STATE OF MICHIGAN

COURT OF APPEALS

ACCREDITED HOME CARE, INC.,

Plaintiff/Counter Defendant-Appellant,

and

BRADLEY E. PUTVIN,

Counter Defendant,

v

CHAMPION NURSING CARE, INC.,

Defendant/Counter Plaintiff – Appellee,

and

JACQUELINE COLLINS,

Defendant.

UNPUBLISHED
July 24, 2018

No. 338786
Oakland Circuit Court
LC No. 2015-146211-CB

Before: CAMERON, P.J., and JANSEN and O'CONNELL, JJ.

PER CURIAM.

Plaintiff/Counter Defendant, Accredited Home Care, Inc. (Accredited), appeals as of right the trial court's dismissal order, following its order granting summary disposition in part, and denying summary disposition in part, to Defendant/Counter Plaintiff Champion Nursing Care, Inc. (Champion) and defendant Jacqueline Collins (Collins), on Count I of Champion's Counter Complaint for breach of contract.[1] Prior to entry of its dismissal order, upon Champion's motion for reconsideration, the trial court granted Champion's motion for reconsideration, and in the same order, granted summary disposition in full to Champion on Count I of its Counter Complaint. We reverse the trial court's grant of summary disposition in

[1] Collins and Counter Defendant Bradley E. Putvin are not parties to this appeal.

favor of Champion on Count I of its Counter Complaint, vacate the trial court's order granting Champion's motion for reconsideration and granting summary disposition in favor of Champion in the amount of $227,448.90, and remand this matter back to the trial court for proceedings consistent with this Court's opinion. We do not retain jurisdiction.

I. RELEVANT FACTS AND PROCEDURAL BACKGROUND

On September 25, 2014, Accredited and Champion entered into a Management Contract, where Accredited agreed to "provide management, administrative[,] and other services" for the operation of Champion's home health care business. In return, Accredited received an operating fee and a monthly management fee consisting of "100% of Adjusted Gross Revenue." Accredited's services were designed to "maximize the quality [of] services and financial performance of [Champion.]" Ultimately, both parties were working towards Accredited acquiring Champion's Medicare provider number and assets. Therefore, Accredited would be providing management services to Champion until such time that Medicare could approve the transfer of Champion's Medicare provider number to Accredited, and the transfer of ownership was complete. Collins, Champion's administrator and director of nursing, testified in her deposition that:

> Accredited Home Care was going to be the management company for Champion Nursing Care; meaning Champion Nursing Care was done. Accredited was going to come in, bring the company back up to standards, to work - - to Medicare standards, meaning that they were going to provide a medical director, DON; they were going to do our financials; they were going to do patient care; I was told that they were going to bring in patients and do patient care; [the Management Contract] also stated that they were going to do all of the financials for us; they were going to do all the billing for us, for Champion Nursing Care.
>
> And then, if they did a great job, then I would love to have sold the business to Accredited.

Section 6 of the Management Contract, which is relevant to this case as the alleged provision that Accredited breached, states:

> **6. REPRESENTATIONS AND WARRANTIES.** Each party represents and warrants to the other that neither it, nor any of its officers, directors, members, managers, employees or contractors, have been sanctioned, excluded, or debarred under Medicare, Medicaid, or any other state or federal program, and each party agrees to report immediately, with relevant factual detail, to the other any sanction, exclusion, or debarment of itself or of any of its officers, directors, members, managers or employees under Medicare, Medicaid, or any other state or federal program.

Pursuant to Section 4.2.2 of the Management Contract, Champion was entitled to terminate the agreement if Accredited "breaches the terms of this Agreement and does not cure such breach within thirty (30) days after . . . written notice of such breach." Additionally, pursuant to Section 4.2.3, Champion was entitled to terminate the Management contract if

"immediately upon delivering written notice of termination to [Accredited] if [Accredited] . . . (iii) is excluded from participation in Medicare, Medicaid or other state or federal health care programs or payers." In the event of termination by either party, the Management Contract provided:

> **4.4 Effect of Termination.** Upon termination of this Agreement: (i) no party shall be discharged from any previously accrued obligation which remains outstanding; (ii) any sums of money owing by one party to the other shall be paid immediately, prorated through the date of termination; (iii) each party shall return to the other party all originals and copies of the other party's confidential information in the possession of the party[;] (iv) ACCREDITED and CHAMPION shall perform such matters as are necessary to wind up their activities under this Agreement in an orderly manner; and [v] each party shall have the right to pursue other legal or equitable relief as may be available depending upon the circumstances of the termination.

On September 4, 2014, prior to entering into the Management Contract, Accredited received notice via certified mail that the Center for Medicare & Medicaid Services (CMS) was terminating its Medicare provider agreement, effective September 25, 2014. As of September 25, 2014, Accredited was no longer allowed to participate as a home health care agency in the Medicare program because Accredited had failed to comply with 42 CFR § 484.36 (Home Health Aid Services) and 42 CFR § 484.55 (Comprehensive Assessment of Patients). Regardless, Accredited warranted to Champion, through Section 6 of the Management Contract, that it had never been "sanctioned, excluded, or debarred" from participating as a Medicare provider.

Champion learned of Accredited's breach in January 2015. On March 9, 2015, through counsel, Champion notified Accredited that the Management Contract was terminated, effective March 27, 2015, pursuant to Sections 4.2.2 and 4.2.3(iii) "because Accredited has been 'excluded from participation in Medicare . . .' " On March 25, 2015, Accredited filed a three count complaint against Champion, alleging that: (1) Champion refused to pay Accredited for services performed under the Management Contract; (2) Champion refused to repay a loan to Accredited in the amount of $25,378; and (3) Accredited and Champion had entered into a contract on October 23, 2014 which provided that Accredited would purchase from Champion the "Assets and Medicare License" for $30,000, and despite Accredited having paid Champion $15,000 as a good faith deposit, Champion refuses to finalize and close the sale.

Champion answered Accredited's Complaint, and filed a four count Counter Complaint alleging: (1) Accredited materially breached the Management Contract by, *inter alia*, warranting under Section 6 that "neither it, or any of its officers, directors, members, manager, employees or contractors, have been sanctioned, excluded, or debarred under Medicare, Medicaid, or any other state [or] federal program[,] and failed to wind up its activities under the Management Contract in an orderly manner; (2) committed fraud in the inducement by making material representations regarding its ability to participate in Medicare as of September 25, 2014, which Champion relied on and therefore Champion should be entitled to pierce the corporate veil and recover damages from Accredited's president, Bradley Putvin, in the amount of $319,333.10; (3) committed silent fraud by making fraudulent omissions relating to its ability to participate in Medicare, and

therefore Champion should be entitled to pierce the corporate veil and recover damages from Accredited's president, Bradley Putvin, in the amount of $319,333.10; and (4) committed common law fraud by making material misrepresentations and "providing and billing for Medicare services [in] Champion's name and using Champion's billing information" after the termination of the agreement and therefore Champion should be entitled to pierce the corporate veil and recover damages from Accredited's president, Bradley Putvin, in the amount of $319,333.10.

Accredited sought summary disposition of Champion's Counter Complaint pursuant to MCR 2.116(C)(10). Relevant to this appeal, Accredited argued that Champion failed to raise any genuine issues of material fact regarding whether the Management Contract had been breached, whether any alleged damages were foreseeable, and whether the alleged breach was the proximate cause of Champion's alleged damages. Accredited maintained that termination of its Medicare provider number was not a bar to performing its obligations under the Management Contract, and further, that termination from Medicare was not the same as exclusion from Medicare. Accordingly, Champion's claim that Accredited that been "excluded from Medicare participation is pure fiction and a disingenuous litigating tactic." Accredited argued that termination from participation was a less serious sanction that exclusion. Where exclusion was permanent, termination is not, and in fact, a provider "may immediately reapply for a new contract." Although a terminated provider may not bill Medicare "directly for services to their own patients . . . they can still work at health care organizations in administrative functions." Finally, Accredited argued that Champion had not specifically pleaded how Accredited's actions were the proximate cause of its damages. Rather, any damages incurred by Champion were through Champion's own doing when Champion terminated its own Medicare provider number in April 2015.

On August 3, 2016, the trial court entered an opinion and order granting, in part, Accredited's motion for summary disposition, and dismissing all but Count I of Champion's Counter Complaint. With respect to Count I, where Champion alleged Accredited breached the Management Contract by violating Section 6, the trial court denied Accredited's motion. The trial court reasoned:

> While Accredited goes to great length[s] to distinguish "termination" from "exclusion," this is a distinction without a difference. Further, by whatever name, Accredited's "termination" is undoubtedly a "sanction" within the meaning of [Section] 6. As a result, Accredited's summary motion on this basis is DENIED.

Moreover, the trial court determined that Champion's alleged damages were identifiable, and on that basis, Accredited's motion was "similarly DENIED."

Champion then filed its own motion for summary disposition on Count I of its Counter Complaint, where it alleged Accredited had breached the Management Contract. Champion argued that it would never have entered into the Management Contract if it had known that Accredited had been terminated from participation as a Medicare provider, and as a result of

Accredited's breach of Section 6, Champion incurred damages in the amount of $289,839.66.[2] Champion argued that it is undisputed that the September 4, 2014 letter from CMS terminated Accredited from participating as a Medicare provider as of the effective date of the Management Contract. This termination was a sanction, as admitted by Accredited in its prior motion for summary disposition of Champion's Counter Complaint, and such a sanction constitutes a breach of Section 6 of the Management Contract. As a result, Champion suffered damages stemming from a recoupment action initiated by CMS for overpayment of various Requests for Advance Payment (RAPs). Champion attached five letters from CMS requesting recoupment for overpayment to its motion to support its damages claim.

Following a hearing on Champion's motion, the trial court entered an opinion and order granting Champion's motion for summary disposition regarding Count I of their Counter Complaint as to Accredited's liability only. The trial court specifically found that Accredited had breached Section 6 of the Management Contract by warranting that it had not been sanctioned by Medicare. However, the trial court found there to be a genuine issue of material fact regarding Champion's damages. Specifically, the trial court found that:

> Champion presents the Affidavit of [Collins], who claims $289,839.66 in damages that Champion suffered as a direct result of Accredited's breach. Collins claims that this amount is derived from five Medicare invoice demand letters attached as exhibits to the motion. But the amount sought in these five demand letters totals $227,448.90. It's unclear how or why these two numbers are different.

Accordingly, damages remained "an issue to be determined at trial." The trial court went on to further grant summary disposition to Champion on Count I of Accredited's Amended Complaint regarding breach of contract for non-payment under the Management Contract. The trial court articulated that the Management Contract,

> provided Accredited with near total control over Champion's home healthcare business. Getting paid for home healthcare services is inherently material and a specific Accredited obligation under the [Management Contract]. And [Champion] present[ed] evidence that Accredited's breach cost Champion some $289,000 in mandatory Medicare reimbursements.

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[2] Champion also sought summary disposition of Accredited's Complaint, which had been amended to include counts against Collins individually. Ultimately, the trial court granted Champion's motion regarding Count I of the Amended Complaint, which alleged breach of contract, but denied summary disposition to Champion on the remainder of the Amended Complaint, which alleged non-payment of various loans. The trial court found that material questions of fact remained regarding "whether these alleged 'loans' were outside the scope of the Management [Contract]."

> Because Accredited's Count I seeks damages relating to Champion's alleged breach of the Management [Contract], but Accredited first materially breached the same, Accredited's Count I fails as a matter of law. . . . As a result, the same is DISMISSED under [MCR 2.116](C)(8).

Champion went on to file a partial motion for reconsideration. Champion acknowledged that it had presented two different damage figures in its motion for summary disposition, however it withdrew the damage figure of $289,839.66, and asserted that its actual damages were $227,448.90. The trial court granted the motion for reconsideration in a written opinion and order, and explained:

> In its current motion, Champion argues that it mistakenly requested $289,839.66 in damages when, as the Court noted, the basis for Champion's damages (the five Medicare demand letters) actually totals $227,448.90.
>
> * * *
>
> Because Champion attached evidence to its original motion (the five Medicare demand letters) that established its damages at $227,448.90, and Champion now requests this amount, there is no longer any question of fact as to the amount of Champion's damages.
>
> For this reason, the [c]ourt will exercise its discretion and GRANT Champion's Motion for Reconsideration. As a result, this Court finds that Champion is entitled to summary disposition of its Counterclaim Count I for breach of contract against Accredited in the amount of $227,448.90.

Subsequently, the parties entered a settlement agreement into the record regarding Accredited's remaining claims against Champion for unpaid loans. Following a hearing on a motion for entry of an order of dismissal filed by Accredited, the trial court did, in fact, enter an order of dismissal. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for summary disposition. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009). In a contract case, summary disposition is appropriate under MCR 2.116(C)(10) where, "except as to damages, 'there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.' " *Batton-Jajuga v Farm Bureau Gen Ins Co of Michigan*, ___ Mich App ___, ___; ___ NW2d ___ (2017) (Docket No. 334130); slip op at 3. This Court construes the pleadings, admissions, and other record evidence in the light most favorable to the nonmoving party. *Lathan v Barton Malow Co.*, 480 Mich 105, 111; 746 NW2d 868 (2008). The meaning of contracts is also reviewed de novo, as they are questions of law. *Batton-Jajuga*, ___ Mich App at ___; slip op at 3.

III. DAMAGES FOR ACCREDITED'S BREACH OF CONTRACT

Accredited argues on appeal that the trial court erroneously granted summary disposition in favor of Champion where there remains a genuine issue of material fact regarding whether Accredited's breach of the Management Contract was the "cause in fact" of Champion's alleged damages, and similarly whether the alleged damages were foreseeable. We agree.

In order to succeed on a breach of contract claim, the plaintiff, in this case Champion as Counter Plaintiff, needed to prove (1) that a contract existed, (2) that the other party, here Accredited, breached the contract, and (3) that the breach resulted in damages. *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016). Here, all parties agree that the Management Contract existed. Additionally, Accredited does not challenge the trial court's determination that Accredited breached the Management Contract by warranting to Champion that it had not been sanctioned by Medicare, contrary to Section 6. In fact, Accredited admitted in various motions below that in the September 4, 2014 letter from CMS, it had been terminated from participation as a Medicare provider, and that termination is a sanction. Accordingly, the only issue remaining is whether Champion incurred damages as a result of Accredited's breach of the Management Contract.

Damages are an element of a breach of contract claim. *Van Buren Charter Twp v Visteon Corp.*, 319 Mich App 538, 550; 904 NW2d 192 (2016). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Id.*, quoting *Alan Custom Homes, Inc., v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "Although breach-of-contract damages need not be precisely established, uncertainty as to the fact of the amount of damage caused by the breach of contract is fatal." *Van Buren Charter Twp*, 319 Mich App at 551 (citation and quotation marks omitted).

The trial court provided no explanation as to how the $227,448.90 damage figure was a direct, natural, and proximate result of Accredited's breach. Rather, in its order granting Champion's motion for reconsideration, the trial court stated:

> Because Champion attached evidence to its original motion (the five Medicare demand letters) that established its damages at $227,448.90, and Champion now requests this amount, there is no longer any question of fact as to the amount of Champion's damages.
>
> For this reason, the [c]ourt will exercise its discretion and GRANT Champion's Motion for Reconsideration. As a result, this Court finds that Champion is entitled to summary disposition of its Counterclaim Count I for breach of contract against Accredited in the amount of $227,448.90.

Based on a thorough review of the record evidence, we conclude that it is unclear how the $227,448.90 Champion must reimburse CMS is related to Accredited's breach of the warranty provision in Section 6 of the Management Contract. In other words, Champion has failed to prove with reasonable certainty how the $227,448.90 that CMS seeks as reimbursement from Champion flows naturally, directly, and proximately from Accredited's breach. *Van Buren*

Charter Twp, 319 Mich App at 550. In her deposition, Collins testified that after terminating the Management Contract, which she was entitled to do under Section 4.2, Collins filed an 855A form with Medicare to terminate Champion's status as a Medicare provider. Additionally, in April 2015, Collins terminated Champion's software license with the provider of its billing software, preventing Accredited, or anyone else, from performing any other billing functions. In fact, Collins testified that after she terminated the Management Contract, she never forwarded any bills to Accredited, and further, Collins testified that she never authorized Medicare to send any documents to Accredited, only to Champion.[3]

Pursuant to Section 4.4 of the Management Contract, both Accredited and Champion had a duty to "perform such matters as are necessary to wind up their activities under this Agreement in an orderly manner," should the Management Contract be terminated. Therefore, after discharging Accredited, Champion would have needed to perform its own management and billing operations. If Champion no longer had a Medicare provider number, and no longer had an ability to perform billing functions, then Champion would have been unable to submit final claims to CMS for each patient, which would trigger a reimbursement claim from CMS for various RAPs advanced to Champion. Champion was the recipient of each RAP, as it was the Medicare provider, and then was responsible for transferring the money from its bank account to Accredited who would manage Champion's finances under the Management Contract. Based on the foregoing, we conclude that Champion has not met its burden of proving its damages with specificity, and accordingly, a genuine issue of material fact remains regarding whether the damages claimed by Champion are a "direct, natural, and proximate result of" Accredited's breach. *Van Buren Charter Twp*, 319 Mich App at 550.

We reverse the trial court's grant of summary disposition in favor of Champion on Count I of its Counter Complaint, vacate the trial court's order granting Champion's motion for reconsideration and granting summary disposition in favor of Champion in the amount of $227,448.90, and remand this matter back to the trial court for proceedings consistent with this Court's opinion. We do not retain jurisdiction.

/s/ Thomas C. Cameron
/s/ Kathleen Jansen
/s/ Peter D. O'Connell

[3] We also note that Champion argues in its brief on appeal that, "according to Medicare," Accredited directed Medicare to cancel various Requests for Anticipated Payments (RAPs). In support, Champion cites to Exhibit 5 of its summary disposition motion, i.e., the five reimbursement letters from CMS. However, based on our review of the record, there is no mention of Accredited in any letter from CMS, and in fact, the sole recipient of those letters was Champion.