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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan Justice PART 36

Index Number : 102832/2011
NYU HOSPITALS CENTER
VS.
HUANG, MEI RONG
SEQUENCE NUMBER : ~~002~~ 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

otion to/for Dismiss
(+ memo) No(s). 1
(+ memo) No(s). 2
Reply memo No(s). 3

Upon the foregoing papers, it is ordered that this motion by defendant Phillips-Van Heusen Corp to dismiss is decided in accordance with the attached memorandum decision.

(consolidated for disposition with motion seq 002)

FILED

JAN 18 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/18/12

J.S.C.

JUSTICE DORIS LING-COHAN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

NYU HOSPITALS CENTER,

Plaintiff,

-against-

MEI RONG HUANG, AETNA LIFE INSURANCE COMPANY, and PHILIPS-VAN HEUSEN CORPORATION,

Defendants.

Decision and Order
Index No. 102832-2011
Motion Seq. No.: 001 & 002

DORIS LING-COHAN, J.:

Motion Seqs. 001 and 002 are consolidated for purposes of disposition.

On March 8, 2011, plaintiff NYU Hospitals Center (NYU), brought this action against defendants Mei Rong Huang (Huang), Aetna Life Insurance Company (Aetna), and Phillips-Van Huesen Corporation (the PVH Plan)[1] to recover $206,388.52 in damages, for inpatient rehabilitative services that it rendered to Shu Gen Liang (Liang), Huang's alleged spouse, from February 18, 2009 to March 30, 2009. NYU's complaint alleges negligent misrepresentation against the PVH Plan, and a claim of breach of contract and promissory estoppel against Aetna.

Defendants Aetna and the PVH Plan move to dismiss the claim against each of them pursuant to CPLR 3211 (a) (3) (claimant lacks the capacity to sue) and 3211 (a) (7) (failure to state a

[1] Effective June 23, 2011, the Phillips-Van Heusen Corporation changed its name to the PVH Corporation.

cause of action). Defendants insist that the state law claims are preempted by the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC § 1001 et seq.), based on the claims' relationship to an employee welfare benefits plan underlying this dispute. NYU counters that ERISA does not preempt these claims, because they arise independently of the underlying benefits plan.

For the reasons set forth below, defendants' motion to dismiss the causes of action against them is granted in part, and denied in part.

BACKGROUND

In reviewing a motion to dismiss under CPLR 3211 (a) (7), the court must accept the complaint's well-pleaded factual allegations as true, including the inferences reasonably drawn from them (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The complaint should be dismissed only if NYU fails to allege any set of facts upon which relief may be granted (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Therefore, the following facts are taken from NYU's complaint.

Plaintiff NYU is a domestic corporation that maintains the hospital facility where Liang was treated. The PVH Plan is an employer insurance plan that provides eligible employees with hospital and medical coverage through a self-insured health

plan. Co-defendant Huang is a former PVH Plan employee who claimed that Liang was her spouse and a covered dependent under her health benefits plan. Liang is deceased, and there are no pending estate proceedings. Aetna is a corporation and health insurer that conducts business in New York State, and serves as a third-party claims administrator for the PVH Plan.

NYU is a participating provider in Aetna's health care network under a contract with U.S. Healthcare, which subsequently became part of Aetna Health Inc. A copy of the relevant portions of a Hospital Service Agreement, dated January 1, 1994, between Aetna Health Inc. and the Hospital for Joint Diseases/Orthopedic Institute were submitted to the court (*see* affirmation of Bernstein, dated July 22, 2011, exhibit B, Edited Agreement).

The parties' agreement provides that Aetna will verify eligibility for hospital services and make payment for inpatient days used in accordance with the Hospital Service Agreement. Section 7 of the Hospital Services Agreement provides, in part, that NYU is to (1) participate in and abide by Aetna's utilization review program; (2) provide notice of an admission; and (3) provide clinical data and information necessary for Aetna to perform utilization review. This section also provides that "[n]on-compliance with any requirements of this section (7) will relieve both [Aetna] and its Members from any financial liability for any portion of the [hospital] admission."

On February 18, 2009, Liang sought admission for inpatient rehabilitative services at NYU. Huang allegedly represented that Liang was covered under her health insurance policy. Huang executed a guarantee to pay any bill for services rendered to Liang that were not covered or allowed by third-party payors. Prior to admitting Liang for treatment, NYU contacted Aetna to obtain pre-certification for Liang's admission. Relying on the representations made by Aetna, NYU admitted Liang, and began providing rehabilitation services. On February 19, 2009, Aetna sent NYU a letter, which initially authorized fourteen days of inpatient services under Huang's health insurance coverage. Thereafter, NYU personnel contacted Aetna, which authorized, in total, a 40-day stay for Liang between February 18, 2009 until March 30, 2009. Aetna was billed $76,923.25 by NYU for services, and Aetna paid that amount to NYU. On October 19, 2009, however, Aetna recouped its payment. It alleged that Liang was not entitled to health care benefits on the dates of service. The PVH Plan had advised Aetna that Liang was not an eligible participant, and was improperly enrolled based on alleged misrepresentations by Huang.

Originally, NYU filed this action in this court against the three defendants, alleging six causes of action. As it applies to Aetna and the PVH Plan, NYU seeks payment for services that these two defendants have declined to cover. The complaint alleges that the PVH Plan retroactively cancelled Liang's

coverage under its group health insurance policy after NYU rendered its services and after Aetna paid NYU. Additionally, the complaint contends that the PVH Plan negligently omitted to inform Aetna that Liang's coverage was terminated as of January 1, 2009, and that it misrepresented that Liang was covered as an insured beneficiary under his wife's plan when he required medical services.

On April 7, 2011, Aetna filed a Notice of Removal in the United States District Court for the Southern District of New York on the basis of federal question jurisdiction under 28 USC § 1331. NYU moved to remand, claiming that ERISA did not preempt NYU's state law claims. The District Court determined that co-defendant Huang had failed to consent to removal, and therefore the case had to be remanded to this court.

DISCUSSION

In arguing that the fourth cause of action for breach of contract and promissory estoppel against Aetna must be dismissed, Aetna avers that the complaint fails to state a cause of action against it because NYU's claim is preempted by ERISA's Section 502 and Section 514. In its motion to dismiss the fifth cause of action for negligent omission or representation, the PVH Plan argues that NYU does not have the capacity to sue it since NYU, as a health care provider attempting to recover benefits under a health insurance plan, failed to allege that it possesses an assignment of rights from Huang, the participant in

the health care plan, or her alleged beneficiary. Further, the PVH Plan suggests that even if the cause of action is recast as an ERISA claim for benefits, the cause of action must be dismissed for failure to exhaust the plan's administrative remedies. Finally, the PVH Plan argues that NYU has failed to plead any contractual or special relationship that gives rise to a duty owed by the PVH Plan to impart correct coverage information to NYU, and therefore, the negligent misrepresentation claim must be dismissed for insufficiency.

In opposition to both motions, NYU maintains that the state law claims are not preempted, characterizing the claims against the PVH Plan and Aetna as only tangentially referencing the employee benefits plan, rather than as a direct claim for benefits under the PVH Plan.

The central question with which this court is presented is whether a third-party health care provider can maintain an action under state law against entities that provide and administer health insurance for services rendered to an uninsured person, based on promises to pay, or whether the two state law claims are preempted by ERISA.

A. No Preemption of State Law Claims

ERISA applies to any employee benefit plan, provided that it is established or maintained by an employer or an employee organization engaged in commerce or in any industry or activity affecting commerce (29 USC § 1003 [a]). The federal statute

provides for the comprehensive federal regulation of employee benefits. ERISA imposes disclosure and reporting requirements, and establishes standards of conduct for employee benefit plans and their fiduciaries (*see Council of City of New York v Bloomberg*, 6 NY3d 380, 393 [2006]). NYU asserts that it is unnecessary to interpret ERISA since its state law claims are independent of the health plan offered by PVH.

The United States Congress has expressed its intent to occupy the field of employee benefit plans to the exclusion of the states (*Shaw v. Delta Airlines Inc.*, 463 US 85, 96-97 [1983]). The primary objective of ERISA is to protect the interests of employees in pension and welfare plans (*id.* at 90-91). ERISA's preemption clause is not, however, all encompassing. In *Shaw v Delta Air Lines, Inc.* (463 US 85, 100 [1983]), the Supreme Court stated that those state actions which affect employee benefits plans in "too tenuous, remote or peripheral a manner", do not relate to an ERISA-regulated plan.

The ERISA statute includes two relevant preemption provisions. Section 502 (a) (29 USC § 1132 [a]) provides an exclusive civil remedy for an employee plan participant or beneficiary[2] to "recover benefits due to him under the terms of

[2] A "participant" is defined as "any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization or whose beneficiaries may be eligible to receive such benefit" (29

the plan, to enforce his rights under the plan, or to clarify his right to future benefits under the terms of the plan." Section 502 is the only provision in ERISA that deals expressly with the question of federal jurisdiction. The provision gives federal courts complete jurisdiction over most ERISA actions.

Section 514 (a) (29 USC § 1144 [a]) states that federal ERISA law will supercede any state law "insofar as they may now or hereafter relate to any employee benefit plan." "Unlike the scope of Section 502, which is jurisdictional and creates a basis for removal, Section 514 (a) merely governs the law that will apply to state law claims, regardless of whether the case is brought in state or federal court" (*Pascack Valley Hosp., Inc. v Local 464A, UFCW Welfare Reimbursement Plan*, 388 F3d 393, 398 n4 [3d Cir 2004]).

The Supreme Court, in *Aetna Health Inc. v Davila* (542 US 200 [2004] [Davila]), set forth a two-part test for determining whether a state law claim is completely preempted by Section 502 (a). First, a state-law cause of action is completely preempted if "an individual, at some point in time, could have brought [the] claim under ERISA § 502 (a) (1) (B)"(*Davila*, 542 US at 210). Second, "where there is no independent legal duty that is implicated by a defendant's actions, then the individual's cause

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USC § 1002 [7]). A "beneficiary" is defined as "a person designated by a participant, or by the terms of the employee benefit plan, who is or may become entitled to a benefit thereunder" (29 USC § 1002 [8]).

of action is completely preempted by ERISA 502 (a) (1) (B)" and may be removed to federal court (*id.*).

Applying the two-part *Davila* test to the facts of this case, the court concludes that NYU's claims are not covered by the civil enforcement mechanism permitted under section 502 (a) (1) (B). A state-law cause of action is preempted only if both prongs of the *Davila* test are satisfied. In this case, the first prong of the *Davila* test is clearly not satisfied.

By its explicit terms, Section 502 (a) provides for preemption only in suits for benefits among ERISA entities (*see Pilot Life Ins. Co. v Dedeaux*, 481 US 41, 54 [1987] ["the policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA"]). Next, as codified in the civil enforcement provision of ERISA, only a plaintiff who is properly considered a participant or beneficiary of a plan has standing to sue under section 502 (a) (1) (B)(*see e.g. Caltagirone v N.Y. Community Bankcorp, Inc.*, 257 Fed Appx 470 [2d Cir 2007]; *Connecticut v Physicians Health Serv. of Connecticut, Inc.*, 287 F3d 110, 115 n4 [2d Cir 2002], *cert denied* 537 US 878 [2002]). The Second Circuit, however, has expanded the list of those who have standing to sue under Section 502 (a) (1) (B) to include "the

assignees of beneficiaries to an ERISA governed insurance plan..."(*I.V. Serv. of America, Inc. v Trustees of Am. Consulting Engr. Council Ins. Trust Fund*, 136 F3d 114, 117 n2 [2d Cir 1998]).

NYU is neither a participant, nor a plan beneficiary. Nor has NYU alleged that it received an assignment of Huang's claim. Without the specific assignment of rights by a participant or a beneficiary, NYU, as a third-party provider, lacks independent standing to sue in federal court under Section 502 (a) (1) (B) (*see Montefiore Medical Ctr. v Teamsters Local 272*, 2009 WL 378209, 2009 US Dist LEXIS 105832 [SD NY 2009], *affd* 642 F3d 321 [2d Cir 2011]). Because the court concludes that NYU has no standing in federal court, it follows that complete preemption does not exist. Thus, the federal court lacks removal jurisdiction over NYU's state law claims under ERISA section 502 (a) (1) (B). Accordingly, dismissal of the complaint on that basis is denied (*see Davila*, 542 US 200, *supra; see also NYU Hospitals Center-Tisch v Local 348 Health and Welfare Fund*, 2005 WL 53261, 2005 US Dist LEXIS 256 [SD NY 2005][since there was no showing of an assignment by the defendant fund, the court concluded that medical provider did not have standing to bring its claims under ERISA section 502 [a] [1] [B]]).

Moreover, Section 514 (a) does not apply to every state action that affects an employee benefits plan. In *New York State Conference of Blue Cross & Blue Shield Plans v Travelers*

Ins. Co. (514 US 645 [1995]) (Travelers), the Supreme Court narrowed the broad scope of the term "relates to" under Section 514 (a). The Court stated that the "starting presumption" is that Congress does not intend to supplant state law (*Travelers*, 514 US at 654]; *see also Metropolitan Life Ins. Co. v Massachusetts*, 471 US 724, 741 [1985]["The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive scope"]). The Court went on to describe the "relates to" language of the preemption statute as "unhelpful," and instructed that the court is instead to look "to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive" (*id.* at 656; *see also Gerosa v Savasta & Co.*, 329 F3d 317, 323 [2d Cir 2003], *cert denied* 540 US 967 [2003]). *Travelers* noted that, in light of the objectives of ERISA and its preemption clause, Congress intended to preempt "state laws providing alternative enforcement mechanisms" for employees to obtain ERISA plan benefits (*id.* at 658).

Similarly, in *Aetna Life Ins. Co. v Borges* (869 F2d 142, 145-147 [2d Cir 1989], *cert denied* 493 US 811 [1989]), the United States Court of Appeals for the Second Circuit reviewed precedent on ERISA preemption of state law and found that,

> "[L]aws that have been ruled preempted are those that provide an alternative cause of action to employees

> to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee. Those that have not been preempted are laws of general application - often traditional exercises of state power or regulatory authority - whose effect on ERISA plans is incidental."

Aetna Life Ins. Co. v Borges, 869 F2d at 146.

Since there is no Second Circuit authority discussing ERISA preemption issues involving the claims of a third-party health care provider, the court looks to analogous cases involving the application of ERISA's preemption provision. A plurality of circuits have held that a medical service provider that provides medical services to a plan participant, after receiving assurances of coverage from the plan, has an independent state law claim which it can pursue for damages, even though the participant, in fact, was not eligible for benefits and a similar state law claim by the participant would be preempted by ERISA (*see In Home Health, Inc. v Prudential Ins. Co. of Am.*, 101 F3d 600 [8th Cir 1996][finding that claim by medical provider against plan administrator for negligent misrepresentation is not preempted]; *The Meadows v Employers Health Ins.*, 47 F3d 1006 [9th Cir 1995][finding that state claims for misrepresentation and estoppel against insurer were not preempted]; *Lordmann Enter., Inc. v Equicor, Inc.*, 32 F3d 1529 [11th Cir 1994], *cert denied* 516 US 930 [1995] [holding that claim by third-party health provider against plan administrator for negligent

misrepresentation is not preempted]; *Hospice of Metro Denver, Inc. v Group Health Ins. of Oklahoma, Inc.*, 944 F2d 752 [10th Cir 1991]; *cf. Cromwell v Equicor-Equitable HCA Corp.*, 944 F2d 1272 [6th Cir 1991], *cert denied* 505 US 1233 [1992]["it is not the label placed on a state law claim that determines whether it is preempted, but whether in essence such a claim is for the recovery of an ERISA plan benefit"]).[3]

In *Memorial Hospital System v Northbrook Life Ins. Co.* (904 F2d 236 [5th Cir 1990]), a case very much like this one and a decision that greatly influenced other Circuits Courts' reasoning on this issue, the Fifth Circuit disagreed with the defendants that misrepresentation of coverage claims should be preempted under Section 514 (a). The court observed that state law claims can be preempted if they feature two unifying characteristics. First, if the state law claims "address areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan," then the state law

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[3] Nonetheless, the Sixth Circuit went on to hold that a plan participant, in some circumstances, may have a federal common law estoppel claim available against an administrator who confirmed plan coverage (*see Kaniewski v Equitable Life Assur. Socy.*, 17 EBC [BNA] 1137 [6th Cir 1993]). The court also later attempted to clarify *Cromwell* by stating that the case did not hold that all misrepresentation claims are preempted by ERISA. It stated "The district court's description of *Cromwell* as holding that all misrepresentation claims are preempted by ERISA is ... inaccurate" (*Lion's Volunteer Blind Indus., Inc. v Automated Group Admin., Inc.*, 195 F3d 803, 808 [6th Cir 1999]).

claim will be preempted (*id.* at 245). Next, if the claims "directly affect the relationship among the traditional ERISA entities - the employer, the plan and its fiduciaries, and the participants and beneficiaries," then ERISA will preempt them (*id.*). The court reasoned that Congress likely did not intend ERISA preemption to "shield welfare plan fiduciaries from the consequences of their acts toward non-ERISA health care providers when a cause of action based on such conduct would not relate to the terms or conditions of a welfare plan, nor affect - or affect only tangentially - the ongoing administration of a plan" (*id.* at 250).

In *Beth Israel Med. Ctr. v Sciuto* (1993 WL 258636, 1993 US Dist LEXIS 9145 [SD NY 1993]),the hospital commenced an action in state court against a union's benefits plan based on state common law claims of breach of implied contract, negligent misrepresentation and estoppel. The hospital's claims rested solely on defendant's alleged misrepresentation of coverage and the cost of services provided in reliance upon that misrepresentation. Defendant removed the case to federal court, and the hospital sought to remand the case to state court. The federal court held that the state law claims advanced in plaintiff's complaint "do not come within any of the categories of laws that have been found to 'relate to' ERISA plans, and accordingly, to be encompassed by the statute's preemptive sweep" (*Beth Israel*, 1993 WL 258636,*2, 1993 US Dist LEXIS 9145,

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*7). The court ruled that the hospital was bringing its claims as a "health care provider asserting a non-derivative right to restitution for services provided to a non-member of Defendant's plan as a result of the specific action of Defendant's agents" (*id.*). Additionally, the court held that the state law claims did not refer specifically to ERISA, and, instead, rested on the state's laws of general application. Defendant's argument that preemption of these state law claims would further the goal of Section 514 (a) were unconvincing to the court. The court stated,

> "Rather than work to the detriment of beneficiaries of ERISA plans, holding plan administrators accountable to health care providers for the accuracy of their pre-certifications of coverage would serve the overall purpose of ERISA, which is to protect the interests of beneficiaries of employee benefits plan, by encouraging health care providers to render services without requiring pre-payment of bills or insisting on cumbersome and costly administrative procedures to verify the coverage or the extent of coverage of the person seeking medical care."
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> * * *
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> "To interpret ERISA to preclude state common law claims asserted against an ERISA plan by a health care provider would extend the statute's reach into a relationship beyond its central regulatory concern ... The statute ... represents an allocation of responsibilities ... among the principal ERISA entities - the employer, the plan, the beneficiaries, and the plan fiduciary - but does not purport to allocate ... responsibilities in local commercial transactions between the plan fiduciary and a third-party, such as a health care provider."

Beth Israel, 1993 WL 258636 [SD NY 1993],*4, 1993 US Dist LEXIS

9145, *11-13 (internal citations omitted); *see also Knickerbocker Dialysis v Trueblue, Inc.*, 582 F Supp 2d 364 (ED NY 2008) (medical provider's breach of contract claim did not affect the benefits structure, administration of the ERISA-regulated plan, or type of services offered under the plan).

Thus, based on these principles and the facts of this case, the court rejects defendants' arguments that this case falls within the scope of Section 514 (a) preemption. Any relationship between NYU's claims and the regulation, or administration of an ERISA-regulated plan, is too remote and tenuous to trigger preemption (*see Plumbing Indus. Bd., Plumbing Local Union No. 1 v E.W. Howell Co., Inc.*, 126 F3d 61, 68 [2d Cir 1997] [state law "will not be preempted simply because it contains a passing mention of or allusion to ERISA — a reference justifies preemption only if the challenged [law] affects ERISA plans in a practical way"). The central issue in this case is not Huang's and Liang's right to receive benefits under the plan.

Moreover, a state law claim which does not affect the relationships between the principal ERISA entities is not preempted by ERISA (*see e.g. Knickerbocker Dialysis v Trueblue, Inc.*, 582 F Supp 2d 364, *supra*). NYU is not an ERISA entity merely because it agreed to become part of Aetna's network of providers. In a situation where a non-eligible person has no coverage at all under an employee benefit plan, a third-party

medical provider's claims of negligent misrepresentation and breach of contract/promissory estoppel against an ERISA-regulated plan and its claims administrator cannot relate to the plan, because the patient, and therefore the medical provider, has no connection to the plan beyond the alleged misrepresentation and promises made by defendants. Finally, the court notes that preemption in this case fails to achieve any of the objectives Congress sought to address by enacting ERISA (Memorial Hospital System v. Northbrook Life Ins. Co., 209 F2d 236, 245 [5th Cir 1990]). Accordingly, the court concludes that NYU's claims for recovery against Aetna and the PVH Plan are not preempted by Section 514 (a) of ERISA, and that defendants are not entitled to dismissal of the complaint pursuant to CPLR 3211 (a) (3).

B. Sufficiency of Causes of Action

1. Fourth Cause of Action: Breach of Contract and Promissory Estoppel Against Aetna

To state a cause of action for breach of contract, NYU's fourth cause of action against Aetna, the allegations must include: (1) the making of an agreement, (2) performance by one party, (3) breach by the other party, and (4) resulting damages (*See Volt Delta Resources LLC v Soleo Communications Inc.*, 11 Misc 3d 1071 [A], 2006 NY Slip Op 50497[U] [Sup Ct, NY County 2006], citing *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The essential terms of the parties' purported contract,

including the specific provisions of the contract upon which liability is predicated, must be alleged" (*Volt Delta Resources LLC v Soleo Communications Inc.*, *supra*, citing *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]; *see also Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 234 [1st Dept 1994]).

In order to state a viable cause of action for promissory estoppel, the following elements must be alleged: (1) a promise that is sufficiently clear and unambiguous, (2) reasonable reliance on the promise by a party, and (3) injury caused by the reliance (*New York City Health & Hosps. Corp. v St. Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]).

Here, the complaint sets forth allegations that Aetna and NYU had a Hospital Services Agreement, and that Aetna failed to honor its obligations under the contract. Specifically, the complaint alleges that on February 18, 2009, Aetna stated to NYU that Liang was entitled to health care benefits for the services provided. Aetna pre-certified the patient's admission. Relying on the alleged representations made by Aetna, NYU admitted the patient. In reliance of continued authorizations from Aetna, NYU continued to provide services. Aetna initially paid for services provided to the patient under the parties' contract, and then recouped its payment of $76,923.25, alleging that the patient was not entitled to health care benefits from Aetna. NYU's contract with Aetna does not allegedly permit Aetna to

recoup its payment under the circumstances. As a result of Aetna's recoupment, NYU suffered money damages. Under these set of facts, NYU has satisfied the liberal pleading requirements for a breach of contract cause of action.

Where a party alleges that an insurer or its agent promised payment of claims to a provider, the promise stands independently, and can support an action to collect the promised funds (*id.* at 491). As such, NYU has satisfied the elements for its promissory estoppel claim, because Aetna allegedly made a promise to pay for services to Liang, and in reliance upon that promise to pay, the hospital admitted Liang. However, this does not end the court's analysis, because these allegations essentially repeat the allegations related to the breach of contract cause of action. In support of their promissory estoppel claim, NYU may only set forth allegations that are not subsumed in their claim for breach of contract (*see Celle v Barclays Bank, P.L.C.*, 48 AD3d 301, 302 [1st Dept 2008]). Therefore, to the extent that NYU's promissory estoppel claim relies on the Hospital Services Agreement between the parties, and is duplicative of its breach of contract claim, the promissory estoppel claim is dismissed against Aetna (*see Englehard Corp. v Research Corp.*, 268 AD2d 358 [1st Dept 2000]).

2. Fifth Cause of Action: Negligent Misrepresentation and/or Omission by the PVH Plan

NYU bases its claim of negligent misrepresentation and/or

omission on allegations that the PVH Plan "negligently omitted to inform Aetna that the patient's coverage [under the PVH Plan] was to terminate as of January 1, 2009" and that the plan misrepresented the insurability of Liang through Aetna (*see* Complaint ¶¶ 43, 47-48).

Liability in negligence may rest on some form of written misrepresentation or non-disclosure on the part of a defendant by which plaintiff or a third party is misled, resulting in injury or damage to plaintiff *(see International Prods. Co. v Erie R. R. Co.*, 244 NY 331, 338 [1927]).

> "Liability in such cases arises only where there is a duty . . . to give the correct information . . . There must be knowledge or its equivalent that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that if false or erroneous he will because of it be injured in person or property. Finally, the relationship of the parties ... must be such that ... the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."

(id at 338).

Under New York law, a cause of action for negligent misrepresentation, which has produced only economic injury, "requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity" (*Ossining Union Free School Dist. v Anderson LaRocca Anderson*, 73 NY2d 417, 419 [1989]). NYU and the PVH Plan did not enter into any contractual arrangement with each other. Both entities

contracted instead, with Aetna. The PVH Plan contends that the complaint does not set forth facts establishing a relationship with NYU constituting the functional equivalent of privity, and that therefore, no duty exists to NYU, including any duty based on a third-party beneficiary theory.

In those cases where there exists no privity of contract, the Court of Appeals has been "cautious" in extending liability to third parties, doing so in "carefully circumscribed" fashion and then only upon "clearly defined ... circumstances which bespeak a close relationship premised on knowing reliance" (*Parrott v Coopers & Lybrand, L.L.P.*, 95 NY2d 479, 483-484 [2000]; *Securities Investor Protection Corp. v BDO Seidman, L.P.*, 95 NY2d 702, 711 [2001]; *Credit Alliance Corp. v Andersen & Co.*, 65 NY2d 536, 551 [1985]). To minimize potentially "limitless liability," the Court of Appeals has crafted an analytical framework which requires that a third party establish: "(1) an awareness by the maker of the statement that it is to be used for a particular purpose; (2) reliance by a known party on the statement in furtherance of that purpose; and (3) some conduct by the maker of the statement linking it to the relying party and evincing its understanding of that reliance" (*Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 384 [1992]; *Credit Alliance Corp. v Arthur Andersen & Co.*, 65 NY2d at 551; *see also Sykes v RFD Third Ave. 1 Assoc., L.L.C.*, 15 NY3d 370 [2010]). It is significant to

note that in the commercial arena, "liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263-264 [1996]).

Guided by the "cautious" approach adopted by the Court of Appeals, the court agrees that NYU's allegations fail to establish that NYU's relationship with the PVH Plan amounts to the functional equivalent of privity (*see Parrott v. Coopers & Lybrand, L.L.P.*, 95 NY2d 479, 484 [2000]). There is nothing in the language of the complaint which supports a finding that a special or fiduciary relationship existed between the parties, a necessary element of the tort of negligent misrepresentation particularly in the commercial context (*see Fab Indus., Inc. v BNY Fin. Corp.* 252 AD2d 367 [1st Dept 1998]). NYU's claim as to negligent misrepresentation, therefore, is dismissed for failure to state a cause of action against the PVH Plan (*see Stafkings Health Care Sys., Inc. v Blue Cross and Blue Shield of Utica-Watertown, Inc.*, 221 AD2d 908 [4th Dept 1995]).

CONCLUSION

Because NYU is not seeking benefits under an employee benefits plan, its state law claims for negligent misrepresentation and breach of contract/promissory estoppel are

not preempted under ERISA, and the complaint will not be dismissed on that ground. However, the negligent misrepresentation claim against the PVH Plan is dismissed for failure to state a cause of action pursuant to CPLR 3211 (a) (7). Further, the promissory estoppel cause of action against Aetna is dismissed as duplicative of its breach of contract claim.

Accordingly, it is

ORDERED that defendant Phillips-Van Heusen Corp. shall serve a copy of this order, with notice of entry, on all parties within 20 days; and it is further

ORDERED that the motion of defendant, Phillips-Van Huesen Corporation, to dismiss the fifth cause of action complaint against it is granted, the cause of action is dismissed and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of defendant, Aetna Life Insurance Company, to dismiss the complaint against it is granted to the extent of dismissing that portion of the fourth cause of action which is based on promissory estoppel, and the motion is otherwise denied; and it is further

ORDERED that the action is severed and continued against

the defendants, Mei Rong Huang and Aetna Life Insurance Company; and it is further

ORDERED that defendants, Mei Rong Huang and Aetna Life Insurance Company, are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a discovery conference by separate order.

Dated: 1/11, **2012**

Doris Ling-Cohan, J.S.C.

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