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SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK - CIVIL TERM - PART 43

-----x  
AMERICAN TRANSIT INSURANCE COMPANY,

Plaintiff,

-against-

Index No.  
150603/2014

JOSEFINA R. FIGUEROA, EMPIRE CHIROPRACTIC  
WELLNESS, P.C., FJ ORTHOPAEDICS, PLLC,  
LONGEVITY MEDICAL SUPPLY, INC., QUEENS  
ANESTHESIA SERVICES, PLLC, STAND UP MRI OF  
BROOKLYN, P.C., UNIVERSAL MEDICAL PRACTICE P.C.  
and YIN YANG NY ACUPUNCTURE P.C.,

Defendants.

-----x  
111 Centre Street  
New York, New York  
June 11, 2015

Oral Argument

B E F O R E: HONORABLE ROBERT R. REED, Justice

A P P E A R A N C E S:

LAW OFFICES OF DANIEL J. TUCKER  
Attorneys For the Plaintiff  
One MetroTech Center  
Brooklyn, New York 11201  
BY: NETANEL BENCHAIM, ESQ.

THE RYBAK FIRM  
Attorneys For Longevity Medical Supply, Inc.  
1810 Voorhies Avenue, Suite 7  
Brooklyn, New York 11235  
BY: JESSICA VOTO, ESQ.

Official Court Copy of Transcript

Maria E. Rivera  
Senior Court Reporter

Proceedings

THE CLERK: American Transit Insurance Company  
versus Josefina Figueroa.

The plaintiff goes closest to the jury box.

Counsel, give your cards to the court reporter.

THE COURT: Appearances, please.

MR. BENCHAIM: For the plaintiff, Netanel BenChaim,  
of counsel to the Law Offices of Daniel Tucker.

MS. VOTO: For the defendant, Longevity Medical  
Supply, Jessica Voto.

THE COURT: Go ahead. Whose motion?

MS. VOTO: Your motion.

MR. BENCHAIM: They are both motion sequence one.  
Chronologically it's the defendant's motion to dismiss, 3211  
followed by the plaintiff's cross motion seeking a default  
against a non-appearance party who aren't here and for  
summary judgment against the client, against the defendant  
that is here. I could begin if that's helpful.

MS. VOTO: Honestly I didn't have a copy of our  
motion to dismiss. I only have the --

MR. BENCHAIM: For some strange reason they were  
both filed as motion sequence one.

THE COURT: Your motion is first, February 11th.

MS. VOTO: Yours being mine?

THE COURT: Yours.

And your defendant is dated February 11th.

## Proceedings

1  
2 MS. VOTO: Fair enough. Fair enough. If I know  
3 most our papers say without it being in front of me, more  
4 likely than not it makes reference to the fact that this is  
5 an advisory opinion. They are seeking an advisory opinion  
6 because denials have not been yet provided and litigation  
7 either is concurrent in Kings Civil for No-Fault claims.

8 THE COURT: I believe it's Queens, but I'm not  
9 sure.

10 MS. VOTO: It could be Queens. It's interesting  
11 that the underlying Civil Court action is preexisting and/or  
12 it's an advisory opinion in that bills have not yet been  
13 presented or litigation has not yet been started. And so  
14 they are just asking to deny future claim that may or may  
15 not happen, and they are asking the Court for permission to  
16 do that.

17 As far as the claims themselves are concerned, we  
18 have not yet received denial for some of these claims that  
19 are subject to this action. I'm not really sure.

20 THE COURT: I understand. I have had a few.

21 MS. VOTO: They sent me here from the up and up.

22 THE COURT: I have had a few that are similar over  
23 the last couple of weeks.

24 MS. VOTO: Yes. I argued one of them. Somebody  
25 else from my office argued another one.

26 THE COURT: All right.

## Proceedings

1  
2 MR. BENCHAIM: Thank you, Your Honor. In the  
3 initial matter our cross motion seeks default judgment  
4 against non-appearing parties. They haven't appeared,  
5 opposes motion, so we respectfully request that that motion  
6 be granted without opposition.

7 Concerning the defendant here, Longevity. Our  
8 papers discuss at length why an action for collection of  
9 breach of contract is different than a declaratory action,  
10 and the CPLR does not require a dismissal of the declaratory  
11 action on the basis that there's a collection matter  
12 pending.

13 I don't want to get into all the specific parts of  
14 CPLR 3211 that is addressed by the defendant's motion. But  
15 I do want to address one item that, as this Court has said,  
16 this Court has seen similar cases. And it's held on an  
17 issue based on a decision that was issued by Judge Billings  
18 on another case. And Judge Billings's decision is a very  
19 important decision, but it does make what I respectfully  
20 submit is an error.

21 THE COURT: Did you appeal that decision?

22 MR. BENCHAIM: That was not handled by this law  
23 firm. It was handled by a different law firm. And there  
24 could be other reasons. There could be a monetary reason  
25 for not to appeal the decision.

26 I just want to raise something that I hope the

## Proceedings

1  
2 Court considers. And that is that I'm going to state the  
3 argument that's made, and then I'll state why it's flawed.  
4 The argument is that since the plaintiff insurance carrier  
5 didn't demonstrate when it received the Longevity bills and  
6 the relationship between when it was received those bills  
7 and what it requested the I.M.E., that therefore the I.M.E.  
8 may not have been timely, so a motion for summary judgment  
9 made by the carrier should be denied.

10 And that's the basic premise of the argument  
11 denying the motion not adopted by Judge Billings.

12 And what I would like to respectfully submit is  
13 that it's incorrect, because the insurance regulations  
14 permit a carrier to request an I.M.E. in two very different  
15 type of scenarios. One is that -- one scenario is when it  
16 receives notice of claim that somebody is going to be  
17 receiving medical treatment may not have received it yet;  
18 but it's received notice that somebody is making a notice of  
19 claim that they will seek pay benefits. And that right to  
20 an I.M.E. comes from the endorsement 651.1. And they ought  
21 to request deny I.M.E. They don't have to wait for a bill  
22 to come in from someone.

23 The second type of I.M.E. is when they get an  
24 actual bill from some medical provider, and then they want  
25 to know that specific bill was medically necessary and they  
26 verify that through an I.M.E.

## Proceedings

So that second type of I.M.E. does require, is required to be done within a certain amount of time from when the bill is received, and it has to be scheduled also within a certain amount of time. The problem is that we are applying those rules to what the I.M.E. is scheduled pursuant to the endorsement, and there is no bill. So the Court --

THE COURT: For me the problem is that you're applying these in a raw manner rather than following what insurance regulations have set up, which is that either these take place in arbitration individually or they take place in individual cases brought in individual actions in suit. You are to me, I mean, in here this particular case there's a -- there is a prior pending action existing in Queens, in Civil Court in Queens, where you can go in and say everything you are saying now and address this matter.

There's no need to come to this Court, to the Civil Courts. They have a -- they're burdened with all these cases, and they're trying to work through them. Some parts they have had multiple clerks come in and sat in court, in the Bronx where we had two clerks to handle No-Fault matters and we had thousand of cases a day, 500 trials, 500 motions. Two clerks assigned, it's a burden. But not -- you can't decide, well, because we are not burdening that court. We are now going to start coming out into Supreme Court and

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bringing in all these matters that need to be handled individually on a fact base inquiry and try up front to say we are going to get rid of all of these cases.

These are fact based inquiries. It doesn't make sense to come to Supreme Court seeking what does amount to an advisory opinion.

You are telling us that either without the facts jump into this and make this general declaration on some of the very pieces of the facts with affidavits there are conclusory in nature. I don't think it -- it doesn't benefit. It's not serving judicial economy. It's trying to jump through, jump over, skip over some of the fact based inquiry that need to be done on a very individual basis. Bringing in all these different providers is not -- does not mean helpful to this Court from my perspective. So I don't see this as a helpful way of addressing these cases.

I understand the problem there's a repetition of particular problems when people don't show up for I.M.E.'s, and when you have providers that don't show up for U.O.'s. But the way to address that is take a decision that you get from any court, whether it's Civil Court or whether it's a Court.

Justice Billings in her decision is to take that, evaluate the claim, and take it to the Appellate Division, take it to the Appellate Division or Appellate Term so that

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1  
2 you can get some clear guidance. Once you get that clear  
3 guidance then come back, and then start applying that to all  
4 the different individual cases you have in Civil Court.

5 But doesn't -- to me it doesn't make, you know,  
6 it's not serving judicial economy to come in and kind of see  
7 if we can get some view different Supreme Court justices  
8 around the city to weigh in. Take it to the Appellate Court  
9 from the individual facts that you have, so that they can  
10 take it as high as possible. And then come back on to  
11 address all these individual cases with some clear case law  
12 that addresses the -- addresses the insurance law areas that  
13 you are talking about and does so definitively.

14 Right now what I have before me is your coming in  
15 asking me to make a decision when a Civil Court in Queens is  
16 going to be presented with the very same facts, same  
17 application, same failure of I.M.E. And if they fail in  
18 that case, you know, if that case falls because they didn't  
19 do the I.M.E., and then the parties can challenge that.

20 All right. I think the way to address it is by  
21 way -- to address it in a way that would be helpful is to  
22 take the individual cases and go to -- go up the ladder.

23 MR. BENCHAIM: Thank you, Your Honor. I wanted to  
24 just mention that the Civil Court is now vested in the  
25 subject matter jurisdiction to make a declaratory decision  
26 that coverage exists or not.



## Proceedings

1  
2 THE COURT: Well, it doesn't matter in this  
3 individual case if you fail to do the I.M.E., then the Civil  
4 Court is addressing the issue that there's no -- in this  
5 particular case there's no coverage because the person  
6 failed to do the I.M.E., and that is always going to be the  
7 fact based inquiry. These are not cases where you are  
8 asking for the Supreme Court to look at the policies  
9 involved. You are not asking us to look at the policies  
10 that have been provided and to say that there's a failure in  
11 the policy. You're still asking Supreme Court to look at  
12 whether or not the individual, an individual provider or  
13 individual subrogor has gone through the fact based step of  
14 following the insurance guidelines. You are not asking us  
15 to address the guidelines. You are not asking us to address  
16 the policy language.

17 You're asking us to determine whether the facts,  
18 whether on these individual facts this individual has  
19 complied with that, and that's supposed to be in the Civil  
20 Court or at arbitration form. That's how the insurance law  
21 is set up. It's not set up to come to the Supreme Court for  
22 these reasons. You should be coming to Supreme Court when  
23 you say there's a problem, there's a problem with the law or  
24 there's a problem with the policy. But not to make a  
25 determination whether an individual involved in a particular  
26 accident failed to show up.

## Proceedings

1  
2 If he didn't, if he failed to show up and this  
3 provider can't get coverage, then you can now take your same  
4 affidavit and say it has been established in Civil Court  
5 Queens that because this individual failed to show up for  
6 the I.M.E. based on an accident that took place on January  
7 1, 2005, at the corner of such and such and such and such,  
8 if you establish that once, all you now do is say this issue  
9 has been decided in the Civil Court in Queens and take that  
10 to all the other providers, and then start asking people for  
11 sanctions if they're persisting in trying to relitigate the  
12 same issue.

13 That I think is the better approach than coming to  
14 kind of short circuit things, and coming to Supreme Court to  
15 ask for declaratory judgment on a matter of fact. Not a  
16 matter of -- not a matter of law, not a matter of  
17 interpretation of the contract. We know what the contract  
18 is.

19 All right. I cut you off. Go ahead with respect  
20 to the cross motion for providers, and with respect to  
21 everybody else, defaulting parties, and you are asking for  
22 summary judgment which argues the flip side of what they  
23 asked for here.

24 MR. BENCHAIM: It's against Longevity, I think this  
25 action should be dismissed based on the prior action in  
26 Queens Civil. I think the Court though really explained its

## Proceedings

1  
2 position on the matter, so I won't go into it any further.  
3 But just as far as the other defendants, they have not  
4 appeared in the action, they have not submitted an answer,  
5 opposed the motion seeking a default, so we respectfully ask  
6 the Court grants that aspect of the motion.

7 THE COURT: With respect to this aspect of the  
8 motion, the only thing I'm concerned about is that I don't  
9 want to now make a declaration that someone has -- a  
10 declaration that was then tried to be used elsewhere with  
11 respect to whether or not this person is an eligible injured  
12 person. I'm not really doing it on the merits. I'm not  
13 making a particular determination that they are on the  
14 merits. I'm not making a particular determination on the  
15 merits. I'm saying they failed to establish that they are  
16 an eligible injured person.

17 Do they have to establish it or do you have to  
18 establish?

19 Who has to establish that they're an eligible  
20 injured person?

21 MR. BENCHAIM: When they filed a collection suit,  
22 that's a presumption that they're an eligible injured  
23 person, we have to handle it by itself, but the facts come  
24 from us.

25 If the Court would like, you can set an order and  
26 we'll submit something so the Court could look at.

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1  
2 THE COURT: Okay. I've heard from both sets of  
3 counsel with respect to the notice of motion that's been  
4 presented by -- motion that's been presented by Longevity  
5 Medical Supply. The Court will grant the motion pursuant to  
6 CPLR 3211(a)(4). Motion will be with -- this case will be  
7 dismissed as against the defendant, Longevity Medical  
8 Supply, Inc., on the basis that there's a prior pending  
9 action in Civil Court Queens County regarding the same facts  
10 and circumstances.

11 Any relief that American Transit seeks here can in  
12 substance be had in that case. That case being Civil Court  
13 Queens County index number 718575 of 2013.

14 Accordingly, the case as against -- this case as  
15 against Longevity Medical Supply, Inc. is dismissed.

16 With respect to cross motion by American Transit,  
17 the cross motion will be denied in part and granted in part.  
18 Cross motion is denied to the extent that it relates to the  
19 defendant, Longevity Medical Supply, Inc., for the reasons  
20 stated with respect to the motion by Longevity Medical  
21 Supply, Inc.

22 The cross motion, however, is granted with respect  
23 to the other defendants, and the case as against those  
24 defendants is severed. And there will be granting of the  
25 cross motion as to those defendants for the relief that's  
26 provided by American Transit.

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In the matter that this Court has said addresses their claims but does not impact, does not try to establish an unnecessary precedent with respect to any determinations of cases with respect to Longevity Medical Supply or anyone else that might have occasion to be a party with respect to the facts and circumstances that led to these claims here.

The cross motion, just to be clear, try to be a little clear, is granted in favor of American Transit.

With respect to Josefina R. Figueroa, Empire Chiropractic Wellness, P.C., FJ Orthopaedics, PLLC, Queens Anesthesia Services, PLLC, Stand Up MRI of Brooklyn, P.C., Universal Medical Practice P.C. and Yin Yang NY Acupuncture P.C., inasmuch as those defendants have failed to appear and defend against the relief that is being sought by American Transit, direct that American Transit with respect to those defendants settle order of judgment present it to the Court promptly for signature.

Counsel, with respect to the notice of motion, counsel for Longevity Medical Supply, I order that you -- direct that you order a copy of the transcript. Present it to the court clerk Part 43 within 14 days.

So this order will reflect the decision of this Court with respect to the notice of motion. And we will also indicate the instructions with respect to the cross motion.

## Proceedings

THE COURT: We will be looking for your settlement.

MR. BENCHAIM: Thank you, Your Honor.

MS. VOTO: Thank you.

\* \* \* \* \*

Certified to be a true and accurate transcript of  
the stenographic minutes taken within.

**SO ORDERED:**

A large, stylized signature in dark ink, appearing to read 'Robert R. Reed', is written over a horizontal line.

**ROBERT R. REED, J.S.C.**

A handwritten signature in dark ink, appearing to read 'Maria E. Rivera', is written above a horizontal line.

Maria E. Rivera  
Senior Court Reporter