

Associated Mut. Ins. Coop. v Dionne's Clip N Curl
2011 NY Slip Op 33719(U)
December 19, 2011
Sup Ct, Suffolk County
Docket Number: 37104-2010
Judge: Peter Fox Cohalan
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INDEX # 37104-10

RETURN DATE: 12-22-10 (001)

1-4-11 (002)

MOT. SEQ. # 001 & 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:Hon. PETER FOX COHALAN-----x
ASSOCIATED MUTUAL INSURANCE COOPERATIVE,

Plaintiff,

-against-

DIONNE'S CLIP N CURL, DIONNE M. WILLIAMS,
 LUNA HEWITT, as Administrator of the Estate of
 Andrea Williams, DAVID WILLIAMS, Individually,
 DWAYNE ROLLINS, M.D., P.C., DWAYNE ROLLINS,
 MD., JAMAICA HOSPITAL MEDICAL CENTER,
 NAGARAJA RAD, MD and COLEEN MCGEE, MD.,

Defendants.
-----x

CALENDAR DATE: July 20, 2011
 MNEMONIC: MD

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Upon the following papers numbered 1 to 29 read on this motion to dismiss _____;
 Notice of Motion/Order to Show Cause and supporting papers 1-8; 9-12(amended); Notice of Cross-Motion and
 supporting papers _____; Answering Affidavits and supporting papers 11-23; Replying
 Affidavits and supporting papers 24-29; Other _____; and after hearing counsel in support of and
 opposed to the motion it is,

ORDERED that this motion and amended motion by the defendants Jamaica Hospital
 Medical Center, Nagaraja Rad, MD and Colleen McGee Woodley s/h/a Coleen McGee, MD,
 seeking dismissal of the plaintiff's declaratory judgment action pursuant to CPLR §3001 and
 §3211(a)(7) for failure to state a cause of action is denied in its entirety. The defendants are
 directed to serve their answers to the complaint within ten (10) days of service of a copy of
 this order with notice of entry thereon.

There is an underlying negligence, medical malpractice and wrongful death action
 entitled *Luna Hewitt as Administrator of the Estate of Andrea Williams and David Williams,
 Individually v. Dionne's Clip N' Curl, Inc., Dwayne Rollins, MD, PC, Dwanye (sic) Rollins MD,
 Jamaica Hospital, Nagaraja Rad MD and PA Colleen McGee Woodley s/h/a Coleen McGee,
 MD* under Index #13854-10 commenced in Supreme Court, Kings County, which is related to
 the declaratory judgment action before this Court. It appears that Andrea Williams (hereafter

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decedent) in the underlying action in Supreme Court, Kings Court, was injured and ultimately died from a scalp infection and sepsis allegedly arising from the performance of hair braiding services provided by defendant, Dionne's Clip N' Curl, Inc (hereinafter Clip N' Curl). The present declaratory judgment action is brought by the plaintiff, Associated Mutual Insurance Cooperative (hereinafter AMIC), who provided insurance to Clip N' Curl under a standard Business Owners insurance policy #200043277 for the period of September 14, 2007 through September 14, 2008 seeking a declaration that it has no obligation to defend or indemnify the moving defendants, Jamaica Hospital Medical Center, Nagaraja Rad, MD, and Colleen McGee Woodley s/h/a Coleen McGee (hereinafter medical defendants) in this action based upon exclusions stated in the policy.

The medical defendants now move to dismiss the action pursuant to CPLR §3211 (a)(7) alleging the complaint fails to state a cause of action on which relief can be granted, arguing that, as provided under CPLR §3001, there is no "justiciable controversy" between AMIC and the medical defendants because there has been no finding of liability or judgment in the underlying action on which a claim of indemnification is founded. AMIC opposes the requested relief pointing out, inter alia, that the defendant Colleen McGee Woodley s/h/a Coleen McGee, MD (hereinafter McGee) has filed an answer in the underlying wrongful death action in Supreme Court, Kings County, with a cross claim for indemnification against AMIC's insured, Clip N' Curl.

For the following reasons, the medical defendants pre-answer motion to dismiss the declaratory judgment action is denied in its entirety.

As Professor David D. Siegel in New York Practice §258 noted:

"CPLR 3211 merely supplies the procedural expedient for bringing to the court's attention a ground that supports an early dismissal of a cause of action or defense. The merits of the particular ground, and whether it supports the dismissal sought, may involve a vast realm of law, substantive or procedural or both."

The Court when considering a pre-answer motion to dismiss the plaintiff's complaint pursuant to CPLR §3211 must afford the complaint a liberal construction, accept the facts contained therein as true, accord the benefit of every favorable inference and merely determine whether the facts alleged raise a cognizable legal theory upon which a recovery may occur. Goldfarb v. Schwartz, 26 AD3d 462, 811 NYS2d 414 (2nd Dept. 2006).

In the underlying wrongful death action in Supreme Court, Kings County, under Index #13854-10, Clip N' Curl is alleged to have negligently performed certain hair braiding services on the decedent which apparently led to a severe scalp infection whereupon the decedent sought medical treatment. This medical treatment is the basis for the malpractice claims against the medical defendants. The Court notes that McGee, a moving defendant in this action seeking dismissal claiming a non-justiciable controversy, has in the underlying wrongful death action in Supreme Court, Kings County, filed an answer asserting a cross claim against AMIC's insured, Clip N' Curl, for indemnification and/or contribution. This fact leads this Court to find that a "justiciable controversy" exists, at least in so far as Clip N' Curl and McGee are concerned.

In the present action before this Court, AMIC seeks a declaratory judgment that the insurance coverage afforded Clip N' Curl under its standard Business Owners policy # 200043277 excludes the medical treatment provided by the moving medical defendants within the policy definition of coverage for an injury that does not arise from a malpractice hazard, and therefore no coverage is available under the Beauty or Barbershop Liability Coverage Form. While the Court declines to rule on the substantive arguments as to coverage at this time as premature, a review of the underlying claims as well as the AMIC complaint clearly establishes a "justiciable controversy" for Court resolution.

This Court notes that in **New York Public Research Group v. Carey**, 42 NY2d 527, 399 NYS2d 621 (1977) in discussing a "justiciable controversy", that Court stated:

"The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory. In the typical case where the future event is an act contemplated *by one of the parties*, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct ..." (emphasis added)

The mere fact that this Court is being called upon in the present declaratory judgment action to determine the rights of parties upon the happening of a future event, i.e. a liability finding in the underlying wrongful death action, does not mean a declaration of rights is advisory only. See, **Hussein v. State**, 81 AD3d 132, 914 NYS2d 464 (3rd Dept. 2011) discussing **New York Public Research Group v. Carey**, *supra*. The question to be answered revolves around whether or not this case is controlled by the actions or inactions of a third party or does the future event arise from an act contemplated by one of the parties to this declaratory judgment action and the decision would have an "immediate and practical effect of influencing their conduct." **Hussein v. State**, *id* at 136.

The Court answers that question in the affirmative. The ultimate determination by this Court of the declaratory judgment action would directly affect the conduct and actions of the underlying defendants in the wrongful death action, especially as to their rights and obligations in seeking contribution and/or indemnification for any liability finding in the underlying wrongful death action. See, **Weiden Lake Property Owners Ass'n, Inc. v. Klansky**, 32 Misc3d 1234(A), 2011 WL 3631955. The proof of such an action is direct and immediate in that one defendant, McGee, has already asserted a claim as against AMIC's insured for indemnification and/or contribution. The rules governing the Court's review of a motion to dismiss pursuant to CPLR §3211 (a)(7) are clear. The Court must afford the complaint a liberal construction, accept as true the allegations contained therein, afford the plaintiff the benefit of every favorable inference and determine only whether the facts alleged fit within any cognizable legal theory. **Guggenheimer v. Ginzburg**, 43 NY2d 268, 401 NYS2d 182 (1978); **One Acre Inc. V. Town of Hempstead**, 215 AD2d 359, 626 NYS2d 226 (2nd Dept. 1995). Although as the Court noted, the plaintiff need not make an evidentiary showing by submitting affidavits or other documentation in support of the complaint, nevertheless, if submitted by the plaintiff, they "may be used freely to preserve inartfully pleaded, but potentially meritorious claims" (**Rovello v. Orofino Realty Co.**, *supra*, 635, 389 NYS2d 314, 316).

Therefore, the Court determines under the applicable rules governing determinations under CPLR §3211 (a), that a "justiciable controversy" exists and the medical defendants' motion to dismiss is denied. The medical defendants are directed to serve their respective answers to the declaratory judgment action within twenty (20) days of service of a copy of this order on the defendants with notice of entry thereon.

The foregoing constitutes the decision of the Court.

Dated: December 19, 2011



J.S.C.