Long Is. Minimally Invasive Surgery, P.C. v MultiPlan, Inc.
2020 NY Slip Op 35794(U)
April 8, 2020
Supreme Court, Nassau County
Docket Number: Index No. 605520/2016
Judge: Vito M. DeStefano
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

LONG ISLAND MINIMALLY INVASIVE SURGERY, P.C.,

Decision and Order

Plaintiffs,

MOTION SEQUENCE: 04, 05
INDEX NO.:605520/2016

-against-

MULTIPLAN, INC.,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

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Plaintiff moves for an order pursuant to CPLR 3212 seeking partial summary judgment as to liability for breach of contract against Defendant and for summary judgment dismissing Defendant's counterclaim for breach of contract.

Defendant moves for an order pursuant to CPLR 3212 granting it summary judgment dismissing the action in its entirety.

Background

Plaintiff Long Island Minimally Invasive Surgery, P.C. (the "Practice") is a professional corporation which specializes in bariatric and weight loss surgery.

Defendant MultiPlan, Inc. ("Multiplan") is a "Preferred Provider Organization" ("PPO") which acts as a liaison between health insurance companies and networks of health providers, including doctors and hospitals. In this regard, on October 15, 2010 MultiPlan entered into an agreement with the Practice, which then became a participating provider in MultiPlan's provider network and agreed to accept negotiated reimbursement rates (i.e., "Contract Rates") as payment for medical services rendered to individuals covered by health benefit programs.[1]

MultiPlan's Agreement with the Practice

The MPI Participating Professional Group Agreement ("Agreement") in which the Practice became a participating provider in MultiPlan's Complementary Network ("Network") contained the following relevant provisions:

> 1.3 Clean Claim Unless otherwise required by law, Clean Claim means . . . a standard billing format containing all information reasonably required by the Client for adjudication.

[1] MultiPlan, in turn, also enters into agreements with its Clients, which are generally insurance companies, employee benefit plans, and self-funded insurance plans who are given access to MultiPlan's provider network in exchange for payment of a fee to MultiPlan (MultiPlan's Response to the Statement of Material Facts at ¶ 4).

1.4 Client means an insurance company, employer, health plan . . . or other organization that sponsors, or administers on behalf of a User, as applicable, one or more Programs for the provision of health care services to participants accessing the Network.

1.8 Covered Services means health care treatment and supplies rendered by a Network provider and provided to a participant for which a User is responsible for payment pursuant to the terms of a Program.

1.10 Network mean an arrangement of Network Providers created or maintained by MPI [MultiPlan], or one of its subsidiaries, under which such network Providers have agreed to accept certain Contract Rates for Covered Services provided to Participants.

1.12 Participant means any individual and/or dependent eligible under a Client's Program that provides access to the Network.

1.15 User means any corporation, partnership, labor union, association, program, employer or any other entity responsible for the payment of Covered Services, entitled to access to the Contract Rate under this Agreement. Client may also be a User. . . .

3.9 Network Participation and Requirements. Except where prohibited by law, MPI may, in its sole discretion, include Group and each Participating Professional as a Network Provider in any or all Network(s). Group and each Participating Professional acknowledge that Programs accessing the Network (i) may not offer their own network option; or (ii) may cover Covered Services under the Participant's Program at an in-Network or out-of-Network benefit level. Group and each Participating Professional will comply with any Network specific requirements contained in Exhibit B and/or the administrative handbook(s).

3.11 Administrative Handbook(s). Group and each Participating Professional will comply with the terms of the administrative handbook(s), including, without limitation, observing the protocols of the quality management and credentialing/recredentialing program(s). Unless otherwise required by law, MPI may, in its sole discretion, modify the administrative handbook(s) from time to time and post such modifications to the MPI website. Group and each Participating Professional will periodically review the administrative handbook(s) on the MPI website for updates.

4.3 Client Agreements. MPI agrees that it has entered into agreements with Clients that specify that the right to access the Network, including access to the Contract Rates, shall be subject to the terms of this Agreement.

4.4 Client Listing. MPI will post to the MPI website a list of the Clients that have purchased the Network ("Client Listing").

4.5 Identification. MPI will require each Client to furnish Participants with a means of identifying themselves to Group as covered under a Program with access to the Network, such as (i) an MPI authorized name and/or logo on an identification card; (ii) an MPI phone number identifier; (iii) written notification by Client of MPI affiliation at time of benefits verification; (iv) an MPI authorized name and/or logo on the Explanation of Benefits; or (v) other means acceptable to MPI and Group.

4.7 Use of Contract Rates. MPI will require Clients and its Users to use the Contract Rates agreed to in this Agreement solely for Covered Services rendered to Participants covered under a Program which utilizes the Network.

* * *

5.2 Payment for Covered Services.

(a) Except as set forth in Section 5.3 and 5.4(b) herein, for those Clients subject to state or federal law with regard to timely payment of claims, Client shall pay or arrange for User to pay Group the Contract Rate for Covered Services per the requirements of such state or federal law, and shall be subject to any interest and/or penalties under such law.

(b) Except as set forth in Section 5.3 and 5.4(b) herein, for those Clients that are not subject to the state or federal law with regard to timely payment of claims, Client will pay or arrange for User to pay Group the Contract Rate for Covered Services within thirty (30) business days of receipt of a Clean Claim and in accordance with the terms of this Agreement. In the event that a Clean Claim is not paid within thirty (30) business days from the date of receipt of such Clean Claim, Group has the right not to honor the Contract Rate. In such event, Group shall, within sixty (60) days of receipt of the late payment (or if no payment was made, within sixty (60) days of the date that the Clean Claim was deemed received pursuant to Section 5.1 above) request that Client/User adjust the Clean Claim, and Client will pay or arrange for User to pay Group at Group's Billed Charges.

> (c) Any payments due by Client under this Agreement shall be reduced by any applicable Co-payments, Deductibles, and/or Co-insurance, if any, specified in the Participant's Benefit Program and/or any service for which the Participant's Benefit Program does not provide coverage. Payment by Client or User shall be subject to Exhibit D, the administrative handbook(s), and industry standard coding and bundling rules, if any (Ex. "3" to Motion Seq. No. 4).

Pursuant to exhibit D to the Agreement, the Practice agreed to give a 15% discount off of its billed charges for medical services and treatment, otherwise referred to as the "Contract Rate". Exhibit D to the Agreement further provided that the Practice was supposed to give MultiPlan notice of any changes to the Practice's "charge master," which was a comprehensive list of the Practice's services and prices. Specifically:

> 1.3 Charge Master Cap.
>
> (i) As of December 1st of each calendar year, Group [the Practice] will provide to MPI, written notice specifying whether there has been a change in the Group's charge master ("Charge Master Notice").[2] In the event that there is an increase in the Group's charge master, such Charge Master Notice will include the average annual increase in Group's overall charge master for the current year as compared to the previous year.
>
> (ii) If in any calendar year, the average increase in the Group's overall charge master (Actual Percentage Increase) is greater than five (5%) percent (the "Charge Master Cap"), any Contract Rate specified in this Agreement as a percent discount from Group's Billed Charges (i.e., Group's Billed Charges reduced by X%) shall be adjusted . . . .
>
> * * *
>
> (iii) In each successive year, adjustments of the Contract Rate shall be cumulative as further set forth in the example below. Group shall be responsible for reporting to MPI annually any Actual Percentage Increase in its charge master.
>
> * * *

[2] According to MultiPlan, under this provision, the Practice was required to provide the annual Charge Master Notice regardless of whether or not any changes were actually made to the Practice's charge master.

The Agreement incorporated by reference MultiPlan's Administrative Handbook ("Handbook") (*see supra* at section 3.11) dated December 17, 2009 (and the modifications thereto) which included the following provision in section four:

> Reimbursement and Billing Requirements
> Timely Payment of Claims
>
> Unless otherwise specified in your Participating Professional Agreement, in order to obtain the benefit of the Contract Rates in your Participating Professional Agreement, Clients contracted with MultiPlan will be required to pay or arrange for Users to pay for Covered Services within thirty (30) business days of receipt of a Clean Claim . . . . Any payments due by Client shall be reduced by any applicable Co-payments, Deductibles, and/or Co-insurance, if any, specified in the Participant's Benefit Program and/or any service for which the Participant's Benefit Program does not provide coverage (Ex. "4" at pp 14-15 [Motion Seq. No. 4]).

The 2009 version of MultiPlan's Handbook was amended by MultiPlan in 2011, and again in 2013, and then again in July 2015 (MultiPlan Rule 19-a Statement at ¶ 45).

The July 2015 Handbook contains the following provision which was not included in the prior Handbooks:

> Please note that not all Clients participate in every product, in every geographic region or elect to access all participating Network Providers. Clients are not obligated to offer access to all participating Network Providers. The list of Clients is subject to change and is updated monthly. Participating Network Providers may obtain an updated Client list at http://provider.multiplan.com.
>
> * * *
>
> The Complementary Network is typically used as a secondary network to a Client's primary PPO. Participants can be directed to MultiPlan Network Providers through online and downloadable directories and a telephonic locator service. A MultiPlan name or logo may be placed on the front or back of the Participant's identification. The MultiPlan name must be reflected on EOB/EOP's. Complementary Network access is available only to Clients that have contracted with MultiPlan to utilize the Complementary Network in conjunction with Clients' Programs either as an extended network or when the Program does not utilize another network as primary. *As a Network Provider, you understand that Clients contracted with MPI to utilize*

> *the Complementary Network are not required to access the terms of the Participating Professional Agreement, including the Complementary Network Contract Rates, for a specific claim for Covered Services rendered to a Participant in the event that the Contract Rates for such Covered Services exceed the maximum amount of reimbursement eligible under the terms of the Participant's Program or the Client's/User's and/or MPI's reimbursement policies*; and (ii) the terms of the Participating Professional Agreement do not apply to Client/User with respect to the specific claim that Client/User elects not to access as permitted under the Participating Professional Agreement, regardless of the identification requirements specified in the Agreement. Complementary Network Clients may pay for Covered Services at an in or out of network level (Ex. "B" to Genzel Affidavit in Opposition) (emphasis added).

Both the Agreement and Handbook were drafted by Multiplan.

The Practice's claims for payment were submitted by the Clients (typically the insurance companies) to MultiPlan for re-pricing in accordance with the Practice's Contract Rate and then returned to the Clients for payment to the Practice. According to MultiPlan, however, those claims are only paid by the Clients pursuant to the Contract Rate if the Clients "decide to access the Agreement" (MultiPlan Rule 19-a at ¶ 27). Certain Clients, however, "were choosing not to access the Agreement - as was their right to do - and as a result, were paying [the Practice] less than the Contract Rate for certain claims, because they considered [the Practice's] billed charges to be exorbitant" (MultiPlan Rule 19-a at ¶¶ 30, 33).

By letter dated December 7, 2011, the Practice advised MultiPlan that it regarded the Clients' conduct (in paying less than the Contract Rate) to be a breach of the Agreement between it and Multiplan.

By letter dated January 28, 2016, MultiPlan wrote the Practice stating:

> Your agreement with MultiPlan is governed by each client's benefit plan and reimbursement polices. This means, for example, that if the benefit plan or reimbursement policy sets a maximum amount the plan will pay, the terms of your agreement may not apply to a specific claim if the agreed contract rate for that claim is above this maximum amount.
>
> MultiPlan clients (and their customers) are not required to access every network offered by MultiPlan, or to access every provider participating in the network(s) they do access. Therefore, MultiPlan clients (and their customers) may elect to not access

> your agreement [the Agreement between the Practice and MultiPlan) and in those situations the terms of your agreement will not apply . . . . (Ex. "11" to Motion Seq. No. 4).

In a letter dated February 11, 2016, the Practice expressly objected to MultiPlan's January 28, 2016 as follows:

> The January 28th letter purports to "update and clarify" several provisions of the agreement between MultiPlan and the Practice. Please be advised that the Practice does not agree to, and in fact, objects to the updates and clarifications set forth in the January 28th letter.
>
> Further, to the extent that MultiPlan has already implemented those updates and clarifications - and we believe that this has occurred with regard to the Practice - such updates and clarifications constitute material breaches of the agreement between MultiPlan and the Practice. Accordingly, the Practice reserves all rights, including the right to seek appropriate legal intervention to recover damages and other relief occasioned by MultiPlan's improper actions (Ex. "14" to Motion Seq. No. 4).

On July 21, 2016, the Practice commenced the instant action alleging: Pursuant to the Agreement, MultiPlan was obligated to enforce the rights of the Practice to receive the Contract Rate for covered services rendered to Participants; MultiPlan breached the Agreement by failing to require its Clients to pay the Contract Rate, "even though health care services were rendered to . . . Participants under the belief that the MultiPlan network applied"; MultiPlan breached the covenant of good faith and fair dealing to require its Clients to pay the Contract Rate, even though health care services were rendered to Participants under the belief that the Multiplan network applied; and, instead of the Contract Rate, which is 15% less than the Practice's billed charges, the Practice has received "dramatically less than this amount on accounts involving MutliPlan Participants" from Clients.[3]

Two months later, on September 20, 2016, MultiPlan terminated its Agreement with the Practice, thereby removing the Practice from its Complimentary Network (Ex. "15" to Motion Seq. No. 4). MultiPlan did not set forth in the letter the basis for terminating the Agreement.

MultiPlan thereafter answered the complaint and interposed the following counterclaim:

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[3] It appears that Clients of Multiplan chose not to access the Network and, hence, not pay the Practice the Contract Rate and, instead, made out of network payments to the Practice (based on usual and customary rates) that resulted in lower reimbursement to the Practice.

the "obligations of the Practice to provide annual notification if its charge master, as well as any increases in the charge master, are material obligations" under the Agreement "in that they ensure financial stability for MultiPlan's clients"; the Practice breached these material obligations by failing to provide MultiPlan with the annual, written Charge Master Notice, and by failing to inform MultiPlan of any increases in its charge master on an annual basis (Amended Answer at ¶¶ 6-8; *see supra* at pp 5-6).

The Practice moves for summary judgment on its sole cause of action for breach of contract and also seeks to dismiss MultiPlan's counterclaim for breach of contract.

MultiPlan moves for summary judgment dismissing the complaint.

For the reasons that follow, the Practice's motion is denied and MultiPlan's motion is granted.

The Court's Determination

The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance of the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach (*see Tudor Ins. Co. v Unithree Inv. Corp.*, 137 AD3d 1259 [2d Dept 2016]; *PFM Packaging Machinery Corp. v ZMY Food Packing, Inc.*, 131 AD3d 1029 [2d Dept 2015]; *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011]).[4]

Implicit in every contract is a covenant of good faith and fair dealing, which encompasses any promise that a reasonable promisee would understand to be included (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Staffenberg v Fairfield Pagma Assoc., L.P.*, 95 AD3d 873 [2d Dept 2012]). "The covenant is breached where one party to a contract seeks to prevent its performance by, or to withhold its benefits from, the other" (*Michaan v Gazebo Hort., Inc.*, 117 AD3d 692, 693 [2d Dept 2014] [internal quotations omitted]).

The fundamental rule of contract interpretation is that agreements are to be construed in

[4] To the extent the sole cause of action alleges, in addition to a breach of contract, a breach of the implied covenant of good faith and fair dealing, that claim is dismissed inasmuch as a cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of contract (*Deer Park Enterprise, LLC v Ail Systems, Inc.*, 57 AD3d 711 [2d Dept 2008]; *see also Educ Ctr. For New Ams., Inc. v 66th Ave. Realty Co.*, 131 AD3d 442 [2d Dept 2015] [implied duty of good faith and fair dealing cause of action dismissed as duplicative of the cause of action alleging breach of contract]).

accord with the parties' intent (*see e.g., Slatt v Slatt*, 64 NY2d 966 [1985]), and the "best evidence of what parties to a written agreement intend is what they say in their writing" which is generally discerned from the four corners of the document itself (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*see e.g., W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990] [in interpreting any contract, "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing"]).

We apply this rule with even greater force in commercial contracts negotiated at arm's length by sophisticated, counseled businesspeople (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29, 32 [2002]; *Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008]; *Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 194 [1st Dept 2012]).

A court may not, in interpreting a contract, add or excise terms or distort the meaning of the terms in a manner that makes a new contract for the parties (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]; *Teichman v Community Hosp. of W. Suffolk*, 87 NY2d at 520, *supra*; *Morlee Sales Corp. v Manufacturers Trust Co.*, 9 NY2d 16, 19 [1961]). Nor should the court imply a term which the parties themselves failed to include (*Aivaliotis v Continental Broker–Dealer Corp.*, 30 AD3d 446 [2d Dept 2006]; *Vermont Teddy Bear Co.*, 1 NY3d at 475, *quoting Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978] ["courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include"]). We instead concern ourselves "with what the parties intended, but only to the extent that they evidenced what they intended by what they wrote" (*Rodolitz v Neptune Paper Prods.*, 22 NY2d 383, 387 [1968] [internal quotations omitted]). Accordingly, before assessing evidence regarding what was in the parties' minds at the time of the agreement, we must first look to the agreement itself.

The aim of a court interpreting a contract is to arrive at a construction that gives fair meaning to all of its terms and provisions, and "to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized" (*Calano v Calano*, 119 AD3d 629 [2d Dept 2014], quoting Joseph v Creek & Pines, Ltd., 217 AD2d 534 [2d Dept 1995]; *see Patsis v Nicolia*, 120 AD3d 1326 [2d Dept 2014]; *Matter of Grill v Genitrini*, 113 AD3d 767 [2d Dept 2014]; *G3-Purves St., LLC v Thomson Purves, LLC*, 101 AD3d 37 [2d Dept 2012]). It is a cardinal rule of construction that a court should not interpret a contract in such a way as would leave one of its provisions substantially without force or effect (*Corhill Corp. v S. D. Plants, Inc.*, 9 NY2d 595 [1961]; *see Beal Sav. Bank v Sommer*, 8 NY3d 318 [2007]; *Zullo v Varley*, 57 AD3d 536 [2d Dept 2008]; *Petracca v Petracca*, 302 AD2d 576 [2d Dept 2003]).

A contract is unambiguous if "on its face [it] is reasonably susceptible of only one meaning" (*Greenfield v Philles Records*, 98 NY2d 562, 570 [2002]), the interpretation of which is a function for the court. In an unambiguous contract, matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument (*Teitelbaum Holdings v Gold*, 48 NY2d 51, 56 [1979]; *2632 Realty Development Corp. v 299 Main St., LLC*, 94 AD3d 743 [2d Dept 2012]).

"A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*New York City Off–Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175 [1st Dept 2006] [internal citations and quotations omitted]) or if there is contradictory or inconsistent language in different portions of the contract (*see Natt v White Sands Condominium*, 95 AD3d 848, 849 [2d Dept 2012]). In determining whether a contractual term is ambiguous, the court looks solely to the plain language used by the parties within the four corners of the contract to discern its meaning and not to extrinsic sources (*Kass v Kass*, 91 NY2d 554, 566 [1998]).

Here, the primary question is whether MultiPlan's Clients were required to access the Network and pay to the Practice the Contract Rate when "Covered Services" were provided by the Practice to Participants.[5] While the parties appear to agree that the Agreement is not ambiguous, they interpret it differently and, thus, disagree as to its meaning.

Numerous sections in the parties' Agreement suggest that the Client had a choice in whether to access MultiPlan's Network for a service provided by the Practice. In particular, section 4.3 of the Agreement, entitled "Client Agreements", specifies that MultiPlan "has entered into agreements with Clients that specify that *the right to access the Network*, including access to the Contract Rates." Similarly, section 4.7, "Use of Contract Rates" specifies that MultiPlan "will require Clients" to "use the Contract Rates" agreed to in this Agreement *solely for Covered Services rendered to Participants covered under a Program which utilizes the*

[5] It is MultiPlan's position that its Clients did not have to pay the Contract Rate under the Agreement if they chose not to access MultiPlan's Network and, further, that such a determination to use the Network was optional and could be made on a claim by claim basis (MultiPlan Rule 19-at ¶ 32).

MultiPlan is paid by its Clients only in those instances where the Clients accessed the Practice and paid the Practice 85% of its billed charges. Thus, to the extent any Clients of MultiPlan did not access a particular provider in the Network (like the Practice) and pay the Contract Rate, MultiPlan was not paid by the Client (Forcash Affidavit in Opposition at ¶¶ 13-14).

Network.[6] In addition, section 1.12 entitled "Participant" refers to any individual "eligible under a *Client's Program that provides access to the Network*." Further, section 3.9 of the Agreement, "Network Participation and Requirements," provides that MultiPlan may include the Practice as a Network Provider in any or all if its Networks and that the Practice "acknowledge[s] that Programs accessing the Network . . . may cover Covered Services under the Participant's Program at an in-Network or out-of-Network benefit level . . . ."

If these commercially sophisticated and counseled parties had intended that MultiPlan's Clients were required to access the Network and pay the Contract Rate (rather than not access the Network and likely pay a lower rate for the Practice's services), they could have expressed this intent in the language of the Agreement. The parties omitted this requirement from their Agreement, and it is not for the court to imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, could have included the requirement if that was the intention (*see Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]).

Moreover, an individual who signs or accepts a written contract, absent fraud or other wrongful conduct on the part of the other contracting party, "is conclusively presumed to know its contents and to assent them, and there can be no evidence for the jury as to her [or her] understanding of its terms" (*Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *see also Gillman v Chase Manhattan Bank*, 73 NY2d 1 [1988]; *Da Silva v Musso*, 53 NY2d 543 [1981]; *Daniel Gale Assoc. v Hillcrest Estates*, 283 AD2d 386 [2d Dept 2001]). While Dr. Garber states in his affidavit that it was his "understanding that if [Client] contacted with MultiPlan to obtain 'access' to the Network . . . the [Client] was committed to paying the Contract Rate under the Agreement for services actually provided to the patients,"[7] Dr. Garber nevertheless signed and

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[6] Moreover, while the court can ascertain the parties' intent from the four corners of the Agreement, and the plain meaning of the words used therein, the court notes that the agreements between MultiPlan and its Clients include "language to the effect that the Clients are not required or obligated to access MultiPlan's provider network on every claim" (Forcash Affidavit in Support at ¶ 8 [Motion Seq. No. 5]). For example, the agreement between MultiPlan and UnitedHeathcare provides that "United may decline to pay a claim at the Contract Rate and may pay it instead on the same basis as United generally would pay such claim from a similarly situated non-MPI Network provider, in cases of or in accordance with internal payment expectations imposed due to certain existing performance guarantees . . . or where such an approach would result in a lower payment than would applying the Contract Rate."

[7] Dr. Garber further states that "if MultiPlan failed to enforce compliance with the Contract Rate by the Payors [Clients], MultiPlan was in breach of the Agreement" (Affidavit in Support at ¶ 37 [Motion Seq. No. 4]).

accepted the Agreement which did not set forth any such requirement.[8]

Here, the Practice's interpretation of the Agreement conflicts with ordinary principles of contractual interpretation. The pertinent language of Section 5.2 merely sets forth a discounted rate at which a Client is required to render payment in connection with the health care services provided by the Practice to a Participant. As such, the language of the provision neither "unequivocally" states nor guarantees that the Practice will receive 85% of its billed charges on every occasion when the Practice renders services (*see The Plastic Surgery Center, P.A. v Cigna Health and Life Ins. Co.*, 2019 WL 1916205 [DNJ 2019]) .

Summary Judgment on MultiPlan's Counterclaim

MultiPlan's counterclaim for breach of contract is based on the Practice's failure to annually notify MultiPlan of its Charge Master which was required pursuant to exhibit D to the Agreement:

> As of December 1st of each calendar year, Group [the Practice] will provide to [MultiPlan], written notice specifying whether there has been a change in the Group's charge master ("Charge Master Notice"). In the event that there is an increase in the Group's charge master, such Charge Master Notice will include the average annual increase in Group's overall charge master for the current year as compared to the previous year.[9]

Specifically, under this provision, the Practice was required to provide the annual Charge Master Notice regardless of whether or not any changes were actually made to the Practice's charge master. This was not done.

In its affidavit in support, the Practice indicates that, "[s]ince the inception of the Agreement, the Practice has only revised its chargemaster three times", in 2011, 2014 and 2016 and, "there were no changes to the chargemaster between 2011 and 2014 and then between 2014 and 2016." The Practice further states that the "vast majority of items have been billed at the same rate throughout the relevant years"; the "prices for only a few select services . . . were increased"; and that the "average increase in the overall chargemaster from update to update is *de minimis*, and would not have triggered any rate caps or adjustments" (Garber Affidavit in

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[8] Dr. Shawn Garber is the founder and director of the Practice.

[9] According to MultiPlan, the purpose of the annual Charge Master Notice was to ensure financial stability for its Clients (Genzel Affidavit at ¶ 22).

Support at ¶¶ 40-41 [Motion Seq. No. 4]).

Notwithstanding the fact that the Practice did not send the requisite annual Charge Master Notice, the Practice nevertheless argues that Mutliplan's counterclaim should be dismissed as "Multiplan has no meaningful claim for damages because there was no rate adjustments that could have been imposed by MultiPlan." The Practice further argues that, "[e]ven assuming that the chargemaster had an overall average increase more than 5%, MultiPlan has not produced any evidence to suggest that such an increase in rates resulted in any corresponding damages to either MultiPlan or its clients, or that MultiPlan lost clients or business as a result." In sum, the counterclaim should be dismissed, according to the Practice, because MultiPlan has no evidence that the alleged lack of notice resulted in any corresponding impact or damages to MultiPlan (Practice Memorandum of Law at p 17).

The court concludes that the Practice has failed to meet its prima facie burden that MultiPlan did not suffer damages as a result of the Practice's failure to send an annual Charge Master Notice, as required by the Agreement and, thus, the branch of the Practice's motion seeking dismissal of MultiPlan's counterclaim is denied.

Conclusion

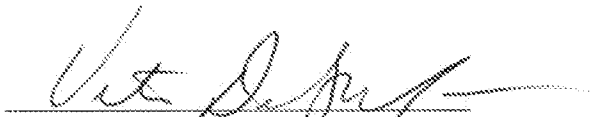
Based on the foregoing, it is hereby

Ordered that the Plaintiff's motion is denied in its entirety; and it is further

Ordered that the Defendant's motion is granted and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: April 8, 2020



Hon. Vito M. DeStefano, J.S.C.

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