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

PRESENT: HELEN E. FREEDMAN PART 39
Justice

MQ of N.Y., Inc.

Dillon

INDEX NO. 603512/02

MOTION DATE

MOTION CAL. NO.

FILED
MAY 04 2004
COUNTY CLERK'S OFFICE
NEW YORK

were read on this motion to/for

fidavits — Exhibits

PAPERS NUMBERED

Cross-Motion: [ ] Yes [x] No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON

This lawsuit arose from the termination by a reciprocal insurer of its attorney-in-fact, plaintiff MQ of New York, Inc. ("MQ"). In this proceeding and a number of others, MQ claimed that the Board of Governors (the "Board') of Academic Health Professional Insurance Association ("Academic"), a reciprocal insurer organized under article 61 of the N.Y, Insurance Law, failed to terminate MQ in compliance with the procedures set forth in Ins. Law § 6106. In this action, MQ sued Board members, both individually and as officers of Academic to recover damages resulting from their alleged wrongful termination, breach of MQ's management agreement with Academic, and certain tortious conduct.

Most of the claims in this action have already been resolved. In April 2002, the Superintendent of Insurance of the New York State Department of Insurance (the "Superintendent") determined that Academic had properly terminated MQ as of March 30, 2002 and approved MQ's successor as Academic's attorney-in-fact; this Court upheld the Superintendent's determination in MQ's subsequent "Article 78" proceeding. Dec & Order **(Apr. 14,** 2003), *MQ* v. *Serio*, index no. 118399/2002. Thereafter, all of MQ's claims in this lawsuit except its second cause of action for breach of the Management Agreement, were dismissed. Dec. & Ord. (June 30,2003). Defendants now move for summary judgment on MQ's remaining claim and for defendants' counterclaim for a permanent injunction restraining MQ from commencing more lawsuits against Academic and its affiliates. For the reasons set forth below, Academic is granted summary judgment on MQ's claim; MQ is granted summary judgment on the defendants' counterclaim.

Background In relevant part, the complaint alleges the following: Academic is as a reciprocal insurer organized under Ins. Law art. 61, which provides malpractice insurance to its subscriber/owners, who primarily are doctors and dentists on the faculty of the State University of New York. Under the statutory scheme set forth in article 61, a reciprocal insurer must operate

through an attorney-in-fact; accordingly, after Academic was organized in 1989 and had applied to the New York Department of Insurance (the "Insurance Department") for a license to issue policies, it appointed MQ as its attorney-in-fact pursuant to a Management Agreement between the parties effective as of July 1, 1989 (the "Management Agreement"). Under the Management Agreement, MQ was authorized to manage and administer Academic's business affairs: among other things, MQ was responsible for soliciting subscribers, issuing policies, setting rates and underwriting and risk management policies, processing and investigating claims, collecting premiums, obtaining reinsurance, and filing reports as required with the Insurance Department and other authorities. In addition, under the Management Agreement MQ was to prepare Academic's financial records of operations, accounts receivable and payable, inventory, and reserves.

As compensation for its services, MQ received a varying percentage of the subscribers' premiums it collected, ranging from 20% of the premiums paid in respect of the first two years of each subscriber's policy, 17.5% of the third and fourth years' premiums, and 16% of the fifth years' premiums. With some limited exceptions, MQ was responsible for paying the operating expenses of the insurance enterprise, i.e., the expenses MQ incurred in fulfilling its duties under the Management Agreement. In 1994, the parties entered a First Amendment to Management Agreement effective as of July 1, 1994 (the "First Amendment"), which provided that MQ would receive a **fixed** percentages of 17.5% of premiums paid for "policies issued to subscribers on an occurrence type basis", and 15% of premiums paid for "policies issued . . . on an extended coverage or endorsement basis." MQ remained responsible for the enterprise's expenses. Hereafter, the compensation structure set forth in the Management Agreement and First Amendment, under which MQ received a percentage of premiums subscribers paid but paid operating expenses, will be referred to as the "Fees Less Expenses Method."

The parties disagree about whether they amended the Management Agreement a second time. According to defendants, in 1999 Academic and MQ entered into **a** second amendment (the "Purported Amendment") which revamped MQ's compensation: MQ would only receive 3.6% of the premiums for policies written after October 1, 1999, but Academic would start reimbursing MQ for expenses that it incurred for its work for Academic. The defendants refer to the new compensation system as the "Cost Plus Method." Pursuant to the Purported Amendment, the defendants claim, Academic began paying MQ 3.6% of premiums written after September 30, 1999, MQ started billing Academic for its ongoing expenses in October 1999, and Academic started reimbursing MQ for those expenses.

MQ denies that the Purported Amendment took effect and contends that, until MQ was terminated on March 30, 2002, the Fees Less Expenses Method determined MQ's compensation. However, MQ does not deny that, after October 1, 1999, the parties acted as if the Fees **Less** Expenses Method was in effect: MQ started receiving **a** 3.6% fee for premiums written, MQ invoiced Academic for the expenses of the enterprise, and Academic issued reimbursement checks to MQ.

Motion: Breach of ***Management Agreement*** : In the complaint's surviving cause of action, MQ alleges that "[p]ursuant to the express terms of the Management Agreement and First Amendment. . . in excess of $1,971,784.07 in fees is due to [MQ] by Academic as of May 1, 2002, covering premiums paid on policies written by [MQ] subsequent to September 30, 1999." Moving for summary judgment, defendants contend that, whether the Purported Amendment took effect or not, Academic does not owe MQ any money for fees or expenses; in fact, the defendants

claim, MQ owes Academic $ 285,877 for overpayments. As evidence, the defendants submit the affidavit of Bruce Parker, a managing account with Bennett Kielson DeSantis & Storch, who has audited Academic's financial statements from September 2000 onward, and who also audited MQ's annual statement for 2000. Parker states that Academic requested that he calculate MQ's compensation using the Fees Less Expenses Method for the period from October 1, 1999 until April 1, 2002, when Academic terminated MQ.

Parker first calculated MQ's fees using the Fees Less Expenses Method. For data, Parker used (1) monthly production statements ("Production Statements") that MQ prepared for Academic that listed the total amount of premiums written on Academic policies, excluding excess premiums, (2) financial statements that MQ prepared, which Parker refers to as "Yellow Book Statements," and which reported all of Academic's then current transactions, including excess premiums, and corrected any errors or omissions in the Production Statements, and (3) annual financial statements that MQ prepared. According to Parker, due to MQ's inadequate record-keeping, he could not determine the aggregate amount of "premiums paid," so he used the ascertainable figure for "premiums written," which would be equal to or larger than the "premiums paid" amount; thus Parker's use of the "premiums written" figure favored MQ. To eliminate any issue about whether a given policy was occurrence, extended, excess, or "claims made," he calculated MQ's fees at 17.5% of the premiums for all policies, i.e., MQ's maximum percentage under the First Amendment. Parker separately calculated MQ's fees for each month from October 1999 through March 2002, and determined that, for the entire period, MQ's total gross Compensation using the Fees Less Expenses Method was $ 6,040,826

Second, Parker calculated the total fees that Academic actually paid MQ under the Cost Plus Method, based upon the Academic checks that MQ had cashed. Those fees totaled $ 1,068,986. Third, using MQ's submitted invoices and backup documentation, as well as the cashed checks that Academic had made out to MQ, Parker determined the expenses for which MQ had billed Academic, and for which Academic had reimbursed MQ. Academic had asked for did not receive back-up documentation for some of MQ's invoiced expenses, but Parker assumed the expenses were valid. The reimbursed expenses totaled $ 5,257,717; the affidavit includes a break-down of the expenses by year and category

Parker stated that if, as MQ claims, the parties should have used the Cost Plus Method to determine MQ's compensation, then MQ was not entitled to have Academic reimburse its expenses, and the reimbursement amount should be credited back to Academic. MQ's net compensation for the period, Parker concluded, equaled the gross fees that Academic owed MQ under the Fees Less Expenses Method ($ 6,040,826), *minus* the amount of fees that Academic had already paid ($ 1,068,986), *minus* the reimbursed expenses for which MQ was responsible under the Fees Less Expenses Method ($ 5,257, 717), or negative $285,877. In other words, Academic had overpaid MQ by $285,877, and MQ owes Academic that amount.

In opposition, MQ argues that issues of fact preclude summary judgment. MQ submits the affirmation of its attorney, John Walshe, and the affidavit of John Lyons, MQ's president and chief executive officer.[1] MQ does not raise specific objections to Parker's method of calculating

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[1]MQ also submits unsigned and un-notarized statements from Robert Jampol, Geraldine DiAnuzzo, and Julius Scorzelli. Those unsworn statements would be inadmissible at trial and accordingly are ineffective proof that any issue of fact exists. See *Grasso v. Angerami*, 79 N.Y.2

MQ's compensation, and does not contest that his data, which was derived from documents that MQ had prepared, including required statements that it had filed with the Superintendent. Instead, MQ questions Parker's credibility on the ground that his affidavit purportedly conflicts with endnote # 5 (the "Endnote") to MQ's 2000 financial statement, which Parker's firm prepared. The Endnote stated in relevant part:

> Effective October 1, 1999, pending completion of a new management agreement, Academic implemented a new method of compensating [MQ]. **As** of December 31, 2000, no formal agreement had been signed. The compensation method will revert back to the original agreement if not finalized by December 31, 2001, and will be retroactive to October 1, 1999. Due to the difference in compensation methods, MQ would have received approximately $184,000 more, for the period October 1, 1999 through December 31, 2000, than it received under the [Cost Plus Method currently in use] In addition, MQ would be entitled to approximately $ 1,016,000 of additional fees on policies written in 2000 and collected in 2001.

In reply, defendants submits another affidavit from Parker, who explained how the figures in the Endnote could be reconciled with those in his earlier affidavit. First, Parker explained, the Endnote figures concerned the period from October 1, 1999 through December 31, 2000, but in his affidavit Parker covered the period extending from October 1, 1999 through April 1, 2002. Second, the compensation figure in the Endnote, $ 1,016,000, was not reduced by the amount of the expenses for which Academic had reimbursed MQ.

Opposing summary judgment, MQ also contends that the motion is premature because it needs further discovery to respond.

A party moving for summary judgment has the initial burden of coming forward with admissible evidence that warrants a directed judgment in that party's favor. *See Zuckerman v. N.Y.C.*, 49 N.Y 2d 557, S62 (1980). Once a movant has met its initial burden, a party opposing summary judgment can defeat the motion only by coming forward with admissible evidence that raises a triable issue of fact. *S.J. Capelin Assocs., Inc. v. Globe Mfg. Corp.*, **34** N.Y.2d **338, 341** (1974). Allegations founded upon surmise, conjecture, or suspicion do not suffice. *See Shaw v. Time-Life Records*, 38 N.Y.2d 201,207 (1975) If the party opposing a summary judgment motion submits affidavits showing that facts essential to justify opposition may exist but cannot then be stated, the court may deny summary judgment. CPLR § 3212(f).

Here, the defendants have submitted an affidavit from Parker, who explained in detail how he calculated that Academic had overpaid MQ using the Fees Less Expenses Method. Moreover, Parker obtained his data either on documents that MQ had prepared, including statutory filings with the Insurance Department, or cashed checks that Academic had made out to MQ. In its opposition, MQ does not demonstrate that Parker used an incorrect method of calculating MQ's fees, or that the data and documents upon which he relied were inauthentic or inaccurate. **As** Parker explained, the figures set forth in the Endnote do not conflict with Parker's, inasmuch as the Endnote figures related to a different time period than Clark's figures, and because the

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813, 814 (I 991). However, inasmuch as MQ has informed the Court that it had mistakenly submitted draft documents and will shortly replace them with proper affidavits, the Court will treat the statements as probative evidence for the purpose of this motion.

Endnote calculations did not reflect that Academic was entitled to recoup its expense reimbursements. MQ also contends that the defendants' motion must be denied because they failed to annex a statement of the material facts pursuant to the rules of this Court. R. of the JJ. of the Commercial Div., Sup, Ct. N.Y. Co. 19-a(a). But denial on that ground is discretionary, *see* ***id.,*** and it would be inappropriate here.

Finally, MQ fails to make an evidentiary showing that additional discovery may defeat this motion, particularly because Parker's affidavits were based on data that MQ provided to Academic. Inasmuch as Academic paid MQ more than it was entitled to under the Management Agreement, Academic did not breach it, and summary judgment is granted dismissing the second cause of action and the entire complaint.

Counterclaim: The defendants' application for summary judgment granting a permanent injunction "enjoining MQ, its agents, servants and employees, from commencing without Court Order any further litigation against Academic, its agents, servants, and employees" is denied, and the Court grants MQ summary judgment on the counterclaim pursuant to CPLR 3212 (b). As grounds for an injunction, the defendants allege that "MQ has engaged in a course of conduct deliberately designed to harass, vex, obstruct, and cause injury to Academic, its agents, servants, and employees." According to the defendants, after this Court had ordered MQ to return Academic's confidential documents to it, MQ instead kept certain documents and publicized them to harass Academic. Moreover, Academic claims, MQ has started "totally baseless" lawsuits against Academic and its affiliates, including this one,

Academic has failed to make out a *prima facie* case for an anti-suit injunction. While litigants can be enjoined from commencing new actions when they have abused the judicial process by "hagriding individuals solely out of will or spite," *Sassower* ***v.*** *Signorelli*, 99 A.D.2d 358, 359 (2d Dept. 1984), at least some of MQ's claims against Academic in this action and others cannot be deemed to be entirely frivolous. For example, MQ prevailed when it claimed that Academic's first attempt to terminate it was invalid. *See* Dec. & Order (June 30, 1992), ***Academic*** **v.** *MQ*, index no 605452/2001. Moreover, apparently financial gain at least partly motivates MQ, rather than pure spite. Academic complains that MQ has been re-litigating claims that it has already lost, but "ordinarily, the doctrine of former adjudication will serve as an adequate remedy against repetitious suits." *Sassower*, 99 A.D.2d at **359.** If MQ is misusing Academic's confidential information, Academic can seek redress by moving for contempt and other orders in the appropriate action.

For the reasons set forth below, it is

ORDERED that the motion is granted, and the complaint is severed from the counter claim and dismissed, and it is further

(continued on the ***next*** *page)*

ORDERED that the defendants' motion for summary judgment on their counterclaim is denied, and summary judgment is granted to the plaintiff on the counterclaim, and it is further

ORDERED that the complaint and counterclaim is dismissed, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 26,2004

J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST