

Hoffman v KSB Broadway Assoc.

2009 NY Slip Op 30062(U)

January 2, 2009

Supreme Court, New York County

Docket Number: 114425/05

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN *Justice*

PART 17

Michael Hoffman

INDEX NO.

114425/05

MOTION DATE

- v -

KSB Broadway

MOTION SEQ. NO.

001

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

is decided as attached

FILED

JAN 15 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/2/09

EGJ

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):

J.S.C.

EMILY JANE GOODMAN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 7

-----X

MICHAEL HOFFMAN,

Plaintiff,

Index No. 114425/05

-against-

KSB BROADWAY ASSOCIATES, CENTRAL PARKING
SYSTEM OF NEW YORK, INC., KINNEY SYSTEMS,
THE KATZ PARKING SYSTEM, INC. and THE
KATZ PARKING SYSTEM OF BROADWAY, INC.,

Defendants.

-----X

Emily Jane Goodman, J.S.C.:

In this action to recover for personal injuries sustained by plaintiff Michael Hoffman, plaintiff moves against non-party Health Net of The Northeast (Health Net), and non-party Rawlings Company (Rawlings), by order to show cause, to dismiss a purported lien claimed by Rawlings Company, on Health Net's behalf, against the proceeds plaintiff recovered in settlement of the main action between himself and his employer/defendants.

I. Background

Plaintiff settled his action against defendants on November 13, 2007, after mediation, for the sum of \$290,000. According to plaintiff, the amount represented only past and future suffering, and not medical expenses.

Prior to the settlement, plaintiff's attorneys received a

letter from Rawlings, dated September 22, 2005, asserting that Health Net had a lien against the settlement for medical expenses for which it had paid. Order to Show Cause, Ex. A. Plaintiff responded by refusing to recognize the lien, and informed Rawlings that plaintiff would make "no claim in any lawsuit for medical expenses that were reimbursed by Health Net of the Northeast as a collateral source." *Id.*, Ex. B. Rawlings sent a second letter to plaintiff's attorneys advising them that the total amount of the monies expended in plaintiff's care was \$11,717.50, which included "all expenses paid from the date of the accident to the present." *Id.*, Ex. C.

Rawlings next approached the defendants in the main action, by letter dated November 3, 2006, advising them that Health Net had a right of equitable subrogation against them as tortfeasors for the sum of the lien, which was now stated as being \$52,117.68. In the letter, Rawlings emphasized that Health Net's *only* claim was against defendants, and that it had no claim against plaintiff. *Id.*, Ex. D.

Despite this letter, Rawlings wrote several more letters to plaintiff's attorneys claiming Health Net's right of subrogation, and, finally, a right to subrogation under the Retirement Income Security Act (29 USC § 1001, *et seq.*) (ERISA), which statute, Rawlings contends, controls the medical benefits plan

administered by Rawlings on Health Net behalf (the Plan). *Id.*, Exs. E and F. Specifically, Rawlings noted that ERISA "can preempt some State laws contradictory to the plan's provisions." Ex. F, at 1. Regardless, Rawlings noted that "[t]he question of whether State laws are contradictory to the Plan's recovery provision, however, is largely academic because New York law strongly supports the Plan's right of recovery." This letter mainly dealt with Rawling's alleged right to equitable subrogation, this time against plaintiff, should the action be settled and paid.

Rawlings sent several other letters to plaintiff's attorneys asking for updates on the action, and itemizing Health Net's losses, which Rawlings now claimed amounted to \$57,897.51. *Id.*, Exs. G, H, I and J. In one letter, dated April 27, 2007, Rawlings appears to admit that the Plan was not "self-funded," but that, regardless, it was an ERISA plan. *Id.*, Ex. F.

Finally, in a letter dated November 16, 2007, sent after the action was settled, Rawlings informed plaintiff that Health Net's lien now totaled \$163,969.38. Throughout the flurry of letters between Rawlings and plaintiff's attorneys, Rawlings stuck to its position that Health Net's claim was based on equitable subrogation. See e.g. Ex. D, F and G. In its final letters to plaintiff's attorneys, it is clear that plaintiff is now Rawling's sole target, and no longer the defendants in the main

action. See e.g. Ex. G.

II. Arguments

The present motion is brought by plaintiff against Health Net, as the Plan's administrator. Rawlings and Health Net, while never formally moving to intervene in the action, apparently assume this court's jurisdiction, to the extent of determining the validity of their lien as against plaintiff. Plaintiff does not object.

Rawlings argues that the Plan is fully explained in a document described as "a summary plan description (SPD)," a document required under ERISA, which informs participants and beneficiaries of their rights and obligations under the Plan. Rawlings' Supplemental Brief, at 4. See *id.*, Ex. A. On the issue of subrogation, the SPD provides that:

[I]f a Member is enrolled in Health Net through a Group and the Member suffers an injury or illness for which another party may be responsible, such as being injured in an accident, and Health Net pays benefits as a result of that injury or illness, *Health Net will be subrogated and succeed to the right of recovery against the party responsible for the Member's illness or injury to the extent of the benefits Health Net has paid. This means that Health Net has the right independently of the Member to proceed against the party responsible for the Member's injury or illness to recover the benefits Health Net has paid. The Member agrees to reimburse Health Net for costs Health Net incurs for services provided for the injury for which the Member recovers damages, but not more than the money collected* [emphasis supplied].

SPD, at EC-49.

Contrary to the letters sent to plaintiff seeking equitable

subrogation, Rawlings now maintains that it has always sought a contractual right to recovery, under the Plan, as stated in the SPD, because the Plan is covered under ERISA, which preempts state law claims and defenses. In short, Rawlings now maintains that the state-law claim of equitable subrogation is not an issue. Plaintiff, in response, contends that the Plan is not an ERISA plan, in that Rawlings has admitted that the Plan is not "self-funded," and that, according to plaintiff, ERISA plans must be self-funded. As a result, plaintiff argues for removal of the lien under state, rather than federal, law.

In consequence, plaintiff contends that Health Net's only right of recovery, if any, must be established as a matter of equitable subrogation to plaintiff's rights herein, and that, in any event, Health Net's rights to recover medical costs it has expended have been extinguished by the settlement, and that, in this instance, CPLR 4545 does not permit Health Net to recover the benefits it paid out to plaintiff. Plaintiff also claims that Health Net's demands are without contractual substance, as no actual contract signed by plaintiff has been produced.

Plaintiff further argues that Rawlings and Health Net should be limited to a recovery, if they are entitled to one, that accords to the amount that they sought from plaintiff while the settlement negotiations were going on, and not the final figure of \$163,969.38. Plaintiff claims that it would not have settled

for as little as it did had it known that Health Net would claim such an expansive lien. In fact, as the final documentation of the settlement has yet to be finalized, plaintiff suggests that he might be forced to re-open negotiations to encompass Health Net's demands. Finally, plaintiff asks for sanctions against Rawlings for frivolous conduct, in claiming a lien on plaintiff's settlement with defendants.

The court first notes that plaintiff is here only moving to remove the purported lien from the settlement, and not specifically asking that Rawlings's claims be denied. It is also noted that Rawlings has not moved to intervene. However, resolution of Rawlings right to recoup on its purported lien is the apparent theme of plaintiff's motion, and of Rawlings's response, and so, these questions will be addressed.

III. Discussion

A. State Law

Assuming, for the moment, that state law is not preempted by ERISA (see discussion below), Rawlings's common-law right to a lien on the settlement proceeds must be addressed. In *Teichman v Community Hospital of Western Suffolk* (87 NY2d 514 [1996]), a case similar to the one at hand, the Court reiterated the common rule that insurance contracts must be interpreted in the same manner as ordinary contracts, so that courts are to "give unambiguous terms their plain and ordinary meaning." *Id.* at 520;

see also *Greenfield v Philles Records, Inc.*, 98 NY2d 562 (2002). Under *Teichman*, and according the present policy its plain meaning, it appears that Rawlings has no contractual lien on the settlement proceeds.

In *Teichman*, the insurance company sought a lien on settlement proceeds in an action involving a beneficiary to the plan therein. The provision stated that "[i]f [the insurer] pays benefits under this Plan for Covered Medical Expenses incurred on [the insured's] account, and it is found that ... [the insured] w[as] repaid for all or some of those expenses by another source, [the insurer] will have the right to a refund from [the insured] [emphasis supplied]." *Id.* at 520. In the SPD in the present matter, the operative language is: "[t]he Member agrees to reimburse Health Net for costs Health Net incurs for services provided for the injury for which the Member recovers damages, but not more than the money collected [emphasis supplied]." Patently, the two provisions are very similar.

In *Teichman*, the Court found that the policy's language contained "nothing regarding a lien" on any recovery its insured might enjoy. *Id.* at 520. As such, the *Teichman* Court found that, in light of the plain language of the policy, there was no contractual lien on the settlement proceeds. Similarly, the Rawlings policy contains no language pertaining to a lien, and, as such, *Teichman* instructs that there is no contractual lien on

plaintiff's settlement proceeds.

The next question is whether Rawlings has an equitable lien on the settlement proceeds, i.e., whether the basis of its claim is equitable in nature. *The Teichman* Court, quoting *James v Alderton Dock Yards* (256 NY 298, 303 [1931]), noted that the Court "long recognized [that] an equitable lien 'is dependant upon some agreement express or implied that there shall be a lien on specific property.'" *Teichman*, at 520. However, the provision must deal with "some particular property either by identifying it or by so describing it that it can be identified and must indicate with sufficient clearness an intent that the property so described or rendered capable of identification is to be held, given or transferred as security for the obligation.'" *Id.*, quoting *James*, 256 NY2d at 303.

The *Teichman* Court found that the operative language therein "[fell] far short of these requirements" (*id.*), because the plan did not describe the property "in such a way as to make identification possible." *Id.* Consequently, state law would not permit Rawlings to place a lien on the settlement proceeds.

B. ERISA

ERISA is "a comprehensive statute 'designed to promote the interests of employees and their beneficiaries in employee benefit plans.'" *Nealy v US Healthcare HMO*, 93 NY2d 209, 217 (1999), quoting *Aetna Life Insurance Co. v Borges*, 869 F2d 142,

144 (2d Cir 1989). ERISA contains a preemption provision which is "central to achievement of its statutory purposes." *Nealy v US Healthcare HMO*, 93 NY2d at 217. The statute provides that ERISA "shall supersede any and all State laws insofar as they ... relate to any employee benefit plan [internal quotation marks and citation omitted]." *Id.*, quoting 29 USC § 1144 (a); see also *Silber v Silber*, 99 NY2d 395 (2003); *Ehrenspeck v Spear, Leeds & Kellogg*, 389 F Supp 2d 485 (SD NY 2005 (ERISA has complete preemptive effect on actions by participants and beneficiaries to recover benefits under an ERISA plan)).

It is noted that there is no substantive evidence before the court that Health Net is an ERISA plan, other than statements made by Rawlings's attorneys in affidavits, and in its memoranda of law, and a form 5500, entitled Annual Return/Report of Employee Benefit Plan, and dated 2005, which was filed with the Department of Labor and the Department of the Treasury. The SPD is not a contract, but a set of directives describing the Plan, which is apparently controlled by an over-arching insurance policy, which plaintiff, as an individual, did not sign. Therefore, more information is needed to determine the nature of the Plan.¹

¹The court rejects plaintiff's argument that the matter should be resolved in his favor because Rawlings has failed to produce a policy signed by the plaintiff himself, and refers to *Bah v Malvet* (Index No. 18557/05 [Sup Ct, NY County, May 8, 2001]) for substantiation of this claim. However, the present

ERISA defines an "employee welfare plan," to which the statute will apply as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer ... to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, ... medical, surgical, or hospital care or benefits

Grimo v Blue Cross/Blue Shield of Vermont, 34 F3d 148, 151 (2d Cir 1994), quoting 29 USC § 1002 (1); see also *Chase v Prudential Insurance Company of America*, 2008 WL 697301, 2008 US Dist LEXIS 20316 (ED NY 2008); *Ehrenspeck v Spear, Leeds & Kellogg*, 389 F Supp 2d 485, *supra*). Form 5500 indicates that the Plan was funded by insurance.

"[A] 'plan fund or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits [internal quotation marks and citation omitted]." *Grimo v Blue Cross/Blue Shield of Vermont*, 34 F3d at 151; see also *Cronin v Zurich American Insurance Company*, 189 F Supp 2d 29 (SD NY 2002).

While Rawlings's assertions would make the Plan an ERISA plan, if the proof established this claim, the inquiry would not end there. ERISA contains a "safe harbor" provision, which

action, unlike *Bah*, does not involve an individual policy, but a group plan, which plaintiff did not sign.

creates an exception to "this broadly inclusive definition of 'employee welfare benefit plan.'" *Cronin v Zurich American Insurance Company*, 189 F Supp 2d at 34. The definition of an "employee welfare benefit plan" has been "narrowed further by regulations promulgated by the Department of Labor pursuant to its authority under 29 USC § 1135." *Ehrenspeck v Spear, Leeds & Kellogg*, 389 F Supp 2d at 488. The Department of Labor's regulations are "intended to 'clarify the definition of the terms "employee benefit plan" and "welfare plan" ... by identifying certain practices which do not constitute employee welfare benefit plans.'" *Id.*, quoting 29 CFR 2510.3-1 (a) (1).

The regulation's "safe harbor" provision requires that certain group insurance plans are excluded from the definition of an ERISA plan if four conditions are met, as follows:

For purposes of Title 1 of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which

- (1) No contributions are made by an employer or employee organization;
- (2) Participation in the program is completely voluntary for employees or members;
- (3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and
- (4) The employer or employee organization receives no

consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues check-offs.

29 CFR 2510.3-1 (j); see also *Marcella v Capital District Physicians' Health Plan, Inc.*, 293 F3d 42, 50 (2d Cir 2002); see also *Grimo v Blue Cross/Blue Shield of Vermont*, 34 F3d 148, *supra*. In order for a plan to not qualify under ERISA, all four of the above criteria must be satisfied. *Cronin v Zurich American Insurance Company*, 189 F Supp 2d 29, *supra*; see also *Sanfilippo v Provident Life and Casualty Insurance Company*, 178 F Supp 2d 450 (SD NY 2002).

The issue of whether the Health Net plan is an ERISA plan is crucial because if it is, plaintiff's state law claims are preempted (*Ehrenspeck v Spear, Leeds & Kellogg*, 389 F Supp 2d 485, *supra*), since "[t]he Supreme Court has held that ERISA has complete preemption effect." *Id.* at 488, citing *Metropolitan Life Insurance Company v Taylor*, 481 US 58 (1987). If the plan is not an ERISA plan, then state law governs, and Health Net, by failing to provide for a lien in the SPD, cannot impose a lien on plaintiff (see *Teichman v Community Hospital of Western Suffolk*, 87 NY2d 514, *supra*), although it may proceed on a contract claim to recover "medical expenses actually included in the settlement." *Id.* at 518. Under *Teichman* (87 NY2d 514, *supra*), Health Net's right to recover would "rest[] on its right to

reimbursement under the insurance contract," and require Rawlings to prove that some identifiable part of the settlement was intended to provide for payment for medical benefits paid by a collateral source.² *Id.* at 522.

While Rawlings bears the burden of proving that Health Net is an ERISA plan (see *Marcella v Capital District Physicians' Health Plan, Inc.*, 293 F3d 42 *supra*; *Grimo v Blue Cross/Blue Shield, of Vermont*, 34 F3d 148, *supra*), the criteria involved in proving the case for the application, or non-application, of ERISA, have not been addressed, beyond plaintiff's bare-bones allegation that the Plan is not ruled by ERISA; Rawlings' acquiescence that the Plan was not "self-funded³," and the 5500 form filed by Health Net with the Department of Treasury, and the Department of Labor, which indicates that the Plan was funded by

²The amount of contractual reimbursement, if any, might be limited based on principals of waiver and/or estoppel; however, any contractual right to reimbursement must be sought by Health Net in a separate action, as it has failed to move to intervene in this action, having merely opposed plaintiff's motion. Accordingly, there is no need to address the application of waiver and/or estoppel in this decision.

³Plaintiff's assertion that an ERISA plan must be self-funded is, however, wrong. The very definition of an ERISA plan states that a plan may be funded by insurance (see *Grimo v Blue Cross/Blue Shield of Vermont*, 34 F3d 148, *supra*), and many cases especially address "self-funded" ERISA plans, obviously as opposed to any other kinds of ERISA plans. See e.g. *Mario v P. & C. Food Markets, Inc.*, 313 F3d 758 (2d Cir 2002): cf *Schnur v CTC Communications Corporation Group Disability Plan*, ___ F Supp 2d ___, 2008 WL 4615907 (SD NY 2008) (concerning an ERISA plan funded by insurance).

insurance. Order to Show Cause, Ex. G, §§ 9a, 9b and 10b. Furthermore, whether the plan falls under the "safe harbor" rules set up by the Labor Department is unclear.

Although, upon perusal of the SPD, the Health Net Plan appears to be voluntary, and to be self-administered without input or contribution from defendants, no affidavit of any persons with knowledge, or evidence other than the SPD, has been offered which might clarify this, and the other safe harbor requirements. Until it is determined whether Health Net actually is an ERISA plan, it cannot be determined whether plaintiff is entitled to the relief sought herein. Therefore, the court refers this issue to a Special Referee to hear and report.

Accordingly, it is

ORDERED that the issue of whether or not the Plan herein is an ERISA plan is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that plaintiff, his attorney, Health Net and its attorney, shall personally appear before this court, Part 17, Room 422, for a settlement conference on January 29, 2009 at 4:00PM; defendants may participate but their appearance is not required.

This Constitutes the Decision and Order of the Court.

Dated: January 2, 2009

ENTER:



J.S.C.

EMILY JANE GOODMAN

FILED
JAN 15 2009
COUNTY CLERK'S OFFICE
NEW YORK