Matter of Green v IPRO
2024 NY Slip Op 32886(U)
August 15, 2024
Supreme Court, New York County
Docket Number: Index No. 153634/2023
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

---X

In the Matter of

REMY GREEN,

Petitioner,

- v -

IPRO, NEW YORK STATE DEPARTMENT OF FINANCIAL SERVICES, and EMBLEMHEALTH,

Respondents.

---X

INDEX NO. 153634/2023

MOTION DATE 07/12/2024

MOTION SEQ. NO. 003

AMENDED 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.

The court's prior decision, order, and judgment, dated August 8, 2024, is recalled and vacated, upon the court's own motion, in response to the request of the petitioner, in order to excise and delete masculine-gendered pronouns that had been employed in reference to the petitioner, and the following amended decision, order, and judgment is substituted therefor:

This is a CPLR article 78 proceeding, pursuant to which the petitioner, Remy Green, had sought judicial review of a December 21, 2022 determination of Island Peer Review Organization, Inc. (IPRO), denying Green's external appeal of an September 15, 2022 determination made by the respondent insurer EmblemHealth. That determination had denied Green's claim for medical benefits to cover the fees that Green had incurred for pain management services and a spinal cord stimulator trial that were provided and administered 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 Green's insurance policy was not provided to Green by an employer or the employer of a family member, which, if demonstrated, would remove the subject claim from the purview of ERISA.

Green elected to renew the petition, and now has provided proof that the relevant medical coverage with EmblemHealth was not provided to Green by an employer or the employer of a family member, but was a policy that Green had purchased directly from EmblemHealth. The court grants Green's motion to renew and, upon renewal, this proceeding is converted into a declaratory judgment action, the petition is converted into a complaint, and Green's submissions are deemed to constitute a motion for summary judgment declaring that EmblemHealth is obligated to reimburse Green or Green's medical provider for expenses that Green incurred in treating 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 Green's contention that this court erred in initially denying the petition, sua sponte, without prejudice to the submission of proof that Green's insurance plan was not an ERISA plan. The court rendered that determination on the ground that Green failed to establish that the claims in this proceeding were not pre-empted by ERISA, inasmuch as Green had not submitted proof that the subject medical insurance policy was provided by a person or entity other than Green's employer or the employer of a family member.

Green recently sent an unsolicited email to the court, citing 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]). Green 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.

Green, however, has now, upon renewal, demonstrated that the relevant 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 Green's medical insurance coverage been provided through an ERISA plan, Green 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 the relevant 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 Green 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 Green'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 that 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]).

Green initially had submitted the denial-of-coverage determination rendered by EmblemHealth, IPRO's determination of the external appeal, email correspondence amongst

the parties, and the affidavit of physician and pain management specialist Jatin Joshi, M.D. These submissions established, prima facie, that the subject insurance policy with EmblemHealth covered Green for expenses that were 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 Green was suffering from CRPS. Green further established, prima facie, that a spinal stimulator trial for treatment of chronic back pain and CRPS was warranted and medically advisable, and that IPRO's external reviewers incorrectly concluded that Green should instead be subject 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. Green thus made a prima facie showing that the relevant insurance policy required EmblemHealth to pay for or make reimbursement for the spinal cord stimulator trial that had been conducted between June 7, 2022 and September 5, 2022. Green properly served EmblemHealth with both the initiatory order to show cause, the petition, and supporting exhibits, but EmblemHealth did not answer or appear in the proceeding. Despite also being served with the order to show case initiating the instant renewal motion, and relevant supporting papers, EmblemHealth did not oppose the motion. Hence, it failed to rebut or make any plausible argument as to why Green's interpretation of the policy language was incorrect. Consequently, upon renewal, and upon conversion of the proceeding into an action, Green must be awarded summary judgment declaring that the relevant EmblemHealth policy obligated it to pay for or make reimbursement 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 the petitioner for the spinal cord stimulator trial that was conducted 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 the petitioner 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 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 between June 7, 2022 and September 5, 2022.

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

8/15/2024
DATE

JOHN J. KELLEY, J.S.C.

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