

**Utopia Heart Care, P.L.L.C. v Gramercy Cardiac
Diagnostic Servs., P.C.**

2020 NY Slip Op 32687(U)

August 18, 2020

Supreme Court, New York County

Docket Number: 152981/2019

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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UTOPIA HEART CARE, P.L.L.C.,

Plaintiff,

- v -

GRAMERCY CARDIAC DIAGNOSTIC SERVICES,
P.C.,

Defendant.

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INDEX NO. 152981/2019
MOTION DATE
MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8-24
were read on this motion for summary judgment.

Plaintiff moves pursuant to CPLR 3212 for an order awarding it summary judgment.

Defendant opposes and cross-moves pursuant to CPLR 3212 for an order summarily dismissing
the complaint. Plaintiff opposes.

By contract dated September 21, 2014, plaintiff licensed its facilities and equipment to
defendant-medical practice. The contract reflects that it would take effect starting October 1,
2014, would renew annually unless terminated, and that defendant would pay plaintiff \$3,000 a
month until October 1, 2015, when the rent would increase to "a fixed monthly fee equal to
\$3,500.00 times 1.015 each month until the month of September, 2016." (NYSCEF 13). The
contract permits termination by either party on 90-days' written notice by registered or certified
mail, return receipt requested, or by hand delivery with written receipt and addressed to the
parties at the addresses listed in the contract. (Id.). Once notice of termination is given, the
parties' obligations remain in effect until the end of the notice period. (Id.).

By summons and verified complaint dated March 20, 2019, plaintiff commenced this

action alleging that starting February 2016, defendant stopped sending payments due under the contract, despite never having served a notice of termination. Accordingly, plaintiff seeks \$123,500 for fees from February 2016 through August 2017. (NYSCEF 8). On May 15, 2019, defendant filed its answer in which it denies, among other things, failing to serve notice of termination and owing payments after February 2016, and admits not having paid plaintiff after February 2016. It advances as affirmative defenses that it terminated the agreement in writing, that it complied with its obligations under the contract until January 2016, and that defendant failed to mitigate its damages. (NYSCEF 8).

To be entitled to summary judgment on its cause of action for breach of contract, plaintiff must demonstrate, *prima facie*, the existence of a contract, its performance, defendant's breach, and resulting damages. (*Markov v Katt*, 176 AD3d 401, 401–02 [1st Dept 2019]). As it is undisputed that there was a contract between the parties, only the remaining elements are addressed.

Plaintiff contends that by having failed to respond to its notice to admit, defendant admitted, among other things, that it did not pay plaintiff on or after February 1, 2016 and that it did not serve plaintiff with a notice of termination in accordance with the contract. As notices to admit may not be used to “request admission of material issues or ultimate or conclusory facts” (*Fetahu v New Jersey Transit Corp.*, 167 AD3d 514, 515 [1st Dept 2018], quoting *Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]), and as the alleged failure to serve a notice of termination would be dispositive of the action, defendant's failure to respond is not deemed an admission. (See e.g., *Luthmann v Gulino*, 131 AD3d 636, 637 [2d Dept 2015], *lv denied* 25 NY3d 914 [2015] [excusing failure to respond to notice to admit which sought admission concerning standing, a legal conclusion]; *Riner v Texaco, Inc.*, 222 AD2d 571, 571 [2d Dept

1995] [response not required where request was at heart of controversy and allegation contrary to pleadings]).

Plaintiff also contends that as it was awarded summary judgment for the same breach in a Civil Court action in 2016, defendant is barred from relitigating the merits. As the decision and order awarding summary judgment was vacated and dismissed on appeal for lack of subject matter jurisdiction, consideration of the merits of this action is not thereby precluded. (*See Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999] [*res judicata* inapplicable where plaintiff could not seek relief in first action due to lack of subject matter jurisdiction]).

Apart from the notice to admit and the 2016 action, plaintiff offers no other evidence of the alleged breach and its requested damages are unsubstantiated. In any event, even if plaintiff had met its *prima facie* burden, defendant raises triable issues of fact. (*See supra*).?????

In support of its cross motion, defendant denies liability as it terminated the contract. In support, it offers plaintiff's letter dated February 23, 2016, in which plaintiff's sole member acknowledges receipt of defendant's emailed 90-days' termination notice, thereby waiving the contractual requirement that it be sent in a particular manner. She also acknowledges therein receipt of a check for \$6,500 and states that defendant owes \$14,950 in unpaid rent until April 9, 2016, and that she received a check for \$800, but does not know what it is for and that she is returning it. (NYSCEF 15). (NYSCEF 12). Defendant thus demonstrates *prima facie* that it terminated the contract.

Defendant offers no evidence establishing if or how much it owes plaintiff for the 90-day period after the notice was served, although it admits having paid no fee after February 2016, despite being contractually obligated to do so until the end of the notice period. While plaintiff wrote that defendant owes \$14,950, that amount does not equal three-months' rent at the

contract's specified rate, and plaintiff denies that its accuracy. As disclosure has not taken place, issues of fact remain as to plaintiff's alleged damages.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment is denied in its entirety; it is further

ORDERED, that defendant's cross motion for summary judgment is denied in its entirety; and it is further

ORDERED, that the parties either enter into a stipulation encompassing their preliminary conference on or before October 21, 2020, or appear for a preliminary conference in room 341, 60 Centre Street, New York, New York, on October 21, 2020 at 2:15 pm or virtually if necessary.

8/18/2020
DATE

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BARBARA JAFFE, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER |
| APPLICATION: | <input type="checkbox"/> GRANTED | | <input type="checkbox"/> GRANTED IN PART | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> SUBMIT ORDER | |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |