SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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KIMBERLY M. MOORE,

Plaintiff,

- v -

MOUNT SINAI HOSPITAL and EMPIRE BLUE CROSS BLUE SHIELD,

Defendants.

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INDEX NO. 805229/2023

MOTION DATE 04/30/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 21, 22, 23

were read on this motion to/for DISMISSAL.

In this action to recover damages, inter alia, for medical malpractice, the defendant Empire Blue Cross Blue Shield (Empire) moves pursuant to CPLR 3211(a)(1) to dismiss the complaint insofar as asserted against it based on a defense founded upon documentary evidence. The plaintiff does not oppose the motion. The motion is granted, and the complaint is dismissed insofar as asserted against Empire.

In her complaint, the plaintiff alleged that Empire, as her medical and prescription drug insurer, "failed to provide authorization for [her] to receive medically necessary prescription medication," that it "wrongfully and negligently denied [her] insurance benefits which prevented, precluded and/or delayed [her] in receiving medically necessary prescription medication," and that it "acted in bad faith in delaying the authorization of Plaintiff's prescription medication." Under CPLR 3211(a)(1), a dismissal is warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially

undeniable" (*Dixon v 105 W. 75th St., LLC*, 148 AD3d 623, 629 [1st Dept 2017], citing *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). Although affidavits do not qualify as documentary evidence (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]), contracts and insurance policies do qualify as documentary evidence (*see Consolidated Rest. Operations, Inc. v. Westport Ins. Corp.,* 205 AD3d 76, 81 [1st Dept 2022] [insurance policy]; *Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2d Dept 2019] [contract]). Empire submitted insurance policy and plan documents establishing that it did not provide medical services to the plaintiff, and that it served only as the third-party claims administrator with respect to medical coverage provided to the plaintiff by her employer. The policy established that Empire did not provide third-party administrative services to the plaintiff's employer with respect to prescription drug coverage which, rather, was provided by nonparty Express Scripts. Hence, even if a negligence claim could be asserted for the failure to cover or reimburse the plaintiff for the cost of prescription drugs, Empire has established that it was not responsible for the denial of coverage. By failing to oppose the motion, the plaintiff did not present any facts to contradict or rebut Empire's showing in this regard. Hence, the complaint must be dismissed against Empire on that ground.

In any event, the proper vehicle for challenging an insurer's denial of a claim for medical or prescription drug coverage or benefits is the commencement of a civil action against the appropriate insurer pursuant to section 502(a)(1)(B) of the federal Employee Retirement Income Security Act of 1974 (ERISA) (29 USC § 1132[a][1][B]). ERISA section 502(a)(1)(B) provides that "[a] civil action may be brought . . . by a participant or . . .to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan" (29 USC § 1132[a][1][B]). 29 USC § 1144(a) provides, in relevant part, that "the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan

described in section 4(a) and not exempt under section 4(b)." The United States Supreme Court has held that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted" (*Aetna Health, Inc. v Davila*, 542 US 200, 209 [2004]; *see Potter v Blue Shield of Northeastern N.Y.,* 216 AD2d 773, 774-775 [3d Dept 1995]; *see also Koucourek v Booz Allen Hamilton, Inc.*, 114 AD3d 567, 567 [1st Dept 2014] ["ERISA preempts state law to the extent plaintiff's breach of contract claims seek to remedy the denial of benefits under an ERISA-regulated" plan]). Thus, while ERISA does not pre-empt a state-law medical malpractice cause of action against a health maintenance organization or other provider that allegedly failed to provide medical services in accordance with good and accepted medical practice (*see Nealy v US Healthcare HMO*, 93 NY2d 209, 217-218, 219-220 [1999] [ERISA pre-empts only those causes of action implicating the "decision making process with respect to coverage or benefits"]; *Jones v US Healthcare,* 282 AD2d 347, 358-359 [1st Dept 2001] *see also New York State Conf. of Blue Cross & Blue Shield Plans v Travelers Ins. Co.*, 514 US 645, 654-655 [1995]), the denial of a claim for medical or prescription drug benefits does not give rise to a negligence cause of action unless the cause of action involves carelessness in the processing of the claim (*see Nichols v Xerox Corp*., 34 AD3d 1200, 1201 [4th Dept 2006]), rather than a challenge to the discretionary determination to deny the claim. Thus, to the extent that the plaintiff alleged that her prescription drug insurer negligently delayed the processing of her application for benefits, a state-law cause of action is cognizable (*see id*.), but to the extent that she alleged that such insurer was "negligent" in its discretionary determination to deny coverage, that claim is pre-empted by ERISA.

In light of the foregoing, it is,

ORDERED that the motion is granted, without opposition, and the complaint is dismissed insofar as asserted against the defendant Empire Blue Cross Blue Shield; and it is further,

ORDERED that, on the court's own motion, the action is severed as against the defendant Empire Blue Cross Blue Shield; and it is further,

ORDERED that the Clerk of the court shall enter judgment dismissing the complaint insofar as asserted against the defendant Empire Blue Cross Blue Shield.

This constitutes the Decision and Order of the court.

5/16/2024
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE