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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden Justice

PART 11

Index Number : 403122/2011
XL CARE AGENCY
vs.
JOHNS, OLIVE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision & Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: October 17, 2013

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

XL-CARE AGENCY, INC.

Plaintiff,

-against-

OLIVE JOHNS and NANCY RAE LEWIS THOMPSON,

Defendant.

----------X

Index No. 09-07631

Joan A. Madden, J.

In this action arising out of a contract for home health care nursing services, plaintiff XL-Care Agency, Inc. ("XL") moves for summary judgment on its complaint against defendant, Nancy Rae Lewis Thompson ("Thompson"). Thompson opposes the motion, which is denied for the reasons below.

Background

This action arises out of Thompson's execution of a Service Agreement on August 11, 2003 ("Agreement") with XL for home health care nursing services to be provided by XL for her great aunt, defendant Olive Johns.[1] Paragraph 1 of the Agreement provides "I understand that if [XL] forwards invoices to patient's insurance company or Medicaid, I am responsible for any portion of all charges incurred not paid by the insurer(s) and/or Medicaid." Thompson also agreed under paragraph 4 to "assume responsibility for and guarantee the payment of all sums that become due for stated services to the extent not paid by insurer(s) and/or Medicaid." She also authorized XL to release medical information pertaining to Ms. Johns' "examination, treatment, history, and medical expenses to the insurers or Medicaid for the purpose of processing insurance claims."

[1] Although named in the caption as a defendant, Ms. Johns was apparently not served with the complaint as she died shortly after the complaint was filed.

Before entering the Agreement, Thompson began the process of applying to Medicaid on behalf of Ms. Johns. (Thompson Dep. at 51-54, 61). In her affidavit, however, Thompson states that she applied to Medicaid sometime in or about 2004, and that she applied in reliance on the Agreement prepared by XL which provided that it would accept Medicaid payments (Thompson Affidavit ¶'s 5, 9). According to Thompson, she was "repeatedly told by XL's care agent, the late Ms. San Germano, that [XL] would accept Medicaid and thereby offset [her] expenses. (Id. ¶ 12). Although Thompson testified that she spoke with Ms. San Germano on the phone prior to her entering the Agreement, she does not recall if these conversations involved the issue of Medicaid coverage, or when she first spoke with XL Care Agency about Medicaid coverage. (Thompson Dep. at 81, 88). Thompson did not receive any legal advice prior to executing the Agreement, and she did not have a lawyer present when she executed the Agreement. (Thompson Dep. at 34, 37, 40). She read the Agreement but did not understand all of it and was concerned about Paragraph 4 in which she agreed to be personally liable for any payments due that would not be covered by an insurance company or Medicaid. (Thompson Dep. 40, 42).

After Thompson executed the Agreement, XL provided home health care services to Ms. Johns from August 23, 2003 to May 18, 2004. A home health aide employed by XL would come to Ms. Johns' home every day to do housekeeping, laundry, provide meals, and take care of her everyday hygiene and needs. (Thompson Dep. at 31). Thompson had been making payments to XL with funds from Ms. Johns' account, which contained $30,000 at the time that she entered the Agreement (Id, at 56, 87). On November 29, 2003, XL's services increased from eight hours of care per day to 24 hours of care per day (Id, at 33). At this point, Thompson's Medicaid application on behalf of Ms. Johns was still pending and she became concerned that the money from her aunt's account would run out before coverage took effect (Id, at 19-20). As a result,

Thompson contacted Medicaid to ask if they would accept XL's bills while her application was still pending. (Id. at 20). Medicaid informed her that they would accept bills from XL three months retroactive to the date of her application. (Id.). Once the money ran out, Thompson did not pay for XL's services rendered from December 23, 2003 to May 18, 2004. (Affidavit of Kathleen Danler-Lopez).

Thompson testified that soon after the money ran out she made an oral agreement with the Ms. San Germano, XL's agent, "to submit the bills" to Medicaid. (Id. at 64-65, 82). Thompson continued to receive XL's services even though she had stopped making payments. (Nancy Thompson Dep. at 17, 67-69). Thompson testified that she relied on Ms. San Germano's statements and would never have continued with XL's services had she known that they were not going to accept Medicaid. (Thompson Affidavit, ¶ 15).

Later, when Ms. San Germano contacted Thompson to collect payment for XL's services, she told Thompson that she would not submit the bills to Medicaid because she did not think that Medicaid would pay. (Id. at 82). After that, Thompson, Ms. San Germano and a Medicaid representative had a three-way phone call in which the Medicaid representative said that Medicaid would accept the bills from XL but there was no guarantee that they would be paid. (Id. at 64, 82). Ms. San Germano then stated, "[t]here would be no point in submitting the bills because Medicaid never paid." (Id. at 64). XL never submitted their bills to Medicaid. (Id. at 17-18, 82; Affidavit of Kathleen Danler-Lopez). At the end of May 2004, Ms. Johns moved into a health care facility that was covered by Medicaid.

In this action, XL seeks to recover the amounts due and owed. XL commenced a previous action in this court against Thompson in 2004; however that action was dismissed for failure to properly serve Thompson. In 2009, XL commenced this action in the Supreme Court

of Westchester County, and it was transferred to this court in 2011. The Complaint asserts causes of action for quantum meruit, breach of contract, account stated, unjust enrichment, as well as separate causes of action for interest and attorneys' fees based on provisions of the Agreement.

Thompson answered the complaint and asserted various affirmative defenses, including that the Agreement is unenforceable, as it is based upon a misrepresentation of fact as to XL's intention to submit its bills to Medicaid and that Thompson was fraudulently induced to enter into the Agreement. Thompson also asserts a counterclaim for fraud, which alleges that based on Thompson's conversations with representatives of XL before executing the Agreement it was her understanding that the invoices would be submitted to insurers, Medicaid and Medicare. She further alleges that before entering into the Agreement, Thompson informed representatives of XL that Ms. Johns had limited funds, and that XL advised Thompson that the invoices would be submitted to Medicare and/or Medicaid but had no intention of submitting invoices. Thompson also alleges that her reliance on these statements was justified as she is a layperson and she relied on XL's agents who she believed had professional knowledge of medical billing and health care.

In support of its motion for summary judgment on its breach of contract claim, XL relies on the terms of the Agreement under which Thompson agreed to be liable for payment of XL's services, and Thompson's deposition testimony that she sought XL's services for Ms. Johns' care and that XL provided these services. XL also points to Thompson's sworn testimony that she did not pay the balance owed, and submits the affidavit of Kathleen Danler-Lopez, XL's sole shareholder. Lopez states that XL provided home health care services to Ms. Johns from August 23, 2003 to May 18, 2004, and that Thompson paid a total of $22,464.00 for services rendered from August 23, 2003 through December 23, 2003. She also states that XL provided services from December 24, 2003 until May 18, 2004, but that Thompson did not pay for these services,

which totaled $47,810.50, and with interest, has accrued to $74,584.40. Lopez also attaches an itemized list of the dates of service and amounts due and owing. She further states, "[u]pon information and belief, Ms. Johns was not covered by Medicaid at the time [XL] provided home health care services" (Lopez Att. ¶ 5).

As for its account stated claim, XL argues that it is entitled to summary judgment on this claim as it has established that invoices for its services were retained by Thompson without any objection for a sufficient length of time. Although XL submits a computer generated itemized list of the dates of service and amounts allegedly due and owing for these services, it does not submit the invoices that it allegedly sent to Thompson until its reply.

XL also argues that it is entitled to summary judgment on its unjust enrichment claim, arguing that it has shown that Thompson was enriched at XL's expense and it is against equity and good conscience to permit Thompson to avoid paying for the services rendered by XL.

In opposition, Thompson argues that the submission of the invoices to Medicaid was a condition precedent to her obligation to pay, and that, at the very least, there are triable issues of fact as to whether she was misled by the terms of the Agreement stating that XL would submit their bills to Medicaid to offset payments for its services, as well as statements made to her by representatives of XL that XL would forward invoices to Medicaid and accept payments from it. Thompson asserts that she relied on the representations of XL that the amounts due and owing for XL's services would be submitted to and paid by Medicaid in continuing XL's services, particularly after Ms. Johns ran out of money. In support of her defense and counterclaim for fraud, Thompson submits Lopez's affidavit in which she admits that XL was never licensed by Medicaid for the services it provided to Ms. Johns. Thompson also contends that the amount XL claims she owes is unfair and inaccurate.

In reply, XL argues that under the unambiguous terms of the Agreement, its forwarding invoices to Medicaid or payment of invoices by Medicaid was not a condition precedent to Thompson's obligation to pay, but merely an option or right of XL. XL also asserts that it never promised that invoices would be forwarded to Medicaid or paid by Medicaid, and that sending the invoices to Medicaid only would apply in the event that XL became licensed by Medicaid and the patient became insured by Medicaid. Therefore, XL argues that Thompson's reliance on any oral statements was unjustified because there was never any guarantee that invoices would be sent to or paid by Medicaid.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

The elements of a cause of action for breach of contract are (i) formation of a contract between plaintiff and defendant, (ii) performance by plaintiff, (iii) defendant's failure to perform, (iv) resulting damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dept 2010).

Here, contrary to Thompson's argument, it cannot be said that paragraphs 1 and 4 of the Agreement, the two relevant provisions, when read together establish a condition precedent. Paragraph 1 of the Agreement states "*if* [XL] forwards invoices to patient's insurance company or Medicaid, I am responsible for any portion of all charges incurred not paid by the insurer(s)

and/or Medicaid"(emphasis added), and paragraph 4 requires Thompson to pay for XL's services to the extent not paid by Medicaid. Thompson's argument is undermined by the inclusion of the word "if" in paragraph 1 and the provisions of paragraph 4 which are not conditioned upon submission to Medicaid.

However, even assuming *arguendo* that XL has made out a prima facie showing of entitlement to summary judgment on its breach of contract claim, Thompson has raised a triable issue of fact as to whether she was fraudulently induced to enter into the Agreement and to retain XL's services based on XL's misrepresentations that it would submit the invoices to Medicaid. See 405 Lexington, LLC v. Reade, 19 AD3d 181 (1st Dept 2005)(record raised triable issues of fact as to whether plaintiff misled defendants into believing they were responsible for replacing windows and whether defendants' reliance was unreasonable);Brunetti v. Musallam, 11 A.D.3d 280, 281 (1st Dept 2004)(reversing trial court's dismissal of fraud claim noting that "[t]he issues of material misrepresentation and reasonable reliance, essential elements of a fraud claim, are not subject to summary disposition"); Prote Contracting Co. Inc., v. N.Y.C. Sch. Constr. Auth., 248 A.D.2d 693, 695 (2d Dept 1998) (affirming grant of summary judgment dismissing complaint on the ground that plaintiff had fraudulently induced the contract and was not entitled to recovery on a contract which was void as against public policy).

In addition to the terms of the Agreement under which XL indicated an intent to submit the invoices to Medicaid for payment, the court may consider extrinsic evidence in determining the viability of a fraudulent inducement claim. Altomare v. Balnir Inc., 309 A.D.2d 683 (1st Dept 2003). Here, there is evidence that XL's agents repeatedly misled Thompson to believe that the invoices would be submitted to Medicaid for payment even though XL is not licensed by Medicaid. Moreover, while XL's representative eventually informed Thompson that Medicaid

would not pay, it appears from the record that these statements were made after the the fees for the services which are the subject of this action were incurred. Under these circumstances, factual issues exist as to whether Thompson detrimentally relied on these misrepresentations and whether such reliance was reasonable. Brunetti v. Musallam, 11 A.D.3d at 280 (issue of whether reliance was reasonable is for the fact finder to resolve).

In addition, the record contains evidence that after Thompson entered into the Agreement, XL's representative told Thompson that the cost of the services would be offset as XL would submit the invoices to Medicaid, and that these statements caused Thompson to continue using XL's services after Ms. Johns' funds ran out. Thus, there are factual questions as to whether these oral statements modified the original Agreement to make Thompson's obligation to pay contingent on XL seeking an offset for Medicaid in exchange for the consideration of Thompson continuing to use XL's services.[2] Cappelli v. State Farm Mut. Auto. Ins. Co., 259 A.D.2d 581, 582 (2d Dept 1999)(the modification of a contract results in the creation of a new contract between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact); 22A NYJur Contracts § 474. Thus, XL's motion for summary judgment is denied with respect to the breach of contract action.

XL also is not entitled to summary judgment on its claim for an account stated. "An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the separate items composing the account and the balance due, if any, in favor of one party over the other." Shea & Gould v. Burr, 194 A.D.2d 369, 370 (1st Dept 1993), quoting Chisholm-Ryder Co., Inc. v. Sommer & Sommer, 70 A.D.2d

[2]Notably, the original contract does not have a clause requiring that all modification be in writing signed by the parties charged.

429, 431 (4th Dept 1979). The essential element of an account stated is that the parties have reached an agreement as to the balance of the indebtedness. Interman Indus. Products, Ltd. v. R.S.M. Electron Power, Inc., 37 N.Y.2d 151, 153-54 (1975); Herrick, Feinstein LLP v. Stamm, 297 A.D.2d 477, 478 (1st Dept 2002). Partial payment or the failure of a party receiving an account to examine the statement and make all necessary objections may be deemed acquiescence to the correctness of the balance owed. Morrison Cohen Singer v. Weinstein, LLP v. Waters, 13 A.D.3d 51, 52 (1st Dept 2004); Rosenberg Selsman Rosenzweig & Co., LLP v. Slutsker, 278 A.D.2d 145 (1st Dept 2000).

Here, XL first submits the invoices required to establish an account stated in its reply papers. For this reason alone, summary judgment should be denied on this claim. See Dannasch v. Bifulco, 184 A.D.2d 415 (1st Dept 1992)(the function of reply papers is to respond to the opposition rather than to permit a party to introduce new arguments or evidence). In addition, "a key element of a prima facie account stated claim is evidence that [the plaintiff] delivered one or more invoices for the account claimed to defendant so that [she] received them." Morgan, Lewis & Bockius LLP v. IBuyDigital.com, Inc., 14 Misc.3d 1224(A) (Sup Ct. NY Co. 2007). Here, while the invoices are addressed to Thompson, XL submits no other proof that the invoices were mailed to Thompson, including its regular mailing procedures. See Morrison, Cohen, Singer & Weinstein, LLP v. Brophy, 19 A.D.3d 161, 162 (1st Dept 2005). In fact, the invoices are all dated January 15, 2013, suggesting that they were recently printed from XL's computer, raising issues as to when and whether they were sent to Thompson. Id. Next, as there is evidence that Thompson continued to accept XL's services based on false statements by XL as to its intent to submit its invoices to Medicaid, summary judgment is not warranted on the account stated claim.

Finally, XL is not entitled to summary judgment on its unjust enrichment claim, and, upon searching the record, the court finds that this claim should be dismissed as there is an express agreement between the parties. Brintec Corp. v. Akzo, N.V., 171 A.D.2d 440 (1st Dept 1991)(recovery for unjust enrichment applies only in the absence of an express agreement).

Conclusion

In view of the above, it is

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

ORDERED that the unjust enrichment claim is dismissed; and it is further

ORDERED that the parties shall proceed to mediation.

DATED: October 17, 2013

J.S.C.

FILED

OCT 23 2013

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NEW YORK