

<b>Michaels v MVP Health Care, Inc.</b>
2017 NY Slip Op 33015(U)
April 6, 2017
Supreme Court, Westchester County
Docket Number: 65172/16
Judge: Mary H. Smith
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# DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH  
Supreme Court Justice

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NORMAN MICHAELS,

Plaintiff,

MOTION DATE: 2/3/17  
INDEX NO.: 65172/16

-against-

MVP HEALTH CARE, INC.; JAMES PES CETTI, individually and in his capacity as an agent of MVP HEALTH CARE, INC.; MATTHEW WALKUSKI, individually and in his capacity as an agent of MVP HEALTH CARE, INC.;; KARRIE ARMSTRONG, individually and in her capacity as an agent of MVP HEALTH CARE, INC.; JOHN DOES 1-5 and JANE DOES 1-5,

Defendants.

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The following papers numbered 1 to 8 were read on this motion by defendants for an Order transferring venue, etc.

**Papers Numbered**

Notice of Motion - Affirmation (Greenberg) - Exhs. (A-M) - Memorandum of Law .....	1-4
Answering Affirmation (Briem) - Exhs. (A,C-F) <sup>1</sup> .....	5-7

<sup>1</sup>While same has no impact on the Court's Decision herein, the Court notes that plaintiff's hard copy submission at bar does not include a tab as Exhibit "B." It further appears that the exhibits that are tabbed do not accurately correspond with their e-filed characterizations. For example, while e-filed documents 26 and 27, described as being copies of Pescetti's grand jury and trial testimony annexed respectively as exhibits "B" and "C," in fact same appear in the hard copy submission as exhibits "C" and "D,"

Replying Memorandum of Law ..... 8

Upon the foregoing papers, it is Ordered that this motion by defendants for an Order pursuant to CPLR 501 and 511 transferring venue of this action to Supreme Court, Schenectady County, is granted.

A forum selection clause in the parties' Independent Broker's Agreement (see Section G, ¶ 12) designates Supreme Court, Schenectady County, as the exclusive venue to adjudicate any action arising thereunder. Plaintiff notably has not argued that this forum selection clause is unreasonable, unjust, or in contravention of public policy, nor that it is invalid due to fraud or overreaching. Nor does this Court find such on the record at bar. Plaintiff does assert, however, that the forum selection is not applicable because same appears in and applies only to disputes arising under the Independent Broker Agreement and he has not asserted any claims arising thereunder. Plaintiff argues that his claims instead arise out of the "MVP Exclusive Provider Organization Group Contract" ("MVP-Chamber Agreement"), an agreement between defendant MVP Health Care, Inc. ("MVP") and the Otsego Chamber of Commerce, that this Agreement does not contain a venue selection clause designating Supreme Court, Schenectady County, as an exclusive forum, and thus that defendants' motion must be denied. This Court disagrees.

As alleged in the complaint, plaintiff Michaels had been a licensed insurance broker and the founding principal of Norman J. Michaels and Associates Agency ("M&A"), an insurance brokerage firm. In July, 2008, defendant MPA had entered into an "Independent Broker's Agreement" with M&A wherein M&A had agreed to act as an independent broker

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respectively.

for MVP. In February, 2009, plaintiff contends that M&A had begun submitting applications to MVP for group insurance coverage for Chamber associate members under the MVP-Chamber Agreement. Pursuant thereto, plaintiff alleges that MVP had reviewed and issued numerous group policies, and thereupon had billed the members and their organizations for the premiums and Chambers dues that were due to them.

In or about, April, 2009, the Chamber had accepted as members of the Chamber both the Americans for Financial Independence and Allstate Business Association, and their members were accepted as associate members. Plaintiff alleges that MVP had been aware that group member eligibility in the Chamber Group Agreement permitted the Chamber to grant membership to businesses and people that resided outside of their region or county. From January, 2010 through September, 2010, plaintiff alleges that M&A had submitted approximately 450 applications to MVP on behalf of Chamber associate members.

Plaintiff alleges that subsequently, in or about October, 2010, pursuant to its having received a complaint from an associate member regarding drug benefits, MVP had decided to no longer accept insurance applications from associate Chamber members under the Group Plan. On November 4, 2010, MVP had written a letter canceling all said issued insurance policies, effective December 4, 2010. The Chamber and plaintiff had objected to MVP's mass cancellation of policies, arguing that such action was in violation of the Chamber Group Agreement and that it punished even those Otsego County policy holders who were legitimate. By letter to plaintiff M&A, dated January 5, 2011, defendant MVP had terminated the parties' Independent Broker Agreement.

Plaintiff alleges that, by April, 2011, the New York State Department of Financial

Services ("DFS"), pursuant to its investigation, had learned of MVP's issuance of health insurance policies under a community rating to associate members of the Otsego Chamber who resided outside of the Otsego area. According to plaintiff, MVP, in order for MVP to avoid sanctions from the DFS investigation, MVP and its agents, defendants Pescetti and Armstrong, had scapegoated plaintiff, improperly having accused plaintiff in a series of filed complaints of plaintiff's having defrauded MVP in the issuance of the Chamber insurance policies.

Plaintiff alleges that, as a result of the DFS investigations that wrongfully had been initiated, encouraged, advised and aided by defendants MVP, Pescetti and Armstrong, plaintiff had been wrongfully indicted on four criminal felony counts charging him with grand larceny in the second and third degrees, scheme to defraud in the first degree and insurance fraud in the second degree. In May, 2014, plaintiff had been convicted of grand larceny in the second degree and scheme to defraud in the first degree, for which plaintiff had been sentenced to imprisonment. On October 22, 2015, the Appellate Division had entered an Order vacating plaintiff's conviction and dismissing the underlying indictment with prejudice.

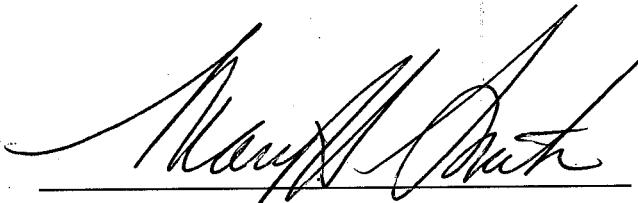
Plaintiff commenced this action, on October 11, 2016, against defendant MVP and others alleging claims for malicious prosecution, breach of the covenants of good faith and fair dealing and prima facie tort.

Notwithstanding plaintiff's protestations to the contrary, the underlying allegations set forth in the complaint establish that plaintiff's complaint emanates from the parties' underlying Independent Broker Agreement, especially since plaintiff has pleaded a cause of action alleging defendants' breach of the covenants of good faith and fair dealing arising

under said Agreement.

Accordingly, within seven (7) days after the date of entry, defendants shall serve a copy of this Order upon the Westchester County Clerk who, upon receipt thereof, shall forthwith transmit the file in this action and the pending dismissal motion to the Clerk, Supreme Court, Schenectady County, for proper assignment and adjudication.

Dated: April 6, 2017  
White Plains, New York



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J.S.C.

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