STATE OF MICHIGAN

COURT OF APPEALS

ULTICARE, INC.,

Plaintiff-Appellee,

v

COUNTY OF WAYNE and URBAN HOSPITAL CARE PLUS,

Defendants-Appellants.

UNPUBLISHED
September 27, 2007

No. 272229
Wayne Circuit Court
LC No. 05-536287-CK

ULTICARE, INC.,

Plaintiff-Appellee,

v

COUNTY OF WAYNE,

Defendant-Appellant,

and

URBAN HOSPITAL CARE PLUS,

Defendant.

No. 272282
Wayne Circuit Court
LC No. 05-536287-CK

Before: Whitbeck, C.J., and Wilder and Borrello, JJ.

PER CURIAM.

In these consolidated appeals, defendants Wayne County and Urban Hospital Care Plus (UHCP) appeal by leave granted in Docket No. 272229, and defendant Wayne County appeals as of right in Docket No. 272282, from the trial court's opinion and order denying their motions for summary disposition of plaintiff's breach of contract and promissory estoppel claims. We reverse.

Plaintiff is a "coordinated provider entity" pursuant to a Health Services Agreement with HealthChoice of Michigan (HC), a statutory corporation formed pursuant to the Municipal

Health Facilities Corporation Act, MCL 331.1101 *et seq.* In this role, plaintiff was responsible for paying health benefits covered by the Health Choice Plan out of funding it received from defendants. Plaintiff filed this lawsuit alleging that defendants breached an agreement to provide additional funding for the Health Choice Plan, seeking damages under theories of piercing the corporate veil (count 1), breach of contract (count II), promissory estoppel (count III), and unjust enrichment (count IV). Defendants moved for summary disposition, seeking dismissal of all claims. The trial court dismissed counts I and IV, but denied defendants' motions with respect to the breach of contract and promissory estoppel claims.

I. Standards of Review

Defendants' motions sought summary disposition under MCR 2.116(C)(7), (8), and (10). "When reviewing a motion for summary disposition under MCR 2.116(C)(7), an appellate court accepts all well-pleaded allegations as true, and construes them most favorably to the plaintiff, unless specifically contradicted by contrary evidence." *Xu v Gay*, 257 Mich App 263, 266; 668 NW2d 166 (2003). "The court must consider all affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties, and the motion should be granted only if no factual development could provide a basis for recovery." *Id*. at 266-267.

As this Court explained in *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998):

> A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true.

A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Lewis v LeGrow*, 258 Mich App 175, 192; 670 NW2d 675 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court "'must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law.'" *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000), quoting *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

II. Breach of Contract

Defendants argue that plaintiff failed to state a claim for breach of contract because they were not a party to the Health Services Agreement. Rather, only plaintiff and HC were parties to that agreement.

A plaintiff in a breach of contract action must establish that a contractual relationship existed. *McInerney v Detroit Trust Co*, 279 Mich 42, 46; 271 NW 545 (1937). Although neither defendant is a party to the Health Services Agreement, we agree with the trial court that plaintiff's complaint does not allege a breach of that agreement. Instead, plaintiff's breach of

contract claim is based on an allegedly independent agreement by defendants to increase plaintiff's funding in order to offset plaintiff's increased costs and obligations under the Health Services Agreement. Thus, dismissal was not warranted because of lack of privity.

Further, because the Health Services Agreement is not the basis for the breach of contract claim, its provisions requiring arbitration of disputes and that modifications be in writing do not defeat the breach of contract claim, nor does the fact that plaintiff did not prevail in its arbitration with HC.

We agree with defendants, however, that the breach of contract claim cannot survive because there is no evidence of consideration for defendants' alleged promises to increase plaintiff's funding. Under the written agreement (the Health Services Agreement), there was no coverage for preexisting conditions. After the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA), certain preexisting conditions were required to be covered. According to plaintiff, the alleged oral agreement or representation was by Mr. Mike Duggan, and was to the effect that "if you don't cancel, we'll pay you extra if you cover preexisting conditions." However, plaintiff failed to present any evidence below that Mr. Duggan made any such promise. In order to raise a genuine issue of material fact, the claimant must come forward with documentary evidence showing specific facts indicating a genuine factual issue for trial. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006).

In addition, there was a preexisting duty to cover preexisting conditions. It is undisputed that under HIPAA, certain preexisting conditions were required to be covered. Although defendants did not raise this argument below, "this Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented[.]" *Smith v Foerster-Bolser Construction, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Here, consideration is a question of law, the facts necessary for its determination are presented, and review of the consideration issue is necessary for a proper determination of the case.

Consideration is required for a valid contract. *The Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 58; 698 NW2d 900 (2005). Consideration is a bargained for exchange involving a benefit on one side or a detriment suffered, or service done, on the other. *Id*. In other words, the consideration necessary to support a contract is a benefit to the promisor or a detriment to the promisee. *Levitz v Capitol S&L Co*, 267 Mich 92, 96; 255 NW 166 (1934). Consideration has also been described as

> "[t]he inducement to a contract. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. The reason or material cause of a contract. Some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other." [*Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 241-242; 615 NW2d 241 (2000), quoting Black's Law Dictionary (6th ed), p 306.]

Here, plaintiff's complaint alleges consideration: "WCHC, UHCP and Wayne County represented to Ulticare that it would increase the funding to Ulticare to pay for the new

responsibilities of the Health Choice Plan related to HIPPA [sic; HIPAA]."[1] But at the time of defendants' alleged promises, plaintiff was already obligated to perform under the Health Services Agreement with HC. Under the "preexisting duty" rule, doing what one is legally bound to do is not consideration for a new promise. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 158; 719 NW2d 553 (2006). Plaintiff's contract with HC included the following provision:

> 4.3 CPE Acceptance of and Responsibilities for Payment. CPE shall accept monthly capitation payments as payment in full for the provision of all Basic Covered Services and Supplemental Covered Services by CPE and CPE's Participating Providers to Subscribers. In exchange for the applicable monthly capitation payment as set forth in Appendix B, CPE agrees to pay all claims of Participating Providers and, in relation to CPE approved referral services, Out-of-CPE Providers, for providing Basic Covered Services and Supplemental Covered Services to Subscribers.

Under this provision, plaintiff was required to accept the monthly capitation payments as payment in full for the performance of its obligations, even if the cost of performing its obligations increased, which is what plaintiff alleges occurred in this case. Plaintiff does not allege that it suffered any additional detriment or assumed any additional obligations that it was not already required to perform under the Health Services Agreement. Therefore, consideration for defendants' alleged promises is lacking. Without valid consideration, there can be no claim enforceable in contract.

Accordingly, on these bases, defendants are entitled to summary disposition on the breach of contract claim.

III. Promissory Estoppel

"The elements of promissory estoppel are (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promissee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided." *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). The reliance must be reasonable and the promise must be definite and clear. *Ypsilanti Twp v Gen Motors Corp*, 201 Mich App 128, 134, 139; 506 NW2d 556 (1993). Courts should cautiously evaluate an estoppel claim and apply the doctrine only if "the facts are unquestionable and the wrong to be prevented undoubted." *Novak*, *supra* at 687.

In this case, even assuming the existence of clear and definite promises to increase plaintiff's funding, plaintiff has not alleged any circumstances showing that an injustice would result if the alleged promises were not enforced. As previously explained, plaintiff was already

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[1] HIPAA is the Heath Insurance Portability and Accountability Act, a federal statute passed in 1996.

obligated to perform under the Health Services Agreement. Plaintiff does not allege, nor did it factually show, that it did anything or changed its position in a way that was not required, because of defendants' alleged promises. Therefore, summary disposition of the promissory estoppel claim is also warranted.

In light of our decision, it is unnecessary to address Wayne County's immunity arguments in Docket No. 272282.

Reversed and remanded for entry of summary disposition in favor of defendants. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello