UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar, Plaintiff, vs. Essentia Health, Innovis Health, LLC, dba Essentia Health West, and HealthPartners, Inc., Defendants.	Court File No.: 16-cv-00100 (RHK/LIB) **MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT TO DISMISS COUNT THREE WITH PREJUDICE**

INTRODUCTION

A motion made pursuant to Federal Rule of Civil Procedure 59(e) is intended to afford an opportunity for relief in extraordinary circumstances, not a second bite at the apple. Plaintiff's request for a final, appealable order as to HealthPartners, Inc. ("HealthPartners"), an incorrect defendant, while expressly leaving open the possibility of a separate suit against HealthPartners Administrators, Inc. ("HPAI"), the third-party administrator ("TPA") for the health plan at issue in this case, is an impermissible litigation tactic that will not provide finality to this matter and may result in duplicative litigation that wastes judicial resources.

When HealthPartners asserted that it was an improper party, Plaintiff stated that, if the evidence showed that HPAI was the health plan's TPA, she would amend her Complaint to include HPAI. As the Court has determined, and the summary plan description shows, HPAI was the TPA for the health plan at issue in this case. After the

Court entered Judgment, Plaintiff raised with HealthPartners the possibility of amending her Complaint to include HPAI in this suit and asking the Court to dismiss the Amended Complaint with prejudice as to HealthPartners and HPAI. Plaintiff now asks for an Amended Judgment, against HealthPartners only, that almost certainly will result in further litigation (over the same issues) between Plaintiff and HPAI. This improper litigation tactic will waste judicial resources on another lawsuit, another motion to dismiss and potentially another appeal. Plaintiff is not permitted to attack the Court's decision twice: through an Eighth Circuit appeal, and, if that is unsuccessful, through a second lawsuit against HPAI.

Rather than approach matters piecemeal, the Court should enter an Order requiring Plaintiff to amend her Complaint to add HPAI as a defendant within 10 days, so that the Amended Complaint can be dismissed and the Eighth Circuit can take up Plaintiff's arguments in a single appeal.

FACTUAL BACKGROUND

In response to Plaintiff's Complaint, HealthPartners alerted Plaintiff and the Court that "[c]ontrary to Plaintiff's Complaint, HealthPartners Administrators, Inc., (rather than HealthPartners, Inc.) is the entity that serves as the third-party administrator for the Essentia health plan at issue in this case." (Dkt. No. 13, p. 2 n.1.) Rather than amend her Complaint, Plaintiff acknowledged that "[i]f discovery reveals that HealthPartners Administrators, Inc., should be added as a defendant or substituted for HealthPartners, Inc., Plaintiff will seek to amend her Complaint accordingly." (Dkt. No. 16, p. 3 n.4.)

Plaintiff never amended her Complaint, and the parties asserted various arguments as though the proper TPA had been named. (*See generally* Dkt. No. 13; 16.)

On May 11, 2016, the Court granted HealthPartners' Motion to Dismiss without prejudice. (Dkt. No. 22.) The Court held that Plaintiff's claim against HealthPartners failed for lack of standing, in part because HealthPartners "plainly was not the administrator of either the 2015 or 2016 Plan." (*Id.*, p. 6.) The Court also made clear that Plaintiff's claim would fail even if Plaintiff had identified the appropriate TPA.

Prior to Judgment, Plaintiff did not seek leave to amend her Complaint to add or substitute HPAI. (Dkt. No. 16, p. 3, n. 2; Dkt. No. 22, p. 8 n.8.) Nevertheless, the Court pointed out that Plaintiff is free to seek leave to amend her Complaint under Rule 15(a). (Dkt. No. 22, p. 8 n.8.)

Plaintiff still has not sought leave to amend her Complaint. On June 3, 2016, Plaintiff's counsel alerted HealthPartners' counsel that she intended to appeal the Court's Order, and presented a number of strategies she was considering to address the dismissal without prejudice. (Wilk Aff., ¶ 2; Dkt. No. 26.) One of these options was to move to amend the Complaint to add HPAI to this action and then ask the Court to enter its May 11th Order as to HealthPartners and HPAI, and dismiss Count III with prejudice. (*Id.*) On June 6, 2016, HealthPartners notified Plaintiff that the issues in this case should be resolved as to HealthPartners and HPAI in one appeal. (Wilk Aff., ¶ 3.) Plaintiff instead filed a motion under Rule 59(e) (supposedly because she "has no desire to waste judicial resources" (Dkt. No. 25 at 3)), and left open the possibility of a second suit against HPAI, despite the many procedural problems with that approach. (Wilk Aff., ¶ 4,

Ex. A.) It is unclear why Plaintiff would refuse to amend her Complaint to add HPAI to this case other than to attempt to use a second lawsuit to argue the exact same issues before a different court hoping to get a different result.

ARGUMENT

Rule 59(e) applies in very narrow circumstances, none of which are present in this case. "Rule 59(e) motions serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (internal quotation omitted). Plaintiff ignores this standard and offers no new evidence or law to the Court.

The Court properly dismissed Plaintiff's Complaint without prejudice. "Generally, an order which dismisses a complaint without prejudice is neither final nor appealable because the deficiency may be corrected by the plaintiff without affecting the cause of action." *Borelli v. City of Reading*, 532 F.2d 950, 951 (3rd Cir. 1976). "Only if the plaintiff cannot amend or declares his intention to stand on his complaint does the order become final and appealable." *Id.* at 951-52. Plaintiff must either seek leave to amend as to HPAI, so the Court may dismiss with prejudice the claim against both HealthPartners and HPAI for the reasons stated in its May 11, 2016 Order, resulting in a final appealable order, or stand on her Complaint, foreclosing a subsequent suit as to HPAI.

In no event should Plaintiff be permitted to attempt to proceed with an appeal regarding HealthPartners while holding open the possibility of bringing a second action against HPAI at a later date:

> A plaintiff whose action is dismissed without prejudice by a district court faces an election. A plaintiff may stand on his complaint and appeal its dismissal to the court of appeals. Alternatively, a plaintiff may file a new action correcting the deficiencies in the first action. But a plaintiff may not select *both* courses of action, for that approach begets the type of duplicative litigation that we reject in this case.

Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc., 259 F.3d 949, 956 (8th Cir. 2001) (emphasis in original); *see also Thomason v. Nachtrieb*, 888 F.2d 1202, 1204 (7th Cir. 1989). While the *Prudential* case involved two simultaneous actions against the same party, the reasoning applies here. Allowing Plaintiff to proceed against HealthPartners and HPAI in separate actions, one of which is on appeal, will result in duplicative litigation and a waste of judicial resources. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("the general principle is to avoid duplicative litigation").

CONCLUSION

Plaintiff has no right to proceed with an appeal solely against HealthPartners while attempting to reserve a litigation strategy that includes a second bite at the apple against HPAI in a separate suit. Plaintiff has been advised by both HealthPartners and the Court to amend her Complaint, but has failed to do so. Plaintiff must now choose whether to stand on her Complaint with full notice of its deficiency, and with fair warning that, if dismissal is affirmed, no later action against HPAI will be permitted. Plaintiff's Motion to Amend or Alter the Judgment should be denied, and the Court should enter an Order requiring Plaintiff to amend her Complaint within 10 days.

Date: June 15, 2016

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brittany R. Tovar,

Plaintiff,

-v-

Essentia Health,
Innovis Health, LLC,
dba Essentia Health West, and
HealthPartners, Inc.,

Defendants.

Case No.: 0:16-cv-00100-RHK/LIB

LR 7.1(f) and (h) WORD COUNT COMPLIANCE CERTIFICATE REGARDING MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT TO DISMISS COUNT THREE WITH PREJUDICE

I, Stephanie Chandler, certify that the Memorandum in Opposition to Plaintiff's Motion to Alter or Amend the Judgment to Dismiss Count Three with Prejudice complies with Local Rule 7.1(f) and (h).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count and I also certify that this Memorandum has been prepared in 13 pt. font.

I further certify that the above-referenced Memorandum contains 1,259 words.

Date: June 15, 2016

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