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

PRESENT: C E Ramos PART 60

Justice

Index Number : 603409/2006

GROUP HEALTH

VS.

KOFINAS, ALEXANDER M.D.

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 603409-06

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

ead 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

is decided in accordance with the accompanying memorandum decision and order.

FILED

AUG 12 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/11/08

HON. CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
GROUP HEALTH INC.,

Plaintiff and Counterclaim Defendant,

-against-

ALEXANDER KOFINAS, M.D.

Defendant and Counterclaim Plaintiff,
----------X

Index No. 603409/06

Charles Edward Ramos, J.S.C.:

Plaintiff Group Health, Inc. (GHI) moves pursuant to CPLR 3211 (a)(7), to dismiss six of seven counterclaims asserted by defendant, Alexander Kofinas, M.D., as well as his requests for punitive damages and attorney fees. At the conclusion of oral argument on April 22, 2008, the fate of all but one counterclaim has been decided[1]. This decision shall address the remaining counterclaim for violation of Insurance Law § 3224-a (the "Prompt Payment Law").

Background

Dr. Kofinas is a Board certified obstetrician/gynecologist (OB/GYN) with over twenty years experience as a specialist in maternal fetal medicine and high-risk pregnancies. In treating high risk patients, it is alleged that Dr. Kofinas must frequently monitor the fetus using diagnostic imaging such as "Doppler studies" and ultrasound. GHI asserts that these

[1] The counterclaims dismissed were prima facie tort, violation of Public Health Law (PHL) § 4910, breach of common law duty of good faith and fair dealing as to PHL § 4910, and attorney's fees. Decision on the fourth counterclaim for violation of Insurance Law § 3224-a (the "Prompt Payment Law") was reserved for this written decision.

protocols are "medically unnecessary."

From 1997-2006, Dr. Kofinas was an in-network healthcare specialist for GHI to whom he submitted claims and was routinely reimbursed. In 2005, GHI began withholding reimbursement to Dr. Kofinas' claims. Nevertheless, Dr. Kofinas continued to perform services for his GHI insured patients.

In early 2006, GHI initiated an audit of Dr. Kofinas' records. Subsequently, Dr. Kofinas held a meeting with GHI and its counsel to discuss the nature of his practice and, among other things, to substantiate the protocol to his patients. The parties later agreed that Dr. Kofinas would terminate his in-network status with GHI.

On September 12, 2006, Dr. Kofinas appealed to the New York State Attorney General and the New York State Department of Insurance on his own behalf citing GHI's alleged violation of the Prompt Payment Law, for its failure to reimburse him for services performed.

Soon after, GHI filed this lawsuit seeking a refund of monies reimbursed to Dr. Kofinas, and in doing so stayed the collateral appeals pending before other administrative agencies. In his answer, Dr. Kofinas asserted counterclaims.

Motion to Dismiss

"Dismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law.'" *Leon v Martinez*, 84 NY2d 83, 88 (1994).

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference." *Id.* at 87-88. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss. *Id.* The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

Discussion

Pursuant to the Prompt Payment Law, a health insurer

> "shall pay the claim to a policyholder or covered person or make payment to a healthcare provider within forty-five days of receipt of a claim or bill for services rendered."

It is alleged that Dr. Kofinas submitted correct and proper claims to GHI and was never paid. GHI argues that the Prompt Payment Law contains no explicit private right of action, nor implies one to Dr. Kofinas. This Court agrees.

New York courts have held that "a private right of action will generally be found not to exist where the legislature has otherwise provided for public enforcement of the law." *Negrin v Norwest Mortgage, Inc.* 263 AD2d 39, 47 (2d Dept 1999). The Superintendent of Insurance is specifically empowered to monitor compliance with health plans under the Prompt Payment Law and to

bring a proceeding for its violation.

Therefore, in order for Dr. Kofinas to sustain his counterclaim under the Prompt Payment Law , he must show that a private right of action is "fairly implied" in the statute. *Carrier v Salvation Army*, 88 NY2d 298, 302 (1996).

This requires a showing that (1) he is a member of the class for whose benefit the statute was enacted; (2) that the recognition of a private right of action would promote the legislative purpose; and (3) that the creation of such a right would be consistent with the legislative scheme. Id. GHI contests that the second and third prongs of the test can be met.

As to the second requirement, Dr. Kofinas fails to adequately support his contention that the legislative purpose of § 3224-a is promoted by a private right of action. Citing *Batas v Prudential Ins. Co. of America*, 281 AD2d 260, 261 (1st dept 2001), Dr. Kofinas contends that on a motion to dismiss, the First Department "affirmed a private right of action under an analogous law." This Court cannot agree. The First Department in *Batas* sustained plaintiffs' causes of action for breach of contract, fraud, and violations of General Business Law (GBL) §§ 349(a) and 350, and held that nothing in PHL § 4406[2] preempts plaintiffs' common law claims or other rights and remedies (emphasis supplied). Because the plaintiffs in *Batas* were not alleging a direct violation under PHL § 4406, the First

[2] PHL § 4406 is alleged to be analogous to the Prompt Payment Law only because it explicitly empowers the Commissioner of the Department of Health to pursue violators of the law.

Department did not endeavor to analyze whether a private cause of action is implied, but rather held that PHL ▪ 4406 does not preempt other claims. Following the same logic here, other viable counterclaims regarding non-payment of claims (i.e. breach of contract) are not preempted because the Superintendent of Insurance is empowered to handle violations of the Prompt Payment Law. Thus, the premise on which the defendant relies on *Batas* is belied by its own facts and hence, not on point nor persuasive.

Further, Dr. Kofinas relies on proposed legislation in the New York State Assembly that if passed, would amend the Insurance Law to grant an explicit private right of action under § 3224-a. Although a fact, *pending* legislation certainly does not reflect any will or intent by state lawmakers and is not binding on this Court whatsoever.

The third requirement under the *Carrier* test requires Dr. Kofinas to show that the creation of a private right of action would be consistent with the legislative scheme. He fails to do so. Contrary to defendant's contention, there is no language (and defendant fails to point the Court to any language) in § 3224-a permitting a healthcare provider to seek the amount due directly from the insurer. The legislature intended that enforcement should be in the hands of the Superintendent of Insurance[3], and not in the hands of private litigants. *Carrube*

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[3] The Superintendent of Insurance is afforded the right to bring a civil or administrative action for a violation of 3224-a and enforce its provisions as a "defined violation" through administrative and civil penalties. See Insurance Law 2402(b).

v New York City Transit Authority, 291 AD2d 558 (2d Dept 2002)("With regard to the third prong of the test, if a provision or body of law has a potent official enforcement mechanism, the Legislature contemplated administrative enforcement and there is no private right of action.") Therefore, the fourth counterclaim must be dismissed.

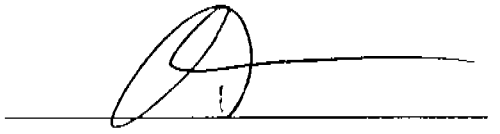
All other arguments not mentioned herein are deemed without merit.

Accordingly, it is

ORDERED that the fourth counterclaim for violation of Insurance Law 3224-a is hereby dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: August 1, 2008



J.S.C.

HON. CHARLES E. RAMOS