Cianchetti v Burgio
2015 NY Slip Op 32701(U)
June 11, 2015
Supreme Court, Niagara County
Docket Number: 128669
Judge: Mark Montour
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF NIAGARA

JEFFERY CIANCHETTI, DC.,

Plaintiff,

vs.

Index # 128669
DECISION and ORDER

PHYLLIS BURGIO, DC.,

Defendant.

Appearances:

Thomas J. Caserta, Esq.
Attorney for the Plaintiff
800 Main Street, PO Box 725
Niagara Falls, NY 14302

James C. Roscetti, Esq.
Attorney for the Defendant
730 Main Street
Niagara Falls, NY 14301

Hon. Mark A. Montour, J.S.C.

In this action, the Plaintiff Jeffery Cianchetti, DC seeks damages from the Defendant Phyllis Burgio, DC for an alleged breach of a contract arising from the failure to provide the agreed upon assets of a business known as Burgio Chiropractic. Plaintiff's second cause of action is to recover for an alleged fraud and misrepresentation of the actual assets of the chiropractic business.

BACKGROUND

On or about June 13, 2006, Jeffery Cianchetti, D.C. (herein after referred to as the "Plaintiff" or "Purchaser") entered into a Professional Practice Assets Purchase Agreement (hereinafter referred to as the "Asset Purchase Agreement") and Real Property Sales (hereinafter referred to as the "Contract") with Phyllis Burgio, D.C. (hereinafter referred to as "Defendant" or "Seller") for the purchase of assets and real property collectively known as Burgio Chiropractic. The parties' dispute involves only the Asset Purchase Agreement. The Asset Purchase Agreement provided for purchase of the assets of Burgio Chiropractic, for the sum of $175,000 (the assets shall hereinafter be referred to as "the Practice"). The Practice included all furniture, fixtures and equipment, good will and a covenant not to compete.

Paragraph 4 of the Asset Purchase Agreement expressly provided as follows:

> "The parties agree that the purchase price agreed to herein, is based primarily upon the gross revenues generated by the Seller and the number of patient visits. The Seller hereby represents and warrants that financial statements provided by Seller are a true and accurate representation of the gross revenues and expenses of the practice. The Seller hereby represent and warrants that gross revenues for the year 2005 were approximately $215,000 and the number of weekly patient visits was approximately 130."

Negotiations between the parties for the Asset Purchase Agreement commenced in December 2005 and carried through the spring of 2006. The Defendant provided tax returns and financial statements for the years 2001 through 2005. Pursuant to the Asset Purchase Agreement, the Seller "represents and warrants that gross revenues for year 2005 were approximately $215,000 and the number of weekly patient visits was approximately 130". Plaintiff testified that in the negotiation of the Asset Purchase Agreement it was "key" and "important to delineate" the 130 patient visits a week to demonstrate value of the Practice. Subsequent to the closing, the Plaintiff learned that the weekly patient visits were approximately 75, and not 130, as was represented in the Asset Purchase Agreement. The Plaintiff asserts that failure to deliver a Practice that services 130 patients per week and generates revenue of $215,000 per year is a breach of the contract. The Plaintiff contends that the Defendant was aware of the decline in weekly patient visits and failed to notify Plaintiff of this fact, thereby fraudulently inducing the Plaintiff to consummate the transaction. The Plaintiff further contends that the Defendant failed to disclose a serious medical condition which prevented her from

complying with the terms and conditions of the Asset Purchase Agreement related to her remaining in the Practice for one year post-closing.

The Defendant maintains that the Seller did not have any obligation to provide updated information concerning the number of weekly visits at the time the contract was signed. Further, the Defendant contends that the "integration clause" in the contract proscribed the consideration of any alleged oral representations made by the Defendant to the Plaintiff concerning the consistent number of weekly visits. The Defendant also asserts that the Plaintiff failed to exercise due diligence in verifying the number of patient visits and at trial failed to prove the elements of fraud.

DISCUSSION

The Plaintiff contends that the Defendant breached the Asset Purchase Agreement. The elements of the breach of contract claim are: (1) the existence of a valid contract; (2) the performance of the Contract by the injured party; (3) breach by the other party; (4) resulting damages. *Morris v. 702 E. Fifth St. HDFC,* 46 AD3d 478 (1st Dept 2007), *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.,* 69 AD3d 802 (2d Dept 2010), *Furia v. Furia,* 116 AD2d 694 (2d Dept 1986). Here, there is no dispute that the parties entered into a valid contract for the sale of the Practice and that the Plaintiff paid to the Defendant the sum of $175,000, as specified in the Asset Purchase Agreement. The Defendant contends that there was no breach of the contract as the Plaintiff failed to exercise due diligence in verifying that the patient visits numbered 130 per week at the time the contract was executed and, further, that the doctrine of caveat emptor (let the buyer beware) should apply in this instance. The Defendant contends Plaintiff made only a vain attempt to verify that the patient numbers were consistent as warranted by the Defendant and failed to request confirmation, in writing, of the 2006 data at any time during the negotiations or prior to the contract being executed on June 13, 2006. The Defendant testified that the Plaintiff only requested her checking account, which was supplied. The Defendant points to the existence of an "integration clause" in the contract to dispute any oral representations made by the Defendant. *See, Gebia v. Toronto-Dominion Bank,* 306 AD2d 37 (1st Dept 2003); *see also, Hobler v. Hussain,* 111 AD3d 1006 (3d Dept 2013).

The Defendant further avers that there is no obligation or duty on her part to advise the Plaintiff that the number of weekly visits were decreasing. The Defendant claims that the doctrine of caveat emptor imposes no duty on the seller to disclose any information unless there is some conduct on part of the seller that constitutes active concealment. Silence alone, without some act or conduct which deceived the purchaser, does not amount to concealment that is actionable as fraud. *See, Matos v. Crimmins*, 40 AD3d 1053, 1054 (2d Dept 2007); *see also, Marques v. Wine Services Inc.*, 2009 NY Misc. LEXIS 4718 (Sup Ct Suffolk County 2009).

"When interpreting a contract, the construction arrived at should give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized." *Fernandez v. Price*, 63 AD3d 672, 675, (2d Dept 2009); *see also, W.W.W. Assoc. v. Giancontieri* , 77 NY2d 157, 162, (1990); *McCabe v. Witteveen*, 34 AD3d 652, 654, (2d Dept 2006). "The terms of the contract are clear and

unambiguous when the language used has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." *Fernandez*, at 675, *supra*; *see also, Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355 (1978), *rearg denied*, 46 NY2d 940 (1979); *Broad St., LLC v. Gulf Ins. Co.*, 37 AD3d 126, 131 (1st Dept 2006). Conversely, contract language is ambiguous when it is "reasonably susceptible of more than one interpretation," and extrinsic or parol evidence may then be permitted to determine the parties' intent as to the meaning of that language. *Chimart Assoc. v .Paul*, 66 NY2d 570, 572-573 (1986); *see also, Mercury Bay Boating Club v. San Diego Yacht Club*, 76 NY2d 256, 267 (1990).

Where the terms of a contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole. *See*, *Greenfield v. Philles* Records, 98 NY2d 562, 569 (2002); *W.W.W. Assocs. v. Giacontieri*, 77 NY2d 157, 162-163, (1990). "The words and phrases used by the parties must, as in all cases involving contract interpretation, be given their plain meaning." *Brooke Group v. JCH Syndicate*, 87 NY2d 530, 534 (1996); *see, Quadrant Structured Products Co., Ltd. v. Vertin*, 23 NY3d 549, 564, (2014); *see also, J.D'Addario & Co., Inc. v Embassy Industries, Inc.*, 20 NY3d 113, 119 (2012).

An agreement is unambiguous "if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." *Greenfield*, at 569, *supra*, *quoting Breed v. Insurance Co. Of N. Am.*, 46 NY2d 351, 355 (1978). Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or when specific language is "susceptible of two reasonable interpretations." *See*, *Brooke Group v. JCH Syndicate*, 87 NY2d 530, 534 (1996); *see also, State of New York v. Home Indem. Co.*, 66 NY2d 669, 671 (1985); *see also, Chimart Assoc. v. Paul*, 66NY2d 570, 573 (1986). "The best evidence of what parties to a written agreement intend is what they say in their writing...a written agreement that is complete clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield*, at 569, *supra* (internal citation and quotation marks omitted).

Here, the parties established that the purchase price was based upon the gross revenues generated by the seller and the number of patient visits. The seller warranted that "the number of weekly patient visits was approximately 130". Clearly, the meaning of the language employed by the parties was to establish value based upon the number of patient visits. Both parties testified that the number of patient visits directly correlated to the amount of revenue generated by the Practice.

Prior to the execution of the Asset Purchase Agreement, and up to the date of closing, the Plaintiff testified that the Defendant confirmed that patient total was still approximately 130 patients per week when questioned. There was testimony at trial from two employees of the Practice who testified that, at the end of each day, tally sheets were generated representing the number of patients treated and money received and such data was supplied to the Defendant. The daily data sheets showed a precipitous decline in weekly patient visits (January, 2006- 124/wk; February, 2006-110/wk; March, 2006-97/wk; April, 2006-95/wk; June, 2006-101/wk). As a result, the Defendant was aware that the weekly patient visits were declining. Furthermore, the employees testified that the Defendant called staff meetings to discuss the decrease in patient visits and measures to be

instituted to generate more patient visits. The Defendant claims that there is no duty to disclose the reduction in patient visits prior to the execution of the contract or the actual closing of the contract. The Defendant maintains that the Plaintiff failed to exercise due diligence in requesting records that would demonstrate the decline in patient visits. The Plaintiff contends that such verbal requests for additional information went unanswered.

Recently, the Court of Appeals, in *ACA Financial Guaranty Corp v. Goldman, Sachs & Co* (2015 N.Y. LEXIS 982), stated it is well established that "if the facts represented are not matters peculiarly within the Defendant's knowledge and the Plaintiff has the means available to it of knowing, by the exercise of ordinary intelligence, the truth or the reality of the subject of the representation, the Plaintiff must make use of those means, or it will not be heard to complain that it was induced to enter into a transaction by misrepresentation," *citing*, *Shoemaker v. Mather*, 133 NY 590 (1892).

Moreover, "when the party to whom this representation is made has hints of falsity, a heightened degree of diligence is required of it. It cannot reasonably rely on such representations without making additional inquiry to determine their accuracy." *Centro Empresarial Cempresa S.A. v. America Movil S.A.B. de C.V.*, 17 NY3d 269 (2011). In the matter at hand, the Plaintiff testified that he made verbal requests for additional information and also repeatedly inquired of the Defendant as to the consistency of the patient visits. Following *ACA Financial Guaranty Corp*, the number of patient visits was directly within the Defendant's knowledge, especially since the Defendant was receiving daily tally sheets exemplifying a decline in the number of daily visits. Therefore, the Plaintiff would not be required to exercise a heightened degree of diligence. Failure to provide the requested documents and the misrepresentation of the number of patient visits is an act of concealment of the Defendant and a breach of a material fact of the Asset Purchase Agreement.

The parties hereto agreed that the Defendant would work a normal work schedule for a period of one year following the closing date. The Plaintiff indicated that this contractual provision was inserted to ensure a smooth transition and the maximum patient retention. The Plaintiff asserted that Dr. Burgio ceased seeing patients at the practice approximately one month after the closing date and left the business entirely in November 2006, for medical reasons. The Defendant failed to disclose this medical condition to the Plaintiff, even though the Defendant's inability to continue servicing patients would have an obvious negative impact on the value of the practice. The Plaintiff maintains that the Defendant's failure to abide by this provision of the Asset Purchase Agreement is a breach thereof.

In contravention, the Defendant asserts that she was effectually prohibited from performing under the Asset Purchase Agreement due to the Plaintiff's demands for an arbitration of the devaluation of the practice and the threats of a lawsuit by the Plaintiff. The Defendant claims that a medical condition and related surgery prohibited her from seeing patients, but it was her intention to return to the practice in January 2007. An employee of the Practice testified that before the transfer of the business she occasionally scheduled medical appointments for the Defendant and on a few occasions Defendant cancelled patient visits for medical reasons. Plaintiff maintains that the Defendant was aware of the medical condition and knew at the time that the contract was executed that the Defendant would not be able to complete this provision of the Asset Purchase Agreement. Following the closing date, the weekly patient visits sharply declined: August, 2006-78/wk:

September, 2006-72/wk; October, 2006-67/wk; November, 2006-61/wk; December, 2006-55/wk. The Court finds the Defendant's position to be unpersuasive.

The Plaintiff's second cause of action is based on fraud. To establish a *prima facie* case for fraud, Plaintiff would have to prove that "(1) Defendant made a representation as to a material fact; (2) such representation was false; (3) Defendant intended to deceive Plaintiff; (4) Plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and (5) as a result of such reliance Plaintiff sustained a pecuniary loss." *Ross v. Louise Wise Servs.*, 8 NY3d 478 (2007). In an action for fraud, the Plaintiff must prove each element by "clear and convincing evidence." *Clark v. Wallace Oil,* 284 AD2d 492 (2d Dept 2001). In the matter before the Court the Plaintiff failed to establish a cause of action for fraud.

DAMAGES

Contract damages are ordinarily entered to give the injured party the benefit of the bargain by awarding a sum of money that will, to the extent possible, put that party in as good a position as it would have been in had the contract been performed. Restatement of Contracts [Second] §347, Comment a; §344.

Both parties asserted the number of patient visits directly related to the amount of revenue generated by the practice. Each party presented an expert to support the level of damages. The Court finds the Plaintiff's expert to be more credible. The data introduced at trial confirmed that monthly patient visits trended significantly downward from January 2006 though July 2006 and increasingly deviated from the 2005 average weekly figures throughout the balance of the 2006 calendar year. The Plaintiff's expert opined that projected visits from 2006 were 33% lower than the actual patient visits reported for 2005. The Plaintiff's expert applied the 33% percentage decline to the purchase price paid for the Practice and determined that the minimum economic damages suffered by the Plaintiff were approximately $57,400. The Court finds this figure to be credible and awards the Plaintiff a sum of $57,400, as a result of the Defendant's breach of the Asset Purchase Agreement. Interest pursuant to CPLR §5001 shall be computed from the closing date August 2, 2006.

This constitutes a Decision and Order of the Court.

Hon. Mark A. Montour, J.S.C.

GRANTED

JUN 11 2015

BY _____
PATRICIA HALL
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