

Rojas v Concannon
2017 NY Slip Op 32849(U)
March 22, 2017
Supreme Court, New York County
Docket Number: 805249/2016
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Rakowey
Justice

PART 6
805249-16
INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 4
+ 3

ROJAS, MARITZA

-v-

Eileen M.T. CONCANNON, M.D.

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion Sequence 003 and 004 are decided in accordance with the accompanying decision and order dated March 22, 2018.

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

Dated: 3/22/18

[Signature], J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

-----X

Maritza Rojas,

Plaintiff,

- v -

Defendants.

-----X

HON. EILEEN A. RAKOWER, J.S.C.

Index No.
805249/2016

**DECISION
and ORDER**

Mot. Seq. #003 &
#004

Eileen M. Travers Concannon, M.D., Denise West, N.P.,
Alberto D. Urena, M.D., Doshi Diagnostic Imaging
Services, P.C., Night And Day Medical Associates, P.C.
And NY Hispanic Family Medical, P.C.,

Plaintiff Maritza Rojas (“Rojas”) commenced this medical malpractice action by filing the summons and complaint on June 16, 2016. Rojas alleges *inter alia* that while she was in the care of Defendant Eileen M. Travers Concannon, M.D. (“Concannon”), Denise West, N.P. (“West”), Alberto D. Urena, M.D. (“Urena”), Doshi Diagnostic Imaging Services, P.C. (“Doshi”), Night And Day Medical Associates, P.C. (“Night and Day”), and NY Hispanic Family Medical, P.C. (“NYHFM”) (collectively “Defendants”), these Defendants failed to diagnose Rojas’ breast cancer. NYHFM, Urena, Doshi, Night, West, and Concannon filed their answers on July 19, 2016, July 19, 2016, July 20, 2016, July 28, 2016 and August 2, 2017 respectively.

Presently before the Court is Doshi’s Order to Show Cause for a stay of this action pursuant to CPLR 2201 (“Motion Sequence 004”). Alternatively, Doshi moves to sever from the instant action and stay all claims against it pursuant to CPLR 603. A stay is sought by Doshi because its medical malpractice liability carrier, Oceanus Insurance Company (“Oceanus”), is insolvent. Additionally, the Court of Common Pleas For The Fifth Judicial Circuit, County of Richland (“Court of Common Pleas”), entered an Order of Liquidation on September 21, 2017, staying *inter alia* all claims and proceedings against Oceanus’ policyholders.

Doshi alleges that Oceanus is a risk retention group domiciled in South Carolina. (affirmation of Cooperman at 2). On August 31, 2017, the Director of the South Carolina Department of Insurance (the “Director”) petitioned the Court of Common Pleas to be appointed as Liquidator of Oceanus. (Doshi’s exhibit C at 1). Thereafter the Court of Common Pleas issued an Order that *inter alia* appointed the Director as Liquidator of Oceanus and provided the following,

“This Court has jurisdiction of the subject matter and is the proper venue for this proceeding pursuant to S.C. Code. Ann. § 38-27-60(b), (c) & (f) & -360 (2015) . . .

Notice is hereby given that pursuant to S.C. Code Ann. §§ 38-7-70 & -430 (2015), the Court grants an injunction and automatic stay applicable to all persons and proceedings, other than the Liquidator . . . which prohibits . . . [t]he institution of further prosecution of any actions or proceedings; [t]he obtaining of preferences, judgments, attachments, garnishments, or liens against the insurer, its assets, or its policyholders . . .”

(Doshi’s exhibit C at 1, 10).

On February 7, 2018, the Court of Common Pleas entered an additional order clarifying that “the automatic stay prohibiting ‘the institution of further prosecutions of any actions or proceedings’ includes prohibiting actions or proceedings against the policyholders . . .” (Doshi’s exhibit D at 1)

Also before the Court is Concannon’s motion pursuant to CPLR 2201 seeking an order staying this action because her insurance carrier, Fairway Physicians Insurance Company (“Fairway”), is also in liquidation (“Motion Sequence 003”).

(affirmation of Klein at 1). Fairway is allegedly a risk retention group domiciled in the District of Columbia. (Concannon's exhibit D). On August 29, 2017, the District of Columbia's Department of Insurance, Securities and Banking ("DISB") issued an Order providing that, "the Commissioner has determined that Fairway's capital and surplus balance renders the company statutorily insolvent . . ." (Concannon's exhibit C). Thereafter DISB petitioned the Superior Court for an Order authorizing the Commissioner to liquidate Fairway. The Superior Court issued an Order that *inter alia* appointed the Commissioner as Liquidator of Fairway and provided that,

"all litigation pending against any Fairway policyholder is hereby stayed and that all persons and entities are enjoined from commencing or continuing any litigation against a Fairway policyholder until further order of this Court."

(Concannon's exhibit D).

Urena NYHFM and West submit affirmations wherein they oppose severing the action against Doshi. (affirmation of Ehrlich at 2; affirmation of Moy at 2) They argue that a severance of this action as to Doshi would prejudice them because Doshi served as the radiologists who interpreted numerous mammograms and breast ultrasounds during the alleged period of malpractice. (affirmation of Ehrlich at 2; affirmation of Moy at 2) Additionally, Urena, NYHFM, and West argue that the "interconnected facts and chronology concerning interpreted radiology results would best be resolved by a single trial of all the defendants." (affirmation of Ehrlich at 2; affirmation of Moy at 2) Lastly, Urena, NYHFM, and West request that the action be stayed pending the outcome of the Oceanus liquidation proceeding.

Rojas opposes and cross-moves for an Order pursuant to CPLR 603 severing the causes of action against Doshi and Concannon. (affirmation of Plotkin at 1) Rojas argues that although other courts have entered orders staying proceedings against Doshi and Concannon, there are no stays in effect as to West, Urena, Night And Day, and NYHFM. Rojas adds that staying this action completely would prejudice her.

West opposes Rojas' cross-motion. She asserts that Concannon was the radiologist employed by Doshi who interpreted numerous mammograms and breast ultrasounds with respect to Rojas. To sever the claims against Concannon and Doshi would prejudice West who treated Rojas during the period of alleged malpractice. Furthermore, West argues that severing these claims would "take up significant time and resources for both the courts and the attorney's involved." (affirmation of Moy at 3).

Night and Day opposes Doshi's instant Order to Show Cause and Concannon's motion for a stay. Night and Day argues that this Court is not required to give full faith and credit to the liquidation order issued from the Court of Common Pleas because the liquidation order is not final under the laws of South Carolina. Additionally, Night and Day contends that "an examination of the [Court of Common Pleas'] authority reveals that it never had any basis to acquire jurisdiction over the subject matter or the parties of this lawsuit." (affirmation of Bota at 4) The Court of Common Pleas, according to Night and Day, "has no basis to assert personal jurisdiction over the parties in the case at bar. [Rojas] is not a resident of South Carolina and does not have any contacts with the State of South Carolina, much less minimum contacts." (affirmation of Bota at 4) "Without in personam jurisdiction or in rem jurisdiction, New York State Courts are not required to afford full faith and credit to a sister court's determination." (affirmation of Bota at 5) Furthermore, Night and Day maintain that "[a]lthough New York and South Carolina are reciprocal states that enacted the Uniform Insurers Liquidation Act, the UILA does not regulate risk retention groups like Oceanus." (affirmation of Bota at 6) Because "Oceanus is neither an insurance company, nor a defendant", this Court need not accord full faith and credit to the liquidation order. (affirmation of Bota at 6) Night and Day lastly argues that severance of the claims against Doshi and Concannon would not be in the interest of judicial economy especially because the claims involve common factual and legal issues. (affirmation of Bota at 9).

On March 21, 2018, the parties appeared for a conference. Although the Court inquired, Rojas' attorney was unable to speak about the status of Rojas' health. It remains unclear. The Court was also informed that Urena and NYHFM provided primary care to Rojas and referred Rojas to Doshi and Concannon for radiological services.

Standards

Severance

CPLR 603 provides, “In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issues.” “Where complex issues are intertwined . . . it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time. Fragmentation increases litigation and places an unnecessary burden on court facilities by requiring two separate trials instead of one.” (*Shanley v Callanan Industries, Inc.*, 54 NY2d 52, 57 [1981].) “Thus . . . where there is an intricate involvement and interdependency of the various activities and decisions made by the multiple defendants, complete relief can be properly granted only by foregoing severance.” (*Chenango County Indus. Development Agency v Lockwood Greene Engineers, Inc.*, 111 AD3d 508, 510 [3d Dept 1985].)

Accordingly, in *Andresakis v Lynn*, (236 AD2d 252, 252 [1st Dept 1997]), the First Department reviewed a dental malpractice action where the plaintiffs allegedly were injured as a result of treatment rendered by three defendant dentists employed in the office of a fourth defendant dentist. The First Department stated, “Clearly, there are common issues of law and fact concerning plaintiffs’ alleged damages. It is apparent that part of the defense of each of the defendants will be that it was the treatment rendered by his colleague(s) which led to plaintiffs’ alleged injuries. The same medical evidence and the testimony of common witnesses can be anticipated whether the actions are tried jointly or separately, and appellant fails to demonstrate that prejudice to a substantial right would result in the absence of a severance.” (*Andresakis v Lynn*, 236 AD2d 252, 252 [1st Dept 1997].)

Stay

CPLR 2201 provides that “Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.”

Uniform Insurers Liquidation Act

The purpose of the Uniform Insurers Liquidation Act (“UILA”) is to provide for those states that enact it “a uniform system for the orderly and equitable administration of the assets and liabilities of defunct multistate insurers. (*Rose v*

Fidelity Mut. Life Ins. Co., 207 F Supp 2d 50, 53 [ED NY 2002].) Accordingly, the UILA “not only . . . preserve[s] available assets for the benefit of creditors, but . . . protect[s] the interest of persons who purchase insurance policies from a company which has become insolvent.” (*Matter of Transit Cas. Co.*, 79 NY2d 13, 20-21 [1993].) Accordingly, New York Insurance law in clear terms prohibits the maintenance of any proceeding in the nature of attachment or execution against the delinquent insurer or its assets during the pendency of delinquency proceedings in this or any other reciprocal state. (*Ace Grain Co v Rhode Island Ins Co.*, 107 F Supp 80, 83 [SD NY 1952].)

Insurance Law § 5902(n)(3)(A) defines “Risk retention group” as “any corporation or other *limited liability association* formed pursuant to the Federal Liability Risk Retention Act of 1986 . . . which is chartered and licensed as a liability insurance company and *authorized to engage in the business of insurance* under the laws of any state.

Full Faith and Credit

“In accordance with the Full Faith and Credit Clause, a ‘judgment of a state court should have the same credit, validity, and effect, in every other court of the United States, which it had in the state where it was pronounced.’” (*O’Connell v. Corcoran*, 1 N.Y.3d 179, 184 [2003].) Therefore a “stay by a court in another state enjoining and restraining all claims against insureds of an insolvent liability insurer is entitled to full faith and credit, and has the effect of suspending all proceedings against the insured as of its effective date.” (*Dambrot v. REJ Long Beach, LLC*, 39 A.D.3d 797 [2d Dept 2007]; *see Beecher v Lewis Press Co.*, 238 A.D.2d 927, 927-928 [4th Dept 1997].)

Doctrine of Comity

“The doctrine of comity is not a rule of law, but one of practice, convenience and expediency.” (*Boudreaux v State of La., Dept. of Transp.*, 49 AD3d 238, 241 [1st Dept 2008].) “It is not a mandate, but a voluntary decision to defer to the laws and policies of a sister state.” (*id.*) Accordingly, “[i]t is not necessary . . . to rely on the conclusion that [a state] is a reciprocal state” because “even under common law, New York courts ha[ve] extended comity to delinquency proceedings in foreign states.” (*Twin City Bank v Mutual Fire Marine & Inland Ins. Co.*, 646 F Supp 1139, 1141 [SD NY 1986]; *Kelly v Overseas Investors, Inc.*, 24 AD2d 157 [1st Dept 1965].) For instance, in *A.B. Medical Services PLLC v Highlands Ins. Co.* (4 Misc 3d 1020(A), 2011 NY Slip Op 50878(U), *4 [Civ Ct, New York County, Billings, J.]),

the Honorable Lucy Billings held, “Even if this court does not afford Texas reciprocal state status, the court still may extend comity to Texas by enforcing the Texas Order’s stay.”

Discussion

Severance Analysis

Here, there is an “intricate involvement and interdependency of the various activities and decisions made by the multiple defendants” because Urena and NYHFM provided primary care to Rojas and referred her to Doshi and Concannon. Thereafter, Doshi and Concannon interpreted numerous mammograms and breast ultrasounds allegedly failing to diagnose the breast cancer. (affirmation of Ehrlich at 2; affirmation of Moy at 2) Like *Andresakis v Lynn*, (236 AD2d 252, 252 [1st Dept 1997]), “[i]t is apparent that part of the defense of each of the defendants will be that it was the treatment rendered by his [or her] colleague(s) which led to plaintiffs’ alleged injuries. The same medical evidence and the testimony of common witnesses can be anticipated whether the actions are tried jointly or separately.” Similarly, Rojas “fails to demonstrate that prejudice to a substantial right would result in the absence of severance” because her current status remains unclear despite this Court’s inquiry during the conference. (*Andresakis v Lynn*, 236 AD2d 252, 252 [1st Dept 1997].) Accordingly, “it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time.” (*Shanley v Callanan Industries, Inc.*, 54 NY2d 52, 57 [1981].) With respect to Rojas, Concannon, West, Urena, Doshi, Night And Day, and NYHFM, “complete relief can be properly granted only by foregoing severance.” (*Chenango County Indus. Development Agency v Lockwood Greene Engineers, Inc.*, 111 AD3d 508, 510 [3d Dept 1985].)

Stay Analysis

Night and Day, by its own admission, asserts that “New York and South Carolina are reciprocal states that enacted the Uniform Insurers Liquidation Act.” (affirmation of Bota at 6) Indeed, South Carolina’s jurisprudence suggests as much because that Court of Appeals has previously found South Carolina to be a reciprocal state under the UILA. (*Smalls v Weed*, 293 S.C. 364, [Ct App 1987].) Although Night and Day argues that UILA does not regulate risk retention groups like Oceanus, this Court is not persuaded. (*see Cohen v State ex rel. Stewart*, 89 A3d 65 [Sup Ct 2014])(affirming Court of Chancery’s decision that a Delaware-domiciled risk retention group’s delinquency proceeding pursuant to the Insurers Liquidation

Act did not violate due process). Similarly, Night and Day's argument that Oceanus is not an "insurance company" is unpersuasive because a risk retention group, by definition, is "authorized to engage in the business of insurance." (Insurance Law § 5902[n][3][A]; affirmation of Bota at 6) To the extent that New York's jurisprudence addresses the issues here, the Appellate Division has clearly stated that, a "stay by a court in another state enjoining and restraining all claims against insureds of an insolvent liability insurer is entitled to full faith and credit, and has the effect of suspending all proceedings against the insured as of its effective date." (*Dambrot v. REJ Long Beach, LLC*, 39 A.D.3d 797 [2d Dept 2007]; see *Beecher v Lewis Press Co.*, 238 A.D.2d 927, 927-928 [4th Dept 1997].)

Accordingly, the stay entered by the Court of Common Pleas prohibiting the "institution of further prosecution of any actions or proceedings" against the policyholders of Oceanus is entitled to full faith and credit, and has the effect of suspending all proceedings against Doshi as of September 21, 2017. (*Dambrot v. REJ Long Beach, LLC*, 39 A.D.3d at 797). Because "New York Insurance law in clear terms prohibits the maintenance of any proceeding in the nature of attachment or execution against the delinquent insurer or its assets during the pendency of delinquency proceedings in this or any other reciprocal state, it would be inappropriate for this Court to allow this action to proceed against Doshi. (*Ace Grain Co v Rhode Island Ins Co.*, 107 F. Supp 80, 83 [SD NY 1952].) In disregarding the liquidation order issued from the Court of Common Pleas, this Court would be contravening the purpose of UILA by failing to preserve Oceanus' available assets and protecting "the interests of persons who purchase[d] insurance policies from a company which has become insolvent." (*Matter of Transit Cas. Co.*, 79 NY2d 13, 20-21 [1993].)

In any event, the foregoing is not dispositive insofar as "[i]t is not necessary . . . to rely on the conclusion that [South Carolina] is a reciprocal state" because "even under common law, New York courts ha[ve] extended comity to delinquency proceedings in foreign states." (*Twin City Bank v Mutual Fire Marine & Inland Ins. Co.*, 646 F Supp 1139, 1141 [SD NY 1986]; *Kelly v Overseas Investors, Inc.*, 24 AD2d 157 [1st Dept 1965].) Similar to *A.B. Medical Services PLLC v Highlands Ins. Co.* (4 Misc 3d 1020(A), 2011 NY Slip Op 50878(U), *4 [Civ Ct, New York County, Billings, J.]), "[e]ven if this court does not afford [South Carolina] reciprocal state status, the court still may extend comity to [South Carolina] by enforcing the [South Carolina] Order's stay." As the Court of Common Pleas noted, it had "jurisdiction of the subject matter . . . pursuant to S.C. Code Ann. § 38-27-60(b), (c) & (f) & -360 (2015)" especially because Oceanus is domiciled in South Carolina. Night and Day has not shown otherwise.

With respect to Concannon, and in accordance with the doctrine of comity and the jurisprudence of the Appellate Division, the order entered by the Superior Court staying “all litigation pending against any Fairway policyholder” will also be enforced. (*Dambrot v. REJ Long Beach, LLC*, 39 A.D.3d at 797; *see also Twin City Bank v Mutual Fire Marine & Inland Ins. Co.*, 646 FSupp 1139, 1141 [SD NY1986]; *Kelly v Overseas Investors, Inc.*, 24 AD2d 157 [1st Dept 1965].)

Wherefore, it is hereby,

ORDERED that Doshi Diagnostic Imaging Services, P.C.’s Order to Show Cause (“Motion Sequence 004”) is granted in that this Court enforces the September 21, 2017 Order of the Court of Common Pleas Fifth Judicial Circuit, prohibiting further prosecution of any proceedings against DOSHI; and it is further

ORDERED that Eileen M. Travers Concannon, M.D.’s motion (“Motion Sequence 003”) is granted to the extent that this Court enforces the Superior Court’s liquidation order staying all litigation as to Concannon, a Fairway policyholder; and it is further

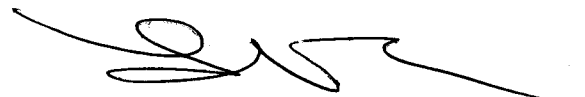
ORDERED that this action is stayed until such time as this Court directs otherwise; and it is further

ORDERED that Plaintiff Maritza Rojas’ cross-motion for an Order pursuant to CPLR 603 severing the causes of action against Doshi and Concannon is denied; and it is further.

ORDERED that all parties to this action are directed to appear for a conference on June 26, 2018 at 71 Thomas Street, 205 D at 9:30 AM with status reports as to the liquidation proceedings.

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

Dated: March 22, 2017



Eileen A. Rakower, J.S.C.