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STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

INTEGRITY HOME HEALTH CARE, INC.

Plaintiff,

vs.

Case No. 2016-905-CB

ASSOCIATES PHYSICAL THERAPY, P.C.,

Defendant.

OPINION AND ORDER

Defendant/Counter-Plaintiff Associates Physical Therapy, P.C. ("Defendant") has filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff/Counter-Defendant Integrity Home Health Care, Inc. ("Plaintiff") has filed a response and requests that the motion be denied.

Factual and Procedural History

Plaintiff is engaged in the business of providing in-home therapy services. Plaintiff is compensated from Medicare or the patient's insurance carrier. Defendant provides in-home physical therapy services. In 2006, the parties negotiated a contract pursuant to which Defendant would provide physical therapy services on Plaintiff's behalf to patients Plaintiff referred to them. The negotiations ultimately culminated in the parties executing a contract with an effective date of February 1, 2007 ("2007 Contract").

In 2012, Plaintiff drafted an amended contract and presented Defendant that amended contract as a replacement for the 2007 Contract ("2012 Contract"). The parties agreed to, and executed, the 2012 Agreement, which has an effective date of October 1, 2012. The 2012 Contract had a term of one year from the effective date, with an automatic renewal of one-year at

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each anniversary of the effective date. The 2012 Contract could be terminated by either party, with or without cause, upon one year's written notice.

On August 20, 2015, Defendant terminated the 2012 Contract, thereby ending the parties' relationship effective August 20, 2016. In December 2015 or January 2016, Plaintiff stopped referring patients to Defendant.

During the parties' relationship, Plaintiff referred patients to Defendant from various clients. One such client was Dearborn Orthopedic. In September 2015, Defendant entered into a contract with Harbor Health Services, Inc. ("Harbor") pursuant to which Defendant agreed to provide physical therapy on Harbor's behalf on a non-exclusive basis ("Harbor Contract"). Defendant has provided services to patients referred to Harbor from Dearborn Orthopedic. Plaintiff has since stopped receiving patients from Dearborn Orthopedic.

On March 18, 2016, Plaintiff filed its complaint in this matter ("Complaint"). The Complaint contains claims for: Count I- Breach of Contract, Count II- Unjust Enrichment, and Count III- Tortious Interference with a Contract or Advantageous Business Relationship or Expectancy. Count I is based on the allegations that Defendant failed to provide services as required until the effective termination date, and provided services to Dearborn Orthopedic patients that were referred by Harbor in violation of an exclusivity provision. Counts II and III are also based on Plaintiff's provision of services to Dearborn Orthopedic patients referred by Harbor.

On April 20, 2016, Defendant filed its answer, affirmative defenses, and counterclaim. Its counterclaim ("Counterclaim") includes claims for: Count I- Breach of Contract and Count II- Unjust Enrichment. Defendant's claims are based on the allegation that Plaintiff has failed to pay the amounts owed under the parties' contracts.

On October 12, 2016, Defendant filed its instant motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Defendant's motion seeks summary disposition of both Plaintiff's claims and its own counterclaims. Plaintiff has since filed a response and requests that the motion be denied. On October 31, 2016, the Court held a hearing in connection with the motion and took the matter under advisement.

Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C) (10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

(1) Summary Disposition of Plaintiff's Claims

a. Count I- Breach of Contract.

Plaintiff's breach of contract claim is based on two allegations: (1) That Defendant breached the 2012 Contract by providing services to Dearborn Orthopedic's patients that were

referred to it from other entities, and (2) That Defendant failed to provide the required services up until the effective termination date.

With respect to Plaintiff's allegations that Defendant breached the 2012 Agreement by providing services to patients of Dearborn Orthopedic that Harbor referred to it, Plaintiff avers that the exclusivity provision set forth in Attachment A to the 2007 Contract was intended to be incorporated into the 2012 Contract. Attachment A to the 2007 Contract provides, in pertinent part:

7. All [Dearborn Orthopedic] patients referred to [Plaintiff] will be seen exclusively by [Defendant] for their physical therapy needs. [Defendant] will only see patients of [Dearborn Orthopedic] referred to from [Plaintiff].

(See Plaintiff's Exhibit C.)

While it is undisputed that Defendant did not begin to provide services to Dearborn Orthopedic patients through the Harbor Contract until the 2012 Contract was the governing document between Plaintiff and Defendant, and while the above-referenced provision is not contained within the 2012 Contract, Plaintiff avers that the above-referenced provision was intended by the parties to apply to the 2012 Contract.

"In ascertaining the meaning of a contract, [courts] give the words used in the contract their plain and ordinary meaning that would be apparent to a reader of the instrument." *Rory v Continental Ins. Co.*, 473 Mich 457, 464; 703 NW2d 23 (2005). "If the language of [a] contract is unambiguous, [courts] construe and enforce the contract as written." *Quality Prod. & Concepts Co. v. Nagel Precision, Inc.*, 469 Mich. 362, 375; 666 NW2d 251 (2003). Where the language of a contract is unambiguous, a court may not consider extrinsic evidence as to the intent of the parties. *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich 459, 467; 663 NW2d 447 (2003). If the contract language is ambiguous, "the ambiguous language presents a question

of fact to be decided by a jury.” *Cole v. Auto-Owners Ins. Co.*, 272 Mich App 50, 53; 723 NW2d 922 (2006).

In this case, the 2012 Contract does not contain the above-referenced exclusivity provision and does not contain any language incorporating that provision. While Plaintiff relies on testimony in support of its position that the parties intended to incorporate the exclusivity provision into the 2012 Contract, the unambiguous terms of the 2012 Contract contain no such provision. As a result, the Court may not consider Plaintiff’s extrinsic evidence; rather, the Court must limit itself to the unambiguous language of the 2012 Contract that contains no restriction on Defendant’s ability to provide services to Dearborn Orthopedic patients referred by third parties. Accordingly, the Court is satisfied that Defendant did not breach the 2012 Contract by providing services to Dearborn Orthopedic patients under the Harbor Contract.

The remainder of Plaintiff’s breach of contract claim is based on its position that Defendant failed to provide the services required under the 2012 Contract until the effective date of its termination, which was August 20, 2016. In its motion, Defendant asserts that Plaintiff has conceded that no patients were rejected by Defendant. In support of its position, Defendant relies on Plaintiff’s discovery response in which it was unable to identify any services that it requested Defendant to perform that Defendant refused. (*See* Defendant’s Exhibit C.) In its response, Plaintiff does not address this portion of its breach of contract claim. As a result, the Court is convinced that Plaintiff has failed to create a genuine issue of material fact that Defendant did not breach the 2012 Contract by failing to perform services requested.

For the reasons discussed above, the Court is persuaded that Defendant’s motion for summary disposition of Count I- Breach of Contract must be granted.

b. Count II- Unjust Enrichment

Count II is based on Plaintiff's allegation that Defendant was unjustly enriched by performing services for Dearborn Orthopedic patients that were not referred to it by Plaintiff. "[U]njust enrichment is (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant." *Keywell & Rosenfeld v. Bithell*, 254 Mich App 300, 327, 657 NW2d 759 (2002). In this case, the benefit at issue, i.e. the compensation that Defendant received from Harbor, was not obtained from Plaintiff. Consequently, Plaintiff's allegations do not support a claim for unjust enrichment. As a result, Defendant's motion for summary disposition of Count II must be granted.

c. Count III- Tortious Interference

As a preliminary matter, while Count III is entitled tortious interference with a contract or advantageous business relationship or expectancy, Plaintiff has conceded that it did not have a contract with Dearborn Orthopedic and has not identified any other contract with which Defendant interfered. As a result, Plaintiff's tortious interference claim must be dismissed to the extent it is brought as a claim for tortious interference with a contract.

The remainder of Count III alleges that Defendant tortiously interfered with its relationship with Dearborn Orthopedic and its expectancy that it would continue to get patient referrals from Dearborn Orthopedic. In order to sustain a claim for tortious interference with a business expectancy or relationship, the plaintiff must prove, *inter alia*, that the interference was intentional and improper. *Weitting v McFeeters*, 104 Mich App 188, 197; 304 NW2d 525 (1981). In this case, Plaintiff argues that Defendant's interference was improper because of the alleged exclusivity provision in the 2012 Contract. However, for the reasons discussed above,

no such provision exists in the 2012 Contract. As a result, Plaintiff has failed to demonstrate that any interference on Defendant's part was improper. Consequently, the Court is convinced that Defendant's motion for summary disposition of Count III must be granted.

(2) Summary Disposition of Defendant's Counter-Claims.

a. Count I- Breach of Contract (Count I)

Count I is based on Defendant's position that Plaintiff has failed to compensate it for services it provided under the 2012 Contract. In support of its position, Defendant relies on the testimony of John Byrne, one of Plaintiff's co-owners. Specifically, Defendant relies on Mr. Byrne's testimony that Plaintiff has not paid Defendant \$31,000.00 that is owed under the 2012 Contract. (*See* Defendant's Exhibit B, at 71.) In response, Plaintiff does not challenge that it did not pay the amounts due to Defendant under the 2012 Contract. Rather, Plaintiff argues that it is not required to pay Defendant for those services because Defendant anticipatorily breached the 2012 Contract by causing Dearborn Orthopedic to no longer refer patients to Plaintiff.

Under the doctrine of repudiation or anticipatory breach, if, before the time of performance, a party to a contract unequivocally declares the intent not to perform, the innocent party has the option to either sue immediately for the breach of contract or wait until the time of performance. *Paul v. Bogle*, 193 Mich App 479, 493-494, 484 NW2d 728 (1992). In this case, Plaintiff has not identified any act or communication through which Defendant declared an intent not to perform its obligations under the 2012 Contract until the effective termination date. Further, Plaintiff has not identified any referral to Defendant that Defendant rejected/refused. Rather, Plaintiff's argument is that Defendant's actions caused Plaintiff not to receive any patients from Dearborn Orthopedic. However, Plaintiff has not cited to any authority supporting their position that such actions constitute an anticipatory repudiation. Moreover, for the reasons

discussed above, Plaintiff has failed to establish that entering into the Harbor Contract and/or accepting referrals from Harbor of Dearborn Orthopedic patients was improper in any way. Consequently, the Court is convinced that (1) Plaintiff has failed to establish that a genuine issue of material fact exists with regards to whether Defendant anticipatorily repudiated the 2012 Contract, (2) there is no genuine issue of material fact that Plaintiff failed to make a portion of the payments required under the 2012 Contract to Defendant, and (3) as a result, Defendant is entitled to summary disposition of Count I of its counter-complaint as to liability.

b.) Count II- Unjust Enrichment

Count II seeks the same damages and is based on the same activities as Count I. As a result, the Court need not independently address Count II. Moreover, as an express contract governing the same subject matter exists, Defendant's claim for unjust enrichment fails as a matter of law. *Keywell & Rosenfield v Bithell*, 254 Mich App 300, 327; 657 NW2d 759 (2002).

Conclusion

For the reasons discussed above, Defendant's motion for summary disposition is GRANTED. Plaintiff's claims are hereby dismissed and summary disposition is entered in favor of Defendant as to liability with respect to Count I of the counter-complaint. The issue of damages as to Count I of the counter-complaint remains OPEN. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last claim nor closes the case.

IT IS SO ORDERED.



RICHARD L. CARETTI
Circuit Court Judge

Dated: December 1, 2016

cc: Shawn R. Cioffi, Attorney for Plaintiff
Michael R. Wolin, Attorney for Defendant