

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|-----------------------------|---|--------------|
| DONALD A. BRENNAN and | : | |
| BERNADETTE J. BRENNAN, | : | CIVIL ACTION |
| Individually and as h/w, | : | |
| | : | |
| Plaintiffs, | : | |
| v. | : | NO. 95-8045 |
| | : | |
| INDEPENDENCE BLUE CROSS and | : | |
| PENNSYLVANIA BLUE SHIELD, | : | |
| | : | |
| Defendants. | : | |

MEMORANDUM

R.F. KELLY, J.

AUGUST 21, 1997

Before this Court is Plaintiffs' Motion for Partial Summary Judgment and Defendants' Cross Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiffs brought this action against their insurer for payments allegedly due for medical care. For the reasons which follow, Defendants' Motion will be granted.

I. Background

This case arose out of a medical malpractice action brought by Donald and Bernadette Brennan ("Plaintiffs") against health care providers for incidents in which Donald Brennan allegedly sustained quadriplegia. In that action, Plaintiffs were represented by attorney Daniel L. Thistle. Thistle also represented Defendants' (Independence Blue Cross and Pennsylvania Blue Shield) subrogation right in the medical malpractice action, which resulted in an out-of-court settlement. The settlement, which was in excess of \$7 million (Defendants' Motion, Ex. A),

included damages for future medical expenses that would be incurred by Donald Brennan. Thistle forwarded to Defendants a check in the amount of \$46,151.50 for Defendants' subrogation lien reduced by Thistle's fee for representation. On the face of the check, Thistle added the words "FULL/FINAL Settlement for all past and future liens/claims against Donald and Bernadette Brennan."

Initially, this Court disqualified Thistle from representing the Plaintiffs in this action because of the conflict of interest with Thistle's former clients, the Defendants. See Brennan v. Independence Blue Cross, 949 F. Supp. 305 (E.D. Pa. 1996). Plaintiffs now move for Partial Summary Judgment on the issue of Defendants' waiver of subrogation rights. Defendants filed a Cross Motion for Summary Judgment asserting that Plaintiffs prejudiced Defendants' subrogation rights and, therefore, can not recover from Defendants.

II. Standard

Summary judgment is proper if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleading, but must go beyond the pleadings and "set forth specific facts showing that there is a

genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

III. Discussion

A. The Language Added to the Check

On the face of the check, Thistle added language relating to "Final Settlement" of any claim against the Plaintiffs. But the language added to the draft did not operate to waive Defendants' right of future subrogation.

Every contract must be supported by consideration. Pennsylvania Dep't of Transp. v. First Pa. Bank, 466 A.2d 753, 754 (Pa. Commw. 1983). The performance of an act which one party is legally bound to render to the other party is not legal consideration. Chatham Communications, Inc. v. General Press Corp., 344 A.2d 837, 840 (Pa. 1975). The payment of a sum admittedly due furnishes no consideration for the discharge of a disputed claim. Nat'l Container Corp. of Pa. v. Regal Corrugated Box Co., Inc., 119 A.2d 270, 273 (Pa. 1956).

In the instant case, there is no dispute that the Defendants were due the amount paid as a result of the underlying medical malpractice claim. Thistle was legally bound to make this payment to the Defendants. The language added to the draft by Thistle was an attempt to enter into a contract in which the

Defendants would release any claims against the Plaintiffs. But there was no consideration for this agreement. Defendants received neither more nor less than that to which they were entitled as reimbursement for their existing lien. Thus, because Defendants received no consideration for the alleged waiver of their future right of subrogation, the waiver is unenforceable.

B. Prejudice of Future Right of Subrogation

Under Pennsylvania law, where an injured party extinguishes an insurer's subrogation rights by settling and releasing an alleged tortfeasor, the injured party loses the right to recover from the insurer. Melendez v. Pennsylvania Assigned Claims Plan, 557 A.2d 767 (Pa. Super. 1989). This reflects the public policy against double recovery for the same injury. Rossi v. State Farm Auto. Ins. Co., 465 A.2d 8, 10 (Pa. Super. 1983).

In this case, Plaintiffs made a claim against the alleged tortfeasors in the underlying medical malpractice action which included claims for past, present, and future medical expenses. The entire claim settled for a substantial sum of money. The settlement extinguished the Defendants' right to subrogate for benefits payable to Plaintiff Donald Brennan caused by the alleged tortfeasors. Because Plaintiffs prejudiced Defendants' future right of subrogation, and Plaintiffs have recovered future medical expenses for this injury, Plaintiffs may not recover further medical expenses from Defendants.

Because I am ruling in favor of Defendants for the above reasons, I have not found it necessary to decide what obligations

Thistle had toward Independence Blue Cross and Pennsylvania Blue Shield under his dual representation.

IV. Conclusion

In summary, Defendants did not waive their right of future subrogation by accepting the check with the language of "final settlement" of all claims. Further, Plaintiffs extinguished Defendants' future right of subrogation in their settlement with the alleged tortfeasors in the underlying medical malpractice action. In doing so, Plaintiffs forfeited any right to recover future medical expenses from Defendants. Plaintiffs cannot recover on this claim for future medical expenses, and therefore, Defendants' Motion for Summary Judgment is Granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|-----------------------------|---|--------------|
| DONALD A. BRENNAN and | : | |
| BERNADETTE J. BRENNAN, | : | CIVIL ACTION |
| Individually and as h/w, | : | |
| | : | |
| Plaintiffs, | : | |
| v. | : | NO. 95-8045 |
| | : | |
| INDEPENDENCE BLUE CROSS and | : | |
| PENNSYLVANIA BLUE SHIELD, | : | |
| | : | |
| Defendants. | : | |

ORDER

AND NOW, this 21st day of August, 1997, upon consideration of Plaintiffs' Motion for Partial Summary Judgment and the Defendants' Cross Motion for Summary Judgment, it is hereby ORDERED that Plaintiffs' Motion is DENIED. It is further ORDERED that Defendants' Motion is GRANTED. Judgment is therefore entered in favor of Defendants Independence Blue Cross and Pennsylvania Blue Shield and against Plaintiffs Donald A. Brennan and Bernadette J. Brennan.

BY THE COURT:

Robert F. Kelly, J.