Norman Maurice Rowe, M.D., M.H.A., L.L.C. v Oxford Health Ins. Co., Inc
2022 NY Slip Op 33150(U)
August 31, 2022
Supreme Court, Queens County
Docket Number: Index No. 716139/21
Judge: Robert I. Caloras
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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS **PART 36**
Justice

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NORMAN MAURICE ROWE, M.D., M.H.A., L.L.C. & EAST COAST PLASTIC SURGERY, PC., **index No. 716139/21**
Seq. No. 2 and 3

Plaintiffs,

-against-

OXFORD HEALTH INSURANCE CO., INC;
OXFORD HEALTH INSURANCE, INC.;
OXFORD HEALTH PLANS (NJ), INC.;
OXFORD HEALTH PLANS (NY), INC.;
AND OXFORD HEALTH PLANS, LLC,

Defendants.
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The following numbered papers E25-E48 read on this motion by Defendants for an order pursuant to N.Y. Civil Practice Law and Rules 3211(a)(1) and (7), dismissing the Amended Complaint of Plaintiffs, in its entirety and with prejudice; and Defendants' motion for an order striking portions of the Affidavit of Kathleen Damiano, and the exhibits annexed thereto, the Affirmation of Plaintiffs' attorney Brendan J. Kearns, and the exhibit annexed thereto, submitted in Opposition to Defendants' Motion to Dismiss the Amended Complaint, as well as Plaintiffs' arguments related thereto as set forth in Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss.

	Papers Numbered
Sequence 2	
Notice of Motion – Affirmation-Affidavits – Exhibits-Memo of Law.....	E25-E32
Memorandum of Law in Opposition-Affirmation-Affidavit-Exhibits	E33-E38
Stipulation……..	E39
Reply Affirmation-Memo of Law.....	E40-E41
Letters…….	E46-E48
Sequence 3	
Notice of Motion – Affirmation…….....	E42-E43
Affirmation in Opposition…….....	E44
Reply Affirmation…….....E45	

Upon the foregoing papers, it is ordered that the motion filed under sequence 2 is granted, and this action is dismissed in its entirety with prejudice, the motion filed under sequence 3 is denied as academic, for the following reasons:

In the Amended Complaint, Plaintiff asserted four causes of action against Defendants, all sounding in New York law, which are: (1) breach of contract; (2) unjust enrichment; (3) promissory estoppel' and (4) violation of New York's Prompt Payment Law. According to the Amended Complaint, Plaintiff alleged that on August 1, 2018 Rowe performed breast reduction surgery on K.F., Plaintiffs submitted bills to Defendants for services performed on K.F., and a balance remains unpaid.

In the motion filed under sequence number 2, Defendants move to dismiss the Amended Complaint pursuant to CPLR 3211(a)(1) and (7), because Plaintiffs' claims are pre-empted by ERISA, and fail to state a cause of action. With respect to their first claim, Defendants argue that

Plaintiffs' claims are expressly preempted by ERISA, because the claims at issue in this case all "relate to" Oxford's administration of an ERISA governed employee welfare benefit plan. Defendants submitted an affidavit from Jane Stalinski, a Senior Legal Services Specialist and an authorized representative of UnitedHealthcare Insurance Company ("United") and its affiliates, including Oxford Health Insurance, Inc. ("Oxford"), along with the Certificate of Coverage and a letter, dated July 16, 2018, Oxford issued to K.F., annexed thereto as Exhibit "1" and Exhibit "2" respectively. Ms. Stalinski claimed that at the time these services were rendered, the Patient K.F. was a participant in and insured through her employer's employee health benefit plan that was fully funded by a group policy of insurance issued by Oxford to the Plan Sponsor, Debeers Group of Companies (the "Plan"), which is an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 (as amended), 29 U.S.C. 1001, et. seq. ("ERISA"). The letter Oxford sent to K.F. on July 16, 2018, advised K.F. that her request for an in-network exception regarding certain services to be performed by Dr. Norman Rowe, MD, an out-of-network provider, were approved. This letter was also sent to Dr. Rowe.

In opposition, Plaintiff argues, among other things, that the Plan is not an ERISA plan. In support thereof, Plaintiff submitted an affidavit from Kathleen Damiano, Plaintiffs' employee since 2018, and a medical biller for over ten years. Ms. Damiano claims that 80 percent of the billed amount is the in-network rate, and that the amount Defendants paid Plaintiff for services rendered to K.F. was unreasonable.

CPLR 3211(a)(1) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... a defense is founded upon documentary evidence..." To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (Dubon v Drexel, 195 AD3d 991 [2d Dept. 2021]).

When a party moves under CPLR 3211(a)(7) for dismissal based on the failure to state a cause of action, the test is whether the pleading states a cause of action, not whether the plaintiff has a cause of action (Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]). A Court must determine whether, accepting the facts as alleged in the pleading as true and according to the plaintiff the benefit of every favorable inference, those facts fit within any cognizable legal theory (Leon v Martinez, 84 NY2d 83 [1994]). Therefore, "a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (Clarke v Laidlaw Transit, Inc., 125 AD3d 920 [2d Dept. 2015]). "A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7)" (id.). "If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id*. [internal quotation omitted). "Yet, affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (id.). A plaintiff "may not be penalized for failure to make an evidentiary showing in support of a

complaint that states a claim on its face" (id.). "The plaintiff may stand on his or her pleading alone to state all the necessary elements of a cognizable cause of action, and, unless the motion to dismiss is converted by the court to a motion for summary judgment, the plaintiff will not be penalized because he or she has not made an evidentiary showing in support of the complaint" (id.).

An ERISA plan is established if "from the surrounding circumstances a reasonable person can ascertain intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits" (Feifer v Prudential Ins. Co. of America, 306 F.3d 1202, 1209 [2d Cir. 2002][internal quotation marks omitted]). Here, the Plan provides that it is a Group Policy between Oxford and Debeers Group of Companies, the employer or party that has entered into an agreement with Oxford. The Plan further provides that the Group, i.e. Debeers Group of Companies, purchased the Plan from Oxford. The Plan also describes how members will be enrolled and how to receive benefits. Therefore, the Plan is an ERISA plan. Since Plaintiffs' claims all relate to Oxford's administration of an ERISA governed employee welfare benefit plan, the claims are expressly preempted by ERISA (see ERISA 514 (a); 29 USC 1144 (a); Pirro v Natl. Grid, 590 Fed.Appx. 19 [2d Cir. 2014]; Norman Maurice Rower MD, MHA, LLC v Oxford Health Ins. Co., Index No. 714272/2021 [Sup Ct., Queens County 2022]). Although Plaintiffs contend that the in-network exception letter, dated July 16, 2018, formed an independent agreement between Plaintiffs and Oxford, the letter was addressed to K.F., the Patient, and not Plaintiffs. The only way to determine whether Plaintiffs' claims were administered properly, is to review the terms of the governing ERISA Plan and thus, all of Plaintiff's state law claims are expressly preempted by ERISA pursuant to ERISA 514(a); 29 U.S.C. 1144(a) (See Pirro, 590 F. App'x at 22; Thompson v. Deutsche Bank Tr. Corp., 2014 U.S. Dist. LEXIS 19386, at 13 (S.D.N.Y. 2014); Comprehensive Spine Care, P.A., 2019 U.S. Dist. LEXIS 100810 [D.N.J. 2019]). Accordingly, Defendants' motion to dismiss this action is granted.

Even if the Court found that Plaintiffs' claims were not pre-empted by ERISA, the instant action would still be dismissed for failing to state a claim under New York law. Initially, Defendants' request to dismiss Plaintiffs' cause of action for unjust enrichment and promissory estoppel are dismissed as unopposed. In the first cause of action, Plaintiff alleged a breach of contract. "To recover damages for breach of contract, a plaintiff must demonstrate the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach" (Halcyohn Constr. Corp. v Strong Steel Corp., 199 AD3d 898 [2d Dept. 2021]). Here, the in-network exception letter, dated July 16, 2018, was addressed to K.F., the Patient, and not Plaintiffs. Plaintiffs claim that this letter established that they entered into an express agreement with Oxford to pay them 80% of their full-billed charges for services rendered to K.F. is without merit. "A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary … and even then, even if not mentioned as a party to the contract, the parties' intent to benefit the third party must be apparent from the face of the contract" (East Coast Athletic Club, Inc. v Chicago Tit. Ins. Co., 39 AD3d 461 [p2nd Dept. 2007]). Here, Plaintiffs do not allege that they were third-party beneficiaries of any agreement between the relevant parties, nor do they allege that they were a third-party beneficiaries of some agreement in the

Amended Complaint. Significantly, the Plaintiffs were not mentioned in the in-network exception letter Oxford sent to K.F., the Patient. Rather, this letter merely copied non-parties Dynamic Surgery Center and Norman Rowe MD. Accordingly,. Plaintiff's cause of action for a breach of contract is dismissed.

In the remaining cause of action, Plaintiff seeks damages for a violation of New York's Prompt Pay Statute, which requires an insurer to pay undisputed claims within 30 days after receipt of an electronic submission or within 45 days after receipt by other means (Ins. Law 3224-a[a]). The Prompt Pay Law applies to "the processing of all health care claims submitted under contracts or agreements" as defined in Section 3224 and other sections of the insurance law. As set forth above, there is no agreement between Plaintiffs and Defendants. As such, Plaintiffs are not entitled to any relief under New York's Prompt Pay Statute. Accordingly, Plaintiff's cause of action seeking damages for a violation of New York's Prompt Pay Statute is dismissed.

In light of the foregoing, the motion filed under sequence 3 is denied as academic.

DATED: August 31, 2022

ROBERT I. CALORAS, J.S.C.

FILED
9/1/2022
COUNTY CLERK
QUEENS COUNTY