

<b>Aetna Health Inc. v Rak</b>
2012 NY Slip Op 33795(U)
September 11, 2012
Supreme Court, New York County
Docket Number: 652819/2011
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Justice

PART 45

Aetra Health Inc.

INDEX NO. 652819/11

RAK Ramin, M.D., et al.

MOTION DATE

MOTION SEQ. NO. 003

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by defendant to vacate the TRO is denied for the attached Decision and Order which requires that the TRO shall lapse unless plaintiffs commence a new lawsuit seeking a preliminary injunction within 20 days.

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

Dated: Sept 11 2012

Signature of Justice

- 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 45

AETNA HEALTH INC. AND  
AETNA LIFE INSURANCE COMPANY,

Plaintiffs,

- against -

RAMIM RAK, M.D., NEUROLOGICAL SURGERY,  
P.C., JOHN DOES 1-10, AND ABC CORPORATIONS  
1-10.

Defendants.

Index No. 652819/2011

DECISION AND ORDER

Motion Sequence No. 003

**MELVIN L. SCHWEITZER, J.:**

In this breach of contract and tortious interference action brought by Aetna Health Inc., and Aetna Health Life Insurance Company (collectively "Aetna") against Ramim Rak, M.D. (Dr. Rak), Shuriz Hishmeh, M.D. (Dr. Hishmeh), Neurological Surgery, P.C. (NSPC) and LI Spine Center (Spine), Aetna seeks to permanently enjoin defendants from balance billing beneficiaries of Aetna health care plans for services already paid by Aetna pursuant to contracted rates; to have the court declare that defendants have no enforceable claim for these charges against plan beneficiaries; and to recover damages and reasonable attorney's fees for injuries Aetna suffered as a result of defendants' submission of health insurance claims to Aetna and its plan beneficiaries.

Aetna filed its complaint with an Order to Show Cause containing a Temporary Restraining Order (TRO) to temporarily enjoin and restrain Dr. Hishmeh and Spine (collectively the Hishmeh Entities) from balance billing any and all Aetna participants. The parties agreed to the entry of a TRO, and then the Hishmeh Entities agreed to a continuation of the TRO during negotiations to resolve the dispute.

The Hishmeh Entities now move to vacate the TRO on the grounds that Aetna “has not met and cannot meet their burden to establish any entitlement to continue. . . .” because Aetna “failed to provide any support to show that it would suffer irreparable injury absent the issuance of the TRO, failed to demonstrate that an award of monetary damages would not adequately compensate it for any alleged injury, and failed to demonstrate a likelihood of success on the merits.” The Hishmeh Entities also argue that the TRO is “contrary to the law as well as every industry trend, devoid of any legal basis, and . . . requires the commission of . . . a crime by the Hishmeh Entities.” Finally, the Hishmeh Entities argue that “there is no longer an underlying action or an action pending for a preliminary injunction” and “a TRO cannot exist without an underlying action. . . .”

For the reasons stated herein, the Hishmeh Entities’ motion to vacate the TRO is denied.

### **Background**

In 2008, Dr. Rak, a participating (in-network) provider of Aetna, entered into a Specialist Physician’s Agreement (SPA) with Aetna in which Dr. Rak specifically agreed to “permit rebundling to the primary procedure those services considered part of, incidental to, or inclusive of the primary procedure.” Dr. Rak also agreed that for HMO Plans, “[he] would hold members harmless and “in no event” would he “bill, charge, collect a deposit from, seek remuneration or reimbursement from, or have any recourse against a member”. . . and for non-HMO plans, he “would not pursue a member for non-covered services unless the member was advised in writing prior to the services being rendered that the specific services were not covered.” Finally, Dr. Rak agreed that he “would submit for prior approval by Company any coverage arrangements made with a non-participating specialist physician,” and require the non-participating specialist “to comply with applicable terms of [the SPA].” Aetna alleges that,

notwithstanding these agreements, by engaging in certain practices, Dr. Rak and Mr. Hishmeh conspired to breach the SPA.

Aetna alleges in its complaint that Dr. Rak, along with his professional corporation of neurosurgeons, NSPC and Dr. Hishmeh, a non-participating (out-of-network) provider, would conspire to have out-of-network providers brought in by in-network providers (often on the day of surgery) to provide treatment as co-surgeons or surgical assistants to patients, without the patients having a choice to decline the services. After treatment, these out-of-network providers allegedly would submit excessively high bills to Aetna, and then "threaten to balance bill Aetna's members on these excessively high amounts unless Aetna pays over and above the maximum allowable under the member's plan." A balance bill is "a bill sent by an [out-of-network] provider to a patient, which includes any acceptable deductible, co-insurance, and that amount of the provider's charges that exceeds the amount of benefit paid under the patient's plan." By balance billing, Aetna contends that "[in-network providers] are using their own patients as pawns in a plot to extort amounts from Aetna that far surpass any amounts that are legitimately owed to the providers." Aetna alleges that although it has properly paid for all services pursuant to the terms of the SPA, Dr. Rak and NSPC have threatened to balance bill Aetna members for excessive fees, including the specific amounts of \$425,555.53, \$373,330.92, and \$232,000.00.

Aetna also contends that Dr. Hishmeh has not advised Aetna members that he would be treating them as an out-of-network provider, the amount of the fees he intended to bill the members, or the potential obligation of members to pay excessively high balance bills. Dr. Hishmeh allegedly did not notify Aetna that he would act as co-surgeon, nor did he obtain any authorization to do so. Aetna contends that it is a breach of the SPA between Dr. Rak and

Aetna for Dr. Rak to have brought an out-of-network provider, such as Dr. Hishmeh, in on the procedures.

### **Procedural Posture**

As noted, along with its complaint, Aetna also filed an Order to Show Cause containing a TRO, which enjoined the defendants from balance billing Aetna participants pending a hearing and determination of the motion for a preliminary injunction. The Hishmeh Entities filed a motion with an Order to Show Cause seeking to sever the Hishmeh Entities as defendants in the action "to avoid inherent confusion" because "the obligations of co-defendants [Mr. Rak] and [NSPC], as in-network providers are entirely different than those of the Hishmeh Entities." The parties entered into a stipulation in March 2012 (March Stipulation), which severed the Hishmeh Entities as defendants from the action. The March Stipulation was signed but was not "So Ordered" by the court. The court required the parties to enter into a new stipulation in which the original-captioned action would be discontinued as against the Hishmeh Entities without prejudice.

The parties then entered into a new stipulation in May 2012 (May Stipulation). Under the May Stipulation, which was "So Ordered" by the court, the parties agreed to a 30-day standstill period commencing on May 20, 2012. During the standstill period, Aetna agreed not to commence a new action against the Hishmeh Entities so that the parties could continue negotiations to reach a resolution of the remaining issues. The Hishmeh Entities also agreed to a continuation of the TRO during the standstill period. If after the standstill period Aetna sought to commence any action against the Hishmeh Entities, Aetna was to notify the Hishmeh Entities, and if the Hishmeh Entities opposed the continuation of the TRO, the parties agreed to discuss the timing of an application so as to reach an agreed upon hearing date and the TRO was to

remain in place until that hearing date. In the event that the parties were unable to reach an agreement on any remaining issue, the May Stipulation provided that it was without prejudice to the Hishmeh Entities' right to be heard on the TRO.

Only the past billing disputes between Aetna and the Hishmeh Entities remain at issue. During the months of negotiations, Dr. Hishmeh agreed to begin providing written notice to Aetna members for future procedures, identifying himself as an out-of-network provider, indicating that the Aetna member will have financial responsibility for some or all of his fees, and identifying the procedure he intends to perform with the proposed fees included. Aetna has agreed to "voluntarily lift the TRO moving forward in instances where [Dr. Hishmeh] properly provides members with his [out-of-network] provider status and information concerning his fees and the member's liability thereon."

The parties have been unable to reach an agreement on a reconciliation of the historical claims and payments regarding past services between Aetna and the Hishmeh Entities. The Hishmeh Entities contend that "it is abundantly clear that the parties will be unable to reach an agreement on a reconciliation of the historical claims and payments between Aetna and the Hishmeh Entities." Accordingly, "Aetna seeks to temporarily restrain [Dr. Hishmeh] from balance billing Aetna members for [the] outrageous amounts regarding *past services* for which the members have no actual financial liability." The Hishmeh Entities, in turn, seek to vacate the TRO.

Aetna argues that the court should not vacate the TRO because the TRO does not injure the Hishmeh Entities and that Dr. Hishmeh only wants the TRO lifted so it can resume threats and "bully his way into a better bargaining position with Aetna." The Hishmeh Entities counter that the TRO must be vacated because the TRO enjoins them from balance billing their patients.

an act which is required of them under the law and is expressly acknowledged by Aetna as appropriate, even in situations where a patient may be unaware of the exact amount of the charges incurred.

### Discussion

CPLR 6301 states, in relevant part, that “[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.”

CPLR 6313 (a) states that “[i]f, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time. . . .”

A temporary restraining order may be granted when a movant demonstrates (1) a likelihood of success on the merits; (2) irreparable injury absent granting the preliminary injunction; and (3) a balancing of the equities in favor of injunctive relief” (*See W.T. Grant Co. v Sragi*, 52 NY2d 496, 517 (1981); CPLR 6301).

The Hishmeh entities argue that Aetna cannot meet its burden to establish an entitlement to continue the TRO under CPLR §6301 because it cannot establish irreparable harm. They contend that the entirety of Aetna's irreparable harm argument is premised on the theory that its members, Dr. Hishmeh's patients, would suffer severe distress, fear and consternation among other emotional maladies. The Hishmeh Entities also point out that Aetna's argument, which states that allowing Dr. Hishmeh to balance bill Aetna members inflated amounts would cause injury to Aetna, Aetna's members, and the relationship between Aetna and its members, is not valid because the only harm that could result from this action, if any, would be to Aetna's members, and not to Aetna. This argument fails.

The court has discretion to grant or deny a preliminary injunction. The Hishmeh Entities are correct that a preliminary injunction may only be granted if the plaintiff, Aetna (and not just Aetna's members), is irreparably harmed. However, in this exceptional situation, the court views Aetna and its members as existing in such an inextricably intertwined health care plan relationship that if Aetna's members are irreparably harmed as a result of being balance billed, Aetna also is irreparably harmed thereby. Aetna argues convincingly that its members are assured when they become Aetna's insureds that they will incur no greater financial responsibility than their nominal co-payment. As such, because the Hishmeh Entities allegedly have failed to inform Aetna's members - Dr. Hishmeh's patients - of excessive fees to which these patients may be subject, that if it comes to pass that they are confronted with exorbitant fees that they indeed were unaware of, their entire emotional and physical well-being is placed in severe jeopardy. Aetna then is placed in the position of attempting to protect its members from this extraordinary distress, and of suffering its own injury by being forced to make payments "which are not due and owing under the plans at issue." Regardless of whether Aetna chooses to

suffer such injury to protect its members, there is no doubt that Aetna itself is being irreparably harmed because its relationship of trust and confidence with its members undoubtedly will suffer severe disruption and injury in these circumstances.

As an insurance company, Aetna's business and personal relationships with its insureds is one of vital trust and confidence. To lift the TRO at this point undoubtedly would do great to harm Aetna's relationship with its insureds in a manner where money damages alone clearly would be an inadequate remedy to repair this harm. Thus, in the court's view, Aetna has met its burden of demonstrating that it will suffer irreparable injury and it has met this prong of the TRO requirements.

Next, the Hishmeh Entities argue that Aetna cannot establish a likelihood of success on the merits because Aetna's claims are based on a conspiracy cause of action alleged only upon information and belief. The Hishmeh Entities also contend that Aetna fails to articulate why it believes the "excessive fees" in question are unlawful and unreasonable. The Hishmeh Entities argue that Aetna must allege specifically that the contract would not have been breached but for the Hishmeh Entities conduct, and that to avoid dismissal of a tortious interference claim, Aetna must support its claim with more than mere speculation, which Aetna allegedly has not. This argument fails as well.

"In order to establish a cause of action for tortious interference with contractual relations, [plaintiff is] required to allege and prove: (1) the existence of a valid contract . . . ; (2) [defendants'] knowledge of that contract; (3) [defendants'] intentional procuring of the breach of that contract; and (4) damages. *Click Model Management, Inc. v Williams*, 167 AD2d 279 (1st Dept 1990), *appeal denied*, 77 NY2d 805 (1991); *see also Manhattan Center for Early Learning Inc. v New York Child Resources Center, Inc.*, 59 AD3d 365 (1st Dept 2009). Aetna

has supported its claims with more than mere speculation and has properly alleged its breach of contract and tortious interference with its contract with Dr. Rak by Dr. Hishmeh. Aetna has alleged that Dr. Rak breached the SPA by not obtaining prior approval to allow out-of-network specialists to use their services on Aetna's members, and by failing to obtain coverage from in-network providers or to ensure that out-of-network providers whose services Dr. Rak solicited would not bill Aetna's members. Aetna contends that despite Dr. Hishmeh's knowledge of the SPA between Aetna and Dr. Rak, he and other similar providers regularly assisted Dr. Rak on procedures performed on Aetna's members without disclosing their out-of-network status to these members. Aetna also has alleged that the Hishmeh Entities are interfering with Aetna and its members by threatening to balance bill Aetna's members for "excessive fees." Aetna has established a clear likelihood of success on the merits because Aetna has properly alleged that Dr. Rak breached the SPA, and Aetna has met the required elements to properly allege a claim of tortious interference.

Finally, under CPLR §6301, the Hishmeh Entities argue that "the balance of equities does not favor the entry of a [TRO] or preliminary injunction preventing Dr. Hishmeh from balance billing. The Hishmeh Entities contend that Aetna has offered no proof suggesting that its members were unaware of the amounts of Dr. Hishmeh's bills. The Hishmeh Entities also attempt to explain that because Aetna clearly states on its website that "Aetna members are specifically aware of their "out-of-network benefits and how reimbursement to "out-of-network" providers is calculated." Aetna's members were aware of the amounts of Dr. Hishmeh's bills. The Hishmeh Entities fail to acknowledge that even if Aetna's members were "specifically aware of their "out-of-network benefits and how reimbursement to "out-of-network" providers is calculated," Aetna members were not prepared to pay these bills because they were not aware

that Dr. Hishmeh (and other specialists) were out-of-network doctors. Furthermore, these members may not have been aware that Dr. Hishmeh would perform his services on them. Dr. Hishmeh admitted that "certain circumstances may [have existed] which could have impacted [my] ability to communicate specific information about [my] fee to the patient, such as where [I] was called in as a second surgeon at a time when the patient was already prepped for surgery." This provides further support that at least some of Aetna's members were unaware of the amounts of Dr. Hishmeh's bills.

In addition to the Hishmeh Entities' argument that there is no proof Aetna's members were unaware of the amounts of Dr. Hishmeh's bills, the Hishmeh Entities also argue that "the only purpose the continuation of the TRO could serve would be to benefit Aetna, and not its members." In response to Aetna's argument that Dr. Hishmeh has failed to claim that the TRO is causing him any type of harm, the Hishmeh Entities assert that "since Aetna's TRO prevents Dr. Hishmeh from seeking to collect over a million dollars said harm [is] self-evident." Under this reasoning, the Hishmeh Entities should clearly understand that it is just as self-evident that balance-billing patients "excessive amounts," of which they were unaware, and not prepared to pay, is all the more harmful to Aetna's members under the circumstances. As such, the continuation of the TRO also serves to benefit Aetna's members.

Furthermore, the TRO does not prevent Dr. Hishmeh from seeking to collect over a million dollars as the Hishmeh Entities have stated. The TRO only temporarily prevents Dr. Hishmeh from seeking to collect over a million dollars until there is a final resolution after full discovery, so that the status quo is preserved during the pendency of this action. The balancing of the equities also favors the continuation of the TRO because Dr. Hishmeh will not suffer hardship since he is not being permanently restricted from balance-billing the patients in

question. In contrast, as discussed above, Aetna (including Aetna's patients), would be irreparably harmed absent the continuation of the TRO. Thus, Aetna has met its burden to establish an entitlement to continue the TRO under CPLR §6301.

The Hishmeh Entities also argue that the entry of the TRO requires the commission of a crime by the Hishmeh Entities because they must be permitted to balance bill in all instances so as to avoid any potential criminal or civil exposure, which could exist absent balance billing. The court disagrees. In any event, under the TRO, the Hishmeh Entities are only temporarily prevented from balance billing for past services rendered to the specified patients in question until further court proceedings are conducted.

Finally, the Hishmeh Entities argue there is no longer an underlying action against them or a preliminary injunction hearing, and a TRO thus cannot exist without such an underlying action. They argue that, as a result, it thus is conceivable that the TRO may continue without any further hearing ever taking place, particularly because the Hishmeh Entities are no longer parties to this action. But, the Hishmeh Entities were well aware when they were severed as defendants in this action, but agreed nevertheless to the entry of the TRO, that Aetna only agreed voluntarily to sever the claims against the Hishmeh Entities from the causes of action asserted against Dr. Rak on the understanding that the TRO against the Hishmeh Entities would remain in effect unless or until a new action was commenced. Aetna now has the option of filing a new claim against the Hishmeh Entities where a new date for a full hearing regarding a preliminary injunction can be requested. Only if Aetna fails to do so, will the TRO lapse and, toward that end, the court herein now requires that Aetna must file a renewed action against the Hishmeh Entities seeking a preliminary injunction no later than twenty days following the entry of this

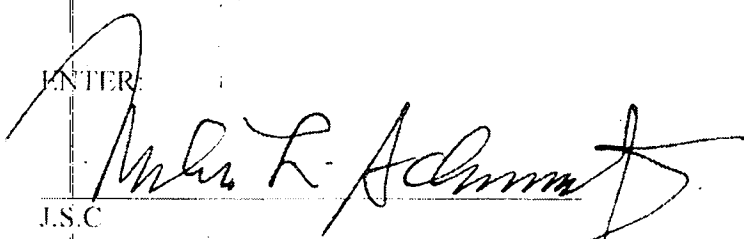
Decision and Order in order to keep this TRO in place. Aetna's failure to do so shall automatically render the TRO null and void.

Accordingly, it is

ORDERED that the Hishmeh Entities' motion to vacate the TRO is denied, subject to the terms of this Decision and Order regarding plaintiffs' recommencement of a lawsuit against the Hishmeh Entities.

Dated: September 11, 2012

ENTER:



J.S.C.

**MELVIN L. SCHWEITZER**  
J.S.C.