

Financial Med. Sys., Inc. v Nassau Health Care Corp.
2014 NY Slip Op 33805(U)
March 25, 2014
Supreme Court, Nassau County
Docket Number: 602645-12
Judge: Timothy S. Driscoll
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ORIGINAL

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
FINANCIAL MEDICAL SYSTEMS, INC.,

**TRIAL/IAS PART: 15
NASSAU COUNTY**

Plaintiff,

Index No: 602645-12

-against-

**Motion Seq. Nos. 2 and 3
Submission Date: 2/4/14**

NASSAU HEALTH CARE CORP.,

Defendant.
-----x

The following papers having been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affidavit in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Notice of Cross Motion, Affirmation in Opposition/Support
and Exhibits.....x**
- Memorandum of Law in Opposition/Support.....x**
- Reply Affirmation in Further Support/Opposition and Exhibits....x**
- Reply Memorandum of Law in Further Support/Opposition.....x**

This matter is before the Court for decision on 1) the motion filed by Plaintiff Financial Medical Systems, Inc. ("FMS" or "Plaintiff") on January 7, 2014, and 2) the cross motion filed by Defendant Nassau Health Care Corp. ("NHCC" or "Defendant") on January 29, 2014, both of which were submitted on February 4, 2014. For the reasons set forth below, the Court 1) denies Plaintiff's motion; and 2) grants Defendant's motion and compels Plaintiff to accept Defendant's Amended Answer with Counterclaim dated November 26, 2013 (Ex. 3 to Kessler Aff. in Supp.).

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order, pursuant to CPLR § 3025(a), dismissing the counterclaim (“Counterclaim”) filed by Defendant in its entirety.

Defendant cross moves for an Order compelling Plaintiff to accept Defendant’s Amended Answer with Counterclaim dated November 26, 2013.

B. The Parties’ History

The parties’ history is outlined in detail in a prior decision (“Prior Decision”) of the Court dated October 9, 2013, and the Court incorporates the Prior Decision by reference as if set forth in full herein. As noted in the Prior Decision, the Complaint alleges that, pursuant to a Billing, Collection and Services Agreement dated February 1, 2003, as amended in 2005, 2006, 2007, 2008, 2009, 2010 and 2011 (collectively with the amendments, “Agreement”), FMS provided various services and on-site personnel to NHCC, for which FMS has not been paid and/or reimbursed. Plaintiff alleges that it performed its obligations under the Agreement and submitted timely invoices to Defendant. Plaintiff alleges that the revenues it collected entitled Plaintiff to bonuses which Defendant failed to pay. Plaintiff also alleges that it did not receive from Defendant the reimbursements for the salaries and unemployment benefits for the On-Site Personnel it provided. The Complaint contains four (4) causes of action: 1) breach of the Agreement by Defendant for failing to pay Plaintiff the Amounts Owed for services provided by Plaintiff to Defendant under the Agreement, 2) account stated based on the allegation that on or about May 31, 2012, an account was stated with NHCC in the sum of \$852,574.27 for services rendered and fees owed under the Agreement to which Defendant never objected, and Defendant has failed to satisfy that obligation, 3) *quantum meruit* based on the allegation that Plaintiff substantially performed its obligations under the Agreement and Defendant has breached its obligations under the Agreement by withholding payments due to Plaintiff, and 4) unjust enrichment by Defendant which has improperly retained the benefit of the services and personnel provided by Plaintiff, for which it has not made payment.

In the Prior Decision, the Court granted Defendant’s prior motion (“Prior Motion”) to dismiss the Second Cause of Action, alleging an account stated, in light of the fact, *inter alia*, that 1) the Complaint acknowledges that the Hospital refused to pay the amounts demanded, and

formally objected to the amount owed in its letter dated December 17, 2012; and 2) Plaintiff conceded, in its June 2012 email, that the submission of a single invoice violated the Agreement's provision regarding monthly billing for On-Site Personnel and the need for the Hospital's agreement to such charges. The Court also granted Defendant's Prior Motion to dismiss the Third and Fourth Causes of Action, for unjust enrichment and quantum meruit, because there is a contract, specifically the Agreement, that governs the parties' dispute. The Court denied Defendant's Prior Motion to dismiss the First Cause of Action, alleging breach of contract, with the caveat that any claims prior to December 21, 2006 are time-barred by the six year statute of limitations set forth in CPLR § 213(2).

In its Amended Answer with Counterclaim dated November 26, 2013 (Ex. 3 to Kessler Aff. in Supp.), Defendant asserts a Counterclaim based on its allegations, *inter alia*, that 1) the Agreement was to terminate as of December 31, 2011; 2) Section 9 of the Agreement provided that, upon the effective date of termination, FMS was required to deliver to NHCC a final list of accounts receivable and the status of all claims, payments and payor responses in both a printed and electronic format; 3) Section 9 of the Agreement also required FMS to provide all transitional services and other services reasonably requested by NHCC to effect a transition to NHCC or NHCC's agent; 4) pursuant to Section 5 of the Agreement, upon termination of the Agreement, FMS was required to return to NHCC all patient information and records, fee schedules, managed care or third party payor contracts, and all other related information, to NHCC; 5) upon termination, NHCC requested that FMS deliver all patient billing and collection records, as well as monthly and yearly reports and related records, to NHCC or its agents so that NHCC could transition the billing and collection services without interruption; 6) FMS advised NHCC that it would only comply with NHCC's request if NHCC made certain payments to FMS, which FMS knew were neither due nor payable; 7) as a result of FMS' wrongful failure and refusal to deliver the billing and collections records, and related data, to NHCC, NHCC was hindered and delayed in its ability to collect on more than \$3 million in accounts receivable; and 8) without the billing and collection records and related data that FMS withheld, NHCC had difficulty with issues including verifying which claims were billed and reimbursed, and re-billing for any claims refused by insurers due to billing errors. The Counterclaim alleges that FMS' failure or refusal to effectuate the timely turnover of

information constitutes a breach of the Agreement and/or a breach of the implied covenant of good faith and fair dealing. Defendant alleges that it has sustained damages of not less than \$500,000, and that FMS has failed to indemnify NHCC for those losses, as required by the Agreement.

In support of Plaintiff's motion, Paul Abrams ("Abrams"), the former President of FMS, affirms that he executed the Agreement on behalf of FMS. As part of its operating procedures to perform the billing, collection and coding services, FMS retained files in both printed and electronic format containing information related to patient billing and collection records, lists of accounts receivable, the status of all claims, payments and payor responses, and the status of each non-adjudicated account.

Abrams affirms that, following the termination of the Agreement on December 31, 2011, he executed the Interim Settlement Agreement ("ISA") (Ex. 1 to Abrams Aff. in Supp.) on behalf of FMS. The purpose of the ISA was to resolve certain disputes that arose between FMS and NHCC concerning the parties' performance under the Agreement. In early February 2012, Abrams supervised the transfer of the files in FMS' possession containing the disputed data to be uploaded to the agreed-upon password-protected File Transfer Protocol ("FTP") site. Abrams affirms that it was his understanding that, pursuant to the ISA, NHCC was to provide FMS and the Escrow Agent with notice of whether the files uploaded to the FTP site were "Acceptable" (Abrams Aff. in Supp. at ¶ 11) or not, as this term was defined in the ISA.

Abrams affirms that on February 8, 2012, the Escrowed Funds, in the aggregate amount of \$175,767.14, were cleared and distributed to FMS. Abrams provides copies of 1) a February 8, 2012 email from counsel for Defendant to the attorney that represented FMS in connection with the ISA and related disputes with NHCC in February 2012 ("Prior FMS counsel") (Ex. 2 to Abrams Aff. in Supp.), 2) a February 14, 2012 email from Prior FMS Counsel to counsel for Defendant (*id.* at Ex. 3), and 3) a February 16, 2012 email from counsel for Defendant to Prior FMS counsel (*id.* at Ex. 4).

In further support of the motion, counsel for Plaintiff provides the procedural history of this matter. He submits that Defendant's time to serve an amended answer as of right expired on November 19, 2013 and the Court should reject Defendant's Amended Answer with Counterclaim because it was served on November 26, 2013 and is therefore untimely.

In opposition, counsel for Defendant affirms that Plaintiff never attempted to seek a pre-motion conference with regard to this motion pursuant to Rule 24 of the Commercial Division Rules. He also provides the Court with FMS' discovery demands in connection with Defendant's Amended Answer (Exs. 1 and 2 to Hsi Aff. in Opp./Supp.). Counsel for Defendant affirms that Defendant intends to respond to Plaintiff's discovery demands, including those requests that make reference to the Amended Answer, and submits that there is no prejudice to FMS as a result of Defendant's filing of the Amended Answer.

C. The Parties' Positions

Plaintiff submits that the Court should strike Defendant's Amended Answer as untimely because Defendant's time to serve an amended answer as of right expired on November 19, 2013, and Defendant served its Amended Answer on November 26, 2013. Plaintiff also argues that the Court should strike the Amended Answer because the Counterclaim is "futile" (P's Memo. of Law in Supp. at p. 7) because, as established by the Abrams affidavit, FMS fully performed its obligations pursuant to the ISA by transferring the files to NHCC "in the exact manner and under the exact circumstances agreed to" (*id.* at p. 8) in the ISA.

Defendant opposes Plaintiff's motion, submitting that service of the Amended Answer was timely and, even assuming *arguendo* that it was not, Plaintiff has suffered no prejudice from the minimal delay. Defendant also submits that the Counterclaim has merit, in light of the fact that Defendant reserved its right to sue FMS for damages under the ISA. Defendant also contends that Plaintiff's motion was improperly made due to Plaintiff's failure to provide advance notice of the motion, in violation of Rule 24 of the Commercial Division Rules.

RULING OF THE COURT

Leave to amend a pleading should be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Etzion v. Etzion*, 112 A.D.3d 782 (2d Dept. 2013) citing, *inter alia*, CPLR § 3025(b) and *Faiella v. Tysens Park Apartments, LLC*, 110 A.D.3d 1028 (2d Dept. 2013). In determining a motion for leave to amend a pleading, a court shall not examine the legal sufficiency or merits of a pleading unless such insufficiency or lack of merit is clear and free from doubt. *Etzion v. Etzion*, 112 A.D.3d at 782, quoting, *inter alia*, *Faiella v. Tysens Park Apartments, LLC*, *supra*. Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant

prejudice to the other side, the very elements of the laches doctrine. *Pub. Administrator of Kings Cty. v. Hossain Construction Corp.*, 27 A.D.3d 714, 716 (2d Dept. 2006), quoting *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983).

The Court 1) denies Plaintiff's motion; and 2) grants Defendant's motion and compels Plaintiff to accept Defendant's Amended Answer with Counterclaim dated November 26, 2013. In light of the minimal lateness, if any, of service of the Amended Answer with Counterclaim, the fact that Plaintiff will not be prejudiced by the proposed amendment, and the Court's conclusion that the Counterclaim is not palpably insufficient or patently devoid of merit, the Court will permit the amendment.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Compliance Conference on April 8, 2014 at 9:30 a.m.

DATED: Mineola, NY
March 25, 2014

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAR 26 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE