

**Norman Maurice Rowe, MD, MHA, LLC v Oxford
Health Ins. Co., Inc.**

2022 NY Slip Op 34442(U)

July 11, 2022

Supreme Court, Queens County

Docket Number: Index No. 714272/2021

Judge: Ulysses B. Leverett

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: Honorable Ulysses B. Leverett Part 41
Justice



----- X:
 NORMAN MAURICE ROWE, MD, MHA, LLC & :
 EAST COAST PLASTIC SURGERY, P.C., : Index No.: 714272/2021
 Plaintiffs, :
 -against- : **DECISION/ORDER**
 :
 OXFORD HEALTH INSURANCE COMPANY, INC; : Motion Seq. No. 2 and 3
 OXFORD HEALTH INSURANCE, INC.; OXFORD :
 HEALTH PLANS (NJ), INC.; OXFORD HEALTH :
 PLANS (NY), INC.; AND OXFORD HEALTH :
 PLANS LLC, :
 Defendants. X

The following numbered papers read on this motion by the defendants for an Order pursuant to CPLR §3211(a)(1) and (7), dismissing the Amended Complaint of Plaintiffs, Norman Maurice Rowe, MD, MHA, LLC & East Coast Plastic Surgery, P.C., in its entirety and with prejudice and for such other and further relief as this court may deem just and proper. Defendants further request an Order striking portions of the Affidavit of Kathleen Damiano dated December 1, 2021, and the exhibits annexed thereto, submitted in Opposition to Defendants’ Motion to Dismiss the Amended Complaint, as well as Plaintiffs’ arguments related thereto as set forth in Plaintiffs’ Memorandum of Law in Opposition to Defendants’ Motion to Dismiss.

	<u>Papers Numbered</u>
Defendants’ Motion to Dismiss and Supporting Papers (Seq. 2)	EF 22-29
Plaintiffs’ Opposition and Supporting Papers (Seq. 2)	EF 30-33
Defendants’ Reply and Supporting Papers (Seq. 2)	EF 36-37
Defendants’ Motion to Strike (Seq. 3)	EF 38-39
Plaintiff’s Opposition (Seq. 3)	EF 40
Defendants’ Reply (Seq. 3)	EF 41

Plaintiffs are companies that provide health services in the State of New York. Plaintiffs allege in the Amended Complaint that they rendered a breast reduction to Patient, T.M., (the “Patient”), and thereafter submitted bills to Oxford for such services. The patient was insured through her employer’s employee health benefit plan that was fully funded by a group policy of insurance issued by Oxford, Roivant Sciences, Inc. (the “Plan”), which is an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974 (as amended) (“ERISA”).

Plaintiffs allege in their Amended Complaint that the basis for their lawsuit is a purported “express contract,” between Plaintiffs and Defendants which Plaintiffs call a “Gap Exception,” that was purportedly entered into on June 13, 2018 (i.e., more than a month before the surgery at issue was performed on July 17, 2018). Plaintiffs further allege that the Defendants entered into this express contract when Oxford approved Plaintiffs’ Patient T.M.’s request for an in-network

[* 1]

exception (*i.e.*, the “Gap Exception”), which they claim is an “agreement [by the Plan] to pay an out-of-network medical provider to render a specific healthcare service or services during a specific period of time for a specific price – [at the Plan’s] in-network rate,” which Plaintiffs allege is 80% of their full-billed charges. Plaintiff claims that 80% of the billed amount was 93,472 of which Oxford paid \$38,264.30. Plaintiffs’ Amended Complaint alleges four counts against the defendants, all sounding in New York state law, which are: (1) breach of contract; (2) unjust enrichment; (3) promissory estoppel; and (4) violation of New York’s Prompt Pay Law.

Defendants argue that Plaintiffs Amended Complaint should be dismissed in its entirety and with prejudice on the grounds that each of Plaintiffs’ state law causes of action are expressly preempted by ERISA and alternatively, fail to state a claim under New York State Law upon which relief can be granted.

Plaintiffs’ state law counts are expressly preempted by ERISA because the claims at issue in this case all “relate to” Oxford’s administration of an ERISA governed employee welfare benefit plan. *See* ERISA §514(a); 29 U.S.C. §1144(a); *Pirro v. Nat’l Grid*, 590 F. App’x 19, 22 (2d Cir. 2014); *Crawley-Mack v. Rite Aid of New York Inc.*, No. 16-cv-4622(AMD)(RER), 2017 WL 11407303, at *6 (E.D.N.Y. May 17, 2017); *Comprehensive Spine Care, P.A. v. Oxford Health Ins., Inc.*, No. CV 18-13874, 2019 WL 2498925, at *4 (D.N.J. June 17, 2019). The in-network exception letter that Plaintiffs allege constitutes an independent agreement between them and Oxford was, by its express terms, addressed to the Patient, not the Plaintiffs and the Plaintiffs were not mentioned in, or parties to, the letter. Therefore, the letter itself does not constitute an agreement between Oxford and the Plaintiffs. Furthermore, in the letter, Oxford informed the Patient that its preapproval does not guarantee payment for the services rendered and that any payment of benefits will be subject to the terms of the Patient’s ERISA Plan. As such, the letter does not constitute an agreement independent of the ERISA Plan. *See Theunissen v. United HealthCare Grp., Inc.*, 365 F. Supp. 3d 242, 247 (D. Conn. 2019); *Comprehensive Spine Care, P.A.*, 2019 WL 2498925, at *4. The only way to determine whether Plaintiff’s claims were administered properly is to review the terms of the governing ERISA Plan and thus, all of Plaintiff’s state law claims are expressly preempted by ERISA pursuant to ERISA §514(a); 29 U.S.C. §1144(a). *See Pirro*, 590 F. App’x at 22; *Thompson v. Deutsche Bank Tr. Corp.*, 2014 U.S. Dist. LEXIS 19386, at *13 (S.D.N.Y. Feb. 14, 2014); *Theunissen, supra.*; *Comprehensive Spine Care, P.A., supra.*

Plaintiffs’ causes of action are also subject to dismissal on the separate ground that they all fail to state a claim upon which relief can be granted under New York State law because: (1) the in-network exception approval, which Plaintiffs allege constitutes the basis for their New York State law causes of action, was reduced to writing and demonstrates that it is not an agreement or promise to pay Plaintiffs at any rate, instead, it states the exact opposite; *i.e.*, that this “approval does not guarantee payment” and that “payment is based on the ... [t]erms, conditions, exclusions and limitations of the Member’s health benefit Plan”; (2) even if the in-network exception letter constituted an agreement and/or promise, the letter was addressed to, and for the benefit of, the Patient, T.M., not the Plaintiffs. The Plaintiffs are not parties to the in-network exception letter nor are they even mentioned in the letter and thus, they are strangers to the document and have not sufficiently alleged the existence of any legal obligation (contractual or otherwise) owed to them by the Defendants; and (3) Plaintiffs do not allege that the services at issue were performed for the Defendants, or at the behest of the Defendants necessary to state a claim for unjust enrichment upon which relief can be granted (*see Kagan v. K-Tel Ent., Inc.*, 172

A.D.2d 375, 376, 568 N.Y.S.2d 756, 757 (1991); *Douglas Elliman, LLC v. E. Coast Realtors, Inc.*, 149 A.D.3d 544, 52 N.Y.S.3d 351, 352 (2017)).

Based on the foregoing, Defendants New York State Law causes of action for (1) breach of contract; (2) unjust enrichment; (3) promissory estoppel; and (4) violation of New York's prompt pay law are expressly preempted by ERISA and dismissed from the Amended Complaint. Without any remaining causes of action within the Amended Complaint, it is hereby:

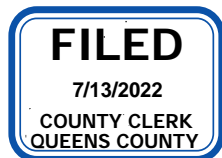
ORDERED that Defendants' Motion to Dismiss Plaintiffs' Amended Complaint is granted, and the Amended Complaint is dismissed in its entirety and with prejudice as against said Defendants and the Clerk is directed to enter judgment accordingly in favor of said Defendants.

The Court may consider affidavits in opposition. *See Conte v. Frelen Associates, LLC*, 51 A.D.3d 620 (2d Dep't 2008) because Defendants' Motion to Dismiss has been granted in its entirety and the Affidavit of Kathleen Damiano and exhibits annexed thereto submitted in Opposition to Defendants' Motion to Dismiss do not change the Court's aforementioned analysis, Defendants' Motion to Strike (Seq. 4) is moot and thus, it is hereby:

ORDERED that Defendants' Motion to Strike portions of the Affidavit of Kathleen Damiano dated December 1, 2021, and the exhibits annexed thereto, submitted in Opposition to Defendants' Motion to Dismiss the Amended Complaint, as well as Plaintiffs' arguments related thereto as set forth in Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss is denied as moot.

The foregoing constitutes the decision and Order of this Court.

Dated: 7/11/2022




ULYSSES B. LEVERETT, J.S.C.

Hon. Ulysses B. Leverett