

1 IN THE UNITED STATES DISTRICT COURT
 2 FOR THE DISTRICT OF NEW JERSEY
 3 CIVIL NO. 13-3636
 4 NORTH JERSEY BRAIN & SPINE CENTER, :
 5 Plaintiff, :
 6 -vs- :
 7 BLUE CROSS BLUE SHIELD OF :
 8 MASSACHUSETTS, INC., :
 9 :
 10 : MOTIONS
 11 Defendants. :
 12 ----- :
 13 Newark, New Jersey
 14 April 20, 2016 10:30 a.m.

15 B E F O R E:

16 THE HONORABLE KATHARINE S. HAYDEN, U.S.D.J.

17 A p p e a r a n c e s:

18 MAZIE SLATER KATZ & FREEMAN
 19 Attorneys for Plaintiffs
 20 103 Eisenhower Parkway
 21 Roseland, New Jersey 07068
 22 BY: DAVID M. ESTES, ESQ.

23 GERBER & PARTNERS LLP
 24 Attorneys for Defendants
 25 155 Willowbrook Boulevard
 Suite 300
 Wayne, New Jersey 07470
 BY: MARY PAT GALLAGHER, ESQ.

JAY BLUMENKOPF, ESQ.
 Attorney for Defendant
 1818 Pacheco Street
 San Francisco, CA 94116

21 Pursuant to Section 753 Title 28 United States Code,
 22 the following transcript is certified to be an accurate
 23 record as taken stenographically in the above-entitled
 24 proceedings.

25 s\ RALPH F. FLORIO
 Official Court Reporter

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4 WITNESSES: PAGES:

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1 THE COURT: Good morning. We're here in the matter
2 of North Jersey Brain & Spine Center versus Blue Cross Blue
3 Shield of Massachusetts.

4 May I have counsel's appearances please.

5 MR. ESTES: Good morning, your Honor. David Estes
6 from the firm of Mazie Slater Katz & Freeman on behalf of the
7 plaintiffs.

8 THE COURT: Good morning.

9 MR. BLUMENKOPF: Jay Blumenkopf, from the firm of
10 Gordon & Rees, and Mary Pat Gallagher from the firm of Gerber
11 & Partners, on behalf of Blue Cross Blue Shield of
12 Massachusetts.

13 THE COURT: And who will be arguing on behalf of
14 the movant?

15 MR. BLUMENKOPF: I will, your Honor.

16 THE COURT: Okay. Come on up.

17 We have according to, I guess I'll start with the
18 reply briefs, since that has the benefit of all of the issues
19 having been aired, the position of your client is that we
20 have the issue of whether or not there's sufficient pleading
21 as to a waiver, correct?

22 MR. BLUMENKOPF: That's correct. Correct.

23 THE COURT: And whether or not administrative
24 remedies were exhausted, correct?

25 MR. BLUMENKOPF: That's correct, your Honor.

1 THE COURT: Okay. Now, the question that I have
2 for you counsel is, the argument that in fact plaintiff has
3 not sufficiently pleaded a waiver can be dispensed with, or
4 plaintiff is dead in the water on it, because of information
5 that you discussed about the Single Case Letter agreement.
6 How-- on this kind of a motion and in this stage of
7 litigation can I entertain the Single Case Letter and give it
8 legal weight so as to support your position?

9 MR. BLUMENKOPF: Well--

10 THE COURT: This is not summary judgment, right?

11 MR. BLUMENKOPF: No. This is not summary judgment,
12 this is a motion to dismiss.

13 THE COURT: Right.

14 MR. BLUMENKOPF: There is no allegation that the
15 Single Case Letter constitutes the waiver itself. The
16 argument is that our dealings in the course of conduct, which
17 would encompass that letter, have created a waiver. But
18 there's been no intentional relinquishment of a known right.
19 On its face that waiver letter said it only applied to that
20 one instance.

21 THE COURT: Again, I can't really use the waiver
22 letter or the Single Case Letter-- can I? At this point can
23 I at this point sit there and say it's over. Because you
24 talk about course of dealings in your complaint, the course
25 of dealings encompasses a contract and a payment for services

1 related to other services, and the Single Case Letter proves
2 it-- when I get all of the information from you-- and we're
3 talking about whether or not there's sufficient pleading.

4 MR. BLUMENKOPF: Their pleading on the issue. The
5 waiver is that they communicated on the new claim and we have
6 totally ignored them. I don't understand how that
7 constitutes waiver.

8 THE COURT: Well, you're already having me accept
9 your fact which is not pleaded that there is a new claim
10 versus an old claim that relates to the Single Case Letter,
11 right?

12 MR. BLUMENKOPF: Well, the new claim is pled.

13 THE COURT: Excuse me?

14 MR. BLUMENKOPF: The new claim is pled. And it's
15 alleged-- waiver is alleged for the new claim. Because of a
16 course of dealings which they take in as true from the
17 allegations in their complaint state that they wrote to us
18 and we have not responded and we've ignored them, and we have
19 been arbitrary and capricious in administering the claim--
20 because we have not responded to them.

21 THE COURT: Well are you saying that the, yes, that
22 the plaintiff is being disingenuous, that it knows perfectly
23 that well whatever course of conduct or course of dealings
24 that they're relying on relates to a discrete and totally
25 unenforceable kind of dealings, and trying to in a

1 disingenuous way and in a misleading way bootstrap themselves
2 into a waiver position?

3 MR. BLUMENKOPF: Well-- I don't want to call the
4 plaintiff disingenuous, but the facts of the pleadings speak
5 for themselves. And there's-- I can't conceive how the
6 Single Case Letter agreement constitutes a waiver to any
7 other claim when it's pled and it's-- the letter is attached
8 as Exhibit 3 to the McInerney declaration. It's there and it
9 says what it says and it is a not a waiver for anything
10 else. Does not apply to anything else.

11 So I don't know how we can bootstrap the subsequent
12 claim into that letter and create a waiver. Their
13 allegations as to the subsequent claim, which is the issue
14 before the Court is that we have just ignored them. And I
15 don't know how that could constitute a waiver of a very, very
16 strong anti-assignment provision.

17 THE COURT: Well, there's no doubt that
18 anti-assignment provision is clear, and the briefing makes it
19 clear too that courts have said, hey, you know, standing on
20 its face-- how could you stand on your face-- looking at it
21 in the face-- this language carries the day. They're not
22 denying that the language is there. They are not denying
23 that the language says what it says. I don't think that they
24 can deny that it has been given legal force and effect.
25 They're hanging on to this waiver situation. And we have

1 language from Judge McNulty down the hall as it were that at
2 least facially in a case not unlike this he is unwilling to
3 move into what really would be summary judgment material. If
4 I were writing the opinion in other words, I would feel as I
5 were writing a summary judgment opinion. Because evidence
6 has been adduced that would suggest that, if I buy your
7 argument, if this is separate and apart-- it's discrete and
8 it's there, it's over, we're talking about a separate claim
9 you never responded and, you know, you behaved as if there
10 was an anti-assignment clause and they can't say that you
11 didn't. But I don't have that situation here.

12 I've got whether or not they have pled other
13 dealings, and taking that as true and even without looking at
14 the contractual nature of the separate contract, or the
15 Single Case Letter, I am faced with the fact that there is no
16 denial of other dealings. It's the significance of the other
17 dealings that you're arguing. And that suggests to me
18 discoverable facts that are not permissible for me to
19 entertain, without at least some kind of a limited discovery
20 around that Single Case Letter issue. That's kind of what I
21 am stuck with.

22 I think even applying the what I would call good
23 law that exists, I'm unwilling to just take a step out the
24 window without looking down and seeing where I'm going to
25 land via discovery. But let me hear from your adversary as

1 to a direct argument back to what you're saying, which is, as
2 to this single claim we never waived. Okay.

3 So let me hear from Mr. Estes.

4 So are you being disingenuous?

5 MR. ESTES: Absolutely not, your Honor.

6 THE COURT: Why not?

7 MR. ESTES: What we alleged in the pleadings is a
8 continuing course of interactions and dealings. And that
9 letter just represents one step or one part of a continuous
10 course. As we detailed in our brief, it spanned over a
11 year. So it began with submitting claims directly to the
12 insurer.

13 THE COURT: Can I just make a bold inquiry. What
14 is the injury that we're talking about? It would appear that
15 it would be an injury-- I'm just guessing, as opposed to a
16 condition? What does the insured person go to your client
17 for?

18 MR. ESTES: Your Honor, my client-- they are based
19 out of Hackensack and they do neurological treatment on brain
20 in injuries. They generally practice out of Hackensack
21 University Medical Center. And they are one of the leading
22 neurosurgeon in North Jersey.

23 THE COURT: That's what they do. What happened to
24 the insured?

25 MR. ESTES: Your Honor, honestly off the top of my

1 head and I don't recall-- I apologize. I presumed based on
2 their speciality and in my, and in previous cases that I
3 represented them, that they either performed a serious back
4 injury or something related to the brain. But I-- I don't
5 remember right now.

6 THE COURT: Okay. All right.

7 MR. ESTES: So my client rendered medical services
8 over several days between March and May.

9 THE COURT: How do I make this thing stop?

10 Off the record.

11 (PAUSE).

12 THE COURT: Back on the record.

13 MR. ESTES: Your Honor, so just stepping back
14 again. My client rendered medical services between March and
15 May 2011 to an insured of defendant Blue Cross. And
16 subsequently they prepared claims, which they submitted on
17 HIPPA 1500 forms. And I note that form has on it in box 13
18 an assertion that an assignment had been provided. There's
19 an analysis from Premier Health, I believe in one of Judge
20 Martini's decisions and it is discussed in our brief?

21 After submitting that claim nothing was paid. My
22 client reached out to the insurer to inquire as to why
23 nothing had been paid. There was various correspondence,
24 communication back and forth, additional documents were
25 submitted. Eventually in the course of the back and forth

1 dealings there was a settlement reached to a single date of
2 service, which I believe is March 25th. And that's what that
3 letter represents-- is a partial agreement. Discussions
4 continued as to the balance of services that were unpaid.
5 Eventually as indicated in the pleadings, communications were
6 cutoff and this litigation began.

7 So that letter I think, you know, obviously the
8 Court knows that the course of dealings is a very
9 fact-sensitive issue. And where that letter fits in that
10 course of dealings and its significance will be colored by
11 surrounding circumstances.

12 I would also point out that that letter doesn't
13 specifically address assignability, doesn't disclose-- it
14 doesn't address the issue that's directly before the Court.
15 So I think its meaning and significance can only be
16 determined in the context of discovery in which the proper
17 subject of a summary judgment motion.

18 I don't know if your Honor wants me to speak beyond
19 that and the other issues?

20 THE COURT: Why don't we move to the other issue
21 that the defendant raises which is the failure to exhaust.

22 MR. ESTES: Okay. With respect to the failure to
23 exhaust.

24 First, I will start with the Rule 9(c), which
25 applies to conditions precedent. And it states that the

1 pleadings standard only requires that a general allegation
2 and that the preconditions have been satisfied.

3 In Hillabrand, the Third Circuit said that that
4 rule applies to exhaustion of remedies. That was a non ERISA
5 case. But I believe the polling and principle apply equally
6 in this contrast.

7 So I think you start from what's the pleading
8 standard and it's low.

9 Second. We look at American Chiropractic, the
10 recent Third Circuit decision regarding ERISA standing-- a
11 derivative standing, excuse me. And in that decision they
12 reversed the motion court for dismissing for failure to
13 exhaust. And what the court said is that's an affirmative
14 defense. It is the burden of the defendant to come forward
15 with something. What the court did that in that case--

16 THE COURT: Well, here they're coming forward by
17 making you eat your own words, where you say they ignored us,
18 right?

19 MR. ESTES: Well, I don't think so. I think what
20 American Chiropractic said, your Honor, was that--

21 THE COURT: No, I'm talking about your adversary in
22 this motion.

23 MR. ESTES: Well, in our pleading what we state is
24 that we exhausted all the remedies. After our claim was not
25 paid, and this is in paragraph 62 in the amended complaint.

1 After a claim wasn't paid, my client contacted the defendant
2 and inquired as to why and there's a back and forth over a
3 period of months. Eventually partial payment and then
4 communication was cutoff.

5 So that fact pattern-- it was alleged it is
6 accepted on a 12(b)(6) motion. And our position is it either
7 constitutes exhaustion of the remedies that were made
8 available, or alternatively demonstrates futility. And
9 either of those is an adequate basis to defeat a motion at
10 this posture of the case.

11 THE COURT: Okay. All right. Let me ask Mr.
12 Blumenkopf. Would you just respond to the last point made by
13 Mr. Estes.

14 MR. BLUMENKOPF: Yes, I'm not familiar with any
15 additional payments other than that under the Single Case
16 agreement. In their own complaint--

17 THE COURT: Let's see what the complaint itself
18 says. Okay.

19 Mr. Estes, you were quoting from the complaint
20 paragraphs what 6 through 9?

21 MR. ESTES: Paragraphs 6 through 9 is what we
22 referenced, your Honor, with respect to this issue.
23 Particularly 6 and 9. Also 7 and 8 have some relevant issue.

24 THE COURT: 6 says following the rendering of said
25 procedures and pursuant to an assignment NJBSC timely

1 submitted its bill to BCBS for processing and payment.

2 And then 9, to the extent that BCBS asserts that an
3 anti-assignment clause prohibits NJBSC from instituting this
4 action... defendant has waived said anti-assignment by virtue
5 of its direct dealings with plaintiff on payment issues
6 pertaining to MCT, and the parties course of dealings during
7 which BCBS resolved payment disputes arising from services
8 rendered by plaintiff to MCT and made payment for such
9 services directly to plaintiff-- and then gives examples.

10 MR. BLUMENKOPF: It's only the March. The March
11 11th treatment and payment and that was the compromise--

12 MR. ESTES: Your Honor--

13 THE COURT: Again, but Mr. Blumenkopf, if I say,
14 oh, okay, that was only a compromise, and I let you prevail
15 on this motion, I've created a record that the worst clerk
16 hired by the worst judge in the Third Circuit would quickly
17 you know go, I really think we have got to send this back
18 down, because she just assumed certain facts that are just
19 not part of the record, right? I mean, we're walking into
20 Judge McNulty territory where he says, I may do what you want
21 but I need a better record.

22 Anything else, Mr. Estes?

23 MR. ESTES: Your Honor, if you would be interested
24 in hearing about our argument in the brief that the
25 anti-assignment clause is void as a matter of public policy I

1 am willing to discuss that as well.

2 THE COURT: Well, I think that that probably is a
3 better argument to make on summary judgment, if you feel
4 you're going down the tubes but you are able to argue a
5 fuller background. Which, frankly, I think would also have
6 to include something about the nature of the medical
7 treatment and the nature of the employment and, you know,
8 let's-- if we're talking about policy let's talk about what
9 your particular insured was doing-- a little bit more
10 context. Because these are fine and dandy--

11 MR. ESTES: Understood, your Honor.

12 THE COURT: These are fine and dandy when we're
13 talking about I would say the global issue of whether an
14 assignment can be made at all. We are beyond that. The
15 Third Circuit has spoken. Now we're talking
16 anti-assignment. We're not beyond that. Third Circuit
17 hasn't spoken.

18 I think both sides as well as the Judge trying to
19 administer justice some way or another, or get you up to the
20 Third Circuit by saying something or other; it's better to
21 have more facts. So you would have your shot on summary
22 judgment.

23 MR. ESTES: Thank you.

24 THE COURT: Anything else, Mr. Blumenkopf?

25 MR. BLUMENKOPF: No, your Honor.

1 THE COURT: Okay. Thank you. If you would all
2 give me a moment and just take a 15 minute break, okay, come
3 back then.

4 Off the record.

5 (RECESS TAKEN).

6 THE COURT: Everybody may be seated. Thank you.

7 In deciding this case I'll advert first to the
8 legal standard.

9 BCBS moves to dismiss the complaint pursuant to
10 Federal Rule of Civil Procedure 12(b)(6). "When standing is
11 challenged on the basis of the pleadings we accept as true
12 all material allegations in the complaint and, construed the
13 complaint in favor of the complaining party," New Jersey
14 Brain & Spine Center at 801 F.3d at 371.

15 The Court asseds challenges to standing that
16 concern a plaintiff's statutory prerequisites under 12(b)(6),
17 while general challenges to standing are reviewed under
18 12(b)(1). And I will spare counsel too much of a legal
19 disposition on this having painfully learned it myself. But
20 particularly here, I think that the Third Circuit's
21 instructions about using the 12(b)(6) standard in deciding
22 standing makes very good sense.

23 The cases to look at would be Maio M-A-I-O v Aetna
24 221 F.3d 472, 482 Footnote 7, Third Circuit 2000. And Franco
25 v Connecticut General Life 818 F.Supp. 2nd 792 at 807; where

1 Judge Chesler analyzed 502(a) standing challenges under a
2 12(b)(6) standard.

3 In deciding a motion to dismiss under Rule
4 12(b)(6), a court may take all allegations in the complaint
5 as true and and draw inferences in the light most favorable
6 to the plaintiff. We are very familiar to that standard, I
7 don't have to give you authority. Generally, where matters
8 outside of the pleadings are presented to and not excluded by
9 the court, the motion must be treated as one for summary
10 judgment under Federal Rule Of Civil Procedure 12(d). While
11 we are familiar with the fact that the court may rely on
12 documents that are integral or explicitly relied upon in the
13 complaint that is not our situation. And the cabining of
14 what may be considered and what may not be considered
15 inherent in 12(b)(6) is what creates the problem here. To
16 credit Blue Cross Blue Shield's position I would need to
17 examine the proofs, the proofs offered that defendant is
18 making in its briefing and in Mr. Blumenkopf's argument. And
19 at this stage I cannot do that under the law that we are
20 familiar with. And we're really talking about our famous
21 Burlington Coat Factory case, 1114 F.3d 1210, a 1997, which
22 seems like ancient history, but is still the law here.

23 And also look at Moore M-O-O-R-E v Beers B-E-E-R-S
24 2015 Westlaw 4638239 at page 3, an August 2015 opinion from
25 Judge Hillman that held "a court reviewing a 12(b)(6) motion

1 must only consider the facts alleged in the pleadings, the
2 documents attached thereto as exhibits and matters of
3 judicial notice except when there is an undisputed authentic
4 document that a defendant attaches as an exhibit to a motion
5 to dismiss if the plaintiff's claims are based on the
6 document. And I find that a particularly helpful example of
7 judicial reasoning. Because I can't, no matter how much Mr.
8 Blumenkopf would like me to and how much I might want to try,
9 cannot square our particular exhibit here, Exhibit 3, the
10 separate case letter with the kind of document that Judge
11 Hillman was referring to in his case.

12 What I am persuaded by is that I must follow and do
13 so because I credit his reasoning throughout his opinion,
14 Judge McNulty's decision and requirement of the defense, or
15 the defendant in *Atlantic Orthopedic Associates v Blue Cross*
16 *Blue Shield of Texas and Express Jet Airline*, the defendants
17 in his case. Where he says, after discussing 12(b)(6), and
18 case law on assignment law generally anti-assignment clauses
19 and so on he comes down to, is waiver proven after examining
20 what both sides presented to him. And I could say to Mr.
21 Estes right now, have you proven waiver? Quoting from Judge
22 McNulty, by no means. And again quoting from Judge McNulty.
23 But I agree with Judge Martini's statement in *Premier Health*
24 *Center Supra*, that the issue is fact intensive and cannot be
25 settled solely in reference to one or two facts.

1 So I would agree with Judge McNulty that in my
2 point, in my case, waiver has not been proven. I'm agreeing
3 with Judge McNulty who agreed with Judge Martini in another
4 case raising similar issues that the issue is fact intensive
5 and cannot be settled solely in reference to one or two
6 facts.

7 Going on with Judge McNulty's observation in his
8 case. "Waiver is adequately suggested by the allegations of
9 the complaint and may be explored further in discovery."
10 Let's look at whether we have a "suggestion of waiver" in the
11 complaint. And I think that paragraph 9 certainly does
12 that. It's a paragraph with some almost 20 lines or so
13 naming people, giving dates, talking about contact between
14 the provider and BCBS. Resolving disputes, and coming to the
15 end of that series of allegations, "at no time during the
16 parties' course of dealings did BCBS ever advise NJBSC, let
17 alone invoke any purported anti-assignment clause. This is
18 not simply the parties had a course of dealings that suggest
19 waiver. This is a lot of facts in the complaint. And Judge
20 McNulty says he wants more than just one or two facts.

21 The interesting thing is, if I were to take a step
22 back here, it is the defendant that is as it were asking me
23 to look at facts. It is almost like a mirror image of what
24 the court does in deciding whether pleadings are sufficient.
25 The defendant is saying, please consider our counter facts to

1 be sufficient. And I am saying I can't look at them yet. I
2 maybe very persuaded on them on summary judgment, I can't
3 look at them.

4 So I agree with Judge McNulty's conclusion "before
5 passing on the question of waiver," and then he adds (or
6 equitable estoppel in a later doctrine). I would need a far
7 more complete record in the course of dealing plaintiff and
8 Blue Cross. And I would need, Judge Hayden would need, a far
9 more complete record of the course of dealing between these
10 two litigates before I could pass on the question of waiver.
11 So that's where we're going next.

12 Now, there is still the other issue of whether
13 there was an exhaustion of remedies. If we look at the kind
14 of information that you're going to be eliciting from one
15 another and the arguments that you will be making that body
16 of information that relates to some of the factual
17 allegations in paragraph 9 seems to me goes right to at least
18 one of the arguments that the plaintiff has made with respect
19 to exhaustion and that's futility. And we know from our
20 circuit that where we're talking about futility a
21 fact-intensive inquiry is required.

22 We know there are limited circumstances where a
23 federal court will entertain an ERISA claim without the
24 exhaustion of administrative remedies. Harrow H-A-R-R-O-W v
25 Prudential, 279 F.3d 244, 249 Third Circuit 2002 held "a

1 plaintiff is excused from exhausting administrative
2 procedures under ERISA if it would be futile to do so."
3 Harrow sets forth factors for the court to weigh. Whether
4 there was diligence pursuit of administrative relief.
5 Whether the plaintiff acted reasonably. The existence of a
6 fixed policy denying benefits. The failure of the insurance
7 company to comply with its own internal administrative
8 procedures. The testimony of planned administrators. I
9 don't have to go any further to show we need discovery to
10 even begin to see whether (a) any of these factors applies at
11 all. Or there are other circumstances in our case, or how
12 some or all of them would apply to our case. The Third
13 Circuit instructs district courts to typically resolve these
14 issues with the consideration of materials outside of the
15 pleadings and therefore on summary judgment.

16 So I'm not in a position for both the interrelation
17 of the facts that had been pleaded with the issue of futility
18 and perhaps other reasons why there has been enough
19 exhaustion. And I need facts to talk about whether or not
20 there was adequate waiver as opposed to what the defendant
21 would want me to do, which is basically say they haven't
22 pleaded enough here with respect to waiver to get in the
23 door. They have. They have. And summary judgment will be
24 the vehicle at which this case can be seen in its full
25 complexion for purposes of a decision on waiver and on

1 exhaustion.

2 For that reason I am denying the motion. I am
3 directing the parties to go to our other courthouse and meet
4 with Judge Waldor who is ready to see you, to put together
5 with you a sufficient time for the kind of discovery that you
6 probably have in your heads already. And a summary judgment
7 schedule thereafter.

8 So you know where she is-- everybody familiar with
9 where Judge Waldor is? Yes. Third floor of the Martin
10 Luther King courtroom.

11 You could do that and still have lunch in beautiful
12 downtown Newark.

13 Thank you very much counsel.

14 MR. ESTES: Thank you.

15 MR. BLUMENKOPF: Thank you, your Honor.

16 MS. GALLAGHER: Thank you, your Honor.

17 THE COURT: Thank you.

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