Bronx Mgt., Inc. v Dalal Med., PC
2018 NY Slip Op 30228(U)
February 8, 2018
Supreme Court, New York County
Docket Number: 651216/2016
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

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BRONX MANAGEMENT, INC., et al.,

Plaintiffs,

Index No.: 651216/2016

– against –

DECISION/ORDER

DALAL MEDICAL, PC, et al.,

Defendants.

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Plaintiff Bronx Management, Inc. (Bronx Management) brings this action against defendant Dalal Medical, PC (Dalal) to recover damages for, among other things, Dalal's alleged breach of a Collection Agreement entered into between Dalal and Bronx Management (the Agreement [Sobel Aff. In Supp., Exh. A]).[1] Section 1 of this Agreement gave Bronx Management the exclusive right to commence proceedings to collect payments on certain outstanding bills previously submitted by Dalal, a medical service provider, to insurance companies (the Bills). The parties dispute whether the Collection Agreement remains in full force and effect. Bronx Management now moves for an order restraining Dalal and a former individual defendant, Rashikesh Dalal, from interfering with Bronx Management's collection efforts, and directing them to post a bond in the amount of $1,000,000.

It is well settled that a preliminary injunction is an extraordinary provisional remedy that will be granted only where the movant shows a likelihood of success on the merits, the potential for irreparable injury if the injunction is not granted, and a balance of equities in the movant's favor. (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; CPLR 6301.)

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[1] The Collection Agreement is not dated, but states that its effective date is December 1, 2011. (Agreement, § 7.)

The proponent of a motion for a preliminary injunction must meet its burden by clear and convincing evidence. (Delta Enterp. Corp. v Cohen, 93 AD3d 411, 412 [1st Dept 2012].)

Here, Bronx Management fails to show a likelihood of success on the merits of its claim that the Collection Agreement remains in full force and effect. Termination of the Collection Agreement is governed by section 7, which provides, in pertinent part, that the Agreement will continue in full force and effect for twelve years following its effective date of December 1, 2011 "unless sooner terminated." Section 7 further provides that "either party may terminate this Agreement at the end of the first 90 days thereof, upon at least 45 days written notice to the other party." Dalal submits evidence in opposition that it terminated the Agreement by written notice dated April 5, 2013. (Dalal Aff. In Opp., Exh. C.)

Bronx Management first contends that the April 5 notice was ineffective because the language in section 7 authorizing termination "at the end of the first 90 days" in effect prohibits termination of the Agreement after that 90-day period has passed. (Sobel Aff. In Supp., ¶ 5.) The court holds that section 7 is not reasonably susceptible of this interpretation. Bronx Management's interpretation would lead to the commercially unreasonable result of affording Dalal only 45 days (given the 45 day notice requirement) to make a choice either to terminate Bronx Management or to be bound to that entity and its collection efforts for more than a decade. The court holds that the only reasonable interpretation of section 7 is that it permits termination upon at least 45 days notice beginning on the 90-day anniversary of the effective date.

Bronx Management also fails to make a clear and convincing showing that Dalal's termination notice was not delivered in compliance with section 8 of the Agreement, which provides that notices must be delivered by certified mail or hand delivery. Bronx Management's attorney, Svetlana Sobel, states that Dalal's April 5 notice was not delivered by either of these

authorized methods to her client. This conclusory assertion is not made on personal knowledge and is insufficient to meet the clear and convincing standard.[2]

Moreover, there has been no showing that Bronx Management will suffer irreparable injury if the injunction is not granted. In support of this motion, Bronx Management claims that the statute of limitations period on the Bills is about to run, and that if collection proceedings are not commenced imminently, the Bills will become uncollectable. (Sobel Aff. In Supp., ¶ 9.) Bronx Management does not claim that the fees it will allegedly lose if an injunction is not ordered cannot be calculated and compensated in the form of monetary damages. (See Fox v Wiener Laces, Inc., 74 AD2d 549, 549 [1st Dept 1980].) Bronx Management's inexplicable failure to bring this motion at any time during the first four years of this litigation is also antithetical to any claim that it will suffer irreparable harm if an injunction is not ordered. (See Mercy Serv. Sys., Inc. v Schmidt, 50 AD2d 533 [1st Dept 1975].)

Finally, Bronx Management fails to show a balance of equities in its favor. Dalal claims that it terminated Bronx Management based on indications that Bronx Management was engaged in improper billing practices in Dalal's name. (Dalal Aff. In Opp., ¶ 6.) Bronx Management submits no reply papers, and thus fails to rebut this claim. Under these circumstances, the equities would not be served by permitting Bronx Management to continue to arbitrate and/or litigate collection proceedings on behalf of Dalal.

With respect to the branch of the motion seeking an order compelling Dalal to post a bond in the amount of $1,000,000, Bronx Management fails to cite any statute or case law authorizing the court to order such relief. To the extent that Bronx Management's request for a

[2] As the court holds that Bronx Management fails to make a showing of a likelihood of success on the merits of its claim that the Agreement remains in full force and effect, the court need not address Dalal's further contention that, under the Agreement, Bills first must be individually "assigned" to Bronx Management before that entity has any right to commence proceedings to collect payments on those Bills. (See Polland Aff. In Opp., ¶ 6.)

bond can be construed as a request for attachment of Dalal's assets in the amount of $1,000,000, its burden is to show, "by affidavit and such other written evidence as may be submitted, that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff." (CPLR 6212 [a].) The court in its discretion must also consider the need for the attachment. (See CPLR 6223; Capital Ventures Intl. v Republic of Argentina, 443 F3d 214, 219-222 [2d Cir 2006] [applying New York law].) For the reasons stated above, Bronx Management fails to show a likelihood of success on the merits of its claims that the Collection Agreement is in full force and effect. Moreover, on this motion, no showing is made of any past breach of contract. Bronx Management does not claim, let alone show, that any ground for attachment provided for in section 6201 exists. Nor does it show that it has any need for an attachment to protect its interests. The court rejects Bronx Management's apparent contention that Dalal's refusal to authorize Bronx Management to collect payments on Dalal's unpaid Bills constitutes an intentional "waste of assets" that could be used to satisfy a judgment and warrants a bond or attachment. (See Sobel Aff. In Supp., ¶ 10.) Bronx Management cites no authority and makes no evidentiary showing in support of that contention.

The above reasoning mandates the denial of Bronx Management's motion in its entirety.[3] It is accordingly hereby

ORDERED that the motion of Bronx Management, Inc. for an order restraining Dalal Medical, PC and former individual defendant Rashikesh Dalal from interfering with Bronx

[3] It is noted that Rashikesh Dalal, a principal of Dalal against whom Bronx Management also seeks injunctive relief, has not been a party to this action since September 23, 2013, when this court granted the original defendants' pre-note-of-issue motion for summary judgment to the extent of dismissing all claims against him. (NYSCEF No. 39.)

Management, Inc.'s collection efforts, and directing them to post a bond in the amount of $1,000,000, is denied in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
February 8, 2018

MARCY FRIEDMAN, J.S.C.