SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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OXFORD HEALTH INSURANCE INC., OXFORD HEALTH PLANS (NY), UNITEDHEALTHCARE INSURANCE COMPANY OF NEW YORK, UNITED HEALTHCARE OF NEW YORK, INC., and UNITED HEALTHCARE SERVICES, INC.,

DECISION & ORDER
Index No. 653125/2017

Motion Seq: 005
ARLENE P. BLUTH, JSC

Plaintiffs,

-against-

PASQUALE MALPESO, D.M.D. and 563 OBS CENTER,

Defendants.

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The motion by defendants to dismiss plaintiff's first, sixth, eleventh, sixteenth (collectively, the "fraud claims") and the third, eighth, thirteenth and eighteenth (collectively, the "negligent misrepresentations claims") causes of action is granted.

Background

Malpeso operates a dental practice in which he purportedly conducts both dental services as well as medical procedures (such as skin grafts and bone restoration). Defendant 563 OBS Center ("OBS") is the facility owned and operated by Malpeso. Malpeso claims that for purely dental procedures, he sends bills for patients who have dental insurance policies. When performing medically necessary surgical procedures, Malpeso contends that he sends bills on behalf of patients.

Since Malpeso is an "out-of-network" provider for plaintiffs, he obtains an executed assignment of benefits from patients who are members in plaintiffs' health plans. The instant case arises over bills sent by Malpeso to plaintiffs. Plaintiffs claim that Malpeso intentionally miscoded the treatment he provided on bills sent to plaintiffs so that he would receive payments from plaintiffs for services that were not covered under his patients' plans. For example, plaintiffs claim that Malpeso would bill plaintiffs for skin grafts when he had actually performed gingival grafts, a dental procedure not covered under patients' plans. Plaintiffs insist that Malpeso submitted these false claims in order to get plaintiffs to pay millions of dollars in claims that would ordinarily not be covered. Plaintiffs allege twenty causes of action against defendants including claims for fraud, unjust enrichment, negligent misrepresentation, breach of contract and tortious interference with contract.

Defendants move to dismiss two "types" of plaintiff's claims– the fraud claims and the negligent misrepresentation claims. Defendants contend that the fraud claims are duplicative of plaintiffs' breach of contract claims. Defendants argue that fraud claims that arise from the same underlying facts as a breach of contract cause of action are redundant and must be dismissed. With respect to the negligent misrepresentation claims, defendants maintain that plaintiff has not established that a special relationship exists independent of the contractual causes of action.

In opposition, plaintiffs contend that the fraud claims are distinct from the breach of contract claims because they do not arise out of any contractual duty. Plaintiffs maintain that the breach of contract claims relate only to defendants' status as assignees of the contracts between the patients and plaintiffs. Plaintiffs insist that the fraud occurred when Malpeso miscoded non-covered dental treatment. Plaintiffs also argue that its negligent misrepresentation claims should

be preserved because defendants owed a special duty to plaintiffs.

Background

As an initial matter, it is unclear whether defendants made a motion to dismiss or one for summary judgment. Because defendants cited motion to dismiss cases in their moving papers, the Court will assume this is a motion to dismiss.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]).

Fraud Claims

"[A] fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as redundant of the contract claim" (*Cronos Group, Ltd. v XComIP, LLC*, 156 AD3d 54, 62-63, 64 NYS2d 180 [1st Dept 2017]).

Here, plaintiffs failed to sufficiently allege how the fraud claims were independent of the breach of contract claims. All of the claims in the complaint arise out of the same general set of facts– defendants allegedly took an assignment of their patients' claims and then sent bills to plaintiffs. Plaintiffs' attempts to distinguish its fraud claims based on the assignment of patients' claims does not compel a different outcome. Defendants took the place of their patients pursuant to a contract (the patients' health plans) by submitting bills (as assignees) to plaintiffs. The fact that those bills may have contained intentionally miscoded treatment does not change the fact

that defendants' actions arose in the context of a contract. Plaintiffs failed to allege that defendants made fraudulent misrepresentations other than those contained in the bills. Moreover, plaintiffs seek identical damages for the breach of contract and fraud claims– for instance, plaintiff Oxford seeks $62,000 in damages for Malpeso's alleged fraud against Oxford and $62,000 for Malpeso's purported breach of contract (*see* NYSCEF Doc. No. 1 at 11, 13-14 [comparing the first and fourth causes of action in the complaint]).

Negligent Misrepresentation Claims

"A claim for negligent misrepresentation can only stand where there is a special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information given" (*Hudson River Club v Consolidated Edison Co. of New York, Inc.*, 275 AD2d 218, 220, 712 NYS2d 104 [1st Dept 2000]). "Generally, a special relationship does not arise out of an ordinary arm's length business transaction between two parties" *(MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296, 928 NYS2d 229 [1st Dept 2011]).

Here, plaintiffs cannot establish a special relationship with defendants. Plaintiffs' claim that it must rely on providers' bills because plaintiffs receive approximately one million health care claims per day does not state a negligent misrepresentation claim. The members in plaintiffs' plans pay premiums to plaintiffs who, in return, make payments for claims that plaintiffs deem are covered under a member's plan. The fact that it might be difficult to investigate the veracity of every claim does not indicate that there is a special relationship; rather, it's the cost of doing business. Plaintiffs could, if they chose, expend the resources necessary to

conduct prompt investigations of all claims. There is no basis to conclude that defendants have unique or specialized expertise regarding the bills submitted– plaintiffs' business is to process these types of claims under a contract and defendants are contract assignees.

Many insurance companies receive thousands or millions of claims every day. It is a business decision how each company handles the processing of those claims– some companies might hire more people to investigate the accuracy of these claims while others might conclude that it makes more business sense to devote resources to other areas. But that decision is entirely within the purview of an insurer and plaintiffs have not cited any case law for the proposition that a special relationship can arise simply because an insurer contests a bill submitted by the insured's assignee, a provider. An assignee does not have greater rights or obligations than his assignor. Just as the insured does not have a special duty, the insured's assignee, an out-of-network provider, does not have a special duty.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the first, third, sixth, eighth, eleventh, thirteenth, sixteenth and eighteenth causes of action is granted and these claims are severed and dismissed.

This is the Decision and Order of the Court.

Dated: April 13, 2018
New York, New York

ARLENE P. BLUTH, JSC
HON. ARLENE P. BLUTH
J.S.C.