

Karan Johar M.D. PLLC v Bluecross & Blueshield of Neb.
2020 NY Slip Op 33498(U)
October 23, 2020
Supreme Court, New York County
Docket Number: 652771/2020
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

-----X

KARAN JOHAR M.D. PLLC,

Plaintiff,

- v -

BLUECROSS AND BLUESHIELD OF NEBRASKA,
WERNER ENTERPRISES INC., HEATHER STAFFORD,
PAUL STAFFORD

Defendant.

-----X

INDEX NO. 652771/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 28, 30, 31, 34, 35

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 29, 32, 33

were read on this motion to/for DISMISSAL.

Motion Sequence Numbers 001 and 002 are consolidated for disposition.

The motion (MS001) by defendant Blue Cross and Blue Shield of Nebraska (“BCBS”) to dismiss is granted. The motion (MS002) by defendant Werner Enterprises Inc. (“Werner”) to dismiss is granted.

Background

In this action for promissory estoppel, plaintiff (the doctor) claims that BCBS (the insurer) failed to pay anything to plaintiff for medical services he rendered to defendant Heather Stafford (the patient). Plaintiff explains that he is a pain management specialist and was contacted in July 2014 by a representative of Ms. Stafford about whether he “took” BCBS. He uses a company to screen patients to determine whether coverage applies and contends that he

determined that BCBS would pay 60% of the usual and customary billings. Plaintiff admits that he is an out-of-network provider for medical services for BCBS but argues that most insurance programs provide for payment to an out-of-network physician.

Plaintiff claims that BCBS sent him letters dated August 2014, September 2014 and December 2014 in which it confirmed that BCBS would pay for services rendered by plaintiff to Ms. Stafford. He insists that he performed the services based on his belief that BCBS would make the promised payments directly to him. Plaintiff claims he billed BCBS a total of \$588,280 and he expected to receive 60% (or \$352,968). Instead, plaintiff says he received nothing.

Defendant Paul Stafford (Heather Stafford's husband) works for defendant Werner and both Staffords were covered by insurance provided by BCBS.

Plaintiff brings four causes of action: promissory estoppel against BCBS and Werner, breach of contract against Ms. Stafford and her husband defendant Paul Stafford, tortious interference with prospective economic advantage against BCBS, and conversion against the Stafford defendants.

The fourth cause of action against the Staffords alleges that the Staffords received checks for services performed by plaintiff from BCBS and that the Staffords denied receiving these checks, deposited them in their own accounts and refuse to pay plaintiff.

MS001

BCBS moves to dismiss the causes of action against it. It explains that it is the claims administrator for the self-funded health care benefit plan that Werner established for its employees. BCBS insists that plaintiff is an out-of-network provider who does not participate in BCBS' managed care network of physicians. BCBS argues that plaintiff can only be paid from

his patients and that he is not entitled to receive payments directly from BCBS. It argues that the communications cited by plaintiff merely describe the benefits and does not contain a promise to pay plaintiff directly.

BCBS argues that the second claim against it—for tortious interference—is time barred and that the Staffords had no right to legally assign her benefits to plaintiff under the terms of the health plan.

In opposition, plaintiff complains that BCBS has “set a trap” whereby doctors are forced to sue patients to recover from patients’ insurers. He insists that the anti-assignment clause in the Werner plan is belied by the “contract” he entered into with BCBS to pay plaintiff. Plaintiff claims that he provided services in reliance on BCBS’ promises that that his promissory estoppel claim is not pre-empted by the anti-assignment provision. Plaintiff contends that the written documentation relied upon by BCBS has no bearing on this claim because promissory estoppel is an equitable doctrine.

With respect to the tortious interference claim, plaintiff points to a letter from Werner to BCBS dated August 24, 2016 which plaintiff believed would lead BCBS to rectify its mistakes. Plaintiff suggests that the date upon which the statute of limitations should run is from August 24, 2017 because it would take about a year to process an appeal with BCBS. He argues that if the Court requires a more definite date, the Court should grant it leave to amend (although plaintiff does not cross-move for such relief).

In reply, BCBS emphasizes that there was no clear and unambiguous promise by BCBS to pay the plaintiff directly. BCBS maintains that plaintiff’s assertions that the letters that form the basis of his promissory estoppel are “boilerplate” are not a basis to deny the instant motion. BCBS notes that paragraph 19 of the complaint, another basis for the promissory estoppel claim,

only alleges that payment would be made in accordance with a particular schedule. But it does not allege that payment would be made to plaintiff.

BCBS also argues that the documentary evidence reveals that plaintiff could not have relief on a promise even if one was made. It argues that plaintiff began performing services in July 2014, the month before he sent his first communication to BCBS about payment. BCBS claims plaintiff can't rely on a promise that was made by BCBS after he had already started treating Ms. Stafford.

Promissory Estoppel Claim

A Court considering a motion to dismiss for failure to state a cause of action “must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference. We may also consider affidavits submitted by plaintiffs to remedy any defects in the complaint” (*Chanko v American Broadcasting Companies Inc.*, 27 NY3d 46, 52, 29 NYS3d 879 [2016]).

“In order to prevail on a theory of promissory estoppel, a party must establish (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance” (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411, 46 NYS3d 99 [1st Dept 2017] [internal quotations and citations omitted]).

As an initial matter, the Court observes that although BCBS stresses that the plan providers for BCBS make payments to the insured only, the portion of the plan cited in its memo of law is incomplete. The plan states that “All payments for Covered Services by In-network providers will be made directly to such providers. In all other cases, payments will be made, at

Blue Cross and Blue Shield of Nebraska’s option, to the Subscriber, to his or her estate, *to the provider* or as required under state or federal law, including qualified medical child support orders” (NYSCEF Doc. No. 21 at 10 [emphasis added]). BCBS’ memo of law stopped its quotation after “Subscriber” which gives the appearance that BCBS only makes payments to the insureds. The plan seems to provide BCBS with an option to pay an out-of-network provider, and BCBS’s counsel is cautioned that an incomplete and misleading representation is most unbecoming to a member of the bar.

The question then is whether plaintiff has properly alleged that BCBS promised to pay him (rather than the Staffords). The Court finds that plaintiff failed to sufficiently plead this cause of action. Paragraph 19 of the complaint alleges that BCBS told plaintiff that it “provided for payments to out-of-network physicians, and that such payments would be based on the UCR schedule” (NYSCEF Doc. No. 20, ¶ 19). That does not state a claim that BCBS made a clear and unambiguous promise to pay plaintiff directly.

Similarly, paragraph 27 alleges that BCBS and Werner “made clear and unambiguous promises to pay Plaintiff for services rendered by Plaintiff as an out-of-network physician” (*id.* ¶27). But no details are provided as to when these promises were made or the specifics of the promises. A conclusory assertion that repeats the elements of a cause of action is not sufficient.

Moreover, the documents that plaintiff claims show BCBS promised to pay him directly do not demonstrate a clear promise (NYSCEF Doc. Nos. 2-5) These papers identify plaintiff as the provider and note that these services involve an out-of-network provider. But there is nothing in these documents that shows BCBS promised to pay plaintiff directly for the services. A vague and indefinite promise cannot form the basis of a promissory estoppel claim (*Sanyo Elec., Inc. v Pinros & Gar Corp.*, 174 AD2d 452, 453, 571 NYS2d 237 [1st Dept 1991])

The Court also observes that plaintiff's fourth cause of action—for conversion against the Staffords—supports BCBS' theory that it pays insureds for out-of-network providers rather than pay these providers directly. Plaintiff even insists that the Staffords received checks from BCBS, hid them from plaintiff, denied receiving them and kept the money.

To be clear, the Court grants this branch of the motion because plaintiff has not sufficiently pled that BCBS made a clear promise to pay plaintiff. The documents and plaintiff's allegations suggest that BCBS agreed to make payments in accordance with a certain payment schedule, but the Court is unable to find that the elements of a promissory estoppel claim were satisfied. Aside from the clear and unambiguous promise element, plaintiff cannot show he had reasonable reliance on a promise or that he suffered injury from the promise. As stated above, plaintiff's own complaint argues that the Staffords received payments from BCBS and refused to pay plaintiff. That means that, according to plaintiff, the Staffords caused the injury.

And plaintiff did not adequately refute BCBS' claim that the timeline of treatment cannot support a promissory estoppel cause of action. BCBS' argues that plaintiff started treating Ms. Stafford before he received any communications about potential payments from BCBS and plaintiff did not contest this point in opposition. Plaintiff cannot demonstrate reasonable reliance that he would be paid directly where he started treatment on Ms. Stafford prior to communicating with BCBS.

While the Court recognizes that plaintiffs are generally permitted to plead causes of action in the alternative, that makes no sense here. If BCBS made payments to the Staffords and the Staffords kept the money, as plaintiff alleges, then plaintiff's promissory estoppel claim must fail.

This Court's decision to dismiss this cause of action has nothing to do with the purported assignment of rights to plaintiff from the Staffords. The Werner plan makes clear that the rights of an insured cannot be assigned but that is of no moment here because plaintiff has not asserted a breach of contract claim against BCBS. Rather he makes a promissory estoppel claim.

Tortious Interference with Prospective Economic Advantage

“In moving to dismiss an action as barred by the statute of limitations, the defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the cause of action has expired. The burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period, and the plaintiff must aver evidentiary facts establishing that the action was timely or [] raise an issue of fact as to whether the action was timely” (*MTGLQ Investors, LP v Wozencraft*, 2019 WL 2291865, 2019 NY Slip Op 04287 [1st Dept 2019] [internal quotations and citations omitted]).

The Court finds that this cause of action is time-barred. As BCBS points out, this cause of action has a three-year statute of limitations and BCBS's alleged tortious interference with his relationship with the Staffords (the refusal to pay plaintiff directly) occurred in late 2014 and early 2015. This case was commenced in June 2020.

The Court rejects plaintiff's claim that he expected BCBS to rectify its mistake after a letter was sent to BCBS by Werner's legal department in August 24, 2016 (NYSCEF Doc. No. 14). An expectation that BCBS was going to take certain action in 2016 does not save a tortious interference claim brought in 2020. Plaintiff attempts to sidestep this date problem by asserting that “it would likely take up a year to process an appeal, making the date of the accrual of a

tortious interference cause of action August 24, 2017” (NYSCEF Doc. No. 30 at 10). A speculative assertion as to when a limitations period should have accrued is not sufficient. No specifics are provided regarding the appeal process (if one occurred) or the date of a final determination. To the extent that plaintiff asks to amend its complaint to provide more details, the Court denies that request as plaintiff did not cross-move for such relief.

MS002

In this motion, Werner claims that the only cause of action asserted against it for promissory estoppel should be dismissed because there is no allegation that Werner made any promises to plaintiff. In opposition, plaintiff claims that Werner acted in concert with BCBS.

The Court grants this motion. Simply put, there are no allegations that Werner made a clear and unambiguous promise that BCBS would pay plaintiff directly for services plaintiff provided to Ms. Stafford. Certainly, Werner was involved with this dispute and its legal department sent a strongly-worded letter to BCBS complaining about BCBS’ actions. But that does not create a cause of action for promissory estoppel. There was no promise, no reasonable reliance on a promise or any injury caused by Werner.

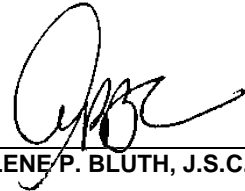
Accordingly, it is hereby

ORDERED that the motion (MS001) by defendant Blue Cross and Blue Shield of Nebraska to dismiss is granted; and it is further

ORDERED that he motion (MS002) by defendant Werner Enterprises Inc. to dismiss is granted; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly along with costs and disbursement after presentation of proper papers therefor.

Remote Conference: November 16, 2020 at 11 a.m.



10/23/2020
DATE

ARLENE P. BLUTH, J.S.C.

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CASE DISPOSED

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NON-FINAL DISPOSITION

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APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE