McCulloch Orthopedic Surgical Servs., PLLC v Group Health Ins. Inc. (GHI) (Patient R.F.)
2016 NY Slip Op 31061(U)
June 8, 2016
Supreme Court, New York County
Docket Number: 156145/14
Judge: Robert R. Reed
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43
----------X

McCULLOCH ORTHOPEDIC SURGICAL SERVICES, PLLC a/k/a DR. KENNETH F. McCULLOCH,

Plaintiff,

Index No. 156145/14

-against-

GROUP HEALTH INSURANCE INCORPORATED (GHI) (Patient R.F.),

Defendant.

----------X

Robert R. Reed, J.:

In this action alleging a single cause of action for promissory estoppel, defendant Group Health Insurance Incorporated (GHI)[1] moves for summary judgment dismissing the complaint.

Plaintiff McCulloch Orthopedic Surgical Services a/k/a Dr. Kenneth F. McCulloch (plaintiff), an orthopedic surgeon, claims that he was promised by GHI, a health insurance company, that GHI would pay 100% of the usual and customary cost of a series of surgeries which plaintiff performed on a patient, but that GHI failed to fulfill that promise, to plaintiff's detriment. GHI claims that it never made such a promise.

Plaintiff is an "out-of-network" health provider with regard to GHI, meaning that he has no contract with GHI (or, for that

[1]GHI is also known as Emblem Health.

matter, any other insurance company). Plaintiff expects to be paid a proportion of the cost of each procedure he performs from his patient's insurer, despite being an out-of-network provider, upon receiving assurances from that insurer that he will be recompensed for the procedure at an agreed amount. Plaintiff does not proceed to surgery on any patient unless he has received a promise from that person's insurance company of some level of coverage.

Plaintiff claims that, on or around June 8, 2011, a prospective patient, identified as R.F., called plaintiff's office. R.F. gave certain personal information to plaintiff's employee, Dina Hergazi (Hergazi). Hergazi allegedly called GHI, and was informed that the GHI plan in which R.F. was a member allowed for payment of out-of-network benefits. According to plaintiff, GHI's representative informed Hergazi that GHI would pay 100% of the "usual and customary" rates for the surgeries plaintiff intended to perform on R.F. Plaintiff has, as evidence of this conversation, a note written by Hergazi which contains the sole notation "OON 100%." Hergazi is not available as a witness.

Plaintiff performed surgeries on R.F. on July 12, 2011. He billed GHI $23,017, which he claims is the "usual and customary rate," as set by FAIRPLAN, "an independent entity . . . published in an Ingenix Booklet that physicians and insurers use."

Plaintiff's opposition memorandum at 2.

On November 10, 2011, plaintiff performed further surgeries on R.F., for which he charged GHI $41,133. However, GHI only paid $7,000 for the first series of surgeries, and $12,153 for the second series of surgeries. Thus, plaintiff claims that GHI failed to pay him $44,957. GHI has refused plaintiff's appeal to pay this amount.

Plaintiff brings this action as one grounded on promissory estoppel, claiming that he had the right to rely on GHI's alleged promise to pay 100% of the usual and customary rate; would not have performed the surgeries but for the promise; and that he has been injured as a result of GHI's reneging on its promise.

GHI brings this motion for summary judgment because it claims that plaintiff cannot prove that GHI ever made any promise to pay anything for R.F.'s surgeries, much less 100% of the ususal and customary rate. GHI notes that the only witness plaintiff can provide is another employee in plaintiff's office, Jennifer Cuevas, who claims to recognize Hergazi's handwriting, and claims to know what the notation "OON 100%" means from the custom and practices in use in plaintiff's office. GHI maintains that, on summary judgment, this evidence is insufficient to establish the elements of promissory estoppel.

Summary judgment is a "drastic remedy." *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 (2012). "[T]he 'proponent of 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.'" *Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510 (1st Dept 2010), quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v Rozbruch*, 91 AD3d 147, 152 (1st Dept 2012), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002). If the movant fails to present a prima facie case for summary judgment, the motion must be denied, regardless of the sufficiency of the opponent's evidentiary showing. *See Vanderhurst v Nobile*, 130 AD3d 716, 717 (2d Dept 2015).

A claim for promissory estoppel is based on three elements: "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." *Schroeder v Pinterest Inc.*, 133 AD3d 12, 32 (1st Dept 2015); *see also New York City Health & Hosps.*

Corp. v St. Barnabas Hosp., 10 AD3d 489, 491 (1st Dept 2004).

GHI's motion is based on the gaps in plaintiff's proof that a "clear and unambiguous promise" was made, because Hergazi is not available to testify, and because the notation "OON 100%" is ambiguous. However, "a moving defendant does not meet its burden of affirmatively establishing its entitlement to summary judgment by merely pointing to gaps in the plaintiff's case; rather, it must affirmatively demonstrate the merit of its defense." *Vanderhurst v Nobile*, 130 AD3d at 717; *see also Setter v Fire Is. Ferries, Inc.*, ___AD3d___, 2016 NY Slip Op 03730, *1 (2d Dept 2016).

In the present instance, GHI has failed to make a prima facie showing on its motion for summary judgment. It has failed to provide evidence by means of any sort of record, or by the testimony of a person with knowledge, that none of its representatives spoke with plaintiff's office on the date in question, or that the promise was not made, or was made in some different form. The court assumes that GHI keeps some records of its transactions, whether written or taped,[2] which might show whether or not its representatives spoke to Hergazi, and what transpired in that call, if such a call was received. Without

[2]Plaintiff asks this court, without benefit of motion, for the imposition of sanctions against GHI for the alleged spoliation of tapes of the alleged phone call. However, there is no evidence that such a tape ever existed, despite plaintiff's insistence that GHI surely must have taped the call.

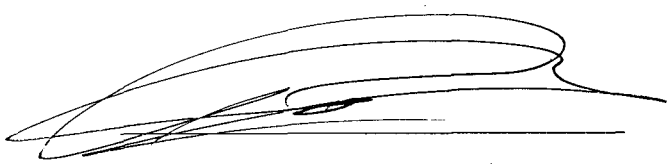
such a prima facie showing, GHI has failed to meet its burden on summary judgment, regardless of whether plaintiff can or cannot prove its case at this time. Therefore, the motion must be denied,

Accordingly, it is

ORDERED that the motion for summary judgment brought by defendant Group Health Insurance Incorporated (GHI) is denied.

Dated: June 8, 2016

ENTER:



J.S.C. 6/8/16