

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

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

Plaintiff/Counter-Defendant,

vs.

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

Defendant/Counter-Plaintiff.

Case No. 13-00830-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER PARTIALLY RESOLVING MOTIONS FOR
SUMMARY DISPOSITION PRIOR TO HEARING ON DAMAGES

On April 11, 2014, the Court issued an opinion and order granting summary disposition in favor of Defendant FPCG, LLC (“Forbes”) on all claims except its unjust-enrichment counterclaim. As a result, the Court scheduled a hearing on August 7, 2014, to establish the appropriate measure of damages that Plaintiff Agility Health, LLC (“Agility”) must pay Forbes. In anticipation of that hearing, Forbes filed second and third motions for summary disposition on several issues concerning damages. At oral argument on those motions on July 18, 2014, both sides requested that the Court address two specific disputes prior to the hearing on damages. Consequently, the Court shall resolve two discrete issues in this opinion. First, the Court concludes that Forbes shall be foreclosed from seeking specific performance with regard to the issuance of a warrant. Its relief for denial of its right to a warrant must take the form of money damages. Second, Forbes shall be denied the attorney fees it has incurred in this case. Instead, the Court shall simply follow the American rule and require each side to bear its own legal fees.

I. Specific Performance With Respect to the Warrants

As the Court concluded in its opinion issued on April 11, 2014, “[Defendant] Forbes must be awarded the placement fee contemplated by section 3 of the agreement” between the two parties. That placement fee includes “(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 [Plaintiff Agility Health] in the Transaction.” See Agility Health’s Brief Opposing Forbes’s Third Summary Disposition Motion, Exhibit A (letter agreement at page 3, § 3, Compensation). For purposes of the pending motions for summary disposition, the two sides do not disagree about Forbes’s entitlement to six percent of the gross proceeds. They simply disagree about whether Forbes should be awarded specific performance or, instead, money damages to account for the warrant to purchase securities that Forbes never received. New York law controls the outcome of this dispute. See id. (letter agreement at page 8, § 12, Governing Law).

Under New York law, “specific performance is an equitable remedy for breach of contract” that “is appropriate when money damages would be inadequate to protect the expectation interest of the injured party and when performance will not impose a disproportionate and inequitable burden on the breaching party[.]” Cho v 401-403 57th Street Realty Corp, 300 AD2d 174, 175; 752 NYS2d 55, 57 (2002). “Traditionally, specific performance has been held to be a proper remedy . . . when the uniqueness of the goods in question makes calculation of money damages too difficult or too uncertain[.]” Id. Significantly, “agreements to convey shares of stock in a close corporation may be enforced by specific performance[.]” Id. But from an analytical perspective, the “point at which breach of a contract will be redressable by specific performance thus must lie not in the inherent physical uniqueness of the property but instead in the uncertainty in valuing it[.]” See Van Wagner

Advertising Corp v S&M Enterprises, 67 NY2d 186, 186, 193; 492 NE2d 756, 760; 501 NYS2d 628, 632 (1986). Accordingly, “[i]n asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at a reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee.” Id.

In assessing the propriety of an award of specific performance, the Court “must determine, in the first instance, whether money damages would be an adequate remedy by considering, ‘among other factors, the difficulty of proving damages with reasonable certainty and of procuring a suitable substitute performance with a damages award[.]’” Cho, 300 AD2d at 175; 752 NYS2d at 57. Here, two factors convince the Court that money damages – as opposed to specific performance – should be provided to Forbes. First, the warrant at issue here manifestly can be valued, even though neither the warrant itself nor the membership units for which it could be exercised are publicly traded. A warrant constitutes an option to buy an interest in an entity, typically during a defined time period. See Oscar Gruss & Son, Inc v Hollander, 337 F3d 186, 197 (2d Cir 2003). Warrants have routinely been valued in litigation, even in the absence of any market price established through public trading. Second, an award of specific performance would present a logistical problem because the warrant Forbes demands has a contractually defined seven-year horizon, see Agility Health’s Brief Opposing Forbes’s Third Summary Disposition Motion, Exhibit A (letter agreement at 3, § 3, Compensation), which cannot be replicated at this stage of the dispute. In contrast, “clear New York law” holds that “the proper valuation for the warrant[] was the date of the breach – the date [Agility Health] failed to deliver the warrant[.]” Oscar Gruss & Son, 337 F3d at 197. Thus, in awarding money damages, all the Court must do is choose between the parties’ competing valuation figures as of that date.

The Court recognizes that the refusal of Plaintiff Agility Health to give Defendant Forbes the warrant contemplated by the parties' agreement deprived Forbes of the opportunity to exercise that warrant as it saw fit. The Court concludes, however, "that the value of the 'unique qualities' of the [warrant can] be fixed with reasonable certainty and without imposing an unacceptably high risk of undercompensating" Forbes. See Van Wagner Advertising, 67 NY2d at 194; 492 NE2d at 760; 501 NYS2d at 632. Consequently, pursuant to New York law, the Court shall render an award of money damages to Forbes as compensation for the undelivered warrant based upon the valuation evidence presented by the parties at the hearing scheduled for August 7, 2014.

II. Forbes's Demand for Attorney Fees

The Court's opinion issued on April 11, 2014, states that Defendant "Forbes may be entitled to 'reasonable attorney's fees' under the indemnity provision in section 7 of the agreement." That indemnity provision states as follows:

Each party shall indemnify and hold harmless the other party and its respective affiliates, officers, directors, employees and agents (collectively, the "Indemnified Parties") from and against any and all losses, claims, damages and liabilities (including reasonable attorney's fees) arising out of or in connection with this Agreement that are directly caused by that party's breach of this Agreement or violation of any applicable laws in connection with its performance hereunder; provided that this indemnification shall not apply to any loss, claim, damage or liability that is found to have resulted from the bad faith, gross negligence, willful misconduct, fraudulent misrepresentation or breach of terms of this agreement by an Indemnified Party.

See Agility Health's Brief Opposing Forbes's Third Summary Disposition Motion, Exhibit A (letter agreement at 5, § 7, Indemnity). Forbes asserts that that language clearly and unambiguously gives rise to a right to "reasonable attorney's fees" incurred in this action against Agility Health to enforce Forbes's rights under the parties' contract. The Court disagrees.

Both the New York Court of Appeals (that state's highest court) and the United States Court of Appeals for the Second Circuit have held that, "[i]nasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise." Hooper Associates, Ltd v AGS Computers, Inc, 74 NY2d 487, 492; 548 NE2d 903, 905; 549 NYS2d 365, 367 (1989); accord Oscar Gruss & Son, 337 F3d at 199. Both Hooper Associates and Oscar Gruss & Son involved the very same dispute faced by the Court in this case concerning a contracting party's right to attorney fees arising from litigation against the other contracting party, rather than against a third party. In both of those cases, the court limited the reach of the indemnification clause to third-party claims.* See Hooper Associates, 74 NY2d at 492; 548 NE2d at 905; 549 NYS2d at 367; Oscar Gruss & Son, 337 F3d at 200. Here, as in both of those cases, the indemnification clause "does not contain language clearly permitting [Forbes] to recover from [Agility Health] the attorney's fees incurred in a suit against" the other contracting party. See Hooper Associates, 74 NY2d at 492; 548 NE2d at 905; NYS2d at 367; accord Oscar Gruss & Son, 337 F3d at 200. "On the contrary, [the indemnification clause] is typical of those which contemplate

* Such a result makes perfect sense because the effort to stretch an indemnification clause to reach attorney's fees in litigation between the contracting parties converts that clause into something much broader than a conventional indemnification agreement. When one contracting party files suit against its contracting counterpart to enforce rights under their contract, the party initiating the suit has chosen to act as the aggressor. Thus, its attorney fees are simply the byproduct of a suit it chose to initiate. In contrast, indemnification covering attorney fees arising from an action filed by a third party simply provides relief from attorney fees involuntary incurred by a party forced to defend itself against a suit it had no involvement in filing. Here, of course, Plaintiff Agility Health chose to fire the first shot by filing this action against Defendant Forbes, so the Court's reasoning does not apply quite so cleanly in the context of this litigation. Nevertheless, the general antipathy toward awarding attorney's fees in litigation between contracting parties rests on a firm foundation.

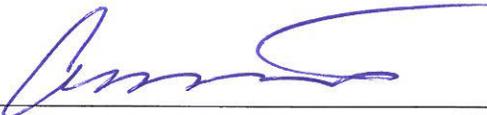
reimbursement when the indemnitee is required to pay damages on a third-party claim.” See Hooper Associates, 74 NY2d at 492; 548 NE2d at 905; 549 NYS2d at 367; accord Oscar Gruss & Son, 337 F3d at 200. Thus, Forbes has no right to attorney fees under the indemnification clause.

III. Conclusion

For all of the reasons set forth in this opinion, the Court must grant summary disposition to Plaintiff Agility Health on Defendant Forbes’s demands for specific performance and attorney’s fees. In resolving the disputes concerning those matters, the Court has left all of the remaining issues for consideration at the hearing on August 7, 2014. In light of the rulings set forth in this opinion, the Court expects the parties to present evidence concerning the value of the warrant, but not to present evidence regarding Forbes’s attorney’s fees.

IT IS SO ORDERED.

Dated: July 25, 2014



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