

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, CIVIL PART
ESSEX COUNTY, NEW JERSEY
DOCKET NO.: ESX-L-6164-18
APP. DIV. NO.: _____

KAYAL ORTHOPAEDIC CENTER, :
P.C. , :
 :
Plaintiff, :
 :
v. : **TRANSCRIPT**
 : **OF**
 : **MOTION AND DECISION**
UNITED HEALTHCARE INSURANCE :
COMPANY, ET AL. , :
 :
Defendants. :

Place: Essex County Superior Court
Historic Courthouse
470 Dr. Martin Luther King, Jr. Blvd.
Newark, New Jersey 07102

Date: November 9, 2018

BEFORE:

THE HONORABLE KEITH E. LYNOTT, J.S.C.

TRANSCRIPT ORDERED BY:

ERIC D. KATZ, ESQ.
(Mazie, Slater, Katz & Freeman, LLC)

APPEARANCES:

DAVID M. ESTES, ESQ.
(Mazie, Slater, Katz & Freeman, LLC)
Attorney for the Plaintiffs

JUAN M. BARRAGAN, ESQ. (Port Authority of NY & NJ)
Attorney for the Defendant, Port Authority of NY &
NJ

Rebecca Y. Natal, AD/T 557
A **UTOMATED TRANSCRIPTION SERVICES**
P.O. Box 1582
Laurel Springs, New Jersey
(856) 784-4276
(856) 784-7254 (fax)
autotranscripts@comcast.net

I N D E X1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25ARGUMENTPAGE (S)

BY: Mr. Barragan

3, 21

BY: Mr. Estes

14, 26

THE COURT - Decision

26

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

THE COURT: -- Orthopaedic Center versus The Port Authority of New York and New Jersey. It's L-6164-18.

Pending before the Court is a motion by the Port Authority to dismiss the complaint, grounded in failure to tender a -- a required notice of the claim, as well as, at least in the reply, a statute of limitations argument or position.

Counsel are present. Would you enter your appearances?

MR. ESTES: Sure. David Estes, from the law firm Mazie, Slater, Katz & Freeman, on behalf of the plaintiff Kayal Orthopaedics.

THE COURT: Good morning.

MR. BARRAGAN: Good morning, Your Honor. Juan Barragan from the Port Authority Law Department on behalf of the Port Authority of New York and New Jersey.

THE COURT: All right. Welcome to both of you.

I've read all these papers, but happy to hear anything you wish to highlight or emphasize. So it's the Port Authority's motion. We'll -- we'll start with you.

MR. BARRAGAN: I'll be brief, Your Honor.

1 This is a standard motion. The law is well
2 settled that the Port Authority must be served with a
3 Notice of Claim. The Notice of Claim must be served at
4 least sixty days prior to the init- -- initiation of a
5 lawsuit and at least -- and within one year of the cau-
6 -- accrual of the cause of action. That wasn't done
7 here.

8 The Notice of Claim was not served upon the
9 Port Authority.

10 THE COURT: How do we know it wasn't done?

11 MR. BARRAGAN: What was --

12 THE COURT: I mean, even accepting your
13 position that something more than what they did, the
14 claim that was filed with the -- the Administrator of
15 the Plan and the appeals with that Administrator, how
16 do we know that, for example, the Port Authority didn't
17 receive a communication directly from the Plan saying
18 here's a -- here's a pending claim?

19 MR. BARRAGAN: We didn't, Your Honor. That's
20 -- and that's the reason I didn't make the argument
21 that the cause of action had accrued prior to the year,
22 because we had no information. All I know is that a
23 Notice of Claim was not filed with the Port Authority
24 and that's what the statute requires.

25 Whether it was submitted to -- to -- be- --

1 between Health -- United Healthcare to the Port
2 Authority, which was -- it was not, that's beside the
3 point. The statute simply requires that a Notice of
4 Claim be served upon the Port Authority. The statutes
5 also requires that it be served at the corporate
6 headquarters of the Port Authority. That wasn't done
7 here, Your Honor. It's plain and simple.

8 THE COURT: How do you respond to the -- the
9 plaintiff's argument that, well, this situation is
10 different. You have -- you're a sponsor of a health
11 plan. You have an agent that's administering that
12 plan. You tell plaintiffs or parties that are seeking
13 -- making claims under that plan, you tell them that
14 they need to contact your agent. That's what they did
15 here. They filed a claim. They filed an appeal. They
16 filed, if I understand it, a second level of appeal.
17 How is that -- they're -- they're your agent. How --
18 how doesn't that constitute satisfaction of a statutory
19 requirement?

20 MR. BARRAGAN: Again, Your Honor, United
21 Healthcare is the insurer. It's a -- the Port
22 Authority's self-funded insurer. The statute requires
23 that it be served upon the Port Authority. Because if
24 you start going down that way, then let's say, anybody
25 who has an issue with a contractor from Port Authority,

1 they have an issue with them, they serve them with the
2 correspondence, and then who would be deemed to with --
3 served with a Notice of Claim.

4 It doesn't work like that. The statute was
5 designed that any claim for monetary damages it must be
6 served upon the Port Authority, and the statute also
7 indicates that it must be served one or two ways.
8 Personal service or certified mail, and provides the
9 address at the principal office of the Port Authority.
10 That's what the statute says, Your Honor.

11 If you start -- you know, allowing for
12 disputes to be served on anybody that the Port
13 Authority had a contract with, that would just go into
14 -- that would go to simply against the -- you know,
15 what the statute was meant to do, which is to apprise
16 the Port Authority of the claim, and the Port Authority
17 to investigate a claim and resolve it, if that's the
18 case. And in order to do that, it must be served upon
19 the Port Authority. And the statute makes it clear
20 that it must be served on the office, on the principal
21 office of the Port Authority.

22 The Port Authority website --

23 THE COURT: When -- when -- when in -- in
24 this setting, when a party like the plaintiff is
25 pursuing or -- or claiming that there's no payment or

1 an underpayment, let's say, of -- of a healthcare
2 benefit under this self-insured plan, is -- is it -- is
3 it your experience that -- that they actually file
4 Notices of Claims with the Port Authority directly, as
5 opposed to with the agent?

6 MR. BARRAGAN: With this particular
7 situation, I've never seen it. But I've seen
8 situations where -- where there's a contract and the
9 contract is, let's say, a maintenance contract with ABM
10 or with any other maintenance company and there's an
11 issue. They always filed a Notice of Claim with the
12 Port Authority they're seeking monetary damages.
13 Whether the contractor was -- you know, partially
14 involved or not in the dispute -- in -- in the alleged
15 dispute.

16 It's just what the statute requires, Your
17 Honor and the website says it. The Port Authority
18 website says that any Notice of Claim must be served in
19 New Jersey at the Port Authority Law Department at 2
20 Montgomery, in New York at 4 World Trade Center, 150
21 Greenwich Street.

22 The -- the whole purpose of the -- the
23 statute -- of the sueability statute is to make sure
24 that the Port Authority itself is apprised of a claim
25 for monetary damages. If you start allowing the agents

1 -- imputing service upon the Port Authority by giving
2 notice to an agent, then that just -- you know, goes --
3 goes -- goes in the face of the statute and against
4 what the statute was meant to do.

5 And these are the con- -- conditions
6 precedent to filing suit.

7 THE COURT: How do you address the
8 plaintiff's reliance on the Zamel case, which seems to
9 suggest substantial compliance is enough and that
10 technical deficiencies in the filing don't vitiate the
11 claim?

12 MR. BARRAGAN: The Zamel case, there was
13 substantial compliance, but it was because the Port
14 Authority wasn't being apprised of the claim. Now, the
15 statute has some very strict requirements and the
16 Courts -- the Court reasoned that there was substantial
17 compliance before the Port Authority had notice. There
18 were three different cor- -- correspondences sent from
19 the attorney in the Zamel case, from the plaintiff's
20 attorney to the Port Authority and the Port Authority
21 responded. So it was clear that the plaintiff -- that
22 the Port Authority was, indeed, apprised of the claim
23 before it was filed.

24 Also, the action was filed within a year. So
25 -- and the -- the -- those letters said, yeah, this is

1 a Notice of Claim. So there was substantial compliance
2 before the Port Authority was, indeed, apprised. Three
3 separate occasions. And the lawsuit was filed in a
4 timely manner.

5 That's not the case here. The Port Authority
6 was never made aware of this until the lawsuit was
7 filed. There's no substantial compliance because the
8 Port -- no Notice of Claim was ever served upon the
9 Port Authority. In Zamel, there was. There was three
10 separate correspondences and, I believe the second one,
11 before the lawsuit was filed, or maybe it was the
12 third, it says please consider this a Notice of Claim.
13 So that's why that case is clearly distinguishable from
14 this one.

15 THE COURT: Although that third letter was
16 filed after the -- or -- or within the six -- sixty day
17 period, as I recall. In other words, there were prior
18 notices that were tendered with medical records and the
19 specific location of where the plaintiff fell or the
20 claimant fell. And the last letter from the attorney,
21 saying please consider this a Notice of Claim was
22 submitted inside the sixty day period, if I'm recalling
23 that.

24 MR. BARRAGAN: Yes. But they were sent to
25 the Port Authority.

1 THE COURT: Uh-huh.

2 MR. BARRAGAN: That wasn't done here.

3 THE COURT: Uh-huh.

4 MR. BARRAGAN: That's the clear distinction.

5 And also --

6 THE COURT: Are you aware of any cases here
7 that address this issue specifically in the -- in this
8 healthcare context, where a party -- either the -- the
9 actual employee or the, in this case, the -- the
10 provider is seeking remuneration under the Port
11 Authority's healthcare plan and the Court addressed the
12 issues pertaining to compliance with the notice
13 requirements?

14 MR. BARRAGAN: I do not, Your Honor. The
15 only case I -- I was able to find yesterday was an
16 unpublished 2018 Appellate Division case where a Notice
17 of Claim was sent, not to the Port Authority, to
18 another governmental agency, to the wrong address. And
19 the Court found -- the Court found that there wasn't --
20 you know, that they didn't comply with the Notice of
21 Claim requirements.

22 THE COURT: It was sent to a -- an
23 environmental --

24 MR. BARRAGAN: To -- no, to a wrong -- to the
25 wrong address.

1 THE COURT: Wrong address. I see.

2 MR. BARRAGAN: And -- and the Court -- you
3 know, they're always looking for exceptional
4 circumstances and the Court found there were none and
5 dismissed the action for failure to comply with the
6 Notice of Claim requirements.

7 However, that applied to a governmental
8 agency, not the Port Authority. As you may know, the
9 difference between the Notice of Claim requirements,
10 between a governmental agency and the Port Authority is
11 that for the Port Authority there are conditions
12 precedent to filing suit. So the Courts usually
13 require strict compliance with these requirements.

14 And then the Zamel case said that there was
15 substantial compliance. You know, but in that case,
16 the Court reasoned that it was because the Port
17 Authority was made aware of the situation through
18 numerous correspondences and the action was filed
19 within a year.

20 Over here there's no substantial compliance
21 because neither of the -- those requirements were met.
22 Notice of Claim was never served upon the Port
23 Authority prior to the initiation of the action and the
24 action wasn't filed within one year of its accrual.

25 THE COURT: Why isn't, at minimum, the

1 plaintiff entitled to explore here, as this is a
2 preliminary stage of the case or an -- an opening stage
3 of the case, pre-answer Motion to Dismiss, whether or
4 not, in fact -- I mean, I recognize the plaintiff
5 contends its already satisfied the requirement, but
6 even granting for the moment that there's an open
7 question about whether it did or it didn't, why isn't
8 the plaintiff at least entitled to explore through
9 discovery whether or not, in fact, this claim that it
10 was pursuing through this process with the -- the
11 Administrator made its way to the Port Authority in
12 some fashion? That -- that the Port Authority was, in
13 fact, apprised of the pendency?

14 Maybe there's some kind of monthly report
15 that goes in, that says these are the pending claims,
16 or some type of accounting that goes on from the
17 Administrator to the plan and to the Port Authority as
18 the sponsor of the plan, that these are the claims that
19 are out there?

20 MR. BARRAGAN: Again, Your Honor, I -- I
21 definitely see where you're coming from, but that
22 wasn't what the statute was meant to do. The whole
23 purpose of the statute was for plaintiff to -- for
24 plaintiff to apprise the Port Authority of the claim
25 before a lawsuit's filed. Whether it made its way or

1 not, it's -- it doesn't have to do, because you're
2 supposed to give notice to the Port Authority's Claim
3 -- Claims Department. If that went to some health
4 insurer administrator, that's just not what the statute
5 was designed for. I -- I see what your -- you know,
6 it's a very good question, but the -- but it doesn't --
7 it doesn't -- it -- it doesn't address what the statute
8 was meant for, which is you need to serve the Port
9 Authority. You need to serve them and the statute
10 explicitly requires that you need to do it at their
11 principal office. That wasn't done here. Whether it
12 made -- made its way from United Healthcare to the Port
13 Authority, it's beside the point.

14 And, at the end of the day, if -- if it did
15 and, let's say the plaintiff wants to explore that,
16 then at the -- you know, even if this action is
17 dismissed with prejudice, they could always bring it
18 back in. But the statute was designed to apprise the
19 Port Authority prior to the filing of an action and
20 that wasn't done here. That's what it comes down to,
21 Your Honor.

22 THE COURT: All right.

23 MR. BARRAGAN: That was the purpose of the
24 sueability statute and that's why the Port Authority
25 waives sovereign immunity. Immunity is compliance with

1 those two conditions before the lawsuit's filed. And
2 the conditions are extremely clear. The statute even
3 says where the Notice of Claim has to be sent, to the
4 principal office of the Port Authority. And the Port
5 Authority website indicates -- there's the New Jersey
6 address, there's the New York address.

7 Over here, the claims were sent to United
8 Healthcare to Salt Lake City, to Arizona, and some
9 other address in the United States, but never to the
10 Port Authority. The Port Authority was never mentioned
11 in any of the letters. The Port Authority was never
12 even cc'd in any of the letters.

13 So there is no way that -- that plaintiff can
14 comply with this -- substantially comply with the
15 notice requirements because there's no evidence here
16 that a notice was ever sent in any manner to the Port
17 Authority and plaintiff has not produced anything of
18 that sort.

19 THE COURT: All right. Thank you. Let me
20 hear from the plaintiff.

21 MR. ESTES: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MR. ESTES: Your Honor, I'd like to begin --
24 our position is that this motion should be denied for
25 at least three reasons.

1 First, it's premature at this posture, as
2 Your Honor noted in your questioning.

3 Second, the Port Authority was provided more
4 than sufficient notice of these claims more than sixty
5 days before the lawsuit was filed.

6 And third, these claims are timely. They
7 were -- they were filed within one year of when the
8 claim accrued.

9 Beginning with the procedural issue, that's
10 where counsel left off. Here, if you look as Vasquez,
11 which is cited in plaintiff's opening brief, footnote
12 on page 1 of the brief, we applied the Printing Press
13 standard to this motion and almost all the argument by
14 both parties is stuff that's outside the four corners
15 of the complaint. So, it's premature.

16 Clearly, these are factual issues. Counsel's
17 making representations as to what communications
18 occurred between United and Port Authority. You can't
19 resolve and dismiss a claim with prejudice under the --
20 under this record. At a minimum, we have discovery.

21 But substantively, we've been talking a lot
22 about --

23 THE COURT: And just so I'm clear, what
24 discovery do you think needs to happen?

25 MR. ESTES: With respect to the Notice of

1 Claim issue, we would need discovery regarding the
2 relationship between the Port Authority and Healthca --
3 United Healthcare and, particularly, the type of
4 materials that Your Honor described. Communications,
5 notifications are one aspect. And then, additionally,
6 we would also need discovery to understand what the
7 relationship is with respect to agency.

8 My experience, I do a lot of healthcare
9 litigation. My firm does a lot of healthcare
10 litigation. We have many matters before Your Honor and
11 in Federal Court. And my experience and my intuition
12 leads me to believe that most likely a self-insured
13 plan, particularly governmental plans, they defer
14 almost entirely and delegate almost all responsibility
15 to an administrator, and they rely on an administrator
16 to perform virtually 100 percent of the healthcare
17 processing, resolving claims, making litigation
18 decisions.

19 In fact, often when I -- I'm in litigation
20 against governmental entities or even commercial
21 entities, the attorneys that I litigate against aren't
22 -- you know, ABC Corporation attorney. It's the -- the
23 attorneys from the managed healthcare industry.
24 They're the ones who manage and -- and provide these
25 claims, which gets back to what is the purpose of this

1 statute? And I'd like to read a -- a -- a quote that
2 Chief Justice -- from Chief Justice Hughes Opinion of
3 Zamel, which is the only Supreme Court precedent
4 interpreting the statute.

5 And we talked a lot about what is the purpose
6 or the design of this statute. And this is what Chief
7 Justice Hughes said, and I quote. "There was no
8 intention on the part of the lawmakers that such a
9 statute should be used as a stumbling block or a
10 pitfall to prevent recovery by meritorious claimants."

11 Here, Your Honor, there's no dispute that we
12 have a meritorious claimant. What happened here is the
13 -- the patient, L.L., she got preapproval from
14 defendants to get an orthopaedic surgery. She got an
15 orthopaedic surgery and when it came time to pay the
16 defendants didn't follow through with their
17 representations when they preapproved the procedure.

18 And what's happening now is instead of
19 getting to the merits and the substance of the claim,
20 the Port Authority, the plan, the pocketbook wants to
21 get out on a technicality, on a pitfall, which is what
22 Zamel said is not the purpose of the statute and leave
23 the patient on the hook.

24 That's what's happening here. There's no
25 certifica --

1 THE COURT: Well, there is a statutory
2 requirement here that does seem to require notice to
3 the Port Authority and it does, itself, have an
4 important purpose. It's -- it's not a -- not a
5 technicality in that sense. It's -- it's intended to,
6 as this is a governmental body and it -- it has certain
7 immunities and it -- it has a [sic] almost quasi-
8 sovereign kind of status --

9 MR. ESTES: Uh-huh.

10 THE COURT: -- if not more than that. It's
11 intended to enable them to conduct early and prompt
12 investigation of a claim so that it can either prepare
13 its defense or it can settle it and move on and not
14 have to devote resources to it. So it has an important
15 purpose.

16 MR. ESTES: I -- I would agree 100 percent,
17 Your Honor. And -- and if we look at Zamel and the
18 other decisions, it says -- it identifies three
19 specific purposes, like Your Honor was just describing:
20 a chance to investigate, a chance to prepare a defense
21 and a chance to settle before the litigation begins.

22 And here, those responsibilities with respect
23 to the healthcare context were contracted out to United
24 Health, the Port Authority's agent, and they conducted
25 all those things. They had almost two years to try to

1 settle this claim, to analyze this claim, to prepare a
2 defense, and to try to settle with Kayal Orthopaedic
3 and they decided not to, and that's why this lawsuit
4 was filed.

5 And -- and their agent understood what
6 happens. When a -- when a healthcare provider is not
7 satisfied with a reimbursement, it go -- they have to
8 exhaust the administrative appellate process, as Your
9 Honor knows. And then after that, the claim accrues
10 and -- and providers file lawsuits if there's a
11 significant amount of money that's unpaid.

12 So the notion that the Port Authority didn't
13 have an opportunity to fulfill the intent of the
14 statute, to -- to -- to evaluate the claim, to assess
15 -- you know, what it wanted to do. They don't want to
16 pay more, they don't want to fight it, do they want to
17 gather documents, prepare a defense. It had two years
18 to do that, because it does it through United
19 Healthcare. It doesn't do it on its own.

20 It's -- and I -- and I'd like to address a
21 couple things in that respect. There -- the argument
22 was made that there's no difference between contractors
23 that the Port Authority hires to -- you know, pave a
24 road or fix a railroad and United Health.

25 But they -- they're really not the same

1 thing. One is administering an employee benefit plan.
 2 Another is -- you're contracting out someone to do --
 3 and -- and it's an independent contractor. There's no
 4 agency. An administrator is an agent.

5 And with respect to the Notice of Claim, I
 6 think anytime we're talking about interpreting a
 7 statute, it -- it doesn't -- it's not interpreted to
 8 abrogate common law principles, unless it expressly
 9 does so. And I read the statutes with respect -- in
 10 Chapter 10A, with respect to the Port Authority and
 11 there's absolutely no language abrogating principles of
 12 agency. And here, it's well understood in the
 13 healthcare context that an administrator is an agent.
 14 So then -- then -- there was -- no one disputes here
 15 that there was notice, there's adequate Notice of Claim
 16 to United Health. That's not disputed. And they had
 17 plenty of time and plenty of opportunity to fill the
 18 intent and purpose of receiving notice. What they're
 19 saying is, well, we gotcha because you had to send it
 20 to this address, not that address.

21 But that's not the purpose of the statute.
 22 That's what Chief Justice Hughes is saying. If you
 23 have a meritorious claim, you don't get bounced because
 24 you sent it to the wrong address. And I -- and I have
 25 a statute right here. And I know counsel's arguing

1 this. It states you have to send it to a particular
 2 address. I'll read it.

3 It says, a Notice of Claim shall be served
 4 upon the Port Authority by or on behalf of the
 5 plaintiff. There's -- there's no address. Here
 6 adequate notice was provided, Your Honor.

7 And with respect to the statute of
 8 limitations, if you'll indulge me for one more moment,
 9 the -- the claim -- the -- the statute provides that
 10 the statute of limitations runs from accrual. So
 11 that's when, in this -- in the healthcare context, it's
 12 when the claim exhausts. And here, exhausted, and the
 13 claim was filed about ten months after it exhausted.

14 Thank you, Your Honor.

15 THE COURT: Go ahead.

16 MR. BARRAGAN: Just two quick issues, Your
 17 Honor, if I may.

18 Counsel read N.J.S.A. 32:1-163. That doesn't
 19 -- that doesn't indicate that it has to be served to
 20 the Port Authority. That just has to deal with 60 days
 21 of filing and then -- and that the Notice -- there must
 22 be a Notice of Claim filed and that it must be ser- --
 23 a lawsuit must be filed within one year of its accrual.

24 N.J.S.A. 32:1-164 is the one that indicates
 25 that a Notice of Claim must be served personally, or in

1 lieu thereof, by registered mail to the Port Authority
2 at its principal office.

3 And --

4 THE COURT: But hasn't the case law indicated
5 that that -- I mean, the substantive provision is 163.
6 The procedural one is 164. And while not discounting
7 the importance of that, it -- it -- it -- it -- it does
8 appear that the case law is -- is -- is indicating that
9 substantial compliance with that procedural requirement
10 suffices. Doesn't it?

11 MR. BARRAGAN: But if there's substantial
12 compliance here, Your Honor, think about it.
13 Substantial compliance in Zamel was that the Port
14 Authority -- that a Notice of Claim or a document that
15 fulfills the requirements of a Notice of Claim was sent
16 to the Port Authority. That wasn't done here. No
17 document was sent to the Port Authority. It was sent
18 to United Healthcare.

19 And, number two, it wasn't filed within a
20 year. The cau- -- the cause of action ac- -- a cause
21 of action accrues when the right to institute a lawsuit
22 happens.

23 THE COURT: Had they instituted a lawsuit
24 immediately after the first denial, wouldn't the --
25 among other first words out of the Port Authority's

1 mouth would have been exhaustion of administrative
2 remedies. They didn't -- they didn't pursue their
3 appellate rights. That whole body of -- that -- that
4 whole contractual principle is intended to -- you know,
5 before this comes before the Court to have an
6 administrative process by which these claims might be
7 resolved to the parties' satisfaction. Wouldn't that --
8 -- wouldn't that have been what -- what you would have
9 said?

10 MR. BARRAGAN: Well, when the first appeal
11 was filed, that was still well -- more than a year
12 before the lawsuit was filed. And then they submit a
13 second appeal and then United Healthcare in response
14 said that's not an appeal.

15 So after a first appeal was filed and denied,
16 that's -- that's the very, very latest that a cause of
17 action would have accrued and that's more than one
18 year. More than one year elapsed between that time and
19 the time that they filed the -- the -- the cause of
20 action.

21 When they said they sent what they call a
22 second appeal, United Healthcare responded and said
23 this is not -- this is not an appeal. So at very
24 earliest is when -- is -- our position is that the
25 cause of action accrued when United Healthcare

1 underpaid them. And even after they filed their --
2 their appeal and United Healthcare denied it, that
3 would have been the exhaustion of administered remedies
4 and that's still more than a year between that time and
5 the time the lawsuit was filed.

6 And, Your Honor, what counsel quoted Chief
7 Justice Hughes stating makes sense. You know, that you
8 don't want to deny the right of unmeri- -- meritorious
9 claims. But if you look at the caption, there's a --
10 there's a bunch of other defendants in this action. So
11 the plaintiff -- by -- by the Port Authority being
12 dismissed from this action doesn't mean that the
13 plaintiff is not going to be able to make whole on its
14 claim.

15 THE COURT: No. Don't these -- the -- those
16 relate to other -- other patients of -- of -- this
17 patient is apparently an employee of the Port Authority
18 and the claim as relates to this patient appears to
19 only be viable against the Port Authority plan and --
20 well, the Port Authority plan.

21 If -- if -- if -- you're dismissed, the --
22 the claim that the plaintiff has as to its treatment of
23 -- of L.L., is -- is over, I -- I believe. Counsel
24 will correct me if I've misstated it, but that appears
25 to be the case.

1 MR. BARRAGAN: Well, United Healthcare is
2 also involved in that claim because of their alleged
3 underpayment. So this is not the case where a
4 meritorious claim is going to be dismissed. But, at
5 the same time, the whole purpose of the statute is to
6 protect the Port Authority from these exact situations.

7 Because let's say we start with this,
8 indicating, oh, well, United Healthcare might have been
9 received. They're their agent. They're the
10 administrator. So now, let's say, another plaintiff
11 down the road has an -- has an issue with their
12 retirement and the New York -- the New York State
13 Retirement Fund is the one administering the -- their
14 retirement for the Port Authority and they -- they send
15 a notice to New York State -- you know, to that fund
16 are we also then deemed to have -- have been served
17 with this?

18 Your Honor, the whole -- this -- this goes
19 against everything the statute was intended to do,
20 which is to protect a governmental agency and to make
21 sure that they are apprised of the -- of an act -- of
22 -- of an action for damages before it's filed.

23 Otherwise, it -- it just -- otherwise,
24 allowing this case to go forward against the Port
25 Authority would go -- you know, would go against the

1 whole purpose of this statute. And that's the Port
2 Authority position, Your Honor.

3 THE COURT: All right. Thank you. Anything
4 further?

5 MR. ESTES: Just one thing, Your Honor, if
6 you indulge me. This is from D'Alessandro, a District
7 of New Jersey case, 2007. It's with respect to when
8 does a claim in this accrue for purposes of the statute
9 of limitations. I'll just read the sentences applying
10 New Jersey law. "The clock does not start until after
11 plaintiff exhausted those mandatory avenues of relief."

12 Now, that's our position and if you -- and if
13 the clock runs from when the second level appeal was
14 responded to by defendant's agent, then this claim is
15 within one year.

16 Thank you very much, Your Honor.

17 THE COURT: All right. Thank you both.

18 Pending before the Court is an application or
19 motion by the Port Authority of New York and New Jersey
20 to dismiss the complaint as to the Port Authority of
21 New York and New Jersey, as -- as this matter involves
22 a number of different claims and defendants. The Port
23 Authority is seeking dismissal as to the Port Authority
24 itself.

25 This matter, I -- I conclude, presents a --

1 what appears to be a -- a fairly novel issue of the
2 intersection of the process by which healthcare claims
3 that are brought against, essentially, against, in this
4 case the Port Authority as a self-insured sponsor of a
5 healthcare plan are presented and disposed of. And the
6 intersection of that body of -- of law, as well as
7 contractual practice and requirements of the plan
8 itself, and -- and the statutory scheme by which the
9 Port Authority is required to -- before a claim can be
10 present- -- pursued in Court against it, the -- the
11 statutory scheme requires -- and this is at N.J.S.A.
12 32:1-163, first a Notice of Claim to be submitted to
13 the Port Authority sixty days before the filing of
14 suit, and also that the action must be commenced within
15 one year of -- of its accrual.

16 In this case, this -- this is essentially a
17 claim by the plaintiff, Kayal Orthopaedic Center, P.C.,
18 in which it is a, as I understand it, an -- an out of
19 network provider of medical care services. In this
20 case, it provided, it alleges -- and -- and, once
21 again, this is -- is -- or not once again, as this is a
22 Motion to Dismiss the Complaint, I accept under the
23 standards of Printing Mart-Morristown versus Sharp
24 Electronics, which is at 116 N.J. 739. I think the
25 speci- -- the specific discussion is at 746. The Court

1 accepts as true all of the averments of the complaint
2 in this matter and, essentially, although I'm
3 summarizing, the complaint alleges that Kayal
4 Orthopaedic Center treated a patient identified in the
5 complaint as L.L. That Kayal Orthopaedic Center
6 secured prior approval, as it's an out of network
7 provider, it -- it secured prior approval from the
8 healthcare plan sponsor, which is the Port Authority of
9 New York and New Jersey, through its -- its third-party
10 administrator which, as I understand it, is United
11 Healthcare Insurance Company, for the treatment that
12 the Kayal Orthopaedic Center rendered to L.L. and/or an
13 assurance that the -- the -- at least a -- a
14 significant portion of the bill that would ultimately
15 be rendered for the services provided would be paid,
16 which is, to the Court's understanding, a fairly common
17 practice in the context of an out of network provider.

18 It alleges that the bill was not paid in
19 accordance with what it expected and it feels it's
20 entitled to and -- and the assurances that it alleges
21 it was provided in terms of preauthorization. And it
22 pursued the claim by submitting in the first instance a
23 claim for payment to United Healthcare, as -- as the
24 administrator for this plan. That the -- the -- the
25 claim was not paid or underpaid in -- in this case, and

1 that it then pursued the required appeals through the
2 administrator, but, essentially, appealing to the plan
3 itself on the grounds that it was underpaid. It
4 submitted a -- a -- a claim, I believe, in -- in late
5 2016 and subsequently submitted a -- a second level
6 appeal, and once those were -- were denied, it then
7 brought this matter before the Court as a civil
8 lawsuit.

9 It alleges specifically in its complaint that
10 it exhausted all available appeals and/or that any
11 further appeals would have been futile, and the Court
12 must accept all of those facts as true. I -- I would
13 note, although there are matters that are extrinsic to
14 the complaint that have been put in the record here, I
15 -- I would note that it -- it does appear from the
16 materials that have been supplied that -- that -- that
17 those facts are -- appear to be essentially true. That
18 the claim was submitted on the forms that are required
19 by the -- the Administrator, detailing the nature of
20 the claim, the nature of the treatment, the relevant
21 code and -- and so forth, and the appeal forms
22 similarly are the -- are on the forms that are
23 prescribed by the Administrator of this plan for
24 purposes of -- of pursuing an appeal.

25 The -- the issue that's lodged in this case,

1 the Port Authority is stating that -- and -- and is
2 contending that it didn't receive notice of this claim
3 within sixty day -- or sixty days prior to the filing
4 of the lawsuit and that this claim was not brought in a
5 timely manner in all events, although I note that
6 argument was really raised for the first time in -- in
7 the reply here in a waiver argument or -- or at least
8 an argument that it's not fair -- fair game for this
9 motion has been raised.

10 I don't, for reasons that I think will become
11 apparent, I don't think I need to address that specific
12 point. The -- the -- the essential argument of the
13 Port Authority is that this claim accrued more than a
14 year before the filing of the claim in this lawsuit,
15 either when the claim was first denied or, as counsel
16 has argued, at the end of the first appellate level.
17 And at that point there was a claim that it was accrued
18 and the claim -- this action was filed more than a year
19 afterwards. The -- those are essentially the
20 arguments.

21 This is a Motion to Dismiss. It is governed
22 by Printing Mart and the standards therein. The Court
23 is required to examine the pleading with liberality in
24 order to determine whether it can glean from the
25 asserted factual averments, the fundament of -- as I

1 think is the direct language in Printing Mart, of a
2 cause of action here.

3 The causes of action here sound in -- in
4 essentially, in -- in -- in -- in breach of contract
5 and/or quantum meruit types of relief. And the facts,
6 as I said, are as I just indicated, that this patient
7 received treatment, that it's a -- the patient is a --
8 is a subscriber or beneficiary of a healthcare plan
9 that's sponsored by the Port Authority, that the
10 plaintiff is an out of network provider, provided
11 medical services, received preauthorization for
12 providing those services, submitted a claim, was
13 underpaid, in its view, and submitted the appropriate
14 appeals. Those appeals were not successful and so it's
15 pursuing its claim now in this civil action.

16 The defendant, Port Authority, asserts in
17 this matter that it re- -- never received any type of
18 Notice of Claim as required by N.J.S.A. 32-1 -- 32:1-
19 163 and specifically, in response to the contentions of
20 the plaintiff, that it did provide notices to the agent
21 of the -- of the -- of the -- of the defendant, Port
22 Authority, that agent being the appointed Administrator
23 of the plan.

24 The Port Authority's response relying largely
25 on N.J.S.A. 32:1-164, is that no notice was directed to

1 the Port Authority and to its -- either by mail or
2 personal service to its offices, its specific places of
3 business, and it notes that its website contains a
4 specific direction as to the precise address at which
5 these claims are to be directed.

6 The plaintiff counters here that the -- the
7 record -- first of all, the plaintiff notes that this
8 is a -- a -- a Motion to Dismiss, that -- that it is
9 premature, that these are matters of -- of affirmative
10 defense, that viewing the complaint, as -- as the Court
11 must, with liberality, it has alleged that it pursued
12 all available appeals and exhausted them. That would
13 permit the Court to infer that it did provide notice of
14 its claim to the United Healthcare Insurance Company,
15 as agent for the Port Authority. The Court must accept
16 that as true.

17 And the -- the plaintiff avers that or
18 contends on this motion that these matters are matters
19 that can only raised in defense. The Court can't
20 dismiss the complaint, that these would have to be
21 matters for summary judgment, essentially, because the
22 Court would necessarily have to examine matters outside
23 of the parameters -- the four corners of the complaint,
24 in order to adjudicate either component of the motion
25 as to whether a notice was filed and whether this

1 action was filed within the appropriate statute of
2 limitations period.

3 And it -- and, beyond that, the plaintiff
4 contends that it did, in fact, meet the notice
5 requirements in substantial part because it supplied
6 the notice to the agent of the Port Authority, which
7 the Port Authority has designated as the recipient for
8 claims and the processor of claims that are presented
9 under the plan, and that it not only presented the
10 initial claim but it presented the required appeals and
11 that all of that information is information that --
12 that satisfies all the notice requirements and that it
13 -- it identifies the -- the claimant, the nature of the
14 claim, the alleged basis for the -- the -- the basis
15 for the claim, the failure of -- of full payment or
16 payment in accordance with what is alleged to have been
17 the preauthorization.

18 That all of that information was conveyed and
19 thus, at minimum, that either satisfies the requirement
20 as -- as -- as a matter of -- of -- of law or that it
21 substantially satisfies the statutory requirement,
22 specifically citing the New Jersey Supreme Court case
23 in Zamel versus Port Authority, which is at 56 New
24 Jersey 1 (1970).

25 Those are essentially the contentions of the

1 parties.

2 The Court comes to the following conclusions
3 in these circumstances.

4 First, noting that this is a -- a -- a -- at
5 Motion to Dismiss, I'm required to accept all of the
6 pleaded allegations as true. Those allegations are
7 sufficient to cause the Court to conclude for purposes
8 of this motion that a notice was given to the agent of
9 the Port Authority, in accordance with the Port
10 Authority's own requirements, through its healthcare
11 plan, as to how these types of notices are to be given
12 and how these types of claims are to be pursued. I
13 conclude that the -- the defenses that are raised here
14 really are matters of -- of, essentially, of summary
15 judgment and the circumstances here that there facts
16 that need to be explored at a minimum.

17 As I was indicating during the course of oral
18 argument, it does seem to me that the plaintiff is
19 entitled to explore the relationship between United
20 Healthcare Insurance Company, the entity with which it
21 was dealing directly in the prosecution of -- of its
22 claim for payment and the Port Authority how this plan
23 operates in -- in practice, in terms of how these
24 claims are -- are -- are handled, to whom they are
25 directed, what -- to whom, to what decision-makers are

1 alerted to it, whether or not the Port Authority
2 itself, or even, indeed, its Claims Department or Law
3 Department is alerted in some way to the pendency of
4 these claims in order for it to pursue a contention
5 that, even granting that some notice had to be directly
6 given to the Port Authority, that that, in fact,
7 happened here.

8 And I conclude on -- on this record, which
9 req- -- would require the Court to go outside the
10 parameters of the pleading, those matters are not
11 apparent to it. I -- I can't reach conclusions as to
12 them and I believe they are relevant matters that a
13 plaintiff here would be entitled to pursue, without
14 prejudice to the Port Authority's right to come back at
15 some later point and say it doesn't matter what
16 happened here. We didn't get the claim directly --
17 directly deposited at our headquarters office and,
18 therefore, the claim as a whole fails.

19 I say this because I -- I -- I am mindful of
20 -- of the Zamel case, which does make clear that the
21 essential purpose of this notice requirement is a -- is
22 -- is to enable the Port Authority to know that a claim
23 has been presented, but to -- in order to facilitate
24 investigation of the claim, preparation of a defense to
25 the claim, possible early resolution of the claim. In-

1 -- indeed, in other context involving tort claims
2 against -- or contract claims against governmental
3 agencies. The other -- the other purpose of a statute
4 like this is -- is prophylactic in the sense of
5 allowing the agency to -- to make -- take corrective
6 actions and so forth. In -- in this case, the
7 corrective action presumably would have been something
8 by way of a -- of an earlier settlement if -- if they
9 felt it was warranted.

10 And in the circumstances here, certainly on
11 the fact of the complaint and even in assessing the
12 matters that are presented beyond the four corners of
13 the complaint, there is a basis for the plaintiff to
14 contend here that those -- those purposes were
15 addressed by the manner in which it proceeded.

16 In other words, the plaintiff is contending
17 here that it did what it was required to do. It's
18 directed to present its claim to this entity. It did
19 so. It was directed and required to pursue appeals
20 through this entity. It did so. That in doing so, it
21 supplied the basic information that was very equivalent
22 to the information that was supplied to the Port
23 Authority in -- in Zamel, by way of -- of the -- the
24 fundamental nature of the claim, in order to facilitate
25 the -- the achievement of the purposes of the statute

1 here.

2 And the Court made clear in those
3 circumstances in which a claim was presented by an --
4 an injured plaintiff to the Port Authority, by way of
5 -- of a -- of a more -- somewhat informal
6 correspondence by counsel. Over a course of time, it
7 was clear that the plaintiff had presented the location
8 of the accident, the nature of the injury, medical
9 records pertinent to the accident, all outside the six
10 month period. And then an attorney on his behalf
11 submitted a letter within the six-month period,
12 indicating please consider this a Notice of Claim.

13 In that factual context, the Court determined
14 that the Port Authority had all the information it
15 needed within the -- or outside of the six month period
16 in order to facilitate its -- its examination of the
17 claim, investigation, possible settlement and -- in --
18 in -- in -- in other words, that all the purposes for
19 which this statute is in place had been achieved. And
20 -- and indicated that in that context there had been
21 substantial compliance with the statutory requisites
22 such that -- that -- that the defense predicated on a
23 -- on a failure to submit a -- a -- a timely Notice of
24 Claim failed.

25 The Port Authority here claims, well, that's

1 different because these matters weren't directed as
2 they were in Zamel, to the Port Authority itself. But
3 in this context, which as I -- I indicated at the
4 outset of this opinion, are -- are -- are -- are -- are
5 different in -- in that this is a plan sponsored by the
6 Port Authority, a self-insured plan. This is an agent
7 which it appoints to administer that plan. That agent,
8 as I understand it, or at least for purposes of this
9 motion, understand that there is a process that's
10 prescribed for the presentation of claims. All of
11 that, I think it could be reasonably concluded is -- is
12 the equivalent of compliance with the statutory
13 requisites, even though the claim itself was not
14 specifically directed by the plaintiff to the Port
15 Authority itself following a -- a -- a -- a pathway of
16 that nature.

17 And -- and -- and I believe that, at least
18 for purposes of this procedural juncture, in which this
19 claim -- in which this motion is presented, that that
20 is a sufficient basis on which to determine that there
21 are factual matters here that need to be explored and
22 this motion, for that reason alone, should be denied,
23 in that, as -- as I've said, this case presents a -- a
24 somewhat different circumstance involving the practices
25 and -- and procedures for presenting a healthcare claim

1 which are, as I said, I think, fundamentally different
2 from the way certain other claims are presented and the
3 were, at least for purposes of this motion, presented
4 to a designated agent of the Port Authority.

5 So for purposes of the motion, I -- I
6 conclude that -- that -- that there's a sufficient
7 showing here that a notice was present to warrant
8 denial of -- of the motion.

9 I believe these are matters, in all events,
10 given the somewhat unique situation here and in the
11 absence of either party, and I'm sure -- I'm sure both
12 parties were represented by very able attorneys who
13 have acquitted themselves very well in the Courtroom
14 this morning, would have presented it, if it existed.
15 There doesn't appear to be any case that directly
16 addresses this specific issue of -- of the intersection
17 between this requirement for a Notice of Claim
18 presented to the governmental agency, in this case, the
19 Port Authority, in the circumstances involving a
20 healthcare claim where there is a plan and there is an
21 agent and there is a process that's prescribed for the
22 presentation of claims via that plan.

23 Seems to me that given the -- the somewhat
24 novel nature of this issue, at minimum, that there
25 should be a full factual record before the Court makes

1 rulings as a matter of law in this context as to
2 whether the statute bars this claim or not. And so I
3 would expect that the parties would explore this matter
4 further to enable the Court to at least have a full
5 factual record to assess this at the appropriate
6 juncture and to determine whether or not -- as it may
7 well turn out to be that the Port Authority was
8 notified of this claim through this process.

9 And -- and, in all events, as I said, I think
10 it's appropriate to explore the nature of this
11 relationship between the Port Authority, its healthcare
12 plan and its designated administrator and how that
13 relationship works, vis-a-vis the processing of claims
14 and the notification of the existence of claims and the
15 pendency of claims and the resolution of claims.

16 So for all of those reasons as well, I'm
17 going to deny this motion without prejudice,
18 essentially, as premature.

19 As to the statute of limitations motion, I --
20 I come to the same conclusion. This is a premature
21 juncture at which to determine when this claim accrued.
22 For purposes of this motion, it would appear that it
23 accrued sometime at the -- in -- in the October 2017
24 time frame, when the second level of appeal was denied.
25 And if that were the case, then this action was timely

1 filed within a year. But, once again, I think that
2 awaits the development of a -- of a more comple -- of a
3 more complete factual record, such that the Court can
4 make a more -- a -- a -- a determination based on that
5 record as to when this claim accrued and whether or not
6 it was timely brought.

7 But for purposes of the motion, I conclude
8 that it hasn't been demonstrated that the claim accrued
9 more than a year prior to the -- the filing of the
10 complaint.

11 So for all those reasons, I'm going to deny
12 the motion. I deny it without prejudice to the right
13 to be renewed at a later time when there is a more
14 complete factual record as to how this claim was
15 processed and handled.

16 And -- and, as I said, for purposes of this
17 motion, I conclude that it hasn't been established by
18 the defendant on a Motion to Dismiss that -- that --
19 that the -- the claim was not presented or note -- or
20 notice of the claim was not presented 60 days before
21 filing the suit, in accordance with the statutory
22 requirement or that the claim was filed out of time, in
23 accordance with the statutory requirement.

24 And so for those reasons, I'm going to deny
25 the motion.

1 All right?
2 MR. BARRAGAN: One -- one more thing, Your
3 Honor.
4 THE COURT: Yes, sir.
5 MR. BARRAGAN: Time for us to answer, since
6 now we would have to file an answer. Counsel, how much
7 time do -- you know, can -- can you give us?
8 MR. ESTES: How much do you need?
9 MR. BARRAGAN: Thirty days?
10 MR. ESTES: No problem.
11 THE COURT: All right.
12 MR. ESTES: Not a problem.
13 THE COURT: Can you record that in -- in -- I
14 -- well, I -- I can -- you -- you submitted a --
15 actually, I'll -- I'll mark up the -- the Order and
16 provide for thirty days for the submission of -- of an
17 answer.
18 MR. ESTES: And -- and, Your Honor, I have
19 one additional matter I wanted to make the record of.
20 And I apologize I didn't raise -- I didn't raise this
21 before you read your opinion --
22 THE COURT: Uh-huh.
23 MR. ESTES: -- but I -- I forgot. During a
24 colloquy with Mr. Barragan, you had discussed whether
25 Port Authority would be the only defendant that could

1 be potentially liable for this procedure in that -- to
2 use your phrasing -- you'll correct me. I -- I don't
3 know the answer to that, but I didn't want to be -- I
4 didn't want my silence to waive any potential claims
5 against United. So --
6 THE COURT: All right. But I -- I was
7 thinking more against Oxford and --
8 MR. ESTES: Oh, yeah.
9 THE COURT: -- the other defendants here.
10 MR. ESTES: I don't -- I don't know, as I sit
11 here today and I think fact discovery will clarify
12 that.
13 THE COURT: All right.
14 MR. ESTES: I just didn't want my silence to
15 be interpreted by Your Honor as -- as not being
16 responsive or -- an -- an -- another party use that
17 against the plaintiff.
18 THE COURT: All right. Well, the -- that's
19 fine. Yeah.
20 MR. ESTES: Like I think it -- it remains to
21 be seen, I guess, is our position.
22 THE COURT: All right. Very well.
23 MR. ESTES: Okay. Thank you, Your Honor.
24 THE COURT: All right. Thank -- thank you
25 both.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

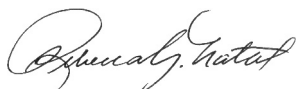
MR. BARRAGAN: Thank you, Your Honor.
MR. ESTES: And thank you for accommodating
my schedule too.
THE COURT: You're welcome.
MR. ESTES: Have a great weekend.
THE COURT: Take care. You too.
(Proceedings Concluded)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATION

I, Rebecca Y. Natal, the assigned
transcriber, do hereby certify the foregoing transcript
of proceedings, Digitally Recorded, Index Number
9:42:57 to 10:35:26 is prepared in full compliance with
the current Transcript Format for Judicial Proceedings
and is a true and accurate compressed transcript of the
proceedings as recorded.

December 14, 2018



Rebecca Y. Natal AD/T 557

AUTOMATED TRANSCRIPTION SERVICES
Laurel Springs, NJ