C

CASE DISP

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

BEN UMEZE, M.D. and LOVINA MEDICAL CENTER, P.C.,

Plaintiff,

-against-

FIDELIS CARE NEW YORK, NEW YORK STATE CATHOLIC HEALTH PLAN, INC., DAVID THOMAS, REGINA TRAINOR, AND CHRIS HALL-FINNEY,

Defendants.

Index No. 25626/03

**DECISION/ORDER**

**Present:**
**HON. KENNETH L. THOMPSON, Jr.**

The following papers numbered 1 to ___ read on this motion, _____



| No On Calendar of | PAPERS NUMBERED |
|---|---|
| Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed | |
| Answering Affidavit and Exhibits | |
| Replying Affidavit and Exhibits | |
| Affidavit | |
| Pleadings -- Exhibit | |
| Stipulation -- Referee's Report --Minutes | |
| Filed papers | |

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants' motion for an Order pursuant to CPLR § 3212 granting summary judgment and dismissing the Complaint is granted in its entirety.

Plaintiffs' lawsuit contains four causes of action: 1) willful breach of contract; 2) failure to afford due process pursuant to the Public Health Law; 3) breach of good faith and fair dealing; and 4) bad faith reporting to the Internal Revenue Service.

In a nutshell, Plaintiffs claim that Defendants failed to honor a 1995 Primary Care Provider Agreement ("Agreement") between LOVINA MEDICAL P.C. and Better Health Plan, Inc ("BHP") that FIDELIS CARE assumed upon its purchase of BHP. Plaintiffs specifically allege that, "Defendants unilaterally and wrongfully refused to reimburse the plaintiffs for any and all medical services since May 1, 2003 contrary to the contract between the parties and despite the protests by the plaintiff that such actions were

contrary to the agreement binding the parties." (Amend. Compl. at ¶ 42.) And that "Defendants summarily terminated the contractual agreement with the plaintiffs without justification and in so doing gave conflicting and unrelated reasons for the sad termination even without prior notice or due process." (Id. at ¶ 43.)

**MSJ Standard**

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3213, subd [b])." Friends of Animals v. Assoc. Fur Mfrs., 46 NY2d 1065, 1067-68.

**Dissolution**

> On or before the last day of March, June, September or December in each calendar year, the tax commission may certify and transmit to the department of state a list containing the names of any or all such stock corporations and corporations formed for profit, other than corporations formed by or under special acts and other than banking, insurance and railroad corporations, as have not filed reports required under this article during the period of two consecutive years next preceding the date of such certification or as have been delinquent in the payment of taxes for any two years duly assessed pursuant to this article.

NY Tax Law § 203-a(1).

> The secretary of state shall make a proclamation under his hand and seal of office, as to the corporations whose names are included in such list as finally corrected, declaring such corporations dissolved and their charters forfeited pursuant to the provisions of this section. He shall file the original proclamation in his office and shall publish a copy thereof in

> the state bulletin no later than three months following receipt of the list by him.

NY Tax Law § 203-a(3).

Upon dissolution, " the corporation's legal existence terminates ... and does not enjoy the right to bring suit in the courts of this state, except in the limited respects specifically permitted by statute." Moran Enters., Inc. v. Hurst, 66 A.D.3d 972, 973. "Specifically, pursuant to statute, the dissolved corporation may only institute a suit, if related to the winding up the affairs of the corporation." 41 E. 1st St. Rehab Corp. v Lopez, 26 Misc. 3d 990, 995; see also BCL § 1006(a) (stating that "[a] dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place"). As such, a dissolved corporation may pursue a suit for a breach of contract that occurred prior to dissolution in the course of winding up its affairs. J. Sackaris & Sons, Inc. v. Onekey, LLC, 60 A.D.3d 733, 734; see also BCL § 1006(b) (stating that "[t]he dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution").

Despite the above,

> [a]ny corporation so dissolved may file in the department of state a certificate of consent of the commissioner of taxation and finance. Such certificate of consent shall be given only if the commissioner of taxation and finance ascertains that all fees and taxes imposed under this chapter or any related statute, as defined in section eighteen hundred of this chapter, as well as penalties and interest charges related thereto, accrued against the corporation have been paid. The filing of such certificate of consent shall have the effect of annulling all of the proceedings theretofore taken for the dissolution of such corporation under the provisions of this section and it shall thereupon have such corporate powers,

FILED Feb 14 2011 Bronx County Clerk

> rights, duties and obligations as it had on the date of the publication of the proclamation, with the same force and effect as if such proclamation had not been made or published.

NY Tax Law § 203-a(7); see also A. A. Sutain, Ltd. v. Montgomery Ward & Co., 17 N.Y.2d 776 (holding that a dissolved corporation may bring a suit for breach of contract after it has been reinstated). Thus, it seems apparent that "[t]he Legislature did not intend a delinquent corporation, which has not sought reinstatement, to enjoy the privileges of corporate existence, which include the right to bring suit in the courts of the state." 41 E. 1st St. Rehab Corp., 26 Misc. 3d at 995.

Although the Court allowed LOVINA MEDICAL, P.C. to be added as party, it did so without examining the merits or legal sufficiency of the proposed amendment. On a motion for summary judgment, however, that is exactly what the Court must do—determine whether the "movant establish[ed] [her] cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in [her] favor," Friends of Animals v. Assoc. Fur Mfrs., 46 N.Y.2d 1065, 1067-68; see also CPLR § 3212(b), which in turn requires Plaintiffs to "show facts sufficient to require a trial of any issue of fact," id.

On or about December 27, 2000, LOVINA MEDICAL, P.C., was dissolved by proclamation of the Secretary of State pursuant to the Tax Law. According to Plaintiffs' Complaint, the alleged breach of the 1995 Contract with LOVINA occurred sometime in 2003. Although Plaintiffs claim that they "vehemently disputed the alleged dissolution and supplied a document from its Accountant," there is no indication as to whom this correspondence was sent to, whether it was actually received or whether it led to the reinstatement of LOVINA MEDICAL, P.C. Therefore, the Court finds as a matter of law

FILED Feb 14 2011 Bronx County Clerk

that LOVINA MEDICAL, P.C. was dissolved as per the above proclamation. Thus, it may not maintain its cause of action for breach of contract.

**Public Health Law**

The dissolution also eradicates Plaintiffs' cause of action regarding the denial of due process for two reasons. Pub. Health Law 4406-d(2)(a), states that "a health care plan shall not terminate a contract with a health care professional unless the health care plan provides to the health care professional a written explanation of the reasons for the proposed contract termination and an opportunity for a review or hearing as hereinafter provided."

First, LOVINA MEDICAL, P.C. has been legally dead since its December 27, 2000 dissolution. See De George v. Yusko, 169 A.D.2d 865, 866-67 (holding that "[i]n New York, a corporation, during its ... tax delinquency and until it receives retroactive *de jure* status, is essentially legally dead and has no *de facto* existence"). Therefore, its Agreement with Defendants terminated upon that dissolution. See, e.g., New York Phonograph Co. v. Davega, 127 A.D. 222, 229 (holding that "so far as such contracts remained executory and were dependent upon the continued existence of the corporation they were terminated by its dissolution").

Indeed,

> When one party [is] a corporation, it draws its vitality from the grant of the state, and could only live by its permission. It exist[s] within certain defined limitations, and must die whenever its creator so will[s]. The party who contracted with it did so with knowledge of the statutory conditions, and these must be deemed to permeate the agreement, and constitute elements of the obligation. The contract in its own nature is dependent upon the continued life of both parties. With the natural death of one, or the corporate death of the other, the contract must inevitably end.

People v. Globe Mut. Life Ins. Co., 91 N.Y. 174, 179. Thus, the Agreement was terminated by operation of law upon LOVINA's dissolution in 2000 and not by any action undertaken by Defendants.

Second,

> a dissolved corporation is prohibited from carrying on any business "except for the purpose of winding up its affairs," BCL § 1005(a)(1), and thus possesses only limited power "to fulfill or discharge its contracts, collect its assets, sell its assets for cash at public or private sale, discharge or pay its liabilities, and do all other acts appropriate to liquidate its business, BCL § 1005(a)(2)

172 E. 122 St. Tenants Ass'n v. Schwarz, 73 N.Y.2d 340, 346; see also Schenectady Mun. Hous. Auth. v. Keystone Metals Corp., 245 A.D.2d 725, 727 (holding that "only new business is prohibited") (citations omitted). LOVINA's dissolution prohibited it from conducting any new business, which would include entering into any new Agreements after its dissolution. LOVINA MEDICAL, P.C. could not have entered into a new Agreement with Defendants in 2003, thus, Plaintiffs may not argue that Defendants effectively terminated the Agreement when they refused to re-certify them in 2003. Consequently, Plaintiff's second cause of action must be dismissed.

**Good Faith and Fair Dealing**

> It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance. This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract

Forman v. Guardian Life Ins. Co. of Am., 76 A.D.3d 886, 888. "For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent

performance of the contract or to withhold its benefits from the plaintiff." Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Commerce, 265 A.D.2d 513, 514.

Plaintiffs allege that Defendants "injur[ed], frustrat[ed], destroy[ed] and/or interfer[ed] with the plaintiffs' rights to receive the benefits of the agreement including, (a) full payment for medical services provided under the contract[1]; (b) the right to remain a participating primary care physician provider of Fidelis health maintenance organization and (c) the right not to be arbitrarily terminated." (Amend. S&C at ¶ 56.) The Court finds that this cause of action fails for three reasons.

First, the 1995 Agreement was terminated in 2000 upon LOVINA MEDICAL, P.C.'s dissolution. As such, there was no Agreement in existence in 2003. See I.S. Sahni, Inc. v. Scirocco Fin. Group, Inc., 2005 U.S. Dist. LEXIS 21876, *21 (stating that "[t]here can be no covenant of good faith and fair dealing implied where there is no contract"). Second, absent evidence that LOVINA MEDICAL, P.C. was reinstated, it was forbidden under New York law to conduct any new business from December 27, 2000—the date of its dissolution—onward. Consequently, it had no right to remain a primary care provider in Fidelis's network past that date. Third, the Agreement was terminated upon LOVINA MADICLA, P.C.'s dissolution for its failure to pay taxes. There is no evidence that Defendants had anything to do with that dissolution, thus, it cannot be held liable for the resultant termination of the Agreement. The Court further finds that the allegations contained in ¶¶ 57(d)-(h) do not state a cause of action for breach of the implied covenant of good faith and fair dealing, but rather, defamation.

[1] Plaintiffs allege that, "Defendants refused to reimburse the plaintiffs since May 1, 2003 when they were aware and knew that plaintiffs were entitled to reimbursement." (Amend. S&C at ¶ 57(a).)

**Bad Faith Reporting/Defamation**

"Plaintiffs in a defamation action must prove special damages, meaning economic or financial loss, unless they fit within an exception in which damages are presumed, i.e., defamation *per se*." Sharratt v. Hickey, 20 A.D.3d 734, 735 (citations omitted).

> A writing is defamatory - that is, actionable without allegation or proof of special damage - if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community, even though it may impute no moral turpitude to him.

Nichols v. Item Publishers, Inc., 309 N.Y. 596, 600 (citations omitted).

Furthermore, "words are libelous if they affect a person in his profession, trade, or business, by imputing to him any kind of fraud, dishonesty, misconduct, incapacity, unfitness or want of any necessary qualification in the exercise thereof." Four Star Stage Lighting, Inc. v. Merrick, 56 A.D.2d 767, 768. Moreover, "[t]he words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." Aronson v. Wiersma, 65 N.Y.2d 592, 594 (citations omitted).

Plaintiffs claim that the basis for this cause of action is "that the defendants ... deliberate[ly] and spiteful[ly] ... [sent] [the] IRS a letter concerning the plaintiff [stating] that the plaintiffs [had] threatened not to [treat] patients assigned to them if the IRS levy is honored." (Pl. Aff. Opp. at 32, pt. IV.) Plaintiffs further claim that this letter was "clearly defamatory of the plaintiffs." The letter referred to was dated June 3, 2003,

written by a David Thompson, sent to Dr. Umeze and copied to the IRS. The Court finds that this cause of action must be dismissed for several reasons.

First, the Court finds that the letter taken as a whole is not susceptible of a defamatory reading nor did it contain statements that amount to defamation *per* se. Second, there is no evidence that: Defendants informed the IRS of Dr. Umeze's alleged threat knowing that such a statement was false; Plaintiffs did not actually make the alleged threat, (see Pl. Aff. Opp. at 32, pt. IV); or the statements contained in the letter went beyond the parties to which it was addressed. Finally, Plaintiffs have failed to provide any evidence showing economic or financial loss as a result of the alleged statements to the IRS.

Given the dismissal of the four causes of actions contained in Plaintiffs' Complaint, there is no need to consider the remainder of Defendants' arguments regarding the individually named Defendants or Plaintiffs' claims for punitive damages.

The foregoing shall constitute the decision and order of this Court.

Dated: JAN 07 2011

J.S.C.