

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nº 08-CV-967 (JFB) (WDW)

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

Plaintiff,

VERSUS

JAMES M. LIGUORI, M.D., P.C., AND JAMES M. LIGUORI, M.D.,

Defendants.

MEMORANDUM AND ORDER

August 17, 2009

JOSEPH F. BIANCO, District Judge:

Plaintiff State Farm Mutual Automobile (hereinafter, “State Farm” or “plaintiff”) brought this action in diversity against James M. Liguori, M.D., P.C. and James M. Liguori, M.D. (collectively, “defendants”), seeking damages and a declaratory judgment related to alleged fraudulent claims for payment under New York State’s No-Fault Insurance Laws (N.Y. Ins. Law § 5106). Defendants moved to dismiss the complaint pursuant to Federal Rule of Civil Procedures 8(a) and 9(b) and 12(b)(6) for insufficient pleadings and failure to state a claim, respectively. By Memorandum and Order dated December 12, 2008, the Court denied defendants’ motion in

its entirety.¹ Familiarity with the underlying decision is presumed. On December 29, 2008, defendants moved that this Court amend that Order to certify it for interlocutory appeal to the United States Court of Appeals for the Second Circuit, and stay the instant action pending the outcome of that appeal. For the reasons set forth below, defendants’ motion is denied.

I. BACKGROUND

On March 7, 2008, plaintiff brought the instant action against defendants, alleging that they ordered and performed hundreds of unnecessary neurological consultations and

¹ See *State Farm Mut. Auto. Ins. Co. v. James M. Liguori, M.D., P.C.*, 589 F. Supp. 2d 221 (E.D.N.Y. 2008).

diagnostic tests on patients who were involved in motor vehicle accidents and thus eligible for insurance coverage under plaintiff's insurance policies. Defendants moved to dismiss the complaint on August 22, 2008. The critical legal issue raised by defendants' motion was whether New York State's 30-day statutory no-fault rule ("the 30-Day Rule") – which compels an insurer to either pay or deny no-fault claims within 30 days of their receipt and requires defenses (other than "no coverage defenses" or "fraudulent corporate formation" defenses), including defenses related to billing fraud based upon lack of medical necessity or excessive fees, to be asserted in the denial within the requisite 30-day time frame – also precludes affirmative lawsuits brought by an insurer outside the no-fault statutory framework to recover for fraud or unjust enrichment against a medical provider in connection with the alleged submission of fraudulent claims. On December 12, 2008, this Court determined, consistent with decisions issued by New York State courts, as well as other federal district court decisions within the Second Circuit, that the 30-Day Rule does not preclude such affirmative lawsuits. On December 29, 2008, defendants moved that the Court certify the matter for interlocutory appeal to the United States Court of Appeals for the Second Circuit, and stay the instant action pending the outcome of that appeal. Plaintiff filed its opposition to defendants' motion on January 20, 2009. Defendants submitted their reply on January 30, 2009. This matter is fully submitted.

II. DISCUSSION

Certification of interlocutory appeals is governed by 28 U.S.C. § 1292(b), which permits a district court to certify an interlocutory order for appeal if it "shall be of

the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation" 28 U.S.C. § 1292(b). However, because "[i]t is a basic tenet of federal law to delay appellate review until a final judgment has been entered[,] . . . [interlocutory appeal] is a rare exception to the final judgment rule that generally prohibits piecemeal appeals." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996); *see also In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) (stating that interlocutory appeal is "a rare exception where, in the discretion of the district judge, it may avoid protracted litigation") (internal quotation and citation omitted); *Patsy's Italian Rest. Inc. v. Banas*, 06-CV-00729 (DLI) (RER), 2007 U.S. Dist. LEXIS 80599, at *13 (E.D.N.Y. Oct. 31, 2007) ("Certification 'is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation.'") (quoting *Telectronics Proprietary Ltd. v. Medtronic, Inc.*, 690 F. Supp. 170, 172 (S.D.N.Y. 1987)). Therefore, while "the party seeking interlocutory appellate review must, at a minimum, satisfy [the] three statutory criteria," *Ryan, Beck & Co. v. Fakh*, 275 F. Supp. 2d 393, 396 (E.D.N.Y. 2003) (internal quotation omitted), district courts retain "broad discretion to deny certification even where the statutory criteria are met." *Century Pacific, Inc. v. Hilton Hotels Corp.*, 574 F. Supp. 2d 369, 370 (S.D.N.Y. 2008) (quoting *SPL Shipping Ltd. v. Gujarat Cheminex Ltd.*, No. 06-CV-15375 (KMK), 2007 WL 1119753, at *1 (S.D.N.Y. Apr. 12, 2007)). To that end, the Second Circuit has

stressed that district courts must “exercise great care in making a § 1292(b) certification.” *Westwood Pharm., Inc. v. Nat’l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992). As set forth below, the Court finds that defendants have not met the statutory criteria warranting certification for interlocutory appeal and, therefore, their motion for certification is denied.

A. Controlling Question of Law

Section 1292(b) first requires that the order certified for interlocutory appeal involve a “controlling question of law.” The Second Circuit has stated that “[a]lthough the resolution of an issue need not necessarily terminate an action in order to be ‘controlling,’ it is clear that a question of law is ‘controlling’ if reversal of the district court’s order would terminate the action.” *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990) (internal citations omitted). “In determining whether a controlling question of law exists the district court should consider whether: reversal of the district court’s opinion could result in dismissal of the action; reversal of the district court’s opinion, even though not resulting in dismissal, could significantly affect the conduct of the action, or; the certified issue has precedential value for a large number of cases.” *S.E.C. v. Credit Bancorp, Ltd.*, 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000) (citing *Klinghoffer*, 921 F.2d at 24-25, and *In re Oxford Health Plans, Inc.*, 182 F.R.D. 51, 54-55 (S.D.N.Y. 1998)).

1. Termination of the Action

Here, the parties agree that a reversal of the Court’s Memorandum and Order would result in the dismissal of plaintiff’s fraud and

unjust enrichment claims. However, the parties dispute whether the dismissal of those claims would terminate the action, as plaintiff has also brought a claim for a declaratory judgment, pursuant to 28 U.S.C. § 2201, which permits this Court to “declare the rights and other legal relations of any interested party” in any “case of actual controversy within its jurisdiction.” Because the “Declaratory Judgment Act does not expand the subject matter jurisdiction of the federal courts to allow suits there that do not arise under federal law,” *PDK Labs v. Friedlander*, 103 F.3d 1105, 1110 (2d Cir. 1997), plaintiff would necessarily have to satisfy the statutory criteria of 28 U.S.C. § 1332 – namely, complete diversity amongst the parties and an amount in controversy that exceeds \$75,000 – in order for its remaining claim to properly lie within the Court’s jurisdiction. Defendants submit that plaintiff would be unable to meet the second requirement once the damages associated with the fraud and unjust enrichment claims were no longer implicated, thereby depriving the Court of jurisdiction over the matter and thus terminating it. As set forth below, the Court disagrees.

“In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation.” *Correspondent Servs. Corp. v. First Equities Corp. of Fla.*, 442 F.3d 767, 769 (2d Cir. 2006) (quoting *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 347 (1977)). That amount is “calculated from the plaintiff’s standpoint; the value of the suit’s intended benefit or the value of the right being protected or the injury being averted constitutes the amount in controversy when damages are not requested.” *Kheel v. Port of N.Y. Auth.*, 457 F.2d 46, 49 (2d Cir. 1972); see also *Am. Standard, Inc. v. Oakfabco, Inc.*, 498

F. Supp. 2d 711, 717 (S.D.N.Y. 2007) (“Because that amount is measured from the plaintiff’s perspective, the value of the requested relief is the monetary value of the benefit that would flow to the plaintiff if injunctive or declaratory relief were granted.”). Further, where “jurisdictional facts are challenged, the party asserting jurisdiction must support those facts with ‘competent proof’ and ‘justify [its] allegations by a preponderance of evidence.’” *United Food & Commercial Workers Union, Local 919, AFL-CIO v. CenterMark Prop. Meriden Square, Inc.*, 30 F.3d 298, 305 (2d Cir. 1994) (quoting *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). Accordingly, plaintiff would bear the burden of establishing the appropriate jurisdictional amount.

In the instant matter, plaintiff identifies the “actual case and controversy” of its declaratory judgment claim as “all professional charges, including charges for the Consultations and Tests that have not been paid” (Complaint (“Compl.”) ¶ 55), and seeks “a judgment declaring that [James M. Liguori, M.D., P.C.] is not entitled to collect No-Fault Benefits for any of the unpaid charges.” Plaintiff does not specify the amount of the outstanding charges and, therefore, the Court is unable to determine the value of “the injury being averted” by the proposed declaratory judgment from the face of the Complaint. However, “[w]here the pleadings themselves are inconclusive as to the amount in controversy, . . . federal courts may look outside those pleadings to other evidence in the record.” *United Food & Commercial Workers Union, Local 919, AFL-CIO*, 30 F.3d at 305. Here, the attorney affidavit filed in support of Plaintiff’s Proposed Order to Show Cause for a Temporary Restraining Order, filed on May 27, 2008, states that “[c]urrently,

State Farm is in possession of claims, totaling approximately \$200,000.00 in unpaid claims filed by Dr. Liguori for reimbursement of No-Fault Benefits. Defendants [sic] counsel in these litigations [sic] also advised in late February that Defendants have at least another 50-75 additional claims that were denied by State Farm that he was preparing to put into suit or seek to place into arbitration” (See Docket Entry No. 4, *Riverso Aff.* ¶ 7.) Plaintiff appends exemplar documentary proof of such claims to the affidavit. Accordingly, plaintiff would satisfy its burden of demonstrating that the injury averted by the grant of a declaratory judgment exceeds the \$75,000 jurisdictional minimum, in satisfaction of 28 U.S.C. § 1332 and, therefore, the dismissal of plaintiff’s claims for fraud and unjust enrichment would not terminate the action as a whole.²

² Furthermore, plaintiff indicated in its opposition to defendants’ motion to dismiss that, if the Court found that the complaint did not meet the pleading requirements of the Federal Rules of Civil Procedure, it would seek leave to amend it accordingly, under Rule 15. Plaintiff would be entitled to seek leave to do the same to meet the jurisdictional amount if its claims for fraud and unjust enrichment were dismissed on interlocutory appeal. Therefore, even assuming *arguendo* that plaintiff’s claim for a declaratory judgment did not satisfy the jurisdictional requirements of 28 U.S.C. § 1332 at this stage in the proceedings, that failure would not necessarily foreclose the possibility that the action would survive before this Court upon amendment of the complaint. Furthermore, the Court would, in the interim, retain supplemental jurisdiction over that claim, pursuant to 28 U.S.C. § 1367. Although defendants correctly note that the Court may decline jurisdiction under subsection (c) of that statute, it is not required to do so.

2. Precedential Value

Defendants next submit that the Order involves a controlling question of law because its reversal would have precedential value for a large number of cases. Although the Second Circuit has stated that a “controlling question of law’ under section 1292(b) need not affect a wide range of pending cases,” *Klinghoffer*, 921 F.2d at 24, the precedential value of a potential reversal is a relevant, though not dispositive, factor to be considered in the analysis, and one that the Court finds does not weigh in favor of certification. Specifically, as another district court noted in denying certification for interlocutory appeal in a matter implicating an issue identical to the one presented by the case at bar, “since the issue is one of pure New York state law affecting a common law cause of action, a decision by the Second Circuit, while binding precedent for district courts in this Circuit, would not carry the same precedential value for New York State courts where it appears the largest number of cases concerned with this issue are centered.” *Allstate Ins. Co. v. Valley Physical Med. & Rehab., P.C.*, 05-5934 (DRH) (MLO), 2008 U.S. Dist. LEXIS 88321, at *7 (E.D.N.Y. Oct. 31, 2008).³ Therefore, the potential precedential

³ Defendants argue that a reversal of this Court’s Order would have precedential value for a large number of case because “all of the cases discovered through research that are ‘concerned with this issue’ are pending in the United States District Court for the Eastern District of New York . . . and a Second Circuit decision would unquestionably be binding on those courts. Moreover, the Second Circuit has the power and authority to certify this issue to the New York Court of Appeals, where a decision would be binding on all.” (Defendant’s Reply, at 4, 6.) This argument is unavailing. As defendants concede, the issue is one of state, not federal, law

value of a reversal of the Court’s Order does not support a finding that the issues implicated therein involve a “controlling question of law.” Because the Court has also determined that a reversal would not terminate the action, defendants have failed to satisfy the first requirement of certification under Section 1292(b).

B. Substantial Ground for a Difference of Opinion

The second factor in this analysis is whether there is “substantial ground for difference of opinion” as to the legal issues presented. 28 U.S.C. § 1292(b). The requirement that such a substantial ground exists may be met when “(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit.” *In re Citigroup Pension Plan Erisa Litig.*, No. 05-CV-5296 (SAS), 2007 WL 1074912, at *2 (S.D.N.Y. Apr. 4, 2007) (quoting *In re*

and, therefore, any decision by the Second Circuit would have limited precedential value. In fact, the precedential value of a reversal of this Order would seem to depend not upon the determination of the Second Circuit on interlocutory appeal, but rather upon the Second Circuit’s decision to certify this question to the New York State Court of Appeals, and then, upon the decision of the Second Circuit that followed therefrom. In other words, defendants’ argument is only persuasive if one assumes that the Second Circuit will certify this question to the New York State Court of Appeals. Notwithstanding the fact that the remaining statutory criteria for certification have not been satisfied, the Court would not certify an Order for interlocutory appeal based on such a prediction, particularly in light of the “basic tenet of federal law to delay appellate review until a final judgment has been entered.” *Koehler*, 101 F.3d at 865.

Lloyd's Am. Trust Funds Litig., No. 96-CV-1262, 1997 WL 458739, at *5 (S.D.N.Y. Aug. 12, 1997)). However, “the mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion. Rather, it is the duty of the district judge . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a substantial ground for dispute.” *In re Flor*, 79 F.3d 281, 284 (2d Cir. 1996) (internal citations and quotations omitted). Furthermore, “[a] mere claim that a district court’s decision was incorrect does not suffice to establish substantial ground for a difference of opinion.” *In re Citigroup Pension Plan Erisa Litig.*, 2007 WL 1074912, at *2 (quoting *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Am.*, No. 04-CV-10014, 2005 WL 3440701, at *2 (S.D.N.Y. Dec. 14, 2005)).

In the instant case, defendants fail to present a single case that contradicts the Court’s holding on the legal question presented. *See, e.g., Morris v. Flaig*, 511 F. Supp. 2d 282, 318 (E.D.N.Y. 2007) (no substantial ground for difference of opinion where party seeking certification could not present any conflicting authority on the issues presented); *Compania Sudamericana de Vapores S.A. v. Sinochem Tianjin*, No. 06-CV-13765 (WHP), 2007 WL 1002265, at *5 (S.D.N.Y. Apr. 4, 2007) (“[Defendant’s] argument that a ‘substantial ground for difference of opinion’ exists is belied by the fact that only one district court opinion . . . supports its position.”); *In re Citigroup Pension Plan Erisa Litig.*, 2007 WL 1074912, at *3 (“Defendants do not cite a single case suggesting that any difference of opinion exists-let alone a substantial one . . .”). On

the contrary, the Court’s Order is but one of many that addressed this specific issue and determined that New York’s 30-Day Rule does not bar affirmative litigation. *See, e.g., State Farm Mut. Auto. Ins. Co. v. CPT Med. Serv., P.C.*, 04 CV 5045 (ILG), 2008 U.S. Dist. LEXIS 71156, at *19-22 (E.D.N.Y. Sept. 3, 2008); *Allstate Ins. Co. v. Valley Physical Med. & Rehab., P.C.*, 555 F. Supp. 2d 335, 339-40 (E.D.N.Y. 2008); *State Farm Mut. Auto Ins. Co. v. Grafman*, 2007 U.S. Dist. LEXIS 96751 at *36-40 (E.D.N.Y. May 22, 2007) (M.J. Gold); *State Farm Mut. Auto Ins. Co. v. Kalika*, 2006 U.S. Dist. LEXIS 97454, at *6-16 (E.D.N.Y. Mar. 16, 2006) (Report & Recommendation); *Carnegie Hill Orthopedic Serv. v. Geico*, No. 3442/02, 2008 NY Slip Op 50639U, at *4 (N.Y. Sup. Ct. Jan. 29, 2008). Therefore, in light of the lack of discord among courts adjudicating this issue, “the fact that the Second Circuit has not yet decided this issue is of little import.” *Babcock v. Computer Assoc. Int’l, Inc.*, 00-CV-1648 (JS) (MLO), 2007 U.S. Dist LEXIS 9818, at *5 (E.D.N.Y. Feb. 9, 2007) (citing *In re Flor*, 79 F.3d at 284). Finally, defendants’ characterization of the issue presented as “complex,” standing alone, cannot satisfy this statutory requirement, as “[i]nterlocutory appeal was not intended as a vehicle to provide early review of difficult rulings in hard cases . . .” *Valley Physical Med. & Rehab., P.C.*, 2008 U.S. Dist. LEXIS 88321, at *5 (quoting *Wausau Bus. Ins. Co. v. Turner Constr. Co.*, 151 F. Supp. 2d 488, 491 (S.D.N.Y. 2001)). Therefore, defendants have failed to demonstrate that substantial ground for difference of opinion exists as to the legal issue for which they seek interlocutory review.

C. Material Advancement of the Litigation

The third factor in determining whether

interlocutory appeal is appropriate is whether granting such an appeal would “materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). “Although technically the question of whether there is a controlling issue of law is distinct from the question of whether certification would materially advance the ultimate termination of the litigation, in practice the two questions are closely connected.” *Primavera Familienstiftung v. Askin*, 139 F. Supp. 2d 567, 570 (S.D.N.Y. 2001). Ultimately, “[t]he critical requirement is that it (an interlocutory appeal) have the potential for substantially accelerating the disposition of the litigation . . .” *In re Duplan Corp.*, 591 F.2d 139, 148 n.11 (2d Cir. 1978) (internal quotation and citation omitted). As discussed above, even if the Court certified this matter for interlocutory appeal and the Second Circuit reversed the December 12, 2008 Memorandum and Order, plaintiff’s declaratory judgment claim would survive. The ultimate determination of that claim would then be subject to appeal. Therefore, certification in this instance would not materially advance the termination of this litigation and, if anything, would only serve to delay it by creating an additional opportunity for appeal. *See Patsy’s Italian Rest. Inc. v. Banas*, 2007 U.S. Dist. LEXIS 80599, at *13 (certificate of appeal would not accelerate termination of litigation where certain claims would survive after reversal); *Hosley Corp. v. Waldron St. Book Co.*, 05-CV-4210 (JG), 2006 U.S. Dist. LEXIS 61387, at *10 (E.D.N.Y. Aug. 21, 2006) (“Defendants argue that an immediate appeal will [advance termination] because if they prevail, it will result in dismissal of plaintiff’s copyright claim. But even assuming that occurs, the conversion and breach of contract claims would continue in this Court. Weighing the advance that would be made in the litigation if the defendants were to prevail against the

inefficiency of having multiple appeals, I do not believe that judicial economy would be served by an interlocutory appeal in this instance.”).

In sum, defendants have failed to demonstrate that the Court’s December 12, 2008 Memorandum and Order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” Because they have not satisfied the statutory criteria of Section 1292(b), the Court finds that certification of this matter for interlocutory appeal is not warranted. Further, because the Court declines to certify this matter, defendants’ motion for a stay of the proceedings pending the outcome of such certification is rendered moot, and is also denied.

III. CONCLUSION

For the foregoing reasons, defendants’ motion to amend the Court’s December 12, 2008 Memorandum and Order, certifying it for interlocutory appeal, and to stay the proceedings during the pendency of such appeal, is denied.

SO ORDERED.

JOSEPH F. BIANCO
United States District Judge

Dated: August 17, 2009
Central Islip, New York

* * *

The attorney for plaintiff State Farm is Barry Levy, Esq., of Rivkin Radler, LLP, 926 Rexcorp Plaza, Uniondale, New York, 11556-0111. The attorneys for the defendants are Harold Levy and Richard Quadrino, Esqs., of Quadrino Schwartz, 666 Old Country Road, 9th Floor, Garden City, New York 11590.