

Empire Marine & Fire Ins. Co. v Franco

2014 NY Slip Op 31594(U)

June 23, 2014

Sup Ct, New York County

Docket Number: 651779/13

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

EMPIRE MARINE AND FIRE INSURANCE CO.,

Plaintiff,

-against-

EMILE FRANCO, HILDA MENDOZA, SANTA MENDOZA,

(collectively the "Participant Defendants",

-and-

CRISTOBAL GUERRERO, ELIZABETH MACEO,
JOSE VASQUEZ,

(collectively the "Non-Participant Party Defendants")

-and-

ACCELERATED REHAB AND PAIN MANAGEMENT, P.A.,
AESTHETIC ANESTHESIOLOGY, L.L.C. ALEXANDER
LILEIKA, PT., P.C., ALL OF NY, INC., BARNERT SURGICAL
CENTER, L.L.C., CENTRAL PARK PHYSICAL MEDICINE &
REHABILITATION, P.C., CONTEMPORARY
ACUPUNCTURE, P.C., D.A. CHRIOPRACTIC, P.C., DAILY
MEDICAL EQUIPMENT DISTRIBUTION CENTER, INC.,
DOSHI DIAGNOSTIC IMAGING SERVICES, P.C., DYCKMAN
NEIGHBORHOOD MEDICAL, P.C., EPIC PAIN MANAGEMENT
& ANESTHESIA CONSULTANTS, L.L.C.,
HMP ORTHOPAEDICS, P.C., DAVID KAPLOWITZ, M.D.,
LAM MEDICAL, P.C. ANGEL LEAL, P.A., ALEXANDER
LILEIKA, PT, MEDICAL PROFESSIONAL GROUP, P.C.,
MILLENNIUM AMBULATORY SURGERY CENTER, L.L.C.,
RICHARD E. PEARL, M.D., QUALITY CUSTOM MEDICAL
SUPPLY, INC., SPINERGY CHIROPRACTIC, P.C.,

(collectively the "Provider Defendants"),

Defendants.

The following papers, numbered 1 to 8 were read on this motion to dismiss this action :

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits cross motion
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, 1-4, 5-6, 7-8

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that
plaintiff's motion to dismiss all the affirmative defenses of Quality Custom
Medical Supply, Inc., pursuant to CPLR §3211(b), is granted only to the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

extent that the second through eighth, tenth, twelfth, fourteenth through sixteenth, and nineteenth through twenty third affirmative defenses, are severed and dismissed. The remainder of Quality Custom Medical Supply, Inc.'s affirmative defenses shall remain in effect.

Empire Fire and Marine Insurance Co. (hereinafter referred to as "Empire"), an insurance company, commenced an action seeking a declaratory judgment that the underlying loss of May 25, 2012 was not an "accident" and is therefore not covered by the Empire insurance policy. Quality Custom Medical Supply, Inc. (hereinafter referred to as "defendant") one of the provider defendants, is a clinic which allegedly provided health care treatment to the participant defendants in connection with the loss of May 25, 2012. Quality Custom Medical Supply Inc. filed an answer asserting twenty three affirmative defenses and three counter-claims. Plaintiffs responded with the instant motion seeking an order dismissing all of the affirmative defenses pursuant to CPLR §3211(b).

The defendant's first affirmative defense, is that the complaint fails to state a cause of action upon which relief may be granted has been held by the Appellate Division, First Department, to be a valid defense. Riland v. Frederick S. Todman & Co., 56 A.D.2d 350, 393 N.Y.S.2d 4 (1st Dept.,1977). "The pleading of that defense is, however, surplusage, as it may be asserted at any time even if not pleaded (CPLR §3211[e])." Id. at 352. Nonetheless, inclusion of the defendant's first affirmative defense is not prejudicial because it serves to give notice to the plaintiff that the defendant may move to assert it at some point in the future. Id. at 352.

The following affirmative defenses are also relevant here: (9) the ninth, which asserts that all bills as submitted to plaintiff by the answering defendants were not fraudulent, (13) the thirteenth, which asserts that all answering defendants did not deceive or cause to deceive the plaintiff and the (18) eighteenth, which asserts that all services provided to the claimants were performed by employees of defendants. Plaintiff's complaint suggests repeatedly that at least some of the provider-defendants were colluding with the participant defendants in order to fraudulently bill the Plaintiff insurance company for this "accident." For examples, see ¶ 49, 50, 53, and 55 of Plaintiff's complaint. Therefore, defenses addressing the deception or fraud alleged of the provider-defendants are relevant.

Related to the plaintiff's suggestion of cooperation between the provider defendants and participant defendants is the defendant's (17) seventeenth affirmative defense that it operates pursuant to the applicable laws and regulations of New York. This is a germane defense because allegations of deception imply the use of illegal methods. In other words, because the plaintiff suggests that the provider defendants collaborated with the participant defendants in order to fraudulently bill for medical

care, they are also implying some illegal conduct on behalf of the participant defendants. Therefore, the assertion that the defendant complies with all laws is a valid defense.

The eleventh affirmative defense, necessary parties have not been included as parties to this action, also has merit. The record shows that the plaintiff, Empire, has discontinued action against several of the provider defendants: Doshi Diagnostic Imaging Services, P.C., Alexander Lileika, P.T., and Medical Professional Group, P.C. No explanation for their removal as parties has been provided by the Plaintiff.

The remaining defenses: second, third, fourth, fifth, sixth, seventh, eighth, tenth, twelfth, fourteenth, fifteenth, sixteenth, nineteenth, twentieth, twenty first, twenty second, and twenty third are conclusory affirmative defenses, which lack factual and legal support and therefore should be dismissed. Fireman's Fund Ins. Co. v. Farrell, 57 A.D.3d 721, 869 N.Y.S.2d 597 (2nd Dept., 2008). Defenses which merely plead conclusions of law without any supporting facts in the record are insufficient. Maclver v. George Braziller, Inc., 32 Misc. 2d 477, 224 N.Y.S.2d 364 (Sup. Ct., N.Y. County, 1961). There is no evidence to suggest a basis for, (2) Plaintiff's lack of standing (3) Plaintiff's failure to comply with all the insurance laws or (4) any prior release or settlement between Quality Custom and Empire. Similarly, there is no evidence of the (5) statute of limitations having expired, (7) of any collateral payments, (8) that Plaintiff failed to properly commence the action, (10) that Plaintiff lacks legal capacity to sue, and (12) that Plaintiff will be unjustly enriched.

In order to claim a defense of (6) laches, the defendant must include allegations showing a delay and injury, change of position, or other disadvantage resulting from such delay. Thurmond v. Thurmond, 155 A.D.2d 527, 547 N.Y.S.2d 385 (2nd Dept., 1989). No such allegations were included in this affirmative defense therefore it is deficient. Similarly, the defendant offers no factual allegations to support any of the elements of a claim for equitable estoppel (6). Pamela Equities Corp. v. Law Suite, L.P., 14 Misc. 3d 1217(A), 836 N.Y.S.2d 487 (Sup. Ct., N.Y. County, 2005).

The defenses (14) that plaintiff's damages are the result of its own fraudulent practices, that (21) plaintiff assumed the risk, and that (22) plaintiff is culpable for the damages are nonsensical and conclusory. There is no evidence of any other (15) pending actions or (20) past actions or (23) compensation received for the same loss between plaintiff and Quality Custom Medical Supply, Inc.. Plaintiff is not alleging (16) breach of the provisions of the insurance policy issued by plaintiff therefore this defense is immaterial. The record shows, via the affidavit of service filed by Empire, (19) evidence of proper service. In any event, this defense was waived as it was not filed in a timely fashion, pursuant to CPLR §3211 (e). NY CLS CPLR R §3211.

These affirmative defenses contain no specific recitation of facts as required by CPLR §3013 and §3018 and there is no obvious rationale for them in the record. They are not properly pled because they are conclusions of law unsupported by any factual evidence.

Accordingly, it is ORDERED that plaintiff's motion to dismiss all the affirmative defenses of defendant, Quality Custom Medical Supply, Inc., pursuant to CPLR §3211(b), is granted only to the extent that, the second through eighth, tenth, twelfth, fourteenth through sixteenth, and nineteenth through twenty third affirmative defenses, are severed and dismissed, and it is further,

ORDERED, that the plaintiff's motion is denied as to the remainder of Quality Custom Medical Supply, Inc.'s affirmative defenses asserted in its answer, specifically, the first, ninth, eleventh, thirteenth, seventeenth and eighteenth affirmative defenses, which remain in effect.

ENTER:

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ,
J.S.C.

Dated: June 23, 2014

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE