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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JOHN F. HULL,

Plaintiff,

Case No. 15-148344-CZ
Hon. Phyllis C. McMillen

v

HOME DEPOT USA, INC.,

Defendant.

______________________________/

OPINION AND ORDER

At a session of Court
Held in Pontiac, Michigan
On
FEB 17 2016

This matter is before the Court on the motion for summary disposition of defendant, Home Depot USA, Inc., and the counter-motion for summary disposition of Plaintiff, John Hull. The Court heard oral argument on January 27, 2016.

I. BACKGROUND

Plaintiff filed the instant action pursuant to the private enforcement provision of the Medicare Secondary Payer ("MSP") statute, 42 USC 1395y(b)(3)(A). The material facts are undisputed. Plaintiff, who was employed by Home Depot, alleged he injured his knee while at work in April of 2010. In September of 2011, he submitted a claim for workers' compensation benefits, which apparently was denied. A hearing before the Workers' Compensation Board of Magistrates was held in March of 2015. On May 5, 2015, Magistrate Keith Castora signed an Opinion and Order finding that Home Depot

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was responsible for paying medical expenses relating to Plaintiff's knee injury of April 13, 2010; the opinion was mailed to the parties on June 1, 2015. On June 26, 2015, Home Depot submitted a Claim for Review appealing the Magistrate's decision. Plaintiff filed the instant action on August 3, 2015. On August 13, 2015, Home Depot sent a letter to the Michigan Compensation Appellate Commission withdrawing its Claim for Review. The Commission's order granting the withdrawal was issued on August 28, 2015 and was received by Home Depot on September 3, 2015. On September 10, 2015, Home Depot paid $6,813.83 to Medicare, and $35,419.33 to Blue Cross Blue Shield.

Home Depot moves for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10). Plaintiff opposes the motion and counter-moves for summary disposition pursuant to MCR 2.116(I)(2).

II. SUMMARY DISPOSITION STANDARDS

When a motion is based on MCR 2.116(C)(7), affidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose grounds asserted in the motion. MCR 2.116(G)(2). The affidavits, together with the pleadings, depositions, admissions and documentary evidence then filed in the action or submitted by the parties must be considered by the court when the motion is based on subrule (C)(7). MCR 2.116(G)(5). If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the trial court is to render judgment without delay. MCR 2.116(I)(1). *Fuller v Integrated Metal Tech, Inc*, 154 Mich App 601, 606-607; 397 NW2d 846 (1986).

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633

(2003). The pleadings are comprised of the complaint, a cross-claim, a counterclaim, a third-party complaint, an answer to any of these, and a reply to an answer. *Village of Diamondale v Grable*, 240 Mich App 553, 565; 618 NW2d 23 (2000). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the non-movant. *Wade v Dep't of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). However, a mere statement of a pleader's conclusions, unsupported by allegations of fact, will not suffice to create a cause of action. *York v Fiftieth Dist Court*, 212 Mich App 345, 347; 536 NW2d 891 (1995); *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 409; 792 NW2d 686 (2010) (on a (C)(8) motion, the Court must accept as true facts alleged in the complaint, but not conclusions). But see *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008) (the trial court must also consider "any reasonable inferences or conclusions that can be drawn from the facts"). A court should grant the motion when the claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

A motion made under MCR 2.116(C)(10) tests the factual support for a claim, *Campbell v Kovich*, 273 Mich App 227, 229; 731 NW2d 112 (2007), and should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, *Healing Place v Allstate Ins Co*, 277 Mich App 51, 56; 744 NW2d 174 (2007). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Id.* But again, such evidence is only considered to the extent that it is admissible.

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MCR 2.116(G)(6); *Campbell*, 273 Mich App at 230. A genuine issue of material fact exists when the record, drawing all reasonable inferences in favor of the nonmoving party, leaves open an issue upon which reasonable minds could differ. *Healing Place*, 277 Mich App at 56.

III. OVERVIEW OF THE MEDICARE SECONDARY PAYER ACT

Medicare serves as a federal health insurance program benefitting the disabled and persons over the age of sixty-five. The MSP statute, enacted in the 1980s, "'reduce[s] Medicare costs by making the government a secondary provider of medical insurance coverage when a Medicare recipient has other sources of primary coverage.'" *In re Guidant Corp Implantable Defibrillators Prod Liability Litigation*, 484 F Supp 2d 973, 978 (D Minn, 2007), quoting *Thompson v Goetzmann,* 337 F3d 489, 495 (CA 5, 2003). Under the statute, a Medicare payment "may not be made ... with respect to any item or service to the extent that payment has been made or can reasonably be expected to be made" by a primary payer. 42 USC 1395y(b)(2)(A). Workers' compensation plans are deemed primary payers. 42 USC 1395y(b)(2)(A)(ii).

The MSP statute permits Medicare to render conditional payments for medical expenses, with the expectation that the primary payer will later reimburse Medicare if responsible for the cost. 42 USC 1395y(b)(2)(B). That provision states:

> (B) Conditional payment
>
> (i) Authority to make conditional payment
>
> The Secretary may make payment under this subchapter with respect to an item or service if a primary plan described in subparagraph (A)(ii)[3] has not made or cannot reasonably be expected to make payment with respect to such item or service promptly (as determined in accordance with regulations). Any such payment by the Secretary

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> shall be conditioned on reimbursement to the appropriate Trust Fund in accordance with the succeeding provisions of this subsection.
>
> (ii) Repayment required
>
> Subject to paragraph (9), a primary plan, and an entity that receives payment from a primary plan, shall reimburse the appropriate Trust Fund for any payment made by the Secretary under this subchapter with respect to an item or service *if it is demonstrated that such primary plan has or had a responsibility to make payment with respect to such item or service. A primary plan's responsibility for such payment may be demonstrated by a judgment, a payment conditioned upon the recipient's compromise, waiver, or release (whether or not there is a determination or admission of liability) of payment for items or services included in a claim against the primary plan or the primary plan's insured, or by other means....* [emphasis added]

Two causes of action contained in the MSP statute aid in the enforcement of this repayment provision. First, the government itself may sue primary payers to obtain money belonging to Medicare. 42 USC 1395y(b)(2)(B)(iii). Second, private citizens may collect double damages by bringing claims against primary payers to recover money owed. 42 USC 1395y(b)(3)(A).

Again, the purpose of the MSP is to counteract escalating healthcare costs. "The MSP statute was passed in response to a dramatic increase in Medicare expenditures." *Baptist Mem Hosp v Pan American Life Ins Co,* 45 F3d 992, 997 (CA 6, 1995); also see *Perry v United Food & Commercial Workers Dist Unions 405 & 442,* 64 F3d 238, 243 (CA 6, 1995) ("In the MSP statute Congress made Medicare coverage secondary to any coverage provided by private insurance programs. It did so in order to lower Medicare costs.").

Congress authorized a private cause of action and double damages to encourage private parties who are aware of non-payment by primary plans to bring actions to

enforce Medicare's rights. *Stalley v Methodist Healthcare*, 517 F3d 911, 916 (CA 6, 2008).

> The thinking behind the statute is apparently that (1) the beneficiary can be expected to be more aware than the government of whether other entities may be responsible to pay his expenses; (2) without the double damages, the beneficiary might not be motivated to take arms against a recalcitrant insurer because Medicare may have already paid the expenses and the beneficiary would have nothing to gain by pursuing the primary payer; and (3) with the private right of action and the double damages, the beneficiary can pay back the government for its outlay and still have money left over to reward him for his efforts. [*Stalley v Catholic Health Initiatives*, 509 F3d 517, 524-525 (CA 8, 2007)]

IV. DISCUSSION

Initially, Home Depot argues it is entitled to dismissal pursuant to MCR 2.116(C)(7), which permits summary disposition on grounds of payment. Home Depot argues that because it paid the amounts owed to Medicare and Blue Cross Blue Shield on September 10, 2015, dismissal is appropriate under that rule. The Court rejects this argument. Home Depot paid Medicare and Blue Cross Blue Shield, not Plaintiff. Home Depot is not entitled to dismissal on this basis.

Next, Home Depot argues the complaint should be dismissed pursuant to MCR 2.116(C)(8) because it fails to state a valid claim. Home Depot argues that Plaintiff must establish that Home Depot's responsibility was "demonstrated" prior to the filing of the private cause of action, citing *Glover v Liggett Group*, 459 F3d 1304 (CA 11, 2006).[1] In *Glover*, the plaintiffs brought a class action lawsuit against cigarette manufacturers under the MSP, alleging that they should have to reimburse Medicare for health care services attributable to cigarette smoking. The Eleventh Circuit affirmed dismissal of the suit,

[1] Although not binding, "federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v Minn Mining & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).

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holding that "an alleged tortfeasor's responsibility for payment of a Medicare beneficiary's medical costs must be demonstrated *before* an MSP private cause of action for failure to reimburse Medicare can correctly be brought under section 1395y(b)(3)(A)." 459 F3d at 1309 (emphasis in original).

Here, Home Depot argues that because Plaintiff filed the instant lawsuit while the Magistrate's opinion was on appeal, the lawsuit is premature and cannot proceed. This argument is without merit. The holding in *Glover* has been limited to cases against tortfeasors. In *Bio-Medical Applications of Tennessee, Inc v Central States Southeast & Southwest Areas Health & Welfare Fund*, 656 F3d 277 (CA 6, 2011), the Sixth Circuit Court of Appeals limited *Glover*'s holding to suits against tortfeasors only. In other words, the "demonstrated responsibility" provision limits only lawsuits against tortfeasors, not lawsuits against private insurers. 656 F3d at 291. The Court stated:

> We believe that Congress added the "demonstrated responsibility" provision as a limiting principle only for tortfeasor liability under the Act. Although the text of that provision is addressed to all "primary plans"—the Act's broadest category of private insurer, *see id.* § 1395y(b)(2)(A), which includes "self-insured plans," and therefore (after the 2003 amendments) tortfeasors—the context of its inclusion strongly suggests that Congress intended it only as a condition precedent to tortfeasor liability. As discussed above, Congress added the provision in the Medicare Modernization Act, in direct response to cases that prevented tortfeasor liability, as part of an effort to amend the Act to permit tortfeasor liability. The Medicare Modernization Act made no other major changes to the Medicare Secondary Payer Act, so there is no reason to believe that Congress intended to affect the liability of primary plans other than tortfeasors—that is, traditional primary plans, like private insurers. *Moreover, the concept of demonstrated responsibility makes sense only in the context of tort (where no evidence of responsibility exists until it is adjudicated ex post), rather than in the context of an insurance contract (where insurers assume the responsibility of paying for enumerated contingencies ex ante). See Mason,* 346 F.3d at 42 [*Mason v American Tobacco Co*, 346 F 3d 36 (CA 2, 2003)] (discussing, in one of the very cases that precipitated Congress' amendments to the Act, this problem with tortfeasor liability under the Act: "alleged tortfeasors ... have yet to

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> assume the medical costs of any identifiable group of individuals"). Accordingly, we hold that the "demonstrated responsibility" provision limits only lawsuits against tortfeasors, not lawsuits against private insurers. [*Bio-Medical*, 656 F3d at 290-291 (emphasis added)]

Because the defendant was a traditional insurer, not a tortfeasor, the case could proceed even without "demonstrated responsibility." The plaintiff "need not first sue and win, in order to sue again." 656 F3d at 291.

The Michigan Court of Appeals has also held that *Glover* is limited to suits against tortfeasors. In *Holmes v Farm Bureau Gen Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2015 (Docket No. 320723), the Court of Appeals agreed that *Glover*'s rule about "demonstrated responsibility" is limited to suits against tortfeasors. The plaintiff was injured in an auto accident. The plaintiff had a no-fault policy with Farm Bureau. All of her medical bills were paid by Medicare, and Farm Bureau paid none. The plaintiff instituted a private action under the MSP. Farm Bureau argued there was no private cause of action, and that only Medicare could sue. This was rejected, because the MSP expressly permits a private citizen to sue a primary payer to recover funds paid by Medicare on her behalf. 42 USC 1395y(b)(3)(A). Id. at *3. Defendant also argued, citing *Glover*, that even if a private cause of action exists, the claim failed because there had not been a prior judicial determination or settlement indicating that it was "responsible" for paying the benefits. The Court rejected this argument, noting that *Glover* has been limited to cases against tortfeasors, and does not apply to contract-based actions involving health plans. *Id.* at *4.

> In short, *Glover*'s "determined responsibility" condition precedent has been held not to apply to insurance contract disputes, meaning that, because defendant's liability may be established by reference to the parties' contract, plaintiff was not required to "first sue and win, in order to sue again" under the double damages private cause of action created by 42 USC 1395y(b)(3)(A). See *Bio–Med Applications of Tennessee, Inc*, 656

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F3d at 291. See also *Mich Spine & Brain Surgeons, PLLC,* 758 F3d at [sic] (allowing a private cause of action to proceed without a prior judicial determination of the insurer's responsibility); *Nawas v. State Farm Mutual Auto Ins Co,* unpub op at 3–5 (same). Consequently, plaintiff's private cause of action under 42 USC 1395y(b)(3)(A) may proceed.

In sum, based upon the foregoing, we find that plaintiff does have a private cause of action under the MSP and does not need to have previously demonstrated a responsibility to pay by defendant in order to proceed. The trial court erred in holding otherwise. [*Id.* at *5].

Thus, the law is clear that *Glover* has been limited to suits against tortfeasors and Plaintiff in this case can proceed without a previously demonstrated responsibility to pay by Home Depot.

Home Depot next argues that it is, in fact, a "tortfeasor" because the Magistrate found that it was obligated to pay Plaintiff's medical expenses. That argument is wholly without merit. The claim before the Workers' Compensation Board of Magistrates arose out of workers' compensation law; it was not a tort action against Home Depot.

Home Depot further argues it is entitled to summary disposition pursuant to MCR 2.116(C)(10), because there is no dispute that Plaintiff filed the instant action before a final adjudication of Home Depot's responsibility, and there is no dispute that it actually paid the amounts owed within seven days of receiving the order granting withdrawal of its Claim for Review. These arguments fail. As noted above, the requirement of demonstrated responsibility does not apply in this case, and that argument is without merit.[2]

[2] In any event, there was, in fact, a determination in the form of the Magistrate's opinion and order and the existence of the workers compensation insurance policy. Home Depot cites no authority for the argument that a determination is only effective after all appeals are exhausted. In *O'Connor v Mayor & City Council of Baltimore*, 494 F Supp 2d 372 (D Md, 2007), a firefighter sued the mayor and city council under the private enforcement provision of the MSP, alleging that his exposure to asbestos while working cause his pleural malignant mesothelioma. He incurred significant medical expenses, which were paid by Medicare. The Maryland Workers Compensation Commission found that plaintiff's mesothelioma resulted from his employment and therefore ordered the City, which was self-insured, to pay all of his related medical bills.

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The fact that Home Depot paid after receipt of the order does not insulate it from liability either. Home Depot cites no authority for the proposition that because it paid after the lawsuit was filed, then it is not liable under the private cause of action provision of the MSP. In fact, there is case law holding the opposite. In *Estate of McDonald v Indemnity Ins Co of North America*, 46 F Supp 3d 712 (WD Ky, 2014), the plaintiff's decedent was employed by O'Reilly Auto Parts. He was severely injured in an auto accident while acting in the course of his job duties, and died some months later. At the time of the accident, he was a Medicare recipient. Medicare paid all of his medical bills. O'Reilly's workers' compensation insurer denied his claim, because O'Reilly disputed that the death was caused by a work-related accident. The Kentucky Workers' Compensation Board found that decedent's death was caused by the accident, and issued an opinion and order ordering the workers' compensation insurer to pay for the medical expenses. The estate moved for reconsideration of portions of the opinion, and the Board issued an amended opinion but did not change its conclusion. The estate then brought a private enforcement action against O'Reilly's workers' compensation insurer. The insurer later paid the amount owed ($184,514.24). In defense of the lawsuit, the insurer argued that it paid in response to the Conditional Payment Letter from Medicare, so it did not fail to provide appropriate reimbursement as provided in 42 USC 1395y(b)(3)(A). The Court rejected that defense, stating:

> The court has already found that such a holding would be contrary to the language of the private cause of action provision. The private cause of

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Despite the order, the City failed to pay. The Court held that the plaintiff had standing to proceed under Article III of the Constitution, which requires (1) an injury in fact, (2) a causal connection between his injury and the City's conduct, and (3) that his injury will likely be redressed by a decision in his favor. *Id.* at 374. Nothing in the Court's opinion implies that all appeals must be exhausted before the primary payer will be made to defend a private cause of action under the MSP.

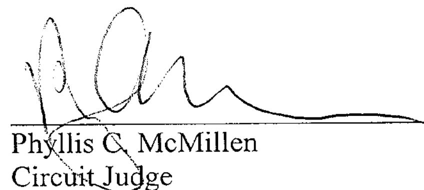
> action provision allows for damages "in an amount double the amount otherwise provided"—the purpose being to encourage beneficiaries to bring claims even if Medicare has already paid the beneficiaries' expenses. *Once a private cause of action claim has been lodged against a defendant, a defendant cannot escape the double damages provided for in that provision by paying single damages to Medicare*. DN 21, pp. 7–8. The court has been offered no reason to question this conclusion. Indemnity's "no harm; no foul" argument disregards the two years between the order for payment by O'Reilly or its carrier from the Worker's Compensation Board and the filing of this suit during which Indemnity did nothing to notify or reimburse Medicare. As the Estate's filing of the suit prompted payment in the amount of $184,514.24, the Estate is entitled to the double damage in that amount to reward the Estate for its efforts. [46 F Supp 3d at 717 (emphasis added), citing *Stalley v Catholic Health Initiatives*, 509 F 3d 517, 525 (CA 8, 2007)].

Here, Home Depot refused to pay for Plaintiff's medical expenses for nearly five years, forcing Medicare to pay them. Only after the instant action was filed did Home Depot finally pay the amounts owed and argue "no harm; no foul." This course of conduct is not permitted in light of the clear intent and purpose of the MSP.

WHEREFORE, IT IS HEREBY ORDERED that Defendant's motion for summary disposition is DENIED.

IT IS FURTHER ORDERED that Plaintiff's counter-motion for summary disposition is GRANTED pursuant to MCR 2.116(I)(2). Because Plaintiff's filing of the suit prompted Home Depot's payment of $42,233.16, Plaintiff is entitled to the double damage in that amount ($42,233.16) to reward him for his efforts. See *Estate of McDonald*, 46 F Supp 3d at 717, citing *Stalley v Catholic Health Initiatives*, 509 F3d at 525. Plaintiff shall submit a proposed judgment in accordance with the Court's ruling.

IT IS SO ORDERED.



Phyllis C. McMillen
Circuit Judge

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