MAPRE Ins. Co. of N.Y. v V.S. Care Acupuncture, P.C.
2016 NY Slip Op 32479(U)
December 13, 2016
Supreme Court, New York County
Docket Number: 155657/2016
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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MAPFRE INSURANCE COMPANY OF NEW YORK, STATEWIDE INSURANCE COMPANY, AMERICAN COMMERCE INSURANCE COMPANY, COMMERCE INSURANCE COMPANY,

Plaintiffs,

DECISION
Index No. 155657/2016
Mot. Seq. No. 001

-against-

V.S. CARE ACUPUNCTURE, P.C., BAY NEEDLE CARE ACUPUNCTURE, P.C., NEW CENTURY ACUPUNCTURE, P.C., TC ACUPUNCTURE, P.C., ACUHEALTH ACUPUNCTURE, P.C., ANDREY ANIKEYEV, OKSANA LENDEL, ELLINA MATSKINA, LYUBOV KONDRANINA, IGOR SHKAPENYUK, JIN QUAN HUANG,

Defendants.

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KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED[1]
ORDER TO SHOW CAUSE, KELLEHER AFF. IN SUPP.	22, 7
KURATHOWSKI AFF. IN SUPP. AND EXHIBITS ANNEXED	8-18
AFF. IN OPP. WITH EXHIBITS ANNEXED	26-31
REPLY AFF.	34

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action, plaintiffs, which are all no-fault insurance carriers, claim that the Acuhealth Acupuncture P.C., Bay Needle Care Acupuncture P.C., New Century Acupuncture, P.C., V.S.

[1] Unless otherwise indicated, the papers are referred to according to the document numbers assigned to them by the New York State Courts Electronic Filing System (NYSCEF).

Care Acupuncture P.C. and TC Acupuncture, P.C. (hereinafter collectively referred to as "the corporate defendants") were fraudulently incorporated by Andrey Anikeyev, Oksana Lendel, Ellina Matskina, Lyubov Kondranina, Igor Shkapenyuk and Jin Quan Huang (hereinafter collectively referred to as "the individual defendants") in order to engage in a no-fault fraud scheme. Currently before this Court is plaintiffs' motion for a preliminary injunction staying 93 separate actions pending in Civil Court, in which the corporate defendants seek payment based on services allegedly rendered in conjunction with no-fault benefits. Following oral argument, and after a review of the papers submitted and the relevant statutes and case law, **the motion is granted and the parties are directed to settle an order on notice.**

FACTUAL AND PROCEDURAL BACKGROUND

In February 2013, defendant Andrey Anikeyev was charged, by superseding information, with conspiracy to commit mail fraud and health care fraud in the United States District Court for the Southern District of New York. (Doc. Nos. 13, 28.) The Government demanded, as a result of the conspiracy, that Anikeyev forfeit $4,102,273.67, representing the aggregate sum of the funds seized from accounts held in the names of the corporate defendants (Doc. No. 13.) Anikeyev pleaded guilty to the count of the superseding information. (Doc. No. 14, 28.) During the allocution, Anikeyev made a statement of guilt. He represented as follows:

> From 2008 to early 2012, in the Southern District of New York and elsewhere, I agreed with others to commit health care fraud and mail fraud. I did this by submitting bills through mail to various insurance companies for acupuncture services which I knew were false. Some of these mailings were to insurance companies located in Manhattan, New York. These bills requested payments for health care services for time periods in excess of the actual time period the patient spent with [the] acupuncturist.

> I did this with intent to obtain money from various insurance companies which was not rightfully mine.

(Doc. No. 28.) In addition, Anikeyev executed a plea agreement with the Government in which he admitted to the forfeiture allegations in the information and agreed to pay $4,102,273.67 in restitution. (Doc. No. 14.) Thus, Anikeyev pleaded guilty to conspiracy to commit mail fraud and health care fraud and agreed to pay restitution. (Doc. Nos. 28, 14.)

In July 2016, plaintiffs commenced this action. They ultimately seek a declaratory judgment that, among other things, the corporate defendants were fraudulently incorporated and therefore not entitled to receive no-fault reimbursements from plaintiffs. Plaintiffs have moved, by order to show cause, for a temporary restraining order and preliminary injunction staying 93 actions pending in the Civil Court of the City of New York. (Doc. No. 22.) In each of the Civil Court actions, one of the corporate defendants seeks reimbursement from one of the plaintiffs.

This Court signed the order to show cause and granted a TRO, which currently provides that, "pending the hearing of [the] application, [d]efendants, their agents, employees, assigns, attorneys and anyone acting on their behalf or at their behest, [were] restrained pursuant to CPLR 6313 from prosecuting and/or seeking to proceed any further in any current proceedings, including, but not limited to" those 93 cases. (Doc. No. 22.)

POSITIONS OF THE PARTIES

Plaintiffs maintain that, based primarily on the developments in the criminal proceeding against Anikeyev, there is a sufficient basis on which to conclude that they will be victorious in establishing that the corporate defendants were fraudulently incorporated. They argue that this

would constitute a defense to reimbursement in each of the Civil Court actions for which they have sought a preliminary injunction. They contend that the burden of litigating each of the individual claims constitutes irreparable harm and that, in that same vein, the balance of the equities favors them.

Defendants argue, in response, that the evidence submitted does not sufficiently establish fraudulent incorporation, which is plaintiffs' only theory. They maintain that the danger of irreparable harm standard has not been met. Finally, they contend that the balance of the equities does not favor plaintiffs, and that this action amounts to forum shopping.

LEGAL CONCLUSIONS

"A preliminary injunction substantially limits a defendant's rights and is thus an extraordinary provisional remedy requiring a special showing. Accordingly, a preliminary injunction will only be granted when the party seeking such relief demonstrates a likelihood of ultimate success on the merits, irreparable injury if the preliminary injunction is withheld, and a balance of equities tipping in favor of the moving party." *1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d 18, 23 (1st Dept 2011) (citations omitted); *see 276-8 Pizza Corp. v Free*, 118 AD3d 591, 593 (1st Dept 2014).

"To establish a likelihood of success on the merits, a prima facie showing of a reasonable probability of success is sufficient; actual proof of the petitioner's claims should be left to a full hearing on the merits. A likelihood of success on the merits may be sufficiently established even where the facts are in dispute and the evidence need not be conclusive." *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d 430, 431 (1st Dept 2016) (internal quotation marks, brackets

and citations omitted); *see 1234 Broadway LLC v West Side SRO Law Project*, 86 AD3d at 23-24.

To establish a likelihood of irreparable harm absent a preliminary injunction, a plaintiff must show that he or she cannot be compensated by money damages. *See U.S. Re Companies, Inc. v Scheerer*, 41 AD3d 152, 155 (1st Dept 2007). The standard is a flexible one based on "the circumstances of th[e] case," and has been held to exist where, as here, the danger to the plaintiff arises from "a multiplicity of actions and arbitrations, and the risk of inconsistent results." *Liberty Mut. Ins. Co. v Raia Med. Health, P.C.*, 140 AD3d 1029, 1032 (2d Dept 2016); *see Ansonia Assoc. v Ansonia Residents' Assn.*, 78 AD2d 211, 219 (1st Dept 1980); *cf. New York Cent. Mut. Ins. Co. v McGee*, 87 AD3d 622, 624 (2d Dept 2011).

"The balancing of the equities requires the court to determine the relative prejudice to each party accruing from a grant or denial of the requested relief." *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d at 432 (citation omitted); *see Bell & Co., P.C. v Rosen*, 114 AD3d 411, 411 (1st Dept 2014). In this regard, the court should bear in mind whether the preliminary injunction would upset or maintain the status quo. *See Buchanan Capital Mkts., LLC. v DeLucca*, ___ AD3d ___, ___, 2016 NY Slip Op 07611, *1 (1st Dept 2016) ; *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d at 432; *Fieldstone Capital, Inc. v Loeb Partners Realty*, 105 AD3d 559, 560 (1st Dept 2013).

Finally, "[t]he decision to grant or deny a preliminary injunction lies within the sound discretion of the trial court." *Gilliland v Acquafredda Enters., LLC*, 92 AD3d 19, 24 (1st Dept 2011); *see Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d at 431.

Here, plaintiffs' claims against defendants are based on the fraudulent incorporation

doctrine – specifically that such a defense would be applicable to each of the cases in which they now seek a preliminary injunction. *See* 11 NYCRR 65-316. (a) (12); *State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d 313, 320-322 (2005). Under this rule, "insurance carriers may withhold payment for medical services provided by fraudulently incorporated enterprises to which patients have assigned their claims." *State Farm Mut. Auto. Ins. Co. v Mallela*, 4 NY3d at 319; *accord Allstate Ins. Co. v Belt Parkway Imaging, P.C.*, 33 AD3d 407, 408 (1st Dept 2006); *see Allstate Ins. Co. v Belt Parkway Imaging, P.C.*, 78 AD3d 592, 592-593 (1st Dept 2010).

Defendants' contention that plaintiffs failed to meet a heightened burden of proof on a fraud cause of action mistakenly replaces their ultimate burden of proof with their burden on this motion. In this Court's view, the fact that the entirety of the contents of the corporate defendants' bank accounts were seized by the government and that Anikeyev took full and personal responsibility for those sums provides a significant indication of his responsibilities with respect to their incorporation. Although it is certainly not conclusive on the question of whether the corporate defendants were fraudulently incorporated, "the evidence need not be conclusive." *Barbes Rest. Inc. v ASRR Suzer 218, LLC*, 140 AD3d at 431.

Plaintiffs have also demonstrated irreparable harm in light of the significant number of Civil Court cases that would be impacted by a declaratory judgment in this action. To force plaintiffs to litigate the issue in each and every one of the Civil Court actions would be extremely burdensome and would inevitably lead to inconsistent results.

Finally, in light of Anikeyev's forfeiture of the entirety of the bank accounts of the corporate defendants, and the great number of Civil Court actions at issue, which would require a significant administrative burden on the part of plaintiffs, the balance of the equities tips

decisively in favor of plaintiffs.

Settle order on notice, with recommendations as to the amount of plaintiffs' undertaking.

DATED: December 13, 2016

ENTER:

Kathryn E. Freed, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT