STATE OF MICHIGAN

COURT OF APPEALS

WOODWARD NURSING HOME, INC., Plaintiff-Appellee, v MEDICAL ARTS, INC., Defendant-Appellant.	UNPUBLISHED June 25, 2009 No. 284968 Wayne Circuit Court LC No. 07-701593-CK

Before: Jansen, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this interlocutory appeal, defendant appeals by leave granted the circuit court's order denying in part its motion for summary disposition. We reverse and remand. This appeal has been decided without oral argument. MCR 7.214(E).

An earlier decision of this Court relating to this case included a convenient statement of the facts:

> Plaintiff alleges that in late May 2003, defendants[1] agreed in a written contract to provide prescription medications and supplies for plaintiff's nursing home residents. Plaintiff contends that it sent defendant a prescription order on August 11, 2004, but that defendants failed to process or deliver the prescription for more than twelve days. According to plaintiff, defendants then lied in an effort to conceal their nonperformance, allegedly stating that the prescription order had been illegible or indecipherable. Plaintiff alleges that, in fact, defendants had merely lost or misplaced the prescription order. Plaintiff asserts that defendants' delay in filling the prescription caused it to lose a valuable Medicaid program certification.
>
> Plaintiff filed its complaint asserting four claims against defendants. Plaintiff alleged breach of contract (count I), negligence (count II), malpractice

[1] In the earlier case, plaintiff named both defendant and defendant's director of operations as defendants.

> (count III), and fraud (count IV). Defendants moved for summary disposition, arguing that all four claims actually alleged medical malpractice and that because plaintiff had not filed a notice of intent or an affidavit of merit, the claims should be dismissed. The trial court denied defendants' motion, finding that plaintiff's breach of contract claim was not one of malpractice. The trial court did not address plaintiff's remaining claims. [*Woodward Nursing Home, Inc v Medical Arts, Inc*, unpublished opinion per curiam of the Court of Appeals, issued January 24, 2006 (Docket No. 262794), slip op at 1.]

In that case, this Court held that the contract claim warranted dismissal because plaintiff had failed to provide copies of the pertinent contracts, citing MCR 2.113(F). *Woodward Nursing Home*, *supra* at 3-4. Concerning the malpractice issue, this Court held that plaintiff should have filed a notice of intent and affidavit of merit, but noted that the statute of limitations had not run, and so dismissed the medical malpractice claim without prejudice. *Id*. at 3.

Plaintiff then filed the instant action, alleging breach of contract and implied contract, and breach of warranty and implied warranty (count I), misrepresentation (count II), pharmaceutical malpractice and pharmaceutical negligence (count III), malpractice on the part of an individual agent, negligent supervision, and vicarious liability (count IV), and negligent performance of a contract (count V). Attached to the complaint were copies of the pharmacy consultant agreement, the vendor pharmacy agreement, and the nurse staffing agreement. The circuit court dismissed all claims except that for breach of contract.

Defendant argued below, and argues on appeal, that any breach of the pharmacy agreement is a medical malpractice allegation, not a breach of contract claim, and that the claim should be dismissed for failure to provide a suitable affidavit of merit as required for medical malpractice claims.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). Defendant brought its motion for summary disposition under MCR 2.116(C)(10). In reviewing a decision on a motion made under that rule, "this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

In this case, we need not decide whether the cause of action plaintiff has pleaded under the rubric of contract is in fact a medical malpractice claim, because it is sufficient to note simply that it is not a contract claim, and to reverse for that reason.

A court may properly "look behind the technical label that plaintiff attaches to a cause of action to the substance of the claim asserted." *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 327 n 10; 535 NW2d 187 (1995).

In this case, plaintiff's contract claim asserts damages in the form of lost certification as a Medicaid provider, which in turn allegedly caused (1) plaintiff to cease operating as a nursing home, (2) termination by the state of plaintiff's provider agreement, and (3) regulatory sanctions. There is no allegation that plaintiff suffered expenses in having to obtain the expected product or

service elsewhere, and no demand for a refund of consideration tendered for products not delivered. Plaintiff has thus claimed damages sounding in tort, not in contract. See *Mobil Oil Corp v Thorn*, 401 Mich 306, 311; 258 NW2d 30 (1977). Plaintiff's contract claim includes no prayer for contract damages, and the trial court erred by failing to dismiss it for this reason alone.

We reverse the trial court's decision to let the contract claim go forward, and remand this case to the trial court for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jane E. Markey