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***SHORT FORM ORDER***

***SUPREME COURT - STATE OF NEW YORK***

***Present:***

***HON. THOMAS P. PHELAN,***

***Justice***

TRIAL/IAS PART 2
NASSAU COUNTY

AMER-A-MED HEALTH PRODUCTS, INC., a/a/o Heather Goldberg, Annette Guerro, and Sarah Johnson, on behalf of itself and all others similarly situated,

Plaintiffs,,

ORIGINAL RETURN DATE:01/31/11
SUBMISSION DATE: 01/31/11

DR. EDWARD J. O'BRIEN, DC a/a/o Tara Singh, on behalf of himself and all others similarly situated,

Plaintiff-Intervenor,

INDEX No.: 9808/04

-against-

GEICO INSURANCE COMPANY,

Defendant.

MOTION SEQUENCE #11

The following papers read on this motion:

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|---|---|
| Order to Show Cause..... | 1 |
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| Plaintiff's and Plaintiff-Intervenor's Memorandum of Law..... | 4 |
| Defendant's Memorandum of Law..... | 5 |

Motion by the attorneys for the plaintiff-intervenor for an order permitting reargument of this Court's order dated November 10, 2010 is granted. Plaintiff-intervenor Dr. Edward J. O'Brien, D.C.'s (Plaintiff-Intervenor) motion upon reargument for an order pursuant to CPLR 5015(a) vacating the dismissal of this action entered on June 23, 2010; and pursuant to CPLR 1012(a)(2) or 1013, allowing Dr. Edward J. O'BRIEN, D.C. to intervene in this action, and directing that plaintiff-intervenor be added as party plaintiff, amending the complaint by adding thereto the name of plaintiff-intervenor as a party plaintiff, and allowing plaintiff-intervenor to serve an amended complaint within 20 days and; allowing plaintiff- intervenor an extension of time to file a Note of issue *sine die* from today's date is granted.

It is well settled that a motion for reargument is addressed to the sound discretion of the court, and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law. *McGill v Goldman*, 261 AD2d 593, 594 ( 2nd Dept. 1999). It is not designed, however, to provide an unsuccessful party with successive opportunities to reargue issued previously decided, or to present arguments different from those originally presented (*McGill v Goldman, supra*; *Mazinov v Rella,* 79 AD3d 979 [2nd Dept. 2010]).

In *Glove Surgical Supply v GEICO*, 59 AD3d 129, the Appellate Division determined that all of the prerequisites for class certification are present with the exception of the adequacy of the proposed class representative. Globe's owner was not an adequate class representative because he had been charged with insurance fraud. GEICO was not permitted to assert a defense of fraudulent billing or the inability of class members to establish "documented costs" (*Id.* at 141-42). An insurance company must pay or deny a no fault claim within 30 calendar days after receipt of the proof of claim (Insurance Law § 5106[a]). However, the 30-day period may be extended where the insurer makes a request for additional information within 15 days of its receipt of the claim (11 NYCRR § 65-3.5; *Hospital for Joint Diseases v Central Mutual Fire Ins. Co.*, 44 AD3d 903. Since GEICO had failed to assert the fraud, or undocumented costs, defense within the required 30-day period, it was precluded from raising the fraud or undocumented costs or defenses in the class action. Thus, the common question of GEICO's denial of medical equipment claims to the extent that they exceeded prevailing rates predominated over any questions affecting only individual class members (CPLR § 901[a][2]).

Globe next attempted to have Amer-A-Med Health Products, Inc. (hereinafter Amer-A-Med) substituted as the party to represent the class that had already met the prerequisite for certification. *Globe Surgical Supply v GEICO, supra.*

This Court stated in its short form order dated November 10, 2010, that the record clearly supported a finding that Amer-A-Med was a foreign corporation, doing business in New York. Absent the requisite authority, Amer-A-Med did not have the standing to maintain the within class action. Rather than addressing the threshold issue of Amer-A-Med's standing, and in the face of GEICO's motion to dismiss based on lack of standing, plaintiffs' counsel cross-moved for an order granting permission to allow Dr. O'Brien to intervene as a class representative. Having determined that Amer-A-Med had no standing and no opposition to the issue of standing being interposed by the plaintiffs, this Court held that "plaintiff's application for an order permitting Dr. Edward J. O'Brien, D.C. to intervene in the within action is denied as moot." (The Court notes that nowhere in the submission now before the Court do the attorneys for the plaintiffs challenge the determination that Amer-A-Med lacked standing.)

A court has the inherent power in the exercise of its control over its judgments to open them upon the application of anyone for sufficient reason in the furtherance of justice. *Ladd v Stevenson*, 112 NY325. The Court may consider an application to correct a final order where it appears for sufficient reasons that the person's rights would be adversely affected, although not a party to the original proceeding and an injustice be prevented. Matter of City of Buffalo, 78 NY 362.

Therefore, the Court will now consider *de novo* whether Dr. O'Brien should be substituted as a party representative of the class. Reargument is granted as to the issue of whether Dr. O'Brien's application be granted and he be permitted to proceed with the class action litigation that was dismissed based on the finding that Amer-A-Med lacked standing.

CPLR 5015 states that:

> On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct . . .

An "interested party" does not have to have been a party to the original action to be relieved of the prior order of the Court. Rather, Dr. O'Brien is part of a "broad class of persons" entitled to invoke CPLR 5015 and through intervention gain relief as a party plaintiff. *See Oppenheimer v Westcott*, 47 NY2d 595. This Court's finding that Amer-A-Med did not have a meritorious cause of action because of its lack of standby does not apply to Dr. O'Brien.

CPLR Article 9 is modeled on Rule 23 of the Federal Rules of Civil Procedure. *See O'Hara v Del Bello*, 47 NY2d 363, 368. Article 9 essentially adopts the broad prerequisites of a Rule 23(b)(3) action as its criteria for all class actions. *In re Colt Indus. Shareholder Litig.*, 77 NY2d 185, 193; *Friar v Vanguard Holding Corp.*, 78 AD2d 83. Additionally, because CPLR 1012 and 1013 were patterned after Fed. R. Civ. P. 24 (for intervention), federal case law ca be looked at with regard to intervention in the class action context. See Weinstein, Korn & Miller, New York Civil Practice § 1012.03.

Federal case law has held that intervention by a putative class representative is necessary and proper when the proposed class representative was inadequate as in the within action.

> Judges in this district and elsewhere, however, have held that when class certification is denied solely on the ground that the representative is inadequate, such denial does not - - and should not - - trigger recommencement of the statute of limitations period. That is because in such cases there is nothing wrong with the class claims, just something inadequate about the lead plaintiff asserting them. To prejudice putative class action plaintiffs based solely on the class representative's inadequacy would frustrate the purposes of the class action statute; for example, by encouraging unwanted policing of class action claims by putative class members, and by encouraging the filing of multiple individual claims. ("It would be at odds with the policy undergirding the class action device . . . to deny the plaintiffs the benefit of tolling, and the class action mechanism, when no defect in the class itself has been shown.") By

> contrast, defendants generally are not prejudiced by continued tolling because the purposes of the statute of limitations will have been met by service of the original complaint (internal citations omitted). *In re Nat'l Austl. Bank Sec. Litig.* 2006 U.S. Dist. LEXIS 94163, *16-*17 (S.D.N.Y. 2006).

Defendant argues that the repetitive filing – piggy-backing - of the same class action by different member is contrary to the principles of equitable tolling of the statute of imitations. Defendants argument would apply to subsequently filed class actions not to class members intervening as Dr. O'Brien in the present class action. In order to be allowed to intervene and relate their claims back to those in the original pleading, as the proposed intervenors argue should be permitted, their claims and the original plaintiffs must be grounded on the same occurrence or transaction, and the plaintiffs and proposed intervenors must be "so closely related that the original petitioner's claim would have given the respondent notice of the proposed intervenor's specific claims so that the imposition of the additional claims would not prejudice the respondent." *Matter of Greater NY Health Care Facilities Ass'n v DeBuono*, 91 NY2d 716, 721. Class action judgments are *res judicata* as to class members who do not participate in the litigation. *See Gowan v Tully* 45 NY2d 32. Members of a proposed class may intervene as of right on a showing that representation by the named plaintiff is inadequate and the class member maybe bound by the judgment (CPLR 1012[a][2] and Practice Commentary [1012:3]).

It is not disputed that the claims of Dr. O'Brien relate back and are closely related to those of Globe and Amer-A-Med. Dr. O'Brien's claims are not time barred because as an intervenor, he will become a party for all purposed and his claims are deemed to have been interposed as of the filing date of the complaint because the filing of the putative class action gave the defendants the requisite notice of the challenged transactions.

Having determined that Dr. O'Brien has the right to intervene, the Court will now address on the merits, Dr. O'Brien's ability to represent the class. GEICO asserts that Dr. O'Brien, because of his status as a chiropractor, is barred since the Amended Class Action Complaint states that the putative class "consist[s] of all persons who had reimbursement payments of claims for medical equipment and supplies subject to part E of the Twenty-Third Amendment to Regulation 83 (11 NYCRR 68)" (GEICO Memorandum at 21).

Dr. O'Brien asserts he is such a person. First, he is alleged to be so in his proposed amended complaint that was submitted with his motion, and GEICO has presented no evidence that his allegation is untrue. GEICO claims that because Dr. O'Brien is also a chiropractor he is barred from relying on the same regulation that plaintiffs Glove and Amer-A-Med and other class members relied upon. Plaintiffs argue that the denial by GEICO of the reimbursement claim by plaintiff-intervenor Dr. O'Brien on behalf of the assignor Tara Singh, which is referenced in the proposed Second Amended Class Action Complaint (and annexed to the Bell Aff. as Exhibit "C"), demonstrates that GEICO acknowledged that Dr. O'Brien's claim was subject to part E – not upon "Ground Rule 3 in the New York Workers' Compensation Fee Schedule cited by GEICO (GEICO

Memorandum at 21).

Like all of the class claims before it, GEICO's denial of Dr. O'Brien's claim stated that "THE COST OF THE CERVICAL PILLOW SUBMITTED IS FAR IN EXCESS OF THE INDUSTRY AVERAGE WHICH IS $13.57. BASED ON THIS A REASONABLE REIMBURSEMENT OF 150% OF THE AVERAGE RETAIL PRICE IS REIMBURSABLE." (Bell Aff., Exhibit C). Dr. O'Brien's claims "arise from the same facts and circumstances as the claims of the class members" because GEICO reimbursed Dr. O'Brien based upon Part E and reduced is reimbursements using the same ad hoc reimbursement rates it applied to other persons who submitted claims for DME reimbursement. *See Glove Surgical Supply v GEICO Ins. Co., supra* at p. 274.

Moreover, the "Ground Rule No.3" cited by GEICO would only apply, by its terms, to a "supply" or "material" billed "using procedure code 99070." (See Bell Aff., Exhibit D). Here, in Dr. O'Brien's case, the cervical pillow was billed and unchallenged by GEICO under procedure code E0943 (Bell Aff., Exhibit C). GEICO's denials of Dr. O'Brien's DME claims were not based upon the Chiropractic Workers' Compensation Schedule. Also, GEICO's failure to assert a fee schedule defense in its denials to medical equipment suppliers like chiropractors means that the defense is waived. *See Westchester Medical Ctr. v Amer. Transit Ins. Co.*, 17 AD3d 581. Even "a timely denial alone does not avoid preclusion which said denial is factually insufficient, conclusory, vague or otherwise involves a defense which has no merit as a matter of law." *Nyack Hosp. v State Farm Mut. Auto Ins. Co.*, 11 AD3d 664, 665, quoting *Amaze Med. Supply v Allstate Ins. Co.*, 3 Misc3d 43, 44. Dr. O'Brien was a "medical equipment supplier" under Part E entitled to reimbursement under that regulation setting forth reimbursement at 150% of the documented cost.

In its opposition to the motion, GEICO also fails to cite the "medical equipment supplier" language to this Court. GEICO paraphrases the regulation saying it only applies to "physicians and DME retail supply companies," a definition not found in the regulation. Courts have held that the actual regulatory language "physicians and medical equipment suppliers" in the relevant Insurance regulation 11 NYCRR 68, Appendix 17-C, part E(b)(1), applies to all "health care providers" who are supplying medical equipment. *See A.B. Med. Servs., PLLC v N.Y. Cent. Mut. Fire Ins. Co.*, 6 Misc3d 1030A, 800 NYS2d 341 (Civ. Ct., Kings Co. 2004). Dr. O'Brien's claim is identical to other "medical equipment suppliers," whether in retail or otherwise, and his class claim has merit.

The dismissal of this action entered on November 17, 2010 is vacated and the action reinstated. Dr. Edward J. O'Brien, D.C. shall be permitted to intervene, and be added as a party plaintiff. The amended complaint, a coy of which is annexed to the moving papers is deemed served. The caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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DR. EDWARD J. O'BRIEN, a/a/o Tara Sing, on behalf of himself and all others similarly situated,

Plaintiff,

- against -

GEICO INSURANCE COMPANY,

Defendant.

This matter is respectfully referred to the Calendar Control Part and shall appear on the CCP calendar on May 3, 2011. Plaintiff shall serve a copy of the order together with the Note of Issue within 20 days of today's date.

This decision constitutes the order of the court.

Dated: 3-31-11

HON THOMAS P. PHELAN

J.S.C.

ENTERED
APR 04 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorneys of Record

Abrams, Fensterman, Fensterman, et al.
Attn: John M. Belesi, Esq.
Attorneys for Plaintiff Amer-A-Med Health Products, Inc. and
Plaintiff-Intervenor Dr. Edward J. O'Brien, DC
1111 Marcus Avenue, Suite LL08
Lake Success, NY 11042

Locks Law Firm PLLC
Attn: Andrew P. Bell, Esq.
Attorneys for Plaintiff Amer-A-Med Health Products, Inc. and
Plaintiff-Intervenor Dr. Edward J. O'Brien, DC
747 Third Avenue, 37th Floor
New York, NY 10017

Rivkin Radler LLP
Attn: Michael A. Sirignano, Esq.
Attorneys for Defendant
926 RXR Plaza
Uniondale, NY 11556

Thomas W. Alfano, Esq.
9 Rockaway Avenue
Garden City, NY 11530

Klafter, Olsen & Lesser, LLP
Attn: Seth R. Lesser, Esq.
Two International Drive, Suite 350
Rye Brook, NY 10573