

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001011-MR

PREMIERTOX 2.0, INC.

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 13-CI-04710

ERIC DUNCAN

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, J. LAMBERT AND VANMETER, JUDGES.

COMBS, JUDGE: PremierTox 2.0, Inc., (PremierTox) appeals from a final judgment of the Fayette Circuit Court entered in favor of Eric Duncan, the corporation's former chief executive officer. PriemerTox had argued that its failure to perform the terms of the parties' contract should be excused. The trial court disagreed and concluded as a matter of law that Duncan was entitled to

damages for breach of the parties' severance agreement. After our review, we affirm.

PremierTox operates a clinical laboratory that performs urine drug testing ordered by physicians for the purpose of treating and monitoring addiction treatment patients. It was established in Russell Springs in December 2010 and has its principal place of business in Russell County.

Eric Duncan has an undergraduate degree in psychology. According to PremierTox, Duncan was offered the position of chief executive officer even though he possessed no management experience. Duncan accepted the corporation's offer, and on January 6, 2011, he entered into an employment agreement with PremierTox and Addixion Recovery of Kentucky, LLC d/b/a SelfRefind. SelfRefind operates a chain of addiction treatment clinics in Kentucky. The owners of SelfRefind, Dr. Bryan Wood and Dr. Robin Peavler, also own 40% of PremierTox.

The employment agreement provided that Duncan could be terminated for cause. Duncan resided in Lexington, and his office was located in Lexington.

PremierTox bills federal health care programs for its services. During the relevant timeframe, PremierTox utilized an entity referred to in these proceedings as Liberty Billing to submit its reimbursement claims to Medicare and Medicaid. Liberty Billing was owned and managed by Kristine Kaiser before it was acquired by the owners of PremierTox in December 2010.

After Liberty Billing was purchased by the owners of PremierTox, Kaiser was named president of the company; her job duties remained the same and her salary exceeded Duncan's by a substantial margin. In his deposition, Duncan indicated that he was instructed by the board of directors and the owners of PremierTox that Kaiser was in charge of billing; that she was experienced in coding claims; and that he would have no responsibility with respect to that aspect of the business. Duncan had no training or experience in federal health care program reimbursement.

In April 2013, the United States Department of Justice launched an investigation into the nature of the drug testing requested by SelfRefind and Drs. Wood and Peavler as well as the billing practices of PremierTox. Late in the year, the parties began to negotiate a settlement of the government's claims. By September 2013, a tentative agreement had been reached.

Eventually, Dr. Bryan Wood, Dr. Robin Peavler, PremierTox, and Addixion Recovery of Kentucky, LLC d/b/s SelfRefind, entered into a formal settlement agreement with the United States Department of Justice and the Commonwealth's attorney general. The agreement recited that the United States had certain civil claims against the defendants arising from their conduct in submitting, or causing the submission of, allegedly false reimbursement claims for medically unnecessary services to the Medicare and Medicaid programs during the period from December 1, 2010, through April 1, 2013.

The settlement agreement recited that Dr. Wood and Dr. Peavler had each purchased a 20% ownership stake in PremierTox upon its inception in 2010. It stated that Drs. Wood and Peavler had then instituted a practice at their clinics to require all the patient urine samples be referred to PremierTox for quantitative urine drug testing of a kind not required before they had acquired an ownership stake in the lab. The agreement recited that Drs. Wood and Peavler and SelfRefind had been aware that PremierTox lacked the laboratory equipment necessary to test all of the SelfRefind patient urine samples that it had begun to receive in December 2010 and that, with their consent, PremierTox had begun to store the excess urine samples in freezers for up to eight months until PremierTox reached the capacity to process them. The Department of Justice alleged that claims for reimbursement were then submitted to federal and state health care programs for drug tests which the defendant's knew were medically unnecessary. The defendants did not acknowledge liability but agreed to pay some fifteen million seven hundred fifty thousand dollars (\$15,750,000) to settle the matter. Neither Duncan nor Kaiser was implicated.

Duncan was notified on September 2, 2013, by the common owners of PremierTox and Liberty Billing and the entities' shared attorney that his services were no longer required. While the PremierTox representatives did not disclose the reason for the change in management, the parties specifically agreed that Duncan was entitled to a severance pay package that included a quarterly executive bonus and that PremierTox would provide a positive reference for him to any

prospective employer. The parties immediately executed a written agreement memorializing these terms. In his verified complaint, Duncan stated that the PremierTox representatives advised him during their negotiations that Kris Kaiser was to be terminated as well.

On October 3, 2013, Kaiser was terminated by the owners of Liberty Billing for “misconduct affecting business of employer including but not limited to failure to comply with state and federal laws.” Kaiser testified in her deposition that the purchasers of Liberty Billing initially told her that she would remain in sole control of the company and that no one would interfere with her management of the business. However, she indicated that the business culture had changed abruptly when Dr. Wood, the chairman of PremierTox’s board of directors, announced in January 2013 that he wanted to be involved in “every aspect of every arm of operations of PremierTox.”

By letter dated October 30, 2013, PremierTox’s attorney advised Duncan that the board of directors had met a week earlier to review the terms of the parties’ severance agreement. PremierTox explained that Duncan’s failure to supervise Kaiser at Liberty Billing and to advise that Liberty Billing was uninsured had resulted in huge losses to the corporation. Based upon this “newly discovered evidence,” PremierTox advised that Duncan should have been terminated for cause and that it no longer intended to honor the terms of the severance agreement.

On November 15, 2013, Duncan filed a civil action against PremierTox for breach of contract. The complaint also included allegations

against Liberty Billing. Those claims have since been dismissed, however, and are not relevant to the claim before us.

PremierTox answered the complaint and alleged that throughout Duncan's tenure, the owners of PremierTox and numerous employees had expressed concern about his abilities to manage key areas of the business. PremierTox explained that a decision had been made in 2013 to circumscribe his duties as CEO. PremierTox alleged that it had "discovered additional failures by Duncan in the areas of supervising billing practices" after his termination and asserted that it was entitled to avoid the terms of the parties' severance agreement. Pursuant to CR¹ 8.03, which sets forth a litany of general affirmative defenses, PremierTox claimed in general all the defenses to which it might be entitled.

In a motion filed on August 29, 2014, Duncan contended that he was entitled to judgment as a matter of law with respect to his claim for breach of contract pursuant to the provisions of CR 56. In support of the motion for summary judgment, Duncan argued that the reasons given by PremierTox for breaching the terms of the severance agreement were wholly pretextual and that no genuine issue existed with respect to the fact that its performance under the contract could not be excused.

In response, PremierTox contended that its decision to avoid the terms of the contract was based upon Duncan's failure to disclose that Kaiser had fraudulently or negligently managed PremierTox's account at Liberty Billing by

¹ Kentucky Rules of Civil Procedure.

failing to input required billing information during the spring and summer of 2013. It contended that his failure to disclose this information during the negotiation of the severance agreement constituted a fraud by omission. In the alternative, PremierTox alleged that Duncan had breached the agreement's implied covenant of good faith and fair dealing.

In an order entered on November 5, 2014, the trial court denied Duncan's motion for summary judgment. It determined that a question of fact remained with respect to whether Duncan had actively concealed or failed to disclose information related to Liberty Billing's data input errors and whether PremierTox had only discovered the nature and extent of the errors following its execution of the severance agreement.

On April 22, 2015, Duncan renewed his motion for summary judgment. Duncan argued that despite a lengthy period of discovery, PremierTox had been unable to marshal any evidence to support its position that he had fraudulently omitted information relative to the billing errors and/or that PremierTox had relied to its detriment on Duncan's failure to disclose any fraud when it executed the severance agreement. He argued that all the evidence presented indicated that he was no more aware of the magnitude of Liberty Billing's computer errors than PremierTox's owners and shareholders. Thus, he could not have "secreted his unique understanding" of the problem from PremierTox.

In response, PremierTox contended that the billing issue had “occurred on [Duncan’s] watch and was disclosed and discussed with him.” It alleged that he had “failed to ensure that PremierTox was aware of the severity of the issue.” Finally, it argued that the outstanding issues of material fact could be addressed only through “complete and honest witness testimony at trial.”

The Fayette Circuit Court entered summary judgment in favor of Duncan on June 5, 2015. The court concluded that PremierTox’s defenses to the breach of contract claim failed as a matter of law since there was no affirmative evidence to support the assertion that Duncan had fraudulently concealed the computer-related billing errors of Liberty Billing or that he had engaged in any other bad faith conduct affecting the parties’ severance agreement. The court determined that the evidence indicated conclusively that other representatives of PremierTox, including its counsel and members of its board of directors, were very much aware of the computer errors at the time the severance agreement was executed. This appeal followed.

PremierTox argues on appeal that the trial court erred by granting summary judgment. It contends that it was excused from performance of the severance agreement since evidence of record appears to confirm that Duncan concealed his knowledge of the severity of the billing errors at the time the agreement was negotiated and that he breached his duty of good faith and fair dealing since he was aware -- and PremierTox was not -- that there were

“significant audits, denials and AR^[2] which would drastically affect the income and Medicare standing of the company.”

The standard of review on appeal of a summary judgment is whether the circuit court correctly determined that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56.03. An appellate court reviews a circuit court’s summary judgment *de novo*. *Blankenship v. Collier*, 302 S.W.3d 665 (Ky. 2010). A party opposing a summary judgment motion “cannot rely on the hope that the trier of fact will disbelieve the movant’s denial of a disputed fact, but ‘must present affirmative evidence in order to defeat a properly supported motion for summary judgment.’” *Steelvest, Inc., v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 481 (Ky. 1991).

In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, and resulting damages. *Barnett v. Mercy Health Partners-Lourdes, Inc.*, 233 S.W.3d 723 (Ky. App. 2007). Neither of the parties has disputed that the severance agreement constitutes a binding contract between them. Instead, PremierTox seeks to avoid the requirements of the contract. It contends that it suffered financial harm as a “direct result of [Duncan’s] concealment of his failure to properly supervise billing and claims submission” and maintains that it is excused from further performance of

² “AR” as utilized in these proceedings is nowhere defined in the briefs, the pleadings, or the record. We assume, however, that it refers to “Accounts Receivable” from accounting terminology.

the agreement by its discovery that Duncan did not disclose the magnitude of the billing errors made by Liberty Billing at the time the agreement was negotiated.

The burden of proving an affirmative defense rests upon the defendant. *Cobb v. Farmers & Merchants Bank*, 267 Ky. 744, 103 S.W.2d 264 (1937). Upon our review, we must examine the pleadings, depositions, answers to interrogatories, and affidavits to determine whether the trial court correctly determined that there is no genuine issue as to any material fact and that Duncan is entitled to judgment as a matter of law. CR 56.

The circuit court did not err by concluding that PremierTox could not prevail in this matter under any circumstance. There is simply no evidence to which PremierTox can point in support of its assertion that Duncan failed to disclose any relevant information pertaining to the billing problems resulting from the computer errors of Liberty Billing. In fact, the record indicates that other members of the management team (including the chief financial officer), the corporation's shareholders, the board of directors, and even the attorney who negotiated the severance agreement (who continues to represent the corporation in these proceedings) were privy to the same information.

The evidence indicates that beginning in January 2013, Dr. Wood undertook to closely supervise the day-to-day operations of PremierTox. E-mails between Kaiser at Liberty Billing and the business entities' attorney sent between July 19, 2013, and August 1, 2013 -- and shared with Dr. Wood -- reveal that the

data input errors were a serious concern. The e-mails indicated that the errors could be remedied prospectively through a software adjustment.

Additionally, shortly after the severance agreement had been executed by the parties, PremierTox represented to the federal government's Centers for Medicare and Medicaid Services that on September 1, 2013, it had become aware that its CEO had "failed, refused, or otherwise been unable to appropriate[ly] ensure entity-wide compliance and appropriate procedure" for the corporation's billing practices. PremierTox reported that both its CEO and its compliance officer had been terminated as a result. This evidence contradicts the argument that PremierTox was unaware of the nature and magnitude of the billing errors at the time the severance agreement was executed on September 2, 2013. Duncan could not have concealed nor could he be held responsible for failing to disclose information about which the corporation had already claimed knowledge; the argument merits no further analysis or comment.

PremierTox next contends that Duncan breached his duty of good faith and fair dealing since he was aware -- and PremierTox was not -- that there were "significant audits, denials and AR which would drastically affect the income and Medicare standing of the company...." This is essentially a re-hash of its initial argument related to the fiduciary duty of a corporate officer. It is also an indefensible position given the state of the record.

Again, in the submission prepared by the attorney for both PremierTox and Liberty Billing, PremierTox indicated to the federal government's

Centers for Medicare and Medicaid Services that “the areas of concern . . . were billing company errors, primarily caused by outdated software which has since been replaced.” The attorney explained that PremierTox “*had no way to know that this occurred* until it was brought to the attention of the lab by Cahaba” [a government contractor that provides administrative services to the Centers for Medicare and Medicaid Services by adjudicating reimbursement claims submitted by health care providers]. (Emphasis added). She represented to the Centers for Medicare and Medicaid Services that “[t]he errors were conducted by a third party and *were not discoverable by the provider.*” (Emphasis added).

Furthermore, in an unemployment administration hearing conducted on behalf of Kristine Kaiser, Liberty Billing represented that it had first become aware of the Centers for Medicare and Medicaid Services Audits *in April 2013* -- months before Duncan was terminated. The representative of Liberty Billing expressly indicated to the hearing officer that the audits were related to failures of the billing company – *failures that were not attributable to PremierTox in any way*. Liberty Billing’s representative indicated that the initial audit requests *had not been provided to PremierTox* as would have been expected -- nor had regular reports ever been provided to PremierTox to show denials of reimbursement claims. Finally, the representative stated that Liberty Billing had not promptly provided notice to the lab of Medicare’s suspension of PremierTox.

In light of this evidence, the contention that Duncan breached his duty of good faith and fair dealing since he was aware at the time that the severance

agreement was executed -- and PremierTox was not -- that “significant audits, denials and AR which would drastically affect the income and Medicare standing of the company” is untenable. After ample opportunity for discovery, PremierTox presented no affirmative evidence to show that Duncan alone was aware of the magnitude of Liberty Billing’s software errors prior to his termination and that he purposely concealed any such knowledge from PremierTox. Consequently, the trial court did not err by concluding that Duncan was entitled to judgment as a matter of law.

We affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

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