At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of September, 2022.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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QUALITY HEALTH MANAGEMENT, INC. d/b/a QUALITY LABORATORY SERVICES,

Plaintiff,

- against -

HEALTHFIRST PHSP, INC., HEALTHFIRST HEALTH PLAN, INC. and HEALTHFIRST INSURANCE COMPANY, INC.,

Defendants.

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DECISION / ORDER

Index No. 511345/18
Motion Seq. # 13, 14

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion and Affidavits (Affirmations)	414-488 490-498
Opposing Affidavits (Affirmations)	527-572 504-526
Reply Affidavits (Affirmations)	578-583 585

Upon the foregoing papers in this action for damages arising from the termination of a June 6, 2016 Participating Provider Agreement (Provider Agreement) between plaintiff [participating provider] Quality Health Management, Inc. d/b/a Quality Laboratory Services (plaintiff or QLS) and [insurance company] Healthfirst PHSP, Inc., Healthfirst Health Plan, Inc. and Healthfirst Insurance Company, Inc. (collectively, Healthfirst or defendants), Healthfirst moves (in motion sequence [mot. seq.] 13) for an

order, pursuant to CPLR 3212, granting it summary judgment dismissing plaintiff's complaint.

QLS moves (mot. seq. 14) for an order, pursuant to CPLR 3212, granting it partial summary judgment on its first (breach of contract) and its third (violation of Insurance Law § 3324-a) causes of action.

Background

QLS commenced this action by filing a summons and a verified complaint asserting causes of action against Healthfirst for: (1) breach of the Provider Agreement by putting QLS on "pre-payment review status"; (2) breach of the implied covenant of good faith and fair dealing; (3) violations of Insurance Law § 3324-a (the Prompt Payment Law); (4) violation of Public Health Law § 4406-d; (5) antitrust violations under General Business Law (GBL) § 340 (the Donnelly Act); (6) prima facie tort; and (7) a declaratory judgment regarding outstanding claims (for thousands of blood tests that QLS allegedly performed) that Healthfirst refused to pay.

By a July 18, 2019 decision and order, this court granted Healthfirst's pre-answer motion to dismiss the fifth cause of action asserting that Healthfirst violated GBL § 340, the Donnelly Act, and the seventh cause of action for a declaratory judgment regarding plaintiff's outstanding claims (*see* NYSCEF Doc Nos. 102 and 442).

On September 5, 2019, Healthfirst answered the complaint, denied the material allegations therein, and admitted that it is "a managed care organization that administers health insurance benefits under Medicaid and Medicare and provides services to over one million Medicaid patients in downstate New York . . ." and that "QLS was placed on

prepayment review in part because one of its former employees [Alec Brook-Krasny] was indicted for, among other things, Medicaid fraud in connection with an alleged 'pill-mill scheme'" (*see* NYSCEF Doc No. 106 at ¶¶ 23 and 34).[1] Healthfirst asserted several affirmative defenses, including that "[p]laintiff's claims are barred in whole or in part because Plaintiff has submitted medical claims that are not payable under applicable law, including the federal law of Social Security and Medicare" (*id.* at ¶ 114).

On July 16, 2021, QLS filed a note of issue and certificate of readiness indicating that all discovery has been completed and that the action is ready for trial (NYSCEF Doc No. 389). Notably, QLS did not indicate that there were outstanding issues or disputes regarding discovery or Healthfirst's production of witnesses for deposition. Indeed, when Healthfirst moved for an order to vacate the note of issue and compel discovery, QLS opposed the motion with an affirmation from counsel representing that QLS had already produced all relevant discovery (*see* NYSCEF Doc Nos. 379 at ¶¶ 40-43 and 580 at ¶¶ 40-43). By an August 12, 2021 order, the court (Knipel, J.) denied Healthfirst's motion to vacate the note of issue (*see* NYSCEF Doc No. 409).

Healthfirst's Instant Summary Judgment Motion

On September 14, 2021, Healthfirst timely moved for summary judgment in its favor on the remainder of QLS's claims. Healthfirst submits an affirmation from Dr. Deborah Hammond (Hammond), Executive Medical Director and Vice President for the Healthfirst defendants and a physician licensed to practice in New York. Hammond affirms that QLS became a Healthfirst participating provider under a June 6, 2016 Provider

[1] He was acquitted after trial in New York County on most counts and the remaining counts were ultimately dismissed.

Agreement, the identical terms of which are in their other participating provider agreements (NYSCEF Doc No. 459 at ¶ 4). Hammond affirms that "[t]he Provider Agreement incorporates by reference Healthfirst's Provider Manual[,]" which "alerts providers that they are expected to comply with all Medicare and Medicaid program requirements, in particular with respect to practices relating to fraud, waste and abuse" (*id.* at ¶¶ 8-9).

Hammond asserts that "it has long been considered excessive and unnecessary for providers to order quantitative tests for a substance without first seeing a positive presumptive result or some other clinical indicators of the patient's use of that particular substance" and that "[p]ractitioners should not apply blanket orders for pre-defined groups of tests to their patients generally" (*id.* at ¶ 26). Hammond references the deposition testimony of Greg Roman, founder of QLS, "who testified that QLS gives providers a requisition form that allows them to order definitive (or confirmation) tests for 78 different drugs and drug classes with a single check-mark" which Hammond claims is "excessive" (*id.* at ¶¶ 66-67).

Hammond alleges that in April 2017, Healthfirst placed QLS on "pre-payment review" because it learned that QLS employee Alec Brook-Krasny, had been indicted in connection with a Medicaid and Medicare fraud scheme (*id.* at ¶ 27). Hammond explained that "Healthfirst initiated a data analysis of past QLS claims to check for irregularities related to the alleged fraudulent scheme . . ." (Post-Pay Analysis), which was performed by General Dynamics Health Services (GDHS), an outside vendor, later known as Cotiviti (*id.* at ¶¶ 29-30). Hammond asserts that "[f]requent absence of claims for referring provider visits is a strong indicator of fraud in medical [testing] services ordered by a

physician . . . because a physician visit must occur before such services can be ordered" (*id.* at ¶ 32). Hammond avers that "[o]n April 14, 2017, Kiran Heer, head of Healthfirst's antifraud Special Investigations Unit ("SIU"), internally reported . . . the results of the Post-Pay Analysis, which showed that for 23.36% of the members [patients] receiving lab services, no claims were ever submitted for a referring provider visit" and that "the 23% figure in QLS's case represented an unusually high discrepancy, and strong evidence that QLS was performing laboratory tests that had not been selected by a treating practitioner" (*id.* at ¶¶ 31 and 34). Consequently, based on this strong indicator of fraud, Healthfirst placed QLS on pre-pay review[2] on April 14, 2017 (*id.* at ¶ 35).

Hammond recounts that subsequently "Healthfirst sent a termination letter to QLS on July 12, 2017, notifying QLS that it was terminated [as a participating provider] for fraud effective immediately and that it was accordingly not entitled to a hearing under Section 4406-d of the New York State Public Health Law" (*id.* at ¶ 55). Hammond affirms that she was a member of Healthfirst's "Fraud, Waste & Abuse Committee [which] unanimously voted to terminate QLS[,]" and the decision was ratified in a July 12, 2017 email by Healthfirst's Credentialing Committee, which unanimously voted to confirm the recommendation to terminate QLS based on "fraud and the threat of imminent harm to Healthfirst members" (*id.* at ¶¶ 41-44).

Hammond asserts that the plaintiff's termination was based on a Medicaid fraud scheme in which "Brook-Krasny was indicted for using QLS to conduct unnecessary

[2] Hammond explained that "Pre-pay Review" means that QLS was required to submit medical records for all of its claims in order to verify that such services were ordered by a treating provider, were actually performed, and were medically necessary (*id.* at ¶ 36).

laboratory tests, to alter test results, and to fraudulently bill Medicare and Medicaid, all as part of a larger opioid prescription conspiracy," as well as based on the results of the Post-Pay Analysis conducted by GDHS in April 2017 (*id.* at ¶¶ 45 and 48-50). As reported to the Fraud, Waste and Abuse Committee, GDHS found that all of the QLS Pre-Pay Claims reviewed were not supported, and should be denied, because there was no documentation, or a signature, or anything else from the treating provider reflecting that the prerequisite drug screen was conducted before the quantitative testing was ordered, and "QLS had a pattern of performing laboratory tests without a signed order" which is "directly contrary to express Medicaid regulations" (*id.* at ¶¶ 52-53).

Hammond avers that "[d]uring the prepay review process, Healthfirst reached out to a small sample of providers identified by QLS as 'referring providers' on various claims" and "[a]lmost none of the 'referrals' asserted by QLS were corroborated" (*id.* at ¶ 56). Specifically, Healthfirst reached out to the following Referring Providers: (1) Dr. Tomas Pattugalan, who confirmed referrals for 70 out of 359 services, but he denied having referred the other 289; (2) Dr. David Laks, who responded that he had referred none of the 156 services for which QLS had identified him as a referring provider; and (3) Dr. Irina Kiblitsky who similarly responded that none of the services performed by QLS had been referred by her (*id.* at ¶¶ 57-59). Hammond asserts that "as of July 2017, these three provider responses constituted significant specific information supporting Healthfirst's determinations . . . that QLS was fraudulently submitting claims for laboratory tests that had not been ordered by a treating physician" (*id.* at ¶ 60; NYSCEF Doc Nos. 474-476).

Hammond references accompanying affidavits and affirmations from the foregoing Referring Providers,[3] including Dr. Abu Haque, who Hammond affirms "had been the number one referring provider identified by QLS . . ." but "denied in a sworn affidavit that he ever treated, let alone ordered lab work for, the Healthfirst members that QLS identified as Dr. Haque's referrals" (*id.* at ¶ 62). According to Hammond, Dr. Kiblitsky denied that she ordered tests for 75 claims submitted by QLS, affirms that she never referred any patient identified by QLS for toxicology tests and that her name was apparently used without her permission. Hammond further affirms that Dr. Laks similarly stated that QLS used his name as the referring provider to bill for tests that he did not order. Hammond asserts that another Referring Provider, "Dr. George Juang, similarly swore that none of the services performed by QLS had been ordered by him . . ." (*id.* at ¶ 65). Hammond concludes by asserting that:

> "[t]he provider affidavits and the revelations about QLS's panel groupings strongly corroborate Healthfirst's earlier determinations of fraud and imminent harm to member care. Even aside from the information that our Committees reviewed in 2017, in light of these additional revelations during this lawsuit, it would be unthinkable for Healthfirst to consider admitting QLS back into its provider network. For these reasons, Healthfirst respectfully opposes any effort by QLS to challenge its termination or seek court-ordered reinstatement" (*id.* at ¶ 71).

Healthfirst also submits a memorandum of law arguing that Healthfirst is entitled to summary judgment on QLS's first cause of action for breach of the Provider Agreement by putting QLS on "pre-payment review status" and by denying QLS's claims. Healthfirst

[3] *See* NYSCEF Doc Nos. 485 (Dr. Haque affidavit), 481 (Dr. Kiblinsky affirmation), 484 (Dr. Laks affirmation), 487 (Dr. Juang affidavit).

argues that "QLS utterly failed to perform its most important contractual obligations – to perform reimbursable services and to comply with the healthcare laws" because "[n]early 95% of the lab claims at issue were performed based on orders without any authenticating signatures from an ordering physician, or [were ordered] based on QLS forms that impermissibly grouped together large numbers of separate lab tests in order to drive up billings . . ." (NYSCEF Doc No. 489 at 1). Healthfirst contends that QLS does not have a viable breach of contract claim based on its termination from the Healthfirst network because "[t]he contract permitted Healthfirst to terminate QLS based on a reasonable determination of fraud or risk of patient harm" which has been established by an abundance of evidence (*id.* at 2).

Healthfirst also argues that there is no evidence to support QLS's second cause of action for breach of the covenant of good faith and fair dealing. Healthfirst next asserts that the third cause of action "for violation of Insurance Law § 3324-a [the Prompt Payment Law] fails because the statute does not apply to clinical labs, and does not apply where, as here, the health plan has specific information of fraudulent submissions by the provider" (*id.*). Similarly, Healthfirst argues that QLS's fourth cause of action for violation of Public Health Law § 4406-d also fails, because that statute only covers individual medical practitioners, and not laboratories. Finally, Healthfirst contends that the sixth cause of action, for prima facie tort, fails because "there is no allegation, let alone evidence, that Healthfirst was motivated solely by malice or that Healthfirst intentionally inflicted any harm independent of its contractual obligations" and "the evidence is undisputed that

Healthfirst acted out of a desire to prevent healthcare fraud and to protect its members" (*id.* at 3).

QLS's Opposition

QLS, in opposition, submits an affidavit from Anna Sokolov (Sokolov), QLS's general manager, who attests that she has personal knowledge based on her review of QLS's business records, which she is "responsible for maintaining" (NYSCEF Doc No. 527 at ¶ 1). Sokolov attests that:

> "in April 2017 based on nothing but speculation Healthfirst invoked a process designed only to terminat[e] QLS's provider agreement and avoid paying for all of QLS' outstanding claims. Healthfirst refers to the process they invoked as 'pre-payment review' but in fact it consisted of an across-the-board denial of all claims. Prior to Defendants placing QLS on a pre-payment review plan in April 2017, Defendants never once raised any of the issues it now asserts as a ground to deny all QLS claims. More importantly Defendant never once denied a claim for reimbursement from QLS prior to placing QLS on prepayment review" (NYSCEF Doc No. 527 at ¶ 9).

In addition to claiming that Healthfirst began to "arbitrarily" reject QLS's claims, Sokolov asserts that "the allegations made by the respective doctors are knowingly false" (*id.* at ¶ 16). Sokolov submits a series of logs and forms regarding the Referring Providers and asserts that "[i]f any potential 'fraud' has been committed, it is on the part of the Referring Providers who did in fact order the tests to be conducted" (*id.* at ¶ 43).

Healthfirst's Reply

Healthfirst, in reply, submit an attorney affirmation arguing that the exhibits annexed to Sokolov's opposing affidavit were never produced by QLS during the course of discovery or otherwise provided to Healthfirst (NYSCEF Doc No. 578 at ¶ 3).

Defense counsel asserts that "QLS's inclusion of these exhibits is all the more shocking because Healthfirst had expressly requested that QLS furnish records regarding the referring providers that these exhibits are purportedly about" (*id.* at ¶ 4). Defense counsel explains that Healthfirst moved to vacate the note of issue and compel production of these documents (in mot. seq. 11), which QLS successfully opposed by claiming that: "all discovery in Plaintiff's possession has already been disclosed," the material was not "material and necessary to [Healthfirst's] defense of this action" and "[p]laintiff cannot draw blood from a stone" (*see* NYSCEF Doc Nos. 578 at ¶ 6 and NYSCEF Doc Nos. 379 at ¶¶ 40-43 and 580 at ¶¶ 40-43 [QLS's counsel's affirmation opposing Healthfirst's motion to compel discovery regarding the Referring Providers in mot. seq. 11]).

In contrast, Healthfirst's counsel affirms that the Referring Provider affidavits submitted in support of Healthfirst's instant summary judgment motion, wherein affiants deny ordering certain tests billed by QLS (NYSCEF Doc Nos. 481, 484, 485 and 487), were previously produced to QLS during discovery and "those affidavits remain factually unrefuted" (NYSCEF Doc No. 584 at 3).

Healthfirst also submits a reply memorandum of law arguing that "[t]he Sokalov Affidavit should be precluded altogether because it relies on purported internal records from QLS that were never disclosed" and were "deliberately concealed" (*id.* at 8). Healthfirst further argues that QLS has abandoned its third cause of action for violation of Insurance Law § 3324-a (Prompt Payment Law) and its sixth cause of action for prima facie tort, since it failed to address or even mention these two causes of action in opposition to Healthfirst's summary judgment motion (*see* NYSCEF Doc No. 584 at 1).

Healthfirst asserts that it has sufficiently demonstrated that the indictment of Brook-Krasny, the Post-Pay Analysis, and the Pre-Pay Review results, were sufficient grounds to terminate QLS and are, therefore, fatal to QLS's fourth cause of action for violation of Public Health Law § 4406-d because "Healthfirst cannot be held to have acted arbitrarily in its fraud determination" (*id.* at 2).

QLS's Partial Summary Judgment Motion

On September 15, 2021, QLS moved for partial summary judgment on its first (breach of contract) and third (violation of Insurance Law § 3324-a) causes of action with only an attorney affirmation.

QLS's counsel argues that "[a]t a Compliance Conference held on or about August 6, 2020, the Court ordered that all depositions must be completed on or before October 30, 2020" and that "[t]he Order [from the Centralized Compliance Part (CCP)] directed that 'failure to comply with this order shall result in preclusion against the offending party from offering evidence at the time of trial or at the time of dispositive motions regarding those specific items of discovery . . .' and that it was "self-executing" (NYSCEF Doc No. 490 at ¶¶ 20-21). QLS's counsel affirms that "[b]y stipulation, the parties agreed to an extension of time to conduct the remaining depositions through December 14, 2020" (*id.* at ¶ 30). QLS's counsel affirms that at a January 4, 2021 compliance conference, the Court again extended the date by which depositions could be held to March 23, 2021 and ordered that the "failure to comply with this order will result in preclusion of the non-complying party pursuant to CPLR 3126 (2) without further order of this court" (*id.* at ¶ 31).

QLS's counsel asserts that Healthfirst produced Shannon Cameron for a deposition on March 19, 2021, rather than Alyssa Friedman and Dr. Eric Johnson, the witnesses whose depositions were noticed. QLS's counsel claims that "Ms. Cameron was unaware of Defendants' claims procedures and did not know about Defendants' billing practices . . ." (*id.* at ¶ 42). Consequently, QLS's counsel now argues that Healthfirst should be precluded from offering any evidence to oppose plaintiff's claim regarding payment for unpaid claims, based on its violations of the self-executing CCP orders issued after compliance conferences on August 20, 2020 and January 4, 2021 (*id.* at ¶ 51). QLS's counsel asserts that Healthfirst violated those two discovery orders because it "repeatedly failed to produce for deposition a witness knowledgeable about the central claim at issue: Plaintiff's submission of claims for laboratory services to Defendants for reimbursement, which Defendants have dismissed without sufficient reason and/or payment to Plaintiff" (*id.* at ¶ 52).

QLS's counsel explains that plaintiff sought to depose Alyssa Friedman, Vice President of Healthfirst's Fraud, Waste and Abuse Committee, and Dr. Eric Johnson, who works in Healthfirst's Claims Department, because, in December 2020, QLS deposed Dr. Jay Schectman, the Chief Clinical Officer of Healthfirst, who was "unable to explain why Healthfirst refused to pay QLS" (*id.* at ¶¶ 22, 52 and 57-58). Counsel contends that QLS "needed to[ ] and had a right to depose the relevant witnesses from Defendants with knowledge of the bases for denial of the claims QLS submitted to [Healthfirst] for reimbursement" (*id.* at ¶ 53).

QLS's counsel argues that "[a]s Defendants have violated this Court's self-executing Orders, they are precluded from offering any evidence on the issue of Plaintiff's unpaid claims submitted to Defendants" and thus, "[a]s Defendants are precluded from offering any evidence to rebut Plaintiff's allegations about their unpaid claims, there are no material issues of fact to be tried and Plaintiff should be granted [partial] summary judgment" on its first (breach of contract) and third (violation of Insurance Law § 3324-a) causes of action (*id.* at ¶¶ 69-70).

QLS's counsel argues that "Exhibit 4.1 of the Provider Agreement obligates Healthfirst to reimburse QLS for the provision of health care services to Healthfirst's members" and:

> "to provide, with reasonable detail, the basis for any service not paid and provides QLS with the opportunity to appeal in writing within sixty days of any such decision by Healthfirst. In the same vein, the Provider Manual requires that rejected claims be returned to QLS by Healthfirst along with a reason for the rejection. The Provider Manual also requires Healthfirst to afford QLS the opportunity, within certain specified filing guidelines, to resubmit certain claims" (*id.* at ¶¶ 74-75).

Relying on the allegations in paragraph 50 of QLS's complaint, counsel affirms that "[f]rom April 11, 2017 to October 19, 2017, QLS electronically submitted over 20,000 claims for reimbursement" and "[t]hese claims were all medically necessary and supported by the proper documentation pursuant to the Provider Agreement, Provider Manual and the terms of the prepayment audit programs" (*id.* at ¶ 77). Counsel further affirms that:

> "Defendants have breached their contractual obligations to QLS by refusing to comply with the terms of the Provider Agreement and Provider Manual by (i) placing QLS on prepayment review based on a fabricated finding of fraud; (ii)

> refusing to reimburse QLS for a vast majority of the properly submitted claims from April 11, 2017 to October 19, 2017, leading to approximately $2,500,000.00 in reimbursements due to QLS; and (iii) terminating QLS's Provider Agreement based on fraud even though no fraud occurred" (*id.* at ¶ 78).

Essentially, counsel argues that based on the self-executing CCP discovery Orders, Healthfirst is deemed to have admitted all allegations in the complaint, and thus, QLS is entitled to summary judgment on its first cause of action for Healthfirst's breach of the Provider Agreement (*id.* at ¶ 79).

QLS's counsel similarly argues that Healthfirst "cannot refute" that it violated Insurance Law § 3324-a (the Prompt Payment Law), which "sets forth time frames within which an insurer must either pay a claim, notify the claimant of the reason for denying a claim, or request more information" and "required [Healthfirst] to reimburse QLS for health care services rendered within thirty days of receipt of the claim via electronic means or within 45 days after receipt by other means" (*id.* at ¶¶ 82-83). Referencing the complaint, QLS's counsel asserts that "[i]n total, [Healthfirst] ha[s] refused to reimburse QLS for the submitted claims from April 11, 2017, to October 19, 2017, leading to approximately $2,500,000.00 in reimbursements due to QLS" and Healthfirst is deemed to admit these allegations in the complaint based on the self-executing CCP discovery orders (*id.* at ¶¶ 88-89).

Healthfirst's Opposition

Healthfirst, in opposition to QLS's partial summary judgment motion, submits a memorandum of law arguing that QLS's motion, submitted "without a single supporting affidavit from anyone in its company," is nothing but "procedural gamesmanship, based

entirely on the blatantly false assertion that Healthfirst withheld relevant witnesses from being deposed" (NYSCEF Doc No. 503 at 1). Healthfirst argues that QLS relies entirely on its complaint, "which cannot be competent evidence because its purported verifier [Alexander Kharaz] has admitted under oath that he has no personal knowledge of its contents" (*id.*).

Healthfirst argues that "any notion that Healthfirst failed to comply with the Court's discovery orders is a figment of QLS's imagination" because "QLS served notices for two Healthfirst witnesses who had no relevant knowledge, and Healthfirst duly substituted them with appropriate witnesses, as expressly permitted under . . . CPLR [3106 (d)]" (*id.* at 2). In any event, Healthfirst asserts that "the contested witnesses upon whom QLS bases its motion [Alyssa Friedman and Dr. Eric Johnson] have no firsthand knowledge of the QLS claims review" (*id.* at 3).[4] Finally, Healthfirst notes that "[o]n July 16, 2021, QLS filed a note of issue stating that discovery in this action had been completed, contradicting its position in this motion that Healthfirst depositions remain outstanding" (*id.* at 11).

QLS's Reply

QLS, in reply, submits a lengthy attorney affirmation which merely reiterates the arguments that QLS previously asserted.

[4] Healthfirst produced its replacement notice, pursuant to CPLR 3106 (d) (*see* NYSCEF Doc No. 497), in which defense counsel explained that "QLS's claims were either processed by an automated adjudication system or subject to prepayment review by outside vendors, including a prepayment process ordered by the court, and Ms. Cameron is the individual who reviewed QLS's claims pursuant to that court-ordered process" (*see* NYSCEF Doc No. 504 at ¶ 11).

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

Healthfirst has satisfied its burden of demonstrating that it is entitled to summary judgment dismissing QLS's first cause of action, which alleges that Healthfirst breached the Provider Agreement by placing QLS on "pre-payment review status" and by failing to pay certain claims. Healthfirst proved, through Hammond's uncontested affirmation testimony and an abundance of documentary evidence, that it was permitted to terminate QLS under the Provider Agreement based on Healthfirst's reasonable determination of fraud or risk of patient harm. Healthfirst did so by producing evidence that it placed QLS on "pre-payment review status" because: (1) QLS's employee, Brook-Krasny, was

indicted in a Medicaid fraud scheme for using QLS to conduct unnecessary laboratory tests, alter test results and fraudulently bill Medicare and Medicaid; (2) the Post-Pay Analysis conducted by GDHS in April 2017 reported to Healthfirst's Fraud, Waste and Abuse Committee that QLS had a pattern of performing laboratory tests without a signed order from a Referring Provider in contravention of Medicaid regulations; and (3) during the prepay review process, Healthfirst reached out to a sampling of QLS's Referring Providers (Drs. Pattugalan, Laks and Kiblitsky) who corroborated that as of July 2017 QLS had submitted claims for laboratory tests that had not been ordered by them.

QLS's second cause of action, for breach of the implied covenant of good faith and fair dealing, must also be dismissed, since there is no evidence in the record that Healthfirst's termination of QLS or its denial of QLS's claims was done in bad faith.

QLS's third cause of action alleges that Healthfirst violated Insurance Law § 3224-a, the Prompt Pay Law, which "imposes standards upon insurers for the 'prompt, fair and equitable' payment of claims for health care services" and "sets forth time frames within which an insurer must either pay a claim, notify the claimant of the reason for denying a claim, or request additional information" (*Maimonides Med. Ctr. v First United Am. Life Ins. Co.*, 116 AD3d 207, 208 [2014]). Insurance Law § 3224-a provides that, except in a case where the obligation of an insurer to pay a claim is not reasonably clear, or *when there is a reasonable basis on which to conclude that such claim was submitted fraudulently*, the insurer "shall pay the claim to a policyholder or covered person or make a payment to a health care provider" within 30 days after receipt of an electronically transmitted claim or bill or 45 days after receipt of such by other means" (emphasis added).

The Second Department has held that "the Prompt Pay Law affords an implied private right of action *to patients and health care providers*" (*id.* at 214 [emphasis added]). Research has disclosed no New York case decisions holding that a laboratory, like QLS, has a private right of action against an insurer under the Prompt Payment Law. Regardless, Healthfirst has submitted sufficient evidence that Healthfirst had a reasonable basis to conclude that QLS submitted fraudulent claims for laboratory tests that were not ordered by Referring Providers. Consequently, summary judgment dismissing the third cause of action, which alleges that Healthfirst violated Insurance Law § 3224-a, is warranted.

The fourth cause of action in the complaint, which alleges that Healthfirst violated Public Health Law § 4406-d, is subject to dismissal because the statute only covers individual health care professionals, by its express terms, and not laboratories. Indeed, Public Health Law §4406-d (2) (a) explicitly provides that:

> "A health care plan shall not terminate a contract with *a health care professional* unless the health care plan provides *to the health care professional* a written explanation of the reasons for the proposed contract termination and an opportunity for a review or hearing as hereinafter provided. *This section shall not apply in cases involving imminent harm to patient care, a determination of fraud*, or a final disciplinary action by a state licensing board or other governmental agency that impairs the health care professional's ability to practice" (emphasis added).

In any event, like the Prompt Payment Law, the Public Health Law § 4406-d does not apply where, as here, there is evidence of fraud and/or imminent harm to patients (*see Ahmed Elkoulily, M.D., P.C. v New York State Cath. Healthplan, Inc.*, 153 AD3d 773, 774 [2017] [holding that "(a) plaintiff has an implied right of action under Public Health Law § 4406–d, which gives *health care providers* a measure of due process, in the form of peer review,

against the arbitrary termination of health care plan contracts . . .” but “it does not apply in cases involving imminent harm to patent care”]).

Finally, Healthfirst has demonstrated a prima facie right to summary judgment dismissing the sixth cause of action for prima facie tort. “The requisite elements of a cause of action sounding in prima facie tort are: (1) the *intentional* infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (*Smith v Meridian Techs., Inc.*, 86 AD3d 557, 558-559 [2011] [internal quotation marks omitted] [emphasis added]). Healthfirst correctly argues that there is no allegation in the complaint, or any evidence in the record, that Healthfirst intentionally inflicted any harm. In contrast, Healthfirst submitted undisputed evidence that it terminated its Provider Agreement with QLS and otherwise refused to pay certain claims for laboratory work in a good faith effort to prevent healthcare fraud and to protect its members.

QLS, in opposition to Healthfirst’s summary judgment motion, produces the Sokolov affidavit, which addresses and discusses documents in QLS’s possession regarding the Referring Providers whose testimony was submitted in support of Healthfirst’s summary judgment motion. QLS is legally precluded from now offering exhibits regarding the tests ordered by the Referring Providers in opposition to Healthfirst’s summary judgment motion; documents which QLS failed to produce during discovery. This is especially so as it represented to the court, in opposition to Healthfirst’s motion to compel and to vacate the note of issue (in mot. seq. 11), that it previously produced or does not have any such documents (*Cap Rents Supply, LLC v Durante*, 167 AD3d 700, 702

[2018] [holding that "the failure to provide information in its possession or control precludes the party from later offering at trial evidence regarding that information"]).

Indeed, QLS filed the note of issue and certificate of readiness in July 2021, which represents that discovery was complete and that there were no outstanding discovery issues. For this reason, those portions of Sokolov's opposing affidavit regarding "detailed records regarding each of the Referring Providers tests submitted to QLS for QLS to perform testing on the respective doctors' patients[,]" (NYSCEF Doc No. 527 at ¶¶ 16-41) and the exhibits annexed thereto (which comprise hundreds of pages) regarding the Referring Providers, such as new client forms and logs that QLS failed to produce during discovery, was not considered by the court (*see Gerardi v Verizon New York, Inc.*, 66 AD3d 960, 961 [2009] [holding that "expert affidavit should not have been considered in determining the motion since the expert was not identified by the plaintiff until after the note of issue and certificate of readiness were filed attesting to the completion of discovery"]).

QLS has otherwise failed to raise any triable issues of fact that preclude summary judgment in Healthfirst's favor regarding the remaining causes of action (first, second, third, fourth and sixth). Indeed, as Healthfirst correctly notes, QLS fails to mention, or even address, its third cause of action for violation of Insurance Law § 3324-a, or its sixth cause of action for prima facie tort, in opposition to Healthfirst's summary judgment motion, and thus, those causes of action, although lacking merit, are also subject to summary dismissal, as they have been abandoned by QLS.

QLS's motion for partial summary judgment on its first cause of action for breach of the Participation Agreement and its third cause of action for violation of Insurance Law

§3324-a is denied. QLS's partial summary judgment motion is supported only by an attorney affirmation and is, therefore, insufficient under CPLR 3212 (b), which explicitly provides that "[a] motion for summary judgment *shall* be supported by affidavit [which] shall be by a person having knowledge of the facts . . ." (emphasis added). An attorney affirmation is without evidentiary value and is, thus, insufficient to support summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980]). Even assuming, arguendo, that QLS's moving affirmation is sufficient, QLS's partial summary judgment motion based solely on CCP Preclusion Orders issued before QLS filed the July 2021 note of issue is rejected. QLS filed a note of issue and certificate of readiness on July 16, 2021 attesting to the completion of discovery, and then opposed Healthfirst's subsequent motion (mot. seq. 11) to vacate the July 2021 note of issue and certificate of readiness. Having previously attested to the completion of discovery, and having opposed a motion to vacate the note of issue, QLS has waived the right to challenge the sufficiency of the defense witnesses that were produced in response to its requests during discovery (*see Morrison v Sam Snead Sch. of Golf of New York, Inc.*, 13 AD2d 986, 986 [1961] [holding that "when a plaintiff places a case upon the calendar by filing a note of issue and a statement of readiness without having taken the defendant's deposition, such action ordinarily constitutes a waiver of the plaintiff's right to take the deposition" absent unusual circumstances]). Accordingly, it is hereby

ORDERED that Healthfirst's summary judgment motion (mot. seq. 13) is granted and the first, second, third, fourth and sixth causes of action, which are the only remaining causes of action in the complaint, are dismissed; and it is further

ORDERED that QLS's motion (mot. seq. 14) for partial summary judgment on its first (breach of contract) and third (violation of Insurance Law § 3324-a) causes of action is denied.

This constitutes the decision, order and judgment of the court.

E N T E R,

Hon. Debra Silber, J.S.C.