

<b>Kemper Independence Ins. Co. v Khan</b>
2017 NY Slip Op 30006(U)
January 3, 2017
Supreme Court, New York County
Docket Number: 652280/2015
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----x  
KEMPER INDEPENDENCE INSURANCE COMPANY,

Plaintiff,

-against-

JAVEED KHAN a/k/a JOHN KHAN; DAILY MEDICAL  
EQUIPMENT DISTRIBUTION CENTER, INC.; JAMAICA  
WELLNESS MEDICAL, P.C.; JU & GI, INC d/b/a JUST IN  
TIME PHARMACY; LR MEDICAL, PLLC; LVOV  
ACUPUNCTURE, P.C.; OMEGA DIAGNOSTIC IMAGING,  
P.C.; SPINE & ORTHOPAEDIC REHAB; STAND UP MRI  
OF BROOKLYN, P.C.; and UNITED WELLNESS  
CHIROPRACTIC, P.C.,

Defendants.

-----x  
Arthur F. Engoron, Justice

Index Number: 652280/2015

Sequence Numbers: 002, 003

Decision and Order

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 12, were used on plaintiff's summary judgment motion, certain defendants' cross-motion to dismiss, and plaintiff's motion to stay proceedings:

Papers Numbered:

Motion for Summary Judgment

Notice of Motion - Affirmation - Affidavits - Exhibits .....	1
Defendant Stand Up's Affirmation in Opposition .....	2
Reply Affirmation to Stand Up's Opposition .....	3
K&F Defendants' Cross-Motion to Dismiss and Affirmation in Opposition - Affidavits - Exhibits .....	4
Defendant Javeed's Affirmation in Opposition .....	5
Defendant LR's Affirmation in Opposition .....	6
Reply Affirmation to K&F Defendants' Opposition .....	7
Reply Affirmation to LR's Opposition .....	8

Motion for Stay and Preliminary Injunction

Notice of Motion - Affirmation - Affidavits - Exhibits .....	9
K&F Defendants' Affirmation in Opposition .....	10
Defendant Khan's Affirmation in Opposition .....	11
Reply Affirmation .....	12

Upon the foregoing papers, the motion for summary judgment is denied (Motion Seq. 002), the cross-motion to dismiss is denied (Motion Seq. 002), and the motion to stay proceedings is granted (Motion Seq. 003).

Background

On June 25, 2015, plaintiff, Kemper Independence Insurance Company ("Kemper"), commenced this action for a judgment declaring that it owes no duty to pay any pending or future no-fault claims arising out of an alleged September 15, 2014 motor vehicle accident in which defendant Javeed Khan a/k/a John Khan ("Javeed") was

allegedly injured. Javeed and the corporate and medical provider defendants sought no-fault benefits for treatment rendered to Javeed for his alleged injuries. The complaint alleges that: Kemper received notice of Javeed's accident by a no-fault application dated October 8, 2014 ("NF2"); Kemper, through its agent, ExamWorks, Inc. ("ExamWorks"), sent Javeed and his attorney, Tarasov & Associates, P.C. ("Tarasov"), a letter, dated November 6, 2014, scheduling a chiropractic independent medical examination ("IME") with Dr. John Iozzio, D.C. for November 20, 2014; ExamWorks sent Javeed and Tarasov a letter, dated November 6, 2014, scheduling an orthopedic IME with Dr. Richard Weiss, M.D. for November 20, 2014; Javeed failed to attend both November 20, 2014 IMEs; ExamWorks sent Javeed and Tarasov two letters, both dated November 24, 2014, rescheduling Javeed's IMEs with Dr. Iozzio and Dr. Weiss for December 11, 2014; Javeed failed to attend both December 11, 2014 IMEs; and Kemper subsequently denied all coverage to defendants due to Javeed's failure to attend the IMEs.

By answer submitted by the law firm of Kopelevich & Feldsherova, P.C., dated November 6, 2015, defendants Jamaica Wellness Medical P.C. ("Jamaica"), Lvov Acupuncture, P.C. ("Lvov"), and United Wellness Chiropractic, P.C. ("United"; together with "Jamaica" and "Lvov," collectively, "the K&F Defendants"), counterclaimed for attorney's fees. By stipulation dated January 12, 2016, Kemper discontinued the action as against defendant Omega Diagnostic Imaging, P.C. By notice of motion dated April 19, 2016, Kemper moved, pursuant to CPLR 3215, for a default judgment against defendants Javeed; Daily Medical Equipment Distribution Center, Inc. ("Daily Medical"); Ju & Gi, Inc. d/b/a Just In Time Pharmacy ("Ju & Gi"); LR Medical, PLLC ("LR"); Spine & Orthopaedic Rehab ("S&O"); and Stand Up MRI of Brooklyn, P.C. ("Stand Up"). By stipulation dated May 12, 2016, Kemper withdrew its default motion as against defendants Javeed and Stand Up. Javeed e-filed his answer on May 12, 2016, and an amended answer on or about July 5, 2016. On or about May 25, 2016, Stand Up e-filed its answer. By Decision & Order dated June 27, 2016, this Court granted Kemper a default judgment as against defendants: Javeed; Daily Medical; Ju & Gi; LR; and S&O. By stipulation dated July 7, 2016, the parties agreed to vacate the default judgment as against Javeed. The Court notes that on April 27, 2016, LR e-filed an answer; however, because the Court granted Kemper a default judgment against LR prior to LR filing its answer, LR no longer has standing to appear, or oppose a motion, in this action (absent a stipulation or a successful motion to vacate its default). As such, all papers submitted by LR will not be considered in deciding this matter.

### **The Instant Action**

By notice of motion dated May 12, 2016, Kemper now moves, pursuant to CPLR 3212, for summary judgment against the remaining defendants. Stand Up, Javeed, and the K&F Defendants oppose the motion. The K&F Defendants cross-move, pursuant to 3211(a)(7), to dismiss the complaint for failure to state a cause of action. By notice of motion dated June 10, 2016, Kemper also now moves, pursuant to CPLR 2201, for a stay of all actions and arbitrations between the parties for no-fault benefits for Javeed's alleged accident pending determination of this action. In opposition, Javeed and the K&F Defendants argue that Kemper cannot establish likelihood of success on the merits and is therefore not entitled to a stay.

In support of its motions, Kemper submits: the various IME scheduling letters sent by ExamWorks to Javeed; the affidavit of Georgianna Michios, an ExamWorks manager who has personal knowledge of the business practices and procedures of ExamWorks with regard to the scheduling of IMEs and mailing of the IME scheduling letters; the affidavit of Richard Weiss, the examining doctor for Javeed's orthopedic IME, establishing Javeed's failure to appear; the affidavit of John Iozzio, the examining doctor for Javeed's chiropractic IME, establishing Javeed's failure to appear; Kemper's denial of Javeed's claim, dated December 22, 2014; the affidavit of Deanna Plantz, Kemper's no-fault representative, establishing Kemper's business practices and procedures with regard to duly noticed and scheduled IMEs; and its attorney's affirmation.

### **Discussion**

John Khan correctly argues that the named party, "Javeed Khan," is not the injured party, but rather the father of the injured party himself and, therefore, not a proper party to this action. However, the Court need not and will not

change the caption because John Khan submitted an affidavit, dated July 5, 2016, in opposition to Kemper's summary judgment motion, establishing that he was the one involved in the alleged motor vehicle accident on September 15, 2014. Thus, John Khan has properly appeared in this action, albeit named as Javeed Khan.

### **Motion for Summary Judgment Denied**

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1<sup>st</sup> Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Kemper failed to establish entitlement to summary judgment against any of the defendants – declaring that it owes no duty to pay no-fault benefits for the alleged September 15, 2014 accident – because Kemper did not demonstrate that the November 20, 2014 IMEs with Dr. Weiss and Dr. Iozzio were timely scheduled, i.e., within 30 days from receipt of Khan's NF2. See 11 NYCRR § 65-3.5(d) ("If the additional verification required by the insurer is a medical examination, the insurer shall schedule the examination to be held within 30 calendar days from the date of receipt of the prescribed verification forms"); see also American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841, 842 (1<sup>st</sup> Dept 2015) ("plaintiff was required to submit proof of the timely notice in order to make a prima facie showing of entitlement to judgment as a matter of law"). All the record shows is that Javeed submitted an NF2; the dates of their receipt by Kemper was not provided, leaving this Court to speculate as to the timeliness of the IME requests. Indeed, Kemper failed to establish the date on which it received Javeed's completed NF2 application for no-fault benefits in the first instance. Accordingly, this Court cannot determine whether Kemper complied with the applicable no-fault regulations in scheduling Javeed's IMEs for November 20, 2014. "Although any one of [defendant's] medical care providers may have submitted a prescribed verification form to establish a claim well within 30 days before [receipt of the NF2], or afterward, plaintiff nowhere provides that evidence." See American Tr. Ins. Co. v Denis, 2014 NY SlipOp 30385(U) (Supreme Court, New York County 2014).

### **Cross-Motion to Dismiss Denied**

Dismissal of a complaint pursuant to CPLR 3211(a)(7) is only warranted if, accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. See Leon v Martinez, 84 NY2d 83, 87-8 (1994); Morone v Morone, 50 NY2d 481, 484 (1989). The court's inquiry is limited to whether plaintiff has stated a cause of action and not whether it may ultimately be successful on the merits. See Stukuls v State of New York, 42 NY2d 272, 275 (1977); EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. See CPLR 3013; Rodgers v Earl, 249 AD2d 990 (4<sup>th</sup> Dept 1998).

The K&F Defendants appear to overlook well-settled law governing no-fault insurance, which demonstrates that a no-fault insurer may indeed commence a declaratory judgment action for a judgment declaring that it has no obligation to provide no-fault benefits based upon an injured person's failure to appear for an IME. See American Tr. Ins. Co. v Longevity Med. Supply, Inc., 131 AD3d 841 (1<sup>st</sup> Dept 2015) (allowing no-fault insurer's action seeking judgment declaring it has no obligation to pay no-fault benefits for injured party's failure to show up for IMEs); see also State Farm Mut. Auto. Ins. Co. v Anikeyeva, 89 AD3d 1009 (2d Dept 2011) (action seeking

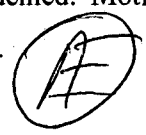
judgment declaring plaintiff had no obligation to pay no-fault claims of provider defendants presented justiciable controversies sufficient to invoke court's power to render declaratory judgment). Hence, Kemper has stated a cause of action, and the K&F Defendants' cross-motion to dismiss the complaint must be denied.

**Motion to Stay Proceedings Granted**

Although the Court declines to grant Kemper summary judgment, the Court, in its broad discretion, grants a stay of all actions and arbitrations between the parties for no-fault benefits for Javeed's alleged September 15, 2014 accident pending determination of this declaratory judgment action in order to avoid the risk of inconsistent adjudications and potential waste of judicial resources. See Goodridge v Fernandez, 121 AD2d 942, 945 (1<sup>st</sup> Dept 1986) ("The stay avoids the unnecessary risk of inconsistent adjudications ... , the duplication of proof, and the consequent waste of judicial resources which would result from prosecution of the instant action").

**Conclusion**

Summary judgment motion denied; cross-motion to dismiss denied. Motion to stay proceedings granted. The clerk is hereby directed to enter judgment accordingly.



Dated: January 3, 2017

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Arthur F. Engoron, J.S.C.