Specfin Mgt. LLC v Elhadidy
2017 NY Slip Op 33341(U)
October 12, 2017
Supreme Court, Saratoga County
Docket Number: Index No. 2015-51
Judge: Ann C. Crowell
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DECISION AND ORDER OF THE HONORABLE ANN C. CROWELL, DATED OCTOBER 12, 2017, WITH NOTICE OF ENTRY [12 - 19]

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

SPECFIN MANAGEMNET LLC, AS ASSIGNEE OF GTA ASSET BASED FUND, A SEGREGATED SERIES OF IFUNDS LLC,,

Plaintiff,

-against-

NABIL AHMED ELHADIDY and HELIOPOLIS MEDICAL, P.C.,

Defendants.

DECISION and ORDER
RJI #45-1-2015-0230
Index # 2015-51

APPEARANCES:

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ANN C. CROWELL, J.

Specfin Management LLC, as assignee of GTA Asset Based Fund, a Segregated Series of Ifunds LLC ("GTA") requests an Order pursuant to CPLR § 3212 granting partial summary judgment on the issue of liability on the First and Second cause of action and the dismissal of defendants Nabil Ahmed Elhadidy ("Elhadidy") and Heliopolis Medical, P.C.'s ("Heliopolis") (collectively "defendants") Third Counterclaim. Defendants have cross moved seeking an Order pursuant to CPLR § 3212 dismissing GTA's complaint and granting summary judgment on defendants' Third Counterclaim in the amount of $140,852.57.

Elhadidy is a medical doctor and president of Heliopolis. Heliopolis is a professional

corporation established to conduct no-fault medical examinations. Elhadidy performed no-fault medical examinations for Heliopolis patients. Heliopolis sought funding from GTA to establish and finance its no-fault examination business. GTA and defendants entered into a written agreement dated May 20, 2014 , entitled "No Fault Medical Claim Flow Funding and Security Agreement." ("the Agreement"). Elhadidy personally guaranteed the obligations and commitments of Helipolis.

GTA advanced money to Helipolis in exchange for repayment of those monies pursuant to the terms of the Agreement. Helipolis' repayment was to be funded from the proceeds of its insurance claim payments. The Portek company was used to process the payments from Heliopolis to GTA. Portek was to receive the insurance payments, take its fee and deposit the remaining funds in a First Niagara Bank account. Those funds would be accessed to make Helioplis' payments to GTA. Any excess amounts were to be forwarded to a second First Niagara Bank account for the benefit of Helipolis.

At issue is the interpretation of the Agreement and the parties' rights and responsibilities flowing from the Agreement. The relevant portions of the Agreement follow:

> Section 5.2.9: "Change in services. Service Provider agrees that he will not deviate from providing the stated scope of medical services now comprising the Services without prior written notification to the Lender. If Service Provider alters the Services and/or augments it in any way Lender at its sole discretion may elect to accelerate this Agreement."
>
> Section: 5.2.11: "Ordinary Course of Services. Service Provider will operate the Services in its ordinary course and shall maintain highly skilled and sufficient personnel to provide acceptable services."
>
> Section: 5.2.14: "Cooperation. Service Provider will cooperate with Lender and perform all necessary duties as required for the collections of Acceptable Claim Receivables including but not limited to executing documents, attending court

> hearings when necessary, appearing at EUO's providing the necessary reports or responses, participating in requested depositions, attendance at court and hearings, assistance (where necessitated) in collection of accounts or in any other manner requested by Lender in connection with collecting on the Acceptable Claims submitted."
>
> Section: 9.1, in relevant part: "Events of Default: The occurrence of any of the following shall be an event of default ("Event of Default"): *** (x) breach of the covenants set forth in section 5.2 hereof ***"

Heliopolis ceased its operations sometime in August 2014. Among various other allegations, GTA alleges that Heliopolis and Elhadidy ceasing operations is an event of default under the terms of their Agreement. Defendants contend that shutting down the operation of Heliopolis does not constitute a breach under Sections 5.2.9, 5.2.11 and 9.1 of the Agreement.

"The best evidence of what parties to a written agreement intend is what they say in their writing. Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Community Bank, NA. v Paul,* 133 AD3d 1008 [3d Dept. 2015], citing *Greenfield v Philles Records,* 98 NY2d 562, 569 [2002]. The agreement herein was negotiated between sophisticated, counseled business people negotiating at arm's length. *See, Reiss v Financial Performance Corp.,* 97 NY2d 195 [2001]. The Court "may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." *Catlyn & Derzee, Inc. v Amedore Land Developers, LLC,* 132 AD3d 1202,1204 [3d Dept. 2015], quoting *Bailey v Fish & Neave,* 8 NY3d 523, 528 [2007].

The Court finds that the Agreement's terms are complete, clear and unambiguous regarding what constitutes an "event of default." The unilateral cessation of Helipolis' business is a breach of the Agreement. Heliopolis was prohibited from changing the scope

of services without notifying GTA. Heliopolis failed to maintain highly skilled and sufficient personnel to provide its services. By closing down the business, Heliopolis changed the scope of its services and failed to maintain any personnel to provide services. While Heliopolis was not required to request funding from GTA pursuant to Section 2.1(c) of the Agreement, Section 2.1(c) of the Agreement does not create an ambiguity with respect to whether the cessation of business is an "event of default." Heliopolis was free not to accept additional funding from GTA. Heliopolis was not free to cease operations until its contractual obligations to GTA were satisfied.

GTA has established that Heliopolis failed to cooperate with collecting on the claims under Section 5.2.14. Alfred Marrapodi ("Marrapodi"), President of SpecFin Management, LLC's affidavit attesting to Elhadidy's complete failure to communicate with plaintiff regarding the No-Fault Claims satisfies plaintiff's *prima facie* burden on this issue. Marrapodi's knowledge, through his business records, of Elhadidy's failure to provide requested documentation and failure to participate in required EUOs (Examinations Under Oath) is additional proof of Heliopolis' breach of Section 5.2.14. Elhadidy denies he failed to cooperate in the collection of the claims. However, Elhadidy has not rebutted Marrapodi's allegation that he did not communicate with plaintiff regarding the no-fault claims. Elhadidy has not demonstrated he provided required documentation to support Heliopolis' claims or participated in a required EUO after Heliopolis ceased operations. Heliopolis and Elhadidy's failure to cooperate subjects Elahdidy to personal liability under Section 9.3 of the Agreement. Additionally, Elhadidy has admitted he attempted to divert insurance payments directly to himself in contravention of the Agreement. The remainder of GTA's claims of breach need not be considered. GTA is granted partial summary

judgment on the issue of liability on the first and second cause of action against defendants Heliopolis and Elhadidy. *Ahlstrom Machinery, Inc. v Assoc. Airfreight, Inc.*, 251 AD2d 852 [3d Dept. 1998].

GTA has not moved for summary judgment on the issue of damages. However, the issues of attorneys' fees and default interest have been raised in the papers. The Assignment Agreement, attached as Exhibit A to the Agreement and signed contemporaneously with the Agreement states, in relevant part:

> "1. OBLIGATIONS: This assignment of collateral and grant of security interest shall secure all loans, advances, indebtedness and each and every other obligation or liability of Service Provider owed to Secured Party, however created, of every kind and description *** including, without limitation, all loans, advances, indebtedness and each and every other obligation or liability arising under the No Fault Medical Claim Flow Funding and Security Agreement dated of even date herewith *** and all expenses and attorneys' fees incurred or other sums disbursed by Secured Party under this Agreement or any other document, instrument or agreement related to any of the foregoing (collectively the "Obligations")." (emphasis supplied)

The Assignment Agreement specifically incorporates all of the obligations contained within the Agreement and authorizes GTA to seek recovery for reasonable attorneys' fees and other expenses incurred in pursuing its funds. *Loch Sheldrake Beach & Tennis Inc. v Akulich*, 141 AD3d 809, 815-816 [3d Dept. 2016]. The reasonableness of GTA's counsel fees shall be a subject of the inquest on damages in this action.

The defendants contend that interest does not apply and that plaintiff has waived any claim for interest on the alleged default. Section 9.2 of the Agreement provides the rights and remedies upon the occurrence of a default. Section 9.2(iii) states:

> "Lender shall have the option of curing any Default, including the paying of any outstanding amounts due by Service Provider for taxes and adding such paid amounts to the amount of outstanding Obligations to be paid by Service Provider at a default interest rate of twenty-four (24%) per annum"

Whether the default interest rate applies to all amounts owed by the Service Provider, or only the amount of taxes added to the outstanding obligations, is unclear. The default interest rate is not referenced under Section 9.2(ii) of the Agreement. Section 9.2(ii) deals with the amounts advanced by the Lender which have not been paid upon the event of a default. Generally, ambiguities are construed against the drafter. *Finch v Haynes*, 104 AD3d 1113 [3d Dept. 2013]. Accordingly, the parties may provide extrinsic evidence in support of their positions at trial of whether or not a default interest rate of 24% would apply to the amounts outstanding at the time of defendants' breach of the Agreement. If the default interest rate is not applicable, the Court would still be required to ascertain the applicable date for statutory interest to be computed. *See, CPLR § 5001; Revell v Guido*, 124 AD3d 1006 [3d Dept. 2015].

GTA's motion for summary judgment dismissing defendants' Third Counterclaim is denied. Defendants' cross motion for summary judgment on their Third Counterclaim in the amount $140,852.57 is denied. The total amount of advances pursuant to the agreement was $370,472.13. GTA asserts that as of July 23, 2017, defendants owe $622,043.39 consisting of: the uncollected principal balance of $251,104.25; less $50,000.00 from the foreclosure credit bid; plus legal and other expenses of $171,339.83, plus default interest at 24% per annum of $249,599.31. After the foreclosure sale of the collateral to itself for a $50,000.00 "credit bid," GTA collected $391,956.82 from the collateral consisting of $46,176.75 in post-foreclosure voluntary payments and $345,780.07 in post-foreclosure arbitration payments.

Defendants' cross-motion for summary judgment in the amount of $140,852.57 ($391,956.82 [the amount collected by GTA on the foreclosed collateral] - $251,104.25 [the

principal balance owed on the advances to Heliopolis]) must be denied in the first instance since GTA will be entitled to some amount of reasonable attorneys' fees and other expenses incurred in pursuing its funds. GTA will also be entitled to some award of interest, either at the statutory rate, or the default rate referenced in the Agreement. Additionally, the amount of any possible deficiency or surplus must await a determination of whether the public sale of the collateral was accomplished in a commercially reasonable manner and/or whether defendants should be credited with the fair value of the collateral rather than the $50,000 "credit bid." There is no evidence presented of the fair market value of the accounts receivable prior to the foreclosure sale. There is a strong equitable argument that defendants should be credited with the full amounts collected from the accounts receivable since GTA would have collected these amounts pursuant to the Agreement without ever having resorted to the foreclosure sale. GTA was not faced with any risk that its collateral would be sold at a depressed price since it was the only bidder present at the foreclosure sale. *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 132 S. Ct. 2065, 2070 fn. 2 [2012].

The Court further notes that GTA's contention that it's damages could have been much higher if the Agreement had been performed as intended (i.e with defendants taking total advances of $2.5 million) is meritless. Heliopolis was not required to request funding from GTA pursuant to Section 2.1(c) of the Agreement.

GTA's motion for partial summary judgment is granted on GTA's First and Second causes of action. GTA's motion for summary judgment dismissing defendants' Third Counterclaim and defendants' cross motion for summary judgment on the Third Counterclaim are both denied. Any relief not specifically granted is denied. No costs are

awarded to any party. This Decision shall constitute the Order of the Court. The original Decision and Order shall be forwarded GTA's attorney for filing and entry. The documents submitted under seal to the Court shall be returned to the party who submitted them. The remainder of the underlying papers will be filed by the Court.

A settlement conference is scheduled for **November 14, 2017 at 1:30 p.m.** The attorneys and the parties and/or principals of the parties are expected and required to personally attend the conference in the Saratoga County Courthouse, 30 McMaster Street, Ballston Spa, New York.

Dated: October 12, 2017
Ballston Spa, New York

ANN C. CROWELL, J.S.C.

Papers Received and Considered:

Notice of Motion, dated July 7, 2017

Affirmation of Chester R. Ostrowski, Esq., dated July 7, 2017, with Exhibits A-Z

Affidavit of Alfred Marrapodi, sworn to July 7, 2017

Plaintiff's Memorandum of Law, dated July 7, 2017

Notice of Cross Motion, dated August 4, 2017

Affirmation of Lloyd M. Eisenberg, Esq., dated August 4, 2017, with Exhibits 1-2

Affidavit of Nabil Ahmed Elhadidy, M.D., sworn to August 4, 2017

Defendants' Memorandum of Law, dated August 5, 2017

Affidavit of Alfred Marrapodi, sworn to August 24, 2017, with Exhibit 1

Plaintiff's Memorandum of Law, dated August 25, 2017

Defendants' Memorandum of Law, dated September 8, 2017