

Fuchs v Gallagher Bassett Servs. Inc.

2019 NY Slip Op 31978(U)

July 10, 2019

Supreme Court, New York County

Docket Number: 155545/2018

Judge: William Franc Perry

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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CHRISTOPHER FUCHS,

Plaintiff,

- v -

GALLAGHER BASSETT SERVICES INC., AMERICAN ZURICH
INSURANCE COMPANY, SUZANNE SLATE,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17

were read on this motion to/for

DISMISSAL

This case presents the question of whether a plaintiff who is injured on the job can pursue direct claims against his workers' compensation insurance carrier, the carrier's claims administrator, and the administrator's employee. Plaintiff claims Defendants refused to provide him with an authorization to see an out of state physician in an effort to delay Plaintiff's medical treatment and to preclude Plaintiff from receiving temporary disability benefits. Defendants have moved to dismiss Plaintiff's breach of contract and intentional tort claims on the grounds that such claims are barred under the workers' compensation law and for a failure to state a cause of action. The Court finds that Plaintiff's causes of action must be dismissed.

BACKGROUND

The facts according to the complaint are as follows. On July 24, 2011, Christopher Fuchs ("Plaintiff") was at work operating a man lift approximately 25-30 feet in the air when his head became stuck between an I-beam and the raised bucket. Plaintiff remained wedged until his skull fractured, creating an opportunity for Plaintiff to kick the bucket out from underneath him and causing Plaintiff to fall to the ground. Plaintiff sustained a severe head injury and crushed skull,

thirteen broken teeth, jaw and facial fractures, a broken neck, vision loss, and hearing loss.

(Complaint, ¶¶ 7-10).

Plaintiff's claim was accepted by his employer's insurance carrier, defendant American Zurich Insurance Company (the "Carrier"), and was handled by the Carrier's claims administrator, defendant Gallagher Bassett, Inc. (the "Administrator"), and the Administrator's claims adjuster, defendant Suzanne Slate (the "Adjuster") (collectively, "Defendants"). In accord with the Workers' Compensation insurance contract with his employer, the Carrier paid Plaintiff's medical bills and total temporary disability benefits from July 25, 2011 through September 11, 2011. Plaintiff returned to work on or about September 12, 2011. Plaintiff was later transferred to North Carolina where he alleges he was unable to find a doctor and stopped receiving treatment for his work injuries. (Complaint, ¶¶ 10-17).

Between 2011 and 2016, Plaintiff worked for several employers. Each time, Plaintiff alleges his work injuries would interfere with his job and he would be forced to quit. Plaintiff left his last job on or about July 31, 2016. On December 16, 2016, Plaintiff requested that the Carrier restart temporary disability payments based on his alleged inability to work. However, since Plaintiff had not received any treatment for his injuries between when he moved to North Carolina in 2011 and December of 2016 and did not have a doctor's note indicating that he was unable to work, the Carrier denied Plaintiff's request. (Complaint, ¶¶ 18-32).

Eventually, Plaintiff moved to Colorado and, on February 8, 2017, Plaintiff sent a letter to the Administrator and the Adjuster requesting a prior authorization to receive medical treatment from a Colorado physician so that Plaintiff could obtain medical documentation to support his request that the Carrier restart his temporary disability benefits. On February 9, 2017, Plaintiff's counsel spoke with the Adjuster, who indicated that her file was closed since Plaintiff had not been

treating and that she would need current complaints before authorizing treatment. When the Adjuster failed to provide an authorization, on February 22, 2017, Plaintiff filed a request for a hearing before the Workers' Compensation Board seeking (1) reinstatement of temporary disability benefits and (2) an authorization to see a doctor in Colorado for treatment. On March 2, 2017, Plaintiff's request was denied based on the Colorado doctor's failure to submit a C-4AUTH or MG-2 form to the carrier. Plaintiff filed a second request for a hearing on March 2, 2017, which was also denied. Ultimately, Plaintiff's counsel was able to convince the Board that the requested forms were inappropriate and the Board scheduled a hearing on Plaintiff's requests. (Complaint, ¶¶ 45-52).

At the hearing on May 3, 2017, Plaintiff requested that (1) Defendants provide a treatment authorization letter to Plaintiff's proposed Colorado physician, Dr. Peter Syre, and (2) to amend his Workers' Compensation claim to include various fractures to his neck, back, face, nose, jaw, and teeth, a TBI, vision and memory loss, and consequential depression and post traumatic stress disorder. The judge ordered Defendants to provide a treatment authorization letter to Dr. Syre for the established cites of injury and set a future hearing date of July 10, 2017 for Plaintiff's request to amend his claim. (Complaint, ¶¶ 53-59).

At the hearing on July 10, 2017, the judge granted Plaintiff's request to amend his claim based on a finding that the Carrier had made prior medical payments regarding the body parts identified in the amended claim and, thus, the statute of limitations did not bar those claims. At the hearing, Plaintiff also sought an update from Defendants regarding an authorization letter for Dr. Syre to treat all of Plaintiff's injuries in his amended claim (Complaint, ¶¶ 60-63).

On August 8, 2017, Plaintiff again contacted the Adjuster and sent a letter requesting that Defendants send an authorization for treatment to Dr. Syre. On August, 11, 2017, Defendants

responded to Plaintiff's letter by filing an appeal of the July 2017 Decision granting Plaintiff's request to amend his Workers' Compensation claim. While the appeal was pending, Defendants eventually provided authorization for Plaintiff to treat at Dr. Syre's office. (Complaint, ¶¶ 64-69).

On September 21, 2017, Plaintiff attended the office of Dr. Syre where he was seen by a nurse practitioner. The nurse practitioner referred Plaintiff to a neurologist, an END, and a Pain Management doctor. However, since Plaintiff was only seen by a nurse practitioner, he did not obtain a doctor's opinion regarding whether he was temporarily disabled. Without a doctor's opinion regarding temporary disability, Plaintiff has to date been unable to convince Defendants or a judge to restart temporary disability payments. (Complaint, ¶¶ 70-75).

On June 12, 2018, Plaintiff commenced this action seeking damages from Defendants claiming their wrongful conduct prevented Plaintiff from obtaining temporary disability benefits. Plaintiff's Complaint contains five causes of action for: (1) bad faith failure to pay Workers' Compensation Benefits, against the Administrator and Carrier; (2) breach of the covenant of good faith and fair dealing, against the Administrator and Carrier; (3) intentional infliction of emotional distress against the Adjuster; and (4 & 5) two counts of breach of contract against the Carrier.

DISCUSSION

On a motion to dismiss under CPLR 3211(a), the complaint is to be liberally construed (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d,144, 151-152 [2002]). The court must "accept the facts as alleged in the complaint as true, accord [the] plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). Moreover, the plaintiffs are to be accorded the benefit of "every possible favorable inference" (*The 20 Pine St. Homeowners Assn. v 20 Pine St.*

LLC, 2012 N.Y. Slip Op. 31302[U] [Sup Ct New York Cnty 2012], *affd as mod sub nom.*, *Pine St. Homeowners Ass'n v 20 Pine St. LLC*, 2013 N.Y. Slip Op. 05962 [1st Dept 2013], quoting *511 W. 232nd Owners Corp.*, 98 NY2d at 152), although “bare legal conclusions” are not entitled to any such presumption or inference (*Delran v Prada USA Corp.*, 23 AD3d 308, 308 [1st Dept 2005] [citations omitted]).

Pursuant to CPLR 3211(a)(1), in order to prevail on a motion to dismiss based on documentary evidence, “the documents relied upon must definitively dispose of plaintiff’s claim” (*Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted “utterly refutes plaintiff’s factual allegations” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see also Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and “conclusively establishes a defense to the asserted claims as a matter of law” (*Weil, Gotshal & Manges, LLP, v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004] [internal quotation marks omitted]).

Concerning a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2010] [citation omitted]). The “question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts ‘can be fairly gathered from all the averments’” (*Foley v D’Agostino*, 21 AD2d 60, 65 [1st Dept 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). A “plaintiff may not be penalized for failure to make an evidentiary showing in support of a complaint that states a claim on its face” (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]).

I. Intentional Infliction Of Emotional Distress.

Defendants move to dismiss Plaintiff's claim for intentional infliction of emotional distress against the Administrator and the Adjuster for failure to state a cause of action. To state a cause of action for intentional infliction of emotional distress, Plaintiff must plead four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." (*Chanko v. American Broadcasting Cos. Inc.*, 27 N.Y.3d 46, 56 [2016], citing *Howell v New York Post Co.*, 81 N.Y.2d 115, 121 [1993])." Here, the Complaint alleges that Defendants unlawfully denied Plaintiff a letter of authorization to treat with a Colorado physician knowing that without a current medical record evidencing temporary disability, Plaintiff would be unable to obtain temporary disability benefits. The Complaint alleges that Defendants alleged with malice or in reckless disregard for Plaintiff's rights, and that Defendants conduct and the financial insecurity and the stress of not being able to get treatment caused Plaintiff extreme emotional harm resulting in stress, loss of sleep, and anxiety. (Complaint, ¶¶ 77-84).

Although Plaintiff's allegations touch upon all the required elements, they are not sufficient to support this claim because "they do not rise to the level necessary to satisfy the outrageousness element- the element most susceptible to a determination as a matter of law – which is designed to filter out petty complaints and assure that the emotional distress is genuine" (*Chango*, 27 N.Y.3d at 57 [citation omitted]). Plaintiff's allegation that Defendants repeatedly delayed in sending a proper letter authorizing Plaintiff to obtain medical treatment in Colorado to preclude Plaintiff from restarting his temporary disability benefits, even if true, is not so outrageous in character, and so extreme in degree, as to be considered utterly intolerable in a civilized community (*see Miloscia v B.R. Guest Holdings LLC*, 2010 N.Y. Slip Op. 33884[U] [Sup Ct New York County 2010]

[holding allegation that defendants falsified the date of plaintiff's termination of employment in order to deny him medical benefits that they knew he desperately needed was not so outrageous and extreme as to be utterly intolerable in a civilized community]; *see also Kirkup v American Intl. Adj. Co.*, 160 A.D.2d 676 [2d Dept 1990] [workers' compensation insurance carrier's denial of medical benefits insufficient to state claim for intentional infliction of emotional distress]).

Accordingly, Plaintiff's cause of action for intentional infliction of emotional distress is dismissed.

II. Breach of Contract.

The Carrier moves to dismiss Plaintiff's two claims for breach of the insurance contract on the ground that the claims are barred by the exclusivity provisions of the Workers' Compensation Law. "It is well settled that the Workers' Compensation Law is intended to be the exclusive remedy for work-related injury" (*Kirkup v Am. Intern. Adj. Co., Inc.*, 160 AD2d 676, 677 [2d Dept 1990], citing Workers' Compensation Law § 11). "A thorough system of regulation, administration and appropriate sanctions has been established" (*id.*). Where the plaintiff in an action seeks "damages for a work-related physical injury, that is, an injury or any aggravation thereof which is compensable under the law or for which a compensation claim was filed, the Workers' Compensation Law constitutes a bar to their action." (*Burlew v Am. Mut. Ins. Co.*, 99 AD2d 11, 14 [4th Dept 1984], *affd.*, 63 NY2d 412 [1984]). "[A] compensation carrier stands in the place of the employer and is subrogated to its rights and claims when the carrier performs its obligations under its insurance policy and pays the contractually provided for compensation benefits. It may avail itself of any defense possessed by its insured, the employer" (*id.* at 14). While intentional torts may not covered by the Workers' Compensation Law, Plaintiff's contentions that he did not receive authorization for necessary care and treatment and was improperly denied renewal of temporary disability benefits are clearly the subject of the

Workers' Compensation Law (*see Kirkup*, 160 A.D.2d at 677). Plaintiff's awareness that the Workers' Compensation Law provides the exclusive remedy for the Carrier's alleged improper denial of his request for treatment authorizations and temporary disability benefits is demonstrated by Plaintiff's repeated requests for hearings before the Workers' Compensation Board. Accordingly, Plaintiff's causes of action for breach of contract are dismissed.

III. Breach Of The Covenant Of Good Faith And Fair Dealing.

Defendants move to dismiss Plaintiff's claim for breach of the covenant of good faith and fair dealing as impermissibly duplicative of Plaintiff's cause of action for breach of contract. In order to state a claim for breach of the covenant of good faith and fair dealing, a plaintiff must show that the defendant acted in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under the agreement (*Avenline Inv. Mgt. v. Canadian Imperial Bank of Commerce*, 697 NYS2d 128 [2d Dept 1991]). However, such a claim is subject to dismissal where it is redundant of a breach of contract claim. (*see Acquista v New York Life Ins. Co.*, 285 AD2d 73, 85 [1st Dept 2001]; *Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260, 265 [1st Dept 2001]; *Canstar v J.A. Jones Const. Co.*, 212 AD2d 452, 453 [1st Dept 1995]).

Here, Plaintiff's claim for breach of the covenant of good faith and fair dealing is based on the same refusal to provide a letter of authorization and to restart temporary disability benefits by Defendants that forms the basis of Plaintiff's breach of contract claims. The alleged damages caused by Defendants in these claims is also the same. Accordingly, Plaintiff's claim for breach of the covenant of good faith and fair dealing must be dismissed.

IV. Bad Faith Failure To Pay Insurance Benefits.

Finally, Defendants move to dismiss Plaintiff's claim for bad-faith conduct in failing to pay temporary disability benefits on the grounds that the claim is not recognized under New York law. While this is not entirely true, the scope of such a claim, which is often pled as an intentional tort collateral to an insurance contract or a demand for punitive damages, is very limited. (*see Rocanova v Equit. Life Assur. Soc. of U.S.*, 83 NY2d 603, 615 [1994] ["A complaint does not state a claim for compensatory or punitive damages by alleging merely that the insurer engaged in a pattern of bad-faith conduct. The complaint must first state a claim of egregious tortious conduct directed at the insured claimant. Only then does an alleged pattern of bad-faith conduct attain legal significance insofar as it demonstrates that a public wrong would be vindicated by the award of punitive damages."]; *cf. DeMarco v Fed. Ins. Co.*, 99 AD2d 114, 115-16 [3d Dept 1984] ["Defendant's persistent, protracted refusal to make payments of authorized or ordered benefits, its dilatory tactics, harassment and arbitrary rejection of requests for authorization for treatment, refusing even to entertain consideration of the justification therefor, goes significantly beyond the kind of wrongful refusal by an insurer to pay benefits constituting only a breach of the insurance contract"]).

Here, Plaintiff concedes that he did not receive any medical treatment for his injuries between 2011 and 2016, and that he was not presently treating or in possession of a doctor's report to support his request for reinstatement of temporary disability benefits on December 16, 2016 (*cf. DeMarco v Fed. Ins. Co.*, 99 AD2d at 115 ["Plaintiffs' allegations describe a history of several years during which both plaintiffs' and defendant's examining physicians and psychiatrist unequivocally found a bona fide serious disc injury and that plaintiff's complaints were neither feigned nor psychosomatic. Despite such reports, defendant repeatedly refused to authorize the

surgery that both sets of experts unanimously recommended.”]). As for Plaintiff’s subsequent requests for a letter authorizing Plaintiff to obtain treatment from a Colorado physician, on June 19, 2017, the Administrator forwarded a letter to Dr. Syre authorizing treatment limited to Plaintiff’s established WC injury and, after Plaintiff was permitted to amend his claim, on August 2017, the Administrator forwarded Dr. Syre a second authorization consistent with Plaintiff’s amended claim. (NYSCEF Doc. No. 11; Complaint, ¶ 69). Plaintiff does not explain why he was unable to see a doctor instead of a nurse practitioner on September 21, 2018 after Defendants forwarded Dr. Syre the authorization letter or how Defendants interfered with his ability to obtain a hearing and order from the Workers’ Compensation Board reinstating his temporary disability benefits. Other than a delay in processing Plaintiff’s requests, which delay Plaintiff does not allege was directed at the public generally, Plaintiff does not allege any wrongful conduct by Defendants that can support a tort claim independent of a claim for breach of the insurance contract. Accordingly, Plaintiff’s claim for bad faith failure to reinstate his temporary disability benefits is dismissed. (*see Polidoro v Chubb Corp.*, 386 F Supp 2d 334, 338 [SDNY 2005] [refusing plaintiff physical therapy treatment after said treatment had been delivered for a period of time was no “egregious tortious conduct” that could support bad-faith conduct claim]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by Defendants Gallagher Bassett Services Inc., American Zurich Insurance Company, and Suzanne Slate to dismiss the Complaint is granted and the Complaint is dismissed in its entirety, without costs and disbursements; and it is further

ORDERED that the clerk of the court is directed to enter judgment accordingly.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

7/10/19
DATE

WFP
W. FRANC PERRY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: