

**Mapfre Ins. Co. of N.Y. v Soltanov**

2019 NY Slip Op 30005(U)

January 2, 2019

Supreme Court, New York County

Docket Number: 154051/2017

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH

PART IAS MOTION 32

Justice

INDEX NO. 154051/2017

MOTION DATE

MOTION SEQ. NO. 003

MAPFRE INSURANCE COMPANY OF NEW YORK F/K/A STATE-WIDE INSURANCE COMPANY, AMERICAN COMMERCE INSURANCE COMPANY, COMMERCE INSURANCE COMPANY, 21ST CENTURY INSURANCE COMPANY, 21ST CENTURY CASUALTY COMPANY, 21ST CENTURY PACIFIC INSURANCE COMPANY, 21ST CENTURY INSURANCE COMPANY OF THE SOUTHWEST, 21ST CENTURY ADVANTAGE INSURANCE COMPANY F/K/A AIG ADVANTAGE INSURANCE COMPANY, 21ST CENTURY ASSURANCE COMPANY F/K/A AMERICAN INTERNATIONAL INSURANCE COMPANY OF DELAWARE, 21ST CENTURY AUTO INSURANCE COMPANY OF NEW JERSEY F/K/A AIG AUTO INSURANCE COMPANY OF NEW JERSEY, 21ST CENTURY CENTENNIAL INSURANCE COMPANY F/K/A AIG CENTENNIAL INSURANCE COMPANY, 21ST CENTURY INDEMNITY INSURANCE COMPANY F/K/A AIG INDEMNITY INSURANCE COMPANY, 21ST CENTURY NATIONAL INSURANCE COMPANY F/K/A AIG NATIONAL INSURANCE COMPANY, 21ST CENTURY NORTH AMERICA INSURANCE COMPANY F/K/A AMERICAN INTERNATIONAL INSURANCE COMPANY, 21ST CENTURY PINNACLE INSURANCE COMPANY F/K/A AIG INTERNATIONAL INSURANCE COMPANY OF NEW JERSEY, 21ST CENTURY PREFERRED INSURANCE COMPANY F/K/A AIG PREFERRED INSURANCE COMPANY, 21ST CENTURY PREMIER INSURANCE COMPANY F/K/A AIG PREMIER INSURANCE COMPANY, 21ST CENTURY SECURITY INSURANCE COMPANY F/K/A NEW HAMPSHIRE INDEMNITY COMPANY, INC., FARMERS INSURANCE COMPANY OF ARIZONA, FARMERS NEW CENTURY INSURANCE COMPANY, FARMERS INSURANCE EXCHANGE, MID-CENTURY INSURANCE COMPANY, TRUCK INSURANCE EXCHANGE, FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN, FOREMOST PROPERTY & CASUALTY INSURANCE COMPANY, FOREMOST SIGNATURE INSURANCE COMPANY, BRISTOL WEST CASUALTY INSURANCE COMPANY, BRISTOL WEST INSURANCE COMPANY AND ANY AND ALL OF THEIR SUBSIDIARIES, AFFILIATES AND/OR PARENT COMPANIES,

DECISION AND ORDER

Plaintiffs,

- v -

PAVEL SOLTANOV A/K/A PAUL SOLTANOV A/K/A PAUL DADA, YAKOV SIMKLAYEV, DMITRIY YAKUBBAYEV A/K/A DMITRIY YAUUBBAEN, PS MANAGEMENT CORP., E&Y RENTAL INC., D&L RENTAL SERVICES INC., DVL TRADING INC., COMPAS MEDICAL, P.C., JCC MEDICAL, P.C., ALLEVIATION MEDICAL SERVICES, P.C., JGG MEDICAL CARE, P.C., ADELAIDA PHYSICAL THERAPY, P.C., MASIGLA PHYSICAL THERAPY, P.C., CHARLES DENG ACUPUNCTURE P.C., ACTION POTENTIAL CHIROPRACTIC, P.L.L.C., ISLAND LIFE CHIROPRACTIC PAIN CARE, P.L.L.C., LYONEL F. PAUL, M.D.

D/B/A GENTLE CARE AMBULATORY ANESTHESIA SERVICES, JULES FRANCOIS PARISIEN, M.D., KSENIA PAVOLVA, M.D., DAVID MARIANO, P.T., JEAN CLAUDE COMPAS, M.D., JAIME GUTIERREZ, M.D. A/K/A JAMIE GUTIERREZ, M.D., ADELAIDA LAGA, P.T., MARIA MASIGLA, P.T., CHARLES DENG, L.A.C., DARREN MOLLO, D.C., ACTIVE CARE MEDICAL SUPPLY CORPORATION, CORTLAND MEDICAL SUPPLY, INC., EMC HEALTH PRODUCTS, INC., EXCEL PRODUCTS, INC., FAVORITE HEALTH PRODUCTS, INC., GREENWAY MEDICAL SUPPLY CORPORATION, HEALING HEALTH PRODUCTS, INC., INFINITY HEALTH PRODUCTS, LTD, LIDA'S MEDICAL SUPPLY, INC., MAIGA PRODUCTS CORPORATION, NEW WAY MEDICAL SUPPLY CORPORATION, PRAVEL, INC., QUALITY CUSTOM MEDICAL SUPPLY, INC., RIGHT AID MEDICAL SUPPLY, CORP., TAM MEDICAL SUPPLY CORPORATION, UNLIMITED PRODUCTS, LTD, VERASO MEDICAL SUPPLY, CORP., VLADENN MEDICAL SUPPLY CORPORATION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 131, 133

were read on this motion to/for

DISMISS

The motion to dismiss is granted in part and denied in part.

**Background**

Plaintiffs are insurance companies who allege that they received fraudulent claims for first-party no-fault benefits from the certain defendants referred to as the medical provider (“Provider”) defendants and the durable medical equipment corporation (“DME”) defendants. Plaintiffs contend that defendants are operating a complex fraudulent scheme designed to bilk plaintiffs out of millions of dollars in claims for no-fault medical treatment. Plaintiffs argue that this scheme dates back to at least 2004. Plaintiffs theorize that certain defendants, who they identify as Management Defendants, set up medical corporations that would treat patients who suffered minor injuries in car accidents. Plaintiffs contend that a considerable amount of medical treatment would be billed to plaintiffs and such treatment was either unnecessary or never actually performed.

Plaintiffs further allege that the Provider defendants would steer these patients to onsite chiropractors and physical therapists who, in turn, would pay kick-backs to the facility. The DME defendants allegedly benefitted when patients were prescribed nonessential medical equipment. Plaintiffs insist that defendants set up a medical facility first at 1468 Flatbush Avenue Brooklyn, New York and later at 1786 Flatbush Avenue, Brooklyn, New York.

The Provider Defendants and the Durable Medical Equipment Corporation Defendants (collectively, the “Moving Defendants”) move to dismiss on the grounds that there are other actions pending between the parties, the claims are barred by the statute of limitations, and plaintiffs failed to state causes of action for fraudulent incorporation, a violation of Public Health Law § 238-a, for fraudulent billing or unjust enrichment or a cognizable claim against the DME defendants.<sup>1</sup>

In opposition, plaintiffs claim that under the Court of Appeals decision in *State Farm Mut. Auto. Ins. Co. v Mallela* (4 NY3d 313 [2005]), they can pursue common law causes of action for fraud and unjust enrichment. Plaintiffs argue that they can recover previously-paid bills under *Mallela* and its progeny under a theory that defendants were fraudulently incorporated. Plaintiff also alleges that defendants engaged in fraudulent billing practices.

### Discussion

“On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Nonnon v*

---

<sup>1</sup> Despite receiving explicit instructions at oral argument, the Moving Defendants failed to properly upload their moving papers to e-filing. Currently, it is filed as one 500-page document that includes the moving papers and exhibits. The Moving Defendants also ignored this part’s page limits. The failure to follow the e-filing rules or this part’s page limits in the future will result in the denial of a motion.

*City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]).

### **Prior Actions Pending**

The branch of the motion to dismiss on the ground that there are prior actions pending is denied because the Moving Defendants failed to articulate in detail which actions are pending. The Moving Defendants claim that “Plaintiffs’ factual allegations and legal claims raise the same issues and defenses as are raised and will be adjudicated in the prior filed Civil Court actions and/or Supreme Court Declaratory Judgment actions” (NYSCEF Doc. No. 119 at 11). The Moving Defendants direct the Court to look at an exhibit which has “a sampling of answers filed by the Plaintiffs in the prior filed Civil Court actions, which raise as affirmative defenses the allegations made by Plaintiffs herein” (*id.*).

The Court is unable to find that there are prior actions pending that support the Moving Defendants’ motion to dismiss without the requisite specificity concerning which cases in Civil Court or Supreme Court apply. Attaching a sample is not enough. The Court cannot bar plaintiffs from seeking relief because there might be *some* of the same issues raised in *some* other cases. The Moving Defendants seem to acknowledge this in their moving papers—“Due to the number of claims and actions at issue here, it would be exceedingly burdensome for the Moving Defendants to provide the Court with the documents pertaining to each of the prior actions pending” (*id.* n 4). Although the Moving Defendants offer to attach the necessary documents upon request, that misses the point. The fact is that it is the Moving Defendants’ burden to identify the other cases that are pending and describe how each one should be barred. Simply attaching these documents and leaving the Court to make the arguments is improper.

And, in any event, this action seeks to recover for fraud, unjust enrichment and obtain declaratory relief. That is different from the relief sought in the various Civil Court suits.

#### **Statute of Limitations**

Plaintiffs' claims are not barred by the statute of limitations. The Moving Defendants claim that "the alleged fraud purportedly in issue here dates back as far as 2004" (*id.* at 14). But that does not establish which claims against which defendants are time-barred.

It may be that discovery reveals that some of the claims are time-barred (and therefore ripe for a summary judgment motion) but at this stage, a general assertion that some claims date back to 2004 does not satisfy the Moving Defendants' burden on a motion to dismiss. And, as pointed out by plaintiffs, the Moving Defendants simply attach uncertified printouts from the Department of State showing that some defendant corporations were dissolved. The fact is that these causes of action accrues when the allegedly false claim was submitted, not when a corporation was formed or dissolved. Plaintiffs also claim in opposition that a dissolved corporation could still submit outstanding claims and that defendants' fraudulent scheme continues to the present.

Discovery may reveal that plaintiffs knew or should have known about the alleged fraudulent scheme well before the statute of limitations-- six years from the date this action was commenced. But the record before this Court only contains guesses and suppositions and the Moving Defendants clearly failed to meet their burden to show that plaintiffs' claims are time-barred.

#### **Failure to State Causes of Action**

Plaintiffs bring causes of action for declaratory judgment relating to fraud in the ownership and licensing of certain defendants, restitution from all defendants for having sham

professional corporations, declaratory judgment and restitution from all defendants based on common law fraud and fraudulent treatment, unjust enrichment as to all defendants, declaratory relief concerning a violation of 11 NYCRR §65-3.11(a), declaratory judgment concerning fee splitting, and reimbursement from all defendants for violation of Public Health Law § 238-a.

### **DME Defendants**

The Moving Defendants insist that there are no cognizable causes of action against the DME defendants because they are not subject to the New York State Education Law, which imposes licensing requirements for certain professions.

In opposition, plaintiffs contend that courts have allowed claims against DME companies where they knowingly supplied items at inflated costs (or failed to supply any equipment) as part of a kickback scheme. Plaintiffs also note that the first cause of action only seeks declaratory relief as to medical providers that are subject to Education Law restrictions. The Moving Defendant did not submit a reply.

On this record, the Court denies this branch of the Moving Defendants' motion. In the amended complaint, plaintiffs do not allege that the DME defendants must be licensed under the Education Law. Rather, they claim that the DME defendants participated in an illegal kickback scheme where durable medical equipment was provided to patients without regard to a patient's symptoms (NYSCEF Doc. No. 2, ¶ 148 [The Amended Complaint]). Later, the Provider Defendants and the DME Defendants would give kickbacks to the Management Defendants.

These allegations state the causes of action alleged against the DME defendants. The fact that the DME defendants are not subject to the Education Law does not insulate them from potential liability if the alleged kickback scheme is proven.

**Fraudulent Incorporation**

The Moving Defendants claim that plaintiffs failed to plead the fraudulent incorporation cause of action with the requisite particularity and that it should be dismissed. Here, the Court is satisfied that plaintiffs have pled fraud with the required particularity (*see e.g., id.* ¶¶ 55-289). This is a motion to dismiss; plaintiffs need not prove their causes of action at this stage. And plaintiffs have offered allegations that identify the actions of specifically-named doctors and defendants. Of course, plaintiffs must prove these claims in order to prevail. But the amended complaint is more than sufficient with respect to the fraudulent incorporation cause of action.

**Fee Splitting**

The Moving Defendants also move to dismiss the cause of action based on fee-splitting. The Moving Defendants claim that binding precedent from this Department holds that this is not a cognizable cause of action. In opposition, plaintiffs attempt to distinguish First Department case law holding that impermissible fee-splitting is not a cognizable cause of action by an insurance company.

Here, the Court finds that the sixth cause of action is severed and dismissed pursuant to *Allstate Property and Cas. Ins Co. v New Way Massage Therapy P.C.* (134 AD3d 495, 19 NYS3d 987 (Mem) [1st Dept 2015]). In *New Way*, the First Department found that impermissible fee-sharing “does not constitute a defense to a no-fault action” and “It is solely a matter for the appropriate state licensing board” (*id.* at 495). This Court is compelled to follow this binding precedent. The rationale makes sense—how the Management and Provider Defendants split the fees has no impact on plaintiffs. It may have been part of the alleged scheme, but plaintiffs’ requested relief for this cause of action is a declaration that they have no obligation to pay any monies for no-fault bills sent by the Provider Defendants. Improper fee-

splitting has nothing to do with any fraud purportedly committed by defendants; the aggrieved party is the relevant stage agency who administers the applicable statutory framework.

#### **Public Health Law § 238-a**

Plaintiffs have stated a cause of action based on Public Health Law § 238-a (the seventh cause of action). This cause of action relates to whether the defendants engaged in illegal patient referrals to each other. The Moving Defendants appear to conflate the sixth and seventh causes of action and suggest that plaintiff has not established that there was a financial relationship between the entity making the referral and the one receiving the referral. (*see* NYSCEF Doc. No. 119 at 28,29).

At the motion to dismiss stage, plaintiffs need not prove that there were illegal referrals. Plaintiffs allege that the “Management Defendants, through their illegal ownership, operation and control of the Provider Defendants, self-referred a vast majority of their patients for services to and amongst the Provider Defendants and DME Defendants” (NYSCEF Doc. No. 2, ¶ 330). That, along with the fraudulent scheme detailed in the amended complaint, is sufficient.

#### **Independent Contractors (Fifth Cause of Action)**

Plaintiffs’ fifth cause of action is also properly pled (*see e.g., State Farm Mut. Auto. Ins. Co. v Anikeyeva*, 89 AD3d 1009, 934 NYS2d 196 [2d Dept 2011]). This claim alleges that the services provided by certain defendants were performed by independent contractors or non-employees, which would prevent defendants from collecting no-fault benefits.

The Moving Defendants correctly point out that plaintiffs must offer more specificity in order to recover against defendants. Obviously, defendants cannot be held liable for the use of independent contractors if plaintiffs fail to establish that a specific defendant violated the

applicable regulation (11 NYCRR § 65-3.11[a]). But this is a motion to dismiss—plaintiffs need only allege that this regulation was violated.

### **Unjust Enrichment**

The Moving Defendants claim that the amended complaint lacks any specificity to sustain a cause of action for unjust enrichment. They also claim that where a contract exists between the parties, an unjust enrichment claim cannot be maintained. The Moving Defendants point to the relevant insurance policies as the contracts that compel dismissal of this cause of action.

In opposition, plaintiffs claim that the misconduct by defendants stems from misrepresentations by the defendants rather than the no-fault contracts. Plaintiffs contend that the misconduct does not rely on the contract and, therefore, an unjust enrichment claim is permissible here. The Court agrees.

Plaintiffs' theory is that defendants engaged in scheme to recover benefits that were either unnecessary to patients or were never actually provided. That is a classic unjust enrichment theory: defendants benefitted from the submission of claims paid by plaintiffs even though defendants were not entitled to be paid. The Moving Defendants, who did not submit a reply, failed to explain how the allegedly fraudulent scheme would be covered by the insurance contract. After all, the insurance contract requires plaintiffs (the insurance companies) to provide benefits to its insureds in exchange for a premium. At this early stage, it is enough for plaintiffs to contend that some of defendants' purported misconduct falls outside of the insurance policies.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted only to the extent that the sixth cause of action is severed and dismissed and denied as to the remaining branches of the motion.

The parties are directed to appear for the already-scheduled conference on April 2, 2019 at 2:15 p.m.

1/2/19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	