

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

**BLUE CROSS BLUE SHIELD OF
MICHIGAN MUTUAL INSURANCE
COMPANY**, a nonprofit mutual
insurance company,

**Case No. 14-143430-CK
Hon. James M. Alexander**

Plaintiff,

v.

ATALLAH HEART CENTER, P.C.,
a Michigan professional corporation, and
PIERRE ATALLAH, M.D., an individual.

Defendants.

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' motion for summary disposition. This case involves a dispute over whether Plaintiff's breach of contract and unjust enrichment claims are time barred by the statute of limitations. Plaintiff's complaint alleges that Defendants breached their 2005 Physician and Professional Provider Participation Agreement with Plaintiff when Defendants overbilled patients for medical services in between 2006 and 2007. Plaintiff alleges that the Agreement was breached by Defendants "improperly billing for services in violation of the Agreement, failing and refusing to return overpayments and payments improperly received by Defendants, and failing to report the overpayments to [Plaintiff]."

Plaintiff alleges that as a result of the overbilling and Defendants' refusal to refund the overpayments, it suffered damages in an amount totaling \$26,756.90. This amount was determined by an administrative law judge of the Department of Insurance Regulation on July 5, 2011.

Defendants now seek summary disposition under MCR 2.116(C)(7) arguing that Plaintiff's complaint is time barred by the statute of limitations. A (C)(7) motion determines whether a claim is barred, among other grounds, because of "state of limitations." MCR 2.116(C)(7). The Court accepts the plaintiff's well-pleaded allegations as true and construes them in the plaintiff's favor unless the allegations are contradicted by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Huron Tool & Eng'g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 376-77; 532 NW2d 541 (1995).

1. Statute of Limitations

Defendants argue that they are entitled to summary disposition because the six-year statute of limitations – for both a breach of contract claim and an unjust enrichment claim – expired on October 1, 2013. And the Plaintiff did not file this lawsuit until October 9, 2014.

Under MCL 600.5807(8), a plaintiff must bring an action within "6 years for all other actions to recover damages or sums due for breach of contract." And the "period of limitations in contract actions typically begins to run on the date the contract is breached." *Diversified Financial Systems, Inc v Schanhals*, 203 Mich App 589; 513 NW2d 210 (1994). Similarly, a Plaintiff must bring an unjust enrichment action "within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes." MCL 600.5815.

Here, Defendants contend the contract was breached in between October 1, 2006 and September 30, 2007 – the time period that the overpayment of medical services occurred. As a result, Defendants argue the statute of limitations ran on October 1, 2013.

In response, Plaintiff argues that its complaint was based on Defendants' failure to reimburse it after the 2013 Department of Insurance Regulation overpayment determination. Plaintiff contends that this amounted to an additional breach of the original contract. Therefore, Plaintiff argues that this is really when the statute of limitations period began to run.¹ As such, the Plaintiff contends the breach occurred in January 2014 and the lawsuit was filed in October 2014, which Plaintiff argues is within the six-year statute of limitations period. This Court disagrees.

Plaintiff relies on an unexecuted addendum to the original Agreement. Plaintiff also cites a Michigan Supreme Court case that states a contract may be breached more than once with each separate breach having distinct points of accrual. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 181; 848 NW2d 95 (2014). While this is true, it is inapplicable under these facts because there was only one type of breach – Defendants' overbilling for medical services – the last of which occurred September 30, 2007.

2. Equitable Tolling

As an alternative argument, Plaintiff requests that equitable tolling apply while the parties were involved in Department of Insurance determination. Plaintiff claims that Defendants elected to pursue this appeals review process on June 12, 2009 and the process did not conclude until

¹ Plaintiff's argument is disingenuous. If Plaintiff now decides to rely on the position that its demand for payment and Defendants' failure to pay was an additional breach, then by its own admission in the complaint – Plaintiff made the initial demand in 2007 following the audit where Plaintiff discovered the overpayment of medical services related to SPECT testing and Holter Monitors. (**Comp.** at ¶ 13).

December 2013, when the Department of Insurance Regulation entered a final determination. In support of its request to equitably toll the statute of limitations, Plaintiff cites to *Ward v Rooney-Gandy*, 265 Mich App 515, 517; 696 NW2d 64 (2005); *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204; 747 NW2d 811 (2008); *AFSCME v Highland Park Bd of Ed*, 457 Mich 74; 577 NW2d 79 (1998); and *Chabad-Lubavitch of Mich v Schuchman*, 305 Mich App 337; 853 NW2d 390 (2014).

Of these, Defendants argue that only two cases, *AFSCME* and *Chabad-Lubavitch*, may even be applicable² in this case. In both of those cases, though, equitable tolling was found proper in the limited circumstance of when a mandatory grievance process in place. “The doctrine of equitable tolling has been recognized by Michigan courts; however it has a limited application.” *Chabad-Lubavitch, supra* at 344. A limited time this applies is “when grievance procedures are mandatory – [then] the applicable period of limitations is tolled during the exhaustion of the mandatory procedure.” *Id*, 348 – 349.

But Defendants correctly point out that this is not the case here. Instead, the contract provided for an election to be made during the grievance process and states, in relevant part:

Disputes arising under this AGREEMENT **may** be appealed as follows.

Disputes **may** be appealed to the Michigan Insurance Bureau or the Courts of this state.

Here, Defendants chose to request a review and determination by the Commissioner of Financial and Insurance Regulation. Defendants’ election was permissive (not mandatory) under the agreement and therefore, equitable tolling is improper in this case.

² The Plaintiff’s reliance on *Ward* is misplaced because it was reversed by the Michigan Supreme Court. And Plaintiff’s reliance on *McDonald* is also misplaced because it is inapplicable under these facts.

For these reasons, the Court finds that Plaintiff's claims are time barred, and Defendants are entitled to judgment as a matter of law. As a result, Defendants' motion for summary disposition under MCR 2.116(C)(7) is GRANTED, and Plaintiff's Complaint is DISMISSED.

IT IS SO ORDERED.

April 1, 2015
Date

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