

Beck v. Boston Med. Ctr. Health Plan, Inc.

Superior Court of Massachusetts, At Suffolk

June 4, 2020, Decided

Civil No. 19-2438-H

Reporter

2020 Mass. Super. LEXIS 89 *

ADAM BECK, M.D., Plaintiff vs. BOSTON MEDICAL CENTER HEALTH PLAN, INC.,¹ Defendant

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Grounds for Injunctions

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[!\[\]\(a08360dc3235ed03bca83cba39535645_img.jpg\)](#) **Injunctions, Grounds for Injunctions**

To obtain a preliminary injunction, a plaintiff must establish (1) he or she is likely to succeed on the merits of his or her claim, (2) he or she will suffer irreparable harm absent the requested relief, and (3) his or her harm, without the injunction, outweighs the potential harm if the injunction is issued.

Civil Procedure > Dismissal > Involuntary Dismissals > Failure to State Claims

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN2[!\[\]\(babf7db3ccb366b82198c3e76e2a29bd_img.jpg\)](#) **Involuntary Dismissals, Failure to State Claims**

¹ Doing business as BMC Healthnet Plan.

To withstand a motion to dismiss for failure to state a claim under [Mass. R.Civ.P. 12\(b\)\(6\)](#), a plaintiff's complaint must allege facts plausibly suggesting (not merely consistent with) entitlement to relief. All well-pled factual allegations in favor of the plaintiff are accepted as true, and all reasonable inferences therefrom are drawn in the plaintiff's favor. The allegations in the complaint are therefore the starting point for an analysis under [Rule 12\(b\)\(6\)](#).

Torts > ... > Compensatory Damages > Types of Losses > Economic Losses

[HN3](#) **Types of Losses, Economic Losses**

The economic loss doctrine bars negligence claims in certain contexts that do not allege physical injury or property damage.

Judges: [*1] Peter B. Krupp, Justice of the Superior Court.

Opinion by: Peter B. Krupp

Opinion

MEMORANDUM AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND DEFENDANT'S MOTION TO DISMISS

After Boston Medical Center Health Plan, Inc. ("BMC") terminated ophthalmologist Alan Beck, M.D. from its provider network in July 2019, Dr. Beck filed this case pro se. His complaint seeks damages on a variety of theories, including for termination in violation of the terms of his contract and to recover monies for services rendered before his termination. The complaint also seeks an injunction restoring him to BMC's provider panel and preventing BMC from reporting his termination to the National Practitioner Databank ("the NPDB"). After months of delay mostly at plaintiff's request,² the case came before me for hearing on Dr. Beck's motion for a preliminary injunction and BMC's motion to dismiss. For the following reasons, I deny the injunction and allow the motion to dismiss in part.³

² Since filing the case, Dr. Beck has not worked as a BMC provider. By agreement of the parties, the Court (Cowin, J.) entered an order in late August 2019 barring BMC from reporting Dr. Beck's termination to NPDB.

³ At argument, Dr. Beck's counsel said he wished to amend the complaint. While I set a schedule below for submitting a motion to amend, I am not now authorizing amendment or ruling that a motion is necessary. See, e.g., [Mass. R. Civ. P. 15\(a\)](#) and 1973 Reporter's Notes at para. 5. I have not seen a proposed amended complaint. I do not know the claims Dr. Beck, with the aid of competent counsel, might put forth. Nor do I rule on whether any such amendment would be timely or futile. The propriety of any

BACKGROUND

The complaint alleges as follows:⁴

On January 18, BMC notified Dr. Beck that it was terminating his network participation based on concerns regarding his "settled malpractice cases and the licensure action filed by the New Hampshire Board [*2] of Medicine."⁵ On April 25, BMC notified Dr. Beck that it had upheld its original decision.⁶ On July 23, BMC and Dr. Beck participated in a panel appeal.⁷ Dr. Beck alleges that he "was only allowed thirty minutes to discuss two settled malpractice cases, one closed and dismissed case, three cases anticipated to be Judgments for the Defense or withdrawn actions and the Board of Medicine actions."⁸ I can reasonably infer from this allegation that Dr. Beck understands this to have been too short a time. The complaint alleges that the telephonic hearing was "a sham," but does not cite any factual basis for this conclusory allegation other than the amount of time allocated. Prior to the hearing, Dr. Beck indicated that he was not giving up his right to arbitration by participating in the panel appeal process.

After the July 23 hearing, the panel upheld the decision to terminate Dr. Beck's participation in the BMC plan. The panel gave no reasons for doing so. Dr. Beck

amendment will have to be considered by the judge assigned to the session. Defendant argues that Dr. Beck's action, at least insofar as he seeks damages for his termination, is precluded by the [Health Care Quality Improvement Act](#). See, e.g., [42 U.S.C. §§ 11111\(a\)\(1\), 11112\(a\)](#). In light of my ruling herein, I need not address this argument. If a proposed amended pleading attempts to present a similar claim, the session judge may have to address it at that time.

⁴ All dates are in 2019 unless otherwise indicated. Footnotes 5-8 contain information BMC submitted relevant to the request for an injunction.

⁵ The January 18 notice states: "After careful review, the [BMC Credentialing] Committee voted to recommend termination of your network participation. . . . The Committee's decision is considered a Disciplinary Action Recommendation, and is based on the Committee's assessment and determination that you do not meet the Plan's Credentialing Criteria related to competence or professional conduct." In opposing the injunction, BMC has submitted information showing that in January it was aware of a jury award of over \$5 million to a New Hampshire couple who claimed Dr. Beck had caused the wife to go blind by performing unnecessary procedures; a settlement agreement in which the New Hampshire Board of Medicine found Dr. Beck "displayed medical practice incompatible with the basic knowledge and competence expected by persons practicing ophthalmology"; and the fact that Dr. Beck's New Hampshire license was not renewed and had become inactive.

⁶ The April 25 notice states: "The [BMC] Credentialing Committee reviewed your reconsideration request. . . . After careful review of your February 15, 2019 letter and referenced documents, the [BMC Credentialing] Committee voted to **uphold** their original decision to terminate your participation in the Plan's provider network." (Bold in original). The notice described the appeal process, including review by "an independent panel," "responsible for making a final decision regarding your network participation" following a "2-hour hearing."

⁷ In the days before the July 23 hearing, BMC learned that on July 17 the Massachusetts Board of Registration in Medicine formally reprimanded Dr. Beck and signed a Consent Order with him agreeing that certain "permanent practice restrictions will be placed on his Massachusetts license." BMC asked Dr. Beck to address this matter at the July 23 hearing.

⁸ BMC contends the hearing lasted 55 minutes, Dr. Beck was allocated 45 minutes to present his evidence, his counsel completed his presentation in 30 minutes, and Dr. Beck did not request additional time.

asserts that he was entitled to continue as a provider under BMC's network because his medical license was neither suspended nor revoked. The decision to terminate Dr. Beck's participation in the BMC plan required a report [*3] to the NPDB, which the complaint alleges would cause Dr. Beck immediate harm with patients, other insurance carriers, and hospitals.

Without specifying any detail, Dr. Beck alleges that BMC did not follow the termination plan, did not give a reason for his termination, and conducted the process "in an arbitrary and capricious manner." He also asserts that he is entitled to an alternative dispute, resolution mechanism, but BMC has denied him that remedy.

On July 31, 2019, Dr. Beck filed this action pro se,⁹ asserting claims for an injunction (Count I), breach of contract (Count II) and negligence (Count III). The legal theory for injunctive relief is not clearly articulated in Count I. Dr. Beck alleges that BMC has violated [G.L. c 93A](#) and [176D](#), although he does not set out a claim under those statutes.¹⁰ The gravamen of his claim for an injunction appears to be that BMC failed to follow its own procedures in terminating him from its approved provider panel.

In support of the injunction, Dr. Beck submits an affidavit, with little additional detail, but attaches the three contracts he had with BMC. BMC's response also attaches the contracts and the Provider Manual referenced in each of the contracts, [*4] which sets out BMC's termination procedure, the details of which are discussed below.

DISCUSSION

HN1[↑] To obtain a preliminary injunction, plaintiff must establish (1) he is likely to succeed on the merits of his claim, (2) he will suffer irreparable harm absent the requested relief, and (3) his harm, without the injunction, outweighs the potential harm if the injunction is issued. [Packaging Indus. Group. Inc. v. Cheney, 380 Mass. 609, 617, 405 N.E.2d 106 \(1980\)](#). The injunctive relief does not flow from all

⁹ Although counsel appeared for Dr. Beck a week after the case was filed, the pro se complaint remains the operative pleading.

¹⁰ Paragraph 2 of the complaint, by way of introduction, also asserts that Dr. Beck "seeks damages for BMC's . . . failure to follow Massachusetts Statutes regarding insurance coverage afforded physicians, defamation of Beck, . . . [and] placing Beck publicly in a false light." The complaint does not cite any Massachusetts statutes other than its passing, conclusory reference to [G.L. c. 93A](#) and [176D](#) in paragraph 15. The complaint does not allege any defamatory statements made by BMC or any statements by BMC casting Dr. Beck in "a false light." Nor does the complaint specifically assert a statutory claim or one for defamation.

of the allegations in the complaint, but only those allegations and claims asserting a failure in the process by which Dr. Beck was terminated as a provider.

Not only has Dr. Beck failed to demonstrate a likelihood of success on the merits in establishing actionable defects in the termination process, his existing complaint fails to state a claim upon which relief may be granted in this regard. [HN2](#)^[↑] To withstand a motion to dismiss for failure to state a claim under [Mass. R. Civ. P. 12\(b\)\(6\)](#), a plaintiff's complaint must allege facts "plausibly suggesting (not merely consistent with) . . . entitlement to relief." [Iannacchino v. Ford Motor Co.](#), 451 Mass. 623, 636, 888 N.E.2d 879 (2008) (internal quotations, omitted). I must (and do) accept as true all well-pleaded factual allegations in favor of the plaintiff and draw all reasonable inferences therefrom in plaintiff's [*5] favor. [Marram v. Kobrick Offshore Fund, Ltd.](#), 442 Mass. 43, 45, 809 N.E.2d 1017 (2004). The allegations in the complaint are therefore the starting point for the analysis under [Rule 12\(b\)\(6\)](#).

To prevail on his requested injunction, Dr. Beck must demonstrate that he is likely to succeed on his claim that BMC breached its contract in terminating him from its provider network. His showing falls far short. The complaint does not state any material contract provision that BMC violated in its process of terminating Dr. Beck, or allege any facts plausibly suggesting an entitlement to relief. To be sure, the complaint contains conclusory allegations calling the July hearing a "sham" and "arbitrary and capricious." But nowhere in the complaint are facts presented to support such conclusions.

Moreover, when looking at the procedure for termination set out in the applicable BMC contract documents, it appears exactly the opposite is true, that BMC complied with its procedure upon termination. First, BMC's Provider Manual ("the Manual"), which is incorporated by reference into each of Dr. Beck's contracts, expressly provides that the credentialing decision belongs exclusively to BMC "in its sole discretion" based on "its Credentialing Policies."

Second, at Sections 3.4 and 3.5, the Manual sets out the [*6] criteria BMC uses to credential or re-credential practitioners. The credentialing criteria include having "a current and unrestricted license in the state in which he/she provides care to Plan members." (Emphasis added). At the time of the panel's review of the termination decision in July, Dr. Beck's license in Massachusetts was subject to a variety of permanent practice restrictions pursuant to a Consent Order. See, [supra](#), at 2-3 n.7. Thus, it appears that Dr. Beck was not eligible to be recredentialed in or after July.

Third, the procedure set out at Section 3.9 of the Manual for appeal of an adverse credentialing decision, including termination, appears to have been largely followed, at least given the factual allegations in the complaint. Section 3.9 requires that "[i]f the Credentialing Committee recommends a disciplinary action, the practitioner will be notified in writing within 30 calendar days" with "a summary of the reasons for the disciplinary action and a description of the appeal process." (This was done in January.) Thereafter, the practitioner may request an appeal postmarked within 30 days (which Dr. Beck apparently did to seek reconsideration, see, supra, at 2 n.6) and the matter will be sent to the Credentialing Committee [*7] for reconsideration. If, as occurred, in this case, the Credentialing Committee "upholds-its original decision," it must notify the practitioner that an appeals panel will-be assembled to review the appeal. (Dr. Beck alleges this notice was sent out on April 25.)

The Manual describes the appeals panel as a medical peer review committee appointed by BMC's chief medical officer ("CMO") or designee. The panel must hear the appeal within 30-90 days of notification of the decision on reconsideration. The Manual does not specify how long such a hearing must last. It does provide that it "will consist, at a minimum, of the panel's "review of the written submissions" by BMC and the practitioner. Thereafter, the panel may "uphold, modify, or overturn the Credentialing Committee's decision," and will notify the practitioner of the panel's "decision and the reasons no later than 45 calendar days from the date of the Hearing." The Manual makes clear that the panel's "decision is final."¹¹

The only procedural failing Dr. Beck alleges in his complaint is that the panel gave no reason for its decision. Support for this allegation is found in the notice letter to Dr. Beck dated July 23, attached as Exhibit [*8] M to the Affidavit of Jake Theberge. That letter states the panel's "decision," but does not provide "the reasons" for it.¹² In the context of this case, and given that Dr. Beck did not satisfy BMC's credentialing criteria because Dr. Beck had agreed with the Massachusetts Board of Registration in Medicine to certain permanent practice restrictions on his Massachusetts license, the mere allegation that the panel failed to state its

¹¹ Although Dr. Beck alleges that he preserved his right to arbitration, he has not pointed to any contractual provision in which he and BMC agreed to arbitration, or any appeal procedure beyond the one specified in the Manual and described above.

¹² The text of the July 23 letter states in full: "I write to inform you of the outcome of your Credentialing Appeal Hearing, which was held by means of conference call on Tuesday, July 23, 2019. Having carefully considered the information presented at the Hearing, the Panel voted to uphold the Credentialing Committee's original decision to terminate your participation in the [BMC] provider network. In accordance with the Plan's Appeal Policy, you have exercised your right to appeal, and the Panel's decision is considered final. Under [45 CFR § 60.5](#), the Plan is required to notify the National Practitioner Databank of this decision."

reasons is insufficient to demonstrate a likelihood of success on the merits or a factual basis to plausibly suggest an entitlement to relief.

If this were the extent of plaintiff's contract claim, I would dismiss it. However, in addition to the allegations that BMC failed to follow proper procedure in terminating Dr. Beck, the complaint alleges at paragraph 40 that "[o]ver the course of the Plan; Beck has provided numerous instances of services, which were later denied and not paid by BMC." He alleges at paragraph 41 and 42 that as a result, BMC has "received unjust enrichment of Beck's services" and "breached its contractual duty to reimburse Beck for services rendered when it refused to pay Beck for services provided to BMC members." Although Dr. Beck does [*9] not specify the amount he claims he is owed under the contracts for past services, his allegations are sufficient to state a claim for monies due under the relevant contracts he had with BMC.

BMC argues that Dr. Beck's negligence claim is barred by the economic loss doctrine. [HN3](#)^[↑] The economic loss doctrine bars negligence claims in certain other contexts that do not allege physical injury or property damage. [Wyman v. Ayer Properties, LLC, 469 Mass. 64, 69, 11 N.E.3d 1074 \(2014\)](#). The concept "was developed in part to prevent the progression of tort concepts from undermining contract expectations." [Id. at 70](#). I do not need to resolve this issue.

Where the relationship between, and the only duty imposed on, the parties is defined by contract, the negligence claim at best would be co-extensive with, and defined by, any contractual obligations, including the contract's implied covenant of good faith and fair dealing. Here, the negligence claim is based solely on the procedure used in connection with the termination of Dr. Beck's plan participation. In this regard, the complaint's negligence count adds allegations at paragraph 49, 50 and 51 that "the three panel members did not have a grasp of any of the cases," the CMO of BMC participated in the panel by presenting "BMC's [*10] side of the facts," and his presentation "was disjointed and without any real understanding of any case" and "confused facts between cases." Dr. Beck fails to allege any contractual obligation requiring the peer review panel be entirely neutral, barring the CMO from participating, or compelling the panel to demonstrate a full knowledge of all of the allegations against Dr. Beck to his satisfaction. Indeed, the Manual expressly provides that the peer review panel is to be appointed by the CMO. Where, as here, I find plaintiff has failed to state a contract claim based on the termination of the contract, the negligence claim, which is based thereon, fares no better.

ORDER

Dr. Beck's Motion for Emergency TRO and Preliminary Injunction (Docket #3) is **DENIED**. Paragraph 4 of the Order entered by the Court (Cowin, J.) on August 12, 2019 is **VACATED**.

Defendant's Motion to Dismiss (Docket #13) is **ALLOWED in part** insofar as (i) so much of Counts II (breach of contract) as is based on a failure to follow the proper procedure or for other defects in the termination of Dr. Beck as a BMC network provider, and (ii) Count III (negligence), are dismissed without prejudice; but otherwise **DENIED**.

Any motion **[*11]** to amend the complaint shall be served by July 7, 2020 and filed by July 31, 2020.

Dated: June 4, 2020

/s/ Peter B. Krupp

Peter B. Krupp

Justice of the Superior Court

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