

**Josephson v Oxford Health Ins., Inc.**

2012 NY Slip Op 32112(U)

July 31, 2012

Sup Ct, Nassau County

Docket Number: 0443/07

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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TRIAL/IAS, PART 1  
NASSAU COUNTY

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

INDEX No. 0443/07

Plaintiff,

MOTION DATE: June 11, 2012  
Motion Sequence # 002, 003

-against-

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

Defendants.

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The following papers read on this motion:

- Notice of Motion..... XX
- Affirmation in Opposition..... XXX
- Reply Affirmation..... XX
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion by plaintiff for leave to renew and reargue is **granted** to the extent that it is taken as further opposition to defendants' motion to dismiss the amended complaint. Defendants' motion to dismiss the amended complaint is **granted** in part and **denied** in part as discussed below.

Plaintiff Dr. Jordan Josephson is an ear, nose, and throat physician with a specialty in endoscopic sinus surgery. Defendant Oxford Health Insurance, Inc. provides a variety of

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health insurance plans. These plans include a “network” of health care providers, who perform services for a set fee, and partial reimbursement for services performed by a provider on an “out-of-network” basis. For out-of-network providers, the plans generally provide for reimbursement of 70 or 80% of the amount which Oxford determines is the usual, customary, and reasonable rate for the service.

Dr. Josephson frequently provides treatment for patients covered by Oxford plans on an out-of-network basis. Dr. Josephson alleges that Oxford has invited him to join their network on numerous occasions, but he has chosen to remain out-of-network. Dr. Josephson requests that patients covered by Oxford plans execute an assignment, assigning their rights under the policy to Dr. Josephson.

According to Dr. Josephson, many patients who have not responded to antibiotic therapy and allergy intervention require functional endoscopic sinus surgery. Following the sinus surgery, Dr. Josephson typically performs a procedure known as a “debridement” in order to ensure that the sinus cavity remains open.

Dr. Josephson alleges that beginning in the mid-1990's Oxford failed to reimburse him at usual and customary rates, and in some cases provided no reimbursement for his services. In particular, Oxford failed to reimburse Dr. Josephson for a great number of debridement procedures on the ground that they were not medically necessary. Dr. Josephson further alleges that Oxford employees have made remarks to his patients, disparaging his competence as a physician and encouraging the patients to seek treatment from other health care providers.

This action was commenced on January 9, 2007 by filing a summons with notice. A verified complaint was filed on June 12, 2007. The first cause of action is for breach of an express contract. Dr. Josephson alleges that he entered into a contract with Oxford whereby he would perform services covered by the Oxford plan and would be reimbursed at the usual and customary rates. Since the first cause of action is based upon an express contract between Oxford and Dr. Josephson, it is not dependent upon the patient's assignment.

Plaintiff's second cause of action is for breach of an implied-in-fact contract. The third cause of action is for breach of the implied covenant of good faith and fair dealing in the contract between Oxford and Dr. Josephson. The fourth cause of action is for unjust enrichment. The fifth cause of action is for tortious interference with Dr. Josephson's contracts and economic relations with his patients. The sixth cause of action is for

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misrepresentation on the theory that Oxford falsely represented that it intended to reimburse Dr. Josephson at usual and customary rates. The seventh cause of action is for violation of Insurance Law § 3224-a, the “Prompt Pay Law.” Plaintiff seeks both compensatory and punitive damages.

Defendants moved to dismiss the complaint based on the statute of limitations and failure to state a cause of action. By order dated October 26, 2011, the court denied the motion to dismiss the first cause of action for breach of an express contract. The court granted the motion to dismiss the second cause of action for breach of an implied-in-fact contract and the fourth cause of action for unjust enrichment on the ground that the existence of an express contract precluded recovery on these theories. The court dismissed the third cause of action for breach of the implied covenant of good faith and fair dealing on the ground that it was duplicative of plaintiff’s breach of contract claim. The court dismissed the fifth cause of action for tortious interference on the ground that plaintiff failed to allege that the interference was for the sole purpose of harming him. The court dismissed the sixth cause of action for misrepresentation on the ground that it related solely to a breach of contract. The court denied the motion to dismiss the seventh cause of action for violation of Insurance Law § 3224-a based on the statute of limitations on the ground that claims which accrued subsequent to January 9, 2004 were timely. Finally, the court dismissed plaintiff’s punitive damages claim. The court granted plaintiff leave to serve an amended complaint, upon submission of a proposed pleading.

Plaintiff moves for leave to renew and reargue the motion to dismiss to the extent that the court granted dismissal of the implied-in-fact contract, implied covenant of good faith and fair dealing, and the tortious interference claims. Simultaneously with the motion for leave to renew and reargue, plaintiff served an amended complaint, which asserts the same claims as the original pleading. Defendants move to dismiss the amended complaint for both statute of limitations and failure to state a cause of action. Although plaintiff’s motion for leave to renew and reargue is in a sense moot because of the filing of the amended complaint, the court will consider plaintiff’s submission as further opposition to defendants’ motion.

A party seeking to recover under a breach of contract theory must prove that a binding contract was made as to all essential terms (*Silber v New York Life Ins.*, 92 AD3d 436 [1<sup>st</sup> Dept 2012]). The basic elements of offer and acceptance determine whether there was an objective meeting of the minds sufficient to give rise to a binding and enforceable contract (Id). An agreement must have sufficiently definite terms, and the parties must express their

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assent to those terms (Id). If material terms have been left open, a contract will fail for indefiniteness, unless there is a reasonably certain basis for giving an appropriate remedy (*Pludeman v Northern Leasing Systems*, 87 AD3d 881 [1<sup>st</sup> Dept 2011]).

Dr. Josephson does not point to any language in the plan documents suggesting that Oxford made an offer to enter into a contract with out-of-network providers. Moreover, any contract to reimburse out-of-network providers at usual, customary, and reasonable rates would fail for indefiniteness (See also *Schoedinger v United Healthcare*, 557 F.3d 872 [8<sup>th</sup> Cir 2009]). In *Schoedinger*, the United States Court of Appeals affirmed a trial court finding of no contract between the out-of-network provider and the insurer and opined that a contract, independent of the assignment of the patient's insurance claim, would be preempted by the Employee Retirement Income Security Act.

The court notes that in previous litigation between the parties in Supreme Court, New York County, Dr. Josephson acknowledged that he had no express contract with Oxford (*Oxford v Josephson*, NY County Index No. 106655/04 [Scarpula., J. order of July 29, 2010 at 7]). Because of the doctrine of estoppel by inconsistent positions, plaintiff is estopped from taking a contrary position in this court. Defendants' motion to dismiss the amended complaint is **granted** to the extent of dismissing plaintiff's first cause of action for breach of an express contract for failure to state a cause of action.

An implied-in-fact contract requires an indication of a meeting of the minds manifested by the acts and conduct of the parties (*DG & A Management Services v Securities Indus Ass'n.*, 52 AD3d 922 [3d Dept 2008]). Oxford's conduct of undertaking to pay out-of-network providers at reasonable and customary rates does not indicate a meeting of the minds constituting an implied-in-fact contract. Moreover, such an implied-in-fact contract would be void for indefiniteness because there would not be a reasonably certain basis for enforcement. Accordingly, defendants' motion to dismiss the amended complaint is **granted** to the extent of dismissing plaintiff's second cause of action for breach of an implied-in-fact contract for failure to state a cause of action.

There is an implied and enforceable obligation of good faith and fair dealing on the part of both parties in all contracts. The implied obligation is in aid of and furtherance of other terms of the agreement of the parties. No obligation can be implied which would be inconsistent with other terms of the contractual relationship (*Horn v New York Times*, 100 NY2d 85, 92 [2003]). Since the court has held that Oxford does not have a contract with its out-of-network providers, there can be no implied covenant of good faith and fair dealing. Stated otherwise, Oxford has no obligation of good faith and fair dealing, aside from its

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obligation to compensate out-of-network providers at reasonable and customary rates. Defendant's motion to dismiss the amended complaint is **granted** to the extent of dismissing plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing for failure to state a cause of action.

An action for unjust enrichment is based upon an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned (*IDT Corp. v Morgan Stanley*, 12 NY3d 132, 142 [2009]). The court has determined that there is no actual agreement between Oxford and the out-of-network providers. However, to prevent injustice, an out-of-network provider who has not been paid at reasonable and customary rates may maintain an action for unjust enrichment. Defendants' motion to dismiss for failure to state a cause of action is **denied** as to plaintiff's fourth cause of action for unjust enrichment. However, plaintiff may recover only for medical services performed within six years of the commencement of the action.

The fifth cause of action alleges a claim for tortious interference with Dr. Josephson's contractual relationships with his patients. A patient may not pursue a breach of contract action against a physician, unless the doctor makes a specific promise to effect a cure or to accomplish some definite result (*Scalisi v NYU Medical Center*, 24 AD3d 145, 147 [1<sup>st</sup> Dept 2005]). Dr. Josephson does not allege that he ordinarily promises to effect a cure or to accomplish a definite result for his Oxford patients. Thus, plaintiff has not alleged a legally sufficient claim for tortious interference with contract. Defendants' motion to dismiss the fifth cause of action for failure to state a cause is **granted** to the extent of dismissing plaintiff's claim for tortious interference with contract.

The court interprets the fifth cause of action as also alleging tortious interference with prospective economic relations, i.e. plaintiff's expectation of continuing to earn fees by treating Oxford patients.

Where there has been no breach of an existing contract, but only interference with prospective economic relations, plaintiff must show "more culpable conduct," such as physical violence, fraud, abuse of process, or economic pressure (*Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004]). Persuasion alone is not sufficient (Id).

Reading the complaint liberally, plaintiff alleges that Oxford threatened not to pay claims in full unless the patients used another physician. Thus, plaintiff has alleged that Oxford engaged in wrongful conduct by applying economic pressure directed toward Dr. Josephson's

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patients. Defendant's motion to dismiss for failure to state a cause of action plaintiff's fifth cause of action for tortious interference with prospective economic relations is **denied**.

The sixth cause of action purports to allege a claim for misrepresentation but alleges only that Oxford failed to reimburse Dr. Josephson at standard and customary rates. The misrepresentation claim is duplicative of plaintiff's claim for unjust enrichment or breach of contract (*LIUS Group v HFS International*, 92 AD3d 918 [2d Dept 2010]). Defendants' motion to dismiss the amended complaint is **granted** to the extent of dismissing the sixth cause of action for misrepresentation for failure to state a cause of action.

The seventh cause of action asserts a claim for violation of Insurance Law § 3224-a which establishes standards for prompt, fair, and equitable settlement of claims for health care and payments for health care services. For example, where there is a good faith dispute as to the amount of the claim, the insurer is required by the statute to pay any undisputed portion of the claim. Defendants move to dismiss this claim, arguing that a health care provider does not have a private right of action under Insurance Law § 3224-a because the Superintendent of Insurance has the exclusive right to enforce the statute. Whether a health care provider has standing to bring a private action under Insurance Law § 3224-a is an open question (See *Cheng v Oxford Health Plans*, 84 AD3d 673 [1<sup>st</sup> Dept 2011]). A health care provider may have a right to bring a private action in other circumstances, as where claims are paid late. However, there is no need to imply a private action where the health care provider has not been paid the usual and customary rates, because the provider has a claim for unjust enrichment. Defendants' motion to dismiss plaintiff's claim for violation of Insurance Law § 3224-a for failure to state a cause of action is **granted** on the grounds that it is duplicative of plaintiff's unjust enrichment claim.

So ordered.

Dated JUL 31 2012

  
J.S.C.

**ENTERED**

AUG 02 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE