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| <b>American Tr. Ins. Co. v Connor</b>                                                                                                                                                                                                                            |
| 2015 NY Slip Op 32253(U)                                                                                                                                                                                                                                         |
| November 24, 2015                                                                                                                                                                                                                                                |
| Supreme Court, New York County                                                                                                                                                                                                                                   |
| Docket Number: 651787/2015                                                                                                                                                                                                                                       |
| Judge: Cynthia S. Kern                                                                                                                                                                                                                                           |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

Index No. 651787/2015

**DECISION/ORDER**

DARIELLE CONNOR, ADELAIDA PHYSICAL THERAPY,  
P.C., CHARLES DENG ACUPUNCTURE, P.C., DELTA  
DIAGNOSTIC RADIOLOGY P.C., ISLAND LIFE  
CHIROPRACTIC PAIN CARE, PLLC, JAIME G.  
GUTIERREZ, JCC MEDICAL, P.C., STEVEN W. WINTER,  
M.D., P.C., T & J CHIROPRACTIC, P.C., TAM MEDICAL  
SUPPLY CORP.,

Defendants.

-----X

**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for  
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| Papers                                       | Numbered |
|----------------------------------------------|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits.....                    | <u>2</u> |
| Replying Affidavits.....                     | <u>3</u> |
| Exhibits.....                                | <u>4</u> |

Plaintiff commenced the instant action seeking a judicial determination that it is not obligated to pay any no-fault benefits to or on behalf of any of the defendants in connection with an alleged motor vehicle collision on February 20, 2012. Defendants Adelaida Physical Therapy, P.C., Charles Deng Acupuncture, P.C., Delta Diagnostic Radiology P.C., Island Life Chiropractic Pain Care, PLLC, and JCC Medical, P.C. (the “Moving Defendants”) now move pursuant to CPLR § 3211(a)(2), (4) and (7) for an order dismissing plaintiff’s complaint, or in the alternative pursuant to CPLR § 325(d) for an order severing plaintiff’s claim against defendant JCC Medical, P.C., and removing this claim to the New York City Civil Court. For the reasons set forth below,

the Moving Defendants' motion for an order dismissing plaintiff's complaint is denied. The Moving Defendants' motion for an order severing and removing the claim against defendant JCC Medical, P.C., is also denied.

The relevant facts are as follows. On February 20, 2012, non-party insured Hernandez Carlos E. and defendant Darielle Connor ("Ms. Connor") were allegedly involved in a motor vehicle accident (the "Accident"). Subsequent to the Accident, Ms. Connor provided plaintiff with notice of the Accident and completed an application for benefits. In its complaint, plaintiff claims that it received bills for medical treatment allegedly rendered to Ms. Connor by the provider defendants. Plaintiff, pursuant to its rights under the no-fault regulations and the insurance agreement between it and Hernandez Carlos E., sought verification of these claims by requesting Independent Medical Examinations ("IME") of Ms. Connor to confirm the legitimacy of the loss and the necessity of any alleged treatment and referrals. IMEs were scheduled for Ms. Connor on April 16, 2012, and April 30, 2012, through letters sent on April 3, 2012, and April 16, 2012, respectively. However, Ms. Connor failed to appear for the scheduled IMEs. Accordingly, plaintiff issued NF-10 denial of claim forms to the provider defendants premised on Ms. Connor's failure to appear for scheduled IMEs.

Thereafter, defendant JCC Medical, P.C., commenced an action in the New York City Civil Court against plaintiff for non-payment of no-fault benefits in relation to the Accident (the "Civil Court Action"). The Civil Court Action is still pending. On or about April 9, 2015, plaintiff commenced the instant action seeking a declaratory judgment that it owes no duty to pay any no-fault claims arising from the Accident.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to

be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980).

Moreover, “a complaint should not be dismissed on a pleading motion so long as, when plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1<sup>st</sup> Dept. 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1<sup>st</sup> Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)).

Initially, the Moving Defendants’ motion pursuant to CPLR § 3211(a)(2) for an order dismissing plaintiff’s complaint for lack of subject matter jurisdiction on the ground that the complaint does not present a justiciable controversy is denied. This court has jurisdiction to render a declaratory judgment “as to the rights and other legal relations of the parties to a justiciable controversy” pursuant to CPLR § 3001. A justiciable controversy is a “real dispute between adverse parties, involving substantial legal interests, for which a declaration of rights will have some effect.” *Downe v. Rothman*, 215 A.D.2d 716, 717 (2<sup>nd</sup> Dept 1995). The Moving Defendants’ argument that the complaint does not present a justiciable controversy because plaintiff did not submit a copy of the insurance policy agreement or identify any claims submitted by the provider defendants or when it issued verification requests and NF-10 denial of claim forms is without merit. Plaintiff has sufficiently established that there is a justiciable controversy between the parties based on its allegation that the provider defendants submitted bills for services allegedly provided to Ms. Connor which it was not obligated to reimburse due to Ms. Connor’s failure to appear for duly scheduled IMEs.

The Moving Defendants also move pursuant to CPLR § 3211(a)(4) for an order dismissing

plaintiff's complaint on the ground that the Civil Court Action is a prior pending case between the same parties. For the court to dismiss a second-in-time action pursuant to CPLR § 3211(a)(4), that action must seek "the same or substantially the same" relief as that sought in the prior-commenced action. *White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D.2d 90, 94 (1<sup>st</sup> Dept 1997). In the present case, the Moving Defendants' motion pursuant to CPLR § 3211(a)(4) is denied as plaintiff seeks declaratory relief in the instant action, which is different from the relief it seeks or could seek in the Civil Court Action.

The Moving Defendant's motion pursuant to CPLR § 325(d) for an order severing and removing the claim against defendant JCC Medical, P.C., to the New York City Civil Court is denied as the New York City Civil Court does not have jurisdiction over the instant action for declaratory relief. To the extent that defendant contends that the New York City Civil Court has jurisdiction pursuant to N.Y. City Civ. Ct. Act § 212-a(a), such argument is unavailing. The cited provision, which grants the New York City Civil Court jurisdiction to issue a declaratory judgment with respect to an insurer's obligation to "indemnify or defend a defendant in an action in which the amount sought to be recovered does not exceed \$25,000," does not apply to the present case, since plaintiff seeks a judicial determination that it is not obligated to pay any no-fault benefits to or on behalf of any of the defendants in connection with the Accident, not a judicial determination that it is not obligated to indemnify or defend a defendant.

Based on the foregoing, the Moving Defendants' motion for an order dismissing plaintiffs' complaint is denied. This constitutes the decision and order of the court.

Dated: 11/24/15

Enter: \_\_\_\_\_

CK

J.S.C.

CYNTHIA S. KERN  
J.S.C.