21st Century Ins. Co. v Gladstein
2015 NY Slip Op 30527(U)
April 10, 2015
Supreme Court, New York County
Docket Number: 151210/14
Judge: Eileen A. Rakower

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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21ST CENTURY INSRANCE COMPANY, 21ST CENTURY CASUALTY COMPANY, 21ST CENTURY PACIFIC INSURANCE COMPANY, 21ST CENTURY INSURANCE COMPANY OF THE SOUTHWEST, 21ST CENTURY ADVANTAGE INSURANCE COMPANY f/k/a AIG ADVANTAGE INSURANCE COMPANY, 21ST CENTURY ASSURANCE COMPANY f/k/a AMERICAN INTERNATIONAL INSURANCE COMPANY OF DELAWARE, 21ST CENTURY AUTO INSURANCE COMPANY OF NEW JERSEY f/k/a AIG AUTO INSURANCE COMPANY OF NEW JERSEY, 21ST CENTURY CENTENNIAL INSURANCE COMPANY f/k/a AIG CENTENNIAL INSURANCE COMPANY, 21ST CENTURY NATIONAL INSURANCE COMPANY f/k/a AIG NATIONAL INSURANCE COMPANY, 21ST CENTURY NORTH AMERICA INSURANCE COMPANY f/k/a AMERICAN INTERNATIONAL INSURANCE COMPANY, 21 ST CENTURY PINNACLE INSURANCE COMPANY f/k/a AIG INTERNAT IONAL INSURANCE COMPANY OF NEW JERSEY, 21ST CENTURY PREFERRED INSURANCE COMPANY f/k/a AIG PREFERRED INSURANCE COMPANY, 21ST CENTURY PREMIER INSURANCE COMPANY f/k/a AIG PREMIER INSURANCE COMPANY, 21ST CENTURY SECURITY INSURANCE COMPANY f/k/a NEW HAMPSHIRE INDEMNITY COMPANY, INC., FARMERS INSURANCE COMPANY OF ARIZONA, FARMERS NEW CENTURY INSURANCE COMPANY, FARMERS INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, TRUCK INSURANCE EXCHANGE, FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN, FOREMOST PROPERTY & CASUALTY INSURANCE COMPANY, FOREMOST S IGNATURE INSURANCE COMPANY, BRISTOL WEST CASUALTY INSURANCE COMPANY, BRISTOL WESTINSURANCE COMPANY, and any and all of their subsidiaries, affiliates and/or parent companies, are insurance companies/associations,

Plaintiffs,

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- against -

DECISION and ORDER

MARK GLADSTEIN, M.D., AVANGUARD MEDICAL GROUP, PLLC, METROPOLITAN MEDICAL & SURGICAL, PC, JOHN DOES 1-10 and ABC CORPORATIONS,

Mot. No. 1

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiffs sell automobile insurance policies that provide first-party benefits (No-Fault Benefits) to their policyholders and other eligible persons who are involved in covered motor vehicle accidents. Defendants, Metropolitan Medical & Surgical Group, PLLC ("Metropolitan Medical") and Avanguard Medical Group, PLLC ("Avanguard"), are owned by defendant Mark Gladstein, MD ("Dr. Gladstein"), and are medical professional corporations that treat patients and submit claims for reimbursements to various No Fault Insurance Carriers in New York, including Plaintiffs. Defendants submitted bills to Plaintiffs seeking reimbursement for No-Fault related services allegedly rendered to individuals who were reportedly involved in automobile incidents.

The claims herein emanate from Plaintiffs' allegations that Dr. Gladstein, by creating numerous professional corporate entities, all alter egos of Dr. Gladstein, overbilled, circumvented the No-Fault regulations, and made claims for nearly half a million dollars in services which he is not entitled to collect. Plaintiffs allege fraud, disregard of corporate formalities, domination by Dr. Gladstein over all entities he created, and deceptive billing practices. Plaintiffs seek to preclude such entities from pursuing pending and future claims.

In this action, Plaintiffs "seek to recover $475,542 that Defendants have fraudulently obtained from Plaintiffs by submitting, and causing to be submitted, numerous charges for services for which the Defendants are not legally entitled to receive reimbursement."

Plaintiffs also seek a declaratory judgment that Avanguard and Metropolitan Medical, allegedly incorporated by Mark Gladstein, MD, "are not entitled to seek,

keep or receive No-Fault reimbursements" from Plaintiffs. Plaintiffs also seek a declaratory judgment that Plaintiffs are "not obligated to pay for any No-Fault related matters pertaining to the healthcare provider under Insurance Law §5102, as they have violated professional licensing laws, Insurance Law §5108, Education Law §6530, 11 NYCRR 65-1.1, et. seq., and *State Farm v. Mallela*, 4 N.Y.3d 313 (N.Y. 2005)."

Defendants seek to dismiss the complaint pursuant to 3211(a)(5). Defendants urge the court to look at several prior arbitration awards, two of which are currently on appeal. Defendants argue that those awards addressed certain of the claims here. Additionally, defendants seek dismissal pursuant to 3211 (a)(2) and (7). Plaintiffs oppose.

Oral argument has been held.

CPLR §3211 provides, in relevant part:

> (a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:
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> (2) the court has not jurisdiction of the subject matter of the cause of action; or
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> (5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or
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> ***
>
> (7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91[1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7]).

As for the portion of Defendants' motion which seeks to dismiss the Complaint based on a failure to state a claim, Insurance Law § 5102 et seq. requires no-fault carriers to reimburse patients or assignees for "basic economic loss." However, "basic economic loss" reimbursement is not required for unlicensed or fraudulently licensed health care providers. Specifically, 11 NYCRR 65-3.16(a)(12) provides:

> A provider of health care services is not eligible for reimbursement under section 5102(a)(1) of the Insurance Law if the provider fails to meet any applicable New York State or local licensing requirement necessary to perform such service in New York or meet any applicable licensing requirement necessary to perform such service in any other state in which such service is performed.

11 NYCRR 65-3.16(a)(12).

In *State Farm Mutual Auto. Ins. Co. v. Mallela*, 4 N.Y.3d 313, 319 (2005), the New York Court of Appeals held that a medical corporation that was fraudulently incorporated under N.Y. Business Corporation Law 1507, 1508, and NY Education Law 6507(4)(c), is not entitled to reimbursed by insurers, under New York Insurance Law 5101, et. seq., and its implementing regulations, for medical services rendered by licensed medical practitioners. The Court reasoned that insurance regulation 11 NYCRR 65-3.16(a)(12) excluded from the meaning of "basic economic loss" payments made to unlicensed or fraudulently licensed providers and thus rendered such providers ineligible for reimbursement. (*Id.* at 320). The Court stated that "on the strength of this regulation, carriers may look beyond the face of licensing documents to identify willful and material failure to abide by state and local law."

In a claim for fraudulent misrepresentation, a plaintiff must allege: (1) a misrepresentation or a material omission of fact; (2) which was false and known to be false by defendant; (3) made for the purpose of inducing the other party to rely upon it; (4) justifiable reliance of the other party on the misrepresentation or material omission; and, (5) injury. (*Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173 [2011]). A cause of action sounding in fraud must be pleaded with particularity. (CPLR § 3016[b]). However, "that requirement should not be confused with unassailable proof of fraud." (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 A.D.3d 287, 295 [1st Dep't 2011]). "[T]he purpose of § 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of", (*Pludeman v. Northern Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 [2008]), and should

not be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting the fraud. (*Lanzi v. Brooks*, 43 N.Y.2d 778, 780 [1977]). Thus, where concrete facts "are peculiarly within the knowledge of the party" charged with the fraud, "it would work a potentially unnecessary injustice to dismiss a case at an early stage" prior to discovery. (*Pludeman*, 10 N.Y.3d at 491).

Here, the Complaint alleges, "Dr. Gladstein, by himself, and in conjunction with other persons and/or corporations, professionals or otherwise, caused to be submitted and submitted claims for No-Fault related services to the Plaintiffs that were in violation of the laws of the State of New York."

The Complaint alleges, among other things, that "Dr. Gladstein and his corporations have split medical fees with non-licensed professionals through alleged lease agreements. Lease agreements, whether made with physicians or not, are really fees for referral of patients." It alleges, "GLADSTEIN CORPORATIONS, entered into a number of lease agreements with various medical offices. The purpose of the lease agreements nothing [sic] more than the Defendants directly or indirectly offering, giving, soliciting a fee or other consideration to a third party for the referral of patients." The "owners of the medical facilities were non-physicians. Since the real owner of the medical facilities that the defendant's [sic] 'leased' space from were non-physicians, the Defendant's [sic] have split medical fees with non-physicians."

The Complaint further alleges, "Defendants entered into an agreement with Forest Drugs. . . .Forest Drugs was the sole pharmacy that would dispense and/or compound a coded or specially marked prescription." "One of these compounds was known as 'Compound Mark." Plaintiffs allege this violated New York Education Law § 6530(38).

The Complaint further alleges that Defendants requested payment "in addition to the charges authorized by the workers compensation fee schedule," ordered "excessive tests, treatment and/or use of treatment facilities not warranted the condition of the patient," and "performed services on various assignors that were not medically necessary" as additional violations.

The Complaint further alleges "[t]he defendants intentionally, knowingly, and with an intent to deceive Plaintiffs . . . concealed the fact that the corporations are really one entity and/or alter ego's [sic] of each other; and/or alter egos of Mark Gladstein." "Plaintiffs were led to believe that there existed valid and sound claims

submitted by the defendants . . . Plaintiffs made substantial payments to the defendant medical professional corporations/companies."

Accepting Plaintiffs' allegations as true and drawing all inferences in favor of the non-moving party, the four corners of Plaintiffs' complaint are sufficient to survive a motion to dismiss at this early stage of litigation.

Turning to Defendants' motion to dismiss based on prior arbitration awards rendered under the no-fault statutory scheme, the Second Circuit, applying New York law, in *Allstate Ins. Co. v. Mun*, 751 F. 3d 94, 95 [2d Cir. 2014], stated:

> New York's arbitration process for no-fault coverage is an expedited, simplified affair meant to work as quickly and efficiently as possible. *See* N.Y. Comp.Codes R. & Regs. tit. 11, § 65-4.5 (setting out "[s]pecial expedited arbitration" procedures). Discovery is limited or non-existent. *See id. Complex fraud and RICO claims, maturing years after the initial claimants were fully reimbursed, cannot be shoehorned into this system.* Allowing the providers to elect arbitration in these actions would also undercut anti-fraud measures that the New York legislature encouraged.

Mun, 751 F. 3d at 95 (emphasis added).

Accordingly, the prior arbitration awards rendered under the no-fault provisions do not preclude Plaintiffs from bringing the instant fraud action against Defendants.

The Court has considered Defendants' remaining arguments, which include alleged lack of subject matter jurisdiction and lack of a justiciable controversy, and finds these arguments to be unavailing.

Wherefore it is hereby,

ORDERED that Defendants' motion to dismiss is denied; and it is further

ORDERED Defendants shall file and serve an answer within 20 days of receipt of a copy of this Order with Notice of Entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: APRIL 10, 2015

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EILEEN A. RAKOWER, J.S.C.