[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63
----------X

DR. KENNETH E. MCCULLOCH,
d/b/a MCCULLOCH ORTHOPAEDIC SURGICAL
SERVICES, PLLC,

Plaintiff,

Index No. 156064/14

-against-

UNITED HEALTHCARE INSURANCE COMPANY OF
NEW YORK, a/k/a THE EMPIRE PLAN
(PATIENT CAROL EVERETT),

Defendant.

----------X

Ellen M. Coin, J.:

In this action by a healthcare provider to recover benefits for services provided to an enrollee in a health insurance plan, defendant United Healthcare Insurance Company of New York (United)[1] moves to dismiss the complaint.

Plaintiff Dr. Kenneth E. McCulloch, d/b/a McCulloch Orthopaedic Surgical Services, PLLC, performed a surgical procedure on patient Carol Everett (Everett) on August 24, 2011. Everett was an enrollee of the Empire Plan at that time. United administers claims for New York State's Empire Plan.

Plaintiff claims that he contacted United before he performed the procedure to confirm Everett's enrollment, and to

[1]United claims that it is improper to sue it as United Healthcare Insurance Company of New York, a/k/a The Empire Plan, as was done here.

determine that his services would be covered at the "usual and customary benefit (UCB) rates" for out-of-network providers. Complaint, ¶ 4. He apparently billed United for $43,344, but only received $1,703.60. He claims that he was misled by United personnel to believe he would receive the UCB, and that he would not have performed the procedure had he known that he would not be covered. He brings a single cause of action for promissory estoppel.

United argues that the complaint fails to plead a cause of action, and is also barred by the two-year limitations provision for commencement of suits under the terms of the Empire Plan and New York State Insurance Law § 3221 (a) (14). In an attempt to avoid the contractual limitations period, plaintiff argues that the Empire Plan is a plan subject to the Employee Retirement Income Security Act of 1974 (29 USC §§ 1001 et seq.) (ERISA). He admits that under the provisions of ERISA, he has no cause of action for breach of contract under the Empire Plan, as an ERISA plan, and that he has not attempted to bring such a claim against the Empire Plan. He argues that "[s]ince plaintiff has no rights under the Plan, the Plan is not controlling" on his claim against United, "and cannot constitute 'documentary evidence' for purposes of this case." Complaint, ¶ 4. He argues that he is confined to a cause of action for promissory estoppel against United, which is not barred by the terms of the Empire Plan.

Plaintiff is mistaken. The Empire Plan is not subject to ERISA. *See Weisenthal v United Health Care Ins. Co. of N.Y.*, 2007 WL 4292039 *1, 2007 US Dist LEXIS 91447 (SD NY 2007). It is a governmental plan which is exempt from ERISA, under ERISA §§ 1003 (b) (1) and 1002 (32). Therefore, plaintiff is suing under the terms of the Empire Plan, as administered by United, and the terms of the Empire Plan do apply to plaintiff's action, including the contractual limitations period.

Without determining whether the complaint states a cause of action, I am granting the motion to dismiss.

In styling his action as one based only on promissory estoppel, plaintiff is attempting to circumvent the statute of limitations for breach of contract. "The key to determining whether a claim is duplicative of [another] is discerning the essence of each claim." *Johnson v Proskauer Rose, LLP*, 2015 WL 1932165 *5, 2015 NY App Div LEXIS 3592, *15-16 (1st Dept 2015). A duplicative claim cannot be used to avoid a shorter statute of limitations. *Hsu v Liu & Shields LLP*, 127 AD3d 522, 522 (1st Dept 2015).

The promissory estoppel cause of action is duplicative of a breach of contract claim against United, as it is based on the same allegations as would a contract claim. *See NYU Hospitals Center v Huang*, 2012 WL 251551, 2012 NY Misc LEXIS 209 (Sup Ct, NY County 2012). Therefore, the question is whether the

complaint is barred by the statute of limitations contained in the parties' contract.

The claim is barred by the applicable time limit for commencement of suit under the Empire Plan provisions, which is two years following the date of receipt of written notice that benefits have been denied. This limitations period is also contained in New York Insurance Law § 3221 (a) (14). The parties to a contract may provide for a shorter period of limitations than that provided in CPLR Article 2. CPLR 201; *see CAB Assoc. v City of New York*, 32 AD3d 229, 232 (1st Dept 2006).

As per the Insurance Law, the Empire Plan limitations period begins at the time a claimant is required to file proof in support of the claim. Plaintiff alleges that he performed the medical service for Everett on August 16, 2011, and that he submitted his claim form to United on or around September 6, 2011. United sent its Explanation of Benefits on September 14, 2011. Thus, plaintiff had until September 14, 2013 to commence this action. However, here the complaint was not filed until June 20, 2014. Therefore, it is time-barred.

Accordingly, it is

ORDERED that the motion to dismiss the complaint brought by defendant United Healthcare Insurance Company of New York, s/h/a United Healthcare Insurance Company of New York, a/k/a The Empire Plan, is granted, and the complaint is dismissed, with costs and

disbursements to the defendant as taxed by the Clerk of the Court upon presentation of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: June 5, 2015

ENTER:

HON. ELLEN M. COIN
A.J.S.C.