[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

----------X
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

DECISION/ORDER
Index No. 155867/2016

-against-

RAMON SANTIAGO, AMC PSYCHOLOGY, P.C., BLANCO MEDICAL, P.C., CHI P&L ACUPUNCTURE P.C., COLUMBUS IMAGING CENTER, DAN COHEN PSYCHOLOGY P.C., DEVONSHIRE SURGICAL FACILITY, LLC, DOMINIC ONYEMA MD, BRIJ MITTAL MD, ELEGANCE REHAB PT P.C., EXCEL SURGERY CENTER, LLC, ISLAM MOHAMED BEKHET PT, JOSEPH QUASHIE, MD P.C., LITE CARE REHAB PT P.C., LONGEVITY MEDICAL SUPPLY, INC., MEDICAL DIAGNOSTIC SERVICES P.C., MEDX PHARMACY, NEW YORK PAIN MANAGEMENT GROUP, PLLC, PROALIGN CHIROPRACTIC P.C., PRO EDGE CHIROPRACTIC P.C., PT OUTCOME PT P.C. and TOTAL CHIROPRACTIC P.C.,

Defendants.

----------X
HON. CYNTHIA KERN, J.:

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 accident on July 24, 2015. Defendant CHI P&L Acupuncture P.C. ("CHI") now moves pursuant to CPLR § 3211(a)(4) and (7) for an Order dismissing plaintiff's complaint. For the reasons set forth below, CHI's motion is denied.

The allegations of the complaint and relevant facts are as follows. Plaintiff's complaint alleges that on July 24, 2015, non-party insured Hurricane Management allegedly struck defendant Ramon Santiago ("Santiago") with the insured motor vehicle (the "accident"). Following the accident, Santiago provided plaintiff with notice of the accident, completed an application for benefits and assigned his right to collect benefits to various health care providers, including defendants. Thereafter, plaintiff received bills for medical treatment allegedly rendered to Santiago by the provider defendants. Plaintiff, pursuant to its rights

under the no-fault regulations and the insurance agreement between it and Hurricane Management, sought verification of these claims by requesting that Santiago attend Independent Medical Examinations ("IMEs"). IMEs were scheduled for Santiago on September 21, 2015, October 5, 2015, October 26, 2015 and November 9, 2015, through letters sent on September 3, 2015, September 22, 2015, October 8, 2015 and October 27, 2015, respectively. However, Santiago failed to appear for any of the scheduled IMEs. Accordingly, plaintiff issued NF-10 denial of claim forms to the provider defendants premised on Santiago's failure to appear for the scheduled IMEs.

On or about June 21, 2016, CHI 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 July 14, 2016, plaintiff commenced the instant action seeking a declaratory judgment that it owes no duty to pay any no-fault claims arising from the accident.

The court first considers CHI's motion for an Order dismissing plaintiff's complaint pursuant to CPLR § 3211(a)(7) for failure to state a claim on the ground that the complaint does not present a justiciable controversy but rather seeks an advisory opinion. 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 (1st 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 (1st Dept 1977), quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956).

In the present case, CHI's motion pursuant to CPLR § 3211(a)(7) 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 (2d Dept 1995).

In the present case, the court finds that the complaint alleges a justiciable controversy sufficient to invoke the court's jurisdiction to render a declaratory judgment. The complaint sufficiently alleges that defendants have submitted claims to plaintiff and that plaintiff has denied those claims based on Santiago's failure to attend IMEs. Therefore, plaintiff has alleged a justiciable controversy as to whether it has any duty to pay no-fault benefits to defendants, the determination of which will have some effect.

CHI's argument that the court should decline to exercise its discretion to render a declaratory judgment in the instant action on the ground that no-fault actions were intended to be resolved in arbitration or Civil Court proceedings as per the legislative intent and framework of the no-fault law and regulations, particularly as the court may have to examine defendants' individual claims when determining whether the IMEs were timely scheduled, is unavailing. The Supreme Court frequently has entertained actions wherein an insurer seeks a declaratory judgment that it has no duty to pay no-fault benefits with regard to a particular accident and therein determined whether IMEs or EUOs were timely scheduled, as is clear from the multiple First Department decisions affirming or reversing Supreme Court orders determining such issues. *See, e.g., American Tr. Ins. Co. v. Vance*, 131 A.D.3d 849 (1st Dept 2015); *American Tr. Ins. Co. v. Clark*, 131 A.D.3d 840 (1st Dept 2015); *National Liab. & Fire Ins. Co. v. Tam Med. Supply Corp.*, 131 A.D.3d 851 (1st Dept 2015).

The court next considers CHI's motion for an Order dismissing plaintiff's complaint pursuant to CPLR § 3211(a)(4) 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 (1st Dept 1997).

In the present case, CHI's 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. To the extent that CHI contends that plaintiff's complaint should be dismissed because the Civil Court has the power to issue a declaratory judgment pursuant to N.Y. City Civ. Ct. Act § 212-a(a), thereby allowing plaintiffs to seek the same declaratory relief in the Civil Court Actions, such argument is

unavailing. N.Y. City Civ. Ct. Act § 212-a(a) grants the 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." This provision does not apply here as 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, CHI's motion for an Order dismissing plaintiffs' complaint is denied. CHI is hereby directed to answer plaintiff's complaint within twenty days. This constitutes the decision and order of the court.

DATE : 1/13/17

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN
J.S.C.