

**Kemper Independence Ins. Co. v E&W Acupuncture
P.C.**

2010 NY Slip Op 31342(U)

May 24, 2010

Sup Ct, NY County

Docket Number: 109691/09

Judge: Carol R. Edmead

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3/2/09

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Kemper

INDEX NO. 109691/09

MOTION DATE 5/20/10

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

- v -

E + W Acupuncture

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED
FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

In accordance with the accompanying Memorandum Decision, the motion by Kemper Insurance, bearing sequence number 003 and Kemper Insurance's motion for default judgment, bearing sequence number 002, are consolidated for joint disposition and decided are follows:

ORDERED that the motion by defendant Top Choice Medical, P.C. ("Top Choice") pursuant to CPLR §3211(a)(4) to dismiss the complaint as asserted against it (sequence 003) is denied; and it is further

ORDERED that the cross-motion by Kemper Independent Insurance Company to consolidate *Top Choice Medical, P.C. a/a/o Cynthia Orta v Kemper Independent Insurance Company*, Index No.: 68399/09, currently pending in Bronx County, with this action in New York County, is granted; and it is further

ORDERED that the Clerk of the Civil Court, Bronx County is directed to transfer the papers in *Top Choice Medical, P.C. a/a/o Cynthia Orta v Kemper Independent Insurance Company*, Index No.: 68399/09 to the Clerk of the Supreme Court, County of New York upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

ORDERED that upon receipt the papers in the case *Top Choice Medical, P.C. a/a/o Cynthia Orta v Kemper Independent Insurance Company*, Index No.: 68399/09, the Trial

Dated: _____

Page 1 of 2

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Support Office and the County Clerk in New York County shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that the motion by Kemper Independent Insurance Company for a default judgment pursuant to CPLR 3215 against defendants E&W Acupuncture P.C., Beth Israel MedCtr a/k/a Beth Israel Medical Center, Shahid Mian M.D., P.C, New Way Massage Therapy a/k/a New Way Massage Therapy, P.C, Restoration Chiropractic, PC, Socrates Medical Health, PC, and York Anesthesiologists, PLLC (sequence 002), is granted, on default; and it is further;

ORDERED that damages against defendants E&W Acupuncture P.C, Beth Israel MedCtr a/k/a Beth Israel Medical Center, Shahid Mian M.D., P.C, New Way Massage Therapy a/k/a New Way Massage Therapy, P.C, Restoration Chiropractic, PC, Socrates Medical Health, PC, and York Anesthesiologists, PLLC, be assessed at the time of the trial of the action or disposition of the action against the remaining defendants; and it is further

ORDERED that Kemper Insurance serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated 5/24/10

ENTER:  J.S.C.
HON. CAROL EDMEAD
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION

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REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
KEMPER INDEPENDENCE INSURANCE
COMPANY,

Plaintiff,

Index No.: 109691/09
Sequence #003

-against-

E&W ACUPUNCTURE P.C, BETH ISRAEL MEDCTR
a/k/a BETH ISRAEL MEDICAL CENTER, GLENN
KASHAN, MD, SHAHID MIAN M.D., P.C, NEW WAY
MASSAGE THERAPY a/k/a NEW WAY MASSAGE
THERAPY, P.C., OLMA MEDICAL EQUIPMENT, INC.,
RESTORATION CHIROPRACTIC, P.C, SOCRATES
MEDICAL HEALTH, P.C, TOP CHOICE MEDICAL, P.C.,
YORK ANESTHESIOLOGISTS, PLLC and CYNTHIA ORTA,

Defendants.

FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this declaratory judgment action, defendant Top Choice Medical. P.C. ("Top Choice") moves to dismiss the complaint by Kemper Independent Insurance Company ("Kemper Insurance") as asserted against it, pursuant to CPLR §3211(a)(4) (prior action pending). Kemper Insurance cross moves to consolidate another action pending in Bronx County with this action. Kemper Insurance also seeks a default judgment pursuant to CPLR 3215 against all defendants¹ except Top Choice, Olma Medical Equipment, Inc. and Cynthia Orta.²

Factual Background

This action arises out of an August 30, 2008 collision where defendant Cynthia Orta ("Orta") was allegedly riding in a vehicle insured by Kemper Insurance and allegedly received

¹Plaintiff represents that it discontinued the action as against Glen Kashan, MD.

² The motion by Kemper Insurance, bearing sequence number 003 and Kemper Insurance's motion for default judgment, bearing sequence number 002, are consolidated for joint disposition and decided herein.

treatment as a result. The various defendants from whom Orta received treatment then sought no-fault benefits from Kemper Insurance as the alleged assignees of Orta. Under the belief that Orta's alleged injuries and subsequent treatment were not related to the underlying collision, Kemper Insurance sought verification of the claims by requesting independent medical examinations ("IMEs") of Orta to confirm the legitimacy of this loss and the alleged treatment. When Orta failed to appear for the IMEs, Kemper denied the claims on the ground that the failure to appear for the IME was a material breach of the provisions of the policy.

Top Choice filed suit in Civil Court of the City of New York, Bronx County, seeking to recover on no-fault claims that were sent to Kemper Insurance (the "Bronx County Action").³

On July 9, 2009, Kemper Insurance commenced this action seeking to disclaim all No-Fault coverage.

In support of dismissal, Top Choice contends that Kemper Insurance seeks, *inter alia*, a judgment declaring that it owes no duty to defendants to pay No-Fault claims due to Orta's failure to appear for an IME. The Court has broad discretion to dismiss the Complaint pursuant to CPLR 3211 (a)(4) where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter. Top Choice contends that here, the same two parties are involved in the two actions: Top Choice and Kemper Insurance. The same issues are being litigated; specifically, Kemper Insurance is relying on its previously proffered defense of "IME no-show by Cynthia Orta" in the Bronx Civil Action, and Kemper Insurance seeks declaratory relief from this Court premised upon the denials issued by

³ *Top Choice Medical, P.C. a/a/o Cynthia Orta v Kemper Independent Insurance Company*, Index No.: 68399/09.

Kemper Insurance based upon Cynthia Orta's failure to show for an IME. Clearly there is a danger of two different outcomes. It is also clear that the Bronx County Action was filed first. Therefore, the Court should dismiss the Complaint as against Top Choice.

Kemper Insurance cross moves to consolidate the Bronx Civil action with the instant action. All sides agree that since the issues in the two cases arise out of a common nucleus of facts, consolidation is appropriate under CPLR 602.

Kemper Insurance also opposes dismissal on the ground that Top Choice failed to establish that the Bronx County action was previously filed. Pursuant to CPLR 304, an action is deemed commenced on the date that it was filed; the summons and complaint have no index number and do not indicate when it was actually filed in court. Further, Kemper Insurance received the Complaint in the Bronx County action in August 2009.

In any event, policy considerations demonstrate that adjudicating all issues in the larger declaratory judgment action is the most just and efficient way to resolve the controversy herein, and any concerns about multiple actions can be obviated by consolidating the actions, which would render Top Choice's motion moot. In this case, Kemper faces \$50,000 in claims from several medical providers and coverage has been disclaimed based upon the failure of Orta to appear for IMEs and Kemper's belief that the alleged injuries were not related to the collision. Given that most of this action turns on the actions of Orta, she is a necessary party to the action and she is a non-party in the Bronx County action. Further, Orta is a New York County resident and thus this court is the most convenient forum to fully address all issues in this controversy. The Court should also be guided by the policy considerations particular to the No-Fault system. The Court of Appeals has recognized that two significant goals of the No-Fault system are to

reduce burden on the court system and reduce cost of the No-Fault premium for New York drivers. In addition, if Top Choice is still submitting claims on behalf of Orta, it would make little sense to adjudicate only a portion of its claim in civil court in the Bronx, when the larger issue could still be revisited between the parties.

Kemper Insurance argues while a defendant may seek dismissal under CPLR 3211(a)(4), this section specifically provides that "the court need not dismiss upon this ground but may make such order as justice requires."

Kemper Insurance also notes that Top Choice's motion violates 22 NYCRR 202.8(c), which provides that "affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of relevant law." The lengthy affirmation of counsel for Top Choice contains lengthy legal argument and precedent that can only be supported by a memorandum of law, which has not been submitted. While minor deviations from this rule of court have been tolerated, such a major violation of the rule merits the striking of the motion and supporting affirmation.

In reply, Top Choice contends that its affirmation in support of its motion cites only two cases and its minor deviation from the rules does not justify striking the motion papers.

Top Choice further argues that dismissal is warranted since there are similar, if not identical, issues of law and fact in both actions, and the Bronx County Action was filed on June 12, 2009 prior to the instant litigation, as indicated on a print-out from e-Courts. That the Summons and Complaint do not show the exact filing date does not negate the indisputable fact that the Bronx County action was still filed first.

Top Choice also opposes consolidation, arguing that the Bronx Action was filed first, and

the potential risk of differing outcomes in the two actions requires dismissal of the latter-commenced action. The potential exists that Top Choice may prevail in the Bronx County Action. Thereafter, plaintiff may secure a judgment declaring that it owes no duty to pay no-fault claims. The separate judgment would create yet more litigation by both parties to either secure payment by Top Choice or to secure a refund by Kemper. As Kemper Insurance has argued, this scenario would be a waste of judicial economy and resources.

Alternatively, Top Choice argues, should this Court find that consolidation is proper, the proper venue is in the Bronx given that the Bronx County Action was filed first and because Top Choice has its principal office in Bronx County. Plaintiff has presented no "special circumstances" herein to compel venue in New York County. As the insurance carrier, Kemper Insurance must demonstrate that the eligible insured party failed to appear for the scheduled IMEs. To do so, the carrier must proffer an affidavit from a person with knowledge sufficient to demonstrate the eligible insured party did not appear. Kemper Insurance may offer such evidence without any testimony or other evidence from Orta, herself. Thus, Kemper Insurance's claim that Orta is a necessary party to the action is unavailing and venue should remain in the Bronx.

In reply, Kemper Insurance argues that Top Choice's attempts to prove that its action was first in time cannot be established in reply papers; while it is questionable whether such a printout from a website is sufficient to prove that the civil court action is first in time, it is clearly not proper to make such an offer of proof in reply papers. Furthermore, there is no jurisdiction to consolidate this action in civil court because the action is equitable in nature and adjudicates claims of over \$25,000. It is uncontested that Top Choice's Bronx civil court action does not

even contain all the claims that it has submitted to Kemper Insurance on behalf of Orta. As such, Top Choice's limited remedy would be to seek a dismissal of only a portion of Top Choice's claims and it would still technically remain in the declaratory judgment action. In addition, Top Choice has offered no reason for the need for dismissal or consolidation other than its assertion that it filed its smaller action first.

By separate motion, Kemper Insurance also moves for a default judgment against defendants E&W Acupuncture P.C, Beth Israel MedCtr a/k/a Beth Israel Medical Center, Shahid Mian M.D., P.C, New Way Massage Therapy a/k/a New Way Massage Therapy, P.C, Restoration Chiropractic, PC, Socrates Medical Health, PC, and York Anesthesiologists, PLLC, based on their failure to answer the Summons and Complaint.

Discussion

It is undisputed that the Bronx County action and the instant action, as between Kemper Insurance and Top Choice involve the same issues of fact and law.

Further, the record establishes that the Bronx County action was commenced prior to this action. Although the proof of filing was not submitted on its initial motion, Top Choice asserted the argument that its action was filed first in the Bronx in its initial motion. Further, the Court may consider the court record submitted in reply since Kemper Insurance had an opportunity to respond this document and in fact, responded to this argument in its reply memorandum (*see e.g., Park Country Club of Buffalo, Inc. v Tower Ins. Co. of New York*, 68 AD3d 1772, 893 NYS2d 408 [4th Dept 2009] ("A court may consider evidence submitted for the first time in reply papers where, as here, the opposing party had an opportunity to respond and submit papers in surreply")). The purpose of the rule against new arguments or evidence in reply is "to prevent a

movant from remedying basic deficiencies in its prima facie showing by submitting evidence in reply ..." (*Diggs ex rel. Diggs v Board of Educ. of City of Yonkers*, 24 Misc 3d 1235, 899 NYS2d 59 [Sup Ct Westchester County 2009] citing *Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 382, 822 NYS2d 264, 266 [1st Dept 2006]). "This rule, however, is not inflexible, and a court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in reply where the offering party's adversaries responded to the newly presented claim or evidence" (*Diggs ex rel. Diggs*, citing *Kennelly*). The Court also notes that the Court record is sufficient to establish that the Bronx County action was filed on (*see e.g., Webster Estate of Webster v State of New York*, 2003 WL 728780 [N.Y.Ct.Cl. 2003] and *Fontanetta v Doe*, 898 NYS2d 569 [2d Dept 2010] (Judicial records would qualify as "documentary evidence" in the proper case)). Therefore, Top Choice's Bronx County action, which arises from the same nucleus of facts and involves the same issues raised by Kemper Insurance against it herein, was filed first.

Turning to Top Choice's motion to dismiss, CPLR 3211(a)(4) provides that where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." 22 NYCRR 202.8(c) states "Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law" and Top Choice submitted an affirmation containing fact and legal analysis. An affirmation may properly be filed, under penalties of perjury, not in place of a brief but in place of a fact affidavit, by an attorney admitted to practice in New York (*ZVUE Corp. v Bauman*, 23 Misc 3d 1111, 885 NYS2d 714 [Sup Ct New York County 2009] citing CPLR § 2106). Thus, affirmations shall be for

statements of fact while briefs shall contain statements of the law. While Top Choice failed to follow the technical requirements of 22 NYCRR 202.8(c) (and CPLR § 2106), such a minor deviation does not justify striking motion papers. Thus, the Court shall consider the merits of Top Choice's motion. However, although the Bronx County action was filed first, dismissal of the instant action is unwarranted, in light of the fact that both actions can be consolidated (*see Michael v S.H. Galleries, Ltd.*, 101 AD2d 755, 475 NYS2d 71 [1st Dept 1984] (reversing dismissal and ordering consolidation)). The remaining issue is in which venue shall the consolidated action remain.

Ordinarily, when separate actions concerning the same subject matter have been instituted by the same parties in courts having concurrent jurisdiction, the court which first obtains jurisdiction with adequate power to administer full justice should continue to exercise jurisdiction (*New York University v Molner*, 119 Misc 2d 989, 464 NYS2d 984 [NY City Civ Ct 1983] citing *Colson v Pelgram*, 259 NY 370, 375). In this case, that would be Bronx County.

However, as Kemper Insurance points out, the Civil Court lacks jurisdiction because this action "adjudicates claims of over \$25,000."

The parameters of the Civil Court's jurisdiction are strictly prescribed by statute (*Rivera v Buck*, 25 Misc 3d 27, 887 NYS2d 747 [Sup Ct Appellate Term, 2nd, 11th and 13th Judicial Districts 2009]). CPLR 325(d) provides that actions may be removed to the Civil Court without consent where the Civil Court would have had jurisdiction but for the amount of "damages demanded." In *Rivera v Buck (id.)*, the Court explained that a third-party action sought no damages but, rather, a declaratory judgment and, thus, the Civil Court's jurisdiction was governed by CCA 212-a, which states:

“The court shall have the jurisdiction defined in section 3001 of the CPLR to make a declaratory judgment with respect to any controversy involving the obligation of an insurer to indemnify or defend a defendant in an action in which the amount sought to be recovered does not exceed \$25,000.”

The Appellate Term held that “A clear reading of CCA 212-a establishes that the Civil Court lacked subject matter jurisdiction, as the third-party complaint against Mount Vernon requested a declaratory judgment involving an obligation of an insurer in which the underlying amount sought to be recovered exceeded \$25,000.”

The Court acknowledges that the Civil Court in *Petito v Beaver Concrete Breaking Co., Inc.* (161 Misc 2d 363, 613 NYS2d 523 [NY City Civ Ct 1994]), held that when CPLR 3001 and 325(d) are read in conjunction with New York City Civil Court Act Sec. 212-a, the Civil Court has jurisdiction to decide a declaratory judgment even where the controversy exceeds \$25,000.00 in demanded damages.

However, such rational was expressly rejected later by in *Apollon Waterproofing & Restoration Corp. v Brandt*, 172 Misc 2d 888, 659 NYS2d 694 [NY City Civ Ct 1997]). In *Apollon*, the Civil Court stated:

. . . the Court cannot ignore the fact that it is a court of limited jurisdiction, the parameters of which are narrowly defined by the State Constitution and the New York City Civil Court Act. N.Y. Const., Art. 6, Sec. 15(b); CCA 201 et seq. Other than in summary, real property proceedings and where a counterclaim for money only is interposed, the monetary jurisdiction of the court is firmly set at \$25,000. CCA 204, 208. Similarly, equity jurisdiction is carefully parsed by statutes delimiting such jurisdiction to \$25,000. CCA 203, 208(c), 209, 213. Thus, CCA 203 empowers the Court to render affirmative equity relief in real property actions *but repeatedly restricts the power to a \$25,000 ceiling.*

Therefore, in accordance with the Appellate Term decision in *Rivera v Buck* and the Civil Court case, *Apollon*, this declaratory judgment action may be transferred to the Civil Court in

Bronx County under the Bronx County action, which was filed first in time, provided this declaratory judgment involves an obligation of Kemper Insurance "in which the underlying amount sought to be recovered exceeded \$25,000" (*see Rivera v Buck*).

The record establishes that the underlying amount sought by defendants against Kemper Insurance (for which Kemper Insurance seeks to disclaim herein) exceeds \$25,000. According to the Complaint, the ten "medical provider defendants, to date, have submitted over \$25,000 in No-Fault claims as the alleged assignees Orta" (Complaint, ¶17). And, Kemper Insurance states in its reply that there is potentially \$50,000 in coverage for any claims brought for Orta. Thus, although Kemper Insurance seeks declaratory relief and no damages, the underlying amount to be recovered exceeds the \$25,000 limitation set by CCA 212-a.⁴ Therefore, the consolidated action shall be venued in New York County.

With respect to Kemper Insurance's motion for default judgment, such motion is granted, on default.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Top Choice Medical. P.C. ("Top Choice")

⁴ The Complaint herein seeks a judgment as follows:

- a. On the First Cause of Action against defendants declaring that Kemper owes no duty to the defendants to pay No-Fault claims to the defendants with respect to the August 30,2008 collision referenced in the complaint and permanently staying any and all pending No-Fault suits or arbitration relating to this
- b. On the Second Cause of Action against defendants declaring that Kemper owes no duty to the defendants to pay No-Fault claims to the defendants with respect to the August 30,2008 collision referenced in the complaint and permanently staying any and all pending No-Fault suits or arbitration relating to this matter;
- c. On the Third Cause of Action against defendants E&W Acupuncture P.C., Restoration Chiropractic, P.C., and Socrates Medical Heath, P.C. declaring that they have no standing to recover No-Fault claims with respect to the August 30,2008 collision; [and]
- d. On the Fourth Cause of Action against all defendants temporarily staying all No-Fault lawsuits and arbitrations brought by the defendants pending the outcome of this action relating to the August 30,2008 collision referenced in the complaint;

pursuant to CPLR §3211(a)(4) to dismiss the complaint as asserted against it (sequence 003) is denied; and it is further

ORDERED that the cross-motion by Kemper Independent Insurance Company to consolidate *Top Choice Medical, P.C. a/a/o Cynthia Orta v Kemper Independent Insurance Company*, Index No.: 68399/09, currently pending in Bronx County, with this action in New York County, is granted; and it is further

ORDERED that the Clerk of the Civil Court, Bronx County is directed to transfer the papers in *Top Choice Medical, P.C. a/a/o Cynthia Orta v Kemper Independent Insurance Company*, Index No.: 68399/09 to the Clerk of the Supreme Court, County of New York upon service of a copy of this order with notice of entry and payment of appropriate fees, if any; and it is further

ORDERED that upon receipt the papers in the case *Top Choice Medical, P.C. a/a/o Cynthia Orta v Kemper Independent Insurance Company*, Index No.: 68399/09, the Trial Support Office and the County Clerk in New York County shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that the motion by Kemper Independent Insurance Company for a default judgment pursuant to CPLR 3215 against defendants E&W Acupuncture P.C, Beth Israel MedCtr a/k/a Beth Israel Medical Center, Shahid Mian M.D., P.C, New Way Massage Therapy a/k/a New Way Massage Therapy, P.C, Restoration Chiropractic, PC, Socrates Medical Health, PC, and York Anesthesiologists, PLLC (sequence 002), is granted, on default; and it is further;

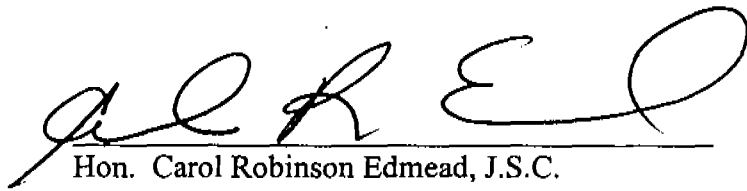
ORDERED that damages against defendants E&W Acupuncture P.C, Beth Israel MedCtr

a/k/a Beth Israel Medical Center, Shahid Mian M.D., P.C, New Way Massage Therapy a/k/a New Way Massage Therapy, P.C, Restoration Chiropractic, PC, Socrates Medical Health, PC, and York Anesthesiologists, PLLC, be assessed at the time of the trial of the action or disposition of the action against the remaining defendants; and it is further

ORDERED that Kemper Insurance serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: May 24, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

FILED
MAY 27 2010
NEW YORK
COUNTY CLERK'S OFFICE