

Utilisave, LLC v Brookdale Hosp. Med. Ctr.
2023 NY Slip Op 30222(U)
January 18, 2023
Supreme Court, New York County
Docket Number: Index No. 654305/2018
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

-----X INDEX NO. 654305/2018
UTILISAVE, LLC, MOTION DATE 08/03/2022, 08/03/2022
Plaintiff, MOTION SEQ. NO. 002, 003
- v -

THE BROOKDALE HOSPITAL MEDICAL CENTER, DECISION + ORDER ON MOTION
Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 132, 133, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185

were read on this motion for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 134, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 170, 171, 172, 173

were read on this motion for SUMMARY JUDGMENT

Upon the foregoing papers, and for the reasons stated hereinbelow, the motions of plaintiff and defendant for summary judgment are granted in part and denied in part.

Background

On July 22, 2009, defendant, The Brookdale Hospital Medical Center ("Brookdale"), entered into a contract with non-party Hudson Energy Services LLC ("Hudson"), a third-party energy supplier, under which the latter agreed to supply the former with electricity at a fixed rate for a term of 36 months. NYSCEF Doc. No. 49. On December 9, 2010, that contract was superseded by an agreement between Jamaica Hospital and Hudson with a 57-month term (the "Hudson Agreement"). NYSCEF Doc. No. 50

On October 23, 2012, Brookdale entered into another contract, a "Cost Recovery & Reduction Agreement" (the "Utilisave Agreement"), with plaintiff, UtiliSave, LLC ("Utilisave"), the purpose of which was for Utilisave to "review, and act to correct and reduce [Brookdale's] costs ... including ... electric, gas, water/sewer, steam, and petroleum." NYSCEF Doc. No. 2.

Section 1 of the Utilisave Agreement states that Utilisave is authorized:

To request information, copies and compilations of Client's Bills, usage and cost data ... from Client's suppliers and governmental authorities, and to submit requests for proposals, verifications, comparisons, and apply for exemptions, refunds, credits, billing, rate, supplier and other changes for the purpose of recovering or reducing Costs. UtiliSave agrees not to initiate litigation absent Client's pre-approval... All submissions and/or applications submitted on behalf of Client by UtiliSave in connection with this Agreement shall be appropriate and shall not have intentionally misstated any fact in connection with its processing on behalf of Client.

NYSCEF Doc. No. 2.

Section 3 of the Utilisave Agreement explains that Utilisave would not charge Brookdale any money upfront, but instead "if a course of action suggested by UtiliSave is substantially implemented" such that "a credit, refund, or savings is achieved" Brookdale would pay UtiliSave 40% of its savings. NYSCEF Doc. No. 2. When "ongoing" savings were achieved, UtiliSave would be entitled to 40% "for a period up to 36 months from the date" the savings first were reflected on Brookdale's bills. Id.

Section 4 of the Utilisave Agreement states that Brookdale:

agrees to cooperate and provide all relevant information in its possession that UtiliSave reasonably requests. If client refuses to cooperate and then intentionally implements UtiliSave's recommendations independent of UtiliSave with the intent to deprive UtiliSave of any Fee, then UtiliSave will be deemed to have fully implemented the actions related to such request, and any fee that would have been due UtiliSave will be due and payable in full.

NYSCEF Doc. No. 2.

Section 5 of the Utilisave Agreement states that Brookdale:

MAY TERMINATE UTILISAVE'S SERVICE AT ANY TIME UPON THIRTY DAYS NOTICE. UtiliSave will notify Client of all matters under consideration within ten business days of termination. Client will be responsible for all invoices outstanding and for any Fees that would have been payable during the remaining Sharing Period (had UtiliSave been provided with Client's cooperation and all information requested and had UtiliSave implemented the recommended action) with respect to all matters implemented or in progress by UtiliSave as of the termination date. UtiliSave shall provide adequate backup and details of its invoices to set forth the basis for any amount being submitted for payment.

NYSCEF Doc. No. 2 (capitalizations in original).

In April 2014, Utilisave and Brookdale communicated regarding the Hudson Agreement and potential savings that Brookdale might get from terminating it. NYSCEF Doc. No. 85.

On July 24, 2014, Utilisave's Director of Energy Auditing, Grigory Goncharov, emailed Brookdale seeking an letter of authorization for Utilisave to "discuss the contract terms, rates, and billing issues" related to the Hudson Agreement with Hudson. NYSCEF Doc. No. 55. On August 14, 2014, Mr. Goncharov's manager, Utilisave's Executive Vice President of Operations Pak Mark, followed up on the same request. Id.

There is nothing on the record of Brookdale authorizing Utilisave to reach out to Hudson.

In a letter dated July 14, 2015, Utilisave wrote Hudson and informed it that Brookdale had retained it to audit its utility bills, and that "Brookdale's accounts are currently on a contract that expires in September. At that time, we request that [Hudson] cease service to all accounts under their name" (the "Purported Termination Letter"). NYSCEF No. 69. Included with the Purported Termination Letter were four documents allegedly authorizing Utilisave to act as Brookdale's agent. All four attached letters say they "authorize [Utilisave] to act as [Brookdale's] agent to audit and otherwise review our accounts and services provided by your entity." Id. None of the letters specify a specific address covered and instead state that "[f]or multiple properties/accounts, please see Exhibit A." No exhibit A appears to have been attached to the Purported Termination Letter. Id.

In a letter dated September 20, 2015, Hudson wrote Brookdale that the Hudson Agreement was nearing its end and urged Brookdale to renew, because "if you do not start a new rate plan, your accounts will be moved to a Month-to-Month Variable Rate Plan." NYSCEF Doc. No. 70.

It is undisputed that on November 18, 2015, the Hudson Agreement ended, and Hudson stopped supplying energy to Brookdale.

Between February 26, 2016, and March 27, 2019, Utilisave sent various invoices to Brookdale asserting that, due to the Purported Termination Letter, it had earned savings of \$178,285.96 for "the period from November 2015 to January 2016" (NYSCEF Doc. No. 87), \$1,876,148.58 for "the periods from December 2015/January 2016 to February 2017/March 2017/May 2017" (NYSCEF Doc. No. 88), \$833,789.82 for "the periods from March 2017/May 2017 to September 2017/ November 2017/December 2017" (NYSCEF Doc. No. 89), \$467,921.61 for "the periods from September 2017/November 2017/December 2017 to June 2018/July 2018" (NYSCEF Doc. No. 90), and \$336,230.93 for "the periods from June 2018/July 2018 to November 2018" (NYSCEF Doc. No. 91), as the result of "UtiliSave cancelling your electric supply service contract with Hudson," noting that the change did not result in any refund or credits but was a "future savings."

In total Utilisave alleges that Brookdale saved \$5,140,357.80 as a result of the Purported Termination Letter and, therefore, owes Utilisave \$2,056,143.12 in fees.

Meanwhile, between August and October 2016, Utilisave repeatedly tried to get Brookdale to authorize litigation against non-party Great Eastern Energy ("GEE") and was rebuffed ("I cannot sign"). NYSCEF Doc. No. 185.

On March 30, 2017, Utilisave sent an invoice to Brookdale asserting that it was entitled to \$195,596.23 in savings (“Purported DEP Savings”) based on a Stipulation and Settlement of Discontinuance entered into between Brookdale and the Department of Environmental Protection (“DEP”) after litigation was commenced by Utilisave. NYSCEF Doc. No. 103. Brookdale paid the first Purported DEP Savings invoice in full. NYSCEF Doc. No. 77 ¶ 79.

On April 27, 2018, Utilisave sent an invoice to Brookdale asserting that it was entitled to \$93,485.32 for the second year of its share of Purported DEP Savings. NYSCEF Doc. No. 104.

On June 4, 2018, Brookdale sent a notice of termination to Utilisave, effective July 3, 2018. NYSCEF Doc. No. 81.

On July 18, 2018, Utilisave, pursuant to the termination clause of the Utilisave Agreement, sent an amended letter listing 34 “Matters in Progress” to Brookdale (“MIP Letter”), including 14 accounts with Hudson that Utilisave alleged it had caused to be canceled with the Purported Termination Letter. NYSCEF Doc. No. 82.

On December 31, 2018, Utilisave sent an invoice to Brookdale referencing the MIP Letter and asserting that it was entitled to \$120,000 based on Brookdale’s failure to cooperate with Utilisave, pursuant to paragraph 4 of the Utilisave Agreement, on a gas-related matter at 554 East 98th Street, Brooklyn. NYSCEF Doc. No. 97. The MIP Letter lists two matters relating to that address, a “futures” issue requiring “an updated [Letter of Authorization] and additional information/documentation” and one noting “an issue regarding forgiveness of late payment charges of \$290,000 was submitted to National Grid. We need an updated [Letter of Authorization] to proceed with this issue.” NYSCEF Doc. No. 92.

On February 12, 2019, Brookdale sent a letter to Utilisave in response to various invoices, rejecting those related to the “hotly contested” Hudson matter, noting the other invoices were “objectionable,” and alerting Utilisave that “all future invoices issued” would also be rejected NYSCEF Doc. No. 112.

On March 27, 2019, Utilisave sent an invoice to Brookdale asserting that it was entitled to \$95,520.32 for the third year of Purported DEP Savings. NYSCEF Doc. No. 105.

Procedural History

On August 29, 2018, Utilisave sued Brookdale, asserting four causes of action: (1) breach of contract; (2) unjust enrichment; (3) quantum meruit; and (4) account stated. NYSCEF Doc. No. 1. On July 8, 2019, Utilisave filed a Verified Amended Complaint with the same four causes of action. NYSCEF Doc. No. 13.

On August 5, 2019, Brookdale answered with general denials and nine affirmative defenses. NYSCEF Doc. No. 16.

On July 29, 2022, Brookdale moved, pursuant to CPLR 3212, for partial summary judgment dismissing Utilisave’s breach of contract cause of action, and full dismissal of the remaining causes of action. NYSCEF Doc. No. 44.

Also on July 29, 2022, Utilisave moved, pursuant to CPLR 3212, for summary judgment against Brookdale on its first cause of action, for breach of contract, only. NYSCEF Doc. No. 76.

Discussion

In order to obtain summary judgment, the “movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests’ [M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient’ for this purpose.” Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

i. Breach of Contract

The elements of a cause of action for breach of contract are “the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages.” Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dep’t 2010).

The Hudson Agreement

Utilisave’s main argument is that its Purported Termination Letter of July 2015, requesting that Hudson “cease service” to Brookdale’s accounts when the Hudson Agreement “expires in September” 2015, is what caused Hudson to switch Brookdale’s electrical provider to Con Edison in November 2015 and, thus, Brookdale breached the Utilisave Agreement by not paying 40% of the difference of what it would have paid Hudson and what it did pay in electricity for three years after the Hudson Agreement. Utilisave also argues that Brookdale’s partial payment “is a ratification and acknowledgement of Utilisave’s entitlement to recover.”

In reply, Brookdale argues that: Utilisave could not have terminated the Hudson Agreement because it was going to end of its own terms; Utilisave had no authority to terminate the Hudson Agreement because Brookdale had not provided a letter of authorization; and that the partial payment argument fails because Utilisave did not move for summary judgment on its account stated claim and, in any event, pursuant to the Utilisave Agreement, Brookdale only owed Utilisave when “a credit, refund, or savings is achieved” and so any inadvertently paid invoices could not ratify future savings that might or might not occur.

Brookdale is correct.

First, the Hudson Agreement clearly covered only a 57-month term, contains no written renewal mechanism, and has no way for either party to unilaterally modify, amend, or renew it. The Hudson Agreement would have (and indeed did) end at its natural conclusion, whether Utilisave wrote a letter or not. Therefore, because Utilisave did not terminate the Hudson Agreement, it is not entitled to any percentage of Brookdale’s savings.

Second, even if Utilisave *could* have ended the Hudson Agreement, it did not have the authority to do so. Neither the Utilisave Agreement, the emails Utilisave sent Brookdale seeking

authorization to work with Hudson, or the “letters of authorization” Utilisave provided Hudson with the Purported Termination Letter let it unilaterally change Brookdale’s electric provider.

Utilisave replies that it had the authority to terminate the Hudson Agreement because the Utilisave Agreement allowed it to “submit requests for proposals, verifications, comparisons, and apply for exemptions, refunds, credits, billing, rate, supplier, and other changes for the purpose of recovering or reducing cost” and ending the Hudson Agreement was an action to reduce Brookdale’s costs. But if the Utilisave Agreement gave Utilisave the power it claims, Utilisave would not have needed to ask to be authorized “to discuss the contract terms, rates, and billing issues with Hudson Energy directly,” a request that was not granted. NYSCEF Doc. No. 151.

In addition, the letters of authorization Utilisave gave to Hudson with the Purported Termination Letter clearly state that they “authorize [Utilisave] to act as our affiliates, to act as our agent to *audit and otherwise review* our accounts and services” and that Utilisave was “*authorized to investigate* [Brookdale and Hudson’s] records and *negotiate* any adjustments in past or future billings, to *select alternate service classifications* for our accounts and to *apply* for any refunds and credits” (emphasis added). Thus, if Utilisave had received the authorization from Brookdale it claims, it would have only been allowed to audit and review the Hudson Agreement and negotiate, not terminate, its terms. As such, the Purported Letter of Termination, with its disingenuous letters of authorization, was arguably inappropriate and intentionally misleading, in violation of Section 1 of the Utilisave Agreement (“All submissions and/or applications submitted on behalf of Client by UtiliSave in connection with this Agreement shall be appropriate and shall not have intentionally misstated any fact in connection with its processing on behalf of Client.”).

Further, Brookdale is correct that any “partial payments” made could not ratify future invoices relating to Hudson, as the savings alleged by Utilisave were not a credit or a refund but “future savings” yet to be achieved.

Therefore, Brookdale did not breach the Utilisave Agreement as it relates to Hudson, the Hudson Agreement, and the Purported Termination Letter.

Failure to Cooperate Claims

Utilisave also argues that it is owed money based on Brookdale’s failure to authorize it to pursue certain claims, specifically relating to: late payment charges from National Grid; billing discrepancies from Con Edison; an allegedly faulty cooling tower meter with the DEP; and overbilling by GEE. Utilisave alleges it could have secured Brookdale \$815,492.47 from those claims and earned itself fees of \$326,196.99.

Utilisave bases its claims on Paragraph 4 of the Utilisave Agreement, which allows it to collect fees if Brookdale “refuses to cooperate and then intentionally implements UtiliSave’s recommendations independent of UtiliSave with *the intent to deprive UtiliSave of any Fee*” (emphasis added).

Utilisave alleges that Brookdale was uncooperative and refused to authorize various actions but fails to argue that Brookdale intentionally implemented any of Utilisave’s recommendations, let

alone with the intention of depriving Utilisave of its fees. Instead Utilisave merely says that it asked: for authorization from Brookdale to negotiate with National Grid and was rejected; for authorization to pursue credits based on alleged discrepancies from Con Edison and was rejected; for authorization to seek replacement of an allegedly faulty water meter and was rejected (because Brookdale disagreed that the meter was faulty); and for authorization to proceed with litigation against GEE regarding an overbilling issue and was rejected.

Additionally, although Utilisave included those claims in its MIP Letter, because Brookdale did not authorize Utilisave to pursue any of them, they cannot be considered “implemented or in progress.”

Therefore, as the Utilisave Agreement is clear that Brookdale could decline to authorize the pursuit of Utilisave’s suggestions as long as it did not then intentionally pursue them itself with the intent of depriving Utilisave of a fee, and as Brookdale did *not* authorize Utilisave to pursue Utilisave’s alleged failure to cooperate claims, and, as there is nothing to suggest that Brookdale intentionally pursued any of the claims it declined to authorize with the intention of depriving Utilisave of a fee, Brookdale did not breach the Utilisave Agreement by failing to cooperate with Utilisave on the National Grid, Con Edison, DEP, or GEE claims.

Purported DEP Savings

Utilisave also argues that Brookdale breached the Utilisave Agreement by not paying the second and third invoices arising from the Purported DEP Savings.

Brookdale argues that it does not owe Utilisave for the Purported DEP Savings, as the 2018 and 2019 invoices are lacking in sufficient detail, do not include a calculation of how the savings were achieved, and do not explain how Utilisave caused the savings.

Utilisave replies that all three Purported DEP Savings invoices were sufficiently explained by Utilisave in their cover letters and attached DEP printouts, and that the Purported DEP Savings were properly included and explained in the MIP Letter.

Therefore, as Brookdale has failed to show that Utilisave was not authorized to work with the DEP, and as the Purported DEP Savings were sufficiently explained in their related invoices and the MIP Letter, showing how the credits were achieved and specifically referencing the settlement from which they arose, Brookdale breached the Utilisave Agreement by not paying the remaining Purported DEP Savings invoices, and owes Utilisave \$95,485.32 plus interest at the contractually agreed upon amount of 1.5% per month compounded monthly from July 26, 2018 (90 days after Invoice #WS10315.00) and \$95,520.32 plus interest at the contractually agreed upon amount of 1.5% per month compounded monthly from June 25, 2019 (90 days after Invoice #WS11032.00).

ii. Unjust Enrichment, Quantum Meruit, and Account Stated

In addition to its breach of contract cause of action, Utilisave also asserts causes of action for unjust enrichment, quantum meruit, and account stated. However, as this Court has already found that the Utilisave Agreement to be a valid contract, those causes of action sounding in

quasi-contract should be dismissed as duplicative. Clark-Fitzpatrick, Inc. v Long Is. R. Co., 70 NY2d 382, 388 (1987) (“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.”).

Further, this Court need not address the alternative cause of action for account stated, as it would be duplicative of the already addressed breach of contract cause of action.

This Court has considered the parties’ other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, the motion of plaintiff, Utilisave, LLC, for summary judgment against defendant, The Brookdale Hospital Medical Center, is granted only as to Invoices #WS10315.00 and #WS11032.00, and the motion of defendant for summary judgment dismissing the complaint is otherwise granted, and the Clerk is hereby directed to enter judgment in favor of plaintiff in the amount of \$95,485.32, plus interest at the contractually agreed upon amount of 1.5% per month compounded monthly from July 26, 2018 (90 days after Invoice #WS10315.00), and \$95,520.32, plus interest at the contractually agreed upon amount of 1.5% per month compounded monthly from June 25, 2019 (90 days after Invoice #WS11032.00).

1/18/2023
DATE

ARTHUR F. ENGORON, J.S.C.

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