SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

JORDAN S. JOSEPHSON and JORDAN S. JOSEPHSON, M.D., P.C.,

Plaintiffs,

INDEX No. 0443/07

MOTION DATE: Sept. 9, 2011
Motion Sequence # 001

-against-

OXFORD HEALTH INSURANCE, INC., OXFORD HEALTH PLANS (NY), INC. and OXFORD HEALTH PLANS LLC,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affirmation/Affidavit in Opposition..... XX
Reply Affirmation..... X
Memorandum of Law..... XX
Reply Memorandum of Law..... X

Motion by defendants for an order pursuant to CPLR 3211 dismissing the complaint is **granted** in part and **denied** in part.

In the within action, the plaintiffs Jordan S. Josephson, and Jordan S. Josephson, M.D., P.C. (Dr. Johnson) allege that the defendants Oxford Health Insurance, Inc., Oxford Health Plans (NY), Inc., and Oxford Health Plans, LLC ("Oxford") failed to reimburse the plaintiffs for medically necessary services that Dr. Josephson provided to defendants' subscribers suffering from chronic sinus disease.

Dr. Josephson commenced this action on January 9, 2007, with the filing of a summons with notice. On or about June 1, 2007, Dr. Josephson served a verified complaint. On June 26, 2007, Oxford removed the action from this court to the United States District Court for the Eastern District of New York, contending ERISA pre-emption. Dr. Josephson then moved in the Eastern District for remand back to this court. By opinion and order dated March 11, 2008, Judge Feuerstein granted Dr. Josephson's motion and remanded the case back to this Court. Rather than serve an answer to the complaint, defendants move to dismiss.

Dr. Josephson is a ear, nose and throat physician with a specialty in functional endoscopic sinus surgery." He is an "out-of-network" provider, i.e., he has not entered into a contract with Oxford to provide covered healthcare services to its members pursuant to an agreed upon fee schedule. As an out-of-network provider, Dr. Josephson is not entitled to be paid directly by Oxford for any covered services he provided to its members. Rather, the members are obligated to pay his fees in full. Those members whose health plans provide benefits for services obtained from out-of-network providers can then seek reimbursement from Oxford for a portion of Dr. Josephson's billed charges. Members whose plans provide benefits for out-of-network services must first satisfy an annual deductible amount. Thereafter, depending upon the specific terms of the members' respective plans, Oxford and the member typically each pay a portion of the provider's billed charge, depending on the "usual, customary and reasonable charge ("UCR") for those services in that specific geographic area. The UCR typically is defined as the provider's billed charge or the amount Oxford determines to be the reasonable charge, whichever is less, for a particular covered service in the geographic area in which it was performed. While the portion of the UCR paid by the member and Oxford depends on the specific terms of each member's plan, under many plans Oxford pays 80% of the UCR, and the member pays the remaining 20%, as well as any difference between the reasonable charge (as determined by Oxford) and Dr. Josephson's billed charge for that service.

Oxford commenced an against Dr. Josephson in Supreme Court, New York County. ***Oxford Health Insurance Inc. v Jordan S. Josephson, M.D.***, index no 502899/04 (the Oxford Action). In the Oxford Action, Justice Scapula found as a matter of law that Dr. Josephson, as an out-of-network provider, has no express contract with Oxford. Dr. Josephson's Oxford patients execute an assignment pursuant to which they assign to him their rights under their policies to receive reimbursement from Oxford. According to the assignment, Dr. Josephson was assigned only his patients' right to receive reimbursement

from Oxford for his services. (Decision and Order, ***Oxford Health Ins. v Josephson***, Index no. 602899/04, Sup Ct New York County, July 23, 2010, pg. 8-9 annexed as Exhibit 9 to the Oxford Action).

In the present action, Dr. Johnson alleges that "starting in or around January 1, 1995," he provided services to members for which he is entitled to obtain benefits from Oxford pursuant to such assignments." Dr. Josephson alleges that "starting in or about January 2001, Oxford breached its obligations under these contracts by issuing final determinations to Dr. Josephson stating the appropriate payment on numerous claims submitted by Dr. Josephson to Oxford for "medically necessary services" that Dr. Josephson provided to Oxford members was '$0' or some other amount far below the appropriate UCR rate," and that "Oxford further breached its obligations under these contracts by deliberately avoiding and systematically denying reimbursement to Dr. Josephson for medically necessary services provided to Oxford subscribers without explanation." (Complaint ¶¶ 38-39). Finally, he alleges that "starting in or about January 1997, Oxford undertook a deliberate, malicious and anti-competitive campaign to induce Oxford members to stop seeking treatment from Dr. Josephson and to refuse to pay any co-payment, co-insurance, or out-of-pocket expense amount Oxford members were obligated to pay Dr. Josephson." *Id.* ¶ 40.

As the assignee of his patients, Dr. Josephson holds contract rights, pursuant to which he can seek reimbursement from Oxford. Dr. Josephson's allegations that these contract right have been breached by Oxford form the basis of the breach of contract claim set forth in the first cause of action of the complaint.

In the second cause of action, Dr. Josephson alleges breach of implied-in-fact contracts. In the third cause of action, Dr. Josephson alleges breach of the implied covenant of good faith and fair dealing. In the fourth cause of action, Dr. Josephson asserts a claim for unjust enrichment. In addition, Dr. Josephson asserts claims for tortious interference (fifth cause of action), fraudulent misrepresentation (sixth cause of action), and failure to comply with the "Prompt Pay Law," Insurance Law § 3224-a–(seventh cause of action).

On a motion to dismiss pursuant to CLR 3211(a)(7), the court must accept as true, the facts "alleged in the complaint and submissions in opposition to the motion, and accord plaintiffs the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory" (***Sokoloff v Harriman Estates Development Corp.***, 96 NY2d 409, 414; *see* ***People ex rel. Cuomo v Conventry First LLC***, 13 NY3d 108; ***Polonetsky v Better Homes Depot***, 97 NY2d 46, 54).

"In assessing a motion under CLR 3211(a)(7), a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (***Leon v Martinez***, 84 NY2d 83, 88; *see also* ***Uzzle v Nunzie Court Homeowners Ass'n, Inc.***, 55 AD3d 723).

On this motion to dismiss for failure to state a cause of action, the court must give plaintiff the benefit of the favorable inference that Oxford failed to pay usual, customary, and reasonable charges for the medical services provided by Dr. Josephson. Accordingly, defendants' motion to dismiss the first cause of action for failure to state a cause of action is **denied**.

The second cause of action alleges the breach of an implied-in-fact contract whereby Dr. Josephson agreed to provide healthcare services to Oxford's members in exchange for Oxford paying Dr. Josephson for those covered healthcare services at the UCR rate. The existence of a valid contract covering the same subject matter precludes recovery under an implied in fact contract theory. ***Superior Officers Council Health & Welfare Fund v Empire Health Choice Assurance***, 85 AD3d 680; ***Clark-Fitzpatrick Inc. v LIRR***, 70 NY2d 382. Dr. Josephson acknowledges that his claims against Oxford are based on allegedly valid assignments he received from the insureds of their rights to benefits from Oxford for services he rendered. (Complaint ¶¶ 28, 36, 37; Dr. Josephson Affidavit ¶¶ 28-30; see also the Oxford Action). Accordingly, defendants' motion to dismiss the second cause of action, breach of an implied-in-fact contract, for failure to state a cause of action is **granted**.

In the third cause of action, plaintiff alleges that Oxford breached the implied covenant of good faith and fair dealing implied in the contract by undertaking a deliberate, malicious and anti-competitive campaign to induce Oxford members to stop seeking treatment from Dr. Josephson and to refuse to pay any co-payment, co-insurance, or out-of-pocket expense amount Oxford members were obligated to pay to Dr. Josephson. Where a claim for breach of the implied covenant of good faith and fair dealing is duplicative or intrinsically tied to damage allegedly resulting from a breach of an express contract, it cannot be maintained. ***Deer Park Enters., LLC v Ail Sys., Inc.***, 57 AD3d711; ***Canstar v J.A. Jones Constr. Co.***, 212 AD2d 452.

Dr. Josephson's claims alleging breach of contract and breach of the implied covenant of good faith and fair dealing are both based on the assertion that Oxford failed to properly reimburse him pursuant to the terms of the members' contracts with Oxford for covered

services he allegedly provided to them. In its July 23, 2010 ruling on the parties' summary judgment motions, the court in the Oxford Action held that the issue of whether the debridement procedures performed by Dr. Josephson were medically necessary was an issue of fact to be decided by the trier of fact, and that Dr. Josephson did not make a *prima facie* case on that issue. Defendants' argue that although this court should give Dr. Josephson the benefit of every possible inference on a motion to dismiss, this court is not required to do so where Dr. Josephson's assertion already has been rejected by the court in the Oxford Action. To the extent Dr. Josephson obtained assignments of benefits from the members, his remedy against Oxford lies solely in breach of contract. Indeed, Dr. Josephson admitted as much in the Oxford Action, stating that "[t]his dispute is governed by the obligations of the parties created by the assignment of benefits." (Dr. Josephson's summary judgment brief in the Oxford Action). Defendants' motion to dismiss the third cause of action, breach of implied covenant of good faith and fair dealing, for failure to state a cause of action is **granted**.

In the fourth cause of action the plaintiffs allege that Oxford was unjustly enriched at the expense of the plaintiff by not paying at the full UCR rate for providing medically necessary services to Oxford members. Plaintiff cannot recover under a theory of unjust enrichment or *quantum meruit* if the services the plaintiff provided were done at the behest of someone other than the defendant. ***JLJ Recycling Contractors Corp. v Town of Babylon***, 302 AD2d 430; ***Kagan v K-Tel Entertainment, Inc.***, 172 AD2d 375. The plaintiff must look for recovery from the party who requested the services. ***JLJ Recycling Contractors Corp., supra***. In the within action, Dr. Josephson performed the medical procedures at the request of his patients – not Oxford. The Second Department has rejected unjust enrichment claims under similar facts. ***Kierell v Hytra Health Plans Long Island, Inc.***, 29 AD3d (dismissing the claim for *quantum meruit* made by a non-participating doctor who sought reimbursement from a defendant health insurer for services he provided to its insureds, holding that because the services were performed at the request of the insureds); ***Pekler v Health Ins. Plan of Greater N.Y.***, 67 AD3d 758 (holding that because the complaint alleged that medical services were performed by plaintiff doctors at the request of their patients, a claim in *quantum meruit* could not be asserted against the patients' insurer). The quasi-contract claim is also precluded by the existence of a valid agreement, to wit, the assignment of benefits. *See* ***Superior Officers Council Health & Welfare Fund v Empire HealthChoice Ass., Inc.***, 85 AD3d 680. Accordingly, defendants' motion to dismiss the fourth cause of action for unjust enrichment for failure to state a cause of action is **granted**.

In the fifth cause of action, Dr. Josephson alleges that Oxford maliciously, intentionally and without justification interfered with his right to receive the assignment of

benefits from the member patients. An action for tortious interference with contractual relations requires proof of the existence of a valid contract between plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of a breach of that contract by the third party without justification, an actual breach of the contract and damages caused by the breach. ***Kaminski v United Parcel Serv.***, 120 AD2d 409, citing ***Israel v Wood Dolson Co.***, 1 NY2d 116, 120. Oxford had a legitimate business purpose in investigating Dr. Johnson. The questionnaires sent by Oxford to its members, which Dr. Josephson concedes were sent to inquire about the patients' treatment and billing experiences (Dr. Josephson Affidavit ¶ 34), were justified as part of Oxford's statutory duty to investigate suspected insurance fraud, *see* Ins. Law §§ 405, 409, as were its follow-up communications with its members. *See* ***Trachtman v Empire Blue Cross & Blue Shield***, 251 AD2d 322. Dr. Josephson's failure to allege that Oxford's conduct was unjustified is fatal to his Fifth Cause of Action. *See* ***Wolf v National Counsel of Young Israel***, 264 AD2d 416. Dr. Josephson fails to allege sufficient facts either in his complaint or his affidavit to show that the alleged interference by Oxford was for the sole purpose of harming him. See ***Trachtman v Empire Blue Cross & Blue Shield***, ***supra***, (affirming dismissal of tortious interference claim where healthcare provider failed to allege sufficient facts to plead that the alleged interference by health plan was for the sole purpose of harming him, "rather than merely incidental to the lawful purpose of obtaining the sought after information" in connection with a fraud investigation); ***EDP Hosp. Computer Sys. v Bronx-Lebanon Hosp. Ctr.***, 212 AD2d 570. Because Oxford was acting in furtherance of its statutorily-mandated duty to detect and investigate potential insurance fraud, its actions were justified as a matter of law, and cannot support a claim for tortious interference. ***Trachtman and Wolf***, ***supra***. Plaintiff cites ***Amaranth LLC v JPMorgan***, 71 AD3d 40 for the proposition that Oxford's alleged false statements to the patients sustain a tortious interference claim. However, in ***Amaranth***, ***supra***, there was an underlying tort of defamation. In the within action there is no independent tort of libel or slander to support a claim for tortious interference. Defendants' motion to dismiss the fifth cause of action for tortious interference for failure to state a cause of action is **granted**.

Dr. Josephson's sixth cause of action alleges that Oxford represented to him that it would reimburse him for the services he provided to Oxford's Members at the full UCR rate, that he relied on those alleged representations, and that the representations were false. Dr. Josephson is alleging nothing more than Oxford's purported failure to pay to him, as an assignee under the members' contracts with Oxford, benefits purportedly due to them for his services. (Claims based upon a failure to perform under a contract do not state a claim for fraud. ***New York University v Continental Ins. Co.***, 87 NY2d 308). Dr. Josephson's claim

for fraud relates directly to the contractual obligations between the parties created by the assignment of benefits that Dr. Josephson received from the Oxford patients treated by him. Moreover, the complaint fails to allege with any degree of specificity that Oxford made representations that were false, knew the representations were false and made with the intent to deceive the plaintiff, or that the plaintiff justifiably relied on the representations. ***See Giurdanella v Giurdanella***, 226 AD2d 342. This court's determination on the issue of fraud is made *de novo* and is in harmony with Judge Lehrer's dismissal of Dr. Josephson's counterclaim alleging fraud against Oxford in the Oxford Action, (Order dated June 3, 2005). Defendants' motion to dismiss the sixth cause of action for fraud for failure to state a cause of action is **granted**.

The seventh cause of action alleges that Oxford failed to compensate Dr. Josephson for medically necessary services that Dr. Josephson provided to Oxford members within 45 days of the receipt of the bills or claims as required by Insurance Law § 3224-a ("the Prompt Pay Law"). These claims are subject to the three-year statute of limitations set forth in CLR 214(2). Any claims that accrued prior to January 9, 2004 would be time barred. However, plaintiff alleges that defendants failed to promptly pay claims which became due after that date. Defendants' motion to dismiss the seventh cause of action, violation of Insurance Law § 3224-a, for statute of limitations is **denied**.

The elements required to state a claim for punitive damages as an additional and exemplary remedy when the claim arises from a breach of contract are that the defendant's conduct must be actionable as an independent tort; the tortious conduct must be of an egregious nature; the egregious conduct must be directed to the plaintiff; and it must be part of a pattern directed at the public generally. ***Rocanova v Equitable Life Assurance Society***, 83 NY2d 603. Where a lawsuit has its genesis in the contractual relationship between the parties, the threshold task for the court considering defendant's motion to dismiss a cause of action for punitive damages is to identify a tort independent of the contract. Where a party is seeking to enforce a contract (such as Dr. Josephson's rights pursuant to be the assignment in the within action), a tort claim will not lie. ***Somer v Federal Signal Corp.***, 179 NY2d 540. Generally, punitive damages are recoverable only where the breach of contract also involves a fraud evincing a high degree of moral turpitude, demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, and where the conduct was aimed at the public generally. ***Rocanova v Equitable Life Assurance Society***, ***supra***, at p. 612.
Taken in a light most favorable to the plaintiff, the complaint does not show that the defendants' conduct constituted an independent tort, that it rose to the level of egregiousness,

or that the alleged conduct was part of a pattern directed at the public generally. Defendants' motion to dismiss plaintiffs' claim for punitive damages for failure to state a cause of action is **granted**.

Plaintiff's request for leave to amend the complaint is governed by CLR 3025(a)(b). Although pled under a variety of theories, the underlying gravamen of Dr. Josephson's second, third, fourth, fifth and six causes of action is breach of contract. To summarize, the second, third, fourth, fifth and sixth causes of action are **dismissed**. The action will proceed as to the first cause of action – breach of the contract of assignment, and the seventh cause of action –violation of "the Prompt Pay Law" (Insurance Law § 3224-a) subject to the three-year statute of limitations set forth in CLR 214(2).

The parties have been litigating the issues since 2004 in the parallel Oxford Action in Supreme Court, New York County and since 2007 in this court, as well as in the United States District court for the Eastern District of New York. Thus, all counsel and their respective parties are familiar with the outstanding issues and would not be prejudiced by an amendment. Plaintiff's request for leave to serve an amended complaint is **granted**, upon submission of a proposed pleading.

Defendants shall serve a verified answer within twenty days of the date of this order or within 20 days after the date an amended complaint is served.

A Preliminary Conference is scheduled for December 6, 2011 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

This decision is the order of the Court.

Dated OCT 26 2011

Stephen A. Bucaria
J.S.C.