

Matter of Green v IPRO

2024 NY Slip Op 32786(U)

August 8, 2024

Supreme Court, New York County

Docket Number: Index No. 153634/2023

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of
REMY GREEN,

Petitioner,

- v -

I PRO, NEW YORK STATE DEPARTMENT OF FINANCIAL
SERVICES, and EMBLEMHEALTH,

Respondents.

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INDEX NO. 153634/2023

MOTION DATE 07/12/2024

MOTION SEQ. NO. 003

**DECISION, ORDER, AND
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 27, 28 were read on this motion to/for RENEWAL.

This is a CPLR article 78 proceeding, pursuant to which the petitioner had sought judicial review of a December 21, 2022 determination of Island Peer Review Organization, Inc. (IPRO), denying his external appeal of an September 15, 2022 determination made by the respondent insurer EmblemHealth, which had denied his claim for medical benefits to cover the fees that he incurred for pain management services and a spinal cord stimulator trial that were provided and administered to him between June 7, 2022 and September 5, 2022. In an order and judgment dated November 17, 2023, this court denied the petition and dismissed the proceeding, albeit without prejudice either to (a) the commencement of a civil action in a court of competent jurisdiction against EmblemHealth pursuant to section 502(a)(1)(B) of the federal Employee Retirement Income Security Act of 1974 (29 USC § 1132[a][1][B]; hereinafter ERISA), or (b) the renewal of the petition, upon proper papers that included proof that the petitioner’s insurance policy was not provided to him by his employer or the employer of a family member, which would remove his claim from the purview of ERISA.

The petitioner elected to renew the petition, and now has provided proof that his medical coverage with EmblemHealth was not provided to him by his employer or the employer of a family member, but was a policy that he purchased directly from EmblemHealth. The court grants the petitioner's motion to renew and, upon renewal, this proceeding is converted into a declaratory judgment action, the petition is converted into a complaint, and the petitioner's submissions are deemed to constitute a motion for summary judgment declaring that EmblemHealth is obligated to reimburse him or his medical provider for expenses that he incurred in treating his complex regional pain syndrome (CRPS) with electrical stimulation therapy. Upon renewal and conversion, the court thereupon grants the motion.

In the first instance, the court rejects the petitioner's contention that this court erred in initially denying the petition, sua sponte, without prejudice to the submission of proof that his insurance plan was not an ERISA plan. The court rendered that determination on the ground that the petitioner failed to establish that his claims were not pre-empted by ERISA, inasmuch as he did not submit proof that his medical insurance policy was provided by a person or entity other than his employer or the employer of a family member.

The petitioner recently sent an unsolicited email to the court, in which he cited a decision by the United States Court of Appeals for the Second Circuit, which held that "ERISA preemption of state contract claims in a benefits-due action is an affirmative defense that is . . . subject to waiver, if not pleaded in the defendant's answer" (*Saks v Franklin Covey Co.*, 316 F3d 337, 350 [2d Cir 2003]). He thus contended that, inasmuch as EmblemHealth never answered the petition and, thus, did not raise ERISA pre-emption as an affirmative defense, this court should not have sua sponte dismissed the petition on that ground.

This court, however, is not bound by the Second Circuit's interpretation of law, even a federal law such as ERISA. "All courts are, of course, bound by the United States Supreme Court's interpretations of Federal statutes and the Federal Constitution" (*People v Kin Kan*, 78 NY2d 54, 59-60 [1991]; see *Flanagan v Prudential-Bache Sec.*, 67 NY2d 500, 506 [1986], cert

denied 479 US 931 [1986]; *Alvez v American Export Lines*, 46 NY2d 634, 638 [1979], *affd* 446 US 274 [1980]; *People ex rel. Ray v Martin*, 294 NY 61, 73 [1945], *affd* 326 US 496 [1946]).

The courts of this state, however, are not bound by constitutional or statutory interpretations made by lower federal courts, although such decisions may serve as “useful and persuasive authority” (*Brown v State of New York*, 9 AD3d 23, 27, n 3 [3d Dept 2004]; see *People v Kin Kan*, 78 NY2d at 59-60; *Flanagan v Prudential-Bache Sec.*, 67 NY2d at 506 [1986]). Moreover,

“It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons Laws of NY, Book 1, Statutes §72 [b]), and where the issue has not been addressed within the Department, Supreme Court is bound by the doctrine of *stare decisis* to apply precedent established in another Department, either until a contrary rule is established by the Appellate Division in its own Department or by the Court of Appeals”

(*D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]).

ERISA contains an express provision pre-empting “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan” (29 USC § 1144[a]). ERISA thus pre-empts a state-law cause of action that has a connection with or reference to an ERISA plan. In New York, where a state-law cause of action is pre-empted by federal law, the court lacks subject matter jurisdiction over that cause of action, and must dismiss it on that ground (see *Astro Ready Mix, LLC v MTA Long Is. R.R.*, 217 AD3d 816, 817 [2d Dept 2023]; *Klingsberg v Council of Sch. Supervisors & Adm'rs-Local 1: Am. Foundation of Sch. Adm'rs, AFL-CIO*, 181 AD3d 949, 950 [2d Dept 2020]; *Parker v St. Lawrence County Pub. Health Dept.*, 102 AD3d 140, 142, 144-145 [3d Dept 2012]; *Sharabani v Simon Prop. Group, Inc.*, 96 AD3d 24 [2d Dept 2012]). Contrary to the Second Circuit's interpretation, in New York, “a court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action” (*Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 [2008], quoting *Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718, [1997]; see *Editorial Photocolor Archives v Granger Collection*, 61 NY2d 517, 523 [1984]; *Lacks*

v Lacks, 41 NY2d 71, 75 [1976] [“It is blackletter law that a judgment rendered without subject matter jurisdiction is void, and that the defect may be raised at any time and may not be waived”]; *VNB N.Y., LLC v Y.M. Intercontinental Gem Corp.*, 154 AD3d 903, 906 [2d Dept 2017]). Where a “court never had power to hear a particular type of proceeding in the first place,” such as a state-law claim that is pre-empted by ERISA, “[s]ubject matter jurisdiction may not come into being through waiver or estoppel” (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [1st Dept 2006]). Hence, the court concludes that its prior determination was correct.

The petitioner, however, has now, upon renewal, demonstrated that his insurance coverage with EmblemHealth was not pursuant to an ERISA plan and, hence, this proceeding is not pre-empted by ERISA (see *Angé v Holley-Angé*, 121 AD3d 595, 595 [1st Dept 2014]).

The court notes that, even had the petitioner’s medical insurance coverage been provided through an ERISA plan, the petitioner could have commenced an action to recover benefits pursuant to ERISA in this court, since state courts have concurrent jurisdiction with the federal courts to entertain such actions (see *id.*; *Kocourek v Booz Allen Hamilton, Inc.*, 114 AD3d 567, 568 [1st Dept 2014]). Under those circumstances, however, this court would have been constrained to apply the deferential “arbitrary and capricious” standard to its review of EmblemHealth’s determination to deny insurance coverage (see *Doe v HMO-CNY*, 14 AD3d 102, 108 [4th Dept 2004]; *Sullivan v LTV Aero. & Defense Co.*, 82 F3d 1251, 1255 [2d Cir 1996]; *Pagan v NYNEX Pension Plan*, 52 F3d 438, 441 [2d Cir 1995]). Since this proceeding is not subject to ERISA, the court is not constrained by that standard of review. Rather, it simply must determine whether EmblemHealth’s interpretation of the terms of its insurance policy was or was not correct.

“An insurance policy is a contract between the insurer and the insured” (*Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 143 AD3d 146, 150-151 [1st Dept 2016], quoting *Bovis Lend Lease LMB, Inc. v Great Am. Ins. Co.*, 53 AD3d 140, 145 [1st Dept 2008]). “[A] CPLR article 78 proceeding is not the proper vehicle to resolve contractual rights” (*Matter*

of *Williams v Town of Carmel*, 175 AD3d 550, 550-551 [2d Dept 2019], quoting *Matter of Hertz v Rozzi*, 148 AD2d 535, 536 [2d Dept 1989], *affd* 74 NY2d 702 [1989]). Rather, an action for a declaratory judgment is the proper vehicle for determining rights and obligations under a contract (see *Kalisch-Jarcho, Inc. v City of New York*, 72 NY2d 727, 731 [1988]; *Matter of Williams v Town of Carmel*, 175 AD3d at 551). Hence, under New York law, a declaratory judgment action is the proper vehicle for the determination of a claimant's right to coverage under a policy of insurance (see *Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co.*, 143 AD3d at 150-151; *Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783 [2d Dept 2015]; *Hollander v Nationwide Mut. Ins. Co.*, 60 AD2d 380, 382 [4th Dept 1978]; *Kemper Independence Ins. Co. v. Best Touch Pt, P.C.*, 2017 NY Misc LEXIS 15243, *4-5 [Sup Ct, N.Y. County, Jul. 14, 2017]).

Although the petitioner improperly commenced this matter as a CPLR article 78 proceeding, CPLR 103(c) provides that, “[i]f a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.” Hence, in the interest of justice, the court may convert a special proceeding into an action, upon such terms as may be just (see *id.*). The court does so here, converts the proceeding into an action, converts the petition into a complaint, and considers the petitioner's submissions as constituting a motion for summary judgment on the complaint for declaratory relief (see *Matter of Houston v Board of Mgrs. Deer Run Condominium Assn.*, 162 AD3d 1026, 1027 [2d Dept 2018]; *Matter of 10 W. 66th St. Corp. v New York State Div. of Housing & Community Renewal*, 184 AD2d 143, 148-149 [1st Dept 1992]).

It is well settled that the movant on a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in

admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (see CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, “[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets his or her burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (see *Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

The construction of an unambiguous contract is an issue of law, to be decided by the court, as is the issue of whether the terms of the contract are ambiguous in the first instance (see *NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 58[1st Dept 2008]). The question of whether an ambiguity exists must be ascertained from the face of an agreement, without regard to extrinsic evidence (see *Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc.*, 112 AD3d 78, 84 [1st Dept 2013]; *Schmidt v Magnetic Head Corp.*, 97 AD2d 151, 156 [2d Dept 1983]). Any ambiguities in the terms of an insurance policy must be construed against the insurer that drafted the policy (see *Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 352 [1978]; *Gennari v Continental Ins. Co.*, 160 AD2d 759, 760-761 [2d Dept 1990]).

The petitioner initially had submitted the denial-of-coverage determination rendered by EmblemHealth, IPRO’s determination of his external appeal, email correspondence between those entities and himself, and the affidavit of physician and pain management specialist Jatin Joshi, M.D. These submissions established, prima facie, that his insurance policy with EmblemHealth covered him for expenses that he incurred for a “lumbar/thoracic D[orsal] C[olumn] S[pinal] implantation as an in-patient procedure for . . . complex regional pain

syndrome (CRPS),” and that he was suffering from CRPS. He further established, prima facie, that a spinal stimulator trial for treatment of his chronic back pain and CRPS was warranted and medically advisable, and that IPRO’s external reviewers incorrectly concluded that he should instead subject himself to long-term intrathecal administration of opiates or opioids---involving the permanent or semi-permanent surgical placement of pump and reservoir placed in the abdomen, with a catheter extension that is placed in the intrathecal space/spinal fluid area of the spinal region. The petitioner thus made a prima facie showing that the relevant insurance policy required EmblemHealth to pay for or reimburse him for the spinal cord stimulator trial that was conducted upon him between June 7, 2022 and September 5, 2022. Inasmuch as EmblemHealth, although properly served with both the initiatory order to show cause, the petition, and supporting exhibits, did not answer or appear in the proceeding. Despite also being served with the order to show case initiating the instant renewal motion, EmblemHealth did not oppose the motion. Hence, it failed to rebut or make any plausible argument as to why the petitioner’s interpretation of the policy language was incorrect. Consequently, upon renewal, and upon conversion of the proceeding into an action, the petitioner must be awarded summary judgment declaring that his policy with EmblemHealth obligated it to pay for or reimburse him for the spinal cord stimulator trial.

Accordingly, it is,

ORDERED that the petitioner’s motion is granted, and upon renewal,

- (a) the order and judgment dated and entered November 17, 2023 is vacated, and the matter is restored to active status,
- (b) on the court’s own motion, this proceeding is converted into a declaratory judgment action, the petition is converted into a complaint, and the papers submitted by the petitioner are deemed to constitute a motion for summary judgment on the complaint declaring that the respondent EmblemHealth is obligated to pay for or reimburse him for the spinal cord stimulator trial that was conducted upon him between June 7, 2022 and September 5, 2022, and
- (c) the converted motion for summary judgment declaring that the respondent EmblemHealth is obligated to pay for or reimburse the petitioner for the spinal

cord stimulator trial that was conducted upon him between June 7, 2022 and September 5, 2022 is granted, without opposition;

and it is,

ADJUDGED and DECLARED that the respondent EmblemHealth is obligated, under the policy of medical insurance that it had issued to the petitioner, to pay for or reimburse the petitioner for the spinal cord stimulator trial that was conducted upon him between June 7, 2022 and September 5, 2022; and it is further,

ORDERED that, within 30 days of the petitioner's service upon it of a copy of this Decision, Order, and Judgment with notice of entry, the respondent EmblemHealth shall pay for or reimburse the petitioner for the spinal cord stimulator trial that was conducted upon him between June 7, 2022 and September 5, 2022.

This constitutes the Decision, Order, and Judgment of the court.

8/8/2024
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE