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| <b>Travelers Indem. Co. v Gutierrez</b>  |
| 2019 NY Slip Op 31617(U)   |
| June 5, 2019   |
| Supreme Court, New York County   |
| Docket Number: 654949/2018   |
| Judge: Andrew Borrok   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. ANDREW BORROK **PART** **IAS MOTION 53EFM**

*Justice*

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THE TRAVELERS INDEMNITY COMPANY AND ITS PROPERTY  
CASUALTY AFFILIATES AND SUBSIDIARIES,

Plaintiff,

- v -

DR. JAMIE GUTIERREZ, ENGLEWOOD ORTHOPEDICS GROUP  
P.C., AMBULATORY SURGICAL CENTER OF ENGLEWOOD  
LLC, ARTHUR AVENUE MEDICAL SERVICES P.C.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for

DISMISSAL

The Travelers Indemnity Company and its Property Casualty Affiliates and Subsidiaries (**Travelers**) brings this action against Dr. Jamie Gutierrez, Englewood Orthopedics Group P.C. (**Englewood Orthopedics**), Ambulatory Surgical Center of Englewood LLC (**Ambulatory Surgical**), and Arthur Avenue Medical Services P.C. (**Arthur Avenue**) for declaratory judgment, breach of contract, and unjust enrichment. The defendants move to dismiss the complaint pursuant to CPLR § 3211 (a) (1) and (7). For the reasons set forth below, the motion to dismiss is granted.

This action arises from a Settlement Agreement and Release (the **Settlement Agreement**), dated October 17, 2013, among Travelers, Dr. Gutierrez, and Alleviation Medical Services, P.C. (**Alleviation**), an entity owned and controlled by Dr. Gutierrez, pursuant to which Dr. Gutierrez and Alleviation agreed to discontinue all outstanding claims relating to certain unpaid no-fault

medical bills and agreed not to submit bills for medical services provided by Dr. Gutierrez or any of his affiliates except for services provided at four specifically enumerated medical offices (NYSCEF Doc. No. 2, ¶¶ 1-2, 7, 8). Travelers alleges that, beginning in 2016, Dr. Gutierrez and entities controlled by Dr. Gutierrez began submitting bills to Travelers for medical services performed at non-exempt medical office locations (Complaint, ¶¶ 25-26). The total outstanding claims for these services are \$400,000 (*id.*, ¶ 31). Travelers initially remitted payment for several of these allegedly improper bills totaling \$69,346.33 (*id.*, ¶ 30). Travelers alleges that the actions of Dr. Gutierrez and the corporate defendants under his ownership and control constitute a breach of the Settlement Agreement (*id.*, ¶ 32). Travelers seeks to recover the \$69,346.33 that it has already paid to the defendants and a declaratory judgment holding that Travelers has no obligation to pay the remainder of the \$400,000 in claims submitted that it alleges are improper (*id.*). The defendants move to dismiss the complaint pursuant to CPLR § 3211 [a] [1] and [7], arguing that the Settlement Agreement only applied to entities in existence and/or affiliated with Dr. Gutierrez at the time that it was executed and only to claims for medical services provided prior to the date of its execution.

On a motion to dismiss pursuant to CPLR 3211 [a] [7], the court affords the pleadings a liberal construction (CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Dismissal under CPLR 3211 [a] [1] is warranted only where the documentary evidence conclusively establishes a

defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Here, the documentary evidence submitted by the defendants, *i.e.*, the Settlement Agreement, conclusively establishes a defense to the causes of action set forth in the complaint as a matter of law. Section 8 of the Settlement Agreement provides as follows:

**8. Future Claims for Services by Dr. Gutierrez and His Entities.** Dr. Gutierrez and Alleviation agree that from the date of execution of this Agreement by all Parties and continuing thereafter, without time limitation, Dr. Gutierrez, Alleviation and any other entity that they own, control or provide management services to will not submit bills to or commence any lawsuits, arbitrations, or other proceedings against Travelers for any medical service provided at any location, subject the exempt locations listed hereafter ("exempt locations") at which Dr. Gutierrez and/or Alleviation, *prior to the execution of this Agreement by all Parties* (emphasis added), provided services to Traveler's insureds. (NYSCEF Doc. No. 2 ¶ 8).

Significantly, this section refers to future claims of entities that either Dr. Gutierrez or Alleviation "owns" – *i.e.*, not "hereafter owns" or any "successor entity" of Dr. Gutierrez or Alleviation.

In addition, Section 9 of the Settlement Agreement states:

**9. Failure to Comply by Dr. Gutierrez and Alleviation.** Dr. Gutierrez and Alleviation further agree that if they or any entity that they own, control or provide management services to submits bills to or commences lawsuits, arbitrations or other proceedings against Travelers *for services rendered to Travelers insureds prior to the date of the execution of this Agreement by both Parties* (emphasis added) at any location other than the exempt locations, and, if after written notice of such bills, lawsuits, arbitrations or other proceedings they do not. within twenty (20) days of written notice is given in writing by Travelers to Dr. Gutierrez or Alleviation and Dr. Gutierrez and Alleviation's counsel, withdraw such bills or dismiss such actions, they will become liable to and pay Travelers reasonable fees, costs and expenses incurred by Travelers in connection therewith.

That is, pursuant to Section 9, Dr. Gutierrez and Alleviation agreed that Dr. Gutierrez and Alleviation would be responsible for any bills other than bills from the exempt organizations that arose out of the provision of services *prior to the date of the Settlement Agreement*. There is no such admission of liability for bills submitted for services rendered *after* the date of the Settlement Agreement. In other words, read together, these two provisions indicate that the Settlement Agreement barred the submission of bills from entities owned by Dr. Gutierrez or Alleviation at time of the Settlement Agreement, and Dr. Gutierrez and Alleviation could not submit bills from any such entities except bills for medical services rendered at exempt locations, and if Dr. Gutierrez or Alleviation did submit any such bills, or if he failed to withdraw them, he would become liable for their payment.

Although the plaintiffs invite the court to add the language “hereafter owned” or “successors” or such similar expressions of intent to bind entities not then owned by Dr. Gutierrez, the court declines to do so. It is well settled that unless a contract contains “explicit language demonstrating the parties’ intent to bind future affiliates of the contracting parties,” the contract is only binding on entities in existence at the time the contract was executed and not on future affiliates or successors (*Ellington v EMI Music, Inc.*, 24 NY3d 239, 246 [2014]). Contract language that expressly indicates that it is binding on successors demonstrates the intent of the contracting parties to bind future affiliates (*Georgia Malone & Co., Inc. v E&M Assoc.*, 163 AD3d 176, 186 [1st Dept 2018]). Significantly, paragraph 8 of the Settlement Agreement does not include any language indicating that it shall apply to entities “now and hereafter” owned, controlled, or management by Dr. Gutierrez or Alleviation, and it does not include the term “successors” or any similar term with respect to the covered entities. “If the parties intended to

bind future affiliates they would have included language expressing that intent” (*Ellington*, 24 NY3d at 246). The court will not read in such a provision in light of the Settlement Agreement’s unambiguous language.

Accordingly, it is

ORDERED that the defendants motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court, upon service upon him (60 Centre Street, Room 141B) of a copy of this order with notice of entry is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to the defendant as taxed by the Clerk; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).



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ANDREW BORROK, J.S.C.

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