February 2, 2006

RCIPA v Blue Cross

Decision

The question underlying this motion and cross motion is whether plaintiff is precluded from seeking additional damages under a claim upon which it was awarded summary judgment. The order was reduced to an interlocutory judgment that was entered against the defendant. The determination of the Court (Stander, J.) was affirmed by the Fourth Department. Rochester Community Individual Practice Assoc. v Excellus Health Plan, 305 A.D.2d 1007.

Defendant invokes principles of res judicata and law of the case, as well as judicial estoppel and the principle prohibiting the splitting of causes of action, in support of its contention that plaintiff is barred from seeking any additional damages under the claim already adjudicated. Defendant further contends that plaintiff abandoned its claim for supplemental damages by failing to raise the issue on its cross appeal. Plaintiff contends that it is only seeking to exercise a right that it reserved on the prior motion.

For the reasons that follow, the Court agrees with plaintiff and denies defendant's motion seeking summary judgment dismissing the additional damage claim. The Court, however, agrees with defendant that plaintiff has not established its right to judgment as a matter of law on that claim, and thus the Court

denies plaintiff's cross motion for summary judgment on it.

I.

Plaintiff commenced this action seeking millions of dollars in damages for, among other things, the breach of a 1995 written service agreement. One of the claims made under the first cause of action was that the defendant underpaid its "per member per month" ("PMPM") obligation under the agreement for the years 1997 and 1998. The PMPM obligation is an amount due plaintiff each month derived from the "actual costs" incurred for the provision of "Covered Health Services" during the immediate preceding year.

In March 2000, the Court (Stander, J.) determined that this obligation should be calculated in accordance with the terms of the agreement, rejecting the defendant's contention that there had been an effective oral modification of the agreement. The Fourth Department affirmed this determination in March 2001. Rochester Community Individual Practice Assoc. v Finger Lakes Health Ins. Co., 281 A.D.2d 977.

Plaintiff thereafter sought, among other things, summary judgment in a specific amount on the claim under the first cause of action that there had been an underpayment of the PMPM obligation in 1997. The motion was brought based on admissions made by the defendant in its discovery responses concerning the "actual costs" of "covered health services" for the year 1996 as reflected in a revised financial statement produced by defendant.

In opposing the motion, defendant agreed for the most part with plaintiff's calculations but argued that it was entitled to certain credits that would reduce its obligation.

In a reply affidavit, plaintiff disputed defendant's entitlement to these credits. It also indicated for the first time that it was reserving the right to adjudicate "at a later time" its contention that the revised financial statement understates 1996 "actual costs" by failing to include $7.5 million of "Other Operating Expenses" reflected on the statement[1]. Plaintiff indicated that following "some additional discovery and verification of data" it would move to "supplement" the "Base 1997 PMPM Amount" it was presently seeking.

Supreme Court rejected the contention of defendant that it was entitled to any additional credits and used plaintiff's calculations to determine "[t]he correct rate for the 1997 PMPM." Based on that "correct rate", the Court determined "[t]he total amount due to [plaintiff] from [defendant]" under that part of the first cause of action relating "to the PMPM payments withheld

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[1]As an example, plaintiff asserted: "[Defendant] arbitrarily and unilaterally carved out $3,500,527 of ... actual medical costs, labeling them 'PCP Incentive 5% Increase,' and put them 'below line' and excluded them for purposes of the Base 1997 PMPM Amount calculation. ... But the Agreement specifically allows [plaintiff] to 'adjust its Office Code Fee schedule at its discretion' ... , making these expenses wholly legitimate 1996 costs actually paid to ... subscribers for services rendered to patients in 1996 which will ultimately justify a supplement to the Base 1997 PMPM Amount."

from [plaintiff] by [defendant] in the year 1997" and severed that claim from the first cause of action.

No where in the decision did the Court make any reference to the reservation of rights in the reply affidavit. Nor did it indicate that it was deciding less than the total amount due on the claim that it severed from the first cause of action. The Court used the term "base PMPM" in its decision but only to describe the foundational amount of the PMPM equation that it utilized.[2]

The Court subsequently signed an "Order and Interlocutory Judgment" that provided in relevant part that:

> ORDERED, first, that the elements of [plaintiff's] first cause of action for breach of contract, to the extent that they relate to the unpaid portion of the base Per Member Per Month (PMPM) payments for standard lives withheld in whole or in part from [plaintiff] by [defendant] for the year 1997 calculated in accordance with the terms of the 1995 Agreement between the parties, are severed from the remaining claims of the first cause of action and the other causes of action and it is further ....
> ADJUDGED:
> 1. Plaintiff ... is entitled to judgment against defendant ... in the amount of $11,062,825 with interest thereon through September 13, 2001 in the sum of $4,170,796.79, for a total judgment of $15,233,648.79 on that part of its first cause of action for breach of contract relating the unpaid portion of the 1997 base PMPM for standard lives, and plaintiff shall have execution therefor.

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[2]Under that equation, the Court multiplied what it referred to as the "base PMPM" (but which the contract refers to as "actual costs") by a cost of living factor and then added to that amount a contractual amount for "Guaranteed Savings." The total was found by the Court to be "[t]he correct rate of the 1997 PMPM."

The judgment thereafter was entered against the defendant.

Defendant appealed from each and every part of the order and interlocutory judgment. Plaintiff cross-appealed only from a part of the order and judgment not at issue here. The Appellate Division affirmed "for reasons stated in decision at Supreme Court." 309 AD2d at 1007.

II.

Defendant initially contends that the doctrine of res judicata bars plaintiff from making any further claim for damages. In support of that contention, defendant cites familiar law that res judicata "bars all claims arising out of a given transaction, occurrence, or event once any of the claims is litigated." Siegel, New York Practice § 447 at 755 (4th ed). However, "[s]ince the doctrine of res judicata technically requires a final judgment on the merits in one action and an attempted relitigation in a second, it has no application, within an action (as here)." Siegel § 448 at 756, supra. See People v Evans, 94 N.Y.2d 499, 502 (2000) ("[R]es judicata precludes a party from asserting a claim that was litigated in a prior action.") The applicable doctrine is "law of the case", which "has been aptly characterized as 'a kind of intra-action res judicata."[3] Evans, 94 N.Y.2d at 681, quoting Siegel, New York

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[3]Plaintiff argues that defendant has failed to plead "law of the case" as an affirmative defense. Although res judicata is designated an affirmative defense, "law of the case" is not.

Practice § 448, at 723 (3d ed). See Duane Reade v Cardinal Health, 21 A.D.3d 269, 270 (1st Dept. 2005) (questioning the application of res judicata to a prior order granting partial summary judgment within the same action).

Regardless, both doctrines "contemplate[] that the parties had a 'full and fair' opportunity to litigate the initial determination." Evans, 94 N.Y.2d at 502. It is for that reason that neither doctrine applies when the right to pursue the claim at issue has been expressly reserved and thus never litigated. See Chen v Fischer, 12 A.D.3d 43, 49 (2d Dept. 2004) ("The reason d'etre of res judicata is to preclude a party from relitigating not only those issues which were actually litigated, but also those that could have been litigated. In order to preserve her right to sue for personal injuries, Chen was required to expressly reserve her right to pursue the claim in a separate action."), revd on other grounds, ___ NY2d ___, 2005 WL 3452221 (Dec. 12, 2005).

Plaintiff asserts that it expressly reserved in its reply affidavit the right to seek further damages under its 1997 PMPM claim. Defendant contests the validity of that reservation of rights: first, because it was asserted for the first time in a reply affidavit; and second, because it is improper to split a single damage claim into two parts.

CPLR 3018 (b). See Evans, 94 N.Y.2d at 502.

In arguing against the reservation of rights because it was asserted for the first time in a reply affidavit, defendant relies upon case law indicating that a court should never consider arguments made for the first time in reply papers, See Azzopardi v American Blower Corp., 192 A.D.2d 453, 454 (1st Dept. 1993), inasmuch as "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." Dannasch v Bifulco, 184 A.D.2d 415, 417 (1st Dept. 1992). Defendant's reliance upon that case law, however, is misplaced because this aspect of the reply affidavit was not a new argument in support of plaintiff's motion, or new grounds for that motion, but a narrowing of the issue presented on the motion.

Defendant's other argument against the validity of the reservation rests upon the familiar rule prohibiting the splitting of a cause of action. This rule, however, is recognized as a "facet of res judicata", Stoner v Culligan, 32 A.D.2d 170, 171-172 (3d Dept. 1969), See Laruto v Constantine, 215 A.D.2d 946, 947 (3d Dept. 1995)(plaintiffs cannot avoid the preclusive effect of a prior judgment by splitting their cause of action), and thus it has no application herein "intra-action". Siegel § 448 at 756, supra. Indeed, CPLR 3212 (e) authorizes partial summary judgment motions "as to one or more causes of

action, *or part thereof* (emphasis added)." Thus, the Court rejects defendant's contention that plaintiff failed to effectively reserve its right to seek supplemental damages under its 1997 PMPM claim.

Defendant additionally cites in support of its law-of-the-case argument the text of Justice Stander's decision itself, which indicates that Justice Stander determined the totality of the 1997 PMPM claim without exception. Nevertheless, Justice Stander was without authority to render a decision on the issue that was reserved and thus never submitted for determination. See City Wide Payroll Service v Israel Discount Bank of New York, 239 A.D.2d 537, 538 (2d Dept. 1997) (Supreme Court does not have "the power to ... grant summary judgment on a cause of action if no party has moved for it."); Marsico v Southland Corp., 148 A.D.2d 503, 506 (2d Dept. 1989) ("CPLR 3212 (b) does not permit the court to grant summary judgment ... absent a motion ... addressed to the specific issues."); Conroy v Swartout, 135 A.D.2d 945, 947 (3d Dept. 1987)(Court is without "authority" to "grant ... summary judgment unless some party has moved for it."); Onondaga Landfill Systems v Onondaga Co. Solid Waste Auth., 112 A.D.2d 807 (4th Dept. 1985)(same). See also Gee Tai Chong Realty Corp. v GA Insurance Co. Of New York, 283 A.D.2d 295, 296-297 (1st Dept. 2001) ("[T]he implicit resolution of an issue not before it on a motion for summary judgment was highly

irregular, the function of the court being the identification of issues, not their determination.")

Moreover, "[a] grant of summary judgment establishes the law of the case [only] as to the issues essential to that determination." 28 N.Y. Jur. 2d Courts, § 269. Since the issue whether certain costs were excluded properly by defendant from the calculation of the 1997 PMPM was never submitted to Justice Stander, neither his decision nor the decision affirming him on appeal, is the law of the case as to that issue.[4] See Gee Tai Realty Corp., 283 A.D.2d at 296 (holding that a summary judgment ruling is not the law of the case as to an issue "never submitted for the court's decision.")

Defendant further argues that, by failing to cross-appeal from the entirety of the order and judgment and to specifically brief the issue whether Justice Stander erred in deciding the totality of the 1997 PMPM claim without exception, plaintiff abandoned (or, more properly, waived) that issue. This Court disagrees. If plaintiff was aggrieved by Justice Stander's determination, that determination was based upon an improper assumption of authority on the part Justice Stander.

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[4]Moreover, even if such doctrine was implicated, law of the case is directed at a court's discretion and does not in fact restrict a court's authority. Evans, 94 N.Y.2d at 503. There is no compelling reason why plaintiff should not be permitted to litigate the question of whether defendant properly characterized costs in calculating the 1997 PMPM.

Jurisdictional questions of that nature cannot be waived and may be raised at any time. See Lacks v Lacks, 41 N.Y.2d 71, 75 (1976). On the other hand, if plaintiff was not aggrieved by Justice Stander's determination inasmuch as the question of plaintiff's right to seek supplemental damages was not submitted for determination, plaintiff had no right to appeal that aspect of the determination. See CPLR 5511.

Defendant also argues that plaintiff is precluded from seeking supplemental damages under this aspect of the first cause of action based on familiar law that, in the absence of newly discovered evidence or other sufficient cause, successive summary judgment motions are not appropriate. Town of Wilson v Town of Newfane, 192 A.D.2d 1095 (4th Dept. 1993). This law, however, is premised upon the assumption that the successive motions seek the same relief. Having reserved the right to supplement its damages based on the argument that defendant improperly characterized the costs involved in calculating the 1997 PMPM, there is no duplicity of relief requested.

Finally, the Court agrees with plaintiff that defendant's reliance upon the doctrine of judicial estoppel is misplaced. See generally Maas v Cornell Univ., 253 A.D.2d 1 (3d Dept. 1999) ("Under the doctrine of judicial estoppel, or estoppel against inconsistent positions, a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an

earlier assumed position in the same proceeding."), affd 94 N.Y.2d 87 (1999). Plaintiff's present claim for damages arising from the alleged improper exclusion of certain "below-line" costs from the calculation of the 1997 PMPM is complementary to, and not inconsistent with, the previously adjudicated claim for damages arising from the "above-line" costs defendant concededly used to calculate the 1997 PMPM.

Therefore, it is the determination of the Court that defendant's motion should be denied.

III.

Having denied defendant's motion, the Court examines the merits of plaintiff's cross motion for summary judgment seeking supplemental damages on its 1997 PMPM claim. The underlying issue is whether certain "excluded" or "below line costs" were "incurred for the provision of 'Covered Health Services'" under the contract, Attachment A (I)(B)(2), and thus should have been included in the calculation of the 1997 PMPM. As the proponent of the cross motion, plaintiff bore the initial burden of submitting sufficient evidence to establish its entitlement to judgment as a matter of law on that issue. Winegrad v New York Univ. Med. Center, 64 N.Y.2d 851, 853 (1985).

"Covered Health Services" under the contract are: "Health services, described on Attachment C as amended from time to time with the mutual consent of the parties, which are required to be

provided under a contract issued by the HMO through its Blue Choice/Premier line of business." Article I (B). The disputed cost items fall into three categories: (1) "Demand Management", (2) "PCP Incentive 5% Fee Increase" and (3) "Specialty Budgeting."

Plaintiff, however, failed to support its cross motion with the "Attachment C" to the contract, thus making it impossible to characterize the disputed cost items as "Covered Health Service" costs as a matter of law. Furthermore, the only affidavit submitted in support of the cross motion describes the disputed cost items only in the most general terms without the attachment of any supporting documentation concerning the programs that generated those costs. Additionally, it is noted that, in its reply papers, plaintiff acknowledges the need for further discovery with respect to at least one of the disputed cost items.

The Court thus concludes that plaintiff did not meet its initial burden on its cross motion. "Failure to make such showing requires denial of the [cross] motion, regardless of the sufficiency of the opposing papers." Winegrad, 64 N.Y.2d at 853. In any event, defendant's responsive papers are sufficient to establish a triable issue of fact whether the disputed cost items were excluded properly from the calculation of the 1997 PMPM. Therefore, the cross motion is denied.