



**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. EDWARD W. MC CARTY, III
Justice.

TRIAL/IAS, PART 1
NASSAU COUNTY

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY.

INDEX NO.: 4399-10

Plaintiff(s).

-against-

MOTION DATE: 08/02/10
MOTION SEQ.: #002 & 003

VALENTINA ANIKEYEVA, ANDREY ANIKEYEV, AVA
ACUPUNCTURE P.C., CROSSBAY ACUPUNCTURE
P.C., DITMAS ACUPUNCTURE, PC., DOWNTOWN
ACUPUNCTURE, P.C., EAST ACUPUNCTURE, P.C.,
EMPIRE ACUPUNCTURE P.C., FIRST HELP
ACUPUNCTURE, P.C., GREAT WALL ACUPUNCTURE,
P.C., LEXINGTON ACUPUNCTURE, P.C., MADISON
ACUPUNCTURE, P.C, MIDBOROUGH ACUPUNCTURE,
P.C., MIDWOOD ACUPUNCTURE, P.C, NEW ERA
ACUPUNCTURE, P.C, N.Y. FIRST ACUPUNCTURE, P.C,
NORTH ACUPUNCTURE, P.C. and V.A. ACUTHERAPY
ACUPUNCTURE, P.C.

Defendant(s).

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Cross-Motion.....
- Answering Affidavits.....XX
- Replying Affidavits.....X

Motion (#002) by defendants for an order pursuant to CPLR 3211(a)(7) dismissing the plaintiff's complaint for failure to state a cause of action and lifting any stays or injunctions related to this case, and motion (#003) by defendants for an order granting defendants leave to commence lawsuits for no-fault benefits pursuant to 11 NYCRR 65-3.9(c), are both denied.

This is a declaratory judgment action to recover no-fault payments made to the defendant professional corporations, on the ground that such defendant professional corporations are improperly incorporated and operating in violation of New York law because they allegedly are not owned and controlled by a licensed acupuncturist.

Defendants have failed to establish that plaintiff's complaint fails to state a cause of action.

Defendants' argument that defendant professional corporations were not fraudulently incorporated because they are operated by the spouse of a licensed acupuncturist is wholly and completely without merit. The fact that a spouse may have a financial interest in a professional corporation for purposes of equitable distribution in no way validates that non-professional spouse's operation of that professional corporation for purposes of claiming no-fault benefits. Such an argument fallaciously compares apples with oranges.

Defendants' argument that plaintiff's complaint fails to adequately plead fraud is likewise without merit. Initially, it should be noted that plaintiff's complaint alleges two causes of action for declaratory judgment and a third cause of action for unjust enrichment. Plaintiff has not alleged a cause of action for fraud. However, even if plaintiff's causes of action for declaratory judgment were deemed to include claims for fraud, such claims have been pled with sufficient particularity to satisfy CPLR 3016(b).

Defendants' argument that plaintiff waived the defense of fraud in the incorporation is also lacking in merit, as such a defense is a non-waivable coverage defense.

Defendant has also failed to establish that plaintiff's cause of action for declaratory judgment due to defendants' use of ineligible providers fails to state a cause of action.

Finally, so much of defendants' motion (#002) as seeks to lift any stays or injunctions related to the case, and defendants' motion (#003) which seeks leave to commence lawsuits for no-fault benefits, must be denied, as such relief is in contravention of the explicit terms of the so-ordered stipulation entered into by counsel for the parties herein.

Defendants' motions (#002 and #003) are hereby denied in their entirety.

EDWARD W. McCARTY III

Date: August 31, 2010

J.S.C.