IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Mary A. Tujetsch,	)	
	)	
Plaintiff,	)	
	)	No. 06 CH 11607
v.	)	
	)	Calendar S
Todd C. Pusateri,	)	
First Dental, P.C., and	)	Judge Raymond W. Mitchell
First Dental of Orland Park, P.C.,	)	
	)	
Defendants.	)	

Order

This cause is before the Court on Plaintiff Mary A. Tujetsch's motion for summary judgment on count II of her amended complaint, and on Defendants Todd C. Pusateri, First Dental, P.C., and First Dental of Orland Park, P.C.'s cross-motion for summary judgment on all counts of Plaintiff's amended complaint pursuant to section 2-1005 of the Illinois Code of Civil Procedure.

I.

Plaintiff Mary Tujetsch is a dentist licensed to practice in Illinois. Defendant Todd Pusateri is the president and sole shareholder of First Dental, P.C. an Illinois-incorporated dental practice located in Orland Park, Illinois. On June 27, 2004 Tujetsch and First Dental, P.C. entered into an Asset Purchase Agreement whereby First Dental sold Tujetsch substantially all of the assets associated with the dental practice.

In the Agreement is a representation by Defendants that the dental practice has approximately 1200 active patients that have been treated within the past twenty-four months. Plaintiff alleges that Defendants breached the Agreement by failing to provide such a requisite number patients. According to Plaintiff, many of the so-called "active patients" changed dentists, moved, lost insurance, or were deceased. Therefore, according to Plaintiff, such patients could not have been included as "active patients." Plaintiff filed a three count complaint against Defendants alleging two claims of breach of contract (counts I and II), and one count of fraud in the inducement (count III). Plaintiff moves for summary judgment on count II, and Defendants move for summary judgment on all counts. Defendants

also move for summary judgment as to the meaning of "active patient." Lastly, Defendants move to strike the affidavit of Tujetsch.

II.

Summary judgment is proper when the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in a light most favorable to the nonmovant, fail to establish a genuine issue of material fact, thereby entitling the movant to judgment as a matter of law. 735 ILCS 5/2-1005(c); *Adames v. Sheehan*, 233 Ill. 2d 276, 295-96 (2009). A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or if reasonable persons might draw different inferences from undisputed facts. *Id.* at 296. However, summary judgment is a drastic means of disposing of litigation and should be granted only when the right of the moving party is clear and free from doubt. *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004). A party opposing a summary judgment motion is not required to prove their case; but, it is under a duty to present a factual basis which would arguably entitle it to judgment in their favor, based on the applicable law. *Soderlund Bros. v. Carrier Corp.*, 278 Ill. App. 3d 606, 615 (1st Dist. 1995).

Where parties have filed cross-motions for summary judgment, they agree that no genuine issue as to any material fact exists and that only a question of law is involved, and they invite a court to decide the issues based on the record. *Home Ins. Co. v. Cincinnati Ins. Co.*, 345 Ill. App. 3d 40 (1st Dist. 2004); see also *Home Insurance Company v. Cincinnati Insurance Co.*, 345 Ill. App. 3d 40, 44 (2003). However, such a tacit agreement among the parties does not compel the court to conclude that there is no issue of material fact, and it does not obligate the trial court to render summary judgment in either party's favor. See *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769 (1993).

A.

Count I of Plaintiff's amended complaint alleges that Defendants breached the Agreement because First Dental, P.C. never provided Plaintiff with patient lists. The Agreement provides, "Seller agrees to sell, convey, assign, transfer and deliver to Purchaser . . . all patient lists." (Pl. Am. Mot. Summ. J. Ex. A at 1). Defendants argue that they are entitled to summary judgment on count I because there is no evidence that Tujetsch failed to receive patient lists for the dental practice.

If a party moving for summary judgment introduces facts which, if not contradicted, would entitle him to a judgment as a matter of law, the

opposing party may not rely on her pleadings alone to raise issues of material fact. *Hermes v. Fischer*, 226 Ill. App. 3d 820, 824 (4th Dist. 1992); *Myers v. Levy*, 348 Ill. App. 3d 906, 913 (2d Dist. 2003). In Defendants' motion for summary judgment, they state that there is no evidence that Plaintiff failed to receive access to, or the right to copy, patient lists of the dental practice. (Def. Mot. Summ. J. at 12). Plaintiff failed to address this in her response. Further, at oral argument, Plaintiff's counsel did not oppose Defendants' same argument. As there is no issue of fact pertaining to Plaintiff's receipt of patient lists, Defendants are entitled to judgment as a matter of law.

B.

Plaintiff alleges in count II that Defendants breached the Agreement by inaccurately representing the number of "active patients" of the dental practice. The Agreement provides, "Seller has represented that the Dental Practice has approximately 1200 active patients, who have been treated within the previous twenty four months according to First Pacific Corporation Software." (Pl. Am. Mot. Summ. J. Ex. A at 1). Plaintiff contends that because many of the patients changed dentists, moved, lost insurance, or were deceased, they cannot be considered "active patients." Defendants, however, contend that the recital at issue is not a guarantee or a prediction that patients will return for subsequent treatment. The representation is merely an objective tally of the number of patients treated at the dental practice within the preceding twenty-four months. This number, according to Defendants, is precisely what was conveyed to Plaintiff. Both parties moved for summary judgment on the count.

Defendants argue that the term "active patient" has a well-established meaning among dental professionals, and has attained a term of art in that profession, thus eliminating any existence of an issue of fact as to its definition. *See* Calamari and Perillo, *Contracts* §3.13 at 155; *see also* Grismore, *Law of Contracts* §106 at 165-66 (1947). Defendants contend that the applicable meaning of "active patients" is the definition provided by the American Dental Association ("ADA"). According to the ADA, an active patient is either: a patient of record who has had dental services provided by the dentist in the past twelve months, or a patient of record who has had dental services provided by the dentist in the past twenty-four months, but not within the past twelve months. (Def. Mot. Summ. J. Ex. 6).

Plaintiff argues that the term "active patient" does not have a common and well-established meaning in the dental industry, and that the term can have different meanings depending on the circumstances in which the term is used. Plaintiff contends that the meaning of the term is that which was provided by Puseteri in the questionnaire given by Practice Transition

Partners in the valuation of the dental practice. In the questionnaire, Puseteri was asked to define "active patients." (Pl. Am. Mot. Summ. J. Ex. F). Pusteri responded, "Seen within last twelve months and has appointment scheduled including six month check up." (Pl. Am. Mot. Summ. J. Ex. F).

In discerning the intent of parties in a typical contract interpretation case, courts initially look to the language of the contract. *Air Safety v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). The plain language of the Agreement states how the term "active patients" is to be defined. The Agreement provides, "Seller has represented that the Dental Practice has approximately 1200 active patients, *who have been treated within the previous twenty four months* according to First Pacific Corporation Software." (Pl. Am. Mot. Summ. J. Ex. A at 1)(emphasis added). Further, Plaintiff attested that she previously purchased several dental practices in the past. (Tujetsch Aff. ¶32.). A purchase agreement for one of the practices includes language similar to that provided in the present Agreement. A 2002 purchase agreement between Tujetsch and Dr. Roy Carlson for Dr. Carlson's dental practice provides, "Active patients represents the number of individuals *treated within the past 12 month period.*" (Def.'s Reply Ex. A at 2)(emphasis added). This definition not only conforms to the ADA definition, but is similar to the definition provided in the current Agreement. The only difference is the length of time within which a patient is permitted to have been treated. As there is not only a commonality between the definitions provided in the agreements as well as to the ADA definition, the applicable definition of active patients shall be those patients who have been "treated within the previous twenty four months," without any consideration of other factors (i.e. death, change of residence).

Plaintiff also alleges in count II that Defendants breached the Agreement by misrepresenting facts pertaining to the functioning capacity of the equipment in the office. The Agreement provides, "Seller represents that all equipment is working and in good order." (Pl. Am. Mot. Summ. J. Ex. A at 1). Plaintiff claims that the dental equipment was not in good order, and that Plaintiff incurred substantial expenses in repairing and replacing equipment. (Pl. Am. Compl. ¶33). Defendants, on the other hand, contend that there is no evidence that any equipment in the dental practice was not in working order on the date on which Plaintiff took possession of the practice. In support of their contention, Defendants point to the affidavit of Tina Buben-Dowling, a dental assistant employed at the dental practice from 1999 to 2005. In her affidavit, Ms. Buben-Dowling attests that "all of the equipment in the Dental Practice was in working order." (Buben-Dowling Aff. ¶13). Further, Jackie Galban, a dental hygienist employed at the dental practice, attested that "no equipment owned by the Dental Practice was out of order on or around June 27, 2004 or June 30, 2004, the date Tujetsch officially

assumed exclusive possession and control of the dental practice." (Galban Aff. ¶40). Moreover, Plaintiff never mentioned any problems regarding equipment in correspondences with Pusateri in the year following the purchase of the practice. (*See* Def. Mot. Ex. 9-11).

As there is no ambiguity as to the definition of "active patients," nor is there an issue of fact as to whether the equipment in the office was in working order, summary judgment on count II is proper. Defendants conveyed precisely what was provided for under the Agreement, 1200 patients who had merely been treated within the previous twenty-four months. Accordingly, Defendants are entitled to judgment as a matter of law.

C.

Defendants argue that they are entitled to summary judgment on Plaintiff's claim for fraudulent inducement (count III). Defendants base their argument on the same grounds as count II in that they argue that there is no evidence of any overstatement of "active patients" or any evidence that equipment was not in working order. As previously stated, no issue of material fact exists as to both of those allegations. Because Defendants did not make any false representations regarding the number of active patients or condition of equipment, Plaintiff's claim for fraud based on such allegations necessarily fails. Judgment on the issue in favor of Defendants is therefore proper.

D.

Defendants also move for summary judgment on the meaning of "active patient." Defendants contend that the term has a well-established meaning among dental professionals, and has attained the status of a term of art within the profession. Therefore, according to Defendants, Plaintiff should be bound by such a definition, and a judgment of such by this Court is warranted.

The principal purpose in construing a contract is to ascertain and give effect to the parties' intent at the time they entered into the contract. *Shields Pork Plus, Inc. v. Swiss Valley Ag Service*, 329 Ill. App. 3d 305, 310 (4th Dist. 2002). In discerning the intent of the parties in a typical contract-interpretation case, Illinois courts adhere to the four corners rule. *Air Safety v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462 (1999). In applying the four corners rule, a court initially looks to the language of the contract alone. *Id.* at 462. If the language of the agreement is facially unambiguous, then it is interpreted as a matter of law, without resort to parol (or extrinsic) evidence.

Id. at 462. If, however, a facial ambiguity is present, then parol evidence may be admitted to aid the trier of fact in resolving the ambiguity. *Id.* at 462-63. Whether an ambiguity is present is a matter of law. *Installco, Inc. v. Whiting Corp.*, 336 Ill. App. 3d 776, 783, 784 N.E.2d 312, 271 Ill. Dec. 94 (2002).

As previously discussed, the term "active patient" is to be defined as persons "treated within the previous twenty four months," without consideration as to any other factor. Plaintiff's subjective definition of the term, which may exclude patients who refuse treatment or who passed away, does not control. As there is no ambiguity as to the meaning of the term, summary judgment on the issue is proper.

III.

It is hereby ORDERED that:

(1) Plaintiff's motion for summary judgment on count II is DENIED;

(2) Defendants' motion for summary judgment on counts I, II, and III is GRANTED;

(3) Defendants' motion for summary judgment on the meaning of "active patient" is GRANTED;

(4) The case management conference scheduled for August 1, 2011 is stricken; and

(5) This is a final order disposing of the case in its entirety.

Judge Raymond W. Mitchell

ENTERED,

JUN 10 2011

Circuit Court – 1992

Judge Raymond W. Mitchell, No. 1992