



SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

REGIONAL OCCUPATIONAL AND PHYSICAL
THERAPY SPEECH-LANGUAGE PATHOLOGY,
PLLC, a/k/a Regional OT & PT SLP, PLLC,
Plaintiff,

DECISION AND ORDER

Index No: 6014/05

-against-

NORTHERN DUTCHESS RESIDENTIAL HEALTH
CARE FACILITY, INC.,

Defendant.

The following papers were read on this motion by the defendant for an order dismissing the second cause of action of the complaint for failure to state a cause of action, and extending defendant's time to serve an answer to the complaint until 10 days following service of this decision and order with notice of entry.

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According to the complaint, in 2003 pursuant to a contractual agreement between the parties, plaintiff provided therapy services on behalf of the defendant in exchange for agreed upon compensation. Plaintiff alleges these services for which defendant has not paid total \$88,680.63. Plaintiff seeks that sum on its first cause of action. On the second cause of action, plaintiff seeks treble damages alleging that defendant fraudulently represented to third party providers including Medicare and Medicaid that they paid plaintiff for these services.

According to defendant, the contract between the parties was initially entered into on or about September 1, 1999, and was terminated on or about April 16, 2004. In July of 2004, and thereafter, plaintiff billed defendant for such services totaling \$88,680.63, and despite these demands, defendant refused to pay. Defendant claims the second cause of action improperly seeks to convert a breach of contract cause of action to a cause of action in fraud, and improperly seeks punitive, and treble, damages. Counsel references the complaint noting a Second Department Appellate Division 2002 holding that where the alleged fraudulent misrepresentations relate to a defendant's purported intent not to pay for services due according to contract these misrepresentations are insufficient to allege fraud. [Citing Sokol v. Addison, 293 AD2d 600, 601 (2nd Dept. 2002)]. Moreover, counsel argues plaintiff has failed to comply with the requirements of CPLR 3016 (b) requiring specificity of alleged claims of fraud. Number 6 of the complaint under the second cause of action addresses the allegations of fraud and provides as follows:

"6- The defendant has been reimbursed for these services by Medicare, Medicaid and/or some other provider by fraudulently representing to these third party providers that they paid the plaintiff for these services when in fact the defendant knew that said services were not paid for and that they had no intention of ever paying for said services."

Counsel asserts that even if such misrepresentations were made, they were made to third parties, and were not relied upon by plaintiff to plaintiff's detriment as is required to sustain a cause of action in fraud. [Baker v. R.T. Vanderbilt Co. Inc., 260 AD 2d 750, 753 (3rd Dept. 1999); Escoett & Co. v. Alexander & Alexander, Inc., 31 AD2d 791 (1st Dept. 1969)].

In opposition, plaintiff's counsel reiterates what the complaint states and argues that the motion is premature since plaintiff has not had an opportunity to conduct discovery of the records that plaintiff claims defendant submitted to Medicare, Medicaid, and other providers, which plaintiff claims are fraudulent. Plaintiff does not explain how these or any other records would support a cause of action in fraud. Plaintiff does not dispute that the alleged false statements, even if made, were made only to third parties, and not detrimentally relied upon by plaintiff. Counsel argues that plaintiff's attorney's affirmation on the motion is insufficient since an affidavit by an individual with personal knowledge of the facts is required. However, the facts on this application are not in dispute. The question as to whether the complaint states a cause of action is a question of law which defendant's counsel has properly addressed by affirmation.

On the basis of the foregoing, it is hereby

ORDERED that defendant's motion is granted to the extent that the second cause of action in the complaint is dismissed for failure to state a cause of action; and it is further

ORDERED that defendant's time to serve an answer to the complaint is extended until ten (10) days after service of a copy of this decision and order with notice of entry; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference on March 16, 2006 at 9:15 a.m. unless a preliminary conference and stipulation is executed by both counsel and submitted to the court prior to that date.

The foregoing constitutes the decision and order of this court.

Dated: February 15, 2006
Poughkeepsie, New York

ENTER:



JAMES V. BRANDS, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.