Molina Healthcare, Inc. v Wellcare Health Plans, Inc.
2019 NY Slip Op 30949(U)
April 8, 2019
Supreme Court, New York County
Docket Number: 651328/2018
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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MOLINA HEALTHCARE, INC., Plaintiff, - v - WELLCARE HEALTH PLANS, INC.,HERITAGE HEALTH SYSTEMS, INC. Defendant.	
INDEX NO.	651328/2018
MOTION DATE	10/24/2018
MOTION SEQ. NO.	001

DECISION AND ORDER

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HON. SALIANN SCARPULLA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 19, 25, 26, 27
were read on this motion to/for DISMISS.

This action concerns the purchase of nonparty Today's Options of New York, Inc. ("TONY"), a health services plan, by plaintiff Molina Health Care, Inc. ("Molina") from defendant Heritage Health Systems, Inc. ("Heritage") pursuant to a stock purchase agreement ("SPA"). Defendant WellCare Health Plans, Inc. ("WellCare") guaranteed Heritage's performance under the SPA.

The parties entered into the SPA on April 19, 2016 and, according to a "Closing Certificate" produced by defendants, the transaction closed on August 1, 2016. Nearly a year later, on June 26, 2017, Molina sent defendants a notice for various indemnification claims based on alleged breaches of representations and warranties in the SPA ("Claims Notice"). On August 22, 2017, defendants responded to the Claims Notice, refusing indemnification for any of the claims raised.

Molina subsequently brought this action in 2018. The complaint alleges that defendants breached their contractual obligations by failing to: 1) disclose and/or properly accrue certain liabilities in TONY's financial statements; 2) prepare TONY's financial statements in accordance with GAAP (generally accepted accounting principles); 3) make available all of TONY's contracts; 4) produce all of TONY's corporate records; and 5) indemnify Molina for the damages it sustained as a result of defendants' breaches.

Section 10.2 of the SPA addresses Heritage's obligation to indemnify Molina. That section provides that Heritage "indemnifies [Molina] . . . against and agrees to hold [it] . . . harmless from any and all claims, demands, liabilities, damage, loss and expense . . . actually suffered by [Molina] . . . arising out of (i) any misrepresentation or breach of warranty made by [TONY] or [Heritage] in this Agreement, the Transaction Documents or any certificate delivered in connection herewith or therewith, (ii) breach of covenant or agreement made or to be performed by [TONY] prior to the Closing or [Heritage] prior to or following the Closing pursuant to this Agreement, the Transaction Documents or any certificate delivered in connection herewith or therewith . . . ." Heritage's obligation to indemnify, however, is not triggered until the aggregate losses exceed $413,000.00.

The complaint seeks $2,624,836.57 in damages for breach of contract. Additionally, in a separate cause of action, Molina seeks specific performance of the SPA by ordering Heritage to completely produce TONY's corporate records. Defendants now move to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

Discussion

On a CPLR 3211 (a) (7) motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp*., 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). "Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.,* 29 NY3d 137, 142 [2017]). Additionally, on a CPLR 3211 (a) (1) motion based on documentary evidence, dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Constellation Energy Servs. of N.Y., Inc. v New Water St. Corp.,* 146 AD3d 557, 557 [1st Dept 2017]).

Breach of Contract Based on Failure to Disclose and Adhere to GAAP

Section 4.08 (a) of the SPA provides that TONY "has delivered to Molina: (i) true and complete copies of its audited balance sheet dated December 31, 2015 . . . and (ii) true and complete copies of its unaudited interim balance sheet . . . dated February 29, 2016 . . . and the related unaudited statements of income for the two (2)-month period ended on the Interim Balance Sheet Date . . . ." It is further represented and warranted that those "Financial Statements have been prepared from and are consistent with the books, records and accounts of [TONY]. The Financial Statements: (x) have been prepared in accordance with GAAP; and (y) fairly and accurately present in all material

respects the financial position of [TONY] as of the dates thereof and the statements of income and cash flow for the periods then ended, subject, in the case of the Interim Financial Statements, to normal recurring year-end adjustments and to the absence of notes."

The complaint alleges that TONY and Heritage breached section 4.08(a) of the the SPA by failing to disclose and accrue certain liabilities. Specifically, Molina alleges that TONY, as a Medicaid managed health care plan, was required to remit certain monies, denoted as "Hospital Reinvestment Reconciliation Funds," to the New York Department of Health ("DOH"). Molina further alleges that on May 26, 2017, TONY received notification from the DOH that, for the period of April 2015 and April 2016, it was required to pay $1,405,932.00 after certain adjustments. Molina claims that, "[i]n accordance with GAAP, TONY should have accrued a liability of $1,405,932.00 for the Hospital Reinvestment Reconciliation Funds in the Financial Statements."

Contrary to Molina's position, these allegations are insufficient to state a claim for breach of section 4.08 of the SPA. Consistent with the SPA, TONY delivered to Molina financial statements for the year ending December 2015 and an interim balance sheet dated February 26, 2016. The failure to disclose the DOH liability on those financial statements was not violation of GAAP-compliance because TONY did not receive notification of the alleged liability until May 26, 2017, *i.e.*, after the closing date set forth in the Closing Certificate. Moreover, the DOH was adjusting the amount owed during the fiscal years April 2015 and April 2016. Therefore, although the DOH liability may

have existed at the time that TONY made the financial statements and disclosure schedule, Molina does not sufficiently allege that TONY knew any more about the liability than the information presented in such documents to accurately reflect the liability in accordance with GAAP.

Moreover, the disclosure schedule refutes Molina's allegation that the DOH liability is also a violation of section 4.10 of the SPA[1], which provides that there are no undisclosed liabilities. Section 4.10 specifically excludes "[l]iabilities disclosed on . . . the Company Disclosure Schedule[.]" That disclosure statement provides that "[b]ased on DOH reconciliations, TONY may need to pay back a portion of [] payments it received . . . [and] [t]he exact amount that may be owed is currently unknown[.]" Therefore, because the DOH liability was explicitly disclosed as a potential future liability, this portion of Molina's claim is also dismissed (*see Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 521 [2d Dept 2007]).

Breach of Contract Based Upon the Undisclosed Contract

Section 4.11 (a) represents and warrants that the "Company Disclosure Schedule sets forth a true and complete list . . . of each of the following agreements to which [TONY] is party[,]" including, in relevant part, "(i) Contracts . . .which [TONY] has annual payment obligations of more than [$100,000.00] . . . [and] (x) Contracts with a Third Party which contain any exclusivity right in favor of a Third Party[.]"

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[1] Section 4.10 of the SPA provides, in part, that "[t]here are no Liabilities of [TONY] . . . that would be required under GAAP to be shown on a balance sheet of [TONY]"

Molina alleges, and defendants does not deny, that TONY did not produce a letter agreement dated November 12, 2015, between nonparty Express Scripts, Inc. ("Express") and TONY (the "Express Letter"). Molina claims that defendants breached the SPA by failing to disclose the Express Letter, and that Molina subsequently incurred $1 million in damages when it was forced to negotiate the termination of its relationship with Express.

The Express Letter provides that TONY and Express agree to complete an amendment to an agreement already between them, the "Pharmacy Benefit Management Agreement," which was disclosed. Additionally, the Express Letter provides that TONY and Express agree to complete renewal documents for the Pharmacy Benefit Management Agreement and a second agreement, the "Pharmacy Network Services IPA Agreement." Notably, the renewal documents for both agreements "shall designate Express [] as TONY's exclusive provider of PBM services for a three (3) year term."

Defendants assert that the SPA did not put them under any obligation to produce the Express Letter, because that letter was merely an agreement to agree, its effect was temporary, and it was superseded by the amended agreement between TONY and Express, effective January 1, 2016, which defendants did disclose.

Contrary to defendants' position, the Express Letter contemplates an exclusive relationship with Express and therefore, qualifies for disclosure pursuant to section 4.11. Although defendants argue that it had no obligation to disclose the Express Letter because it disclosed the amended Pharmacy Benefit Management Agreement, the Express Letter references two agreements. Defendants' disclosure of one agreement

contemplated therein does not address the failure to disclose a second agreement also referenced therein. Therefore, at this time, I deny dismissal of the breach of contract cause of action based on the failure to disclose the Express Letter.

Defendants additionally argue that even failure to disclose the Express Letter was a violation of section 4.11, Molina is not entitled to indemnification because it failed properly to give defendants notice pursuant to section 10.4. That section provides, in part, that the party "seeking indemnification under [the indemnification provision] agrees to give prompt notice in writing to the Party against whom indemnity is to be sought [] of the assertion of any claim or the commencement of any suit, action or proceeding by any Third Party . . . in respect of which indemnity may be sought under such Section . . . ."

According to defendants, Molina should have informed defendants before making the payment to terminate the contractual relationship with Express, and Molina deprived defendants of the opportunity to participate in resolving the issue with Express, as is their right under the SPA.

However, Molina's alleged failure timely to give defendants' notice and the opportunity to participate does not necessarily relieve defendants of their indemnification obligation, because the SPA further provides that "[t]he failure to so notify . . . shall not relieve the [defendants] of its obligations hereunder, except (and then only) to the extent such failure shall have actually prejudiced the [defendants]." Defendants' claim that they were actually prejudiced presents factual issues which should not be determined on a pre-answer motion to dismiss, and I also deny dismissal on this basis.

Breach of Contract Based Upon the Undisclosed Smaller Liabilities

Molina also alleged in the complaint that defendants breached section 4.10 of the SPA by failing to disclose that TONY owed $189,225.60 to an electronic data clearinghouse, and $29,678.97 to a telephone company. Defendants argue that these claims are barred by the SPA because defendants are not required to indemnify Molina until the aggregate amount of losses exceeds $413,000.00. However, because I sustained the breach of contract cause of action as related to the Express Letter, it is premature to dismiss this part of the breach of contract cause of action on the sole ground of failure to meet the floor of aggregate losses.

Breach of Contract Based on Failure to Disclose Corporate Records

The complaint alleges that defendants breached the SPA by not producing all of TONY's corporate records, as represented,[2] without identifying any specific document that defendant failed to produce.[3] Molina seeks specific performance and, also, alleges that the failure to produce corporate records caused it to suffer damages in an amount to be determined at trial.

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[2] Molina alleges a litany of provisions that were allegedly breached, including sections 3.02, 4.01, 4.02, 4.05, 4.06, 4.31, 8.02.

[3] The Claims Notice indicates that plaintiff did not receive documents evidencing that TONY formally appointed a board of directors, that TONY's board of directors and Heritage adopted TONY's bylaws, that TONY's board of directors authorized the issuance of 200 shares to Heritage, and more important documents.

Section 4.31 of the SPA provides "[t]he (a) minute books and stock books of the [TONY], as previously made available to [Molina] . . ., contain accurate records of all material meetings of and all material corporate actions or written consents by their applicable shareholder(s) and Board of Directors, and (b) books and records related to Providers and Members, as previously made available to [Molina] . . . , are true and correct in all material respects." Plaintiff does not allege or identify any corporate record that defendants failed to deliver or the inaccuracy of any corporate record that has been delivered. Moreover, pursuant to section 10.10(b), Molina, "acknowledge[d] and agree[d] that each such Person has had the opportunity to receive all information and conduct due diligence to its satisfaction." Therefore, I dismiss this part of the breach of contract cause of action to the extent Molina seeks damages, because it does not allege any facts from which damages attributable to defendants' breach may be reasonably inferred, and the SPA refutes a contrary conclusion.

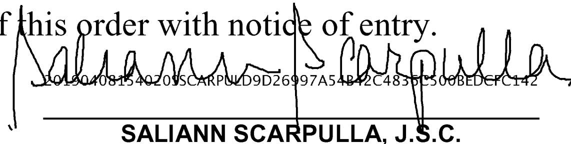
Instead, consistent with Molina's allegation that there is no adequate remedy at law, I sustain the cause of action to the extent that Molina seeks specific performance of defendants' obligation to produce corporate records. However, because specific performance is a remedy for breach of contract, not a separate cause of action, (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002]), Molina's specific performance cause of action is dismissed to the extent asserted as a standalone cause of action.

In sum, Molina has pled one cause of action for breach of contract of the SPA provisions set forth above, in which Molina demands monetary damages and specific performance of the SPA.

In accordance with the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint is granted consistent with the decision herein, and the motion is otherwise denied; and it is further

ORDERED that defendants are directed to serve and file an answer to the complaint within 20 days after service of a copy of this order with notice of entry.



4/8/19		SALIANN SCARPULLA, J.S.C.
DATE		

CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE