[Cite as *Oh v. Anthem Blue Cross & Blue Shield*, 2004-Ohio-565.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

KONG T. OH, M.D., d.b.a. OH EYE ASSOCIATES PLAINTIFF-APPELLANT VS. ANTHEM BLUE CROSS AND BLUE SHIELD, et al. DEFENDANTS-APPELLEES	)))))))))))	CASE NO. 02 CA 142 OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 02 CV 1168

JUDGMENT: Affirmed.

APPEARANCES:

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JUDGES:
Hon. Cheryl L. Waite
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: February 4, 2004
WAITE, P.J.

{¶1} Appellant, Dr. Kong. T. Oh, M.D., appeals the ruling of the Mahoning County Court of Common Pleas that granted Appellee's, Anthem Blue Cross and Blue Shield ("Anthem"), motion to dismiss his complaint.

{¶2} For the following reasons, the trial court's decision is affirmed.

{¶3} Appellant filed his complaint on April 22, 2002, naming as defendants Anthem and John Doe. Defendant John Doe was described as a local agent for Anthem. Appellant's complaint originally asserted a claim on behalf of John Doe plaintiff, as well.

{¶4} Appellant's complaint consisted of two counts. First, Appellant sought damages for Anthem's failure to select Appellant as a health care provider for its

Senior Advantage Plan. Appellant also originally sought to enforce a contract between Anthem and John Doe plaintiff as a third-party beneficiary.

{¶5} In lieu of filing an answer, Anthem filed a motion to dismiss the complaint for failure to set forth a claim for which relief could be granted. The trial court granted the motion and Appellant filed a timely notice of appeal.

{¶6} Appellant raises two assignments of error on appeal. His first assignment states:

{¶7} "THE TRIAL COURT ERRED IN GRANTING DEFENDANTS-APPELLEE' [sic] MOTION TO DISMISS PURSUANT TO RULE 12(b)(6), [sic] OHIO RULES OF CIVIL PROCEDURE BECAUSE PLAINTIFF-APPELLANT'S COMPLAINT ALLEGED SUFFICIENT FACTS AND INVOKED ADEQUATE LAW AND PUBLIC POLICY UPON WHICH A CLAIM FOR RELIEF CAN BE GRANTED."

{¶8} Appellant's second assignment of error asserts:

{¶9} "IN ITS COMPLAINT, PLAINTIFF-APPELLANT ALLEGED SUFFICIENT FACTS RELATIVE TO A CAUSE OF ACTION IN CONTRACT SO THAT THE TRIAL COURT SHOULD HAVE DENIED DEFENDANT-APPELLEES' 12(B)(6) MOTION TO DISMISS AND ALLOWED PLAINTIFF-APPELLANT THE OPPORTUNITY TO PROVE THOSE FACTS AT TRIAL."

{¶10} This Court has recently addressed the standard of review for a Civ.R. 12(B)(6) motion to dismiss in *Hergenroder v. Ohio Bureau of Motor Vehicles,* 152 Ohio App.3d 704, 2003-Ohio-2561, 789 N.E.2d 1147:

{¶11} "A trial court may grant a motion to dismiss for failure to state a claim only when it appears 'beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery.' * * * When reviewing a trial court's judgment granting a Civ.R. 12(B)(6) motion to dismiss, an appellate court must independently review the complaint. * * * The appellate court is not required to defer to the trial court's decision to grant dismissal but instead considers the motion to dismiss de novo. * * * We are to presume the truth of all factual allegations in the complaint and must make all reasonable inferences in favor of the nonmoving party." (citations omitted.) *Hergenroder,* 152 Ohio App.3d 704, at ¶8.

{¶12} The first count in Appellant's complaint alleged that Appellant was an intended third-party beneficiary to the health care contract between Anthem and John Doe plaintiff. Appellant identified John Doe plaintiff as an anonymous patient denied coverage by Anthem for treatment rendered by Appellant. Appellant subsequently conceded that the cause of action which involved the unidentified and unascertainable John Doe plaintiff was improper. Appellant stated he would withdraw all counts,

without prejudice, on behalf of John Doe before the trial court in his motion in opposition to dismissal.

{¶13} Appellant subsequently conceded in his motion in opposition to dismissal that he was not an intended third-party beneficiary of a contract between Anthem and John Doe plaintiff. Appellant argued, however, and continues to claim that a different definition of third-party beneficiary should apply for the health care industry. Appellant did not suggest an alternative definition nor did he supply any authority in support of this assertion.

{¶14} If one is not an intended third-party beneficiary, then he may be an incidental third-party beneficiary. "If the promisee has no intent to benefit a third party, then any third-party beneficiary to the contract is merely an 'incidental beneficiary,' who has no enforceable rights under the contract." *Bobb Forest Products, Inc. v. Morbark Industries, Inc.,* 151 Ohio App.3d 63, 2002-Ohio-5370, 783 N.E.2d 560, at ¶59, citing *Hill v. Sonitrol of Southwestern Ohio* (1988), 36 Ohio St.3d 36, 40, 521 N.E.2d 780. Even if we assume that Appellant is an incidental third-party beneficiary to an alleged contract, Appellant cannot enforce the contractual rights of John Doe plaintiff. As such, Appellant's first count failed to state a claim upon which relief could be granted and was properly dismissed.

{¶15} The second count in Appellant's complaint was identified as a declaratory judgment action. Thereafter, it alleged that the manner in which Anthem chose physicians for its health care plans violated common law due process.

{¶16} Appellant asserted that he was denied due process since he was denied an opportunity to be heard before being denied an economic benefit. He argued Anthem was denying him the opportunity to practice and earn a livelihood.

{¶17} Appellant asks this Court to ignore Ohio law and to adopt the law of California as set forth in *Potvin v. Met. Life Ins. Co*. (2000), 22 Cal.4th 1060, 95 Cal.Rptr.2d 496, 997 P.2d 1153. However, *Potvin* was recently considered by this Court and rejected. *Panozzo v. Anthem Blue Cross and Blue Shield*, 152 Ohio App.3d 235, 2003-Ohio-1601, 787 N.E.2d 91, at ¶30. Citing the doctrine of separation of powers, the *Panozzo* decision appropriately held that *Potvin* was contrary to Ohio law as set forth in R.C. 1753.09, termination of provider contract. Id. at ¶¶ 30-31.

{¶18} Further, even if the law as set forth in *Potvin*, supra, was applicable in Ohio, *Potvin* is clearly inapplicable to this case. *Potvin* involved a physician who was removed from a health care provider's preferred list. *Potvin*, 22 Cal.4th 1060, 1064, 95 Cal.Rptr.2d 496, 997 P.2d 1153. *Potvin* held that the physician's common law right to fair procedure outweighed the termination-without-cause clause in the provider agreement. Id. at 1073, 95 Cal.Rptr.2d 496, 997 P.2d 1153.

{¶19} In the instant case, however, Appellant was never included as a provider on the Senior Advantage Plan at issue in his Complaint. (Complaint ¶11, Motion in Opposition to Defendant's Motion to Dismiss p. 1.) Appellant is arguing not only for an adoption of California law, but for a dramatic extension of the *Potvin* holding to require a hearing for all possible health care professionals not identified as a "preferred provider" with Anthem or some other insurance company.

{¶20} This Court in *Panozzo* likewise addressed Appellant's other claimed authority, *Ahmed v. Univ. Hosp. Health Care Sys., Inc.* (Apr. 18, 2002), 8th Dist. No. 79016. *Ahmed* involved a physician who had his hospital staff privileges revoked. Id. *Ahmed*, like *Potvin*, supra, is not applicable to the instant case since Appellant was never a Senior Advantage Plan physician. Further, the procedural safeguards addressed in *Ahmed* were specifically provided for in the staff bylaws. Id. at 6.

{¶21} Based on the foregoing, the remainder of Appellant's complaint also failed to allege sufficient facts and adequate law to sustain an action against Anthem for breach of contract. Thus, his second assignment of error fails.

{¶22} What Appellant is urging is nothing less than the complete dissolution of "preferred provider" plans, or HMOs, in Ohio. Appellant has brought this matter to the wrong branch of government. Such an ambitious goal is a matter for legislation.

Current Ohio law runs contra to Appellant's case and as a court of review applying Ohio law we can only affirm the decision of the trial court.

{¶23} It should also be noted that Appellant mentions tortious interference and breach of prospective business advantage allegations in his brief. These claims were not asserted in his complaint and he did not file an amended complaint; therefore, they cannot be considered on appeal. *BSW Development Group v. Dayton* (1998), 83 Ohio St.3d 338, 344, 699 N.E.2d 1271.

Vukovich and DeGenaro, JJ., concur.