

**Grzegorz Wolski Physical Therapy P.C. v
United Healthcare Group**

2024 NY Slip Op 31911(U)

May 30, 2024

Supreme Court, Kings County

Docket Number: Index No. 503189/2023

Judge: Peter P. Sweeney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

PRESENT: HON. PETER P. SWEENEY, PART 73
JUSTICE

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GRZEGORZ WOLSKI PHYSICAL THERAPY :
P.C. d/b/a PHYSIOTHERA LLC, : Index No. 503189/2023
:
Plaintiff, : Motion Date: 1/10/2024
:
-against- :
: Motion Seq. No. 002
:
UNITED HEALTHCARE GROUP, :
UNITEDHEALTHCARE OF NEW YORK, INC. :
d/b/a UNITEDHEALTHCARE INSURANCE : DECISION + ORDER ON
COMPANY OF NEW YORK, and "JOHN DOE : MOTION
CORPORATION," said company being :
fictitious, as true corporate entity is unknown, :
:
Defendants. :
----- X

The following e-filed documents, listed by NYSCEF document number (Motion 002) were read on Defendants Motion to Dismiss

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Upon the foregoing papers, and argument heard on April 22, 2024, it is ordered that the motion filed under Sequence No. 002 is granted and this action is dismissed in its entirety, and it is determined as follows:

First, Plaintiff, Grzegorz Wolski Physical Therapy P.C. d/b/a Physiothera LLC, does not have standing to assert claims for breach of contract against Defendants. Plaintiff is an out-of-

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network provider that seeks to recover allegedly unpaid or underpaid benefits for medical services rendered by Plaintiff to a series of patients who allegedly participated in the New York State Health Insurance Program Empire Plan (the “Empire Plan”). According to Plaintiff, these patients “are allowed to assign the benefits of the [Empire Plan] to any treating medical provider,” and delivered to Plaintiff “a valid assignment of benefits” under the Empire Plan so that Plaintiff could “receive the benefits of the [Empire] Plan.” Defendants argue, however, that Plaintiff does not possess any “valid” assignments of benefits under the Empire Plan because the Empire Plan contains an anti-assignment provision that prohibits assignments of benefits, stating:

No Assignment. You cannot assign any benefits or monies due from the Hospital Program Administrator to any person, corporation or other organization. Any assignment by You will be void. Assignment means the transfer to another person or organization of Your right to the services provided or Your right to collect from the Program Administrator for those services.

NYSCEF Doc. No. 32, p. 34; NYSCEF Doc. No. 33, p. 34; NYSCEF Doc. No. 34, p. 36.¹

Defendants are correct. While Plaintiff seeks to recover health insurance benefits based on an alleged contractual right to the benefits that Plaintiff claims it holds, on assignment, under the Empire Plan, the Empire Plan’s anti-assignment provision clearly and definitively bars Plaintiff from proceeding.

Under New York law, “an assignment is valid ... unless the agreement specifies that an assignment would be invalid or void[;] [t]hus, it has been consistently held that assignments

¹ The Empire Plan documents in effect during the years of services at issue are attached as Exhibits 1-3 (NYSCEF Doc. Nos. 32-34) of the Affirmation of Mabel S. Fairley (NYSCEF Doc. No. 31). The Empire Plan documents are properly considered by this Court in ruling on Defendants’ Motion to Dismiss because they are incorporated by reference in Plaintiff’s Complaint. *All. Network, LLC v. Sidley Austin LLP*, 43 Misc.3d 848, 852 (N.Y. Sup. 2014) (“On a motion to dismiss, the Court may consider documents referenced in a complaint, even if the pleading fails to attach them.”). “When evidentiary material” like the Empire Plan documents “is considered”, then the criterion for granting the motion is “whether the proponent of the pleading has a cause of action, not whether he has stated one.” *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274 (1977); see also *Prudential-Bache Metal Co., Inc. v. Binder*, 121 A.D.2d 923, 926 (1st Dep’t 1986) (“When evidentiary material submitted in support of a complaint demonstrates that a material fact claimed by the plaintiff is not a fact at all, there is no bar to a dismissal of the complaint for failure to state a cause of action.”).

made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments.” *Mosdos Chofetz Chaim, Inc. v. RBS Citizens, N.A.*, 14 F. Supp.3d 191, 226 (S.D.N.Y. 2014). The Empire Plan’s anti-assignment provision clearly and definitely states that an assignment to any medical provider is void. *See Cole v. Metro. Life Ins. Co.*, 273 A.D.2d 832, 833 (4th Dep’t 2000) (affirming dismissal of plaintiff-provider’s claims to recovery health insurance benefits under the Empire Plan because the Empire Plan contains “clear, definite and appropriate language declaring the invalidity of such assignments” and reiterating that Empire Plan “assignments cannot confer standing upon plaintiff.”) (quoting *Macklowe v. 42nd Street Development Corp.*, 170 A.D.2d 388, 389 (1st Dep’t 1991).

Plaintiff argues that Defendants waived the right to invoke the Empire Plan’s anti-assignment provision under *Hosp. for Joint Diseases v. Travelers Prop. Cas. Ins. Co.*, 9 N.Y.3d 312 (2007). That decision is inapplicable, and does not govern the subject matter of this action. In *Travelers*, the court held that the defendant no-fault motor vehicle insurer waived its right to challenge a purportedly invalid assignment of benefits because it failed to verify the assignment of benefits within the time period permitted by the regulations governing no-fault motor vehicle insurance claims. Contrarily, this case involves a health insurance benefit claim that is not subject to the no-fault motor vehicle insurance regulations, set forth in relevant part at N.Y. Comp. Codes R. & Regs. tit. 11, §65-3.5.² Plaintiff did not identify any similar regulations or other legal obligation allegedly applicable to health insurance claims. “It is well settled under New York law that a waiver is an intentional abandonment or relinquishment of a known right or

² Specifically, *Travelers* concerned a dispute over no-fault insurance payments under Property and Casualty regulations set forth in N.Y. Comp. Codes R. & Regs. tit. 11, §65-3.5, which is the “Claim Procedure” for “Claims for Personal Injury Protection Benefits” within New York’s “Regulations Implementing the Comprehensive Motor Vehicle Repairs Act.” New York’s motor vehicle no-fault Claim Procedure requires a no-fault insurer to “accept a completed hospital facility form (NYS form NF-5) ... submitted by a provider of health services with respect to the claim of such provider” for payment of no-fault insurance benefits. N.Y. Comp. Codes R. & Regs. tit. 11, §65-3.5(g). If a no-fault insurer wishes to verify a no-fault health services claim submitted on an NYS form NF-5, it is statutorily required to do so within 15 days of its receipt of that form. *Travelers*, 9 N.Y.3d 312, 315-17 (2007) (citing N.Y. Comp. Codes R. & Regs. tit. 11, §65-3.5(b)). The defendant motor vehicle no-fault insurer received an NYS form NF-5 that did not contain an executed assignment of benefits, but failed to request the executed assignment within the no-fault Claim Procedure’s statutorily mandated period. *Travelers*, 2005 WL 6052938. The healthcare provider plaintiff thus commenced a lawsuit and the defendant insurer argued that the plaintiff lacked standing because it did not have an executed assignment. *Id.* The Court ruled that the defendant waived the right to assert that the plaintiff lacked standing due to a defective assignment because it did not object to the assignment within the time period set forth in the applicable regulation. *Travelers*, 34 A.D.3d 532 (2d Dep’t 2006), *aff’d*, 9 N.Y.3d 312 (2007).

advantage which, but for such waiver, the party would have enjoyed.” *Rsch. Frontiers Inc. v. Prelco Inc.*, No. 18-cv-2939(ST), 2020 WL 6746730, at *5 (E.D.N.Y. Nov. 17, 2020) (internal quotation marks and citations omitted). The “right or advantage” that the defendant abandoned in *Travelers* was the regulatory right to seek verification of the hospital’s assignment within 15 days of receipt of NYS form NF-5 in accordance with N.Y. Comp. Codes R. & Regs. tit. 11, §65- 3.5(b); *Travelers*, 9 N.Y.3d 312, 317 (2007). Here, there is no regulation requiring health insurance plans to verify or challenge assignments of benefits within any time period and Plaintiff does not argue otherwise. In addition, courts that have addressed this issue in the context of health insurance claims reject arguments that insurers/claim administrators waived anti-assignment provisions by not raising the issue at the time of the benefit denial. *See N. Jersey Plastic Surgery Ctr., LLC*, No. 2023 WL 5956142 at *11 (“Mere silence regarding [an] anti-assignment provision[] does not constitute a waiver of those provisions.”)(citations omitted); *Mbody Minimally Invasive Surgery, P.C. v. Empire Healthchoice HMO, Inc.*, 2014 WL 4058321, at *3 (S.D.N.Y. Aug. 15, 2014) (holding that “[t]hat defendants did not raise the anti-assignment provision at the time they denied or reduced payment is irrelevant because the anti-assignment provision was not a factor determining the payment amount.”).

Plaintiff also argues that N.Y. Ins. Law §3103 creates a contract and/or statutory right of action under which Plaintiff may sue Defendants for breach of contract, regardless of Plaintiff’s lack of standing. Plaintiff’s argument is not persuasive. N.Y. Ins. Law §3103 is not a mechanism for strangers to contracts to create contractual privity where none otherwise exists. Rather, it is a statutory safe-harbor that protects insureds (*e.g.*, Empire Plan participants) when their insurance contract or policy contains or omits provisions in violation of New York Insurance Law, such that the contract or policy remains enforceable against the insurer and the offending provisions are enforceable only as if they conformed to the law. N.Y. Ins. Law §3103(a) (providing that “any policy of insurance or contract of annuity delivered or issued for delivery in this state in violation of any of the provisions of this chapter” remains “valid and binding upon the insurer ... but in all respects in which its provisions are in violation of the requirements or prohibitions of this chapter it shall be enforceable as if it conformed with such requirements or prohibitions”); *id.* §3103(c) (“In any action to recover under the provisions of any policy of insurance or contract ..., the court shall enforce such policy or contract as if its provisions were the same as

those specified in this chapter unless the court finds that its actual provisions were more favorable to policyholders at the date when the policy or contract was issued.’). Nothing in N.Y. Ins. Law §3103, or the caselaw interpreting it, provides a mechanism for strangers to a contract to create contractual standing out of thin air. Plaintiff alleges no facts to support an allegation that it has any contractual privity with Defendants and, to the extent that it relies on Empire Plan assignments, such assignments are invalidated by the Empire Plan’s anti-assignment provision.

Accordingly, Plaintiff’s First, Fourth and Seventh Causes of Action for breach of contract are dismissed because Plaintiff has identified no contract or agreement under which it has standing proceed.

Second, Plaintiff’s claims for violations of New York’s Prompt Pay Law, N.Y. Ins. Law, § 3224-a (Plaintiff’s Second, Fifth and Eighth Causes of Action), must also be dismissed for lack of standing. “The Prompt Pay Law applies only to the processing of all health care claims submitted under contracts or agreements as defined in Section 3224 and other sections of the insurance law.” *Norman Maurice Rowe, M.D., M.H.A., L.L.C., et al. v. Oxford Health Insurance Co., Inc., et al.*, Index No. 716139/2021, NYSCEF Doc. No. 49; *Rowe Plastic Surgery of Long Island, P.C. v. Oxford Health Ins. Co., Inc.*, No. 702091/2022, 2023 WL 2238042, at *5 (N.Y. Sup. Ct. Feb. 17, 2023) (“Plaintiffs’ claims for violation of New York’s Prompt Pay law fail to state a claim because there are no independent agreements between the parties on which to predicate such claims and plaintiffs’ Complaints fail to state when or how the bills were submitted to Defendants necessary to state a claim for violation of New York’s Prompt Pay law.”). As an out-of-network provider, Plaintiff has no contract or agreement with Defendants. The only contract implicated in Plaintiff’s action, therefore, is the Empire Plan, which prohibits participants from assigning benefits to providers, like Plaintiff. Because Plaintiff does not have any contract or agreement with Defendants, the health benefit claims at issue are not claims “submitted under contracts or agreements” identified in N.Y. Ins. Law §3224–a. Accordingly, Plaintiff’s Second, Fifth and Eighth Causes of Action for violations of New York’s Prompt Pay Law are dismissed.

Third, Plaintiff's unjust enrichment claims (Plaintiff's Third, Sixth and Ninth Causes of Action) are dismissed, as Plaintiff does not plead that the services rendered by Plaintiff to the patients at issue were performed at the request or behest of Defendants. *East Coast Plastic Surgery, P.C. v. Oxford Health Ins. Co., Inc.*, No. 713753/2021, 2023 WL 2238046, at *3 (N.Y. Sup. Ct. Jan. 11, 2023) (citing *Lakeville Pace Mech., Inc. v. Elmar Realty Corp.*, 276 A.D.2d 673 (2d Dep't 2000)); *Rowe Plastic Surgery of Long Island, P.C. v. Oxford Health Ins. Co., Inc.*, No. 702091/2022, 2023 WL 2238042, at *4 (N.Y. Sup. Ct. Feb. 17, 2023); *Pekler v. Health Ins. Plan of Greater N.Y.*, 67 A.D.3d 758, 760 (2d Dep't 2009) ("As the complaint alleges that medical services were performed by the plaintiff doctors at the behest of their patients, no claim in *quantum meruit* can be asserted against the defendants.")³ According to Plaintiff's Amended Complaint, the services at issue here were provided to patients that participated in the Empire Plan, not to Defendants. The benefit of those services, *i.e.*, medical care, thus ran directly to those patients. *See Josephson v. United Healthcare Corp.*, No. 11-cv-3665 (JS)(ETB), 2012 WL 4511365, at *1 and *5 (E.D.N.Y. Sept. 28, 2012). Accordingly, Plaintiff's Third, Sixth and Ninth Causes of Action for unjust enrichment are dismissed.

Fourth, Plaintiff's tortious interference claims (Plaintiff's Tenth, Twelfth and Fourteenth Causes of Action) are dismissed due to Plaintiff's failure to sufficiently plead either tortious interference with contractual relations or tortious interference with prospective business advantage. An action for tortious interference with contractual relations requires "proof of the existence of a valid contract between plaintiff and a third party, the defendant's knowledge of that contract, the defendant's intentional procurement of a breach of that contract by the third party without justification, an actual breach of the contract and damages caused by the breach." *Kaminski v. United Parcel Serv.*, 120 A.D.2d 409 (1st Dep't 1986). Here, Plaintiff does not plead the existence of any valid contract between Plaintiff and any of the Empire Plan patients whose claims are the subject of this action.

"To state a cause of action for tortious interference with prospective economic advantage,

³ "Quantum meruit and unjust enrichment are not separate causes of action and are therefore analyzed under the same principles." *Sasson Plastic Surgery, LLC v. UnitedHealthcare of New York, Inc.*, No. 17-cv-1674 (SJF)(ARL), 2021 WL 1224883, at *14 (E.D.N.Y. Mar. 31, 2021), *reaffirmed in relevant part on reconsideration*, 2022 WL 2664355, at *6 (E.D.N.Y. Apr. 26, 2022).

a plaintiff must plead that the defendant directly interfered with a third party and that the defendant either employed wrongful means,” meaning “conduct amounting to a crime or an independent tort,” or “acted for the sole purpose of inflicting intentional harm on plaintiff.” *Ray v. Stockton*, 162 A.D.3d 1677, 1679 (4th Dep’t 2018). Plaintiff’s Amended Complaint fails this standard for the reasons stated in Defendants’ Memorandum of Law, NYSCEF Doc. No. 35. Accordingly, Plaintiff’s Tenth, Twelfth and Fourteenth Causes of Action for tortious interference are dismissed.

Fifth, Plaintiff’s claims for breach of the implied covenant of good faith and fair dealing (Plaintiff’s Eleventh, Thirteenth and Fifteenth Causes of Action) are dismissed because there is no contract between Plaintiffs and Defendants. *Duration Mun. Fund, L.P. v. J.P. Morgan Sec., Inc.*, 77 A.D.3d 474, 474–75 (1st Dep’t 2010) (“A cause of action based upon a breach of a covenant of good faith and fair dealing requires a contractual obligation between the parties.”); *Randall’s Island Aquatic Leisure, LLC v. City of New York*, 92 A.D.3d 463 (1st Dep’t 2012) (“There can be no claim of breach of the implied covenant of good faith and fair dealing without a contract.”). Accordingly, Plaintiff’s Eleventh, Thirteenth and Fifteenth Causes of Action are dismissed.

In opposition to dismissal, Plaintiff asks this Court to construe its action as one seeking benefits under its Patients’ health insurance plans governed by the Employee Retirement Income Security Act of 1974 (as amended), 29 U.S.C. §1001, *et. seq.* (“ERISA”). The Court cannot construe Plaintiff’s action as one seeking ERISA-governed health benefits under Plaintiff’s patients’ ERISA-governed health insurance plans. Plaintiff does not plead a cause of action under ERISA in its Amended Complaint. And, even if Plaintiff did, the Court would still be required to dismiss such claims because the Empire Plan upon which Plaintiff premises this action is a “government plan” under ERISA and ERISA explicitly excludes government plans from its jurisdiction. 29 U.S.C. §1003(4)(b)(1).

ORDERED, that Defendants’ Motion to Dismiss Plaintiff’s Amended Complaint (Seq. No. 002) is granted, and this action is hereby dismissed in its entirety, with prejudice; and it is further

ORDERED, that this action is hereby disposed.

This constitutes the Decision and Order of this Court.

Dated: May 30, 2024



PETER P. SWEENEY, J.S.C.

KINGS COUNTY CLERK
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