

N.Y.S.D. Case #
12-cv-4788(NSR)

14-1759-cv
Roe v. Empire Blue Cross Blue Shield

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court’s Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation “summary order”). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of December, two thousand fourteen.

PRESENT: JOSÉ A. CABRANES,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

**USDC SDNY
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DATE FILED: January 13, 2015**

JANE ROE, individually and on the behalf of all others similarly situated, JANE DOE, individually and on the behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

No. 14-1759-cv

EMPIRE BLUE CROSS BLUE SHIELD,
ST. JOSEPH’S MEDICAL CENTER,

Defendants-Appellees.

FOR PLAINTIFFS-APPELLANTS:

JEFFREY M. NORTON (Randolph M. McLaughlin, *on the brief*), Newman Ferrara LLP, New York, NY.

FOR EMPIRE BLUE CROSS BLUE SHIELD:

ROBERT A. SCHER (Douglas Heffer, Michael J. Tuteur, *on the brief*), Foley & Lardner LLP, New York, NY.

MANDATE ISSUED ON 01/13/2015

FOR ST. JOSEPH'S MEDICAL CENTER: ARTHUR J. ROBB, Clifton Budd & DeMaria, LLP, New York, NY.

Appeal from a May 2, 2014 judgment of the United States District Court for the Southern District of New York (Nelson S. Román, *Judge*).

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED**.

Plaintiffs Jane Roe and Jane Doe appeal from the District Court's May 2, 2014 judgment dismissing their claims for discrimination and breach of fiduciary duty pursuant to Sections 510 and 404, respectively, of the Employment Retirement Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1140, 1104, and denying plaintiffs' motion for a preliminary injunction. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

Upon *de novo* review of the record and relevant law, we conclude that the District Court properly dismissed plaintiffs' Section 510 claim. Plaintiffs have failed to adequately allege any right to which they are entitled or may become entitled under the plan at issue with respect to which defendants discriminated against them or with which defendants otherwise interfered. *See* 29 U.S.C. § 1140.

We also conclude that the District Court properly dismissed plaintiffs' Section 404 claim. Plaintiffs have not adequately alleged that defendants were acting in a fiduciary capacity or that they breached any fiduciary duty under ERISA. *See* 29 U.S.C. § 1002(21)(A). Accordingly, the District Court also properly denied plaintiffs' motion for a preliminary injunction.

As the District Court held, this decision does not address whether the plan exclusion is constitutional or otherwise lawful under any other federal or state laws.

CONCLUSION

We have considered all of the arguments raised by plaintiffs on appeal and find them to be without merit. For the reasons stated above, the District Court's May 2, 2014 judgment is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

 

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

 