Corizon Health, Inc. v New York City Health & Hosps. Corp.
2019 NY Slip Op 32029(U)
July 12, 2019
Supreme Court, New York County
Docket Number: 652710/2018
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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CORIZON HEALTH, INC.,

Plaintiff,

-against-

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

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DECISION AND ORDER
Index No.: 652710/2018

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the following facts are taken from the amended complaint, which was filed after the motion to dismiss (Complaint, NYSCEF Doc. No. 19). Defendant opted to apply the motion to the amended complaint.

Plaintiff Corizon Health, Inc. (Corizon) and its associated clinical professional corporations contracted with the New York City Department of Health and Mental Hygiene (DOHMH) to provide medical, dental, and related services to the NYC Dept. of Correction (DOC) on Rikers Island and at other facilities for 2013-15 (Corizon's predecessor, PHS, had entered into similar agreements previously, for similar services). The Agreement provided for DOHMH to pay the actual costs of the services plus a fixed administrative fee. Actual costs included union pension expenses, which includes pension withdrawal liability (the statutory obligation for an employer to pay a share of the plan's unfunded vested benefits if the employer withdraws from a defined benefit multi-employer pension plan). As the Agreement required Corizon to hire incumbent union healthcare workers at Rikers Island, Corizon entered into the required collective bargaining agreement, which required Corizon to contribute to the unions' multi-employer pension plans and meant Corizon would accrue pension withdrawal liability, when it stopped providing the services.

In July 2015, DOHMH told Corizon it would not enter into a new contract after the end of the term of the Agreement. DOHMH wanted the New York City Health and Hospitals Corporation (HHC) to be the new provider and assigned the Agreement to HHC as of August 9, 2015.

As assignee, HHC became responsible for DOHMH's obligations to Corizon, including reimbursing Corizon for withdrawal liability. The New York State Nurses Association Pension

Plan has assessed over $5 million in withdrawal liability against Corizon. Corizon has paid over $1.7 million. HHC has rejected Corizon's claim for reimbursement.

HHC arranged for Physician Affiliate Group of New York, PC (PAGNY) its clinical services provider, to purchase certain Corizon assets (Complaint, 14-15). The transfer was made in accordance with ERISA, section 4204, which "provides that withdrawal liability is not triggered when a successor company employs incumbent employees who remain in the same pension plan if the successor also purchases assets from the predecessor company" (*id.* at 15). The 1199 Union pension plan withdrawal liability was transferred to PAGNY, and no liability was triggered or assessed at that time (*id.*). HHC and PAGNY did not use the same structure for the nurses. PAGNY did not want to recognize the New York State Nurses Association (NYSNA) union, so the nurses were hired by HHC, which already had a NYSNA bargaining unit with a different pension. As PAGNY would not be taking over Corizon's relationship with the NYSNA pension plan, withdrawal liability was triggered (*id.*). The total withdrawal liability plus fee is estimated to be over $10.7 million.

Corizon asserts claims for:

1) Breach of Contract- for failure to reimburse Corizon for the actual costs of contract services, which include the union pension withdrawal liability;
2) Declaratory Judgment- the HHC is responsible under the Contract for to pay the withdrawal liability to the NYSNA Pension Plan and outstanding.
3) Unjust Enrichment- HHC is using the NYSNA nurses whose benefit costs have been paid by Corizon to date.

II. ARGUMENTS

A. Lack of Subject Matter Jurisdiction

HHC argues in support of dismissal that the Contract has a mandatory dispute resolution procedure with which plaintiff has not complied. It contends, as plaintiff has not exhausted its administrative remedies, the suit should be dismissed. Appendix A of the Contract provides that "Except as provided . . . , all disputes between the City and the Contractor that arise under, or by virtue of, this Agreement shall be finally resolved in accordance with the provisions of this Section and PPB Rule § 4-09. This procedure shall be the exclusive means of resolving any such disputes" (attached as Exhibit A to the original complaint, NYSCEF Doc. No. 2, § 12.03). The section continues that the Contractor shall present its dispute in writing to the agency head within 30 days of written notice of the determination which is the subject of the dispute (unless a time limit is

otherwise specified). That section then lays out a process for the agency head to make a decision, and provides that the decision is final, unless the decision is brought to the Comptroller and then to the Contract Dispute Resolution Board by the Contractor (*id.*).

HHC contends plaintiff failed to submit a notice of dispute, and that HHC was not required to instruct or aid Corizon in navigating this process. HHC argues that Corizon was informed of HHC's refusal to reimburse Corizon by email on February 13, 2017, and Corizon's attorney sent his email to Salvatore Russo (general counsel of HHC) on April 10, 2017, about a month late. HHC also argues the email would not have qualified as a proper notice of a dispute as the email did not "set forth the facts . . . on which Corizon relies" (Reply at 3, citing Agreement Appendix A, §12.03[D][1]). Nor does the large amount of money at stake excuse compliance with the contractual dispute resolution process. In the case relied upon by plaintiff, the court excused the plaintiff's failure to provide a verified statement, since the unverified statements had included sufficient detail, it would be a disproportionate forfeiture, the requirement was not material, "noncompliance [was] de minimum and defendant [had] shown no prejudice whatsoever" (*Danco Elec. Contractors, Inc. v Dormitory Auth. of State*, 162 AD3d 412, 413 [1st Dept 2018]).

As far as plaintiff claims HHC was not subject to the dispute resolution process set out in the Agreement, defendant contends that DOHMH assigned the Agreement to HHC, and therefore HHC stepped into DOHMH's shoes, including with regard to the dispute resolution protocol (Reply at 5). Nor was compliance impossible. The head of HHC would qualify as an Agency Head under the Agreement. Nor did plaintiff unsuccessfully attempt to identify or notify the Agency Head of HHC. Moreover, Corizon did not notify the Comptroller. As far as Corizon argues that the Comptroller could not act, that failure would allowed Corizon to petition for further review, pursuant to the Agreement (*id.* at 7-8).

Plaintiff argues that the restrictions and administrative remedies in the Agreement do not apply, as plaintiff is not suing a City agency (Opp at 23). Plaintiff points out that the dispute resolution procedure set out in the Agreement (Appendix A § 12.03[A] and PPBR § 4-09 [9 NYCRR § 4-09]) applies to "disputes between the City and the Contractor." As HHC is not an agency of the City, but instead a public benefit corporation, the plaintiff argues the procedure in the Agreement does not apply to HHC. Further, HHC does not have an agency head, and the comptroller does not handle HHC's disputes. Accordingly, compliance with the dispute resolution procedure has been rendered legally impossible.

While HHC argues it stepped into the City's shoes because of the assignment, the process simply cannot apply. The Comptroller has no authority over HHC, and there is no Agency Head for HHC. Therefore, Corizon could not have complied with the specified procedure. Further, if Corizon was required to notify HHC of its claim, it did so, via a litigation letter reserving rights after HHC rejected Corizon's claim. HHC did not examine the claim or make a formal determination as per the specified process (Opp at 23-24).

Additionally, Corizon did notify HHC of its dispute of HHC's rejection of Corizon's reimbursement request within thirty (30) days of receiving the rejection and sought a meeting, which HHC denied. HHC did not direct Corizon to the dispute resolution procedure which it is now asserting to be the proper procedure. While there is a special dispute resolution process for HHC, that is only for certain torts, which are not at issue here.

B. Withdrawal Liability is not Reimbursable under the Contract

Defendants also contend the Agreement is not ambiguous and does not require reimbursement for withdrawal liability. The Agreement provides for reimbursement of the "actual costs of the contract services required," which cannot be reasonably interpreted to include withdrawal liability. Corizon admits it had a collective bargaining agreement with NYSNA dating back to 2008 (*see* letter from NYSNA Pension Plan dated December 16, 2016, attached as Exhibit D to Complaint, NYSCEF Doc. No. 23 at 5 [showing 2008 contributions]). Accordingly, Corizon faced potential withdrawal liability before entering into the Agreement and that expense cannot be considered a cost of the contract services (Reply at 9). Nor is the withdrawal liability an expense that "accrued over time" (*id.* at 10). Courts have determined withdrawal liabilities to accrue on withdrawal from the pension plan (*id.*, citing *CenTra, Inc. v Cent. States, Southeast And Southwest Areas Pension Fund*, 578 F3d 592, 604 [7th Cir 2009]). The liability is not an actual cost of required services as a "true up" of contributions, as argued by Corizon, because the pension plan was underfunded. Liability would have accrued unless NYSNA Pension Plan had gotten all participating employers to make additional contributions to fully fund the pension plan, which is an utterly speculative possibility (Reply at 11). The reimbursement obligations for "personnel services" and "fringe benefits" also do not apply to withdrawal liability as that liability is not a cost of services provided and did not accrue until Corizon stopped providing services (*id.*). As far as the budget for the Agreement was amended, the additions to the budget cover specific costs, and the withdrawal liability does not fit into those categories (*id.* at 12). Since the Agreement is

not ambiguous, extrinsic allegations regarding the parties' course of conduct, expectations, and understanding are irrelevant (*id.*).

Corizon contends the withdrawal liability was an actual cost under the Agreement (Opp at 10). As a result of the Agreement, Corizon was required to enter into a relationship with NYSNA and to contribute to the NYSNA retirement plan (*id.*). Based on this required relationship, if a shortfall appeared in the NYSNA plan, Corizon would be required to make an additional payment. Under the Agreement "actual costs" fall into three categories: "personnel services," "fringe benefits," and "other than personnel services" (*id.* at 10). The Agreement does not define any of those terms. All payments to the NYSNA plan are covered as "fringe benefits" (*id.*) DOHMA and HHC reimbursed Corizon for payments to the NYSNA plan over the years.

Also, Corizon argues the withdrawal liability accrued over time, although it was only assessed when Corizon stopped paying in to the retirement plan (*id.*). The withdrawal liability covers underfunded pension obligations incurred during Corizon's relationship with the plan. While Corizon contributed the proper amounts, the pension plan was underfunded, resulting in this liability. If NYSNA had required Corizon to make additional contributions over time, those would have been reimbursable under the Agreement (*id.* at 11). The NYSNA plan incorrectly predicted or calculated what Corizon's contribution should be, and the withdrawal liability represents a "true up" of Corizon's obligation from that period (*id*).

The withdrawal liability is reimbursable as either "personnel services" or "fringe benefits." According to NY Labor Law sections 190 and 198-c, "wages" include "wage supplements" such as retirement benefits (*id.* at 11). The withdrawal liability is a payment into the retirement plan, which is therefore part of wages, and thus "personnel services" under the Agreement (*id.*). The withdrawal liability is also part of "fringe benefits" reimbursable under the Agreement (*id.* at 12). Corizon provided some fringe benefits directly to the nurses, such as vacation time and severance. Contributions to the retirement plan were also a fringe benefit (although not paid directly by the employer), to be collected by the nurses later. Notably, contributions made during the term of the Agreement were reimbursed (*id.*). Reimbursement for the withdrawal liability is appropriate, and there was room in the budget.

As far as HHC argues that withdrawal liability is a cost of ceasing to provide services (Memo at 11), rather than a cost of providing those services, the case relied upon by defendant is distinguishable (*Central States, Southeast and Southwest Areas Pension Fund v International*

Comfort Products, LLC, 2008 WL 8448356 [MD Tenn]). That court, on summary judgment, noted that, as the contract was silent on the issue of withdrawal liability, as the contract term requiring reimbursement of costs terminated when operations did, and as the parties had not contemplated withdrawal liability, withdrawal liability was not reimbursable there (Opp at 17, *Central States* at *4, ["The two limiting phrases "of operations" and "applicable to operations" indicates that, once the contract terminates and operations . . . cease, this language no longer obligates [defendant] to reimburse [plaintiff] for any operational costs or any other costs, including reimbursements for pension contributions on behalf of . . . drivers"]). A Michigan court, looking at a similar set of facts and a different contract, came to a different conclusion, declining to follow the federal case law finding "withdrawal liability does arise under the MPPAA [Multiemployer Pension Plan Amendments Act] until the time of actual withdrawal from the pension fund" and instead considering the case under contract law (*Triple E Produce Corp. v Mastronardi Produce, Ltd.*, 209 Mich App 165, 174 [Mich Ct App 1995]). The Court of Appeals of Michigan, considering the totality of the circumstances, decided the lower court had not erred in ruling the plaintiffs were entitled to indemnification (*id.* at 174-75).

In this Agreement, the categories are broad and vague, and cover the withdrawal liability. The liability accrued during the term of the Agreement, even though the amount was not billed during that term (Opp at 18). Further, HHC paid for severance costs which did not accrue until after the term of the Agreement (*id.* at 18-19). The Agreement contemplated that certain reimbursable expenses might be incurred after the termination of the agreement, providing that, in the event the City terminated the Agreement, "any obligation necessarily incurred by the Contractor on account of this Agreement prior to receipt of notice of termination and falling due after the termination date shall be paid by the City in accordance with the terms of this Agreement" (Agreement, Appendix A, § 10.01). To the extent both sides' interpretations of the Agreement are plausible, the Agreement is ambiguous, and issues of fact exist about the parties' intentions.

C. Declaratory Judgment Claim

As to the declaratory judgment claim plaintiff argues it is not duplicative of the breach of contract claim because the breach of contract claim seeks to recover payments made on the withdrawal liability to date. The declaratory judgment claim seeks to clarify the parties' responsibility for future withdrawal liability payments. In their reply, defendant abandons this

objection and seeks to dismiss the declaratory judgment claim only on the same grounds as the breach of contract claim.

D. Unjust Enrichment Claim

As to Corizon's unjust enrichment claim, HHC argues it fails as a matter of law because the parties have no relationship outside the Agreement and the Agreement contains all terms defining their relationship, so the claim does not arise outside of the Agreement (Reply at 13). The validity of the Agreement is not disputed (*id.* at 14). Further, even if the claim were not precluded, the allegations by Corizon do not include any benefit to HHC bestowed by Corizon. As far as Corizon claims its payment of the withdrawal liability defrays HHC's benefit costs, that is refuted by Corizon's other allegations, including that the nurses who worked for Corizon became members of a different retirement plan, and so cannot be benefitting from Corizon's payment of the withdrawal liability (*id.* at 14-15).

Plaintiff argues that this is pled in the alternative and claims HHC has appreciated the benefit of employing the nursing staff without having to fund a portion of their pension plan (Opp at 21). Corizon was left to make these payments because HHC chose to structure its transaction in a particular way. HHC could have had PAGNY employ the nurses and make the contributions, but because PAGNY refused to recognize the NYSNA union, the deal was structured leaving Corizon with this liability.

III. DISCUSSION

A. Standards

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary

evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85).

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

B. Claims 1 and 2- Breach of Contract and Declaratory Judgment

"The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67).

In accordance with these principles, a court should interpret a contract "so as to give full meaning and effect to the material provisions" (*Beal Savings Bank v Sommer*, 8 NY 3d 318, 324 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). "A reading of a contract should not render any portion meaningless . . . . Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*id.* at 324-325, quoting *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]).

First, defendant argues this court lacks jurisdiction, as the plaintiff failed to follow the dispute resolution procedures. The Agreement provides for dispute resolution procedures between Corizon and the City of New York, but they do not apply to HHC. Nor does HHC have the equivalent people or roles to those listed in the Agreement (§ 12.03). The Agreement does not, by itself, refute the claims alleged.

As to the question of whether the Agreement requires HHC to reimburse Corizon for the withdrawal liability, New York State courts do not provide a direct answer. The cases submitted by HHC are distinguishable and, in any event, are not binding on this court. The agreement in *Central States* had different language, cutting off the obligation to make reimbursements when the contract terminated (2008 WL 8448356 [MD Tenn]["The two limiting phrases "of operations" and "applicable to operations" indicates that, once the contract terminates and operations between the ICP and Top cease, this language no longer obligates ICP to reimburse Top for any operational costs or any other costs"]). Defendant also provides other federal case in which the courts hold that withdrawal liability accrues when the withdrawal occurs, not when the union member does the work (*see* Memo at 10). The language of the Agreement is broad and vague, but it is clear and undisputed "Fringe Benefits" (including contributions to the pension, when made during the terms of the Agreement) are reimbursable. The documentary evidence provided does not directly refute Corizon's claims, which should stand.

C. Unjust Enrichment

Corizon argues, in the alternative, that HHC is unjustly enriched by using the services of the NYSNA-affiliated staff while Corizon pays the NYSNA pension plan expenses, via the withdrawal liability.

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties

concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86 AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

Plaintiff does not allege that the nurses would not be available to HHC if Corizon did not pay the withdrawal liability. Nor does Corizon argue HHC would have to pay for the liability if Corizon did not. Accordingly, Corizon has not alleged HHC is enriched at Corizon's expense, and the claim fails.

IV. CONCLUSION

For the reasons discussed above, the motion shall be granted in part and denied in part. The first two claims, for breach of contract and a declaratory judgment, survive. The third claim, for unjust enrichment, will be dismissed. It is hereby

ORDERED that the motion of defendant New York City Health and Hospitals Corporation to dismiss the complaint (motion sequence number 001) is GRANTED to the extent that the Third Cause of Action alleging unjust enrichment is DISMISSED and is otherwise DENIED.

This constitutes the decision and order of the court.

DATED: July 12, 2019

ENTER,

O. PETER SHERWOOD J.S.C.