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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

SAFECO INSURANCE COMPANY OF INDIANA,

Plaintiff(s),

MOTION DATE: 7/16/09
INDEX No.:2235/09
MOTION SEQUENCE NO:1,2,3,4

-against-

ANNETTE MOREL, et al.,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..........	1-4
Notice of Motion...............................	5-7
Notice of Cross Motion.........................	8,9
Notice of Cross Motion.........................	10-13
Answering Affidavits...........................	14-19
Replying Affidavits............................	20
Briefs:	

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 2201 staying several underlying actions and pending arbitrations pending the resolution of Safeco's declaratory judgment action is granted.

Motion by defendants NYU Hospital for Joint Diseases, St. Barnabas Hospital, Frances R. Pelham, M.D., German Steiner, M.D., John Munger, M.D., Linda Rogers, M.D., Lugia C. Abramovici, M.D., NYU Radiology Associates and Prakash Kamalnath, M.D. (collectively referred to as "summary judgment defendants") for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint is denied.

Cross-motion by defendant NYU Hospital for Joint Diseases and

NYU Radiology Associates for an order pursuant to CPLR 602(a) granting a "stay" and joining the underlying actions and pending motions herein is granted to the extent hereinafter determined.

Motion by plaintiff for an order pursuant to CPLR 3215 directing the entry of a default judgment in favor of Safeco against defendants Annette Morel, Albania Frias, Jose Cuevas, Bartolina Frias a/k/a Magalis Frias, Stanley Liebowitz, M.D., Pomona medical Diagnostics, P.C., Anesthesiology Associates of Manhattan, SP Orthotic Surgical & Medical Supply, Inc., York Anesthesiologist, PLLC, Alexander Rozenberg, M.D., Alrof, Inc., Bronx Park medical, David Steiger, M.D., East Tremont Medical Center, Franklin Center for Rehabilitation and Nursing, Inc., Healthcare Radiology d/b/a St. Barnabas Hospital, Healthy Way Acupuncture, P.C., Intensive Care Associates, Judith J. Berger, M.D., P.C., Kenneth Egol, M.D., Little Neck Radiology, P.C., Medical Records Retrieval, Inc., Mona Bashar, M.D., Nolia Medical, P.C., Quality Psychological Services, P.C., Quarry Road Emergency Service, RG Psychological Services, P.C., Roy Davidovitch, M.D., Shirom Acupuncture, P.C., Timothy Segal, M.D., Transcare NY, Inc. d/b/a Transcare, Mark E. Schweitzer, M.D., Uptown Chiropractic, P.C., Daniel P. Klein, M.D. and East Side Primary Medical Care, P.C. (hereinafter collectively referred to as "Default Defendants") awarding the relief requested in the summons and complaint upon the grounds that the Default Defendants failed to answer the Summons and Complaint and for an order pursuant to CPLR 3025(b) amending the subject caption to delete settling defendants Beth Israel Medical Center and Arimed Orthotics, Prosthetics and Pedorthics as parties to this action based upon stipulations of discontinuance entered into with the plaintiff with respect to this matter is denied as to so much of this motion which seeks the entry of a default judgment and granted as to that portion which seeks the amendment of the caption.

This is an action for a declaratory judgment in which Safeco seeks a judicial determination to the effect that it is not obligated to provide a defense and/or indemnification to any insured named as a defendant herein or to pay any no-fault benefits, sums, monies, damages, awards and/or benefits to any of the defendants named herein. Specifically, Safeco asserts that 1) Annette Morel is not entitled to liability coverage or

indemnification for her actions in intentionally and non-negligently causing the incident and injuries arising out of the occurrence of April 22, 2008; 2) the individual claimant defendants are not entitled to any insurance coverage or protections from the Safeco policy of insurance as the incident of April 22, 2008 was not the product of a covered event; and 3) the healthcare provider defendants are not entitled to any reimbursements or coverage for any services that they may have provided, or will provide, to any of the individual defendants for any injuries allegedly sustained in the incident of April 22, 2008.

The following defendants have entered into settlement agreements with plaintiffs: Beth Israel Medical Center; Arimed Orthotics, Prosthetics and Pedorthics, Inc.; Alexander Rozenberg, M.D. and Kenneth Egol, M.D.

In support of its application for a stay of the underlying proceedings, Safeco asserts that such relief is warranted to protect plaintiff from suffering irreparable harm and to avoid a "multiplicity of lawsuits." Plaintiff also asserts that the granting of a stay will not prejudice defendants.

A motion to stay an action pending determination of another action is discretionary with the trial court [*Pierre Associates, Inc. v Citizens Cas. Co. of New York*, 32 AD2d 495 (1st Dept. 1969)]. Further, "[a] stay of one action pending the outcome of another is appropriate only where the decision in one will determine all the questions in the other, and where the judgment in one trial will dispose of the controversy in both actions" [*Somoza v Pechnik*, 3 AD3d 394 (1st Dept. 2004); *Pierre Associates, Inc. v Citizens Cas. Co. of New York, supra*].

Notably, courts have granted stays of underlying actions pending the outcome of a declaratory judgment action in the following actions:

(a) *Utica v Fernandez, et al.*, Supreme Court, Nassau County, Index No. 4794/2006, February 13, 2007, Honorable Ute Wolff Lally;

(b) *State Farm v Ergashev, et al.*, Supreme Court, Nassau County, Index No. 11956/2005, July 14, 2006, Honorable

Ute Wolff Lally;

(c) *Utica v Bowen, et al.* , Supreme Court, Nassau County, Index Number 534/2006, June 21, 2006, Honorable Lawrence J. Brennan;

(d) *Utica v Talyzin, et al.*, Supreme Court, Kings County, Index Number 31410/2005, November 17, 2005, Honorable Gerard H. Rosenberg;

(e) *State Farm v Pinto, et al.*, Supreme Court, Nassau County, Index Number 4758/2003, August 2, 2005, Honorable Kenneth a. Davis;

(f) *Utica v Townsend, et al.*, Supreme Court, Queens County, Index Number 11108/2005, June 29, 2005, Honorable Peter J. Kelly; and

(g) *Utica v Ashley, et al.*, Supreme Court, Nassau County, Index Number 2411/2006, May 30, 2007, Honorable Thomas P. Phelan.

Under the circumstances that exist herein, plaintiff's motion for a stay of the no-fault actions pending the resolution of the declaratory judgment action is granted.

Accordingly, all current and future proceedings, including but not limited to uninsured/underinsured motorist lawsuits and arbitrations seeking to recover no-fault benefits and third-party lawsuits and arbitrations, involving plaintiff and defendants named herein, their agents, employees, assignees and/or heirs, are stayed pending further order of this court.

CPLR 602(a) provides that, when actions involving common questions of law or fact are pending before the court, the court may grant an order consolidating the two actions. Indeed, when common issues of law and fact prevail, courts favor consolidation unless the party opposing consolidation can demonstrate that consolidation will prejudice a substantial right (*Geneva Temps v New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept. 2005]). Consolidation or joint trial of actions serve the goals of

efficiency and economy (Maigur v Saratogian, Inc., 47 AD2d 982 [3 Dept. 1975]).

The test to determine whether the actions have a common question of law or fact is usually met if evidence that would be admissible in one action would also be admissible in the other. However, there are countervailing considerations that may weigh against consolidation or joint trial, including jury confusion, or the prejudice of a substantial right [*Leeco Construction Co. v United States Liability Ins. Co.*, 22 Misc3d 611 (Supreme Court New York County 2008)].

The declaratory judgment action before this court seeks a determination as to whether plaintiff is obligated to provide coverage under the applicable policy of insurance for the injuries sustained as a result of the accident of April 22, 2008. The two no-fault actions at issue seek to recover payment for services rendered to their assignor Albania Frias in connection with the motor vehicle accident on April 22, 2008.

Plaintiff has not demonstrated that the action for declaratory judgment relating to insurance coverage would substantially prejudice the no-fault actions or that it would create jury confusion (*cf. Leeco Const. Co. v United States Liability Insurance Co., supra)*.

Accordingly, the motion by NYU Hospital for Joint Disease and NYU Radiology Associates is granted to the extent that the actions are joined for trial.

So much of the motion which seeks the entry of a default judgment is denied. Although it is undisputed that the default defendants are in default, the court must still consider the propriety of entry of a default judgment.

It is well settled that "declaratory relief is a discretionary remedy which should be granted only where necessary to serve some useful purpose of the parties" [*Frasca v Frasca*, 129 AD2d 766, 767 (2nd Dept. 1987); *accord; Smyley v Tejada*, 171 AD2d 660 (2nd Dept. 1991)]. "Declaratory relief should rarely, if ever, be granted solely upon default and without inquiry by the court into the

merits. Declaratory judgment should not be granted unless the plaintiff establishes *prima facie* entitlement to the relief sought and may not be granted where the judgment would affect the rights of other parties not in default or would affect the rights of non-parties" (citations omitted) [*Certain Underwriters at Lloyd's of London v Bellettieri, Fonte & Laudonio*, 19 Misc3d 1136(A) (Sup. Ct. Westchester County 2008)].

It has not been established that a default judgment against the default defendants would serve any useful practical purpose in the absence of an adjudication on the coverage issue [*Certain Underwriters at Lloyd's of London v Bellettieri, Fonte & Laudonio, supra]*. Indeed, the granting of a default judgment "could potentially lead to fundamentally inconsistent judgments that could impact upon the rights of non-parties" (*Id)*.

Hence, even though these defendants have defaulted, the court declines to grant a declaratory judgment upon default against them.

That portion of the cross-motion which seeks leave to amend the caption to delete Beth Israel and Arimed Orthotics, Prosthetics and Pedorthics, Inc. as party defendants is granted, there being no opposition thereto.

The motion made by the summary judgment defendants is denied. In opposition to the motion, Safeco relies upon an order rendered by the Honorable F. Dana Winslow in the underlying action of *NYU-Hospital for Joint Diseases a/a/o Albania Frias v Safeco Insurance Company of America* (Supreme Court, Nassau County Index No. 14724/08) where plaintiff's motion for summary judgment was denied without prejudice pending the outcome of the criminal trial of the insured, Annette Morel.

Contrary to defendants' contention, defendants have not made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint as against them.

In their original motion for summary judgment, defendants' counsel at page 8 in his affirmation in support correctly states that "a determination of whether Annette Morel intentionally caused injuries to the individual claimants will have to await a

disposition of the criminal charges."

Inasmuch as an issue of fact exists as to whether the incident in question was an accident or the product of an intentional act, summary judgment may not be granted at this juncture.

Dated: SEP 11 2009

J.S.C.

ENTERED
SEP 15 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE