



Shuriz Hishmeh, M.D., PLLC v. Empire Health Choice Assurance, Inc.

2020 | Cited 0 times | E.D. New York | August 3, 2020

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

-----X For Online Publication Only SHURIZ
HISHMEH, M.D., PLLC, Plaintiff,

ORDER -against- 19-CV-03144 (JMA) (ARL) EMPIRE HEALTH CHOICE ASSURANCE, INC. d/b/a
EMPIRE BLUE CROSS BLUE SHIELD, Defendant.

-----X APPEARANCES: Michael G. Levin
Levin & Chetkof, LLP 265 Post Avenue Suite 290 Westbury, NY 11590 Attorney for Plaintiff Shuriz
Hishmeh, M.D., PLLC Stephen J. Steinlight Troutman Pepper Hamilton Sanders LLP 875 Third
Avenue New York, NY 10022 Attorney for Defendant Empire Health Choice Assurance, Inc. d/b/a
Empire Blue Cross Blue Shield AZRACK, United States District Judge:

I. BACKGROUND On September 18, 2017, plaintiff Shuriz Hishmeh, M.D., PLLC , an orthopedic
surgeon, performed a lumbar laminectomy and decompression at multiple levels of the lumbar spine
on a non- (No. 13 at 2.) At the time of the procedure, Patient maintained a health insurance policy
with

defendant Empire Health Choice Assurance, Inc. d/b/a/ Empire Blue Cross Blue Shield (Compl. at 2.)
of specific plan . (Id.) P an

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LONGISLANDOFFICE subject to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 1

(Id. at 3.) policies. (Id. at 4.) On October 30, 2017, Defendant reimbursed Plaintiff \$972.33 for Patient
operation, even though Plaintiff charges a usual and customary rate of \$78,700.00 for the
procedure. (Id.) .

On April 8, 2019, Plaintiff commenced this action in Nassau County Supreme Court to recover
\$77,727.67 rendered. (Id. at 5.) Plaintiff causes of action predicated on ERISA:

(1) Defendant failed to invoices; (2) Defendant breached the Plan by denying payment to Plaintiff at
his usual and customary rate; and (3) Defendant was unjustly enriched. 2 (Id.) Defendant timely



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removed the action to this Court on May 28, 2019. (Id. at 3.) Following a pre-motion conference, Defendant filed a motion to dismiss 12- Because Plaintiff lacks standing to bring his claims, the Co

II. DISCUSSION A. Standard

Defendant moves to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). 3

1 The Complaint contains to Dismiss, ECF No. 12-1 at 3.) However, Plaintiff clarified in his July 8, 2019 pre-motion conference letter, (ECF No. 8 at 2), and again during the September 19, 2019 pre-motion conference, (ECF No. 9), that all claims are subject to ERISA. 2 By agreement of the parties, Plaintiff dropped his unjust enrichment claim. (ECF No. 8 at 3.) 3 Originally, Defendant moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). In reply, Defendant clarified that it was moving to dismiss pursuant to both Rules 12(b)(1) and 12(b)(6) regarding standing in his brief in opposition. 1.)

1. Rule 12(b)(1) Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of a claim when there - Fed. R. Civ. P. 12(b)(1). dismisses an action under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction if the court

when . . . the plaintiff lacks Cortlandt St. Recovery Corp. v. Hellas Telecommunications, S.À.R.L., 790 F.3d 411, 416 17 (2d Cir. 2015) (quoting Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)). In reviewing a motion to dismiss under this Rule, the Court accepts all factual allegations in the complaint as true. Shipping Fin. Servs. Corp. v. Drakos, 140 F.3d 129, 131 (2d Cir. 1998). In resolving a jurisdictional issue, the Court may consider other materials beyond the pleadings but may not rely on mere conclusions or hearsay statements contained therein. J.S. ex rel. N.S. v. Attica Cent. Sch., 386 F.3d 107, 110 (2d Cir. 2004).

2. Rule 12(b)(6) To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) that

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). factual content that allows the court to draw the reasonable inference that the defendant is liable

Id. (citing Twombly, 550 U.S. at 556). Mere labels and legal conclusions will not suffice. Twombly, 550 U.S. at 555. In reviewing a motion to dismiss, the Court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. Cleveland v. Caplaw Enters., 448 F.3d 518, 521 (2d Cir. 2006). B. Plaintiff Lacks Standing to Pursue His Claims

1. Standing Under ERISA Plaintiffs who sue must establish both statutory standing and constitutional stan Kendall v. Emps. Ret. Plan of Avon Prods., 561 F.3d 112, 118 (2d Cir. 2009).



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Sections 502(a)(1)(B) and 502(a)(3) of ERISA limit the benefits due, enforce rights, or clarify rights to future benefits to those individuals who are

Merrick v. UnitedHealth Grp. Inc., 175 F. Supp. 3d 110, 115 (S.D.N.Y. 2016). ERISA defines employee . . . who is or may become eligible to receive a benefit of any type from an employee

employee benefit plan, who is or may become entitled to a benefit thereunder 29 U.S.C. §

1002(7) (8). Case law is clear that [o]nly the parties enumerated in Section 502 may sue directly Merrick, 175 F. Supp. 3d at 110. Here, it is undisputed that Plaintiff does not satisfy the statutory definition of a or . Accordingly, for Plaintiff to have standing to bring his claims, Patient must have assigned her claims to him.

2. Assignment claims. The general rule exception . . . that confers standing to healthcare providers to whom a beneficiary has assigned

Simon v. Gen. Elec. Co., 263 F.3d 176, 178 (2d Cir. 2001). benefits of his/her insurer asserting that claims under ERISA [. . .] have been assigned by the patients to [Plaintiff] is Am. Psychiatric Ass'n v. Anthem Health Plans, Inc., 821 F.3d 352, 361 (2d Cir. 2016).

Attached to his opposition brief, 4

which he believes is proof that he received an assignment. (ECF No. 13-5, Ex. C.) In it, Patient agreed:

[to] hereby assign, transfer, and set over to Winthrop-University Hospital and its related health care providers and entities, all monies and/or benefits to which I may be entitled from government agencies, including the Medicare and Medicare Programs, insurance carriers, HMOs, or others who are financially liable for my treatment rendered.

(Id. at 2.) Plaintiff also argues that he has additional proof of an assignment. He submits given to Defendant on which a box was

(at 8; ECF No. 13-4, Ex. B, at 2.) As explained in further detail below, both of these alleged assignments are invalid because the terms of the Plan prohibit Patient from unilateral permission. 5

For healthcare providers to have standing Mbody Minimally Invasive Surgery P.C. v. Empire Healthchoice HMO, Inc., No. 13-CV-6551, 2016 WL 2939164, at *4 (S.D.N.Y. May 19, 2016). 4

and he relies upon it in framing his pleadings, it may be considered in resolving the instant motion. See Goel v. Bunge, Ltd., 820 F.3d 554, 559 (2d Cir. 2016); Hishmeh v. Empire Healthchoice HMO, Inc., No. 16-CV-2780, 2017 WL 663543, at *2 (E.D.N.Y. Feb. 17, 2017). 5 Defendant also raises other



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arguments in asserting that these two documents at issue do not constitute a valid assignment to Plaintiff. It is unnecessary to address these arguments because the terms of the Plan prohibit Patient from unilaterally assigning her rights without Defendant's violation of anti-assignment provision . . . assignment, an attempted assignment will be ineffectual . . . [and] . . . a healthcare provider who

Merrick, 175 F. Supp. 3d at 118-19 (quoting Neuroaxis Neurosurgical Assocs.,

PC v. Costco Wholesale Co., 919 F. Supp. 2d 345, 351-52 (S.D.N.Y. 2013)).

-assignment provision that bars any

6 Plan are not assignable by any Member without the written consent of the Plan. (ECF No. 12-3,

Ex. A, at 67.) Plaintiff has not alleged that Defendant provided written consent to the assignment. Instead, he insured, warrant 8.) Plaintiff has failed to

demonstrate how public policy concerns override enforcement of this clear and unambiguous provision. acceptance of an assignment when the Plan contained an anti-assignment provision makes any purported assignment -a legal nullity. McCulloch Orthopaedic Surgical Servs., PLLC v. Aetna Inc., 857 F.3d 141, 147 (2d Cir. 2017). bar[s] the assignment of benefits upon which [Plaintiff] relies to establish his statutory standing,

Hishmeh, 2017 WL 663543, at *4. Accordingly, acknowledges standing.

6 Though the Plan was not attached as an exhibit to the complaint, it is integral to the complaint and is incorporated by reference indeed, it is repeatedly referenced in the complaint and forms the very basis for plaintiff's claims. It is Prof'l Orthopaedic Assocs., PA v. 1199 Nat'l Benefit Fund, No. 16-CV-4838, 2016 WL 6900686, at *1 (S.D.N.Y. Nov. 22, 2016), *aff'd sub nom.*

3. Waiver Despite the clear anti-assignment language, Plaintiff argues that Defendant waived enforcement of the anti-assignment provision by processing documents he submitted and issuing him a partial payment. Plaintiff has not yet addressed whether a healthcare company may be estopped from relying on or waive its right to enforce an anti-assignment provision, it has found the equitable doctrines of estoppel and waiver are applicable to ERISA Merrick, 175 F. Supp. 3d at 110. clear manifestation of an intent . . . to relinquish [a] known right and mere silence, oversight or

thoughtlessness in failing to object to a breach of the contract will not support Beth Israel Med. Ctr. v. Horizon Blue Cross and Blue Shield of New Jersey, Inc., 448 F.3d 573,

585 (2d Cir. 2006). Courts routinely find that when a health insurance company makes a direct payment to healthcare providers, it does not constitute a waiver of any applicable anti-assignment



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provision. See, e.g., Merrick anti-assignment provision by acting pursuant to the direct payment provision is to create an

ambiguity. *Mbody*, 2014 WL 4058321, at *3 That 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 [in] determining the payment amount. Plaintiff's argument is simply another way of re-arguing that defendants waived the anti-assignment provision by making direct payments to plaintiffs). Here, the language in Defendant's yments directly to Providers -3, Ex. A, -assignment provision. *Merrick*, 175 F. Supp. 3d at 122. Accordingly, Defendant did not waive enforcement of the anti-assignment provision when it processed issued him a partial payment.

-assignment provision is similarly unpersuasive. As explained earlier, Patient lacks the authority to waive enforcement because she cannot act unilaterally and must have to agree to an assignment. (ECF No. 12-3, Ex. A, at 67.) Further, the Plan expressly provides that only Patient, not Patient, has the authority to waive the except an authorized officer of the Employer, has authority to waive any conditions or restrictions

Id. at 83.) Plaintiff's -assignment provision is therefore meritless.

Plan expressly bars the assignment upon which Plaintiff relies to establish standing, and Plaintiff has failed to demonstrate why the anti-assignment provision is standing to bring this lawsuit. In addition, the Court finds that complaint would be futile because there is no set of facts Plaintiff could allege that would confer

standing in the face of the clear and unambiguous anti-assignment provision.

III. CONCLUSION Based on the foregoing, The Clerk of Court is respectfully directed to enter judgment accordingly and close this case. SO ORDERED. Dated: August 3, 2020 Central Islip, New York

/s/ (JMA) JOAN M. AZRACK UNITED STATES DISTRICT JUDGE

