Custom Survey Group v Oxford Health Plans (NY), Inc.
2013 NY Slip Op 33557(U)
January 31, 2013
Supreme Court, Suffolk County
Docket Number: 32377/13
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORDER

INDEX No. 32377/13

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 12/17/13
ADJ. DATES 12/20/13
Mot. Seq. # 001 - MD
CDISP Y____ N xx

CUSTOM SURVEY GROUP, CATSKILLS SALES STATS, INC., PREFERRED MARKET DATA CORP., AMERICAN MONEY SERVICES, INC., and additional Plaintiffs listed on Exhibit 1 annexed hereto, Plaintiffs, -against- OXFORD HEALTH PLANS (NY), INC., UNITEDHEALTH GROUP INCORPORATED and UNITEDHEALTHCARE OF NEW YORK, INC., Defendants.	KENNETH L. ROBINSON, ESQ. Attys. For Plaintiffs 35 Roosevelt Ave. Syosset, NY 11791 SEDGWICK, LLP Attys. For Defendants 225 Liberty St. New York, NY 10281

Upon the following papers numbered 1 to 9 read on this motion by the plaintiffs for preliminary injunctive releif; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; 4; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 5-6; Replying Affidavits and supporting papers ____; Other 7-8 (memorandum); 9 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiffs for preliminary injunctive relief is considered under CPLR 6311 and is denied.

Plaintiff, American Money Services, Inc. "(ASMI"), is in the business of compiling, analyzing and marketing customer surveys generated by the remaining 73 plaintiffs (hereinafter "Employer Group Plaintiffs or EGP"), each of whom are solely owned by ASMI. These plaintiffs allegedly provide health insurance to their employees under a program endorsed by the State of New York known as the Healthy New York Program. Each plaintiff obtained such group health insurance after qualifying under the Program's "small employer group" provisions and by payment of an initial binder. The coverage afforded thereunder is available only to employees who qualify for the Program under its income and other standards and who pay monthly premiums. The defendants are participating providers in the plan and

the insurers of eligible EGP employees under contracts issued by such defendants and have been providing insurance to the employees thereunder (*see* Complaint attached as Exhibit A to moving papers ¶¶ 1-25).

At issue in this action[1] are notices of coverage cancellation via termination or non-renewal notices issued by the defendants on November 15, 2013, effective January 1, 2014 on seven grounds including, a failure on the part of the plaintiffs and their employees to qualify as eligible to participate in the Healthy New York Program. By their complaint, the plaintiffs demand a judicial declaration that they are eligible to participate in such program. In a second and separate cause of action, the plaintiffs demand permanent and preliminary injunctive relief restraining the defendants from terminating coverages and compelling them to issue new policies that are compliant with the new federal health insurance requirements imposed under the recently enacted Affordable Care Act (*see* 42 USC § 18021).

By the instant motion, the plaintiffs seek the following relief provisionally: 1) an order granting the plaintiffs their agents and others acting on their behalf "staying the December 31 2013 effective date of the termination and/or non-renewal of Group Health Insurance Contracts between the Plaintiffs and defendants and enjoining them from continuing to terminate or renew or non-renew, or taking any further action which would result in the termination or non-renewal fo the Contracts"; and 2) an order "transferring each Plaintiffs' Group Insurance Policy into a conforming plan and maintain the plan in effect after December 31 2013". The defendants oppose on several grounds including the lack of due proof of the existence of the three elements required for the issuance of either prohibitive or mandatory injunctive relief.

For the reasons stated below, the motion is denied.

By statutory fiat, "[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" (CPLR 6301). Appellate case authorities have long pronounced that to prevail on a motion for preliminary injunctive relief, the movant must make a preponderant demonstration of a likelihood of success on the merits, the prospect of irreparable harm or injury if the relief is withheld and that a balance of the equities favors the movant's position (*see* ***Nobu Next Door, LLC v Fine Arts Hous., Inc.***, 4 NY3d 839, 800 NYS2d 48 [2008]; ***Aetna Ins. Co. v Capasso***, 75 NY2d 860, 862, 552 NYS2d 918 [1990]; ***Greystone Staffing, Inc. v Warner***, 106 AD3d 954, 2013 WL 2228792 [2d Dept 2013]; ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, 886 NYS2d 41 [2d Dept 2009]; ***Pearlgreen Corp. v Yau Chi Chu***, 8 AD3d

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[1] This is a third action brought by the plaintiffs in connection with coverage termination notices issued by the defendants. The first was brought under Index No. 014664/2012, in Nassau County Supreme and was discontinued by order dated August 7, 2013 (Driscoll, J). Prior thereto, the plaintiff's application for a temporary restraining order and preliminary injunctive relief of the type sought here were denied by orders dated February 25, 2013 and July 19, 2013 (Driscoll, J.). The second action was commenced under Index No. 11264/2013 in this court and dismissed upon motion of the defendants that was granted pursuant to CPLR 3211 by order of this court dated October 10, 2013 (Whelan, J). Prior thereto, the plaintiffs obtained a temporary restraint and preliminary injunctive relief of the type sought here from other Justices of this court who were then assigned to the case.

460, 778 NYS2d 516 [2d Dept 2004]). The decision to grant a preliminary injunction is committed to the sound discretion of the court, as the remedy is considered to be a drastic one (*see* ***Doe v Axelrod***, 73 NY2d 748, 536 NYS2d 44 [1988]; ***Tatum v Newell Funding, LLC***, 63 AD3d 911, 880 NYS2d 542 [2d Dept 2009]; ***Bergen-Fine v Oil Heat Inst., Inc.***, 280 AD2d 504, 720 NYS2d 378 [2d Dept 2001]). Consequently, a clear legal right to relief, which is plain from facts presented that are generally undisputed, must be established (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, *supra*; ***Gagnon Bus Co., Inc. v Vallo Transp., Ltd.***, 13 AD3d 334, 786 NYS2d 107 [2d Dept 2004]; ***Blueberries Gourmet v Avis Realty***, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]). Recent appellate case authorities have instructed that each of the three elements must be established by "clear and convincing evidence" (***County of Suffolk v Givens***, 106 AD3d 943, 967 NYS2d 387 [2d Dept 2013]).

Under certain circumstances, the movant is entitled to a reduced degree of proof *with respect to the likelihood of success on the merits element* where a denial of the requested preliminary injunction would disturb the status quo and render the final judgment ineffectual *(see* ***Masjid Usman, Inc. v Beech 140, LLC***, 68 AD3d 942, 892 NYS2d 430 [2d Dept 2009]; ***North Fork Preserve, Inc. v Kaplan***, 31 AD3d 403, 819 NYS2d 53 [2d Dept 2006]). Cases in which this reduced standard are applicable have been limited to those involving Yellowstone injunctions (*see* ***Trump on the Ocean, LLC v Ash***, 81 AD3d 713, 916 NYS2d 177 [2d Dept 2011]) and those involving competing claims of corporate control and/or corporate ownership interests (*see* ***Datwani v Datwani***, 102 AD3d 616, 959 NYS2d 153 [1st Dept 2013]; ***North Fork Preserve, Inc. v Kaplan***, 31 AD3d 403, *supra*). However, the courts remain without authority to effectively re-write leases or other contracts existing between the parties via a preliminary injunction (*see* ***Trump on the Ocean, LLC v Ash***, 81 AD3d 713, *supra*).

Factors militating against the granting of preliminary injunctive relief include: 1) the absence of a jurisdictionally proper predicate claim for injunctive relief (*see* CPLR 6301; ***BSI, LLC v Toscano***, 70 AD3d 741, 896 NYS2d 102 [2d Dept 2010]); 2) that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Di Fabio v Omnipoint Communications, Inc.***, 66 AD3d 635, 636–637, 887 NYS2d 168 [2d Dept 2009]; ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]; ***Dana Distr., Inc. v Crown Imports, LLC,*** 48 AD3d 613, 853 NYS2d 111 [2d Dept 2008]; ***White Bay Enter. v Newsday, Inc.***, 258 AD2d 520, 685 NYS2d 257 [1999]); 3) that the granting of the requested injunctive relief would confer upon the plaintiff the ultimate relief requested in the action (*see* ***Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.,*** 65 AD3d 1051, *supra*; ***SHS Baisley, LLC v Res Land, Inc.***, 18 AD3d 727, 795 NYS2d 690 [2d Dept. 2005]); and 4) that the relief would disturb, rather than maintain the status quo, except where it is necessary to restore the status quo that was disturbed by action undertaken immediately prior to suit so as to prevent the dissipation of assets that could render the judgment ineffectual (*see* ***1650 Realty Assoc., LLC v Golden Touch***, 101 AD3d 1016, 956 NYS2d 178 [2d Dept 2012]).

A preliminary injunction is thus not a proper remedy where it appears that the movant can be fully recompensed by a monetary award or other adequate remedy at law (*see* ***Mar v Liquid Mgt. Partners, LLC***, 62 AD3d 762, 880 NYS2d 647 [2d Dept 2009]; ***Dana Distrib., Inc. v Crown Imports, LLC,*** 48 AD3d 613, *supra*). Nor is it appropriately issued where the irreparable harm claimed is remote or speculative or where it is economic in nature (*see* ***County of Suffolk v Givens***, 106 AD3d 943, *supra*; ***Rowland v Dushin,*** 82 AD3d 738, 917 NYS2d 702 [2d Dept ,2011]; ***Family-Friendly Media, Inc. v Recorder Tel. Network,*** 74AD3d738, 903 NYS2d 80 [2d Dept 2010]).

Here, the plaintiffs failed to satisfy their burden of establishing each of the elements necessary for the issuance of the preliminary injunctive relief demanded by them on this motion. An insufficient showing of a likelihood of success on the merits of their claims for declaratory and injunctive relief under the customary standard was advanced in the moving papers, as there was an absence of proof tending to demonstrate the plaintiffs' entitlement to perpetual eligibility as a qualified employer groups in the Healthy New York Program as it currently exists now, or after December 31, 2013 when the program's current policies terminate in favor of new ones that conform to the Affordable Care Act. As this court previously found "an insurer's right to cancel contracts of insurance are governed principally by the law of contracts and/or by the statutes and regulations governing the conduct of insurers with respect to cancellation as may be applicable (*see generally* ***Government Employees Ins. Co. v Allen***, 95 AD3d 1322, 944 NYS2d 761 [2d Dept 2012]; ***Security Mut. Life Ins. Co. of New York v Rodriguez***, 65 AD3d 1, 880 NYS2d 619 [1st Dept 2009]; *see also* 31 NY PRAC - NY Insurance Law § 11.8)." (*see* Order dated October 10, 2013 under Index No. 11264/13).

The plaintiffs' submissions failed to demonstrate that the defendants were without any bona fide legal right to cancel the coverages now afforded to the plaintiffs' employees due to the ineligibility of such plaintiffs under the Healthy New York Program or otherwise (*see generally* ***Lippman v Board of Educ. of the Sewanhaka Cent. High School Dist.***, 66 NY2d 313, 496 NYS2d 987 [1985]; ***Police Benev. Ass'n of New York State Troopers, Inc. v New York,*** 2012 WL 6020013 [N.D.N.Y. 2012]; ***Lawrence v Town of Irondequoit***, 246 F.Supp.2d 150 [W.D.N.Y. 2002]). A review of the record adduced on this motion reveals that the plaintiffs' claim to a perpetual right to insurance coverage from the defendants under the Healthy New York Program is not supported by a citation to any federal or state constitutional clause nor to any statute or contract between the plaintiffs and the defendants. The defendants are thus free to cancel by termination or non-renewal the policies it issued to the plaintiffs provided that any such cancellation comports with all applicable contractual and statutory requirements therefor. The record contains ample proof of the defendants' due and proper termination of the policies on the several grounds advanced in their notices of cancellation and/or non-renewal, including failures on the part of the plaintiffs and their employees to meet or maintain eligibility requirements imposed by the Healthy New York Program. It is devoid, however, of the requisite clear and convincing proof of a likelihood of success on the merits of the plaintiffs' demands for a declaration of their eligibility for continued participation in the Healthy New York Program or their entitlement to permanent injunctive relief precluding termination of their current or future policies.

Even if the court were to measure the plaintiffs' application under the less stringent standard accorded in cases wherein a denial of the preliminary injunctive relief sought would disturb the status quo and render any potentially favorable final judgment ineffectual, the plaintiffs' proof was inadequate. The plaintiffs' submissions failed to demonstrate that the defendants were without any bona fide legal right to cancel the coverages due to the ineligibility of such plaintiffs under the Healthy New York Program or otherwise or that the defendants' notices of cancellation and/or non-renewal were ineffective due to some failure to comport with applicable policy or statutory requirements therefor. The requisite showing of some likelihood of success on the merits of the plaintiffs' pleaded claims is thus lacking.

In addition, the plaintiffs' submissions contained insufficient proof of the remaining elements necessary for the issuance of preliminary injunctive relief. The irreparable harm element has been defined as "that which cannot be repaired, restored, or adequately compensated in money, or where the compensation cannot be safely measured (*see* ***McLaughlin, Piven, Vogel, Inc. v W.J. Nolan & Co.***, 114 AD2d 165, 498 NYS2d 146 [2nd Dept.1986]). Imminence is also required for a finding of irreparable

harm since harm that is remote or speculative does not qualify (*see* ***County of Suffolk v Givens***, 106 AD3d 943, *supra*; ***Family-Friendly Media, Inc. v Recorder Tel. Network,*** 74AD3d 738, *supra*). Any such irreparable harm must be shown to be more burdensome to the movant than that caused to the defendant if the injunction were granted (*see* ***Lombard v Station Sq. Inn Apts. Corp.***, 94 AD3d 717, 942 NYS2d 116 [2d Dept 2012]).

The element of irreparable harm is missing here for several reasons. Clearly, actionable conduct, if any, on the part of the defendants is fully compensable by an award of money damages under breach of contract theories. That such award is adequate is clear because coverages of the type provided by the defendants' policies are now available to all individuals under the federal Affordable Care Act. There is thus no loss that cannot be restored. Any increased costs associated with new insurance coverage is a mere economic harm which does not support the grant of preliminary injunctive relief. Issuance of the requested preliminary injunctive relief would thus cause greater harm to the defendants than any harm suffered by the plaintiffs in the absence of such relief. For these reasons and others apparent in the record, the court rejects as unmeritorious and non-controlling the trial court cases recited by the plaintiff in which it was held that a loss of medical insurance coverage provided employees or retirees under a collective bargaining agreement or under a vested benefits plan may constitute an irreparable harm that is not fully compensable by an award of money damages (*see e.g.* ***Matter of Sheriff Officers Assoc. Inc. v Nassau County***, 2012 NY Slip Op. 31617U [Sup. Ct. Nassau County 2012]; ***Freeport Police Benevolent Assoc. v Inc. Vil. Of Freeport,*** 2012 NY Slip Op. 31186U [Sup. Ct. Nassau County 2012]; ***International Union of Operating Engineers, Local No. 463 v City of Niagra Falls***, 191 Misc 2d 375, 743 NYS2d 236 [Sup. Ct. Niagra County 2002], *aff'd., sub nom.* ***Bathurst v City of Niagra Falls***, 298 AD2d 1010, 748 NYS2d 127 [4th Dept 2002]; ***Kimm v Blue Cross and Blue Shield of Greater New York***, 160 Misc2d 97, 608 NYS2d 385 [Sup. Ct. NY County 1993]).

Nor do the equities when weighed tip in favor of the position of the plaintiffs. This is evident from the absence of irreparable harm and the plaintiffs' failure to secure policies of insurance from other insurers participating in the Healthy New York Program or from non-participant insurers. The court thus finds that a the plaintiffs failed to establish an entitlement to any of the preliminary relief demanded on this motion.

In view of the foregoing, the instant motion (#001) by the plaintiffs for a preliminary injunction is denied.

Dated: December 31 2013

THOMAS F. WHELAN, J.S.C.