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NO JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JULIA ZEMAN, on behalf of)	Case No. CV 11-05755 DDP (MRWx)
the UNITED STATES OF)	
AMERICA,)	
)	ORDER RE: MOTIONS FOR SUMMARY
Plaintiff,)	JUDGMENT
)	
v.)	
)	
USC UNIVERSITY HOSPITAL,)	[Dkt. Nos. 66, 67, 70, 76]
)	
Defendant.)	
)	
_____)	

Presently before the court are the parties' cross-motions for summary judgment. Having considered the submissions of the parties and heard oral argument, the court grants Defendant's motion, denies Plaintiff's motion, and adopts the following order.

I. Background

As explained in this court's earlier orders, Relator Julia Zeman is covered by the Medicare program. (SAC ¶ 11.) Medicare provides certain health care benefits to eligible elderly and disabled people. See Maximum Comfort Inc. v. Sec'y of Health and Human Servs., 512 F.3d 1081, 1083 (9th Cir. 2007); Vencor Inc. v. Nat'l States Ins. Co., 303 F.3d 1024, 1026 (9th Cir. 2002);

1 Alhambra Hosp. v. Thompson, 259 F.3d 1071, 1072 (9th Cir. 2001).

2 Zeman underwent eight outpatient orthopedic surgeries between
3 September 6, 2007 and November 1, 2011. (SAC ¶ 16.) The surgeries
4 all took place at an Ambulatory Surgical Center ("ASC") owned and
5 operated by Defendant USC University Hospital ("the Hospital"), but
6 adjacent to the main hospital facility.¹ (SAC ¶¶ 3, 13.) Zeman
7 occasionally returned for follow-up visits with her surgeons within
8 ninety days of her various procedures. (SAC ¶ 18.)

9 In October 2009, Defendant began to operate the orthopedic
10 practice at the ASC as part of the hospital itself. (SAC ¶ 3.) At
11 that time, the Hospital notified patients that they would
12 thereafter be receiving two separate bills, one from the medical
13 group practice for physician's services and the other from the
14 Hospital for overhead, facility fees, and technical services.
15 (Declaration of Scott Evans in Support of Defendant's Motion ¶¶ 6-
16 7, Ex. E.) Plaintiff was charged additional fees of about \$95.63
17 for follow-up "office visits," "clinic," and "clinic services".
18 (SAC ¶¶ 15, 20.) The Hospital did not bill for every office visit,
19 however. (SAC ¶ 18.)

20 Zeman alleges that these billings were improper because
21 Medicare regulations prohibit charges for follow-up care within
22 ninety days of a major surgery. (SAC ¶¶ 13-14.) On July 13, 2011,
23 Zeman filed a qui tam complaint against the Hospital for violations
24 of the False Claims Act, 31 U.S.C. §§ 3729-3733. The complaint

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26 ¹ Though the SAC alleges that the Hospital owned and operated
27 the ASC at all relevant times, the SAC also alleges that Defendant
28 purchased the ASC in April 2009, between Plaintiff's second and
third surgeries. (SAC ¶¶ 3, 16.)

1 alleged that the Hospital knowingly presented false or fraudulent
2 claims to Medicare and used false records to get the fraudulent
3 claims approved. The government did not intervene.² This court
4 dismissed Plaintiff's original complaint and First Amended
5 Complaint, with leave to amend. Plaintiff then filed the SAC,
6 which the Hospital also moved to dismiss.

7 This court denied Defendant's Motion to Dismiss the SAC.
8 (Dkt. 44.) The court explained, however, that "facility fee"
9 charges did not fall within the ambit of Medicare regulations
10 prohibiting charges for follow-up surgical services within ninety
11 days of a covered procedure. Nevertheless, the court denied
12 Defendant's Motion because Plaintiff's SAC alleged that Plaintiff
13 was charged not for "facility fees," but rather for services
14 labeled "clinic," "clinic services," or "office visit." (SAC ¶
15 20.) Thus, Plaintiff alleged, "Defendant . . . was simply trying
16 to use overhead recovery as a guise to improperly collect for
17 professional services rendered by its physicians." (SAC ¶ 18.)
18 The court therefore allowed Plaintiff's claim that the Hospital
19 intentionally mislabeled its bills to proceed.

20 The parties each now move for summary judgment.

21 **II. Legal Standard**

22 Summary judgment is appropriate where the pleadings,
23 depositions, answers to interrogatories, and admissions on file,
24 together with the affidavits, if any, show "that there is no

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26 ² Under the False Claims Act, 31 U.S.C. §§ 3729-3733, a
27 private party may bring suit, under seal, on behalf of the
28 government as a qui tam relator. If the government elects not to
intervene, the case proceeds as a normal civil action. See
Aflatooni ex rel United States v. Kitsap Physicians Serv., 314 F.
3d 955, 998 n.2 (9th Cir. 2002).

1 genuine dispute as to any material fact and the movant is entitled
2 to judgment as a matter of law." Fed. R. Civ. P. 56(a). A party
3 seeking summary judgment bears the initial burden of informing the
4 court of the basis for its motion and of identifying those portions
5 of the pleadings and discovery responses that demonstrate the
6 absence of a genuine issue of material fact. See Celotex Corp. v.
7 Catrett, 477 U.S. 317, 323 (1986). All reasonable inferences from
8 the evidence must be drawn in favor of the nonmoving party. See
9 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986).

10 If the moving party does not bear the burden of proof at trial, it
11 is entitled to summary judgment if it can demonstrate that "there
12 is an absence of evidence to support the nonmoving party's case."
13 Celotex, 477 U.S. at 323.

14 Once the moving party meets its burden, the burden shifts to
15 the nonmoving party opposing the motion, who must "set forth
16 specific facts showing that there is a genuine issue for trial."
17 Anderson, 477 U.S. at 256. Summary judgment is warranted if a
18 party "fails to make a showing sufficient to establish the
19 existence of an element essential to that party's case, and on
20 which that party will bear the burden of proof at trial." Celotex,
21 477 U.S. at 322. A genuine issue exists if "the evidence is such
22 that a reasonable jury could return a verdict for the nonmoving
23 party," and material facts are those "that might affect the outcome
24 of the suit under the governing law." Anderson, 477 U.S. at 248.
25 There is no genuine issue of fact "[w]here the record taken as a
26 whole could not lead a rational trier of fact to find for the non-
27 moving party." Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
28 475 U.S. 574, 587 (1986).

1 It is not the court's task "to scour the record in search of a
2 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275,
3 1278 (9th Cir. 1996). Counsel has an obligation to lay out their
4 support clearly. Carmen v. San Francisco Sch. Dist., 237 F.3d
5 1026, 1031 (9th Cir. 2001). The court "need not examine the entire
6 file for evidence establishing a genuine issue of fact, where the
7 evidence is not set forth in the opposition papers with adequate
8 references so that it could conveniently be found." Id.

9 **III. Discussion**

10 **A. Absence of a Genuine Dispute**

11 Defendant argues, with references to Plaintiff's bills, that
12 it did not bill for anything other than legitimate facility fees.
13 (Defendant's Motion at 16-20.) Plaintiff's motion, and opposition
14 to Defendant's motion, is premised not on the characterization of
15 the various bills, but rather on the newly-raised argument that the
16 facilities fees Defendant billed were duplicative and violative of
17 42 C.F.R. § 413.65. (Plaintiffs Mot. at 1; Plaintiff's Opp. at 1.)
18 Section 413.65 sets forth requirements facilities must meet to
19 obtain "provider-based" status. The crux of Plaintiff's position
20 appears to be that Defendant's outpatient facility fails to meet
21 the requirements of 42 C.F.R. § 413.65(d)(g), not qualify as
22 "provider based," and therefore cannot fall under an exception to
23 the 90-day global surgery rule. (Plaintiff's Mot. at 1.)

24 Critically, for purposes of these motions, Plaintiff's Second
25 Amended Complaint makes no reference to 42 C.F.R. § 413.65, and
26 makes no allegations regarding the outpatient clinic's "provider-
27 based" status or lack thereof. Plaintiff contends that she did not
28 discover the facts underlying her new position until discovery had

1 commenced in this case, and that she should not be limited to the
2 facts contained in the SAC. (Plaintiff's Opp. At 1.)

3 Plaintiff's argument is untenable. "Simply put, summary
4 judgment is not a procedural second chance to flesh out inadequate
5 pleadings." Wasco Prods., Inc. v. Southwall Techs., Inc., 435,
6 F.3d 989, 992 (9th Cir. 2006). A plaintiff may not proceed at
7 summary judgment on a theory that is not pleaded in the complaint.
8 Ashley v. City and County of San Francisco, No. 12-cv-45-JST, 2014
9 WL 4627736 at *8 (N.D. Cal. Feb. 4, 2014) (citing La Asociacion de
10 Trabajadores de Lake Forest v. City of Lake Forest, 624 F.3d 1083,
11 1089 (9th Cir. 2010); See also Coleman v. Quaker Oats Co., 232 F.3d
12 1271, 1292-94 (9th Cir. 2000).

13 Federal Rule of Procedure Rule 8 is no salve to the
14 deficiencies of Plaintiff's position. Plaintiff correctly states
15 that Rule 8 requires only a "short and plain statement of the claim
16 showing that the pleader is entitled to relief." Fed. R. Civ. P.
17 8(a)(2). Liberal though this standard may be, a complaint must
18 provide a "defendant with fair notice of what the claim is and the
19 grounds upon which it rests." Oliver v. Ralphs Grocery Co., 654
20 F.3d 903, 908 (9th Cir. 2011) (quotation marks and alterations
21 omitted). Here, Plaintiff's Second Amended Complaint alleges only
22 misclassified facility fees, and provides no indication of any
23 claim premised upon a facility's lack of "provider based" status.

24 B. Leave to Amend

25 Plaintiff requests leave to file a Third Amended Complaint.
26 Defendant, however, would clearly be prejudiced by Plaintiff's
27 proposed amendment. Discovery in this case has closed. "A
28 complaint guides the parties' discovery, putting the defendant on

1 notice of the evidence it needs to adduce in order to defend
2 against the plaintiff's allegations." Coleman, 232 F.3d at 1292.
3 At this stage, Defendant's ability to defend itself against
4 Plaintiff's new allegations would be severely compromised. See
5 Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 608-09 (9th
6 Cir. 1992).

7 **IV. Conclusion**

8 For the reasons stated above, Plaintiff's Motion for Summary
9 Judgment is DENIED. Defendant's Motion for Summary Judgment is
10 GRANTED. Plaintiff's request for leave to amend is DENIED.

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12 IT IS SO ORDERED.
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15 Dated: November 12, 2014


16 DEAN D. PREGERSON
17 United States District Judge
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