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

2023 NY Slip Op 30514(U)

January 19, 2023

Supreme Court, Queens County

Docket Number: Index No. 715806/21

Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **ALLAN B. WEISS** IAS Part 2
Justice

NORMAN MAURICE ROWE, MD, MHA, LLC & EAST COAST PLASTIC SURGERY, PC,

Plaintiffs,

-against-

OXFORD HEALTH INSURANCE COMPANY, INC., et al.,

Defendants.

Index No. 715806/21

Motion Date: 5/4/11

Motion Seq. Nos. 2 & 3

The following numbered papers read E26-E33, E34-E39 and E41-E42 on Motion Seq. No. 2, by defendants Oxford Health Insurance Co., Inc., Oxford Health Insurance Inc., Oxford Health Plans (NJ), Inc., Oxford Health Plans (NY), Inc. and Oxford Health Plans, LLC (Oxford) for an order dismissing plaintiff's amended complaint pursuant to CPLR 3211 (a)(1) and (a)(7); and papers read E43- E44, E45 and E46 on motion Mot. Seq. No. 3 by defendants for an order striking portions of the affidavit of Kathleen Damiano and the affirmation of Brendan Kearns, Esq., submitted by plaintiffs in opposition to Motion Seq. No. 2.

Mot Seq. No 2	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	E26-E33
Opposing Affidavits - Exhibits.....	E34-E39
Reply Affirmation.....	E41-42

Mot Seq. No 3

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	E43-E44
Opposing Affidavits - Exhibits.....	E45
Reply Affirmation.....	E46

Upon the foregoing papers it is ordered that the Motion Sequence Nos. 2 and 3 are considered simultaneously herewith for one decision and order and are determined as follows:

Plaintiffs Norman Maurice Rowe, M.D., M.H.A.., L.L.C. (Rowe) and East Coast Plastic Surgery, P.C. (East Coast), are entities that provide health services in the State of New York. Plaintiffs allege that surgical services were provided to patient "S.S." (the patient) on August 27, 2019. Plaintiffs were considered "out-of-network" providers of such services. Thereafter plaintiffs submitted bills to Oxford for payment. It is undisputed that the patient was insured through her employer's United Healthcare/Oxford-administered health benefit plan, Metro Plan, which as an employer-provided welfare benefit plan, is governed by the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC 1003 [a]). Plaintiffs allege that a certain letter, dated August 13, 2019, (the Oxford letter), sent to the patient by Oxford, constituted a "network exception" agreement to pay plaintiffs, as out-of-network providers, the in-network rate. The letter was copied to Dr. Norman Rowe, M.D., Manhattan Eye, Ear and Throat. Plaintiffs allege that Oxford issued payment that was unreasonable for the services provided.

In their amended complaint[1], plaintiffs interpose causes of action for breach of contract, unjust enrichment, promissory estoppel, and violation of the Prompt Pay Law. Plaintiffs claim that the Oxford letter approving the services to be performed constituted an agreement to pay them at the in-network rate.

Oxford brings a pre-answer motion to dismiss the amended complaint on the grounds that each of plaintiffs' causes of action, being state-law claims, are expressly preempted by ERISA or otherwise fail to state a claim upon which relief can be granted.

ERISA's federal preemption provision explicitly provides, in pertinent part, that "the provisions of this subchapter…shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan…" (ERISA §514; 29 USC 1144

[1] To the extent that plaintiffs filed a second amended complaint in NYSCEF (Doc. # E48), the same was filed without leave of court and not upon a motion, as such it is disregarded (CPLR 3025[b]).

[a]). Moreover, "ERISA pre-emption is not limited to state laws that specifically affect employee benefit plans, it extends to state common-law contract and tort actions that relate to employee benefits as well" (*Chau v Hartford Life Ins. Co*. 167 F Supp 3d 564, 571[SDNY 2016]). Oxford maintains that the claims at issue in this action "relate to" its administration of an ERISA-governed plan within the meaning of 29 USC 1144 (a), and as such are pre-empted.

In opposition to the motion, plaintiffs maintain that their claims are not pre-empted inasmuch as the said Oxford letter is a contract. A claim is not preempted by ERISA if some other "independent duty" forms another basis for legal action (*see McCullogh Orthopaedic Surgical Services, PLLC v Aetna, Inc.*, 857 F. 3d 141, 146 [2nd Cir 2017). Plaintiffs maintain that they are not making an ERISA claim, but rather seeking to enforce Oxford's independent contractual "promise" to pay the in-network rate.

This case is one of dozens of cases filed by the plaintiffs against Oxford in Queens Supreme Court. It appears that an separate action was commenced with regard to each individual patient. In a related Queens matter, *Norman Maurice Rowe, M.D., M.H.A., L.L.C. and East Coast Plastic Surgery PC v Oxford Health Insurance Co., Inc., Oxford Health Insurance Inc., Oxford Health Plans (NJ), Inc., Oxford Health Plans (NY), Inc. and Oxford Health Plans, LLC,* (Index 715808/2021 [McDonald, J.]), Oxford sought removal of the action to the Federal court. In the Memorandum and Order of the Honorable Eric Komitee, United States District Judge, the court found that plaintiff's state-law claims were not pre-empted, and the matter was remanded to Queens Supreme Court (*see, Norman Maurice Rowe, M.D., M.H.A., L.L.C. and East Coast Plastic Surgery PC v Oxford Health Insurance Co., Inc., Oxford Health Insurance Inc., Oxford Health Plans (NJ), Inc., Oxford Health Plans (NY), Inc. and Oxford Health Plans, LLC,* 22-CV-0117 [EK][CLP]).

Notwithstanding the issue of preemption, central to all of plaintiffs' claims, state and federal, is that the allegation that the Oxford letter was an enforceable contract existing between the plaintiff and defendants. However, is undisputed that the Oxford letter was written to "S.S", the patient. Moreover, in the letter, Oxford informed the patient that its approval "does not guarantee payment…Upon receipt of the claim, we will assess whether the service codes listed above are eligible for payment." Arguments alleging pre-authorization letters to be deemed contracts have been rejected in New York and other Federal courts (*Neurological Surgery, P.C. v Siemens Corp.*, 17-civ-3477; 2017 WL 6397737 [EDNY 2017]; *Advanced Orthopedics and Sports Medicine Inst. v Oxford Health Ins.*, 21-17221; 2022 WL 1718052 [U.S. Dist. Ct., New Jersey 2022]). To the extent plaintiffs allege that "Rowe" spoke via telephone to an individual in Oxford's

surgical preapproval department, there is no allegation that oral approval was in fact given.

A complaint shall be given a liberal construction on a motion to dismiss (*see, Reznick v Bluegreen Resorts Mgt.,* 154 AD3d 891 [2nd Dept 2017]). With regard to a claim of breach of contract, a party alleging the same must demonstrate the existence of a contract reflecting the terms and conditions of the purported agreement. (*Canzona v Atanasio*, 118 AD3d 837 [2nd Dept 2014]). Moreover, "the plaintiff's allegations must identify the provisions of the contract that were breached" (*id.,* at 839). Here, plaintiffs' amended complaint contains no allegations of the terms or conditions of a purported agreement whereby Oxford would pay plaintiffs (*see*, *Theaprin Pharm. v Conway*, 137 AD3d 1256 [2d Dept 2016]). The court cannot be called upon to "speculate" as to the terms and conditions of any agreement to be gleaned from the Oxford letter (*see, Mandarin Trading v Wildenstein*, 16 NY3d 173, 182 [2011]).

Notwithstanding plaintiffs' allegation that "Rowe and Oxford reached an agreement," neither of the plaintiffs were a party to the Oxford letter. Even assuming arguendo, the Oxford letter itself constituted a contract, the "agreement" was between Oxford and the patient. A non-party to a contract lacks standing unless it can establish that it was an intended beneficiary of the contract (*Nanomedicon, LLC v Research Foundation of the State Univ. of N.Y.*, 112 AD3d 594 [2013]). "A party asserting rights as a third-party beneficiary must establish '(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to [them] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost (*id.*, at 596). Here, in the amended complaint, there are no allegations in the complaint sufficient to meet these elements. Similarly, there is no allegation at all that the plaintiffs were intended beneficiaries of the said contract. It is well-established that such an allegation is required for a non-party to maintain a claim of breach of contract (*id.*; *Reznick,* 154 AD3d at 894; *Town of Oyster Bay v Doremus,* 94 AD3d 867 [2nd Dept 2012]; and *see*, *Norman Maurice Rowe, M.D., M.H.A., L.L.C. and East Coast Plastic Surgery PC v Oxford Health Insurance Co., Inc., et al,* Sup. Ct., Queens County, July 21, 2022, McDonald, J., index 713753/2021; *Norman Maurice Rowe, M.D., M.H.A., L.L.C. and East Coast Plastic Surgery PC v Oxford Health Insurance Co., Inc., et al,* Sup. Ct., Queens County, Aug. 31, 2022, Caloras, J., index 716139/2021). "Vague allegations suggesting that there may have been an agreement do not suffice" (*Reznick*, 154 AD3d at 893; *Canzona v Atanasio*, 118 AD3d at 839). Essentially, without an agreement, "there can be no contract and without a contract, there can be no breach of the agreement" (*Reznick*, 154 AD3d at 893). Accordingly, the breach of contract claim is dismissed.

Insofar as plaintiffs interposed no opposition to those branches of the motion that sought to dismiss the claims of unjust enrichment and promissory estoppel, the claims are

dismissed as abandoned (*Blackman v Metropolitan Transit Auth*, 206 AD3d 602 [2nd Dept 2022]).

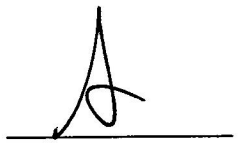
Finally, the Prompt Pay Law (Insurance Law §3224-a), by its very terms, applies to the processing of health care claims "submitted under contracts or agreements." It follows that plaintiffs' claims cannot stand where this court has already found that there was no contract or agreement between the parties. Moreover, the Prompt Pay Law "is designed to facilitate the 'prompt, fair and equitable' payment of claims for health-care services. Specifically, the Prompt Pay Law requires insurers to pay undisputed claims within thirty days following receipt of an electronic claim submission or within forty-five days after receipt by other means, as long as the claims were themselves timely submitted to the health insurer within 120 days of the date of service" (*Surgicore of Jersey City v Empire HealthChoice Assurance,* 2021 WL 1092029 [EDNY 2021]). Here, plaintiffs allege only that "Rowe submitted its claim to Oxford." There is no allegation that plaintiffs timely made their claim, and as such, the allegations in the amended complaint are insufficient (*id.,* at 7).

In light of all of the foregoing, the complaint is dismissed pursuant to CPLR 3211 (a)(7).

With regard to Motion Sequence No. 3, it is rendered moot by the dismissal of the complaint. To the extent that this motion seeks to strike the affidavit of Katheen Damiano and the affirmation of Brendan Kearns, Esq., submitted by plaintiffs in opposition to Motion Sequence No. 2, nothing in the said affidavits is sufficient to change the court's determination in Motion Sequence No. 2.

Accordingly, Motion Sequence No. 2 seeking dismissal of the amended complaint is granted in its entirety. Motion sequence No. 3 is denied as moot.

Dated: January 19 2023



J.S.C.