

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

**ACCREDITED HOME CARE, INC,
Plaintiff/Counter-Defendant,**

v.

**Case No. 15-146211-CB
Hon. James M. Alexander**

**CHAMPION NURSING CARE, INC,
Defendant/Counter-Plaintiff.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Counter-Defendants Bradley Putvin and Accredited Home Care’s motion for summary disposition. In September 2014, Accredited and Champion Nursing Care entered into a Management Services Agreement, in which Champion engaged Accredited to provide management, administrative, and other services for the operation of Champion’s home health care business. In exchange, Accredited was to receive “all money, [and] gross revenue, from Medicare as its compensation under the [Agreement].”

Accredited’s Complaint also alleges that it separately loaned Champion \$25,378 so Champion could continue operation. And, in October 2014, Accredited alleges that Champion agreed to sell Accredited its “Assets and Medicare License” for \$30,000.

Accredited claims that Champion breached these agreements by (1) failing to pay for Accredited’s services, (2) failing to repay the loan, and (3) refusing to finalize the sale of its assets and Medicare License. As a result, Accredited filed the present suit on three breach-of-contract claims.

In response to the Complaint, Champion filed an Amended Counterclaim on breach of contract (Count I), fraud (Counts II-IV), and breach of fiduciary duty (Count V) claims. Said counterclaims are largely based on the allegation that Accredited misrepresented its status as a Medicare-participating provider and violated its fiduciary duties to Champion.¹

Specifically, Champion claims that Accredited knew that its Medicare approval was terminated in September 2014, but never told Champion. And Champion claims that it did not find this out until the end of January 2015. Based on the same, on March 9, 2015, Champion sent Champion a letter purporting to terminate the Management Agreement. Champion also claims that Accredited's billing failures caused Medicare to demand reimbursement of monies from Champion.

Accredited now seeks dismissal of Champion's Counter-Complaint under MCR 2.116(C)(10), which tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Id.* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

Accredited claims that it is entitled to summary of the Counter-Complaint for several reasons. First, Accredited argues that it was "terminated" from Medicare participation, not "excluded." And "termination of Accredited's Medicare Provider Number is not a bar to performing services under the Management Contract." Second, "Champion's fraud in the inducement claim is barred by the Economic Loss Doctrine." And finally, Champion's breach of

¹ Champion also named Bradley Putvin, Accredited's owner or principal, as a Counter-Defendant.

fiduciary duty claim fails because the parties' duties are based in contract and do not give rise to a fiduciary relationship.

1. Counterclaim Count I – Breach of Contract

Accredited first argues that Champion's breach of contract claim fails because its termination from Medicare participation "had absolutely no impact on its ability to undertake the duties required of it under the Management Contract."

Generally, 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).

Champion claims that Accredited had violated the Management Agreement from day one by failing to disclose the termination of its Medicare participation. Paragraph 6 of the Management Agreement provides:

REPRESENTATIONS AND WARRANTIES. Each party represents and warrants to the other that neither it, nor any of its officers, directors, members, managers, employees or contractors, have been sanctioned, excluded, or debarred under Medicare . . . , and each party agrees to report immediately, with relevant factual detail, to the other any sanction, exclusion or debarment of itself or of any of its officers, directors, members, managers or employees under Medicare.

Champion claims that Accredited failed to disclose its termination from Medicare, which constitutes a breach of this provision.² The Court agrees.³ While Accredited goes to great length to distinguish "termination" from "exclusion," this is a distinction without a difference.⁴ Further,

² Champion also alleges several other breaches of the Management Agreement. Accredited's motion does not challenge other categories of breaches.

³ Ultimately, this may be the basis for a Champion summary motion based on the first alleged breach of the parties' Management Agreement. *Able Demolition, Inc v City of Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007) ("The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." quoting *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994); and *Flamm v Scherer*, 40 Mich App 1, 8-9; 198 NW2d 702 (1972)).

⁴ If Accredited's Medicare participation was terminated, it certainly is also excluded from participating.

by whatever name, Accredited's "termination" is undoubtedly a "sanction" within the meaning of Paragraph 6. As a result, Accredited's summary motion on this basis is DENIED.

Accredited also claims that it is entitled to summary because Champion cannot establish that it was damaged as the result of any breach – claiming that Champion's unstated theory of damages is a "deepening insolvency theory," which has not been recognized in Michigan. But it appears that Accredited mischaracterizes Champion's claimed damages.

For example, in its Response to Accredited's Motion, Champion claims that its damages include monies that Medicare required be repaid based on Accredited's billing failures. This includes some "\$289,839.66 [Accredited] was paid related to the services that Medicare now seeks recoument." These damages are identifiable and not based on any "deepening insolvency theory." As a result, Accredited's motion on this basis is similarly DENIED.

2. Counterclaim Counts II-IV – Fraud

Accredited next claims that Champion's fraud counterclaims are barred by the economic loss doctrine. This doctrine provides that an alleged breach of contract cannot also constitute an actionable tort. *Hart v Ludwig*, 347 Mich 559; 79 NW 895 (1956).

It is also well-established that "fraud must be pleaded with particularity." *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008), citing MCR 2.112(B)(1). Champion's fraud claims solely allege that Accredited misrepresented its ability to participate in Medicare when it knew otherwise. Champion claims, but for this misrepresentation, "[it] would not have entered into the Agreement."

Because Champion simply alleges the breach of a term contained in a contract, Accredited claims that Champion's fraud claims must be dismissed.

In response, Champion argues that its fraud claims are not barred by the economic loss doctrine “because the economic loss doctrine does not apply to services contracts,” citing *Higgins v Lauritzen*, 209 Mich App 266, 269; 530 NW2d 171, 172 (1995).

But, as pointed out by Accredited, Michigan courts have applied the doctrine in cases other than those involving the sale of goods under the UCC. See *Huron Tool & Eng’g Co v Precision Consulting Services, Inc*, 209 Mich App 365, 374; 532 NW2d 541 (1995) (holding “the doctrine is not limited to the UCC.”). Our Supreme Court in *Rinaldo’s Constr v Mich Bell Tel Co*, 454 Mich 65, 559 NW2d 647 (1997) also applied this doctrine to a contract for services.

The Court will also note that the *Huron Tool* Court allowed a **fraud in the inducement** claim survive because it “redresses misrepresentations that induce the buyer to enter into a contract but **that do not in themselves constitute contract or warranty terms subsequently breached by the seller.**” *Huron Tool*, 209 Mich App at 375 (emphasis added).

But the Court also cautioned about other types of fraud – reasoning that its holding “heeds the Supreme Court’s admonition to avoid confusing contract and tort law. The danger of allowing contract law to ‘drown in a sea of tort’ exists only where fraud and breach of contract claims are factually indistinguishable.” *Huron Tool*, 209 Mich App at 375, citing *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512, 529; 486 NW2d 612 (1992).

A careful examination of Champion’s Counter-Complaint reveals that its fraud claims are based solely on the allegation that Accredited breached a representation or warranty under a specific contract provision – Paragraph 6. And this allegation “constitute[s] contract or warranty terms subsequently breached” as considered by *Huron Tool*, 209 Mich App at 375.

As a result, Champion’s fraud claims allege precisely the same wrong as alleged in its breach of contract claim – that Accredited intentionally made false and misleading statements

under Paragraph 6's "Representations and Warranties" provision. But this is a specific term contained **in the parties' Agreement**. As such, it cannot serve as the basis for a tort claim.

As a result, viewing all evidence in the light most favorable to Champion, the Court finds that there are no material facts in dispute and Accredited is entitled to judgment as a matter of law. Therefore, the Court GRANTS Accredited's motion with respect to Champion's fraud claims (Counts II, III, and IV), and the same are DISMISSED.

3. Counterclaim Count V – Breach of Fiduciary Duty

The Court notes that, after Accredited filed the present motion for summary disposition, Champion amended its Counter-Complaint to include a breach of fiduciary duty claim (as Count V). But the same reasoning for dismissing Champion's fraud claims applies to said breach of fiduciary duty claim.

Accredited and Champion executed a written agreement that set forth the duties and obligations each had in the relationship. But, just like fraud, a breach of fiduciary duty claim sounds in tort. *Fultz v Union Commerce Assoc*, 470 Mich 460, 467; 683 NW2d 587 (2004). The cases cited by Champion in support of extending a fiduciary relationship between parties to a contract are both inapplicable to this case and predate *Huron Tool*, *Fultz*, and *Rinaldo* by over 50 years.

Similarly, to the extent that Champion alleges that Accredited breached its duty of good faith and fair dealing, Michigan does not recognize such a claim. *Fodale v Waste Mgmt of Mich, Inc*, 271 Mich App 11, 35; 718 NW2d 827 (2006).

For all of the foregoing reasons and viewing all evidence in the light most favorable to Champion, the Court finds that there are no material facts in dispute and Accredited is entitled to

judgment as a matter of law. Therefore, the Court GRANTS Accredited's motion with respect to Champion's breach of fiduciary duty claim (Count V), which is also DISMISSED.

4. Summary/Conclusion

To summarize, Accredited's motion for summary under (C)(10) is GRANTED IN PART, and Champion's Counterclaim Counts II, III, IV, and V are DISMISSED.

Accredited's motion with respect to Champion's breach of contract claim (Count I), however, is DENIED.⁵

IT IS SO ORDERED.

August 3, 2016
Date

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

⁵ The Court notes that, on July 27, 2016, Champion also filed a motion to allow filing of a supplemental brief opposing summary disposition. But this motion and proposed supplemental brief only address Champion's opposition to Accredited's breach-of-contract damages argument. Because the Court has denied summary with respect to said claim, Champion's motion to file a supplemental brief is moot.