

*193 Fed. Appx. 70, *; 2006 U.S. App. LEXIS 21192, **;
38 Employee Benefits Cas. (BNA) 2447*

ERIC RUBIN-SCHNEIDERMAN, Plaintiff-Appellant, - v - MERIT BEHAVIORAL CARE CORPORATION, SATI AHLUWALIA, EMPIRE BLUE CROSS and BLUE SHIELD, Defendants-Appellees.

No. 05-5851

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

193 Fed. Appx. 70; 2006 U.S. App. LEXIS 21192; 38 Employee Benefits Cas. (BNA) 2447

August 14, 2006, Decided

NOTICE: [1]** RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: US Supreme Court certiorari denied by Rubin-Schneiderman v. Merit Behavioral Care, 166 L. Ed. 2d 708, 2007 U.S. LEXIS 91 (U.S., Jan. 8, 2007)

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of New York (Alvin K. Hellerstein, Judge). Rubin-Schneiderman v. Merit Behavioral Care Corp., 2005 U.S. Dist. LEXIS 20156 (S.D.N.Y., Sept. 14, 2005)

COUNSEL: For Appellant: WHITNEY NORTH SEYMOUR, JR., New York, NY.

For Appellees Merit Behavioral Care Corporation and Sati Ahluwalia: JONATHAN K. COOPERMAN, Kelley, Drye & Warren (Jennifer A. Huber, of counsel), New York, NY.

For Appellee Empire Blue Cross and Blue Shield: DALY D.E. TEMCHINE, Epstein Becker & Greene, P.C., New York, NY.

JUDGES: PRESENT: HON. ROBERT D. SACK, HON. ROBERT A. KATZMANN, Circuit Judges, HON. J. GARVAN MURTHA, * District Judge.

* Of the United States District Court for the District of Vermont, sitting by designation.

OPINION

[*71] SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment be, and it hereby is, AFFIRMED.

The plaintiff, Eric Rubin-Schneiderman, brought suit against the defendants -- Empire Blue Cross and Blue Shield ("Empire"), his health insurance company; Merit Behavioral Care Corporation ("Merit"), the company **[**2]** that performs utilization review of mental health services for Empire; and Sati Ahluwalia, an employee of Merit -- under section 502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(a)(3). He alleged that the defendants negligently failed to authorize his hospitalization in a psychiatric facility and that, as a result of this negligence, he suffered permanent injury from a failed suicide attempt. The district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) on the ground that, under recent Supreme Court precedents beginning with *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), the monetary damages Rubin-Schneiderman sought were unavailable under ERISA § 502(a)(3). **[SPA 3-6]**

Rubin-Schneiderman's primary argument on appeal is that *Mertens* was wrongly decided and we should not follow it. But "[w]e cannot overrule the Supreme Court." *Bach v. Pataki*, 408 F.3d 75, 86 (2d Cir. 2005); see also *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989); **[**3]** *Cicio v. Does*, 321 F.3d 83, 106-07 (2d Cir. 2003) (Calabresi, J., dissenting in part), *vacated and remanded*, 542 U.S. 933, 124 S. Ct. 2902, 159 L. Ed. 2d 808 (2004). *Mertens* and its progeny are binding on us and we are obliged to follow those decisions. See, e.g., *Coan v. Kaufman*, 457 F.3d 250, 2006 WL 2075129, at *10 (2d Cir. July 21, 2006).

Rubin-Schneiderman also urges us to adopt Justice Ginsburg's suggestion in *Aetna Health Inc. v. Davila*, 542 U.S. 200, 124 S. Ct. 2488, 159 L. Ed. 2d 312 (2004), that monetary relief under section 502(a)(3) may be more widely available in suits against ERISA fiduciaries than against non-fiduciaries. See *id.* at 223-24 (Ginsburg, J., concurring). As we recently concluded, however, the fact that a defendant is a fiduciary does not change the requirement of section 502(a)(3) that the relief sought be "equitable." See *Coan*, 457 F.3d 250, 2006 WL 2075129, at *11; *Sereboff v. Mid Atlantic Med. Servs., Inc.*, U.S. , 126 S. Ct. 1869, 1874, 164 L. Ed. 2d 612 (2006). **[**4]** Because Rubin-Schneiderman is seeking compensatory monetary damages, a legal remedy, he cannot proceed under ERISA § 502(a)(3).

For the foregoing reasons, the judgment of the District Court is hereby AFFIRMED.