

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

AGILITY HEALTH, LLC, as successor to
Agility Health, Inc.,

Plaintiff/Counter-Defendant,

Case No. 13-00830-CKB

vs.

HON. CHRISTOPHER P. YATES

FPCG, LLC, d/b/a Forbes Private Capital
Group,

Defendant/Counter-Plaintiff.

OPINION AND ORDER GRANTING SUMMARY DISPOSITION TO FPCG AS
TO ALL CLAIMS AND COUNTERCLAIMS EXCEPT UNJUST ENRICHMENT

Business expansion almost invariably requires capital, and so Plaintiff Agility Health, LLC, (“Agility Health”) quite predictably sought assistance from at least two firms – including Defendant FPCG, LLC, (“Forbes”) – in its endeavor to find private equity investors willing to inject funds into its operations. When Agility Health ultimately obtained \$12.5 million in financing, Forbes sought to recover its placement fee, but Agility Health responded by disclaiming any obligation to Forbes, so this litigation ensued. Because the Court concludes that Forbes has established an entitlement to a contractual placement fee from Agility Health, the Court shall award summary disposition in favor of Forbes on all claims except its counterclaim for unjust enrichment.

I. Factual Background

Both sides have requested summary disposition under MCR 2.116(C)(10). “A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.” See Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). “In evaluating such a motion, the court considers the entire record in the

light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Id. Here, because both parties have asked for summary disposition, the Court shall set forth the factual background by discussing the exhibits appended to the parties’ competing motions.

On April 2, 2012, Plaintiff Agility Health signed an agreement enlisting Defendant Forbes as its “exclusive placement agent in the United States and non-exclusive placement agent outside the United States in connection with an offering of preferred, common stock, or subordinated debt of” Agility Health. See Defendant’s Motion for Summary Disposition, Exhibit A (letter agreement at 1). In exchange, the agreement entitled Forbes to “a monthly non-refundable fee of Ten Thousand dollars per month during the term of this Agreement” and “a placement fee equal to (a) 6.0% of the gross proceeds of any Transaction; and (b) a warrant, exercisable for seven (7) years, to purchase a number of Securities . . . at the same price as the price of the Securities issued by [Agility Health] in the Transaction.” See id. (letter agreement at 3, § 3, Compensation).

On December 19, 2012, Plaintiff Agility Health closed a \$12.5 million financing transaction with Alaris USA, Inc. (“Alaris USA”), which is a domestic subsidiary of a Canadian parent, Alaris Royalty Corp. (“Alaris Canada”). In a nutshell, Alaris USA traded 1,250 Class B membership units for \$12.5 million, with the first \$2.1 million of that funding initially coming through a promissory note executed by Agility Health five days before the closing, *i.e.*, on December 14, 2012. Because a Canadian firm named Bloom Burton & Co. (“Bloom Burton”) had introduced Agility Health to the Alaris investors, Defendant Forbes at first knew nothing of that financing transaction. See Forbes Counterclaim, ¶¶ 16-18. But as soon as Forbes learned of the completed \$12.5 million transaction, “Forbes sent an invoice in the amount of \$698,333.00 to Agility for a portion of the placement fee

due Forbes (exclusive of the warrant portion of the placement fee due Forbes).” Id., ¶ 19. That led to the dispute underlying this lawsuit. Specifically, Agility Health filed a complaint for declaratory relief on January 24, 2013. Forbes responded with counterclaims for breach of contract and unjust enrichment, asserting both a contractual and an extra-contractual right to placement fees. Both sides ultimately filed motions for summary disposition under MCR 2.116(C)(10), so the Court must now determine whether either side should prevail in this fee dispute prior to trial.

II. Legal Analysis

Summary disposition should be awarded pursuant to MCR 2.116(C)(10) when “there is no genuine issue regarding any material fact.” West v General Motors Corp, 469 Mich 177, 183 (2003). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” Id. Because both sides have moved for the entry of summary disposition, the Court infers that the record at this juncture is sufficiently developed to support a final ruling. Accordingly, the Court shall resolve each of the various claims and counterclaims in turn.

A. Breach of Contract.

The fundamental disagreement between the parties is most accurately captured in Defendant Forbes’s counterclaim for breach of contract. Pursuant to the agreement executed on April 2, 2012, the Court must apply New York law to resolve this dispute. See Defendant’s Motion for Summary Disposition, Exhibit A (letter agreement at 8, § 12, Governing Law). According to New York law, “the elements of a breach of contract cause of action are ‘the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.’”

Niagara Foods, Inc v Ferguson Electric Service Co, Inc, 111 AD3d 1374, 1376; 975 NYS2d 280, 282 (2013). By all accounts, the parties entered into a valid contract and Forbes performed all of its contractual obligations, so the breach-of-contract counterclaim turns upon whether Plaintiff Agility Health failed to live up to its obligation under the contract by refusing to pay Forbes a placement fee. Although a straightforward reading of the compensation provision in the parties' agreement requires Agility Health to pay such a fee "as compensation for the services provided by Forbes" upon closing of a "transaction," Agility Health contends that its consummation of the \$12.5 million financing deal with Alaris USA did not trigger any obligation to pay a fee to Forbes. The Court disagrees.

Plaintiff Agility Health begins its attack upon Defendant Forbes's demand for a placement fee by pointing out that Bloom Burton, as opposed to Forbes, made the connection between Agility Health and Alaris that resulted in the \$12.5 million financing deal. Under New York law, however, a broker or investment banker can earn a fee without procuring the underlying deal if the language of the contract so provides. CV Holdings, LLC v Artisan Advisors, LLC, 9 AD3d 654, 656-657; 780 NYS2d 425, 427-428 (2004); see also Morpheus Capital Advisors LLC v UBS AG, 105 AD3d 145, 150-151; 962 NYS2d 82, 86-87 (2013); Deutsche Bank Securities Inc v Rhodes, 578 F Supp 2d 652, 667-668 (SDNY 2008); PaineWebber Inc v Campeau Corp, 670 F Supp 100, 105-106 (SDNY 1987). Thus, the mere fact that Forbes played no role in procuring Alaris as an investor in Agility Health cannot exempt Agility Health from any contractual obligation to pay a placement fee to Forbes.¹

¹ The Court's conclusion in this regard is fortified by the termination provision in the parties' agreement, which provides that Defendant "Forbes shall be entitled to its full fees" for a transaction "consummated within six (6) months after the date of termination of this Agreement" if the investor was "introduced to [Plaintiff Agility Health] by Forbes[.]" See Defendant's Motion for Summary Disposition, Exhibit A (letter agreement at 6, § 8, Termination). In contrast, the agreement places no such limitation upon a transaction closed during the life of the agreement, see id. (letter agreement at 3, § 3, Compensation), so the Court cannot impose such a limitation where it does not exist.

Pursuant to the parties' April 2, 2012, agreement, Plaintiff Agility Health was obligated to pay a placement fee to Defendant Forbes in the event of "any Transaction." See Defendant's Motion for Summary Disposition, Exhibit A (letter agreement at 3, § 3, Compensation). The first paragraph of the April 2, 2012, agreement indicates that "the 'Transaction'" refers to "an offering of preferred, common stock, or subordinated debt of [Agility Health] in a proposed private placement with total gross proceeds of up to approximately \$25 million for the purpose of raising capital, financing the Company's operations and making certain distributions to the existing shareholders" See id. (letter agreement at 1). The transaction between Alaris and Agility Health involved an exchange of \$12.5 million for 1,250 Class B membership units, as opposed to stock or subordinated debt.² When Agility Health entered into its agreement with Forbes on April 2, 2012, it existed as a corporation. But before it closed the deal with Alaris in December of 2012, Agility Health converted itself from a corporation into a Delaware limited liability company. Accordingly, as a limited liability company, Agility Health had membership units, rather than stock, to offer Alaris. Delaware law most certainly permits a corporation to convert itself into a limited liability company, but Delaware law also makes clear that the converted entity remains liable for all obligations incurred by its corporate predecessor. See 6 Del C § 18-214(e). Therefore, to the extent that Agility Health seeks to disclaim its contractual duty to pay a placement fee to Forbes by dint of Agility Health's conversion from a corporation that issued stock into a limited liability company that issued membership units, the Court must reject that argument. See 6 Del C § 18-214(e).

² The Court could characterize the deal on December 14, 2012, between Alaris and Plaintiff Agility Health as a "transaction" with subordinated debt in the form of a promissory note. But the parties themselves both seem inclined to address the broader financing deal on December 19, 2012, as the operative exchange for determining whether a "transaction" occurred.

Plaintiff Agility Health's final challenge to the counterclaim for breach of the April 2, 2012, agreement flows from a provision that the "Transaction does not include any . . . sales to Canadian investors[.]" See Defendant's Motion for Summary Disposition, Exhibit A (letter agreement at 1). Agility Health contends that it consummated a deal with Alaris Canada, so Forbes cannot lay claim to a placement fee for a transaction with such a Canadian investor. The record belies this contention. To be sure, the Alaris principals who negotiated with Agility Health may well have been Canadians who spoke for Alaris Canada, but the exchange of \$12.5 million for 1,250 Class B membership units took place between Agility Health and Alaris USA. Accordingly, Agility Health cannot characterize the deal as a sale to a Canadian investor when its partner in the deal was an American subsidiary of a Canadian parent.³ Therefore, the Court must grant summary disposition under MCR 2.116(C)(10) to Forbes on its counterclaim for breach of contract because the parties' April 2, 2012, agreement unambiguously entitles Forbes to the placement fee prescribed in section 3 of that agreement. See Defendant's Motion for Summary Disposition, Exhibit A (letter agreement at 3, § 3, Compensation).

B. Unjust Enrichment.

Defendant Forbes's success on its counterclaim for breach of contract forecloses relief on its separate counterclaim for unjust enrichment. Because that claim depends upon an extra-contractual theory, the Court must look to Michigan law to determine the viability of the claim. In Michigan, a claim for unjust enrichment cannot exist "if there is an express contract between the same parties on the same subject matter." See Morris Pumps v Centerline Piping, Inc., 273 Mich App 187, 194

³ As Agility Health has explained, "Alaris USA is a Delaware corporation" that was "formed on October 21, 2011 . . . to acquire and hold interests in the American entities financed directly or indirectly by Alaris" Canada. See Agility Health's Summary Disposition Brief at 7.

(2006). Here, the April 2, 2012, agreement plainly addresses each and every component of Forbes's counterclaim for unjust enrichment, so the Court must grant summary disposition to Agility Health under MCR 2.116(C)(10) on the unjust-enrichment counterclaim.

C. Declaratory Relief.

Michigan law provides a procedural mechanism for resolving disputes before they ripen into claims for actual damages. See UAW v Central University Michigan Trustees, 295 Mich App 486, 495 (2012). According to MCR 2.605(A)(1), "a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Here, Plaintiff Agility Health has requested "a declaration that (1) Agility Health has not breached the [April 2, 2012] engagement letter with Forbes and (2) Agility Health does not owe any Placement Fee to Forbes under the Forbes engagement letter agreement." See Declaratory Judgment Complaint, Prayer for Relief. Because the Court finds such declaratory relief incompatible with the Court's resolution of the counterclaim for breach of contract, the Court must grant summary disposition to Forbes under MCR 2.116(C)(10) on Agility Health's request for a declaratory judgment.

III. Conclusion

For all of the reasons set forth in this opinion, Defendant Forbes is entitled to prevail on its counterclaim for breach of its April 2, 2012, agreement with Plaintiff Agility Health. As a result, the Court must not only grant summary disposition to Forbes on that counterclaim pursuant to MCR 2.116(C)(10), but also schedule a hearing to establish the appropriate measure of damages to which Forbes is entitled under the terms of the April 2, 2012, agreement. At a minimum, Forbes must be

awarded the placement fee contemplated by section 3 of the agreement. In addition, Forbes may be entitled to “reasonable attorney’s fees” under the indemnity provision in section 7 of the agreement. Accordingly, when the parties appear for the hearing on damages, both sides should be prepared to present evidence and arguments as to the computation of the placement fee as well as the propriety and extent of an award of “reasonable attorney’s fees” in this case.⁴

IT IS SO ORDERED.

Dated: April 11, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

⁴ Section 7 of the April 2, 2012, agreement contemplates an award of “reasonable attorney’s fees” that “are directly caused by” a breach of the agreement. See Defendant’s Motion for Summary Disposition, Exhibit A (letter agreement at 5, § 7, Indemnity). Therefore, Defendant Forbes must convince the Court that its request for attorney fees not only meets the standards of reasonableness under New York law, but also flows directly from Plaintiff Agility Health’s breach of its obligations under the agreement.