East Coast Plastic Surgery, P.C. v Oxford Health Ins. Co., Inc.
2023 NY Slip Op 30537(U)
January 9, 2023
Supreme Court, Queens County
Docket Number: Index No. 713753/2021
Judge: Sally E. Unger
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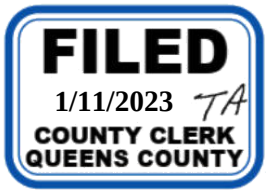
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HONORABLE SALLY E. UNGER
Acting Justice

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EAST COAST PLASTIC SURGERY, P.C., IAS Part 24

Plaintiff, Index No.: 713753/2021

-against- Motion Date: 3/31/2022

OXFORD HEALTH INSURANCE COMPANY, INC., OXFORD HEALTH PLANS (NJ), INC., OXFORD HEALTH PLANS (NY), INC. and OXFORD HEALTH PLANS, Motion Seq. No. 3

Defendants.

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The following electronically filed (EF) papers, read on this motion 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 (hereinafter collectively "Oxford") for an order dismissing plaintiff's amended complaint pursuant to CPLR 3211 (a)(1) and (a)(7); and duly submitted as motion sequence 3.

	Documents Numbered
Notice of Motion - Affirmation - Exhibits.....	EF31-EF39
Opposing Affidavits - Exhibits.....	EF40-EF45
Reply Affirmation.....	EF46-EF47

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff East Coast Plastic Surgery. P.C., (hereinafter "East Coast"), is an entity that provides health services in the State of New York. Plaintiff alleges that surgical services were provided to patient "B.G." (hereinafter "patient") on August 5, 2020. East Coast was an "out-of-network" provider of such services. Thereafter plaintiff submitted bills to Oxford for payment for said services. The patient was insured through her employer's Oxford-administered health benefit plan, Lantern Community 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]; *Comprehensive Spine Care v Oxford Health Insurance*, No. CV 18-13874; 2019 WL 2498925 [D. New Jersey 2019]). East Coast alleges that correspondence dated July 23, 2020, (hereinafter " Oxford letter"), sent to the patient by Oxford, constituted a "network exception" agreement to pay East Coast as an out-of-network provider at the in-network rate. The letter was copied to non-parties

Hudson Regional Hospital and Dr. Norman Rowe. In the amended complaint, East Coast alleges that Oxford issued payment that was unreasonable for the services provided.

In its amended complaint, plaintiff alleges causes of action for breach of contract, unjust enrichment, promissory estoppel, and violation of the Prompt Pay Law. East Coast claims that the Oxford letter approving the services to be performed constituted an agreement to reimburse it at the in-network rate.

Oxford brings a pre-answer motion to dismiss the amended complaint on the grounds that each of plaintiff's causes of action, being state-law claims, is expressly preempted by ERISA or otherwise fails 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 [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, [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).

Pursuant to 29 USC §1003(a), ERISA applies to "any employee benefit plan if it is established or maintained ... by any employer engaged in commerce." "The purpose of this broad preemption clause [is] to ensure [that] plans and plan sponsors [are] subject to a uniform body of benefit law, minimizing the administrative and financial burden of complying with conflicting requirements of the various States" (*Comprehensive Spine Care v Oxford Health Insurance*, No. CV 18-13874; 2019 WL 2498925; *Crawley-Mack v Rite Aid of New York*, 16 Civ 4266, 2017 WL 11407303 [EDNY 2017]).

In opposition, plaintiff does not submit a memorandum of law or any legal arguments from counsel. Rather, plaintiff relies on an affidavit of Kathleen Damiano (hereinafter "Damiano"), an employee of East Coast. While the amended complaint states that East Coast "spoke to an individual in Oxford's surgical preapproval department," Damiano does not state that she was the employee, or even identify the employee, who spoke to Oxford. To the extent that some courts have found oral approval to be sufficient (see, *Plastic Surgery Ctr. v Aetna Life Ins. Co.* (967 F3d 218, 2020 Employee Benefits Cas. 266, 211 [3rd Cir 2020] and *McCullogh Orthopaedic Surgical Services, PLLC v Aetna, Inc*. 857 F3d 141, 63 Employee Benefits Cas. 1657 [2nd Cir 2017]), here, there is a written letter from Oxford stating that coverage was subject to the terms of the plan (see *Advanced Orthopedics and Sports Medicine Inst. v Oxford Health Ins.*, Civ 21-17221, 2022 WL 1718052 [D. New Jersey 2022];). Moreover, while the amended complaint asserts that East Coast contacted Oxford and spoke to an individual in Oxford's pre-approval department to request an "in network" exception, the amended complaint does not allege that oral approval was ever given.

Attached to the Damiano affidavit are unsworn, redacted billing records of another patient and a one-page excerpt from a different purported agreement. While an affirmation in opposition is provided by counsel, who only states he adopts the arguments made in a memorandum of law, no such memorandum was submitted with regard to the instant motion (and does not appear in the NYSCEF file).

Intrinsically, plaintiff seemingly maintains the said Oxford letter is a contract insofar as the Damiano affidavit alleges that Oxford made an offer to pay the in-network rate and plaintiff accepted by providing the services. With regard to preemption, a claim is not preempted by ERISA if "some other completely independent duty forms another basis for legal action" (*Montefiore Med. Ctr v Teamsters Local 272*, 642 F3d 321, 50 Employee Benefits Cas. 2496 [2d Cir 2011]; and see *McCullogh Orthopaedic Surgical Services, PLLC v Aetna, Inc*., *supra*). Plaintiff is evidently seeking to enforce Oxford's alleged contractual "promise" as an independent duty and as such, defeat pre-emption. However, it is undisputed the Oxford letter was written to the patient. Moreover, in the letter, Oxford plainly informed the patient that its approval "does not guarantee payment" and payment would "depend on" other terms of the patient's (ERISA-governed) plan (see, *Comprehensive Spine Care v Oxford Health Insurance, supra*; *Advanced Orthopedics and Sports Medicine Inst. v Oxford Health Ins*., *supra*; *Glastein v Horizon Blue Cross Blue Shield* 17-cv-7893, 2018 WL 3849904 [D. New Jersey 2018]). In *Glastein*, the court rejected a plaintiff doctor's claim that a pre-authorization letter was a contract where the terms of the letter stated that payment was subject to the terms of the patient's plan (see also, *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.*, *supra*; *Comprehensive Spine Care v Oxford Health Insurance*, *No*. *supra*).

This Court concurs with the reasoning in several related cases in Queens County that "the only means by which to determine if the claims were administered properly is to review the terms of the governing ERISA plan" (*Rowe, et al v Oxford Health Ins. Co., Inc*., Sup Ct, Queens County, July 11, 2022, Leverett, J., index No. 714272/2021; and see *East Coast Plastic Surgery v Oxford Health Ins. Co*., Sup Ct, Queens County, May 27, 2022, Esposito, J., index No. 713748/2021; *Rowe Plastic Surgery of Long Island v Oxford Health Ins. Co*., Sup Ct, Queens County, July 21, 2022, McDonald, J., index No. 702017/2022; and *Rowe v Oxford Health Ins. Co., et al*, Sup Ct, Queens County, Aug. 31, 2022, Caloras, J., index No. 716139/2021). Moreover, as noted by the Court of Appeals, preemption is intended for those claims relating to the administration of healthcare plans and the "decision making process with respect to coverage or benefits" (see *Nealy v U.S. Healthcare HMO*, 93 NY2d 209, 689 NYS2d 406 [1999] [ERISA did not pre-empt medical malpractice or timely treatment claims]). As such, it follows that plaintiff's contractual and other state-law claims are expressly preempted by ERISA and thereby superseded.

In reply, Oxford correctly maintains that, in addition to pre-emption, where East Coast interposed no opposition to those branches of the motion that sought to dismiss the claims of unjust enrichment, promissory estoppel, or violation of the Prompt Pay Law, the claims must be deemed abandoned (*Blackman v Metropolitan Transit Auth*, 206 AD3d 602, 169

NYS3d 653 [2nd Dept 2022]). The only claim stemming from the Damiano affidavit is, plausibly, breach of contract. While a complaint shall be given a liberal construction on a motion to dismiss pursuant to CPLR 3211(a)(7), there can be no breach of contract claim where, assuming arguendo, the Oxford letter constituted a contract, there is no allegation the non-party, in this matter plaintiff, was an intended beneficiary of the contract (see, *Reznick v Bluegreen Resorts Mgt*., 154 AD3d 891, 62 NYS3d 460 [2nd Dept 2017]; *Town of Oyster Bay v Doremus*, 94 AD3d 867, 942 NYS2d 546 [2nd Dept 2012]). Moreover, "vague allegations suggesting that there may have been an agreement do not suffice" (*Reznick*, at 893). Accordingly, the breach of contract claim is dismissed.

Had plaintiff not abandoned its other claims, and notwithstanding the clear Federal pre-emption, the remaining state law claims must still fail and are also dismissed pursuant to CPLR 3211(a)(7). To recover on a claim for unjust enrichment, the services must have been performed at the request or at the behest of the defendant (*Lakeville Place Mech. v Elmar Realty Corp*., 276 AD2d 673, 714 NYS2d 338 [2nd Dept 2000]; *Clark v Daby*, 300 AD2d 732, 751 NYS2d 622 [3rd Dept 2002]). No such allegation is made herein, rather, the services were performed at the behest of the patient, B.G., and any incidental benefit to Oxford is insufficient to sustain a claim for unjust enrichment (Id. at 732). Moreover, as noted herein, the Oxford letter did not contain a "clear and unambiguous promise" so as to support a claim for promissory estoppel (*Nam Tai Electronics v UBC PaineWebber*, 46 AD3d 486, 850 NYS2d 11 [1st Dept 2007]). Finally, insofar as the Prompt Pay Law (Insurance Law §3224), by its very terms, applies to the processing of health care claims "submitted under contracts or agreements," plaintiff's claims cannot stand where this court has already found that there was no contract or agreement between the parties (see *Millennium Health, LLC v Emblem Health*, 240 F Supp 3d 276 [SDNY 2017]; *Surgicore of Jersey City v Empire HealthChoice Assurance*, 2021 WL 1092029 [EDNY 2021]). Moreover, Prompt Pay claims are also expressly pre-empted by ERISA (See, *Neurological Surgery, P.C. v Siemens Corp.*, 2017 WL 6397737 [EDNY 2017]).

Accordingly, it is

ORDERED, that the motion seeking dismissal of the amended complaint is granted in its entirety as and against the 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.

This constitutes the decision and order of the Court.

Dated: January 9, 2023

SALLY E. UNGER, A.J.S.C.

FILED
1/11/2023 TA
COUNTY CLERK
QUEENS COUNTY