[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 53

Index Number : 602427/2006

BETH ISRAEL MEDICAL CENTER

VS.

ALLIED WELFARE FUND

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to ____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 14 2010
COUNTY CLERK'S OFFICE

NYS SUPREME COURT
RECEIVED
SEP 14 2010
MOTION SUPPORT OFFICE

is decided in accordance with
accompanying memorandum decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/9/2010

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION
----------X
BETH ISRAEL MEDICAL CENTER,

Plaintiff,

-against-

Index No.
602427/2006

ALLIED WELFARE FUND and CROSSROADS HEALTHCARE MANAGEMENT, INC.,

Defendants.
----------X
TEAMSTERS LOCAL 210 AFFILIATED HEALTH AND INSURANCE FUND, by and through its TRUSTEES,

Plaintiff,

-against-

BETH ISRAEL MEDICAL CENTER and RUTH LEVIN,

Defendants.
----------X

Charles Edward Ramos, J.S.C.:

This action arises out of a dispute over the payment of fees for health care services that plaintiff Beth Israel Medical Center (Beth Israel) had contracted to provide to members of defendant Allied Welfare Fund (Allied), and its successor-in-interest, plaintiff Teamsters Local 210 Affiliated Health and Insurance Fund (Local 210).[1]

Allied and Local 210 (together, Allied or the Allied Fund)

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[1] Allied is a welfare fund that provided certain health and medical benefits to union members belonging to the International Brotherhood of Teamsters' Local Union 210 and their dependents, pursuant to collective bargaining agreements entered into between the union and employers in New York and New Jersey. In 2006, Local 210 was created as a spin-off of Allied, and now provides the health care benefits that formerly were provided through Allied.

and defendant Crossroads Healthcare Management, LLC (Crossroads), the Allied Fund's current third-party administrator, move for summary judgment on their counterclaims/claims against Beth Israel, in which they seek adjustment of the fees that they paid to Beth Israel between January 1, 2005 and December 31, 2005, and between January 1, 2002 and December 31, 2004. Additionally, Allied seeks summary judgment on Beth Israel's second cause of action for quantum meruit. Crossroads seeks summary judgment on Beth Israel's third cause of action for tortious interference with contract.

BACKGROUND

The following facts are not in dispute. Effective June 1, 1997, Allied entered into an agreement with D.O.C.S./ Physicians Affiliated with Beth Israel (DOCS/Beth Israel), a multi-specialty medical practice group, for the provision of certain health care services to eligible fund members and their dependents (the Agreement). Under the terms of the Agreement, DOCS/Beth Israel was to provide primary care, clinical laboratory, and radiology services to eligible fund members and their dependents in return for a total monthly flat rate of $11.00 per covered life (the Capitation Fee) (*see* DeBartolome.Aff., Exh. 3). The Agreement provided:

> [t]his Agreement shall be in effect for an initial two-year term commencing on June 1, 1997.
>
> It is understood that this Agreement will be reviewed every six months over the next two years and a retro-rate adjustment will be made based upon actual experience calculated at contractual or medicare rates, subject to minimal fixed overhead costs.

> This Agreement may be terminated by either party upon 30-day written notice. If terminated it is understood that a retro-rate adjustment will be made and paid, if necessary based on activity up to point of termination (*id.* at 6).

In a written agreement dated August 31, 2000, the parties amended and extended the Agreement, increasing the Capitation Fee to $12.00 a month per covered life, retroactive to January 1, 2000. The amended agreement additionally provided:

> 2. This Agreement shall be subject to review and adjustment as of the 1st of every year based upon utilization of the eligible participants covered by ALLIED. D.O.C.S. agrees to supplied ALLIED with monthly utilization statistics in such format as may be reasonably requested by ALLIED.
>
> 3. In all other respects, the Agreement between the parties shall remain the same (*id.*, Exh. 4).

In 2002, Beth Israel requested an additional adjustment of the Capitation Fee. By letter dated October 31, 2002, Beth Israel proposed that the Capitation Fee for 2002 be increased, effective as of January 1, 2002, by adding separate capitation rates for laboratory and radiology services (*see id.*, Exh. 5).

Specifically, Beth Israel proposed that the Capitation Fee remain at $12.00 per month per member for primary care services, but that Allied pay additional capitation fees of $1.24 per month per member for radiology services, and $1.31 per month per member rate for laboratory services, representing a total fee increase of approximately 20% over the then-current Capitation Fee (*id.*). Beth Israel supported its proposed adjustment with utilization data from 2001, the last full year for which utilization data was available.

By letter agreement dated November 11, 2002, the trustees of the Allied Fund approved Beth Israel's request retroactive to January 1, 2002 (*id.*, Exh. 6). The letter agreement stated:

> [t]he increase shall be effective until December 31, 2004, at which time it shall be subject to adjustment based upon actual experience and statistical support. All other provisions of the Agreement between [Allied] and [DOCS/Beth Israel], dated June 1, 1997, shall remain in full force and effect.
>
> If the foregoing meets with your approval, please sign and return the enclosed copy of this letter agreement. Upon receipt of your signed Agreement, we will make a retroactive adjustment in your per capita fee (*id.*).

Prior to 1997, and until December 31, 2004, non-party Churchill Benefit Services, Inc. (Churchill), owned and operated by Stephen Barasch, acted as the Allied Fund's third-party administrator. On October 21, 2004, Crossroads purchased Churchill's business. As part of this transaction, Crossroads took assignment of the Administrative Services Agreement between Churchill and the Allied Fund, becoming the Fund's new third-party administrator effective as of January 1, 2005.

On November 16, 2004, in anticipation of assuming the Fund's administrative duties, Michael DeBartolome, Crossroads' president and managing member, accompanied by Barasch, met with Dr. Morton Davidson, a physician and representative of DOCS/Beth Israel, to discuss various matters regarding Beth Israel's services to Allied members. During the meeting, Crossroads requested copies of utilization reports that Beth Israel was required to provide under the terms of the Agreement. By fax dated December 6, 2004, Davidson sent Barasch a summary procedure analysis listing

charges incurred by Allied members between January 1, 2004 and November 30, 2004 (*see* Thompson Aff., Exh. 4).

Upon assuming administration of the Allied Fund on January 1, 2005, Crossroads began a review of the Fund's utilization of services at Beth Israel during 2004. On April 13, 2005, upon completion of this review, Crossroads sent a letter to Davidson containing a summary of its findings that the Allied Fund was paying considerably more for services than it was receiving; that Beth Israel's services were being underutilized; and, that the volume of laboratory tests seemed disproportionately high given the low rate of utilization (DeBartolome Aff., Exh. 7). The letter concluded that "[i]t may be a good time to meet and assess the programs" (*id.*).

In the following months, Crossroads received additional information from Beth Israel with respect to the Fund's utilization of services in 2004 and 2005. Crossroads apparently viewed this information as inadequate and/or inaccurate. In August 2005, without notice, Crossroads ceased payment of the monthly Capitation Fee to Beth Israel.

On September 21, 2005, DeBartolome met with Ruth Levin, a vice-president of managed care at Beth Israel, to discuss the status of the Agreement and certain findings contained in various reports regarding the utilization of services. The participants also discussed whether to change the Agreement's reimbursement structure from a capitation to a fee-for-service arrangement based upon a multi-plan fee schedule.

Following this meeting, by letter dated September 23, 2005, Ellen Nolan, Director of Billing and Collections for Beth Israel, sent Crossroads some additional reports regarding charges incurred by Allied Fund members in 2005 (*id.*, Exh. 10). In a signed addendum to this letter, which she inserted on September 28, 2005, Nolan wrote, "[a]fter reviewing the enclosed reports, with the volume lower than anticipated, perhaps converting to a fee-for-service agreement would be appropriate. Please contact Ruth Levin to discuss a change from capitation to a fee for service arrangement" (*id.*).

On October 27, 2005, DeBartolome sent a letter to the Allied Fund trustees, in which he recapped Crossroads' findings regarding Allied's utilization of Beth Israel's services for the first eight months of 2005 (*id.*, Exh. 11). Crossroads reported that the Allied Fund had grossly overpaid for the little services that its members had received; that Crossroads would not make any other payments to Beth Israel unless authorized by the trustees to do so; that Crossroads would seek to renegotiate an all-encompassing fee-for-service arrangement with Beth Israel; and, that Crossroads would immediately provide notice to Beth Israel that it was invoking the 30-day termination clause contained in the 1997 Agreement and demanding the retro-rate adjustment provided therein (*id.*).

In a letter addressed to Ruth Levin on November 1, 2005, DeBartolome summarized Crossroads' findings regarding the Fund's 2005 utilization, and advised Beth Israel that Allied was

invoking the 30-day notice of termination and the retro-rate adjustment provision under the Agreement (*id.*, Exh. 12). DeBartolome further stated that, despite various discrepancies that were identified in his letter, Allied still wished to continue with a discounted fee-for-service arrangement for the small number of members who still sought services through DOCS/Beth Israel (*id.*).

By letter dated November 15, 2005, Levin responded to Crossroads' letter, expressing Beth Israel's disagreement with a number of Crossroads' conclusions (Levin Aff., Exh. H). Levin noted that there had been no discussion about a retro-rate adjustment, and claimed that Allied was not entitled to one under the current agreement. Levin further stated that Allied had violated the terms of the Agreement by not paying the stipulated Capitation Fee during the past year, and that, while DOCS/Beth Israel would consider changing the reimbursement structure to a fee-for-service arrangement, Allied still would need to pay the monies owed under the Agreement.

The Agreement was terminated as of November 30, 2005. Since December 2005, Beth Israel has continued to provide certain health care services to Allied members on a fee-for-service basis. However, Allied has not paid the monthly Capitation Fee for those services rendered under the Agreement between August 1, 2005 and November 30, 2005.

Beth Israel commenced this action on July 10, 2006, asserting three causes of action against Allied for breach of

contract and quantum meruit, based upon (1) Allied's failure to pay the Capitation Fee for August through November 2005, (2) Allied's failure to reimburse Beth Israel for the services it has received on a fee-for-service basis, and (3) tortious interference with contract, based upon Crossroads' unilateral refusal to pay the monthly Capitation Fee and for terminating the Agreement.

Allied asserts a counterclaim against Beth Israel for breach of contract, based upon allegations that Beth Israel failed to provide Allied with monthly utilization reports and failed to adjust the Capitation Fee as of December 31, 2004. Allied seeks, inter alia, adjustment of the 2005 Capitation Fee as of January 1, 2005. Allied also seeks specific performance of these same obligations.

In a second action,[2] commenced by Local 210 on October 30, 2008, Allied asserts three causes of action for fraud against Beth Israel and Ruth Levin. The complaint alleges that Beth Israel, through Ruth Levin, concealed and/or failed to disclose material information regarding a substantial reduction in Allied's utilization of services in 2002, at the very time that Beth Israel was proposing its 2002 rate increase. Allied seeks a retroactive adjustment of the Capitation Fee paid to Beth Israel between January 1, 2002 and December 31, 2004.

Allied and Crossroads now move for summary judgment on their

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[2] By order of this court dated December 16, 2008, these two actions have since been consolidated under Index No. 602427/2006 (*see* Chronakis Affirm., Exh. G).

counterclaims/claims, and adjustment of all Capitation Fees paid to Beth Israel between January 1, 2002 and December 31, 2005. Allied and Crossroads additionally seek summary judgment on, Beth Israel's quantum meruit and tortious interference claims.

DISCUSSION

Allied's motion for summary judgment on its first counterclaim for breach of contract, which seeks adjustment of the 2005 Capitation Fee, must be denied. Allied has failed to tender evidence sufficient to establish, as a matter of law, that the 2005 capitation rate should have been other than as billed.[3]

Allied contends that it is entitled to summary judgment on this counterclaim, because the language of the parties 2002 Agreement clearly required that Beth Israel adjust the Capitation Fee, as of December 31, 2004, provided that there was data to support the need for such an adjustment. Allied argues that a fair and reasonable interpretation of the language in that Agreement, which provided that the Capitation Fee "shall be effective until 12/31/2004, at which time it shall be subject to adjustment based on actual experience and statistical support," establishes that the parties intended to make such an adjustment mandatory, not discretionary, and required that the adjustment reflect actual experience based on statistical support.

Allied contends that evidence sufficient to support the need

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[3] A motion for summary judgment will be granted only where the movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

for an adjustment is contained within a procedure analysis that was prepared by DOCS/Beth Israel for the 12-month period ending December 31, 2004 (*see* Thompson Aff., Exh. 5). This procedure analysis includes a list of "charges" for primary care services utilized by Allied members in 2004 (*id.*).

Allied argues that, when the total amount of these listed charges is translated into a monthly capitation rate, it becomes evident that Allied was vastly overpaying for the primary care services that it was utilizing, and thus, Beth Israel was required to adjust the Capitation Fee effective as of January 1, 2005.

While there is no dispute that the language of the 2002 Agreement entitled Allied to seek adjustment of the 2005 Capitation Fee, in order to prevail on its breach of contract claim, Allied also must prove that there was a need for an adjustment. However, Allied has failed to tender evidence sufficient to show that the list of "charges" included in the procedural analysis prepared by DOCS/Beth Israel, upon which Allied has based this request for relief, necessarily included all of the charges for primary care services that Beth Israel had rendered to Allied members throughout the whole of 2004.

Allied also has failed to proffer any evidence to establish that the formula, which it argues should be used to calculate the need for, and rate of, such an adjustment, was one upon which the parties had agreed.

Additionally, Beth Israel notes that in their prior course

of dealing, the parties had, in fact, adjusted the Capitation Fee only twice, in 2000 and 2002, despite the use of similar language in their 1997 and 2000 Agreements. The record further reflects that these prior adjustments became effective only after the execution of a written amendment and/or agreement by each party. Whether, as Beth Israel contends, this prior course of dealing affected the parties' understanding and interpretation of the adjustment provision in the 2002 Agreement presents an issue of fact, which cannot properly be determined on a motion for summary judgment.

Allied's motion for summary judgment on its fraud claims, which seek retroactive adjustment of the Capitation Fee paid between January 1, 2002 and December 31, 2004, is denied. Allied has failed to establish prima facie entitlement to relief on these claims.

Allied argues that it is entitled to summary judgment, because Beth Israel breached its duty to provide the Fund with certain material information regarding a reduction in the Fund's 2002 utilization of services, during the time that it was proposing and negotiating an increase in the 2002 Capitation Fee. Specifically, Allied alleges that Beth Israel, through Ruth Levin, failed to provide Allied with an internally generated report and analysis that showed a substantial decrease in its use of Beth Israel's services in 2002.

Instead, Allied contends that Beth Israel, through Ruth Levin, chose to support its proposed 2002 increase by providing

Allied with information based solely on its 2001 utilization data, although it knew that this information was no longer accurate and did not reflect the value of the primary care services that its members were receiving in 2002.

Allied argues that this material information, which could only have been generated and compiled by Beth Israel, was peculiarly within the knowledge of Beth Israel, and that Allied had no way of obtaining this information through the exercise of ordinary intelligence. Allied alleges that the failure of Beth Israel and/or Ruth Levin to disclose this material information induced Allied to enter into an inherently unfair agreement, and that it would not have agreed to the 2002 rate increase had this internal report and analysis been disclosed.

Although a cause of action for fraud may be predicated on acts of concealment, a claimant first must establish a duty to disclose material information *(Dembeck v 220 Cent. Park S., LLC,* 33 AD3d 491 [1st Dept 2006]) . In the context of an arm's length transaction where no fiduciary relationship exists between the parties, such a duty may arise where one party has special, superior knowledge not readily available to the other and knows that the other is acting on the basis of mistaken belief (*Swersky v Dreyer and Traub,* 219 AD2d 321 [1st Dept 1996]).

However, to invoke the "special facts" doctrine, Allied must establish that the undisclosed material information was peculiarly within the knowledge of Beth Israel and/or Ruth Levin, and that the information was not such that it could have been

discovered by Allied through the exercise of ordinary intelligence (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005]). Generally, a sophisticated party cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that party failed to make use of the means available to know the truth of the representation *(see e.g. Stuart Silver Assocs. v Baco Dev. Corp.*, 245 AD2d 96, 98-99 [1st Dept 1997]; *Abrahami v UPC Constr. Corp.*, 224 AD2d 231, 234 [1st Dept 1996]).

Here, Allied has failed to establish that information revealing a substantial reduction in Allied's utilization of services during 2002 was within the peculiar knowledge of Beth Israel. Even assuming that Beth Israel did not provide Allied with a certain internal report and analysis, it is undisputed that, under the terms of their Agreement, Allied was entitled to receive regular reports from Beth Israel detailing Allied's actual utilization of services during 2002.

Although Allied has produced evidence that no such information has not been found within their files, Beth Israel has produced an affidavit from Dr. Davidson, who avers that he, and others at Beth Israel, sent utilization reports to the Allied Fund on a regular basis between 1997 and 2005 (Davidson Aff., ¶ 5). This affidavit is sufficient to raise a triable issue of fact as to whether the information, revealing the substantial reduction in Allied's utilization of primary care services in 2002, was peculiarly within the knowledge of Beth Israel.

Further, even if Allied were to establish that Beth Israel failed to provide it with the monthly utilization reports to which it contractually was entitled, in the absence of any evidence to show that Allied ever requested and/or was refused such information, Allied has failed to establish that it could not have obtained such information through the exercise of ordinary intelligence.

Moreover, Allied's motion for summary judgment on Beth Israel's quantum meruit claim is denied. The parties have produced conflicting accounts as to whether Allied reimbursed Beth Israel adequately on its fee-for service claims.

Allied contends that it is entitled to summary judgment, because it has produced evidence to show that Crossroads reimbursed Beth Israel in full for all healthcare services provided to its members on a fee-for-service basis since January 1, 2006. Specifically, Allied submits the affidavit of Veronica Ramos, the claims manager for Crossroads. Ramos avers that on January 5, 2010, she conducted a computer inquiry at Crossroads to determine whether Beth Israel had any outstanding claims that had not been paid, and that this inquiry showed no outstanding claims for services older than 30 days.

In opposition, Beth Israel has produced evidence to show that Allied has not reimbursed Beth Israel's fee-for-service claims at the rate upon which the parties had agreed.

Specifically, Beth Israel submits the affidavit of Deborah Hackett, vice president of the parent entity of Beth Israel, who

avers that in April of 2009, and again in April 2010, the Continuum billing office ran a report of fees that were due and outstanding from Allied. According to Hackett, these reports, which she attaches to her affidavit, establish that Allied unilaterally reduced many of Beth Israel's proper charges, and failed to pay the "approved amount" on many claims. The affidavit is sufficient to raise a triable issue of fact whether Crossroads has reimbursed Beth Israel fully on its fee-for-service claims.

Finally, Crossroads' motion for summary judgment on Beth Israel's tortious interference claim also must be denied. Crossroads has failed to establish that it was acting within the scope of its authority when it stopped payment of the Capitation Fee to Beth Israel in August of 2005.

Generally, "an agent cannot be held liable for inducing his or her principal to breach a contract with a third person when that agent is acting on behalf of the principal and within the scope of agent's authority" (*Lutz v Caracappa*, 35 AD3d 673, 674 [2d Dept 2006]).

Here, however, Crossroads did not possess the authority to stop the payment of the monthly Capitation Fee or to terminate the parties' Agreement without the approval of the Allied trustees. Although Crossroads argues that at all times it was acting as Allied's agent and with Allied's approval, it has failed to proffer evidence sufficient to show that the Allied trustees had given their approval before Crossroads ceased

payment of the Capitation Fee in August of 2005.

In contrast, Beth Israel has proffered excerpts from the deposition testimony of DeBartolome, Crossroads' principal, in which he acknowledges that no one on the board of trustees had authorized him to stop making payments in August of 2005, but that he believed that he was entitled to stop the payments under Crossroads' contract with Allied (*see* Chronakis Affirm., Exh. L: DeBartolome Deposition, at 89-91).

Nevertheless, Crossroads argues that, even if it is assumed that Crossroads acted outside the scope of its authority by terminating Beth Israel's Capitation Fee payments without obtaining prior trustee approval, it still is entitled to summary judgment because there is ample evidence to establish that the Allied trustees were aware of, and subsequently did ratify, Crossroads' action.

In support of this contention, Crossroads proffers excerpts from the deposition of George Miranda, a former Allied trustee, who testified that the trustees knew and ultimately did approve of this measure, although Miranda could not recall the specific time frame, or whether the matter had been discussed and/or approved at a trustees meeting or outside (*see* Thompson Aff., Exh. 9: Miranda Deposition, at 78-81).

While a principal can choose to ratify tortious conduct by an agent acting outside the scope of its authority, Crossroads has provided no authority for its contention that a subsequent ratification necessarily voids a tortious interference with

contract cause of action. In any event, as Crossroads has yet to establish when and how the Allied trustees actually undertook to approve and/or ratify its conduct, Crossroads has failed to establish prima facie entitlement to summary judgment on this cause of action as a matter of law.

Accordingly, it is

ORDERED that the motion for summary judgment by defendants Allied Welfare Fund, Crossroads Healthcare Management, LLC, and by plaintiff Teamsters Local 210 Affiliated Health and Insurance Fund Local 210, is denied in its entirety.

The parties are hereby directed to contact the Part Clerk in order to schedule a pre-trial conference.

Dated: September 9, 2010

ENTER:

J.S.C.

CHARLES E. RAMOS