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JOHN D. O'DWYER, J.S.C.

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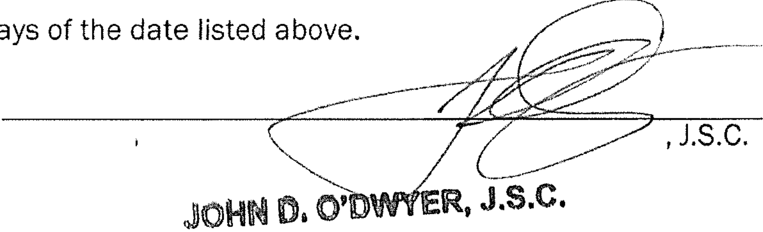
NORTH JERSEY BRAIN & SPINE CENTER Plaintiff, vs. AETNA LIFE INSURANCE CO., Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION / BERGEN COUNTY DOCKET NO.: BER-L-3333-17 Civil Action **ORDER**

THIS MATTER having been opened to the court by Connell Foley, LLP, counsel for Defendant Aetna Life Insurance Company ("Aetna"), for an Order dismissing Plaintiff's Complaint, and the Court having considered the papers submitted in support of thereto, and for good cause shown;

IT IS ON THIS 15th day of September, 2017, **ORDERED** that Defendant's Motion to Dismiss Plaintiff's Complaint is ~~GRANTED;~~ DENIED. See Rider attached

IT IS FURTHER ORDERED that a copy of this Order be served upon all parties and/or their attorneys, if any, within 7 days of the date listed above.



______________________, J.S.C.

JOHN D. O'DWYER, J.S.C.

[X] Opposed
[ ] Unopposed

Denied for reasons placed on record.

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North Jersey Brain & Spine v. Aetna Life Insur. Co.

Docket No. BER-L-3333-17

Rider to the Order Dated SEPTEMBER 15, 2017

THIS MATTER has come before this Court as a motion on behalf of the defendant, Aetna Life Insurance Company, seeking to dismiss the complaint filed by plaintiff, North Jersey Brain & Spine Center for failure to state a claim upon which relief may be granted under R. 4:6 – 2(e). The plaintiff, North Jersey Brain & Spine Center, is a medical provider which provided surgical services to a patient who receives health benefits through his employment with Mason Tenders' District Council, under a self – funded health benefit plan administered by Aetna and governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sec. 1001 et. seq. Plaintiff, North Jersey Brain & Spine Center is an "out – of – network provider" and does not have any assignment of benefits from the patient whose services are at issue.

Plaintiff has brought a six – count Complaint against Aetna to recover increased benefits for services rendered to the patient. The Complaint alleges state law causes of action including breach of implied contract; breach of implied covenant of good faith and fair dealing; unjust enrichment and quantum meruit; interference with economic advantage; promissory estoppel; and negligent misrepresentation. Plaintiff alleges that Aetna pre – authorized the surgical services at issue and advised that Aetna would "pay 80% of the patients billed UCR charges for the surgery performed." It is the contention of the defendant, Aetna Life Insurance Company, that plaintiff's state law claims are expressly preempted by ERISA Sec. 514 as they clearly "relate to the

Plan." Plaintiff counters that both New Jersey and federal appellate precedent hold that ERISA does not preempt a healthcare provider's state law misrepresentation related claims arising from health insurance preauthorization for a medical procedure or service.

PROCEDURAL SETTING

At the outset it is important to note that this application for relief is brought pursuant to R. 4:6 – 2(e). When considering such a motion, the Court must accept the allegations of the complaint as true. Printing Mart -Morristown v. Sharp Electronics Corp., 116 N.J. 739, 745 – 46(1989). A complaint must be properly reviewed "in depth and with liberality to ascertain whether the fundamental cause of action may be gleaned…". Printing Mart, 116 N.J.at 746. As noted in Printing Mart "applications for dismissal… brought at the very earliest stage of the litigation should be granted only in the rarest of instances." Printing Mart at 771-772. This Court is also mindful that determining whether the federal law preempts state law is a fact – sensitive endeavor. Preemption is to not be lightly presumed and dismissal at an early stage litigation must be undertaken with care and deliberation. R.F. v. Abbott Labs, 162 N.J. 596, 619 (2000). Furthermore, there is a presumption against preemption. In re Reglan Litig., 226 N.J. 315,328-29 (2016). This is particularly true where a question involves healthcare, an area traditionally regulated by the states.

PREEMPTION

The federal Employee Retirement Income Security Act (ERISA) seeks to establish "a uniform regulatory regime over employee benefit plans." Aetna Health Inc. v Davila, 542 US 200, 208(2004). The Act contains an expensive preemption provision under which the enforcement provisions of ERISA "shall supersede any and all State laws set forth then and now or hereafter

related to any (ERISA) employee benefit plan." 29U.S.C. Sec. 1144(a). While ERISA preemption is understood to be quite broad, it does not foreclose a plaintiff pleading state law claim based on a legal duty that is independent from ERISA or an ERISA-governed plan. Preemption is, however, mandated if a plaintiff is entitled to recover "only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA" exists. Pascack Valley Hospital v. Local 464A UFCW Welfare Reimbursement Plan, 383 F.3d 393,400 (3rd. Cir.2004).

There are two types of preemption established under ERISA: complete preemption under Section 502(a), which is inapplicable here, and express preemption under Section 514(a), which preempts state law claims that "relate to" an ERISA plan. A state law claim relates to an employee benefit plan" if the existence of an ERISA plan is a critical factor in establishing liability" and " the trial court's inquiry would be directed to the plan." 1975 Salaried Retirement Plan for Eligible Emps. Of, Inc. v Nobers, 968 F.2d 401,406 (3rd. Cir.), cert. denied, 506 U.S. 1086 (1993).

It appears that the crux of the analysis concerns the extent of the connection between the claims brought by the plaintiff and the terms of the Plan itself. Parties argue each side of the coin. That is, plaintiff stresses that its claim is brought by an independent third – party healthcare provider against a plan administrator for its misrepresentation. Plaintiff argues that such a scenario is not preempted by the Plan and the claim could have been brought even if the Plan did not exist. Plaintiff points to decisions in multiple circuit courts across the country in support of its position espousing what it calls the "Memorial Hospital rule". Memorial Hospital System v. Northbrook

Life Insurance Company, 904 F. 2d 236(5th Cir. 1990). Plaintiff points to the decision of McCullough Orthopedic Surgical Services v Aetna Inc., 857 F.3d 141,148 (2nd Cir.2017) where the Court found that ERISA does not preempt state law when the state law claim is brought by an independent, third – party healthcare provider against an insurer or plan administrator for its misrepresentation regarding healthcare coverage.

Plaintiffs argue that since their claims sound in tort for negligent misrepresentation and related claims, the claims have no relation to the ERISA Plan. Rather, they stand separate and apart from the Plan and there is no need to reference or address the Plan in resolving such claims. According to plaintiff's this results in a lack of pre-emption.

Contrarily, defendant, Aetna Life Insurance Company, argues broadly that Section 514(a) of ERISA preempts any and all state laws relating to any employee benefit plan. Aetna asks this Court to take an expansive view of the scope of preemption. Aetna stresses where a medical provider seeks further payment for services rendered this necessarily involves the plan, and, therefore, results in preemption. Aetna relies upon the decision of Center for Special Procedures v. Connecticut General Life Insurance, 2010 U.S. Dist. LEXIS 128289, at 10 (D.N.J. Dec. 6, 2010) for the position that when a claim involves alleged misrepresentation and denial of payments under the Plan, which undeniably involves the administration of benefits and administration of the Plan it necessarily has a connection to the ERISA plan and preemption results.

The parties have provided numerous cases from various Districts and Circuit Courts throughout the United States in support of their respective positions. Important to the Court is the fact that the claim brought by plaintiff is non-derivative. That is, it is a direct claim under a state law cause of action not dependent on the provider being a participant in the Plan nor an assignee of the patient whose billing is at issue. North Jersey Brain & Spine is not a "beneficiary" or "participant" as defined by ERISA, and thus may not seek relief in its own name under the ERISA statute itself. 29 U.S.C.S. 1002 (7) (8): 29 U.S.C.S. 1132 (a) (1).

The cases relied upon by defendant suggest that various state-law causes of action, although brought by a healthcare provider, are so closely related to an ERISA plan that such causes of action are preempted by ERISA. These cases primarily, if not exclusively, concern derivative claims - claims that have been assigned by the insured to the healthcare provider. In the present matter, this Court is presented with non-derivative claims. Non-Derivative nature of the claim brought by plaintiff is an important factor for this court in resolving the issue before it.

Having reviewed the various cases cited by the parties in support of their diametrically opposed positions, this Court is satisfied that plaintiff's motion should be denied. A District of New Jersey decision, McCall v. Metropolitan Life Ins. Co., 956 F. Supp. 1172 (D.N.J. 1996) is instructive. In McCall, supra. at 1186 Judge Simandle found that the healthcare providers:

> (n)egligent misrepresentation claim is a tort action that is brought in Meadow View's own name, is independent of the Plan, and could have been brought even if the Plan did not exist.

Defendant places reliance upon a New Jersey District Court decision, Ctr. for Spinal Procedures v. Conn. Gen. Life Ins. Co., 2010 U.S. Dist. Lexis 128289 (D.N.J. Dec. 6, 2010). The decision is unreported and pursuant to Rule 1:36-3 has no precedential value. However, this Court addresses same to illustrate its non-applicability to the factual scenario herein. In Ctr. for Spinal Procedures, the healthcare provider did not bring a non-derivative claim. As such, Judge Cooper found that the contractual relationship binding the healthcare provider as an assignee precluded a state law claim.

Another case relied upon by defendant but not found persuasive to defendant's position is McCulloch Orthopedic Surgical Services v. Aetna Inc., 857 F. 3d 141, 146 (2nd Cir. 2017). Therein, the Second Circuit noted:

> (o)n appeal, McCulloch argues *inter alia* that his state-law claim is not preempted by ERISA because: (1) he did not receive a valid assignment and thus is not the "type of party" that can bring a claim pursuant to § 502(a)(1)(B) and (2) Aetna's oral statements gave rise to a duty that was distinct and independent from its obligations under the patient's healthcare plan. We agree.

The instant matter despite defendant's claim that it is distinguishable appears to be analogues to McCulloch. In this matter, the plaintiff does not have an assignment. As such, plaintiff is a third-party service provider who seeks to recover not as a plan beneficiary assignee, but as an independent claimant who allegedly received representation of payment from the defendant. Plaintiff's claim does not affect the Administration nor obligations of the defendant under the relevant ERISA plan.

The Court finds that defendants reliance upon St. Peter's Univ. Hosp. v. New Jersey Bldg. Laborers Statewide Welfare Fund, 431 N.J. Super 446 (App. Div. 2013) is also misplaced. Importantly, contrary to the claim herein which is independent of the Plan terms itself, the claim in St. Peter's was integrally related to the express terms and conditions of the Plan. The Appellate Division noted in St. Peter's, supra. at 460 as follow:

> (t)he plan itself is referenced and incorporated in that agreement, as well as the hospital agreement, in the definition of such terms as "covered services." Thus, in order to adjudicate the Hospital's claims, the court would be required to examine and consult the terms of the ERISA plan to determine whether the Fund was liable under either state law cause of action. ..... we are convinced the claims are neither tenuous nor peripheral but, rather, clearly "relate to" the ERISA plan within the **[***21]** intendment of the statute, **[*461]** and are expressly preempted under Section 514(a).

The claim at issue in this case does not call for nor require reference to the Plan itself. It is therefore distinguishable from the holding in St. Peter's.

Based on the forgoing, the Court denies the application for dismissal under R. 4.6-2(e). This ruling pertains only to the issue of ERISA preemption. This ruling does not address nor consider the overall sufficiency of individual claims, i.e. breach of contract; quantum meruit, etc.

SO ORDERED this 15th day of September, **2017.**

John D. O' Dwyer J.S.C.