

Healthcare I.Q., LLC v Tsai Chung Chao
2013 NY Slip Op 32144(U)
September 3, 2013
Supreme Court, New York County
Docket Number: 108230/2010
Judge: Bransten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: J.S.C. Justice

PART 3

Index Number : 108230/2010
HEALTHCARE IQ LLC
vs.
CHUNG, CHAO TSAI
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 108230/2010
MOTION DATE 6/5/2013
MOTION SEQ. NO. 005

The following papers, numbered 1 to 4, were read on this motion to/for Summary Judgment
Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1
Answering Affidavits - Exhibits No(s) 2
Replying Affidavits No(s) 3, 4
Cross Motion yes - no

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 9-3-13

Eileen Bransten, J.S.C.

EILEEN BRANSTEN

- 1. CHECK ONE: CASE DISPOSED (checked) NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER (checked)
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

-----X

HEALTHCARE I.Q., LLC,

Plaintiff,

-against-

Index No. 108230/2010
Motion Sequence No. 005
Motion Date: 6/5/2013

DR. TSAI CHUNG CHAO, MD D/B/A
NATURO-MEDICAL HEALTH CARE, P.C.,

Defendant.

-----X

BRANSTEN, J.:

In this action, plaintiff Healthcare I.Q., LLC alleges breach of contract arising out of a software licensing and service agreement with defendant Dr. Tsai Chung Chao, M.D. d/b/a Naturo-Medical Health Care, P.C. (“Naturo-Medical”). The licensed software is a medical billing software used to process claims related to Naturo-Medical’s provision of medical services to patients. Plaintiff contends that the licensing and servicing agreement called for an automatic renewal after the initial three-year period of the agreement, and that therefore, licensee Naturo-Medical’s failure to terminate after the three-year period resulted in the agreement being renewed on February 1, 2010 for another 18 months, and again on September 1, 2011 for an additional 18 months. Plaintiff contends that Naturo-Medical did not give notice of termination until October 2012, but, after February 2010, continued to use the license provided by plaintiff, without paying for the license, in breach of the agreement. Plaintiff alleges that, as a result of such breach, it is entitled to

judgment in the amount of its liquidated damages, as set forth in the agreement, for \$525,000.00.

Naturo-Medical moves for summary judgment dismissing the amended complaint, on the ground that it is barred by General Obligations Law (“GOL”) § 5-903. Plaintiff cross-moves for summary judgment on the amended complaint, as well as for sanctions and an award of costs and attorneys’ fees pursuant to 22 NYCRR § 130-1.1. For the reasons set forth below, Naturo-Medical’s motion for summary judgment is denied, and plaintiff’s cross-motion for summary judgment is granted. Further, plaintiff’s motion for sanctions and costs is granted.

I. Background

On February 1, 2007, plaintiff and Naturo-Medical entered into a Practice Management and Licensing Agreement, *see* Affirmation of Daniel S. Goldstein (“Goldstein Affirm.”), Ex. 2 (the “Agreement”), pursuant to which plaintiff licensed the use of its medical billing software to Naturo-Medical for a fee of \$14,000 to \$16,000 per month for 36 months.

Plaintiff is a health care information company that has “significant experience and expertise in the area of health care service reimbursement, including but not limited to the availability, use and appropriate application of diagnosis and treatment codes, and office

management and efficiency.” (Agreement at 1.) Plaintiff “has developed or acquired licenses to certain technology and software applications designed to improve reimbursement efficiency, including web-based claim pre-adjudication and re-adjudication systems.” *Id.*

Naturo-Medical was founded in 1992 by defendant Tsai Chung Chao, M.D., a physician and therapist. Naturo-Medical is a medical diagnostic and therapeutic facility and medical practice. Naturo-Medical is divided into three medical diagnostic clinics in Manhattan and Queens, and one imaging center in Manhattan.

As set forth in the Agreement, Naturo-Medical retained plaintiff to “provide supervision and to assume the exclusive responsibilities of the medical and administrative staff, including but not limited to the clinical, financial and business resources needed to manage the Practice.” (Agreement at 2.) Naturo-Medical agreed to pay plaintiff for “licensing, clinical and coding guidelines, management of billings to insurance companies, patient billing, collection support services, denial management, consultative services, and supervision of medical and administrative staff, including all services and efforts rendered by HCIQ related to improving clinical and business outcomes.” *Id.*

Plaintiff agreed to provide numerous services to Naturo-Medical’s practice, including reviewing and analyzing Naturo-Medical’s practice, its patient case histories, billing procedures, reimbursement rates, managed care agreements and collections and

denial patterns with the intention of reducing the practice's fixed costs and reducing the number of unpaid claims; utilizing the data to improve medical billing and collections; managing and supervising the practice's medical billing, coding and collection of reimbursable insurance dollars; providing software and communication protocols; reviewing the practice's claims prior to submission and flagging potential claim rejections; and providing all updates and technical support to maintain state of the art status for its programs and applications. (Agreement at 2-3.) In addition, plaintiff licensed its proprietary technology to Naturo-Medical to aggregate medical claims and facilitate claim reimbursement from insurance companies and payers. *Id.* at 3.

Pursuant to Section 5(a) of the Agreement, after 36 months, the Agreement automatically renewed for an additional 18 months, unless either party gave written notice of termination:

Subject to the terms and conditions of this Agreement, HCIQ grants the Practice a limited, non-exclusive, non-transferable, non-assignable license to incorporate the Program(s) provided by HCIQ into Licensee's desktop or network information system, as the case may be, for the term of this Agreement, subject to any early termination of this Agreement. Thereafter, this Agreement shall be automatically renewed for additional eighteen (18) month periods unless either party by written notice notifies the other at least ninety days before the end of any eighteen month renewal period that it intends to terminate the services provided for hereunder, and such notification shall be effective one hundred and eighty (180) days thereafter.

(Agreement, § 5(a).)

It is undisputed that, on the 36-month anniversary, no notice of termination was given by either party, and that therefore, on February 1, 2010, the Agreement was automatically renewed for an additional 18-month period. Plaintiff contends that Naturo-Medical paid the first month of the renewed term, February 2010, and continued to use plaintiff's software license, and accept plaintiff's services. *See* Affidavit of Arthur Gelber ("Gelber Aff.") ¶¶ 7-8; *see also* Affirmation of Tristan C. Loanzon ("Loanzon Aff."), Ex. E at 32-33 (deposition of defendant Chao). Plaintiff further contends that, after the making the first month's payment following the renewal, Naturo-Medical ceased making payments but did not cease using plaintiff's software. *See* Gelber Aff. ¶¶ 8-9.

Naturo-Medical eventually provided written notice of termination in October 2012, 32 months after the first renewal, and 12 months after the contract was renewed for the second time in October 2011. *See* Goldstein Affirm., Ex. 5 (Naturo-Medical notice of termination).

Plaintiff contends that Naturo-Medical's usage of the software license after it stopped paying in February 2010 was extensive. Plaintiff submits a usage report that it compiled, which shows that Naturo-Medical accessed the license at least through June 2010. *See* Goldstein Affirm., Ex. 4 (usage report). According to this usage report, in March 2010, the software was accessed over 27,000 times. *See id.* Between March and June 2010, Naturo-Medical accessed the software 48,648 times. *See id.*; *see also* Gelber

Aff. ¶ 9. Plaintiff contends that, through June 2010, Naturo-Medical accessed the license on a daily basis. *See* Gelber Aff. ¶ 8.

Naturo-Medical contends that, in February 2010, it demanded that plaintiff return the health and financial records of Naturo-Medical's patients. Naturo-Medical asserts that, when plaintiff failed to do so, it had no choice but to access plaintiff's software in order to review the files, but did not use the software for billing.

This case has been ripe for nearly two years. Plaintiff filed a note of issue on September 12, 2011. Two weeks later, on September 23, 2011, Naturo-Medical moved for summary judgment for the first time, seeking dismissal of the breach of contract claim on the ground that it was barred by GOL § 5-903 – the same ground upon which its current summary judgment motion is based. On July 26, 2012, the court denied Naturo-Medical's motion for summary judgment, and, on August 2, 2012, Naturo-Medical appealed the decision. However, Naturo-Medical defendant never perfected the appeal, and in February 2012, after seven months of delay, Naturo-Medical withdrew the appeal. Defendant also commenced a case against plaintiff in Queens County.

Even though the court warned Naturo-Medical about moving a second time for summary judgment, *see* Goldstein Affirm. Ex. 7, Naturo-Medical ignored the court's instructions, and filed a second motion for summary judgment, upon the same grounds previously rejected – GOL § 5-903.

II. Discussion

In support of its motion for summary judgment, Naturo-Medical contends that GOL § 5-903 bars the amended complaint. According to Naturo-Medical, GOL § 5-903 “states that a party – seeking enforcement of an automatic renewal in agreements involving personal or real property – must send to the other party a written notice that ‘calls attention’ to the automatic renewal provision; [o]therwise, the renewal is unenforceable.” *See* Def.’s Moving Br. at 4-5. Naturo-Medical argues that plaintiff has conceded its failure to send a written notice to Naturo-Medical. *See* Loanzon Affirm. Ex. D at 134 (transcript of Arthur Gelber deposition) (admitting that he did not give Naturo-Medical written notice that the Agreement would not automatically renew, and that the software licensing agreement called for the provision of “goods and services.”) Moreover, Naturo-Medical argues that it transmitted and stored patient files in plaintiff’s computer servers, which files are the property of Naturo-Medical. Naturo-Medical contends that, therefore, “because the licensing agreement involved a personal property – both the software and Naturo-Medical’s patient files – the agreement falls within the ambit of Section 5-903.” (Def.’s Moving Br. at 5.) Naturo-Medical concludes that, because plaintiff failed to give the required notice, the Agreement expired by its own terms on February 1, 2010, and the amended complaint must be dismissed as a matter of law.

Plaintiff contends that summary judgment motion should be denied on two bases:

(1) Naturo-Medical already moved for summary judgment in September 2011, and successive summary judgment motions are disallowed by law; and (2) GOL § 5-903 does not apply to the Agreement because the Agreement is a contract for technology licensing, management of billings to insurance companies, consultative services and supervision of staff – not a contract for service, maintenance or repair to “real or personal property.”

Plaintiff further contends that its cross-motion for summary judgment should be granted because Naturo-Medical breached the Agreement, which breach is supported by undisputed evidence in the record.

A. *Defendant’s Motion for Summary Judgment*

1. Naturo-Medical’s Successive Motion for Summary Judgment

Naturo-Medical’s second motion for summary judgment is denied, as “New York law has a ‘strong policy against allowing successive motions for summary judgment.’” *Ferolito v. Vultaggio*, 36 Misc.3d 1227[A], at * 4 (Sup. Ct. NY Cnty. 2012) (citation omitted). “This is particularly true where the motion is based on legal grounds and factual assertions that were or could have been raised in an earlier motion.” *Id.* at *5; *see also Phoenix Four v. Albertini*, 245 A.D.2d 166, 167 (1st Dep’t 1997); *Levitz v. Robbins Music Corp.*, 17 A.D.2d 801, 801 (1st Dep’t 1962).

This is not just a motion that “could have been brought” in a prior motion – this is the exact same motion that was previously denied. Indeed, the court explicitly told Naturo-Medical that it would not consider a second summary judgment motion:

You know you’re not ever going to get another summary judgment motion, you used up your one and only. I told you that when you were here the first time. You can’t get another summary judgment motion because it wasn’t denied for lack of discovery. It was denied on the merits and you can’t get more than one summary judgment motion.

Naturo-Medical’s belief that its defense under the GOL is meritorious does not allow it to circumvent the law disallowing successive motions. This is especially true when it never perfected, and in fact withdrew, the appeal that was based on the same defense. Accordingly, the motion for summary judgment is denied on this basis.

2. Naturo-Medical’s GOL § 5-903(2) Defense

Moreover, even if this court were to consider the substance of the instant summary judgment motion, the motion nonetheless would be denied.

“‘[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’” *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1062 (1993) (citation omitted); *accord Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733,

735 (2008). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *see also Lesocovich v. 180 Madison Ave. Corp.*, 81 N.Y.2d 982, 985 (1993). The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *CitiFinancial Co. v. McKinney*, 27 A.D.3d 224, 226 (1st Dep’t 2006).

Here, it is clear that Naturo-Medical has failed to establish its entitlement to summary judgment, as the Agreement is not an agreement of service, maintenance or repair to real or personal property.

The Agreement contains an evergreen clause that renewed the contract, unless one party gave written notice of termination. GOL § 5-903(2) requires prior written notice for a very specific, very narrow type of evergreen contract that pertains to “service, maintenance or repair” to “real or personal property”:

No provision of contract for service, maintenance or repair to or for any real or personal property which states that the term of the contract shall be deemed renewed for a specified additional period unless the person receiving the service, maintenance or repair gives notice to the person furnishing such contract service, maintenance or repair of his intention to terminate the contract at the expiration of such term, shall be enforceable against the person receiving the service, maintenance or repair, unless the person furnishing the service, maintenance or repair, at least fifteen days and not more than thirty days previous to the time specified for serving such notice upon him, shall give to the person receiving the service, maintenance or repair written notice,

served personally or by certified mail, calling the attention of that person to the existence of such provision in the contract.

(GOL § 5-903(2).)

However, contrary to Naturo-Medical's arguments, it is evident that the Agreement is not a contract for service, maintenance or repair to real or personal property, and therefore, the statute does not apply.

Pursuant to the Agreement, Naturo-Medical retained plaintiff for software licensing, clinical and coding guidelines, management of billing to insurance companies and patients, collection support services, denial management, consultative services, and supervision of Naturo-Medical's medical and administrative staff. (Agreement at 1.) The administrative services that Naturo-Medical outsourced to plaintiff, in addition to licensing plaintiff's software program, include the following services, which are clearly not service, repair or maintenance to real or personal property, but instead are business consulting, outsourcing and administrative services for the medical practice itself:

- HealthCare IQ will review and analyze the Practice, its patient case histories, billings procedures, its reimbursement rates, managed care agreements, collections and denial patterns;
- HealthCare IQ will supervise and work with medical and administrative staff to introduce payer specific clinical and financial guidelines, to improve medical billing and collections, to define compliance issues, and introduce educational material;

- HealthCare IQ will be responsible for the Practice Staff, management and supervision of medical billing, coding, collection of reimbursable insurance dollars, adherence to documentation guidelines, compliance issues, business issues, and for the overall management of the medical facility;
- HealthCare IQ will introduce information technology and will provide software, communication protocols, and will define hardware upgrades or technological issues required to improving communications between the medical facilities, and between the medical facilities and payer industry; and
- HealthCare IQ will review the Practice's claims prior to submission and flag potential claim rejections

(Agreement at 1-3.)

There are numerous cases directly analogous to the one at bar where the court has held that the contract did not involve the provision of maintenance, repair or service to property, and that thus, GOL § 5-903 did not apply. For instance, in *Donald Rubin, Inc. v. Schwartz*, 160 A.D.2d 53 (1st Dep't 1990), plaintiff was an administrator and consultant for defendant's employee benefits – similar to the role that plaintiff played as an administrator and consultant for Naturo-Medical's billing department. The First Department reversed the lower court's dismissal under GOL § 5-903, holding that "the contract herein, however, is in the nature of a personal services contract requiring that plaintiffs provide 'consulting services' to the trustees and administer its plan," and was not an agreement to provide services to or maintenance of some real or personal property.

Id. at 56.

Likewise, in *Trepp, LLC v. McCord Dev., Inc.*, 100 A.D.3d 510, 510 (1st Dep't 2012), plaintiff contracted to provide defendants with "information and analytics" concerning securities "via plaintiff's website." Similarly, here, plaintiff contracted to provide information and analytics concerning billing of insurance companies and obtaining reimbursements through plaintiff's web-based software. The First Department affirmed the lower court's denial of defendant's motion under GOL § 5-903, holding that the contract "did not involve the provision or lease of personal property." *Id.* at 510; *see also Pozament Corp. v. AES Westover, LLC*, 14 Misc.3d 1210[A], at *2 (Sup. Ct. Broome Cnty. 2006) (holding "the terms of this Agreement include far too many obligations on defendant's behalf" to find that the agreement falls within the purview of GOL § 5-903); *Prial v. Supreme Ct. Uniformed Officers Assn.*, 91 Misc.2d 115, 117 (App. Term 1977) (holding that GOL § 5-903 "is addressed to contractors who furnish 'service, maintenance or repair to or for any real or personal property,'" and "may not reasonably be construed to encompass the personal service agreement at bar.").

This court rejects Naturo-Medical's contention that the Agreement is for service to property, because plaintiff handled "patient records," which constitutes real or personal property. The mere fact that plaintiff came into contact with patient records does not render the Agreement as one for service to property. "In every ... professional retainer agreement the person hired is likely to come into contact with an item of personal

property owned by the employer which is arguably serviced or maintained by such person.” *Donald Rubin, Inc.*, 160 A.D.2d at 57 (“we reject defendant’s argument that GOL § 5-903 on its face includes ‘services’ to any type of ‘personal property’ and reject that the latter term ... includes administrative services contracts”).

Naturo-Medical also refers to “HCIQ’s software” as “another form of property.” This argument similarly lacks merit, as this was not Naturo-Medical’s property; it was plaintiff’s property, licensed to Naturo-Medical. In *Mobile Diagnostics Testing Servs. Inc. v. TLC Health Care Network*, 2004 WL 5452877 (Sup. Ct. Erie Cnty. 2004), *aff’d* 19 A.D.3d 1145 (4th Dep’t 2005), a case remarkably similar to the one at bar, the defendant sought to avoid its obligation under an agreement by invoking GOL § 5-903. The court held that GOL § 5-903 did not control the matter because “the primary purpose of the agreement was for the provision of medical diagnostic services (echocardiograms)” and noted that, “the equipment being serviced was at all times the property of the Plaintiff itself.” *Id.* at *1. The court denied the defendant’s motion, which rested solely on GOL § 5-903, and granted the plaintiff’s cross motion for summary judgment as to liability for breach of contract.

The court thus concludes that the Agreement is not a contract for service to property, and that GOL § 5-903 does not apply. Accordingly, Naturo-Medical’s motion for summary judgment dismissing the amended complaint is denied.

B. *Plaintiff's Motion for Summary Judgment*

However, plaintiff's motion for summary judgment is granted, because plaintiff has demonstrated that Naturo-Medical breached the Agreement as a matter of law.

Under New York law, to establish a right to recover for breach of contract, a party must prove: (1) the existence of a contract; (2) performance of the contract by the injured party; (3) breach by the other party; and (4) damages. *See, e.g., Morris v. 702 E. Fifth St. HDFC*, 46 A.D.3d 478, 479 (1st Dep't 2007).

In *BGC Partners, Inc. v. Refco Sec., LLC*, 35 Misc.3d 1210[A], at *4 (Sup. Ct. N.Y. Cnty 2012), the court granted summary judgment for breach of contract where, as here: (1) the "License Agreement called for payment of a fixed software licensing fee," (2) defendant never repudiated the Agreement based on patent invalidity, (3) plaintiff performed fully, and defendant received substantial benefits under the Agreement, (4) defendant ceased making payments, and (5) defendant, as licensee, remained obligated to pay all royalties under the Agreement.

Similarly, here, the Agreement called for monthly payments for a software licensing fee; defendant did not provide written notice of termination until October 2012, 32 months after the first renewal and 12 months after the second; plaintiff fully performed and defendant received substantial benefits under the license in the form of daily usage of

the HealthCare software; defendant ceased making payments; and defendant remained obligated to pay.

Significantly, plaintiff has submitted un rebutted evidence of Naturo-Medical's ongoing usage of plaintiff's technology and software for several months after the Agreement was renewed, during which time Naturo-Medical did not comply with its obligations under the Agreement to pay for these services. *See* Goldstein Affirm. Ex. 4 (usage report). Naturo-Medical does not deny that the Agreement contains an evergreen clause which provided for renewal in February 2010 (Def.'s Resp. to Pl.'s to Rule 19-a St. ¶ 5), that it continued to use plaintiff's software license after the renewal, or that it paid for the first month of the renewed contract in February 2010, but then ceased making additional payments. *Id.* ¶ 3.

Plaintiff also submits evidence that, pursuant to Section 7(i) of the Agreement, it is entitled to liquidated damages of average monthly payments for the months remaining on the initial term and/or any renewed term:

In the event that HCIQ services are terminated pursuant to paragraph 7 above, or for any reason under this Agreement, other than without cause by HCIQ, HCIQ shall be entitled to all fees accrued for services rendered to date of termination and liquidated damages calculated as follows:

(i) the average monthly payment paid by the Practice pursuant to 7 (a)(b)(c) multiplied by the number of months remaining in the initial term or any renewal term.

(Agreement, § 7(i).)

The contract renewed twice for 18 month periods. The first renewal occurred on February 1, 2010. The second renewal occurred on October 1, 2011. *See* Goldstein Affirm. Ex. 10 at ¶¶ 3-6. Naturo-Medical gave notice of termination on October 12, 2012. *Id.* Ex. 5. Plaintiff submits evidence that the average monthly payment was \$15,000. *See* Loanzon Affirm. Ex. E at 32 (Defendant Chao Deposition Tr.) (“We paid a monthly commission of the amount of \$15,000 to Art Gelber”); Goldstein Affirm. Ex. 13 (attaching \$15,000 check dated 2/7/07 from Naturo-Medical to plaintiff). Thus, pursuant to the liquidated damages provision, plaintiff is entitled to \$15,000 per month for 35 months, equaling \$525,000, which takes into consideration the February 2010 payment by Naturo-Medical.

Accordingly, plaintiff has met its burden of demonstrating that it is entitled to judgment as a matter of law for breach of contract and liquidated damages. Naturo-Medical fails to offer any proof to establish an issue of material fact that precludes summary judgment.

Although Natural-Medico asserts that its conduct subsequent to February 1, 2010 “clearly signaled a discontinuation of the parties’ business relationship” (Def.’s Reply Br. at 7-8), the Agreement does not call for signals; rather, it calls for written notice of termination. In any event, Naturo-Medical’s continued use of and payment for the software after February 2010 completely refutes this assertion. *See* Loanzon Affirm. Ex.

E at 32 (Defendant Chao Deposition Tr.) (“at the end we pay during some extension of time as well”); *see also* Goldstein Affirm. Ex. 4.

Naturo-Medical also argues that the automatic renewal provision is ambiguous, and that the evergreen clause “does not state when it automatically renews.” Naturo-Medical is wrong. The Agreement unambiguously provides that it “shall automatically be renewed for additional eighteen (18) month periods.” Indeed, New York courts “have upheld enforcement of similar provisions containing automatic renewal and advance notification of termination clauses.” *Rockland Exposition, Inc. v. Alliance of Auto. Serv. Providers of N.J.*, 2009 WL 1154094, at *7 (S.D.N.Y. 2009) (citing *Feder v. Caliguira*, 8 N.Y.2d 400 (1960)) (upholding contract with an automatic renewal and written termination clause); *Daniel v. UnumProvident Corp.*, 261 Fed. App’x 316, 319 (2d Cir. 2008) (applying contract provision which stated that the contract would be automatically renewed for successive periods of one year unless either party notifies the other in writing).

Finally, although Naturo-Medical denies that it paid \$15,000 per month under the Agreement, *see* Def.’s Resp. to Pl.’s Rule 19-a St. ¶ 2, this denial fails to create an issue of fact, as Dr. Chao specifically admitted in his deposition that he paid a monthly commission to Gelber of \$15,000 per month. *See* Loanzon Affirm. Ex. E at 32

(Defendant Chao Deposition Tr.). Moreover, documentary evidence exists in the form of the \$15,000 check attached to plaintiff's moving papers.

Accordingly, plaintiff is entitled to summary judgment on the amended complaint in the amount of \$525,000.

C. *Plaintiff's Request for Sanctions*

Plaintiff also contends that it is entitled to sanctions and an award of costs for Naturo-Medical's frivolous motions and delays in the amount of \$88,318 – the amount of its costs, expenses and attorneys' fees expended in connection with Naturo-Medical's summary judgment motion.

22 NYCRR 130-1.1(a) authorizes the court to award any party "costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees, resulting from frivolous conduct as defined in this Part." "Where motions are redundant to matters already decided on the merits, constituting a lengthy barrage of litigation to relitigate those already-decided matters, but that protracted litigation continues, with rulings ignored, despite the court's warning to cease delaying tactics, sanctions are appropriate to punish frivolous litigation." *Levy v Carol Mgt. Corp.*, 260 A.D.2d 27, 34 (1st Dep't 1999).

Plaintiff's motion for sanctions is granted. This court specifically warned Naturo-Medical not to move for summary judgment a second time. Nevertheless, Naturo-Medical ignored the court's warning, and made its duplicative motion for summary judgment on the same ground as its previous, unsuccessful motion. This conduct, likely made for the sole purpose of delay, was completely frivolous, and sanctions are warranted. Thus, Naturo-Medical must pay all of plaintiff's costs, including attorneys' fees, incurred in opposing this motion, and bringing its cross-motion for sanctions. Plaintiff is directed to prepare an affirmation detailing such costs, and provide it to Naturo-Medical's counsel within 14 days of service of notice of entry of this decision and order.

III. Conclusion and Order

Accordingly, it is

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the amended complaint is granted and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$525,000, together with interest at the statutory rate,

as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

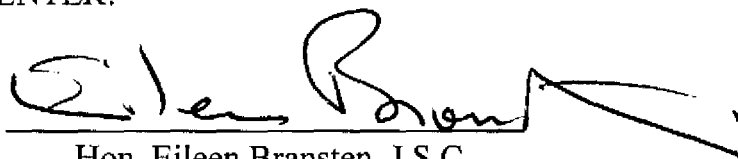
ORDERED that plaintiff's cross-motion for sanctions is granted and defendant is hereby sanctioned by this court in the amount of plaintiff's costs and expenses opposing and cross-moving for sanctions in response to defendant's summary judgment motion (motion sequence no. 003); and it is further

ORDERED that Plaintiff prepare an affirmation detailing the costs and expenses of opposing and cross-moving for sanctions in response to defendant's summary judgment motion, and provide it to defendant's counsel within 14 days of service of notice of entry of this decision and order. Within 30 days of service of notice of entry of this decision and order, defendant's counsel may serve a copy of this decision and order with notice of entry on the Clerk of the Office of Special Referees (60 Centre Street, Room 119), who shall set the matter down for a hearing concerning the costs and attorneys' fees associated with plaintiff's opposition to defendant's summary judgment motion and cross-motion for sanctions. Failure to serve this decision and order on the Office of the Special Referee within 30 days of service of notice of entry shall result in a judgment in favor of plaintiff in the amount set forth in its affirmation related to costs and attorneys' fees. Plaintiff's failure to serve a costs/fees affirmation on defendant's counsel

within 14 days of service of notice of entry of this decision and order will result in a waiver of recovering costs and fees by that party.

Dated: New York, New York
September 3, 2013

ENTER:

A handwritten signature in black ink, appearing to read "Eileen Bransten", written over a horizontal line. The signature is stylized and extends to the right of the line.

Hon. Eileen Bransten, J.S.C.