Floral Home Care, LLC. v Independence Care Sys., Inc.
2019 NY Slip Op 32223(U)
July 24, 2019
Supreme Court, New York County
Docket Number: 656000/2018
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM

Justice

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FLORAL HOME CARE, LLC.,

Plaintiff,

- v -

INDEPENDENCE CARE SYSTEM, INC.,

Defendant.

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INDEX NO. 656000/2018

MOTION DATE 02/20/2019

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 40, 41

were read on this motion for PRELIMINARY INJUNCTION

Caitlin Robin & Associates, PLLC (Caitlin A. Robin and Jesse Dinner of counsel), for plaintiff.
Greenberg Traurig, LLP (Stephen M. Buhr of counsel), for defendant.

Gerald Lebovits, J.:

Background

Plaintiff provides home health-aide services and benefits. Plaintiff and defendant have a provider agreement under which plaintiff has been providing home health aide services and benefits to 14 to 15 patients who are members of defendant's managed-care plan. Plaintiff alleges that defendant has failed to pay invoices for services provided under the agreement between approximately June 2017 and November 2018, and that defendant owes an outstanding balance of $440,324.31.

Plaintiff has brought claims against defendant for breach of contract, unjust enrichment, and account stated. Plaintiff now moves for (i) a preliminary injunction preventing defendant from receiving any further health-aide services under the provider agreement until a payment stipulation and/or judgment is entered; and (ii) summary judgment on plaintiff's account-stated claim.

Discussion

I. Plaintiff's Preliminary Injunction Motion

CPLR 6301 provides that "[a] preliminary injunction may be granted in any action where . . . the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff." A preliminary injunction may be

granted only if the movant demonstrates "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor." (*W.T. Grant Co. v Srogi*, 52 NY2d 496, 517 [1981].)

Plaintiff's motion for a preliminary injunction is denied: plaintiff has failed to establish either that it has a likelihood of success on the merits or that it would suffer an irreparable injury.

A. Lack of Success on the Merits

Plaintiff asserts that defendant breached their contract by failing to pay sums owed for services rendered under the contract. But plaintiff fails even to identify the particular contractual provisions that defendant assertedly breached.

Instead, plaintiff merely alleges that it sent certain invoices to defendant (which plaintiff attaches to the complaint), and that defendant did not pay the amounts invoiced. But plaintiff has not identified which provisions of the contract govern billing and payment, what rights and obligations each side has under those provisions, and whether defendant's alleged failure to pay the amounts appearing on plaintiffs' invoices constitutes a breach of its contractual obligations. Plaintiff thus has not shown a likelihood that it will succeed on the merits of its breach of contract claim.[1] (*See Gordon v Curtis*, 68 AD3d 549, 550 [1st Dept 2009].)

Plaintiff also fails to show a likelihood of success on the merits of its account-stated claim. A party bringing an account-stated claim must establish that it sent bills or invoices to defendant and that defendant did not object to those invoices within a reasonable time after receiving them. (*See Bartning v Barning*, 16 AD3d 249, 250 [1st Dept 2005].) Plaintiff has not satisfied these requirements here.

At most, plaintiff has provided what it alleges to be several hundred pages of invoices for services rendered to defendant. But plaintiff has not provided evidence that it ever sent those invoices to defendant, much less that defendant received them and did not object.

Plaintiff relies on an email exchange between employees of plaintiff and defendant, in which defendant's employee acknowledged that defendant owed plaintiff certain amounts per week as payment for services rendered. But conceding the accuracy of an aggregate weekly figure is not equivalent to conceding the accuracy of individual invoices. Nor do plaintiffs show that the charges on the particular invoices in the record represented part of the total amounts that defendants conceded that they owed each week.

Indeed, the emails in which defendant acknowledged owing plaintiff certain sums per week were sent in May and June 2017; the last email from defendant is dated June 28, 2017. Of

[1] Additionally, because plaintiff's claims undisputedly arise out of a business relationship governed by a valid and enforceable contract, plaintiff cannot establish a likelihood of success on its claim sounding in unjust enrichment/quantum meruit. (*See Bettan v Geico General Ins. Co.*, 296 AD2d 469, 470 [2d Dept 2002].)

the hundreds of pages of invoices submitted here by plaintiff, only *one* invoice — for $79.20 — pertains to services that plaintiff rendered prior to defendant's June 28 email. And the invoice does not indicate whether it was prepared (much less sent and received) prior to that email. On this record, plaintiff has not established a likelihood of success on the merits of an account-stated claim even for the $79.20, much less the remaining $440,255.11 that plaintiff claims defendant owes.

B. No Irreparable Injury

Even if plaintiff could establish likelihood of success on the merits, it would still also have to show that it would suffer irreparable injury. Plaintiff has failed to do so.

"[I]rreparable injury, for purposes of equity, has been held to mean any injury for which money damages are insufficient." (*McLaughlin, Piven, Vogel v Nolan & Co.*, 114 AD2d 165, 174 [2d Dept 1986].) Thus, "damages compensable in money and capable of calculation, *albeit* with some difficulty, are not irreparable." (*SportsChannel Am. Assocs. v Nat'l Hockey League*, 186 AD2d 417, 418 [1st Dept 1992].)

Here, plaintiff argues that it will suffer irreparable injury because defendant's failure to pay the amounts invoiced by plaintiff will cause plaintiff financial harm and leave it without funds to pay a number of its employees. But these harms are a form of economic loss that may be compensable by money damages, and therefore do not constitute an irreparable injury warranting a preliminary injunction. (*See EdCia Corp. v McCormack*, 44 AD3d 991, 994 [2d Dept 2007]; *J.O.M. Corp. v Department of Health of State of N.Y.*, 173 AD2d 153, 154 [1st Dept 1991].)

Plaintiff's contrary argument is based on cases in which courts have held injunctive relief to be appropriate because a risk exists that a defendant will dissipate assets that would go to satisfy a money judgment against it, thereby rendering monetary remedies ineffectual. (*See, e.g.*, *Zonghetti v Jeromack*, 150 AD2d 561, 562 [2d Dept 1989].) But plaintiff does not allege any risk in this case of defendant taking steps to frustrate plaintiff's ability to collect on a monetary damages award. The cases on which plaintiff relies are therefore inapposite.

Plaintiff's preliminary injunction motion is denied.

II. Plaintiff's Summary Judgment Motion

CPLR 3212(a) provides that "[a]ny party may move for summary judgment in any action, after issue has been joined." The restriction on moving for summary judgment prior to issue being joined "is strictly adhered to." (*City of Rochester v Chiarella*, 65 NY2d 92, 101 [1985].) Issue is not joined until a defendant serves an answer or counterclaim to the complaint. And it is undisputed that plaintiff here brought its summary judgment motion before defendant had served its answer. The motion is therefore premature.

Additionally, even were plaintiff's motion for summary judgment properly made (and it was not), it is not clear that plaintiff has yet stated an account-stated cause of action, much less

established entitlement to judgment as a matter of law. Plaintiff's motion for summary judgment on the current record is denied.

Accordingly, it is

ORDERED that plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that plaintiff's motion for summary judgment is denied, without prejudice to its renewal following discovery; and it is further

ORDERED that the parties appear for a preliminary conference in Part 7 of this court, Room 345, 60 Centre Street, on September 4, 2019, at 11:00 a.m.

7/24/2019
DATE

GERALD LEBOVITS, J.S.C.

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