SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.
TRIAL/IAS PART 7

MDJ MEDICAL, P.C.

Plaintiff,

INDEX NO.: 000775/2011
MOTION DATE: 5/12/2011
MOTION SEQUENCE: 001, 003, 004, 005, 007, & 008

-against-

HERTZ RENT-A-CAR, HERTZ VEHICLES, LLC GEICO INDEMNITY CO., GOVERNMENT EMPLOYEES INSURANCE CO., GEICO GENERAL INSURANCE COMPANY, GEICO CASUALTY CO., USAA CASUALTY INSURANCE COMPANY, GARRISON PROPERTY CASUALTY INSURANCE COMPANY, THE PROGRESSIVE GROUP OF INSURERS, ALLSTATE INSURANCE COMPANY, AMERICAN TRANSIT INSURANCE COMPANY, FARMERS NEW CENTURY INSURANCE COMPANY, NICB a/k/a THE NATIONAL INSURANCE CRIME BUREAU, THE HARTFORD INSURANCE COMPANIES, and GMAC INSURANCE COMPANY

Defendants.

The following papers read on this motion:

Order to Show Cause, Edward K. Blodnick Affirmation, and Amended Complaint 1
Stipulation Regarding Motions to Dismiss and Amended Complaint 2
John McCormack Affirmation in Opposition on Behalf of Progress and Exhibits 3
Progressive Group's Cross-Motion to Dismiss, John McCormack Affirmation and Exhibits 4
John McCormack Reply Affirmation on Behalf of Progressive Group 5
NICB Cross-Motion to Dismiss, Barry Jacobs Affirmation, and Exhibit 6
NICB Memorandum of Law 7
Barry Jacobs Reply Affirmation on Behalf of NICB 8

PRELIMINARY STATEMENT

Plaintiff filed an Order to Show Cause with this action seeking a TRO and Preliminary Injunction which would bar the defendants from issuing any further requests for Examination Under Oath ("EUO") pursuant to 11 NYCRR § 65-1. The defendants have cross-moved for dismissal of the Complaint under CPLR § 3211(a)(7) for failure to state a cause of action. Following oral argument, this court denied plaintiff's Order to Show Cause for Preliminary Injunction, while reserving decision on the defendants' motions to dismiss and permitting Attorney Blodnick to respond to applications for sanctions. Because the action as against Hertz Rent-a-Car and Hertz Vehicles, LLC has been discontinued, the court will not consider Hertz's motion and it is considered withdrawn.

The Amended Complaint alleges five Causes of Action: Permanent Injunction, Prima Facie Tort, Interference with Business Relations, General Business Law § 340, Attorneys Fees, and Interference with Business. These actions surround the defendants' alleged tortious use of EUO requests and their defamation or fraudulent misrepresentations regarding the plaintiff's billing practices in providing medical services to clients with no-fault auto insurance claims. The

plaintiff claims that the defendants' practices in making onerous document demands and requests for the personal appearance of the plaintiff's principal, Richard Dominick Berardi, D.O. under 11 NYCRR § 65-1, have caused the plaintiff to suffer financial losses from unpaid services or claims, Dr. Berardi's inability to practice medicine, and loss of clients or patients.

STANDARD

When determining a motion to dismiss for failure to state cause of action, the pleadings must be afforded a liberal construction and the court must determine only whether the plaintiff has a cause for relief under any cognizable legal theory. (*Uzzle v. Nunzie Court Homeowners Ass'n. Inc.* 70 A.D.3d 928 [2d Dept. 2010], *Sokoloff v. Harriman Estates Develop. Corp.*, 96 NY2d 409 [2001]). Thus, a pleading will not be dismissed for insufficiency merely because it is inartistically drawn; rather, such pleading is deemed to allege whatever can be implied from its statements by fair and reasonable intendment. (*Brinkley v. Casablancas,* 80 A.D.2d 815 [1st Dept. 1981]). Conversely, allegations that only generally characterize some conduct or status with a particular legal conclusion, rather than stating discrete facts, are not afforded any weight. (*Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408 [2d Dep't 2005]).

The plaintiff has no burden to produce documentary evidence supporting the allegations in the complaint in order to oppose a motion to dismiss under CPLR 3211(a)(7). (*Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 [2d Dep't 2002]). However, if the movant introduces evidence that "flatly contradicts" the plausibility of allegations in the complaint, the court no longer presumes the validity of those allegations (*Asgahar v. Tringali Realty, Inc.*, 18 A.D.3d 408 [2d Dep't 2005]), and the court then examines "whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it." (*Doria v. Masucci*, 230 AD2d 764, 765 [2d Dept. 1996]). Also, the plaintiff can introduce documentary evidence to show that the allegations in the complaint are supportable with further proof. (CPLR §§ 3211(c) & 3211(e), *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633 [1976]). When the plaintiff offers such proof in response to a motion to dismiss, the standard "is whether the proponent of the pleading has a cause of action, not whether he has stated one." (*Leon v. Martiznez*, 84 NY2d 83, 88 [1994]).

DISCUSSION

Plaintiff has filed an Amended Complaint as of right. Therefore the court will examine and analyze the allegations in the Amended Complaint when considering the defendants' motions to dismiss.

First Cause of Action for Permanent Injunction

There is no cause of action for a permanent injunction such as would establish the basis for a judgment. Rather, a permanent injunction is a type of relief that may be available to a plaintiff in lieu of or in addition to damages only after trial. (*See* 67A N.Y. Jur. 2d Injunctions § 45). It is not clear on what cause of action the plaintiff bases its claim for this relief. To the extent that the cause of action may be read to be one for private enforcement of the laws and regulations regarding the No-Fault regulatory scheme (rather than simply a complaint for non-payment of a claim), it is not clear that private citizens have any private right of action to enforce these laws and regulations in civil courts, rather than by resorting to administrative or other non-judicial remedies, such as referral and complaint to the Superintendent of Insurance or by influencing the political and rule-making process. In any case, the laws and regulations do not require insurance carriers to disclose the reason for an EUO, only that they apply objective standards internally and that they make these standards available for review by the Superintendent. (11 NYCRR 65-1; Op. Gen. Counsel NY Ins.Dep. No. 12-22-06; *see, e.g., Yellowstone Medical Rehab PC v. State Farm Ins. Co.*, Index No. 76378/09 [N.Y.C. Civ. Ct. Bronx Cty. Dec. 20, 2010, J. Taylor]). The plaintiff does not challenge the validity of these regulations.

Finally, although there may be unresolved questions as to whether the regulations permit insurance carriers to impose onerous document production demands for specific items (as opposed to requiring only a personal appearance at an EUO) (*see Dynamic Med. Im.., P.C. v. State Farm Mut. Auto Ins. Co.*, 29 Misc. 3d 278 [Dist. Ct. Nassau Cty. 2010]) and whether the insurance carriers may require that a particular person appear for an EUO on behalf of an assignee (*see* Op. Gen. Counsel NY Ins. Dep. No. 09-06-10), there is little question that an assignee such as the plaintiff may not simply refuse to cooperate or communicate with an

insurance carrier in response to a request for an EUO.[1] (*Canarsie Chiropractic, P.C. v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2105860 [NY City Civ. Ct. NY Cty 2010]; *see New York Presbyt. Hosp. v. Progressive Cas. Ins. Co.*, 5 AD3d 568 [2d Dept. 2004], *Nyack Hosp. v. State Farm Mut. Auto Ins. Co.*, 19 AD3d 569 [2d Dept. 2005]). The facts as alleged do not reveal that the plaintiff sought any accommodation by the defendants (such as scheduling various EUOs for one appearance) or objected to the validity of any requests. Instead, the plaintiff ignored various EUO requests and now claims that the defendants' conduct in issuing EUO requests in order to address concerns of fraud was tortious or otherwise unlawful conduct. To the extent that the Plaintiff seeks an independent cause of action by the facts stated in its First Cause of Action, it is dismissed.

Second Cause of Action for Prima Facie Tort

Plaintiff seeks to make out a claim for prima facie tort in its Second Cause of Action. "The elements of a cause of action alleging prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or a series of acts which would otherwise be lawful." (*Epifani v. Johnson*, 65 AD3d 224, 232 [2d Dept. 2009]; *see generally* 103 NY Jur. 2d Torts § 20). Further, "the plaintiff must allege that disinterested malevolence was the sole motivation for the conduct of which he or she complains." (*Id.* [quoting *R.I. Is. House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890, 896 (2008)]).

While Plaintiff alleges that the defendant insurance carriers have collectively "requested in bad faith appproximately 86 [] EUOs without any reasonable basis for the same," (¶ 29) the plaintiff fails to allege any discrete facts that reveal a "disinterested malevolence" as the insurance carriers' motivation for their "bad faith" in requesting these EUOs. While the Amended Complaint in general fashion alleges that defendants' conduct constitutes

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[1] This flows from regulation 11 NYCRR 65-1, which states that "[n]o action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with the terms of this coverage." Among the terms that must be satisfied before an action may lie against a company, is that "[u]pon request by the Company, the eligible injured person or that person's assignee... shall [] ... as may reasonable be required submit to examinations under oath..."

"disinterested malevolence" (¶ 42), such a characterization that only supplies a particular legal conclusion is not afforded any weight, since it does not allege any particular discrete facts. A generous reading of plaintiff's allegations only yields an inference that any baseless EUOs were requested out of an interest in financial gain, rather than as an attempt to go out of their way only to malevolently inflict harm on the plaintiff. Where the motivation is financial gain, a plaintiff has not made out the necessary "disinterested malevolence" that is requisite for a prima facie tort cause of action. (*Etzion v. Etzion*, 62 AD3d 46, 651-52 [2d Dept. 2009], *WFB Telecom., Inc. v. NYNEX Corp.*, 188 AD2d 257, 258-59 [1st Dept. 1992]). Because the facts as alleged cannot make out a claim for prima facie tort, plaintiff's Second Cause of Action is dismissed as to all defendants.

Third Cause of Action Against NICB for Tortious Interference with Business Relations

The Third Cause of Action seeks to establish a cause of action for tortious interference with business relations as against defendant NICB. A tort for interference with business relations or interference with contract can take various forms, as described in Restatement Second of Torts §§ 762–774A. By alleging that NICB has induced various auto insurance carriers to break their contracts benefitting the plaintiff (i.e., by seeking EUOs or denying claims), the relevant tort appears to be interference with performance of contract by a third person, as defined in Restatement Second of Torts § 766. This Section of the Restatement states:

> **§ 766**. Intentional Interference With Performance Of Contract By Third Person:
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

Under New York's liberal pleading standards and accepting all alleged facts as true, the Amended Complaint states facts which, if proven, would establish intentional interference with a contract. The NICB has not submitted any affidavits or documentary proof to flatly contradict the allegations in the complaint. Instead, the NICB relies on affidavits submitted by co-defendants to contend that these affidavits flatly contradict and eliminate any dispute regarding

plaintiff's allegations. (*Cf. Ahmed v Getty Petroleum Mktg., Inc.*, 12 AD3d 385, 385-386 [2d Dept. 2004]). However, if such evidentiary material on a pre-answer motion to dismiss leaves any doubt as to the plaintiff's allegations that would entitle the plaintiff to a judgment, such evidentiary material will not result in dismissal, although it may contradict or make certain allegations unlikely. In other words, when evidentiary material on a pre-answer motion is introduced to counter complaint allegations, the court must determine"whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it." (*Doria v. Masucci*, 230 AD2d 764, 765 [2d Dept. 1996]).

While the affidavits submitted by various insurance carriers reveal that the plaintiff was independently investigated by various defendants for suspected fraud, they do not flatly contradict the plaintiff's contention that NICB provided information to any co-defendants or that any such information was false or disparaging, or that it bore misrepresentations. The affidavits also do not eliminate the plausibility that any such false or disparaging information shared by NICB has a causal relationship to the co-defendants' investigations, denial of any claims, and requests for EUOs.

The Amended Complaint alleges that "the Defendant NICB by releasing fraudulent and incorrect information about the Plaintiff herein induced the other Defendants to breach their contractual relationship with the Plaintiff's assignors." (¶ 45). The Amended Complaint also alleges that "NICB has furnished to some or all of the other Defendants derogatory information about the Plaintiff and its principal, Richard Dominick Berardi, D.O., all to his detriment." (¶ 31). It is further alleged that these actions "caused the other Defendants to breach their duties to Plaintiff in regard to handling of no fault benefits claims [and] Plaintiff has suffered substantial damage in that it will eventually be forced to close its business." (¶ 47).

The Court of Appeals has acknowledged that it has "upheld complaints and recoveries in actions... when the alleged means employed by the one interfering were wrongful as consisting of fraudulent representations..." (*Guard-Life Corp. v. S. Parker Hardware Manuf. Corp.*, 50 NY2d 183, 194 [1980]). Moreover, "greater protection is accorded an interest in an existing contract... than to the less substantive, more speculative interests in a prospective relationship." (*Id.* at 191). Thus, where the alleged tortious interference involves an existing contract, the defendant's intent

need not be an explicit desire to interfere with the contract or business relation. As the Comment *j* to the Restatement Second of Torts § 766 explains, "[t]he rule applies... to an interference that is incidental to the actor's independent purpose and desire but known to him to be a necessary consequence of his action." (*Cf. Guard-Life Corp.*, 50 NY2d at 194-95). The Amended Complaint sufficiently alleges that NICB provided false information or stated fraudulent representations to the co-defendants, which resulted in the co-defendants failure to perform on their insurance contracts. That the plaintiff is a third-party beneficiary, rather than direct party to these contracts does not eliminate a right of action for tortious interference with business relations. (*Burba v. Rochester Gas and Elec. Corp.*, 90 AD2d 984 [4th Dept. 1982]).

Fourth and Fifth Causes of Action Under GBL § 340 and Donnelly Act

The Amended Complaint asserts a Fourth Cause of Action under General Business Law § 340 (or the Donnelly Act) and a Fifth Cause of Action for attorney's fees under GBL § 340(55). The General Business Law § 340(1) states:

> Every contract, agreement, arrangement or combination whereby
> ***
> Competition or the free exercise of any activity in the conduct of any business, trade or commerce or in the furnishing of any service in this state is or may be restrained...

"To state a claim under the Donnelly Act, a party must: (1) identify the relevant product market, (2) describe the nature and effects of the purported conspiracy, (3) allege how the economic impact of that conspiracy is to restrain trade in the market in question, and (4) show a conspiracy or reciprocal relationship between two or more entities." (*Benjamin of Forest Hills Realty, Inc. v. Austin Shepard Realty, Inc.*, 34 AD3d 91, 94 [2d Dept. 2006]). The alleged injury to a single discrete plaintiff, as in this case, does not constitute injury in restraint of trade or injury to competition, because it fails to identify the relevant product market or allege how the alleged conspiracy has resulted in restraint of trade and a particular economic impact. The Amended Complaint does not state a valid cause of action under Gen. Bus. L. § 340 because the plaintiff has "not only failed to show how the economic impact of the alleged conspiracy restrains trade in the market... but [has] also failed to adequately allege impairment of competition in a relevant market." (*Constant v. Hallmark Cards, Inc.*, 172 AD2d 641, 642 [2d

see also LoPresti v. Mass. Mut. Life Ins. Co., 30 AD3d 474, 475 [2d Dept. 2006]). The Fourth and Fifth Causes of Action are dismissed.

Sixth Cause of Action for Tortious Interference with Business

Plaintiff's Sixth Cause of Cause presumably seeks to establish a cause of action for tortious interference with prospective economic advantage or prospective business opportunities. As stated earlier, a tort for interference with contract or business relation can take various forms. Read liberally, plaintiff's allegations appear to fit most closely into a tort for intentional interference with prospective contractual relation or , as defined by Restatement Second of Torts § 766B and as recognized by New York Courts. (*Carvel Corp v. Noonan*, 3 NY3d 182, 189 [2004], *Caprer v. Nussbaum*, 36 AD3d 176, 204 [2d Dept. 2006]).

"Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant." (*NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621 [1996]). Accordingly, "[t]he requirement of wrongful means where only prospective rights are threatened honors free and lawful competition and accords an appropriate level of protection to a plaintiff's interest--by definition not its contract rights--in its expectancy of future benefits. (*Id.* at 624). The Restatement Second of Torts § 767 also offers some factors to determine whether an interference is wrongful or improper:

> **§ 767.** Factors In Determining Whether Interference Is Improper:
> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
> (a) the nature of the actor's conduct,
> (b) the actor's motive,
> (c) the interests of the other with which the actor's conduct interferes,
> (d) the interests sought to be advanced by the actor,
> (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
> (f) the proximity or remoteness of the actor's conduct to the interference and
> (g) the relations between the parties.

The nature of the defendant's conduct, his motive, the interests which are interefered with, and the proximity or remoteness of causation are perhaps the most salient factors to

determine whether the defendant's conduct was wrongful. Thus, when an alleged tortious interference was motivated by the defendant's legitimate interest in protecting its own welfare, rather than by the principal intent of damaging or destroying the prospective business opportunities of the plaintiff, the tort will generally not lie on such facts. (*Thome v. Alexander & Lousa Calder Found.*, 70 AD3d 88, 108 [1st Dept. 2009], *Newport Serv. & Leasing, Inc. v. Meadowbrook Distrib. Corp.*, 18 AD3d 454 [2d Dept. 2005]). The plaintiff must also "identify any specific employment or business relationship that he was [or will be] prevented from entering into as a result of defendants' interference" (*Baker v. Guardian Life Ins. Co. of Am.*, 12 AD3d 285, 286 [1stDept. 2004]) in order to determine the plaintiff's expectation interest in the business opportunity and whether the plaintiff had a superior legitimate claim to that expectation interest that is legally protected from conduct such as the defendant's. Finally, where a defendant's conduct has only an uncertain or remote relation to the plaintiff's alleged loss of prospective economic advantage, the defendant's conduct would not meet a measurable culpability threshold and the tort should not lie. (*See NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621 [1996]).

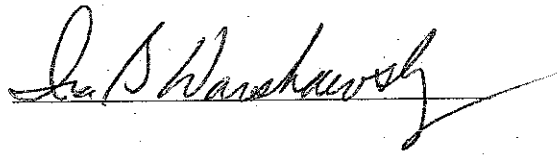
The alleged facts fail to state a cause of action for tortious interference with prospective economic advantage, because even a generous reading of the Amended Complaint does not state wrongful conduct by the defendants which directly interfered with a protected expectancy of economic advantage. Regardless whether the EUOs where properly founded, the facts and inferences that may be drawn therefrom reveal that the defendants' EUO requests have at most only a tangential and uncertain relation to the plaintiff's alleged loss of business opportunities or prospective economic advantage. Indeed, the alleged facts do not state *how* the EUO requests would have interfered with the plaintiff's business opportunities or prospective economic advantage. A charitable interpretation of the alleged facts might suggest that either requests and accusations of fraud drew away the plaintiff's no-fault auto accident claims clientele or it so occupied the doctors personally in responding to and attending EUOs (even though the suggestion is that the plaintiff failed to respond to or appear for most of these EUOs) such that they could not attract or keep additional business. Such interests in a no-fault auto accident claim clientele or an interest in freeing doctors' and their staff's time from their responsibilities under

the No-Fault regulations when submitting no-fault claims, are not the sort of interests or legitimate expectations that are legally protected. Finally, the facts as alleged and admitted in the papers reveal that rate and quantity of defendants' *collective* EUOs are only in proportion to the plaintiff's myriad no-fault claims for reimbursements of medical services. Indeed, that insurance carriers' have a legitimate and lawful interest in protecting their own economic interests, particularly from fraud, by verifying claims through EUOs is obvious and not denied. As such, the quantity of EUOs by itself, even without consideration whether the EUOs were properly founded, is not wrongful interference that would constitute the tort of tortious interference with prospective economic advantage. The Sixth Cause of Action is dismissed.

The court notes that the action against Herz has been withdrawn, and thus the court no longer considers its request for sanctions. Further, the court denies the requests for sanctions by the Government Employees Insurance Co., GEICO Indemnity Co., GEICO General Insurance Co., GEICO Casualty Co., Allstate Insurance Co., American Transit Co., and Garrison Property Casualty Insurance Co. The request for sanctions by the GEICO defendants, Allstate, and American Transit was limited to a Cause of Action in the original Complaint that has been withdrawn by the filing of an Amended Complaint. Defendant Garrison's request for sanctions is further denied as counsel for plaintiff avers in an affidavit that he made an attempt to withdraw plaintiff's action entirely as against Garrison, but Garrison refused the offer unless the action was also withdrawn against counsel's other clients, USAA Casualty Insurance Co. and GMAC Insurance Co.

This constitutes the Decision and Order of the Court.

DATED: June 14, 2011



J.S.C.