McCulloch Orthopaedic Surgical Servs., PLLC v Group Health Inc. (GHI) (Patient A.S.)
2016 NY Slip Op 31768(U)
September 27, 2016
Supreme Court, New York County
Docket Number: 156257/14
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

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MCCULLOCH ORTHOPAEDIC SURGICAL SERVICES, PLLC a/k/a DR. KENNETH E. MCCULLOCH,

Index No. 156257/14

Plaintiff,

- against -

GROUP HEALTH INCORPORATED (GHI) (PATIENT A.S.),

Defendant.

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HON. ELLEN M. COIN, J.:

Defendant Group Health Incorporated (GHI)(Patient A.S.) moves pursuant to CPLR 3212 for summary judgment dismissing the Complaint.

BACKGROUND

Plaintiff McCulloch Orthopaedic Surgical Services, PLLC a/k/a Dr. Kenneth E. McCulloch brings this action to recover medical insurance benefits from his patient's insurer, based on a theory of promissory estoppel. The following facts are gleaned from the submissions of the parties.

Plaintiff is an orthopedic surgeon. Defendant is a medical and surgical insurer. Plaintiff is not in defendant's network of physicians, surgeons, and healthcare providers and, as such, is an "out-of-network" provider under defendant's healthcare insurance plan.

In February 2012, one of plaintiff's patients, who is insured under a plan administered by defendant, sought treatment from plaintiff. Jennifer Cuevas, plaintiff's employee,

telephoned defendant to ascertain whether defendant would cover the patient for orthopedic surgery. Defendant's employee reportedly stated that the reimbursement rate would be 100% of the usual and customary benefit rates for the procedure, less a $200 deductible, since defendant was an out-of-network provider.

Plaintiff performed the surgical procedure on the patient on March 15, 2012, and sought reimbursement from defendant for a claim in the amount of $33,024.00. Defendant paid plaintiff $10,881.00 in satisfaction of the claim, and this action ensued.

The Complaint alleges a claim for promissory estoppel. Defendant's answer includes general denials and affirmative defenses. Defendant now seeks summary judgment dismissing the Complaint.

DISCUSSION

It is well settled that the 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 demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York, supra*). In addition, the opponent is entitled to all

favorable inferences (*see Cetindogan v Schuyler*, 95 AD3d 577, 578 [1st Dept 2012]).

To state a viable cause of action for promissory estoppel, the pleading must allege a clear and unambiguous oral promise; reasonable reliance on the promise by a party; and injury caused by the reliance (*see New York City Health & Hosps. Corp. v St Barnabas Hosp.*, 10 AD3d 489, 491 [1st Dept 2004]).

Here, defendant makes a prima facie showing of entitlement to summary judgment as a matter of law (*see Alvarez v Prospect Hosp.*, *supra*). The submissions simply do not support plaintiff's assertion that defendant made a clear and unambiguous oral promise to plaintiff or his employee that defendant would reimburse plaintiff a particular amount for the surgical procedure he performed on the patient. Rather, the submissions demonstrate that defendant simply confirmed the existence of coverage for the patient and gave a general description of the nature and extent of that coverage.

First, plaintiff's employee, Cuevas, the sole witness to the alleged promise of the extent of coverage, testified that she did not recall whether she was involved in insurance confirmation for the subject patient (Ex D to the Manalansan Aff at 34). While Cuevas recognized the note of a telephone conversation as hers, she concedes that at the time she telephoned GHI, "we had not even seen the patient and we did not know if any surgery would be necessary or appropriate." (Cuevas Aff ¶ 23 at 6). Her note,

made after the telephone inquiry, states only "$200-deductible" and "$100% [sic]" (Ex 1 to Cuevas Aff). At a deposition held on August 31, 2015, Cuevas testified that if there had been any other information communicated by GHI during that phone call regarding the amount that would be paid, it would have been reflected in her note (Cuevas dep at 35; Ex D to the Manalansan Aff.) Cuevas testified that she understood her note to mean that defendant would pay "100% of out-of-network" benefits at the "usual and customary" or "reasonable and customary" rate. However, she claims that she did not write down everything that the GHI representative told her because "we were rushed in the office" (Cuevas EBT, Manalansan Aff, Exh D, p. 33; Cuevas Affid ¶ 25 at 6). Yet in opposition to this motion Cuevas produces a note she made in a similar, unrelated matter, contained the notation "r + c", which she alleges means reasonable and customary (Cuevas Aff ¶ 26 at 7; Ex 2 to Cuevas Aff.).

To summarize, plaintiff's claim of defendant's promise rests on a note Cuevas made of a telephone conversation of which she has no independent recollection and which does not reflect the promise she alleges regarding usual and customary or reasonable and customary rates of reimbursement. Her allegations are insufficient to raise a triable issue of fact as to whether plaintiff, in determining whether to perform surgery, could reasonably have relied upon an oral representation by defendant concerning the nature and extent of the patient's insurance

coverage, and whether he could have deemed such an oral representation to be the equivalent of a promise to pay him at a particular rate of reimbursement. (*See McCulloch v Group Health Inc.*, Sup Ct, N.Y. County, April 5, 2016, Bannon, J., index no. 155939/13; *cf. Gross v Empire HealthChoice Assur., Inc.*, 16 Misc 3d 1112(A)[Sup Ct, N.Y. County 2007]).

Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed, with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 27, 2016

ENTER:

A.J.S.C.

HON. ELLEN M. COIN