

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**ONE POINT PATIENT CARE, LLC,
Plaintiff,**

v.

**Case No. 14-142961-CK
Hon. James M. Alexander**

**HOSPICE OF MICHIGAN, INC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff’s motion for summary disposition. In its motion, Plaintiff seeks a ruling establishing liability on its Count I for breach of contract and dismissal of Defendant’s Count II for “Overbilling” (alleged in the Counterclaim).

On April 23, 2013, the parties entered into a Pharmacy Services Agreement, whereby Plaintiff provided dispensing pharmacy services for Defendant. Plaintiff claims that the Agreement was for a three-year term, with automatic one-year renewals (unless terminated by either party on 90-days’ advanced notice). The Agreement also contained for-cause and without-cause termination provisions.

The for-cause provision provides that if either party defaulted “in performing any of its obligations set forth in the Agreement,” then the other party must provide notice of the alleged breach, which the defaulting party has 30 days to cure. (Paragraph 5(b)). If the breach is not cured within said 30 days, then the Agreement “shall terminate on the day after the conclusion of the Cure Period.” *Id.*

If, however, a party wished to terminate the Agreement “without cause,” then that party must provide “not less than [180 days] prior written notice to the other of such intent.”

In its Amended Complaint, Plaintiff claims that Defendant began complaining about its costs under the Agreement about ten months in. Plaintiff claims that it responded with offers to train Defendant’s staff, which Defendant rebuffed. Instead, Plaintiff alleges, Defendant “decided it would be easier to terminate the Agreement and return to its previous supplier.” Plaintiff claims that Defendant ultimately provided a notice of termination of the contract without cause on July 10, 2014 and refused to fully pay its August 2014 invoice. Plaintiff then filed the present suit to recover sums due under the parties’ Agreement.

Defendant now moves for summary disposition under MCR 2.116(C)(8) and (C)(9). A (C)(8) motion tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Wade v Dept of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

Similarly, a (C)(9) tests whether the defendant’s defenses are “so clearly untenable as a matter of law that no factual development could possibly deny plaintiff’s right to recovery.” *Lepp v Cheboygan Area Schools*, 190 Mich App 726, 730; 476 NW2d 506 (1991).

When considering a (C)(8) or (C)(9) motion, **all well-pled factual allegations are accepted as true and construed in a light most favorable to the nonmovant.** *Wade*, 439 Mich at 162-163; *Lepp*, 190 Mich App at 730. Additionally, when considering such motions, **the court considers only the pleadings.** MCR 2.116(G)(5).¹

¹ For purposes of the cited Court Rule, under MCR 2.110 (emphasis added), “The term “pleading” **includes only:** (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer.”

But “[w]hen an action is based on a written contract, it is generally necessary to attach a copy of the contract to the complaint. Accordingly, the written contract becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8).” *Laurel Woods Apts v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007); citing MCR 2.113(F) and *Liggett Restaurant Group, Inc v City of Pontiac*, 260 Mich App 127, 133; 676 NW2d 633 (2003).

I. Plaintiff’s Count I

Plaintiff first argues that it is entitled to summary disposition of its Count I for breach of contract because Defendant’s own pleadings state that it terminated the Agreement **without cause**. (Defendant’s Counter Complaint, at paragraph 16).

In order to prove breach of contract, a plaintiff must establish: (1) the existence of a contract; (2) a breach of that contract; and (3) damages resulting from that breach. *Stoken v JET Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988).

In response to Plaintiff’s motion, Defendant argues that Plaintiff’s motion plainly ignores the remainder of Defendant’s Counter-Complaint and other pleadings, which establish that it actually terminated the Agreement with cause – and even provided specific examples of Plaintiff’s alleged breaches that allowed it to do so. The Court agrees.

Even a cursory review of Defendant’s pleadings establishes that Defendant alleged that Plaintiff breached the Agreement in over a dozen ways. (Counter Complaint, at paragraph 11). Defendant alleges that it provided notice of said breaches to Plaintiff. (Counter Complaint, at paragraph 13). Defendant alleges that Plaintiff reassured that the alleged breaches would be corrected. (Counter Complaint, at paragraph 14). And Defendant relied on these reassurances – foregoing terminating the contract until it was clear that Plaintiff had no intention of correcting

the alleged breaches. (Counter Complaint, at paragraph 15, 17). Finally, Defendant claims that it terminated the contract “for cause” on July 29, 2014 – effective September 4, 2014. (Counter Complaint, at paragraph 17).²

When the Court accepts all of Defendant’s above, well-pled factual allegations as true and construed in a light most favorable to Defendant, the Court cannot possibly conclude that Plaintiff is entitled to judgment as a matter of law based on a without-cause termination.

As an alternative, Plaintiff argues that Defendant waived any claim or defense of first material breach when Defendant continued to operate under the contract.

In support of its argument, Plaintiff cites *Schnepf v Thomas L McNamara, Inc*, 354 Mich 393, 397; 93 NW2d 230 (1958). The *Schnepf* Court reasoned:

Where there has been a material breach which does not indicate an intention to repudiate the remainder of the contract, the injured party has a genuine election either of continuing performance or of ceasing to perform. Any act indicating an intent to continue will operate as a conclusive election, not indeed of depriving him of a right of action for the breach which has already taken place, but depriving him of any excuse for ceasing performance on his part. Anything which draws on the other party to execute the agreement after the default in respect of time or which shows that it is deemed a subsisting agreement after such default will amount to a waiver. *Schnepf*, 354 Mich at 398 (internal quotation and citation omitted).

Defendant responds that *Schnepf* is distinguishable because, in that case, there was no notice of defective performance before the lawsuit was initiated. In our case, however, Defendant claims that there were substantial discussions about Plaintiff’s alleged breaches. Defendant also claims that Plaintiff responded with “repeated assurances” that the alleged breaches would be corrected.

Further, Defendant argues that it could not simply cease dealing with Plaintiff and run out

² While Plaintiff wishes the Court to view Defendant’s Counter Complaint paragraph 16 in a bubble, the Court will not do so. And Plaintiff’s reference to Defendant’s July 10, 2014 letter as notice of a without-cause termination is misplaced. The letter does not state that it is terminating without cause. It provides that Defendant is terminating the Agreement “[p]ursuant to recent phone conversations” – whatever that means.

and find a replacement supplier because this would have left hundreds of patients without medication for an uncertain amount of time.

Further, Defendant cites to *Finnegan v Worden-Allen Co*, 201 Mich 445; 167 NW 930 (1918) for the proposition that continuing performance after an alleged breach does not automatically amount to a waiver when the non-breaching party repeatedly protests the continuing defaults and provides an opportunity to cure. The Court agrees.

Defendant claims that it repeatedly informed Plaintiff of the alleged breaches, received repeated assurances that the breaches would be cured, and ultimately concluded that Plaintiff's assurances were meritless. On July 29, 2014, Defendant then notified Plaintiff of its election to terminate the Agreement as of September 4, 2014 (just 37 days later). Defendant gave no indication that it intended to continue performance beyond this date or waive the alleged breaches. Accepting these allegations as true, the Court cannot conclude that Defendant waived any breach as a matter of law.

For all of the foregoing reasons, Plaintiff's motion for summary disposition of its Count I under (C)(9) is DENIED.

II. Defendant's Counter Complaint Count II

Plaintiff next argues that Defendant's Counterclaim Count II should be dismissed because Defendant is not entitled to a monetary recovery for overbilling under the Agreement. As a result, Plaintiff argues, Defendant cannot establish damages as an essential element of a breach of contract claim.

In support, Plaintiff cites to paragraph 2.1(q) of the Agreement (emphasis added):

[Plaintiff] shall review the charges set forth in this Section 2.1 semi-annually.
[Plaintiff] guarantees that the rate charged in Section 2.1(a), (b), (c), and (d) will

not exceed a rate of \$12.50 per patient per day (the “Per Diem Rate”) as determined by [Plaintiff]. After ninety (90) days the Per Diem Rate will be reduced to \$10.00. **In the event the rate charged by [Plaintiff] pursuant to Section 2.1(a), (b), (c), and (d) exceeds the Per Diem Rate as determined by [Plaintiff], [Plaintiff] shall credit [Defendant] the difference divided over the next six months.** [Defendant] will cooperate with [Plaintiff] in reviewing the dispensing data and patient days to calculate the Per Diem Rate. At any time that [Plaintiff] recommends cost savings activities to [Defendant], [Defendant] will act in good faith to promptly implement the cost savings activities recommended by [Plaintiff].

Plaintiff argues that this paragraph establishes that “the sole and exclusive remedy in the event [it] determines that any overbilling has occurred [is] a credit for ‘the difference divided over the next six months.’” (emphasis in original).

Defendant responds that Plaintiff mischaracterizes the above paragraph. In support, Defendant argues that Plaintiff “makes the mistake of equating the ‘credit’ with the term ‘setoff.’” And a “credit” is not limited to six months of future billings. The Court disagrees.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Based on its plain language, the Court concludes that paragraph 2.1(q) provides that the exclusive remedy for any overbilling is a credit divided over the next six months of billing. Had Defendant wished the Agreement to provide unlimited opportunity to recover any overpayments outside of credits to upcoming bills, it could have so contracted. But it did not.

For this reason, the Court finds that Defendant's right to recover any overpayments is limited to credits equally divided against the following six months bills. Neither party cites to any provision that provides that termination of the Agreement somehow changes how overpayments are recovered as provided in paragraph 2.1(q).

And the parties have also failed to address whether Plaintiff actually provided such a credit in its final accounting or bills (even if just for the short time until the parties ceased performance). As a result, Defendant may have suffered damages if it paid bills that were subject to an unaccounted credit.³

For the above reasons, the Court cannot conclude that summary disposition of this claim is appropriate, and Plaintiff's motion for summary disposition under MCR 2.116(C)(8) is DENIED.

IT IS SO ORDERED.

July 29, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge

³ Although not relevant to its Count II for Overbilling, Defendant may also use any alleged overbilling as a defense in the form of a partial setoff to amounts sought in Plaintiff's Complaint.