IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

FLORIDA INFECTIOUS DISEASE GROUP, P.A., a Florida personal service corporation,

Plaintiff,

vs. CASE NO.: 03-CA-2424

UNITED HEALTHCARE OF FLORIDA, INC., a Florida corporation, Div.: 39

Defendant.
_____________________________________/

PLAINTIFF FLORIDA INFECTIOUS DISEASE GROUP'S

MEMORANDUM OF LAW

IN OPPOSITION TO

DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

COMES NOW the Plaintiff, Florida Infectious Disease Group, P.A. ("FIDG"), through its undersigned counsel, and files this Memorandum of Law in Opposition to Defendant United Healthcare's ("UHC") Motion to Dismiss the Amended Complaint, and states as follows:

I. BACKGROUND AND FACTS

Plaintiff is a medical group of physicians located in Orlando, Florida, practicing within the medical specialty of infectious diseases. Defendant UHC is a health maintenance organization (HMO) which has contracted with FIDG to treat UHC's members and to pay for the medical services and drugs used by FIDG's physicians to treat them. This suit is over claims for the services and medications used to treat UHC's members which UHC has failed to pay.

Plaintiff FIDG commenced the present action against Defendant by filing a Complaint on March 6, 2003. On July 24, 2003, FIDG filed the instant Amended Complaint in response to Defendant's first Motion to Dismiss. Defendant has moved to dismiss the Amended Complaint and to strike Plaintiff's claim for attorney's fees.

II. DISCUSSION OF LAW

It is well settled that on a motion to dismiss all well-pled allegations in the complaint must be accepted as true. Nat Weaver, Inc., v. Fencil, 701 So. 2d 121 (Fla. 5th DCA 1997). As discussed more fully below, Defendant's Motion to Dismiss FIDG's Amended Complaint improperly attempts to have the Court dismiss the complaint on grounds that are not proper in a motion to dismiss and attempts to have the Court rule on factual conflicts with its Motion.

A. Plaintiff FIDG Voluntarily Dismisses Counts VII and VIII

Plaintiff voluntarily dismisses Counts VII and VIII of the Amended Complaint.

B. Count I of Plaintiff's Amended Complaint Is Sufficiently Pled and Therefore Should Not Be Dismissed

Count I of Plaintiff's Amended Complaint adequately states a claim for breach of contract. Rule 1.130 of the Florida Rules of Civil Procedure, states "[a]ll bonds, notes bills of exchange, contracts, accounts or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading." FIDG attached a copy of the relevant contracts to the Amended Complaint. FIDG is not required by the Rules of Civil Procedure to attach copies of all of the documents it intends to introduce as evidence to show the UHC breached the contract, even though this is the position that UHC urges the Court to adopt.

Defendant incorrectly asserts that FIDG must attach every denied claim in support of its allegation that Defendant breached the contract. Rule 1.130 states that "[n]o papers shall be unnecessarily annexed as exhibits." The claims are evidence of Defendant's breach, but not required attachments to the compliant. See Department of Revenue v. Bander, 734 So. 2d 1145, 1146 (Fla. 5th DCA 1999) (Lack of attachment of DNA evidence not a basis to dismiss the complaint.)

Therefore, the Defendant's assertion that Count I fails to state a claim for breach of contract is without merit and Count I should not be dismissed.

C. Counts II, III and VI for Equitable Relief Are Permissible and Are Properly Pled

Defendant claims that Count II (an action for equitable estoppel), Count III (an action for promissory estoppel), and Count VI (an action for unjust enrichment), must be dismissed because equitable remedies may not be sought where a contract exists, citing Williams v. Bear Stearns & Co., 725 So. 2d 397 (Fla. 5th DCA 1998). However, this Williams does not stand for this proposition. Apparently, Defendant is citing Williams for the general proposition that equity will not lie where adequate legal remedies exist, and then attempts to infer that adequate legal remedies exist for FIDG. This is inapplicable in the present case.

FIDG does not dispute the general principle discussed in Williams, and does not dispute that adequate legal remedies exist for Count I of the Amended Complaint which claims damages for Defendant's breach of the express contracts. However, Counts II, III, and VI have been pled in the alternative and for the purpose of obtaining relief from Defendant's current and ongoing deceitful business practices outside the contract. Adequate remedies at law simply do not exist for the continuing wrongful acts by which Defendant induced FIDG's performance outside the contract and Defendant's failure to perform its own obligations outside the contract.

FIDG's Amended Complaint adequately pled Count II for equitable estoppel and Count III for promissory estoppel. Furthermore, FIDG has pled these in the alternative. To plead equitable estoppel and promissory estoppel, a plaintiff must allege that the defendant made certain representations to the plaintiff, and that the plaintiff relied to its detriment on the representations.[1] The only difference between equitable and promissory estoppel is that promissory estoppel is "a qualified form of equitable estoppel which applies to representations relating to a future act of the promisor rather than to an existing fact." Crown Life Ins. Co. v. McBride, 517 So. 2d 660, 661-62 (Fla. 1987).

Implicit in those causes of action is a claim of misrepresentation, fraud, or deceit. Id. at 662. Here, FIDG pled both types of estoppel because Defendant's employees

[1] To sufficiently plead a claim for equitable estoppel, a plaintiff must allege only the following: (1) a representation of a material fact by the defendant to the plaintiff that is contrary to the condition of affairs later asserted by the defendant; (2) reliance on the representation by the plaintiff; and (3) the plaintiff suffered a detriment by a change in position as a result of the representation and reliance thereon. Florida Dept. of Revenue v. Anderson, 403 So.2d 397, 400 (Fla. 1981). All of these required elements to state a cause of action for equitable estoppel were pled in each count.

induced FIDG's continued delivery of medical services to Defendant's members by promising to pay both existing disputed bills and future bills for the same services.

Moreover, Counts II and III specifically allege that they are being pled for promises made which "were outside of and for actions by the parties that were not covered by any existing contract." In other words, these Counts are based on promises which Defendant made to induce Plaintiff to provide medical services outside the contract. FIDG alleged that these promises were independent of the written contract, and Plaintiff relied on those promises to its detriment. Thus, Counts II and III are properly and sufficiently pled.

Likewise, Count VI of FIDG's Amended Complaint adequately pled a claim for unjust enrichment. A claim for unjust enrichment requires the plaintiff plead that the plaintiff conferred a benefit on the defendant who has knowledge of the benefit, that the defendant accepts and retains the benefit, and that under the circumstances it is inequitable for defendant to retain the benefit without paying for the benefit. Duncan v. Kasim, Inc., 810 So. 2d 968, 971 (Fla. 5th DCA 2002).

FIDG not only alleged all of the specific elements for unjust enrichment, but also stated that for purposes of that Count, "the actions described herein were outside the coverage" of the contracts referred to in the Amended Complaint. In other words, the claim for unjust enrichment is distinct from the contract and not pled as enforcement of the contract. Id.

Furthermore, FIDG's claims for equitable estoppel Count II, promissory estoppel Count III and unjust enrichment Count VI are all alternative causes of action. It is permissible to plead alternative legal and equitable causes of action for the same conduct under Florida Rule of Civil Procedure 1.110(g), states:

> A pleader may set up in the same action as many claims or causes of action . . . as the pleader has, and claims may be stated in the alternative if separate items make up the cause of action, or if 2 or more causes of action are joined. A party may also set forth 2 or more statements of a claim . . . alternatively, either in 1 count or defense or in separate counts or defenses. . . . A party may also state as many separate claims or defenses as that party has, regardless of consistency and whether based on legal or equitable grounds or both. All pleadings shall be construed so as to do substantial justice.

In Williams, the Fifth District Court of Appeal stressed that if the causes of action are properly pled, then the questions of fraud, equitable estoppel, reliance, unjust enrichment–and even whether an express contract applied to the disputed actions–were premature for the court to decide on a motion to dismiss, since the court must take as true all well-pled allegations. Williams, 725 So. 2d at 400-401. Similarly, FIDG's Counts for equitable estoppel, promissory estoppel and unjust enrichment cannot properly be dismissed based upon Defendant's Motion.

Counts II, III and VI for equitable relief are properly pled and should not be dismissed.

D. Count IV Sufficiently Pleads a Claim under the Florida RICO Statute

Defendant incorrectly claims that Count IV should be dismissed because Chapter 895, Florida Statutes, applies to ongoing racketeering activity "tantamount to criminal behavior." FIDG's Amended Complaint is properly pled and alleged all the elements set for in the Florida RICO statute.

The Florida RICO statute is based on the federal RICO law, 18 U.S.C. Section 1961 et seq., and it states, in pertinent part:

> 895.02 Definitions.
>
> (1) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit:
>
> (a) Any crime which is chargeable by indictment or information under the following provisions of the Florida Statutes:
>
> * * *
>
> 24. Chapter 812, relating to theft, robbery, and related crimes.
> 25. Chapter 815, relating to computer-related crimes.
> 26. Chapter 817, relating to fraudulent practices, false pretenses, fraud generally, and credit card crimes.
>
> * * *
>
> (b) Any conduct defined as "racketeering activity" under 18 U.S.C. s. 1961(1).

FIDG not only alleged all required elements, but also alleged specific instances when Defendant engaged in a practice of promising to pay for certain medications and devices, which FIDG relied upon when it continued to provide these medications and devices to Defendant's members. FIDG's Amended Complaint also clearly alleges that Defendant has used several "manipulative devices" to deny, reduce and delay payments due to FIDG including an automated computer program. These activities, if proven, certainly could be considered theft and fraudulent practices, amounting to a pattern of activity that could be considered racketeering and a computer-related crime.

FIDG's Amended Complaint specifically pled that Defendant engaged in prohibited activity set forth in Section 895.03, Florida Statutes. Furthermore, Section 895.05, Florida Statutes provides civil remedies, including injunctive relief, for the criminal activity set forth in Section 895.03, Florida Statutes. Thus FIDG's Amended Complaint has alleged all the elements necessary to state a claim under the Florida RICO statute and therefore, Count IV should not be dismissed.

Defendant asserts that Florida's RICO Act "simply does not apply where there has been no showing of criminal activity," and asserts that a suggestion that RICO might apply here "obviously must be dismissed." Clearly, Federal courts, including the United States Supreme Court, disagree. Currently before the United States District Court for the Southern District of Florida is a class action lawsuit brought on behalf of health care providers against several large HMOs-including the Defendant United HealthCare. That suit includes claims under the Federal RICO statute alleging essentially the same facts, the practice of promising medical providers payment in order to induce the providers to render additional services, against the HMOs which FIDG alleges here against Defendant.

It is not necessary for this Court to take judicial notice of that action because one issue in that case has already been adjudicated by the U.S. district court, the Court of Appeals for the Eleventh Circuit, and the U.S. Supreme Court, with published opinions at all levels. Those published opinions contain recitations of the facts of that case, and they obviously may be cited here.[2] The U.S. Supreme Court addressed whether those

[2] In Re: Managed Care Litigation, 132 F. Supp. 2d 989 (S.D. Fla. 2000); aff'd by In Re: Humana Inc. Managed Care Litigation, 285 F.3d 971 (11th Cir. 2002); reversed and remanded by Pacificare Health Systems, Inc. v. Book, 123 S. Ct. 1531 (2003)(reversed lower courts' rulings; found that arbitration of RICO claims could be compelled).

defendant HMOs which had arbitration clauses in their provider contracts could compel arbitration of the RICO complaints. There was not a hint that the Supreme Court believed the RICO complaints against United HealthCare and the other defendants to be frivolous. Since Defendant UHC is one of the named party defendants in the federal litigation, it is disingenuous and frivolous, at best, for Defendant to assert FIDG's Count IV under the Florida RICO statute should be dismissed.

Count IV should not be dismissed. The U.S. Supreme Court has not found any problem with a RICO claim being pursued against United HealthCare in Florida federal court, nor should this Court find any problem with such a cause of action in state Court.

E. Count IX for Declaratory Relief and Count X for Injunctive Relief Are Sufficiently Pled

In the Motion to Dismiss, Defendant argues that Count IX for Declaratory Judgment must be dismissed because the express contracts between the parties are not ambiguous and Count IX does not allege that they are. FIDG is not required to allege the contract is ambiguous to maintain this cause. As the Fifth District Court of Appeal has stated:

> The purpose of a declaratory judgment action is to afford relief from insecurity and uncertainty with respect to rights, status, and other equitable or legal relations. Individuals seeking declaratory relief must show that there is a bona fide, actual, present, and practical need for the declaration and that the declaration deals with a present controversy as to a state of facts.

Sutton v. Dept. of Environmental Protection, 654 So. 2d 1047 (Fla. 5th DCA 1995).

FIDG's Amended Complaint alleges: "A bona fide, actual, present practical need for a declaration exists." (Paragraph 196.) "The declaration requested concerns a present, ascertained or ascertainable state of facts or present controversy as to a state of facts." (Paragraph 197.) "A privilege or right of the Plaintiff is dependent upon the facts or the law applicable to the facts." (Paragraph 198.) and "Plaintiff and the Defendant have an actual, present, adverse and antagonistic interest in the subject matter, either in law or in fact." (Paragraph 199).

Additionally, the Declaratory Judgment Statute, at Section 86.021, Florida Statutes, states:

> Any person . . . who may be in doubt about his or her rights under a deed, will, contract, or other article, memorandum, or instrument in writing or whose rights, status, or other equitable or legal relations are affected by a statute, or any regulation made under statutory authority . . . may have determined any question of construction or validity arising under such statute, . . . contract, . . . and obtain a declaration of rights, status, or other equitable or legal relations thereunder.

Thus, there is no requirement that FIDG allege that the contracts are ambiguous in order to seek declaratory relief under Chapter 895, Florida Statutes. The dispute between FIDG and Defendant UHC over the interpretation of the contracts and how they should have been applied in the past and are to be applied in the future, requires the Court to provide the parties with a declaration of their respective rights under the contracts.

Therefore, FIDG's Count IX for declaratory relief should not be dismissed.

Defendant also claims that Count X for injunctive relief must be dismissed because Plaintiff FIDG "cannot set forth the irreparable harm required" for such relief. Defendant inexplicably argues that Plaintiff FIDG is "solely seeking monetary damages" in this case, and that "irreparable harm does not exist where the potential loss is compensable by money damages."[3] In effect, Defendant is arguing that FIDG cannot prove what it is alleging, an improper argument for a motion to dismiss.

Plaintiff FIDG agrees that there is no irreparable harm where the loss is completely compensable by damages. However, this conclusion is irrelevant for purposes of a motion to dismiss this Count and does not apply to the present case.

The Amended Complaint seeks injunctive relief precisely because monetary damages are insufficient to stop Defendant's continuing and future violations of law and breaches of contract. As the Amended Complaint states at Paragraph 206: "[a] money judgment in this case will only compensate Plaintiff for past losses. It will not stop Defendant's interference in medical treatment decisions, and it will not stop Defendant from continuing to confiscate the money Plaintiff earns, and that is necessary to maintain its practice on an ongoing basis."[4]

In addition to alleging that it will suffer irreparable harm and that it has no adequate remedy at law, Count X asserts that Plaintiff has a substantial likelihood of success on the

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[3] Defendant argues that since some of the disputed payments date back four or five years, there can be no showing of irreparable harm, because if "imminent irreparable harm existed, it certainly would have taken place by now." If Defendant's logic is to be followed, no party could continue to perform on a contract and negotiate in good faith for payment it believes is already due, and no party could believe reassurances that it would be paid, because to do so would mean the party would give up its ability to seek injunctive relief when the problem continues indefinitely. This argument makes no sense. Defendant's reasoning also would lead to the conclusion that Defendant could still continue its wrongful conduct into the future and Plaintiff would be required to file a new suit every year or two, after each unpaid claim became ripe for a complaint for damages. This also makes no sense.

[4] Plaintiff is at a loss to understand why both Defendant's motion and its memorandum of law insist that the Amended Complaint seeks only money damages. Obviously, counts for declaratory and injunctive relief are not claims for monetary damages. In any event, a party may be awarded monetary damages for the same actions that cause it irreparable harm and provide it the basis for injunctive relief. See Lawler v. Eugene Wuesthoff Memorial Hosp., 497 So. 2d 1261 (Fla. 5th DCA 1986) (plaintiffs permitted to seek both monetary damages and injunctive relief for hospital's breach of its bylaws in terminating physician privileges); see also, I.C. Systems, Inc. v. Oliff, 824 So. 2d 286 (Fla. 4th DCA 2002), and cases cited therein.

merits and that the public interest will be served by entry of both a temporary injunction and a permanent injunction, which can be practically and adequately framed and enforced. These constitute all elements required to sufficiently plead a cause of action for injunctive relief. See Naegle Outdoor Advertising Company v. City of Jacksonville, 659 So.2d 1046, 1047 (Fla. 1995).

Therefore, FIDG's count for injunctive relief also should not be dismissed.

F. Count V Properly Asserts a Claim for Breach of the Implied Duty of Good Faith and Fair Dealing

Defendant has moved to dismiss Count V of the Amended Complaint, a cause of action, for breach of the implied duty of good faith and fair dealing. Defendant states as its basis for this argument that such duty "should not be invoked to override the express terms of the agreement between the parties," and that such cause of action cannot be maintained "absent an allegation that an express term of the contract has been breached." This contention makes no sense, since the Amended Complaint is replete with allegations of Defendant's breaches of contracts and agreements and its utter disregard for the terms of the agreements. Plaintiff, in paragraph 156 of the Amended Complaint, invoked the implied duty of good faith and fair dealing precisely because such duty "is implicit in all enforceable contracts under Florida law, and implied in the performance of every term of an express contract."[5]

Moreover, Count V specifically alleged Defendant breached the express terms of the Contract by making false or misleading statements, by wrongfully denying and down coding claims, by wrongfully failing to pay claims, and by using manipulative devises to reduce payments due to Plaintiff, while inducing it to keep treating Defendant's members. (Paragraph 155.)

Count V also incorporates all allegations in Paragraphs 1 through 110, and states that Count V is being pled <u>in the alternative</u> to or in addition to the other counts of the

[5]Surely Defendant is not seriously arguing to this Court that there are no express terms in the contracts requiring it to pay FIDG for services rendered to Defendant's members; or that FIDG has not alleged that it failed to pay on hundreds of occasions.

Complaint (including, of course, Count I for "Breach of Contract").

FIDG's Amended Complaint sufficiently pled its claim for breach of the implied duty of good faith and fair dealing so this Count should not be dismissed.

G. There is No Basis Whatsoever to Strike Plaintiff's Claim for Attorney's Fees

Defendant has moved to strike Plaintiff's request for attorney's fees. This request for attorney's fees is made under Section 5.1 of the 1996 Amended Agreement between the parties, which specifically states that FIDG is entitled to attorney's fees and costs if it prevails in the litigation.

It is difficult to understand Defendant's argument that a "plain reading" of Section 5.1 of the 1996 Amended Agreement between the parties "obviously" shows an "intent" to limit the application of that clause to third-party actions.

To the contrary, a plain reading of Section 5.1 of the contract, a contract which was prepared by Defendant UHC, clearly shows that it applies to claims between the parties. Section 5.1 states, in its entirety:

> **SECTION 5**
>
> **Liability of Parties**
>
> **5.1 Responsibility for Damages.** Each party shall be responsible for any and all damages, claims, liabilities or judgments which may arise as a result of its own negligence or intentional wrongdoing. Any costs for damages, claims, liabilities or judgments incurred at any time by one party as a result of the other party's negligence or intentional wrongdoing shall be paid for or reimbursed by the other party.

(Emphasis added.)

Note that "the parties" to this contract are FIDG and UHC, not someone else.

Defendant UHC does not dispute that this clause applies to attorney's fees; Defendant just wants it to apply only to its own attorney's fees and attorney's fees of third parties, because it is now being sued and will have to pay these attorney's fees. However, the plain language of this provision of UHC's contract does not state what Defendant now argues.

It is well-settled that a court will not use extra-contractual information to interpret a contract clause that is not ambiguous. Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 942 (Fla. 1979); Pathare v. Goolsby, 602 So. 2d 1345, 1346 (Fla. 5th DCA 1992); Hall Constr. Co. v. Beynond, 507 So. 2d 1225, 1226 (Fla. 5th DCA 1987).

By the plain meaning of Paragraph 5.1 of UHC's contract, each party is responsible to pay for its own negligence, wrongdoing, judgments and claims, no matter who brings a particular civil action. Plaintiff is now holding UHC to its own contract to pay for its negligence and wrongdoing.

To agree with Defendant's interpretation of this clause, the Court would have to find that more than one reasonable meaning exists. In other words, the Court would have to find that the paragraph is ambiguous. Premier Ins. Co. v. Adams, 632 So. 2d 1054, 1057 (Fla. 5th DCA 1994); Denman Rubber Mfg. Co. v. World Tire Corp., 396 So. 2d 728 (Fla. 5th DCA 1981). This is simply not the case.

Moreover, even that legal conclusion would not help Defendant in this case. Since Defendant drafted the contract, including Section 5.1, **any ambiguity must be construed**

against Defendant. Excelsior Ins. Co., 369 So. 2d at 942; Premier Ins. Co., 632 So. 2d at 1057; Pathare, 602 So. 2d at 1146. Therefore, the Court has no justification for striking Plaintiff's claim for attorney's fees based on Section 5.1 of the 1996 Amended Agreement.

In summary, there is no basis for the Court to strike the Amended Complaint's allegation that Plaintiff would be entitled to attorney's fees if it prevails in the litigation.

The Motion to Strike should be denied.

III. CONCLUSION

FIDG voluntarily dismisses Counts VII and VIII of the Amended Complaint. However, there is no basis to dismiss the remaining counts of the Amended Complaint, nor is there a valid reason to strike FIDG's claim for attorney's fees and costs.

The statutes, rules and cases cited in this Memorandum of Law show that FIDG's Amended Complaint properly sets forth the appropriate elements of and states the requisite "ultimate facts" supporting Count I for breach of contract, Count II for equitable estoppel, Count III for promissory estoppel, Count VI for unjust enrichment, Count IV for Florida RICO, Count V for breach of the implied duty of good faith and fair dealing, Count IX for declaratory relief, and Count X for injunctive relief. Defendant's arguments against these causes of action are inaccurate, illogical, often frivolous and completely without merit in law or in fact.

WHEREFORE, Plaintiff FIDG requests the Court to enter an Order:

1. Acknowledging that Plaintiff voluntarily dismisses Counts VII and VIII of the Amended Complaint;

2. Denying the remainder of Defendant's Motion to Dismiss;

3. Denying Defendant's Motion to Strike; and

4. Requiring Defendant to file its Answer to the Amended Complaint within 10 days of the date of the Court's Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail, postage prepaid, to David J. Armstrong, Esquire, Law Offices of Steven M. Ziegler, P.A.(Attorneys for the Defendant, United HealthCare), Presidential Circle, 4000 Hollywood Boulevard, Suite 375 South, Hollywood, Florida 33021, on this ______day of November, 2003.

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