Manhattan Total Health & Medical Diagnostic, P.C. v Oxford Health Plans
2006 NY Slip Op 30000(U)
September 14, 2006
Supreme Court, New York County
Docket Number: 0106935
Judge: Richard B. Lowe
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SCANNED ON 3/13/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 56

HON. RICHARD B. LOWE, III

Index Number : 106935/2004

MANHATTAN TOTAL HLTH & MEDICAL

VS.

OXFORD HEALTH PLANS, INC.

SEQUENCE NUMBER : 004

DISMISS ACTION

C

INDEX NO. ______

MOTION DATE 7/20/06

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

RECEIVED
MAR 9 2007
MOTION SUPPORT OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAR 12 2007

COUNTY CLERK'S OFFICE NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 9/14/06

HON. RICHARD B. LOWE, III

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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MANHATTAN TOTAL HEALTH & MEDICAL DIAGNOSTIC, P.C., MANHATTAN TOTAL HEALTH & GENERAL MEDICINE, P.C. and THOMAS GIORDANO, M.D.,

Plaintiffs,

Index No. 106935/04

-against-

OXFORD HEALTH PLANS,

Defendant.

---X

RICHARD B. LOWE, III, J,:

According to the verified amended complaint (the Complaint), plaintiffs Manhattan Total Health & Medical Diagnostic, P.C., Manhattan Total Health & General Medicine, P.C., and Thomas Giordano, M.D. (collectively, Manhattan), provided medical services to individuals insured by Oxford Health Plans[1] (Oxford). Those individuals (herein, Members) purportedly assigned Oxford's coverage obligations to Manhattan, and Oxford has refused to pay amounts allegedly due and owing for those services.

The first cause of action in the Complaint seeks payment for the services rendered to the Members, the second cause of action seeks interest on the allegedly overdue payments, and the third cause of action seeks punitive damages for "unconscionable, wanton, and reckless disregard" of the duty to pay for the services.

FILED
MAR 12 2007
COUNTY CLERK'S OFFICE
NEW YORK

Oxford moves, pursuant to CPLR 3212, for summary judgment dismissing the Complaint. In the alternative, Oxford moves for an order striking Manhattan's jury demand, and granting partial summary judgment on Oxford's first (fraud), third (tortious interference with

[1]Also known as Oxford Health Insurance, Inc.

contractual relations), and fourth (unjust enrichment) counterclaims. Manhattan cross-moves for summary judgment dismissing all of Oxford's counterclaims, including the second (breach of contract), and the fifth (declaratory judgment).

Oxford's counterclaims state that Oxford is entitled to reimbursement for services allegedly performed for the Members by Manhattan between the years of 1997 and 2000. Those services included electrical/electroceutical nerve blocks (ENBs), transcutaneous electrical nerve stimulation (TENS), and thermogram/temperature gradient studies (TGSs). Oxford contends that when billing Members for services, Manhattan used improper Current Procedural Terminology (CPT) Codes, and failed to attempt to collect amounts due from the Members. Principally, Oxford alleges that Manhattan used CPT Codes that referred to nerve block injections, and not ENB.

Standard of Review

On these motions for summary judgment, each party must show that the causes of action of the other party have no merit. In order to do so, each party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 (1985); Wolff v New York City Tr. Auth., 21 AD3d 956 (2nd Dept 2005).

Once each party has made this prima facie showing, the burden shifts to the other party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006).

On each motion for summary judgment the non-movant is entitled to the benefit of every

favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties. Myers v Fir Cab Corp., 64 NY2d 806 (1985); Marshall v Vilar, 303 AD2d 466, 466 (2nd Dept 2003).

Preemption under ERISA

Oxford maintains that the contract under which Manhattan seeks payment is an employee welfare benefit plan that is covered by the Employee Retirement Income Security Act of 1974 (29 USC §1000, et. seq.), as amended (ERISA). Oxford argues that under 29 USC §1144(a), Manhattan's claims are preempted by federal law, as ERISA supersedes any and all State laws insofar as they relate to any employee benefit plan to which ERISA applies. Thus, Oxford concludes, Manhattan's claims must be dismissed because they are preempted.

Manhattan argues that the claims in the Complaint are not preempted by ERISA because: (i) Manhattan does not fit the category of participants, beneficiaries, or fiduciaries that ERISA protects; and (ii) the Complaint does not involve a state statute, but merely a common law claim for breach of contract and services rendered.

The arguments of Oxford and Manhattan are both unsound. The Complaint clearly states that the causes of action derive from the Members, who maintained valid contracts with Oxford for insurance and benefits. The causes of action are patently to 'recover benefits' due, or 'enforce rights,' under the terms of the employee welfare benefit plan. Thus, ERISA, specifically 29 USCA §1132(a)(1)(B), is implicated. See Aetna Health Inc. v Davila, 542 US 200, 210 (2004) (claim for coverage under an ERISA-regulated employee benefit plan falls within the scope of 29 USC §1132[a][1][B]); see also Egelhoff v Egelhoff, 532 US 141 (2001) (claim preempted if it has a connection with, or reference to, the plan at issue); accord Matter of Morgan

Guar. Trust Co. v Tax Appeals Trib., 80 NY2d 44 (1992).

Although there has been historic contention as to the effect of an assignment on the right to bring causes of action that may be preempted by ERISA, the Second Circuit has now made clear that assignees of the participants or beneficiaries of an ERISA-governed insurance plan have standing to sue under ERISA. I.V. Servs. of America, Inc. v Trustees of American Consulting Engrs. Council Ins. Trust Fund, 136 F3d 114, 117 n2 (2nd Cir 1998); Nissho-Iwai Co. v M/T Stolt Lion, 617 F2d 907, 912 (2nd Cir 1980); see also Simon v General Elec. Co., 263 F3d 176, 178 (2nd Cir 2001) (healthcare provider to whom a beneficiary has assigned claim has standing under ERISA).

Therefore, Manhattan, as assignee of plan participants and/or beneficiaries, may bring claims under ERISA, and state law as to those claims is preempted. However, that preemption does not, as Oxford contends, automatically lead to dismissal of those claims in this court. ERISA provides that "[s]tate courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under" the applicable section (i.e. 29 USC §1132[a][1][B]). 29 USC §1132(e)(1). Emphasis added. Rather, the effect of preemption is the replacement of the state cause of action with a congruous federal cause of action. See Sola Elec. Co. v Jefferson Elec. Co., 317 US 173, 176 (1942).

Oxford's motion for summary judgment dismissing the Complaint due to preemption by ERISA is, therefore, denied with reference to the first two causes of action (to recover benefits due under an employee benefit plan). In addition, those causes of action are hereby converted to federal claims under ERISA 29 USC §1132(a)(1)(B).

The third cause of action for punitive damages, however, is dismissed. Congress did not

authorize the development of federal common law on punitive damages, as such damages are not "necessary to effectuate the purposes of ERISA." See US Steel Min. Co., Inc. v District 17, United Mine Workers of America, 897 F2d 149, 153 (4th Cir 1990); see also Massachusetts Mut. Life Ins. Co. v Russell, 473 US 134, 148 (1985) ("Congress did not provide, and did not intend the judiciary to imply, a cause of action for extra-contractual damages caused by improper or untimely processing of benefit claims").

Exhaustion of Administrative Remedies

Oxford asserts that Manhattan has failed to exhaust administrative remedies in compliance with ERISA (29 USC §1133[2]). The doctrine of exhaustion of administrative remedies provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Myers v Bethlehem Shipbuilding Corp., 303 US 41, 50-51 (1938); accord Kennedy v Empire Blue Cross and Blue Shield, 989 F2d 588, 592 (2nd Cir 1993).

There is no specific mention of an exhaustion requirement in ERISA. Despite this, "courts have developed the requirement that a claimant should ordinarily follow internal plan procedures and exhaust internal plan remedies before seeking judicial relief under ERISA." Sibley-Schreiber v Oxford Health Plans (NY), Inc., 62 F Supp 2d 979, 985 (ED NY 1999) (internal quotation marks and citations omitted); Alfarone v Bernie Wolff Const. Corp., 788 F2d 76, 79 (2nd Cir), cert denied 479 US 915 (1986) (recognizing the "firmly established federal policy favoring exhaustion of administrative remedies in ERISA cases").

This requirement has been read into ERISA for the purposes of: (i) upholding the legislative intent that ERISA trustees, rather than the courts, administer employee benefit plans;

(ii) establishing a clear record of administrative actions for the purposes of judicial review; (iii) ensuring that such judicial review is conducted under the 'arbitrary and capricious' standard, and not de novo; (iv) reducing the number of frivolous lawsuits; (v) establishing standards that promote consistent treatment of claims utilizing nonadversarial methods of claim settlement; and (vi) minimizing costs of claims settlements. Kennedy, 989 F2d at 592-594; Amato v Bernard, 618 F2d 559, 566-568 (9th Cir 1980); Sibley-Schreiber, 62 F Supp 2d at 985.

Oxford has averred that the insurance documents of the Members set forth specific procedures to appeal denial-of-coverage decisions. Moreover, Oxford attests that each Member was provided with a "Grievance Procedure Rider" identifying applicable administrative procedures.[2]

Manhattan does not dispute any of these allegations, but argues that any engagement in administrative procedures would be futile, as denial-of-payment decisions were almost never reversed in the Oxford administrative process.

Three generally recognized exceptions to the requirement that administrative remedies be exhausted are where the administrative remedy would be futile, inadequate, or, absent judicial review, result in irreparable injury. North Jersey Secretarial School, Inc. v McKiernan, 713 F Supp 577, 582 (SD NY 1989); see also Kennedy, 989 F2d at 594-595.

Manhattan's conclusory assessment of futility in exhausting administrative remedies is insufficient to obviate the requirement. Rather than offering any evidence whatsoever of

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[2]Oxford does not state that Manhattan was ever given instructions as to how to appeal denial-of-coverage decisions, or that Manhattan was made aware of any administrative procedures. See Novak v TRW Inc., 822 F Supp 963, 969 (ED NY 1993); Clay v ILC Data Device Corp., 771 F Supp 40, 45 (ED NY 1991) (where plaintiff is unaware of appeals process, exhaustion requirement may be waived).

participation in the administrative appeals process, Manhattan simply provides an affidavit from a managing director asserting that "95 percent of [Oxford's] denials of payment have been upheld in both appeal processes." Rizvi-Riemer Affidavit, Exhibit E, Memorandum in Opposition. Manhattan's reckoning of the chances that an appeal would be overturned is neither evidence of futility, nor a substitute for the requirement that administrative remedies be exhausted. "Courts have been unwilling to conclude that pursuit of the administrative process is futile absent evidence that a plaintiff sincerely attempted to resolve its dispute extrajudicially." Sibley-Schreiber, 62 F Supp 2d at 986.

Despite this, the court must find that exhaustion of administrative remedies in this action would be futile because such remedies would be manifestly inadequate: Oxford has asserted counterclaims that suggest futility. To wit, among other postulations, Oxford states in its Verified Answer and Counterclaim that Manhattan's claims are barred because: (i) they are excluded under the applicable plans; (ii) the Members had no no legal obligation, as required under their coverage, to pay Manhattan for the services rendered; (iii) Manhattan failed, as required, to pre-certify the Members' coverage; (iv) Manhattan waived its right to reimbursement; and (v) Manhattan has unclean hands. Answer ¶¶31, 34-37.

Oxford not only betokens the futility of Manhattan's claims for reimbursement by the defenses asserted in its Answer, but also counterclaims for damages for fraud, breach of contract, tortious interference with contract, and unjust enrichment. Counterclaim, ¶¶47-64, 74-87, 88-97. In support of those counterclaims, Oxford avers that it: (a) "does not provide insurance benefits" for the therapy Manhattan offers; (b) is entitled to recover all sums that have already been paid to Manhattan; and (c) "cannot process and has no obligation to pay claims for services" due to the

way they were billed by Manhattan. Counterclaim, ¶¶4, 6, 31, 41, 46.

Given the Verified Answer and Counterclaims, it would be futile and inadequate for Manhattan to pursue administrative remedies while Oxford continued its action, based upon the very same transactions, in this court. Although there is no compulsory counterclaim rule in New York (Classic Autos., Inc. v Oxford Resources, Corp., 204 AD2d 209 [1st Dept 1994; CPLR 3211[a][5]; 3 Weinstein-Korn-Miller, NY Civ Prac, ¶3019.12), to guard against potential claim preclusion (Parker v Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 347 [1999]), Manhattan would be in the position of having to pursue their original claims as potential counterclaims in this continuing action, while, at the same time, having to pursue those very same original claims in administrative proceedings with Oxford.[3]

Such an outcome does not serve any of the purposes of the juridically imposed exhaustion requirement, and the court, in its discretion (see CPLR 602), will not blindly adhere to it. Kennedy, 989 F2d at 594-595; see also Mallis v Kates, 56 AD2d 818 (1st Dept 1977) (intertwined issues should be tried together). The motion to dismiss for failure to exhaust administrative remedies is denied.

Motion to Strike Jury Demand

Oxford moves for an order striking Manhattan's jury demand. It is well established that "there is no right to a jury trial in a suit brought to recover ERISA benefits." Sullivan v LTV Aerospace and Defense Co., 82 F3d 1251, 1257-1258 (2nd Cir 1996). The jury demand is

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[3]It would not be advantageous to stay this action (CPLR 2201) pending the result of an administrative appeal because that appeal would deal with Manhattan's claims for payments never received. Contrarily, Oxford's counterclaims attempt to recover for amounts already paid. The findings of an administrative appeal would, hence, be of little value to the resolution of Oxford's counterclaims in this action.

stricken.

Motion and Cross Motion for Summary Judgment on Counterclaims

Oxford also moves for an order granting partial summary judgment on the first (fraud), third (tortious interference with contractual relations), and fourth (unjust enrichment) counterclaims. Manhattan cross-moves, however, for summary judgment dismissing all of Oxford's counterclaims, including the second (breach of contract), and the fifth (declaratory judgment).

First Counterclaim: Fraud

Oxford asserts that Manhattan falsely represented the fees actually chargeable to Oxford for the services provided to Members because Manhattan waived some of the amounts Members would have to pay for the services. Oxford claims that as a result of the waivers of co-insurance and deductibles, Oxford paid Manhattan's charges in full, instead of paying 80%, with the Members paying the remaining 20%. In addition, Oxford alleges that the services Manhattan offered were therapeutically unproven, and that Manhattan used improper CPT Codes in order to bill Oxford.

Oxford seeks reimbursement for benefits it overpaid to Manhattan as a result of Manhattan's waiver of deductibles and co-insurance due, ENBs which were billed as nerve block injections, training of members in the application of TENS, and unnecessary TGSs. On this basis, Oxford moves for summary judgment on the first counterclaim.

Upon its own motion for summary judgment dismissing the first counterclaim, Manhattan avers that they attempted to collect the amounts that were eventually waived. Whether Manhattan truly made efforts to collect the deductibles and co-insurance, and whether those

efforts were adequate, are fact determinations within the purview of the fact finder. Creighton v Milbauer, 191 AD2d 162, 166 (1st Dept 1993). Thus, neither party, can, at this juncture, establish entitlement to judgment as a matter of law without the court making an improper determination as to credibility. See id.; S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338, 341 (1974)

In addition, Manhattan has identified evidence in the record (from an employee of Oxford's parent company and from the American Medical Association [AMA]), that prior to clarification of the appropriate CPT Codes by the AMA in 1999/2000, there was considerable doubt as to which CPT Code to use for ENBs. See McNamara Affirmation, Exhibit X, at 2; Smith EBT, at 226, 227. In fact, the record indicates that at one point the AMA actually may have recommended the use of the CPT Codes used by Manhattan. These competing issues of fact also preclude summary judgment for either Oxford or Manhattan.

In any event, even if such issues were more settled, a main element in a claim of fraud ,which is intent, calls for a highly subjective determination, and, as such, is especially unsuited for summary judgment. Siegel, NY Prac 278, at 438 (3rd ed); Falk v Goodman, 7 NY2d 87, 91 (1959); see also In re Barral, 153 BR 15, 17 (SD NY 1993), affd 17 F3d 1426 (2nd Cir 1994) ("[f]indings as to fraudulent intent are peculiarly fact-intensive and an affirmative finding can rarely be made as a matter of law") (citation omitted).

Finally, ERISA, does not explicitly preempt a "state common law cause of action for fraud, pressed by a pension plan subject to ERISA, against a third party who is neither a fiduciary nor a party in interest with respect to the plan ...." LeBlanc v Cahill, 153 F3d 134, 138 (4th Cir 1998); see also Miara v First Allmerica Fin. Life Ins. Co., 379 F Supp 2d 20, 45 (D Mass 2005). Both the motion and the cross-motion for summary judgment on the first counterclaim, for fraud,

are denied.

Second Counterclaim: Breach of Contract

Manhattan moves for summary judgment dismissing Oxford's second counterclaim. Oxford alleges Manhattan could only have been in the position to collect the Members' benefits if the Members had assigned their contracts to Manhattan. Oxford then offers, with no further evidence, that the contracts putatively assigned to Manhattan, had particular provisions that were binding on Manhattan.

First, Manhattan and Oxford, in Oxford's own words "are not in privity of contract." In order to recover for breach of contract, there must be a contract between the parties. It is important to note, however, that under ERISA, "an assignee cannot collect unless he establishes that the assignment comports with the plan." Kennedy v Connecticut Gen. Life Ins. Co., 924 F2d 698, 700 (7th Cir 1991). Thus, Manhattan, in order to prevail on their claims for payment, will eventually have to show that the assignments comport with the applicable contracts.

Second, Manhattan, as assignee under a bilateral contract, is not necessarily bound by the Members' duties without an express undertaking to be so bound. Lachmar v Trunkline LNG Co., 753 F2d 8, 10 (2nd Cir 1985). Neither Oxford nor Manhattan have referenced the documents of assignment that supposedly bind Manhattan to the terms of the Members' contracts. In fact, in the typic Member's contract put into evidence by Oxford, the section entitled "Assignment," states that "[t]his Agreement shall not confer any rights or obligations on third parties except as specifically provided herein." The court cannot, hence, determine if Manhattan took on any specific obligations to Oxford without analysis of the conditions of assignment.

Third, Oxford makes a point of not conceding that any of the alleged assignments were

valid. See Memorandum in Support, at 8, n1, and Reply Memorandum in Further Support, at 5, n2. In attempting to defeat Manhattan's motion for summary judgment, Oxford cannot, on the one hand, claim that the assignments are not valid, and on the other hand claim that Manhattan is bound to the underlying contracts via valid assignments. To argue theory in the alternative is one thing; to argue facts in the alternative appears no more than an attempt to raise a shadowy semblance of an issue, which is not enough to defeat summary judgment. Hanrog Distrib. Corp. v Hanioti, 10 Misc2d 659, 660 (Sup Ct, NY County 1945); accord MRI Broadway Rental, Inc. v US Mineral Prods. Co., 242 AD2d 440, 443 (1st Dept 1997), affd 92 NY2d 421 (1998).

Here, the factual allegations of Oxford, taken together, do not manifest a cognizable cause of action for breach of contract. 511 W. 232nd Owners Corp. v Jennifer Realty Corp., 98 NY2d 144, 151-152 (2002). Upon Manhattan's motion for summary judgment dismissing Oxford's counterclaim, Oxford was required to assemble, lay bare and reveal its proofs, in order to show that its claim for breach of contract is provable at trial. Di Sabato v Soffes, 9 AD2d 297, 301 (1st Dept 1959); McNamee Const. Corp. v City of New Rochelle, 29 AD3d 544, 545 (2nd Dept 2006). Oxford has failed to make any such showing. The second counterclaim, for breach of contract, is dismissed.

Third Counterclaim: Tortious Interference with Contract

Oxford moves for summary judgment, and Manhattan moves to dismiss, the third counterclaim, for tortious/intentional interference with contractual relations.

Oxford argues that the Members were required to pay a deductible and co-insurance for services received, and that Manhattan intentionally inflated the amounts billed to Oxford in order to induce Members to breach their contracts by avoiding payment of said deductibles and co-

insurance.

Oxford's claim for tortious interference with contract is fundamentally flawed. Oxford claims that Manhattan induced the Members to "breach their contracts with Oxford by routinely not collecting the Deductible and Co-insurance payments required to be paid by each Member for the services at issue." However, Manhattan's alleged failure to collect amounts due is only a putative omission by Manhattan (there is no complicity by Members even alleged in the counterclaim), and does not establish a breach by the Members.

Furthermore, Oxford has not identified any provision in the Member's contracts indicating that failure to pay deductibles or co-insurance to a third party constitutes a breach of the Members' contract with Oxford. This omission is not surprising, as the section of the Members' contracts entitled "Member Rights and Responsibilities" makes no specific or manifest mention of deductibles or co-insurance.

What is more, Oxford explicitly relies upon Lama Holding Co. v Smith Barney Inc. (88 NY2d 413 [1996]) to show entitlement to summary judgment. Although the elements of tortious interference with contract, as expounded in Lama, may all be stated in Oxford's counterclaim, courts have repeatedly held that claims for tortious interference with contract, based upon an ERISA plan, are preempted. See Kuhl v Lincoln Nat. Health Plan of Kansas City, Inc., 999 F2d 298, 303 (8th Cir 1993), cert denied 510 US 1045 (1994); Greany v Western Farm Bureau Life Ins. Co., 973 F2d 812, 819 (9th Cir 1992); Maciosek v Blue Cross & Blue Shield United of Wisconsin, 930 F2d 536, 541 (7th Cir 1991); Dependahl v Falstaff Brewing Corp., 653 F2d 1208, 1216 (8th Cir 1981).

The legislative history of ERISA reveals that Congress intended federal courts to fashion

some federal common law relief under ERISA. Oxford nonetheless fails to adduce any such federal law underpinning its cause of action for tortious interference with contract. See e.g. Hospital Corp. of America v Pioneer Life Ins. Co. of Illinois, 837 F Supp 872 (MD Tenn 1993).

As the third counterclaim for tortious interference with contract under New York State law (see Garren v John Hancock Mut. Life Ins. Co., 114 F3d 186, 187-188 [11th Cir 1997]) is patently insufficient, and explicitly relates to enforcement of provisions under, and compliance with, the subject ERISA plan, it is dismissed.

Fourth Counterclaim: Unjust Enrichment

Oxford argues that Manhattan was unjustly enriched because the ENBs were improperly billed, the TENS treatments given to Members were too numerous, and at least one purpose behind the TGSs was to evaluate the efficacy of the ENB treatments.

Manhattan urges the court to adopt the policy espoused in Lincoln Nat. Life Ins. Co. v Brown Schools, Inc. (757 SW2d 411 [Tex App, Hous. 1988]) denying restitution for money paid under mistake of fact to the one who created the situation, and was in the best position to have avoided the mistake. That case is inapplicable here: Oxford has not claimed to have made a mistake, but argues that Manhattan created the instant situation by engaging in fraudulent billing and patient-care practices.

The counterclaim for unjust enrichment presented in this matter is preempted by ERISA (29 USCA §1132[a][3]), which provides for "appropriate equitable relief" to enforce the terms of a plan. Compare LeBlanc, 153 F3d at 138 (29 USC §1132[a][3] provides for cause of action against "nonfiduciary, nonparty in interest, whose interests are adverse to the interests of a pension plan subject to ERISA, and who knowingly participated in a transaction prohibited by

ERISA ... 29 USC § 1106[b][2]").

As Oxford has, in effect, stated a claim under 29 USCA §1132(a)(3), the fourth counterclaim, for unjust enrichment, is converted to an ERISA claim for equitable relief under that section.

Fifth Counterclaim: Declaratory Judgment

Manhattan moves to dismiss the fifth counterclaim for a declaratory judgment determining: (i) the right of Manhattan to retain sums paid by Oxford for the services rendered to Members; (ii) any obligation Manhattan may have to reimburse Oxford and the Members for the services; and (iii) Manhattan's right to collect any unpaid amounts from the Members.

The request for a declaratory judgment seeks determination of issues that will, of necessity, be resolved by the action and remaining counterclaims. See Josephs v Bank of New York, 302 AD2d 318, 319 (1st Dept 2003) (dismissal of the declaratory judgment action warranted when it is duplicative of other causes of action); accord Sofi Classic S.A. DE. C.V. v Hurowitz, __ F Supp 2d __, 2006 WL 2266302, *15, 2006 US Dist LEXIS 55549, *46 (SD NY 2006). As such, the fifth cause of action is dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendant Oxford Health Plans for summary judgment dismissing the Complaint is granted to the extent that the third cause of action is dismissed, and it is otherwise denied, with leave to renew only with regard to 29 USC §1132(a)(1)(B); and it is further

ORDERED that the motion of defendant Oxford Health Plans to strike the jury demand of plaintiffs is granted, and the jury demand is hereby stricken; and it is further

ORDERED that the cross motion of Manhattan Total Health & Medical Diagnostic, P.C., Manhattan Total Health & General Medicine, P.C., and Thomas Giordano, M.D. for summary judgment dismissing the counterclaims of Oxford Health Plans is granted to the extent that the second, third, and fifth counterclaims are dismissed, and it is otherwise denied, with leave to renew (under the fourth counterclaim) only with regard to 29 USCA §1132(a)(3); and it is further

ORDERED that the remainder of the action shall continue.

Dated: September 14, 2006

ENTER:

HON. RICHARD B. LOWE, III
J.S.C.

FILED
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