

<b>Unitrin Safeguard Ins. Co. v 406 Med., P.C.</b>
2022 NY Slip Op 33033(U)
September 8, 2022
Supreme Court, New York County
Docket Number: Index No. 160944/2020
Judge: Lori Sattler
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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  
COUNTY OF NEW YORK: PART 02TR

-----X

UNITRIN SAFEGUARD INSURANCE COMPANY,

INDEX NO. 160944/2020

Plaintiff,

MOTION DATE 06/24/2022

- v -

MOTION SEQ. NO. 001

406 MEDICAL, P.C.,AFFINITY RX., INC.,ALL NATIONS  
DME CORP., ALL WELLNESS ACUPUNCTURE,  
P.C.,ANCIENT POINT ACUPUNCTURE, P.C.,ANDREW J.  
DOWD, M.D., ATLANTIC MEDICAL CARE, P.C.,BETTER  
HANDS PHYSICAL THERAPY, P.C.,CROSS RIVER PAIN  
MANAGEMENT, P.C.,FRESH POND MEDICAL SUPPLY,  
INC.,JEVA PHYSICAL THERAPY, P.C.,JPB  
CHIROPRACTIC, P.C.,MAJESTIC MEDICAL IMAGING,  
P.C.,ONE TOUCH HEALTH SUPPLY, INC.,PRESSURE  
POINTS ACUPUNCTURE CARE, P.C.,QUALITY MED  
EQUIP, INC, RELIEF PHYSICAL THERAPY,  
P.C.,ROCKAWAY COMPLETE CHIROPRACTIC,  
P.C.,SHOP-N-SAVE PHARMACY, INC, STAND-UP MRI  
OF BROOKLYN, P.C.,HILDA ORTEGA, KEMAGNE  
THEAGENE

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

HON. LORI SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to/for DISMISSAL.

In this action for declaratory judgment, defendant Affinity RX., Inc. (“Affinity”) moves to dismiss this action pursuant to CPLR 3215(c) and CPLR 3211(a)(4). Plaintiff Unitrin Safeguard Insurance Company (“Unitrin”) cross-moves pursuant to CPLR 3025(b) to amend the complaint to add additional parties as defendants to the action.

**BACKGROUND**

This action arises out of an alleged motor vehicle collision on January 14, 2020. Defendants Hilda Ortega and Kemagne Theagene (“Claimants”) were purported occupants of a Unitrin-insured vehicle when it was allegedly involved in a collision on the Jackie Robinson Parkway in Queens,

New York. The only report of the alleged incident was a Report of Motor Vehicle Accident generated by Claimants; no police report was created. Claimants alleged serious bodily injuries resulting from the collision and received treatment from the remaining defendants (“Medical Provider Defendants”) along with other medical providers not named in the complaint. According to Unitrin, the Medical Provider Defenders subsequently submitted over \$70,000 in No-Fault complaints as the assignees of the Claimants. The magnitude of these bills, along with other factors surrounding the alleged crash, caused Unitrin to maintain a belief in the strong possibility that Claimants’ alleged injuries and subsequent treatment by the Medical Provider Defendants were not causally related to the collision and/or did not arise from an insured incident.

Unitrin then exercised its rights under the No-Fault regulations and sought an examination under oath (“EUO”) of the Claimants to confirm the legitimacy of the alleged loss and resulting treatment. The Claimants appeared at their EUO, at which Unitrin maintains that they gave questionable testimony suggesting that the collision did not occur as reported. Unitrin alleges that Claimants failed to subscribe to and return their EUO transcripts as required by the No-Fault regulations.

Unitrin also sought EUOs of the Medical Provider Defendants to confirm the legitimacy of the alleged loss and treatments. However, Unitrin alleges that the Medical Provider failed to appear for their respective EUOs on at least two occasions each and therefore breached a condition precedent to coverage under the No-Fault regulations.

Based on the Defendants’ alleged breaches of conditions precedent to coverage under the No-Fault Regulations, Unitrin denied all No-Fault claims submitted on behalf of Claimants related to the alleged collision. Unitrin commenced the present action on December 16, 2020, seeking a declaratory judgment stating that it has no duty to pay No-Fault claims with respect to the alleged January 14, 2020 collision.

Affinity answered the Complaint on February 22, 2021. It then commenced two arbitration proceedings against Unitrin to recover payments allegedly related to the collision (NYSCEF Doc. No. 42, 45). Hearings for the arbitrations were held on September 27, 2021 and awards for \$5,263.00 and \$5,773.40 were entered in Affinity's favor (*id.*) These awards were subsequently confirmed by the Master Arbitrator on December 2 and December 27, 2021, respectively (*id.*). Pursuant to its rights under Insurance Law § 5106 and 11 NYCRR § 65-4.10, Unitrin commenced separate civil actions for trials de novo against Affinity on January 8, 2022 ("Post-Arbitration Actions," Index Nos. 150232/2022 and 150233/2022), seeking declaratory judgments stating that it has no obligation to pay the claims submitted by Affinity.

Following the filing of its Summons and Complaint, Unitrin alleges that it received additional claims related to the collision from the following entities: Accu Reference Medical Lab LLC; Sedation Vacation Perioperative Medicine PLLC; Right Choice Supply Inc; All City Family Healthcare Center, Inc.; Contemporary Orthopedics, PLLC; East Coast Medical Associate, P.C; July Gaysynsky, MD; Recovery Ortho Solutions Inc.; and SP One Services, Inc. (collectively "Additional Healthcare Providers").

## DISCUSSION

### Affinity's Motion to Dismiss

Affinity first moves to dismiss the action pursuant to CPLR 3215(c), asserting Unitrin has "taken no steps to secure a default judgment" (NYSCEF Doc. No. 41, Affinity aff). Affinity claims that, because "over a year has elapsed since the purported defaults" and Unitrin has taken no steps to seek a default judgment, it is entitled to an order dismissing the action (NYSCEF Doc. No. 40, Notice of Motion; Affinity aff ¶ 6).

The Court denies this branch of Affinity's motion. CPLR 3215(c) provides, in relevant part, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the

default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . .” “[A] party may waive its rights under CPLR 3215(c) by ‘serving an answer or taking any other steps which may be viewed as a formal or informal appearance’” (*Wells Fargo Bank, N.A. v Martinez*, 181 AD3d 470, 471 [1st Dept 2020], quoting *Private Capital Group, LLC v Hosseinipour*, 170 AD3d 909, 910 [2d Dept 2019]). Here, Affinity has waived its right to seek dismissal under CPLR 3215(c) by appearing in this action upon the filing of its Answer.

In the second branch of its motion to dismiss, Affinity argues that the pending Post-Arbitration Actions entitle it to dismissal under CPLR 3211(a)(4). Section 5106(c) of the Insurance Law and 11 NYCRR § 65-4.10(h) allow a party to challenge the award of a master arbitrator under CPLR Article 75 or, if the award is more than five thousand dollars, in a de novo court action. CPLR 3211(a)(4) permits a party to move for dismissal on the ground that “there is another action pending between the same parties for the same cause of action in a court of any state,” provided, however, that “the court need not dismiss upon this ground but may make such order as justice requires” (CPLR 3211[a][4]). Relief under CPLR 3211(a)(4) is generally given where another action was commenced earlier; the first-in-time action is given priority outside of narrow exceptions (*see National Union Fire Ins. Co. v Jordache Enter.*, 205 AD2d 341, 343 [1st Dept 1994] [“Virtually every exception to the first-in-time rule involves competing litigation commenced within days or even hours of each other”]).

This branch of Affinity’s motion is denied. The Post-Arbitration Actions were filed in January 2022 – eleven months after the commencement of this action – which is well outside of the exception to the “first-in-time” rule for motions to dismiss under CPLR 3211(a)(4) (*cf. Unitrin Safeguard Ins. Co. v Advanced Recovery Solution, Inc.*, 75 Misc 3d 1216[A] [Sup Ct, NY County 2022] [Lebovits, J.] [denying motion to dismiss where plaintiff filed action ten months prior to commencement of suits against movant that arose from same incident]). The Court further notes

that the present action has progressed further than the Post-Arbitration Actions and that it seeks relief against additional defendants, not merely Affinity (*id.*).

### Unitrin's Cross-Motion to Amend Complaint

Unitrin cross-moves pursuant to CPLR 3025(b) for leave to amend its Complaint to add the Additional Healthcare Providers as defendants to this action. Leave to amend pleadings under CPLR 3025(b) should be freely given where there is no surprise or prejudice to the nonmoving party (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]) or where the amendments are “palpably insufficient or patently devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). In support of its cross-motion, Unitrin maintains that adding the Additional Healthcare Providers as defendants would not result in surprise or prejudice and that its cause of action against them is meritorious. Affinity opposes the cross-motion by relying on the same argument put forth in its motion to dismiss by asserting that Unitrin has neglected this case by failing to seek default judgment within a year of default (NYSCEF Doc. No. 60).

Unitrin's cross-motion to amend is granted. “On a motion for leave to amend, [a] plaintiff need not establish the merit of its proposed new allegations” (*MBIA Ins. Corp.*, 74 AD3d at 500). The Court finds that no surprise or prejudice would result from adding the Additional Healthcare Providers as defendants. Little to no discovery has taken place and the Additional Healthcare Providers have allegedly submitted No-Fault claims related to the collision at issue in this case and/or have commenced arbitrations or litigations to recover based on these claims. The factual and legal issues raised by Unitrin's claims against the Additional Healthcare Providers are identical to those in Unitrin's present claims against the Defendants. Unitrin's proposed causes of action against the Additional Healthcare Providers are not “palpably insufficient or patently devoid of merit” as Unitrin shows sufficient merit in its affirmation in support and the affidavit of its claims

adjuster (*id.* at 499-500). The Court has considered the remainder of Affinity's arguments and finds them unavailing.

Accordingly, it is hereby:

ORDERED that Defendant Affinity's motion to dismiss the entire action, or, in the alternative, dismissing the action as against Affinity only, is denied; and it is further

ORDERED that Plaintiff's motion to amend the complaint is granted; and it is further

ORDERED that Accu Reference Medical Lab LLC; Sedation Vacation Perioperative Medicine PLLC; Right Choice Supply Inc; All City Family Healthcare Center, Inc.; Contemporary Orthopedics, PLLC; East Coast Medical Associate, P.C; July Gaysynsky, MD; Recovery Ortho Solutions Inc.; and SP One Services, Inc. are hereby joined as party defendants in this action; and it is further

ORDERED that Plaintiff shall serve an amended complaint upon the Defendants herein naming Accu Reference Medical Lab LLC; Sedation Vacation Perioperative Medicine PLLC; Right Choice Supply Inc; All City Family Healthcare Center, Inc.; Contemporary Orthopedics, PLLC; East Coast Medical Associate, P.C; July Gaysynsky, MD; Recovery Ortho Solutions Inc.; and SP One Services, Inc. as additional party defendants; and it is further

ORDERED that Plaintiff shall serve a supplemental summons and amended complaint upon Accu Reference Medical Lab LLC; Sedation Vacation Perioperative Medicine PLLC; Right Choice Supply Inc; All City Family Healthcare Center, Inc.; Contemporary Orthopedics, PLLC; East Coast Medical Associate, P.C; July Gaysynsky, MD; Recovery Ortho Solutions Inc.; and SP One Services, Inc., said supplemental summons and amended complaint together with a copy of this order with notice of entry thereof to be served upon, and upon the attorneys for, Defendants herein, within twenty days from the date of the signing and entry of this order; and it is further

ORDERED that all Defendants shall have twenty days from the date of service of the supplemental summons and amended complaint within which to put in such answers to said amended complaint as they may be advised; and it is further

ORDERED that the County Clerk is directed to amend the caption in this action to the following:

UNITRIN SAFEGUARD INSURANCE COMPANY,

Plaintiff,

-against-

406 MEDICAL, P.C., AFFINITY RX INC., ALL NATIONS DME CORP., ALL WELLNESS ACUPUNCTURE, P.C., ANCIENT POINT ACUPUNCTURE, P.C., ANDREW J. DOWD, M.D., ATLANTIC MEDICAL CARE, P.C., BETTER HANDS PHYSICAL THERAPY, P.C., CROSS RIVER PAIN MANAGEMENT, FRESH POND MEDICAL SUPPLY, INC., JEVA PHYSICAL THERAPY, P.C., JPB CHIROPRACTIC, P.C., MAJESTIC MEDICAL IMAGING, P.C, ONE TOUCH HEALTH SUPPLY, INC., PRESSURE POINTS ACUPUNCTURE, P.C., a/k/a ACUPUNCTURE AND MASSAGE THERAPY CARE, P.C., QUALITY MED EQUIP, INC., RELIEF PHYSICAL THERAPY, P.C., ROCKAWAY COMPLETE CHIROPRACTIC, P.C., SHOPN-SAVE PHARMACY, INC., STAND-UP MRI OF BROOKLYN, P.C., ACCU REFERENCE MEDICAL LAB LLC, SEDATION VACATION PERIOPERATIVE MEDICINE PLLC, RIGHT CHOICE SUPPLY INC, ALL CITY FAMILY HEALTHCARE CENTER, INC., CONTEMPORARY ORTHOPEDICS, PLLC, EAST COAST MEDICAL ASSOCIATE, P.C., JULY GAYSYNSKY, MD, RECOVERY ORTHO SOLUTIONS INC., and SP ONE SERVICES, INC., HILDA D. ORTEGA, and KEMAGNE THEAGENE,

Defendants.

This constitutes the Decision and Order of the Court.

LORI SATTLER, J.S.C.

9/8/2022  
DATE

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE