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Western N.Y. Immediate Med. Care, PLLC v Healthnow N.Y., Inc.
2013 NY Slip Op 52252(U)
Decided on December 20, 2013
Supreme Court, Erie County
Walker, J.
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Decided on December 20, 2013

Supreme Court, Erie County

Western New York Immediate Medical Care, PLLC, Plaintiff/Petitioner,

against

Healthnow New York, Inc. d/b/a BLUE CROSS BLUE SHIELD OF WESTERN NEW YORK, Defendant/Respondent.

2013-804071

APPEARANCES:NOTARO & LAING, P.C.

Linda C. Laing, Esq., of counsel

Attorneys for Plaintiff

WEBSTER SZANYI LLP

Michael P. McClaren, Esq., Of Counsel

Attorneys for Defendant

Timothy J. Walker, J.

This matter concerns the participating provider status of Plaintiff, Western New York Immediate Medical Care, PLLC ("PP Status") with Western New York's largest health insurer, HealthNow New York, Inc. d/b/a Blue Cross Blue Shield of Western New York (Defendant). By way of an order to show cause, requesting a temporary restraining order ("TRO") and a preliminary injunction, Plaintiff seeks to prevent Defendant from terminating its PP Status as of January 1, 2014. After argument on December 6, 2013, the parties stipulated to certain relief, pending the return date on the preliminary injunction (PI) application (the "Return Date"). Essentially, they agreed that there would be no interference with, or termination of any relationship between the parties, so that Plaintiff would retain its PP Status; Defendant would continue to reimburse Plaintiff as before, through the Return Date; Defendant would communicate no further with its subscribers as to Plaintiff's PP Status; and neither party would communicate to third parties regarding the status of their relationship. Defendant also agreed to [*2]inform the New York State Department of Health (DOH) that Plaintiff's PP Status would be continued through the Return Date.

Record on Application

Plaintiff provides urgent care services at five centers located in Erie County. The complaint contains seven (7) causes of action: 1) breach of express contract; 2) breach of implied in fact agreement; 3) breach of preliminary agreements to agree on Five Tier Reimbursement Rates; 4) breach of implied covenant of good faith and fair dealing (i.e., failure to negotiate in good faith); 5) General Business Law §349; 6) Defamation; and 7) a request for preliminary injunctive relief.

The parties' initial contract was actually an addendum to a 2003 Agreement between Buffalo Emergency Associates Inc. ("BEA") (an affiliate of Plaintiff) and Defendant (the "2003 Agreement"). The addendum was executed in 2005 (hereafter the "2005 Agreement"). The 2005 Agreement essentially set reimbursement rates for Plaintiff, and incorporated (from the 2003 Agreement) a provision for a 2-year term, ending on June 30, to continue thereafter for successive one-year terms unless either party "notifie[d] the other that it elect[ed] not to renew the [2005] Agreement at least six (6) months prior to the end of the initial term or any Extended Term(s)." A

copy of the 2003 Agreement was delivered to the Court during oral argument on December 6, 2014.

However, when **BEA** executed a new contract in 2011, the 2003 Agreement was extinguished as between BEA and Defendant. At that point, no new written agreement existed between the parties herein.

Defendant admits that, at that point, the parties "agreed to retain the status quo pending negotiations" of a new written agreement.

The Course of Negotiations

Plaintiff asserts that Defendant sent it a proposed new agreement on August 27, 2010 (the "2010 Proposed Agreement"). However, no such document appears in the record. Emails exchanged between the parties establish that Plaintiff's counsel sent revised proposed contracts for both BEA and Plaintiff to Defendant on December 6, 2010, and requested a meeting to negotiate formal agreements. In response, Defendant advised that the **BEA** agreement had been sent for final formal review and suggested that a meeting be scheduled to discuss the **other** (i.e., Plaintiff's) contract.

Based on that exchange, Plaintiff alleges that the parties agreed upon an automatic renewal provision and a September 30th anniversary date, terminable on 60-days' notice prior to the end of the term (similar but not identical to section 8.1.1. of the 2003 Agreement).

Defendant alleges that the 2010 Proposed Agreement included a provision entitling either party to terminate on 90-day's notice, which **Plaintiff** rejected in its December 6, 2010 email, instead submitting a counter-proposal that included a provision that the parties would negotiate a new contract prior to September 30, 2011, and if they failed to agree, that the contract would automatically renew.

Defendant alleges it never agreed to the counter-proposal.

In October 2010, the parties agreed to reimbursement terms going forward (i.e. new rates) namely, 3 percent above prior reimbursement rates (the "Amended Reimbursement Rates"). Plaintiff submits an email from Defendant dated October 3, 2011, stating: [*3]

[Defendant] will accept [Plaintiff's] offer relating to the [Amended Reimbursement Rates]. ... [r]ates will remain in effect through October 1, 2013. [Defendant] is preparing the [new] contract and will incorporate much of the language that has already been agreed to in the BEA agreement. We will

get a red line version to you as soon as we have completed this exercise.

Since October, 2010, Defendant has continued to pay Plaintiff pursuant to the Amended Reimbursement Rates.

Plaintiff alleges that the parties agreed — through the sending and receiving of drafts of a new agreement (starting with the 2010 Proposed Agreement) - - that Plaintiff would retain its PP Status in Defendant's network. It is important to note that Defendant continues to represent that Plaintiff can retain its PP Status in Defendant's network if Plaintiff agreed to accept "community rates".

Plaintiff asserts that the parties agreed to a "rate amendment prohibition", included in all proposals exchanged after December 6, 2010 (i.e., that Defendant could not modify the rates without a new contract).

Plaintiff asserts that the parties also agreed to an "effective date" of October 1, 2010, and later agreed to change that date to June 30, 2013.

Finally, Plaintiff asserts that Defendant never stated that it intended to be bound only by a written agreement. Defendant claims that it is unable to operate without a written agreement, approved by the New York State Department of Health (*see,* 10 NYCRR 98-1.13 [a]).

The Applicable Standard

"In order to prevail on a motion for a preliminary injunction, the moving party has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury in the absence of injunctive relief, and (3) a balance of equities in its favor" (*Eastman Kodak Co. v Carmosino*, 77 AD3d 1434, 1435 [4th Dept 2010]). For the reasons that follow, Plaintiff has established a likelihood of success on the merits.

The parties agree that their original contract, the 2005 Agreement, expired when BEA signed a new agreement with Defendant in August 2011.

Plaintiff has established a reasonable likelihood of success on its implied contract cause of action (*North Am. Hyperbaric Center v City of New York*, 198 AD2d 148 [1st Dept 1993]). "When an agreement expires by its terms, if, without more, the parties continue to perform as theretofore, an implication arises that they have mutually assented to a new contract containing the same provision[s] as the old" (Id. at 149 [cit om.]). Here, the 2003 Agreement and the 2005 Agreement

expired, but the parties continued to perform as before, with mutually agreed upon rates. Defendant relies heavily upon regulatory obligations that participating provider agreements be in writing. Nonetheless, it continues to categorize, and reimburse Plaintiff as a "participating provider" in the absence of a new writing.

Therefore, the termination provisions contained in the 2005 Agreement (incorporated by reference from the 2003 Agreement) required Defendant to either provide written notice six (6) months prior to the Anniversary Date (June 30, 2013); or provide written notice ninety (90) days - at any time - followed by a hearing.

There is no evidence that Defendant complied with either provision of the 2003 Agreement. [*4]

In addition, and in the particular circumstances of this case, the Court determines that Plaintiff has established a likelihood of irreparable injury in the nature of loss of good will and the inability of its five urgent care centers to continue in operation, leading to a loss of over 300 credentialed and other personnel (*see Marcone v Servall*, 85 AD3d 1693 [4th Dept 2012]); *Main Evaluations, Inc. v. State of New York*, 296 AD2d 852 [4th Dept 2002] [Scudder, J., dissenting]). Plaintiff alleges that it derives in excess of 40% if its revenue from Defendant's network, and that its PP Status with Defendant is "vital to [its] patient base, income, market ability, business, goodwill and reputation."

Moreover, Defendant's publication to its subscribers and others that 14 other (i.e., non-plaintiff) urgent care centers in the Western New York area have already agreed to "community rates," while Plaintiff has refused to do so, leaves the impression that Plaintiff, alone among urgent care providers in this area, is greedy. Equally important, there is no evidence in the record of any wrongdoing by Plaintiff; in fact, Defendant reiterates in its submissions that Plaintiff's services are of high quality (cf. *Abramo v HealthNow New York, Inc.*, 305 AD2d 1009 [4th Dept 2003] ; *Main Evaluations Inc. v State*, 296 AD2d 852, 854 [4th Dept 2002], *lv dismissed*, 98 NY2d 762 [2002]).

Turning to the balancing of the equities, Defendant is required by law to provide certain notice to its subscribers of termination of access to particular providers (*see, e.g.*, Public Health Law §4408 [4] [within fifteen days of notification that access will be lost]; section 4403 [6] [e], [f] [subscriber under "ongoing care" with provider who becomes an out-of network [i.e., non-participating] provider for certain reasons must be allowed to continue with the provider for a certain period]; and 10 NYCRR 98-1.13 [c] [2] [45-day prior written notice to DOH required for termination or non-renewal]).

Such notice has already been provided. However, the burden of countermanding these notifications is relatively light, compared with the potential for irreparable harm to Plaintiff should its PP Status be terminated as of January 1, 2014.

Upon consideration of the record, the Court will impose an undertaking of $ 2.6 million.

This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The mailing of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated:December 20, 2013

Buffalo, New York

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HON. TIMOTHY J. WALKER, J.C.C.

Acting Supreme Court Justice

Presiding Justice, Commercial Division

8th Judicial District

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