

**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.**

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**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendants Champion Nursing Care’s and Jacqueline Collins’ motion for summary disposition. In a prior, August 3, 2016 Summary Opinion, the Court summarized this case as follows:

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.<sup>1</sup>

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.

Defendants now move for summary disposition under MCR 2.116(C)(5), (C)(8), and (C)(10). A motion under MCR 2.116(C)(5) challenges whether a plaintiff has standing. *McHone v Sosnowski*, 239 Mich App 674, 676; 609 NW2d 844 (2000). A (C)(8) motion tests the legal sufficiency of the complaint, and a (C)(10) motion tests the factual sufficiency of a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Specifically, Defendants seek \$289,839.66 on Champion's Counterclaim for breach of contract. Defendants also seek the dismissal of Plaintiff's Amended Complaint for a variety of reasons.

### **1. Counterclaim Count I – Breach of Contract**

Champion first argues that it is entitled to judgment on its breach of contract counterclaim because Accredited breached the representations and warranties section of the Management Agreement.

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).

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<sup>1</sup> Champion also named Bradley Putvin, Accredited's owner or principal, as a Counter-Defendant. But the Court's August 3 Opinion dismissed Champion's Counterclaim Counts II-V, leaving only Counterclaim Count I for breach of contract.

Paragraph 6 of the Management Agreement provides (emphasis added):

**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.

On this issue, the Court previously ruled:

Champion claims that Accredited failed to disclose its termination from Medicare, which constitutes a breach of this provision. The Court agrees. While Accredited goes to great length to distinguish “termination” from “exclusion,” this is a distinction without a difference.<sup>2</sup> Further, by whatever name, Accredited’s “termination” is undoubtedly a “sanction” within the meaning of Paragraph 6.

In response, Accredited first appears to want to revisit its argument that “termination” is different than “exclusion” such that it did not breach the Agreement. But the Court has already rejected this argument and will not revisit the same.

Accredited next argues that its alleged breach is not material, citing *Able Demolition v Pontiac*, 275 Mich App 577, 585; 739 NW2d 696 (2007), for the proposition that: “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. However, the rule only applies if the initial breach was substantial.” *Able*, 275 Mich App at 585 (internal citations and quotations omitted).

While the Court agrees that this is an accurate statement of law, Accredited’s reliance on the same **to defeat Defendants’ breach of contract counterclaim** is misplaced. The same would only be relevant to Defendants’ request for **dismissal of Plaintiff’s Count I for breach of contract** based on the first breach rule.

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<sup>2</sup> If Accredited’s Medicare participation was terminated, it certainly is also excluded from participating.

Simply, Champion breached the Management Agreement when it warranted that it had not been sanctioned by Medicare. The Court will quickly address Accredited's two remaining arguments.

First, the Court rejects Accredited's attempt to argue that Champion or Collins knew of Accredited's Medicare sanction prior to entering into the Agreement. This argument is based on a disputed verbal communication occurring prior to the Agreement. But reliance on any pre-contractual promise or representation is eviscerated by the Agreement's Section 7.8, which claims that the Agreement supersedes all prior oral and written understandings of the parties.

Finally, the Court rejects Accredited's argument that Champion was the first to breach the Agreement based on a September 25, 2014 letter from Community Health Accreditation Program to Collins. But Accredited fails to cite to any portion of the Agreement that requires notification of Champion's status with Community Health Accreditation Program. As a result, it does not appear that this letter constitutes any breach of the Agreement.

The final question is damages. On this issue, Champion presents the Affidavit of Defendant Jacqueline Collins, who claims \$289,839.66 in damages that Champion suffered as a direct result of Accredited's breach. Collins claims that this amount is derived from five Medicare invoice demand letters attached as exhibits to the motion. But the amount sought in these five demand letters totals \$227,448.90. It's unclear how or why these two numbers are different.

Because it is unclear, summary disposition as to damages is inappropriate and denied. The Court will, however, GRANT Champion's motion for summary disposition **only as to Accredited's liability** for its breach of the Management Agreement, with damages to be determined at trial.

## 2. Plaintiff's Amended Counts I and II – Breach of Contract

Defendants next move for summary disposition of Plaintiff's Counts I and II for breach of contract, respectively alleging (Count I) non-payment under the Management Agreement, and (Count II) non-payment of a \$25,378 "loan."

Defendants seek dismissal of the same based on the argument that both relate to terms of the express Management Agreement that Accredited first breached. As a result, Defendants argue that Accredited cannot maintain said claims.

With respect to Accredited's Count I, as stated, Accredited argues that its first breach of relating to its Medicare sanction is not material, and as a result, it should be permitted to proceed on its Count I. The Court disagrees. The Management Agreement provided Accredited with near total control over Champion's home healthcare business. Getting paid for home healthcare services is inherently material and a specific Accredited obligation under the Agreement. And Defendants present evidence that Accredited's breach cost Champion some \$289,000 in mandatory Medicare reimbursements.

Because Accredited's Count I seeks damages relating to Champion's alleged breach of the Management Agreement, but Accredited first materially breached the same, Accredited's Count I fails as a matter of law. *Able*, 275 Mich App at 585. As a result, the same is DISMISSED under (C)(8).

With respect to Count II, however, Accredited claims that four, separate loans were made under agreements **outside of** the Management Agreement. But the alleged dates of these loans (September 25, 2014; October 23, 2014; November 1, 2014; and December 7, 2014) all occur on or after the September 25, 2014 Management Agreement. And only one of these "loans" is

referenced in any writing – the \$15,000 “downpayment for purchase of Champion Medicare Provider Number.”

In any event, because material questions of fact exist as to whether these alleged “loans” were outside of the scope of the Management Agreement, summary disposition on this claim is inappropriate and DENIED. This is so because Accredited’s first breach of the Management Agreement **cannot** serve to defeat any claim arising under **separate** agreements.

### **3. Plaintiff’s Amended Counts III and IV – Breach of Contract**

Finally, Accredited’s Counts III and IV are pled in the alternative. Accredited’s theory on these claims is that the parties agreed that Accredited would buy Champion’s Medicare provider number. But, after making an initial \$15,000 payment towards the same, the parties verbally modified the deal so Accredited would buy stock in Champion. The parties did so, Accredited argues, because it would significantly expedite the time period to obtain Medicare approval of the Champion sale. But neither of these transactions went completed before the parties’ relationship soured.

Accredited’s Count III is based on Champion’s breach of the Medicare provider number sale. And its Count IV is based on the alleged breach of the modification into a stock purchase agreement.

In the end, both claims rely heavily on verbal agreements for complete terms, and each side challenges the other’s assertions of those terms and credibility. But it is well-settled that credibility must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, “courts ‘may not resolve factual disputes or determine credibility in ruling on a summary disposition motion’ *Id.* at 625,

citing *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004); and *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005).

Because Accredited's Counts III and IV appear based on verbal Agreements outside the Management Agreement, and both sides challenge the terms of the same, summary disposition on these claims is inappropriate and DENIED.

#### **4. Summary/Conclusion**

To summarize, Defendants' motion for summary is GRANTED IN PART.

Champion's motion for summary disposition on its Counterclaim Count I for breach of contract is GRANTED **only as to Accredited's liability** for its breach of the Management Agreement. Damages remains an issue to be determined at trial.

Defendants' motion with respect to Accredited's Count I alleging breach of the Management Agreement is GRANTED, and the same is DISMISSED.

In all other respects, Defendants' motion is DENIED.

**IT IS SO ORDERED.**

November 2, 2016  
Date

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