

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

982

CA 17-00372

PRESENT: SMITH, J.P., DEJOSEPH, CURRAN, TROUTMAN, AND WINSLOW, JJ.

PROSTHETIC HOME SERVICES, INC.,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

FIDELIS CARE OF NEW YORK WESTERN REGION,
DEFENDANT-RESPONDENT.

DADD, NELSON, WILKINSON & WUJCIK, ATTICA (JAMES M. WUJCIK OF COUNSEL),
FOR PLAINTIFF-APPELLANT.

NIXON PEABODY LLP, BUFFALO (ERIK A. GOERGEN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (Donna M. Siwek, J.), entered May 3, 2016. The order granted the motion of defendant to dismiss the complaint.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action against defendant, a New York State-sponsored health insurance provider, asserting causes of action for fraud resulting in breach of contract and for prima facie tort. Pursuant to a contract with defendant, plaintiff provided prosthetic services to defendant's members, and defendant reimbursed plaintiff according to a reimbursement rate schedule that was adjusted periodically during the term of the contract. Plaintiff did not renew the contract after defendant informed plaintiff that all prosthetic providers would be compelled to accept the same reduced reimbursement rate if they wished to continue to do business with defendant. According to plaintiff, that information was untrue inasmuch as not all prosthetic providers doing business with defendant in western New York were offered the same reimbursement rate or were compelled to accept a reduced reimbursement rate. Defendant moved to dismiss the complaint pursuant to CPLR 3211 (a) (5) and (7). Plaintiff opposed the motion and, in the alternative, sought leave to replead the complaint pursuant to CPLR 3211 (e). Supreme Court granted the motion, and we affirm.

Both of plaintiff's causes of action contained pleading defects. Inasmuch as plaintiff presented no proposed amendments to correct the defects (*see Gerrish v State Univ. of N.Y. at Buffalo*, 129 AD3d 1611, 1613), we conclude that the court properly denied plaintiff leave to

replead the complaint (*see generally* CPLR 3211 [e]).

Entered: October 6, 2017

Mark W. Bennett
Clerk of the Court