Enterprise Radiology, P.C. v CDP Holdings Group, LLC
2016 NY Slip Op 32914(U)
January 25, 2016
Supreme Court, Nassau County
Docket Number: 601786-15
Judge: Timothy S. Driscoll
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 12**
ENTERPRISE RADIOLOGY, P.C. d/b/a WASHINGTON HEIGHTS IMAGING,	**NASSAU COUNTY**
Plaintiff,	**Index No: 601786-15**
	Motion Seq. Nos. 7, 8 and 9
-against-	**Submission Date: 11/23/15**
CDP HOLDINGS GROUP, LLC and LONG ISLAND RADIOLOGY ASSOCIATES, P.C.,	
Defendants.	
----------x	

Papers Read on these Motions:

Notice of Motion.....x
Affidavit in Support and Exhibits.....x
Affirmation in Support and Exhibits.....x
Memorandum of Law in Support.....x
Affirmation in Opposition and Exhibits.....x
Zapata Affidavit.....x
Reply Affirmation and Exhibit.....x
Reply Memorandum of Law in Further Support.....x
Notice of Motion.....x
Affirmation in Support.....x
Notice of Cross Motion.....x
Affirmation in Opposition/Support and Exhibits.....x
Reply Memorandum of Law in Further Support/Opposition...x

This matter is before the court on 1) the motion filed by Defendant CDP Holdings Group, LLC ("CDP") on November 17, 2015, 2) the motion filed by CDP on November 17, 2015, and 3) the cross motion filed by Plaintiff Enterprise Radiology, P.C. d/b/a Washington Heights Imaging ("WHI" or "Plaintiff") on November 18, 2015, all of which were submitted on November 23, 2015. For the reasons set forth below, the Court refers the motions and cross

motion to a hearing. The Court reminds counsel for the parties of their required appearance before the Court for a conference on January 25, 2016 at 9:30 a.m. at which time the Court will schedule the hearing.

BACKGROUND

A. Relief Sought

CDP moves for an Order modifying the Court's prior injunction by 1) allowing CDP to terminate any provision of medical records to Plaintiff within 30 days; and 2) requiring that Enterprise bear all of the costs associated with engaging MERGE or another vendor agreeable to CDP to migrate from CDP to Enterprise the uncompressed medical records of Enterprise patients that have not already been migrated. Plaintiff opposes the motion.

CDP also moves for an Order requiring that Plaintiff, as a contempt sanction, 1) pay CDP's costs of bringing this motion, plus $5,000; 2) place $80,000 in escrow with the County Clerk under the terms of the Court's so-ordered stipulation within 3 business days of the Court's Order; and 3) be subject to fines of $500 per day for any late payment.

Plaintiff cross moves for an Order requiring that CDP, as a contempt sanction, 1) pay Plaintiff's costs associated with this motion, plus $5,000; 2) immediately transfer Plaintiff's data in DICOM format; and 3) award such other relief as is appropriate to remedy CDP's violations. [1]

B. The Parties' History

The parties' history is outlined in detail in prior decisions ("Prior Decisions") of the Court dated May 11, 2015 ("May Decision") and July 28, 2015 ("July Decision") and the Court incorporates the Prior Decisions by reference as if set forth in full herein. In the May Decision, the Court granted, to a limited extent, Plaintiff's prior motion for injunctive relief, directing that the stipulation ("Stipulation") entered into by the parties on the record on March 20, 2015 shall remain in effect, pending further court order ("Injunction"). Pursuant to the Stipulation, Plaintiff agreed to place $35,000 in escrow by the close of business on March 23, 2015 and then $45,000 by the close of business on March 30, 2015 and Defendants agreed to restore access to the

[1] The Court previously issued a decision dismissing this action as asserted against Defendant Long Island Radiology Associates, P.C. ("LIRAD").

radiological records as they existed prior to February 17, 2015. In the July Decision, the Court 1) granted CDP's motion to dismiss the first, fifth and sixth causes of action, as well as Plaintiff's request for punitive damages, and otherwise denied CDP's motion to dismiss; and 2) granted the motion by Defendant Long Island Radiology Associate, P.C. ("LIRAD") to dismiss the Complaint against LIRAD.

As noted in the Prior Decision, the Complaint describes the nature of this action as follows:

> This is an action by WHI for conversion, declaratory judgment, specific performance, breach of contract, breach of good faith and fair dealing, tortious interference and injunctive relief against CDP and LIRAD...resulting from CDP's actions in barring WHI from accessing critical medical records of WHI's patients, specifically electronically stored mammograms for patients, many of whom have been diagnosed with breast cancer, as well as additional radiological images, and in preventing LIRAD from giving WHI access to these critical medical records and LIRAD's actions in agreeing or acquiescing to CDP restricting WHI's access to its medical records.
>
> Comp. at ¶ 4.

As also noted in the Prior Decision, the Complaint contains seven (7) causes of action. The remaining causes of action against CDP are: 1) a request for a declaratory judgment setting forth the rights and obligations of the parties, including that a) the mammography and other radiological records of WHI's patients are the property of WHI and its patients; b) CDP is improperly retaining and refusing to permit access to said records; and c) WHI does not owe to CDP any sum of money for the restoration of access to said records for the purpose of viewing said records or migrating them to WHI's PACS (the second cause of action), 2) a request for specific performance requiring Defendants to provide WHI with cost-free access to PACS until the migration of WHI's patients' records to WHI's PACS is complete (third cause of action), 3) breach of the parties' implied and/or oral contract to provide ready access to patient records (fourth cause of action), and 4) a request for injunctive relief prohibiting Defendants from restricting WHI's ready access to its patient records and ordering CDP to immediately restore WHI's access to LIRAD's PACS (seventh cause of action).

In support of CDP's motion to modify the Injunction, Daniel DiPietro ("DiPietro"), the principal of CDP, affirms that the parties anticipated that, pursuant to the Stipulation, the records

would eventually be migrated to Plaintiff permanently. DiPietro submits that an essential component of the Stipulation was that there be a firm date by which CDP would no longer be required to provide Plaintiff with free access to the records. DiPietro affirms that CDP would never have consented to the Stipulation without this assurance because it was concerned about having to indefinitely provide support to Plaintiff without being compensated. DiPietro also submits that it was implicit that Plaintiff would pay for the migration because, if CDP was going to bear the migration costs, it would simply have paid those costs immediately, rather than continuing to support Plaintiff without compensation.

DiPietro affirms that by April 3, 2015, CDP had fully transferred all mammogram records for Enterprise patients - the only type of records mentioned in Enterprise's prior motion for injunctive relief - so that Enterprise would no longer need CDP's support with respect to those records. CDP also provided access to the remaining records via a system called iConnect, which the Food and Drug Administration ("FDA") recognizes as a program of full diagnostic quality. Notwithstanding the setting of a firm date to migrate all of the records, over six months have passed and the non-mammogram records have not been migrated. Enterprise "has at every turn refused to pay for the transfer" (DiPietro Aff. in Supp. at ¶ 9).

DiPietro affirms his understanding that at a conference on October 16, 2015, counsel for Enterprise ("Plaintiff's Counsel") represented that migration could be completed in one day at no cost through a Virtual Private Network ("VPN"), and that the transfer process was simple. Based on these representations, the Court ordered that CDP transfer the records via VPN or bear the costs of another method. DiPietro affirms that the representations of Plaintiff's Counsel regarding a VPN transfer were incorrect for two reasons. First, the private network between CDP and Enterprise no longer exists due to Dr. Daniel Beyda's ("Dr. Beyda's") failure to pay the amounts due pursuant to a contract that Dr. Beyda signed on behalf of Enterprise which provided that Enterprise would assume the connection charges and the vendor's refusal to provide the connection until those amounts are paid. Second, Enterprise now claims that it wants "raw" (Dipietro Aff. in Supp. at ¶ 12) uncompressed medical images that exist only on archive tapes that would have to be restored, at considerable expense, before being transferred. DiPietro submits that the current practice, pursuant to which CDP provides access to compressed data via

iConnect, is apparently adequate for Enterprise because, since the issuance of the Injunction, Enterprise has never asked CDP to retrieve any uncompressed patient records from the archives.

DiPietro affirms that, following the October 16, 2015 conference, CDP offered to provide all of the compressed data to Enterprise at no cost but subsequently learned that Enterprise did not want the compressed data. MERGE, the company that created the systems at issue, has advised CDP that the uncompressed images can be transferred from the archive tapes to Enterprise at a cost of approximately $32,500 (see MERGE documentation, Ex. 7 to DiPietro Aff. in Supp.). This would allow Enterprise to load those images into any system that it wishes, without maintaining an ongoing relationship with CDP. In addition, CDP has always been prepared to respond promptly to any requests from patients directly for their records, and will continue to do so.

In opposition to CDP's motion to modify the Injunction, Victoria Beyda ("Victoria") affirms that she was present in Court on March 20, 2015 at which time the Stipulation was placed on the record. As set forth in a prior affidavit of Dr. Beyda, Enterprise placed $35,000 into escrow on March 23, 2015. Victoria affirms that, due to CDP's failure to fulfill its obligations under the Injunction, Enterprise did not place the additional $45,000 into escrow on March 30, 2015. Thereafter, however, notwithstanding CDP's alleged failure to restore the pre-February 17th status quo, Enterprise placed the remaining $45,000 in escrow.

Victoria affirms that prior to February 17, 2015, Enterprise had full access to the MERGE RIS system, which is comprised of patient documents. Since February 17, 2015, Enterprise has had no access to MERGE RIS. In addition, prior to February 17, 2015, Enterprise was able to view diagnostic quality, non-mammography images and to print, copy and transfer those images. Since February 17, 2015, Enterprise has not had that ability, and the images have not been diagnostic quality.

With respect to CDP's contention that "Enterprise has not requested any records at all since October 13" (see Dipietro Aff. in Supp. at ¶ 12), Victoria affirms that in beginning of October, CDP stated that it would no longer provide records to Enterprise. Notwithstanding the Court's direction on October 16, 2015 that CDP transfer Enterprise's data within 2 weeks via the VPN, CDP has not transferred those data, contending that the connectivity was shut down by the

vendor. Luis DeCastro ("DeCastro"), the manger of Enterprise, however, determined that this representation is not accurate. DeCastro affirms that on October 30, 2015 he spoke with Stephen Perfetti ("Perfetti"), a technical services technician for Lightower Fiber Networks ("Lightower"), the VPN provider. Perfetti confirmed that connectivity between Enterprise and CDP has not been cut off and sent an email to DeCastro confirming that fact (Ex. A to DeCasto Decl.).

In reply, CDP Counsel provides a copy of a Payment Default Notice from Lightower to LIRAD dated September 17, 2015 (Ex. A to Michael Reply Aff.). That Payment Default Notice advises LIRAD that its account is "delinquent" and reflects an amount due of $14,856.74.

Charles Zapata , an employee of CDP who serves as Chief Technology Officer of LIRAD, addresses Enterprise's contention that CDP would easily migrate, with no out-of-pocket cost, the raw uncompressed records of Enterprise's patients that are stored on CDP's systems. Zapata affirms that this contention is "incorrect" (Zapata Aff. at ¶ 2). Zapata affirms that the raw uncompressed data that Enterprise seeks is stored on archive tapes because of the manufacturer's configuration of CDP's computer systems and is unrelated to the parties' current disputes. This configuration was established when Dr. Beyda, the principal of Enterprise, was in charge of the business, and has not changed since approximately 2012. The tapes contain "intermingled data" from Enterprise and other CDP clients (Zapata Aff. at ¶ 3) and, therefore, it is not possible to simply hand over the archive tapes to Enterprise. In addition, CDP cannot simply put the archived tape data online and migrate it to Enterprise, as Enterprise has suggested. Rather, this process would require the assistance of MERGE, which is the reason that CDP has provided several quotes to Enterprise for MERGE to handle the migration.

With respect to Enterprise's contention that it lacks access to certain CDP systems and cannot print, copy or transfer records, Zapata affirms that Enterprise has, at all times, had the same access to the studies within the MERGE PACS system and the patient data in the MERGE RIS system that it had prior to the parties' dispute. In addition, Enterprise has never had access to the raw uncompressed data on the archive tapes. In light of the fact that LIRAD fired Dr. Beyda and Victoria in March 2015, CDP can no longer provide them with access to the data of LIRAD patients because doing so would violate HIPAA. CDP has been supplying Enterprise or its patients directly with CDs of their records as needed, and the data on those CDs can be freely

copied, printed or transferred.

Pursuant to a so-ordered Stipulation and Order Regarding Deposit of Funds with County Clerk dated October 26, 2015, the parties agreed that, consistent with the Orders placed on the record on October 16, 2015, Plaintiff is authorized to make, and the Nassau County Clerk is authorized to accept, deposits of funds by Plaintiff totaling $80,000. The Stipulation and Order also provides that the funds shall be held in escrow and released only as directed by stipulation of the parties or by further Order of the Court. CDP provides a copy of the transcript of the October 16, 2015 proceedings before the Court (Ex. F to Michael Aff. in Supp.). In his affirmation in support dated November 12, 2015, CDP Counsel affirms that Plaintiff's Counsel confirmed that the funds were not placed with the County Clerk as required. Plaintiff's Counsel also stated that a portion of the funds "may have" been placed with Enterprise's prior counsel (Michael Aff. in Supp. at ¶ 5), but Plaintiff's Counsel could not confirm that fact.

In opposition to CDP's contempt motion and in support of Plaintiff's cross motion, John Killcommons ("Killcommons") affirms that he is the principal of Pixel River Technology, LLC, a company that provides IT consulting, computer support services and network services to Enterprise. He affirms that what the parties have referred to as a VPN is a fiber optic ethernet connection between CDP and Enterprise. Lightower is the provider of that connection. To transfer data to Enterprise using this connection, CDP needs to authorize exportation of the data. Killcommons affirms that Enterprise is "ready and able" to receive the data (Killcommons Decl. at ¶ 6) and a costly server was built to allow Enterprise to receive the data from CDP.

C. The Parties' Positions

CDP submits that the Court's direction on October 16, 2015 that the migration be accomplished either through the purportedly no-cost VPN method, or by another method at CDP's expense, was premised on the representation of Plaintiff's Counsel that the transfer was a simple process that could be accomplished at no cost. Those representations, however, were inaccurate in light of the fact that the records that Enterprise seeks are on offline archive tapes, and the VPN network is not connected. Therefore, someone must bear the costs of the transfer and it would be inappropriate to impose that cost on CDP because the Injunction was issued based on the presumption that Enterprise would bear that cost. If CDP had believed it would

bear the cost, it would have done so months ago, rather than continue to provide free services to Enterprise. Modification of the Injunction is appropriate because it is unfair for CDP, which has been supplying services to Enterprise for over a year without compensation, to incur costs and, in effect, provide Enterprise with the relief it seeks in this action. Modification of the Injunction is also appropriate because there is no longer a danger of irreparable harm, assuming such a danger existed previously, because all of the mammography records were transferred in April.

Plaintiff opposes the motion to modify the Injunction submitting that, as demonstrated by the DeCastro declaration, CDP's representations regarding the VPN are inaccurate, and the VPN is in fact active. Plaintiff contends, further, that modification is inappropriate because CDP has not fully complied with the Court's directives. As outlined by Victoria, Enterprise is unable to access diagnostic quality images or transfer the images to patients and others and, therefore, does not have the same access to diagnostic quality images that it had prior to February 17, 2015.

In reply, CDP submits that 1) there is no dispute that the Injunction was premised on CDP not bearing further costs which is the reason that CDP insisted on a firm date by which it could cease supporting Enterprise's business; 2) the data that Enterprise seeks cannot be easily transferred, both because of non-payment to the VPN vendor which was to result in the connection being cut off and because there are offline archive tapes that cannot simply be transferred over the internet; and 3) Enterprise cannot demonstrate any ongoing irreparable harm in light of the fact that CDP has already migrated the mammography images and because there is no evidence that Enterprise's business has been affected by any failure to migrate data.

With respect to CDP's contempt motion, CDP submits that Plaintiff is in violation of the Court's directives by virtue of its failure to comply with the Injunction at the time of its issuance and its failure to place all of the required funds with the County Clerk pursuant to the court-ordered stipulation. In opposition to the motion and in support of Plaintiff's cross motion, Plaintiff's Counsel affirms that, at or about the time that the Court so-ordered the stipulation regarding the deposit of monies with the Clerk, the parties were engaged in settlement discussions. On November 11, 2015, Plaintiff's Counsel communicated to CDP Counsel his concern about one item contemplated by the settlement. CDP Counsel did not respond and, instead, filed the contempt motion. Plaintiff's Counsel affirms that his office has made all

necessary arrangements to deposit the funds with the Clerk and submits that it is CDP, not Plaintiff, that is in contempt of the Court's directives by virtue of its refusal to restore the pre-February 17, 2015 status quo and transfer data via the parties' virtual private network or fiber optic ethernet connection.

RULING OF THE COURT

A. Contempt

To find a party in civil contempt of court pursuant to Judiciary Law § 753, the applicant must demonstrate, by clear and convincing evidence, 1) that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect; 2) that the order was disobeyed and the party disobeying the order had knowledge of its terms; and 3) that the movant was prejudiced by the offending conduct. *Matter of McNelis v. Carrington*, 116 A.D.3d 858, 859 (2d Dept. 2014), citing *El-Dehdan v. El-Dehdan*, 114 A.D.3d 4, 16-17 (2d Dept. 2013), quoting *Bernard-Cadet v. Gobin*, 94 A.D.3d 1030, 1031 (2d Dept. 2012) and citing, *inter alia*, Judiciary Law § 753(A) and *McCain v. Dinkins*, 84 N.Y.2d 216, 226 (1994).

An application to adjudicate a party in contempt is treated in the same fashion as a motion and a hearing must be held if issues of fact are raised. *Gomes v. Gomes*, 106 A.D.3d 868, 869 (2d Dept. 2013), quoting *Quantum Heating Servs. v. Austern*, 100 A.D.2d 843, 844 (2d Dept. 1984) (citation omitted). A hearing, however, is not necessary when there is no factual dispute as to the party's conduct unresolvable from the papers on the motion. *Gomes v. Gomes*, 106 A.D.3d at 869, quoting *Quantum Heating Servs. v. Austern*, 100 A.D.2d at844 (internal quotation marks omitted).

B. Modification of Injunction

A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court and may be granted upon compelling or changed circumstances that render continuation of the injunction inequitable. *Thompson v. 76 Corp.*, 54 A.D.3d 844, 846 (2d Dept. 2008), quoting *Wellbilt Equip. Corp. v. Red Eye Grill*, 308 A.D.2d 411 (1st Dept. 2003) (internal quotation marks omitted), and citing CPLR § 6314 and *Thompson v. 76 Corp.*, 37 A.D.3d 450, 452-453 (2d Dept. 2007). A motion to vacate or modify a preliminary injunction is addressed to the sound discretion of the court which also has the power to impose conditions. One claiming

error in its exercise has to show an abuse of such discretionary power. *Rosemont Enterprises, Inc. v. Irving*, 49 A.D.2d 445, 448 (1st Dept. 1975), *app. dism.*, 41 N.Y.2d 829 (1977), citing 7A Weinstein-Korn-Miller, NY Civ Prac, par 6301.13.

C. Application of these Principles to the Instant Action

The Court refers the motions and cross motion to a hearing. With respect to CDP's motion to modify the injunction, the submissions raise issues regarding the appropriateness of continuing the Injunction. CDP has provided submissions in support of its contention that it is unfairly being required to continue to provide services to Plaintiff at its own expense, and that any threat of irreparable harm that was present at the time of the Injunction no longer exists. Plaintiff has provided affidavits and documentation that arguably contradict those submissions. With respect to the motion and cross motion asking the Court to impose contempt sanctions, the submissions arguably establish that one or both of the parties disobeyed the Court's clear directives and that the other party was prejudiced by that conduct. In light of the factual disputes, a hearing is required on the motions and cross motion.

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 Certification Conference on January 25, 2016 at 9:30 a.m. at which time the Court will schedule the hearing as directed herein.

ENTER

DATED: Mineola, NY
January 25, 2016

HON. TIMOTHY S. DRISCOLL
J.S.C.