

**Medical Transp. Mgt., Inc. v Xpress Transp. & Multi
Servs. Inc.**

2021 NY Slip Op 31563(U)

May 4, 2021

Supreme Court, New York County

Docket Number: 652655/2018

Judge: Louis L. Nock

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

-----X

MEDICAL TRANSPORTATION MANAGEMENT, INC.,

Plaintiff,

- v -

XPRESS TRANSPORT & MULTI SERVICES INC.,

Defendants.

-----X

Table with 2 columns: Field Name, Value. Fields include INDEX NO. (652655/2018), MOTION DATE, MOTION SEQ. NO. (003), and DECISION + ORDER ON MOTION.

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 89, 90, 91, 92, 93, 94, 95, 96

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, the motion of plaintiff Medical Transportation Management, Inc. ("Plaintiff") for summary judgment against defendant Xpress Transport & Multi Services, Inc. ("Defendant") is denied in accord with the following memorandum decision.

Background

Plaintiff is a non-emergency medical transportation broker located in Brooklyn, New York. Defendant is a provider of medical transport services that previously provided services to Plaintiff pursuant to a Medical Transportation Services Agreement dated July 1, 2015 (the "Agreement") (Walters Aff. Exhibit C, NYSCEF Doc 78). The Agreement contains the following indemnification provision:

10. INDEMNIFICATION

A. TRANSPORTATION PROVIDER Transportation Provider agrees to defend, indemnify, and hold harmless MTM and MTM's Client against any claims, liabilities and expenses, including reasonable attorney's fees, arising from

performance of any service by Transportation Provider in connection with this Agreement.

B. MTM MTM agrees to indemnify and hold harmless Transportation Provider against any claims, liabilities and expenses, including reasonable attorney's fees, arising from performance of any service by MTM in connection with this Agreement with respect to which Transportation Provider is not at fault.

(*Id.* at 11.) In 2017, Defendant entered into an agreement with non-party Blue Vine whereby Defendant purportedly securitized its future accounts receivable (Cooper Aff. ¶ 6).¹ Sometime thereafter, Defendant defaulted on its obligations to Blue Vine, who then commenced an action against Plaintiff to recover debts in the amount of \$581,883.43 (Walters Aff. in Support ¶ 10). Plaintiff settled the suit with Blue Vine for \$130,000.00 pursuant to a settlement agreement dated April 18, 2018 (the "Settlement Agreement") (*id.*, exhibit E). Defendant does not dispute these facts, but no documentation from the Blue Vine suit has been submitted in this action except the Settlement Agreement; nor have the parties informed the court of the venue or index number of that action involving Blue Vine.

On November 26, 2019, Plaintiff commenced this action to recover the \$130,000.00 it paid for the Settlement Agreement, along with costs and attorneys' fees, from Defendant. The complaint interposes causes of action for contractual indemnification arising from the Agreement, unjust enrichment, breach of contract, and for attorneys' fees (Complaint, NYSCEF Doc 1). Defendant appeared in the action by filing an answer that denies the allegations in the complaint and asserts fourteen affirmative defenses and five counterclaims. Defendant's first and second counterclaims for detrimental reliance allege that Plaintiff promised "Defendant that it would be awarded significant work including increased work when Defendant acquired wheelchair accessible vehicles to increase the number of claims awarded" (Answer ¶ 30,

¹ Although the Cooper Affidavit references the securitization agreement as Exhibit D, no such exhibit was uploaded to the NYSCEF docket and is not currently before the court.

NYSCEF Doc 28). Defendant alleges that it “informed Plaintiff that it would have to borrow money in order to buy the wheelchair accessible vehicles,” that “Plaintiff promised to give Defendant significantly more business if it would acquire the wheelchair accessible vehicles,” and that “Defendant, in reliance upon Plaintiff’s promise, took loans from financing companies and bought the wheelchair accessible vehicles” (*id.* ¶¶ 35-37). Defendant further alleges that after it acquired the wheelchair accessible vehicles, Plaintiff failed to provide the promised increased work; but instead, decreased the number of claims provided to Defendant, causing Defendant to default on its obligations to Blue Vine (*id.* ¶¶ 31, 38). Defendant’s third counterclaim alleges that, “[w]ithout authorization from Defendant, Plaintiff reduced the base rate per claim for payout from twenty-five dollars (\$25) per claim to twelve dollars and fifty cents (\$12.50) per claim” (*id.* ¶ 43). The fourth counterclaim alleges that “Plaintiff owes Defendant for unpaid claims” (*id.* ¶ 46). Finally, the fifth counterclaim alleges that “Plaintiff requested that Defendant create and develop software for a transportation status system to view and audit claims in real-time” and “promised Defendant a royalty/commission of fifty cents (\$0.50) per ride,” but did not pay the royalty/commission after Defendant developed the software, which Plaintiff used (*id.* ¶¶ 49-52). Discovery was completed in the action, and Plaintiff now moves for summary judgment on its claims. Defendant opposes.

Standard of Review

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant’s burden is “heavy,” and “on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22

NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Upon proffer of evidence establishing a *prima facie* case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). “A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010] [internal quotation marks and citation omitted]).

Discussion

A. First Cause of Action – Contractual Indemnification

Plaintiff moves for summary judgment on its first cause of action for contractual indemnification on the basis of the indemnification provision of the Agreement. “The right to contractual indemnification depends upon the specific language of the contract” (*Roldan v New York Univ.*, 81 AD3d 625, 628 [2d Dept 2011]). “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed (*Hooper Assocs. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]). A party is “entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 87 [1st Dept 2018]). This is a matter of contract interpretation. It is well settled that the court’s role in interpreting a contract “is to ascertain the intention of the parties at the time they entered into the contract” (*Evans v Famous Music Corp.*, 1 NY3d 452,

458 [2004]). “If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further” (*id.*).

The indemnification provision in the Agreement provides that Defendant “agrees to defend, indemnify, and hold harmless [Plaintiff] and [Plaintiff’s] Client against any claims, liabilities and expenses, including reasonable attorney’s fees, arising from performance of any service by Transportation Provider in connection with this Agreement” (Walters Aff. Exhibit C ¶ 10, NYSCEF Doc 78 [emphasis added]). By the plain language of the Agreement, Defendant’s duty to indemnify Plaintiff is limited to circumstances “arising from the performance of any service by [Defendant] in connection with [the] Agreement.” The Agreement does not define the term “service,” but defines “Covered Service” as “any medical transportation service that [Plaintiff] is obligated to provide to Covered Persons pursuant to a Coverage Agreement” and defines “Service Area” as “the areas in which Transportation Provider will provide transportation services” (*id.* at 1). The Agreement also uses the term “services” throughout to refer to transportation services provided by Defendant pursuant to the Agreement (*e.g., id.* at 2 §§ F, K, L; 3 §§ N, R; 4 §§ X, BB, CC, DD, FF). Hence, it is clear from the plain language of the Agreement that the parties intended Defendant’s obligation to indemnify Plaintiff to be limited only to claims arising from actual transportation services that it provided pursuant to the Agreement (*cf. Karwowski v 1407 Broadway Real Estate, LLC*, 160 AD3d 82, 88 [1st Dept 2018] [holding that provision for indemnity from “all claims of whatever nature” was not limited to negligence in the performance of contract]). Under New York law, this provision must be strictly construed (*Hooper*, 74 NY2d at 491). Strictly construing this provision, Defendant’s agreement with Blue Vine, and Plaintiff’s settlement of claims asserted by Blue Vine, did not arise from, or were not the direct result of, any transportation services provided by Defendant

pursuant to the Agreement. Therefore, Plaintiff is not entitled to contractual indemnification for monies paid to Blue Vine, and summary judgment is denied with respect to the first cause of action for contractual indemnification.

B. Second Cause of Action – Unjust Enrichment

In New York, the elements of a cause of action for an unjust enrichment claim are “that (1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quote omitted] [brackets in original]). Unjust enrichment also requires a sufficiently close relationship between the parties that “could have caused reliance or inducement” (*id.*). Plaintiff’s motion papers do not address the elements of unjust enrichment or promote any arguments regarding this cause of action. Plaintiff has not demonstrated, or even alleged, that the parties have a relationship that is sufficiently close to support a cause of action for unjust enrichment,; nor has it demonstrated that it relied on any representation or action by Defendant or was otherwise induced by Defendant to enter into the Settlement Agreement. Thus, summary judgment is denied with respect to the second cause of action for unjust enrichment.

C. Third Cause of Action – Breach of Contract

To make a *prima facie case* on its breach of contract claim, Plaintiff must demonstrate “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages” (*Belle Lighting LLC v Artisan Constr. Partners LLC*, 178 AD3d 605, 606 [1st Dept 2019]). It is undisputed that there is a contract between the parties whereby Defendant agreed to provide certain transportation services to Plaintiff in exchange for a fee for each service provided. Nevertheless, Plaintiff does not demonstrate or allege a breach of the

Agreement. As alleged in the complaint, the breach of contract claim relies on the same factual allegations as the first cause of action for contractual indemnification and seeks the same relief (Complaint ¶¶ 8-10). In support of its motion for summary judgment, Plaintiff does not cite any specific provision of the Agreement that it alleges was breached and has not demonstrated that Defendant failed to provide any service or perform any specific obligation under the Agreement. As evidence of a purported breach, Plaintiff refers to the Agreement, the Blue Vine financing agreement (which is not in evidence), the Settlement Agreement, and excerpts from a deposition transcript of Miguel Pieter, the principal of Defendant (Mem. in Support at 5). Plaintiff contends that Pieter “does not dispute the above-referenced facts,” but does not cite to any specific portion of the testimony or indicate which facts the testimony purportedly confirms. In short, the cause of action for breach of contract appears to allege only that Defendant’s breach of its obligations to Blue Vine constitutes a breach of the Agreement. This is insufficient to demonstrate Plaintiff’s entitlement to summary judgment for breach of contract.

Moreover, questions of fact exist regarding Plaintiff’s performance under the Agreement and with respect to Defendant’s counterclaims. In support of its motion, Plaintiff submits an affidavit of Crystal Cooper, the General Manager of its New York office, who purports to have personal knowledge of the facts set forth in her affidavit (Cooper Aff. ¶ 1, NYSCEF Doc 75). Cooper avers that “[d]uring the course of the litigation, [Plaintiff] has produced to [Defendant] detailed electronic database records of all rides and transportation services provided by [Defendant]. See EXHIBIT F. There are no outstanding balances for which [Plaintiff] owes [Defendant] money. All rides and transportation services provided by [Defendant] have been paid in full at the agreed-upon fee rate.” (*Id.* ¶ 6.) The referenced Exhibit F is a copy of the Pieter deposition testimony, but the attached exhibit G is what purports to be Plaintiff’s

electronic accounting records (NYSCEF Doc 81). However, Plaintiff does not lay any foundation for admission of these records as evidence.

In general, any writing or record shall be admissible in evidence as proof of an act, transaction, occurrence or event, if it was made in the regular course of any business at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter (CPLR 4518 [a]). Nevertheless, it is well established that a proper foundation for the admission of a business record must be provided by someone with personal or firsthand knowledge of the maker's business practices and procedures (*Viviane Etienne Med. Care, P.C. v Country-Wide Ins. Co.*, 25 NY3d 498, 503 [2015]). The Cooper Affidavit does not comply with the requirements of CPLR 4518 because no authentication, business records foundation, or other evidentiary basis was provided for the records. The affiant does not indicate that she has personal or firsthand knowledge of the maker's business practices or procedures, does not describe the practices or procedures, and does not attest that the procedures were followed with respect to the records in issue (*see Oldham v City of N.Y.*, 155 AD3d 477, 477-478 [1st Dept 2017] [records inadmissible where affiants failed to indicate they possessed personal knowledge and failed to lay a proper foundation pursuant to CPLR 4518]). Therefore, the records are inadmissible hearsay.

To the extent that the Cooper Affidavit avers that there are no outstanding balances owed to Defendant, this allegation is contradicted by the affidavit of Miguel Pieter, which is submitted in opposition to the motion (NYSCEF Doc 90). Pieter attests that Plaintiff failed to make all payments due to Defendant and failed to pay the agreed-upon rate (Pieter Aff. ¶ 12). Pieter similarly offers business records, without foundation, in support of this allegation (*id.*). The competing testimony and unverified records of each party are insufficient to resolve all issues of

fact regarding whether Plaintiff has performed its obligations and paid all amounts due to Defendant pursuant to the Agreement. Furthermore, Pieter also attests that Plaintiff's affiant, Crystal Cooper, "began working for [Plaintiff] in November 2016 and does not have personal knowledge of the material facts of this action from 2014-2016, nor does she know of anyone currently employed by [Plaintiff] that would have such knowledge (Pieter Aff. ¶ 10). Plaintiff did not submit any reply to the opposition and has not responded to this allegation. Therefore, this raises a question of fact regarding whether and to what extent Ms. Cooper has personal knowledge of the facts set forth in her affidavit. Thus, summary judgment is denied with respect to the third cause of action for breach of contract.

Finally, numerous outstanding questions of fact also exist with respect to the remainder of Defendant's counterclaims, which are unresolved by the competing Pieter and Cooper affidavits. Therefore, Plaintiff has not demonstrated its entitlement to summary judgment regarding the Defendant's counterclaims.

Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment is denied; and it is

ORDERED that a status conference will be held on June 16, 2021 at 2:30 p.m. by Microsoft Teams appearance to be arranged by the court.

This will constitute the decision and order of the court.

ENTER:

Louis L. Nock

5/4/2021

DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE