

Head v Emblem Health
2016 NY Slip Op 31887(U)
October 4, 2016
Supreme Court, New York County
Docket Number: 161536/2014
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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MARGOT HEAD as Administratrix of
THE ESTATE OF WILLIAM HEAD WILLIAMS,
MARGOT HEAD, individually, and
WILLIAM HARRISON WILLIAMS,

Plaintiffs,

-against-

EMBLEM HEALTH, HEALTH INSURANCE
PLAN OF GREATER NEW YORK, and
VALUE OPTIONS

Defendants.
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Index No. 161536/2014

**Decision, Order, and
Judgment**

JOAN B. LOBIS, J.S.C.:

This motion, sequence 002, arises out of defendants' alleged failure to approve coverage for decedent's detoxification treatment. In motion sequence 001, this Court granted defendants' motion to dismiss several causes of action but granted plaintiffs leave to replead their causes of action for fraud against all defendants, bad faith breach of insurance contract against defendants Emblem and HIP, and punitive damages against defendants Emblem and HIP. Following plaintiffs' amended complaint, defendants now move for an order dismissing the individual defendants, decedent's parents, for lack of standing. Defendants also move to dismiss the causes of action for fraud and bad faith breach of insurance contract. Defendants concede that

plaintiffs may seek punitive damages¹. For the reasons stated below, the motion is granted. The Court incorporates the underlying facts from its decision on motion sequence 001 by reference.

Defendants argue that the fraud claims in plaintiffs' amended complaint are duplicative of the breach of contract claim and thus fail to state a cause of action. Defendants state that plaintiffs' reliance on the Attorney General's investigation of Emblem and ValueOptions to rectify defects in the original complaint is insufficient to establish a cause of action for fraud. They state that plaintiffs fail to identify a misrepresentation made to decedent or to allege fraudulent intent. Additionally, they argue that New York does not recognize a separate cause of action for bad faith breach of insurance contract. Plaintiffs oppose the motion, arguing that their allegations of fraud are predicated on defendants' failure to engage in proper utilization review, which they assert the First Department has already determined to be a viable basis for fraud. They cite to Batas v. Prudential Ins. Co. of Am., 281 A.D. 2d 260 (1st Dep't 2001), for this proposition and to demonstrate that they are not required to set forth with particularity the materials they relied on at the pleading stage. Plaintiffs state that defendants misrepresented their intention to deny care, interfere with appeal rights, not properly notify individuals of denials, and exact illegally greater copays. They contend that defendants made misrepresentations to decedent through direct communications including the policy, plan documents, utilization review documents, and Explanation of Benefits. Further, they argue, they created a reasonable inference of the alleged fraud. They state that defendants made misrepresentations to the decedent which induced his reliance through communications about the policy, utilization review decisions, and explanations

¹ In their motion defendants sought dismissal of the eighth cause of action in the amended complaint, for punitive damages, but in their reply papers clarify their position that it should proceed at this stage of the litigation.

of benefits as well as failure to communicate their scheme. They cite to Assurances of Discontinuance (AODs) between the Attorney General and Emblem and ValueOptions as further specification of the elements of fraud. Even if the Court dismisses the cause of action for fraud, they contend, the causes of action for bad faith breach of insurance contract and punitive damages should proceed. Plaintiffs assert that under New York Univ. v. Continental Ins. Co., 87 N.Y.2d 308, 662 N.E.2d 763 (1994), bad faith breach of insurance contract claims are available when plaintiffs assert an independent tort or conduct that both violates the contract and endangers the insureds. In reply defendants contend that plaintiffs misinterpret Batas. They state that there, the Court determined that plaintiffs' fraud claim was not duplicative of their cause of action for breach of contract where plaintiffs' cause of action for fraud was "based on defendants' alleged misrepresentation of facts in materials used to induce potential subscribers to obtain defendants' health policies." Batas at 261. Thus, defendants argue, in that case plaintiffs alleged additional misrepresentations not contained in the contract itself.

In considering a motion to dismiss, the Court accepts all facts alleged in the pleading and in opposition to the motion to dismiss as true. E.g., ABN AMRO Bank, N.V. v. MBIA Inc., 17 N.Y.3d 208, 227 (2011). To make out a cause of action for fraud, plaintiff must demonstrate that defendant materially misrepresented a fact, that defendant knew the falsity of the fact, that defendant intended to induce reliance through the misrepresentation, that plaintiff justifiably relied on the misrepresentation, and that plaintiff incurred damages as a result of the reliance. See Nicosia v. Bd. of Mgrs. of the Weber House Condo., 77 A.D.3d 455, 456 (1st Dep't 2010). Under CPLR § 3016 (b), plaintiff must plead the elements in detail. In motion sequence 001, this Court found that plaintiffs did not allege fraudulent intent with enough specificity to

satisfy their burden. Accepting all facts alleged by the plaintiffs as true, the amended complaint still does not remedy this problem. Plaintiffs' allegations that defendants withheld information from its customers and knew that they would not provide medically necessary treatment, without more, does not show that defendants intended to deny medically necessary treatment. Plaintiffs rely on findings by the Attorney General which do set forth a laundry list of bad practices by Emblem and ValueOptions but do not amount to a misrepresentation to decedent. Moreover, plaintiffs do not allege damages separate from those alleged in their breach of contract claim.

The Court in Batas, which plaintiffs cite to, did not state that an allegation of failure to properly conduct utilization review alone is a viable basis for fraud. As defendants point out, the plaintiffs in Batas alleged additional misrepresentations that do not stem from the contract itself. In motion sequence 001 this Court dismissed plaintiffs cause of action for bad faith breach of insurance contract subject to reinstatement if plaintiffs successfully replead fraud on decedent's behalf. As plaintiffs did not successfully replead fraud, the issue is moot.² The Court has already determined that the individual plaintiffs lack standing and therefore defendants' arguments here are unnecessary, however, to reflect their dismissal the caption should be amended. The Court has considered the rest of the parties' arguments and they do not change the outcome.

Accordingly, it is

² Moreover, the issue of whether New York recognizes a separate claim for bad faith breach of insurance contract was not litigated in motion sequence 001. As defendants point out in this motion, the cause of action is not recognized and must be dismissed regardless of whether plaintiffs successfully replead fraud. See Zawahir v. Berskire Life Ins. Co., 22 A.D.3d 841 (2d Dep't 2005). Contrary to plaintiffs' assertion, the Court in New York Univ. did not address the viability of a claim for bad faith breach of insurance contract under New York law, but rather discussed situations in which punitive damages may be sought in connection with a breach of contract claim.

ORDERED that defendants' motion is granted; and it is further

ORDERED that the parties are directed to appear for a compliance conference on November 29, 2016 at 9:30 AM at 60 Centre Street, Room 345, New York, New York 10007.

ORDERED that the caption is amended to read as follows:

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MARGOT HEAD as Administratrix of
THE ESTATE OF WILLIAM HEAD WILLIAMS,

Plaintiff,

-against-

EMBLEM HEALTH, HEALTH INSURANCE
PLAN OF GREATER NEW YORK, and
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Defendants.
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All further papers shall use this caption, and the Clerk is directed to amend the caption accordingly.

The Clerk is directed to enter judgment accordingly.

Dated: *Oct. 4*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.