SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0452-22

JERALD P. VIZZONE, DO, PA,

Plaintiff-Respondent,

v.

M&D CAPITAL PREMIERE BILLING, LLC,

Defendant-Appellant.

Submitted February 1, 2023 – Decided March 10, 2023

Before Judges Vernoia and Firko.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0443-20.

Cole Schotz, PC, Adam J. Stein (Stein Adler Dabah & Zelkowitz LLP), and Jacob E. Lewin (Stein Adler Dabah & Zelkowitz LLP), attorneys for appellant (Jason R. Finkelstein and Adam J. Stein, of counsel and on the brief; Jacob E. Lewin, on the brief).

Respondent has not filed a brief.

PER CURIAM

By leave granted, defendant M&D Capital Premiere Billing, LLC appeals from an order denying its motion for summary judgment on plaintiff Jerald P. Vizzone, DO, PA's breach of contract and breach of the implied covenant of good faith and fair dealing claims. Based on our de novo review of the motion record, we are convinced defendant's motion papers submitted in accordance with Rule 4:46-2 established it is entitled to judgment as a matter of law and plaintiff failed to present any competent evidence in accordance with Rule 4:46-2 demonstrating any genuine issues of material fact. We therefore reverse and remand for entry of an order granting defendant summary judgment on plaintiff's claims and for further proceedings on defendant's counterclaims.

I.

We discern the following undisputed facts from defendant's Rule 4:46-2 statement and the record of the proceedings before the motion court. We note defendant presented a statement of material facts in accordance with Rule 4:46-2(a) and each was supported by a citation to competent evidence. Plaintiff did not submit a response to defendant's statement of material facts as required under Rule 4:46-2(b). For purposes of our de novo review of the summary judgment record, we therefore deem defendant's statements of

material fact admitted, Polzo v. Cnty. of Essex, 196 N.J. 569, 586 (2008), and we view those facts in the light most favorable to the non-moving plaintiff, Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

Plaintiff is an orthopedic surgeon. Defendant provides claims, billing, and collections services to healthcare providers; files medical insurance claims on behalf of healthcare providers; and provides billing services for healthcare providers for fees due from patients not covered by insurance.

Plaintiff and defendant entered into a written agreement pursuant to which defendant agreed to "process" plaintiff's medical insurance claims, follow up on those claims, and "aggressively pursue" "all of [plaintiff's] medical insurance claims for payment." Plaintiff agreed to pay defendant eight percent of the amount it was paid for the claims defendant processed. The agreement also provided defendant "cannot, and does not, guarantee that [plaintiff] will receive payment from patients, insurance companies[,] or any other source."

The agreement required plaintiff timely provide defendant with "all information necessary or beneficial to properly process" plaintiff's claims, provide complete and correct information necessary for defendant's processing of the claims, and ensure the accuracy of all information provided to

defendant. Nevertheless, plaintiff "maintained a grossly disorganized practice whereby documents were not furnished to [defendant] in accordance with the [a]greement[] or were furnished in a highly disorganized manner which hindered the ability of [defendant] to effectively process claims." Plaintiff also "failed to comply with industry standards . . . in maintaining records, reviewing patient information[,] . . . and providing [defendant] with the necessary information to allow successful submission, processing and payment on claims." In other instances, plaintiff provided defendant claims to process, but then processed the same claims itself, inviting waste, confusion, and ultimately, denial of claims submitted by defendant. In contrast, defendant provided its services to plaintiff pursuant to the terms of the agreement.

In October 2018, plaintiff brought suit against defendant for breach of contract, breach of the implied covenant of good faith and fair dealing, and tortious interference with prospective economic advantage. During that proceeding, plaintiff did not seek discovery from defendant or information from any non-party. Also during the proceeding the court dismissed plaintiff's tortious interference claim. Following an unsuccessful mediation and a settlement conference, plaintiff's counsel agreed to discontinue the action and refile it.

On January 20, 2020, plaintiff filed the present action against defendant asserting claims for breach of contract and breach of the implied covenant of good faith and fair dealing. Defendant filed an answer and counterclaims. Plaintiff did not serve an answer or otherwise respond to the counterclaims, which remain pending.

During the present proceeding, plaintiff again did not serve any discovery demands; plaintiff did not attempt to extend the discovery period, which ended on January 4, 2021; and attempts at mediation again proved unsuccessful. On May 18, 2022, sixteen months after the close of discovery, plaintiff served defendant with "30 documents totaling 611 pages" in a single production.

Defendant subsequently moved for summary judgment, relying on the foregoing facts as set forth in its Rule 4:46-2(a) statement. As noted, plaintiff did not respond to defendant's statement of material facts as required under Rule 4:46-2(b). Instead, in response to defendant's motion, plaintiff relied on a certification from its counsel, who annexed what he described as a "spreadsheet prepared by [defendant] with comments in bold from plaintiff exchanged between the parties pre-litigation in an attempt to amicably resolve the matter." In an apparent reference to the documents produced by plaintiff

on May 18, 2022, plaintiff's counsel further asserted plaintiff had produced "over 500 pages of patient records to back up the spreadsheet claims."

At oral argument on its summary judgment motion, defendant argued plaintiff had abandoned its case through its failure to marshal competent evidence in discovery supporting its causes of action. Defendant noted plaintiff delivered the spreadsheet upon which it relied in opposition to the motion four months following the close of discovery; the spreadsheet did not constitute competent evidence because it was untethered to a proper authenticating affidavit; and plaintiff agreed during the settlement discussions that it would not submit the spreadsheet as evidence to the court.

Plaintiff's counsel argued the spreadsheet details improperly processed claims under the parties' contract, with each claim presenting a genuine issue of fact as to defendant's compliance with its obligations under the agreement. Plaintiff also sought to justify its belated production of documents by claiming the parties agreed to extend the discovery period and "a lot of the discovery had already been exchanged" in the prior 2018 action. Plaintiff argued "the complaint is based on a breach of contract" and did not address its breach of the implied covenant of good faith and fair dealing claim.

The motion court did not make any findings of fact based on defendant's Rule 4:46-2(a) statement of material facts and plaintiff's failure to respond to defendant's statement. Instead, the court denied defendant's motion based solely on the following findings:

> The [c]ourt is aware . . . that . . . his may be a difficult case for the plaintiff to prove. In fact, the plaintiff may have their case thrown out, uh, at the conclusion of their purported case.
>
> But they do mention and create a[n] issue as to whether there was a contract and whether those services should or should not have been paid and whether there was in fact billing tendered which rendered . . . the defendant . . . obliged to make good on those.

The motion hearing did not expressly address plaintiff's cause of action under the implied covenant of good faith and fair dealing.

The court entered an order denying defendant's summary judgment motion. We later granted defendant's motion for leave to appeal from the order. Plaintiff did not file an answering brief in response to defendant's merits brief on appeal.

II.

We review the denial of summary judgment de novo, applying the same standard as the trial court. Stewart v. N.J. Tpk. Auth., 249 N.J. 642, 655

(2022). We accord no deference to the trial court's legal conclusions. Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019). Rule 4:46-2(c), which guides our analysis, provides summary judgment is proper

> if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.
>
> [Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016) (quoting R. 4:46-2(c)).]

"Rule 4:46-2(c)'s 'genuine issue [of] material fact' standard mandates that the opposing party do more than 'point[] to any fact in dispute' in order to defeat summary judgment." Id. at 479 (alteration, omission, and emphasis in original) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). "Under that standard, once the moving party presents sufficient evidence in support of the motion, the opposing party must 'demonstrate by competent evidential material that a genuine issue of fact exists[.]'" Id. at 479-80 (quoting Robbins v. Jersey City, 23 N.J. 229, 241 (1957)). "[T]he determination whether there exists a genuine issue" as to any "material fact . . . requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-

moving party[,] . . . are sufficient to permit a rational factfinder to resolve the . . . issue in favor of the non-moving party." Brill, 142 N.J. at 523; see also Globe Motor Co., 225 N.J. at 481 (alteration in original) (quoting Perez v. Professionally Green, LLC, 215 N.J. 388, 405-06 (2013)) ("the court's task is to determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party[.]").

To properly oppose a motion for summary judgment, the non-moving party must proffer specific facts demonstrating a genuine issue of material fact. Housel v. Theodoridis, 314 N.J. Super. 597, 603-04 (App. Div. 1998). "[T]he nonmovant cannot sit on [their] hands and still prevail." Id. at 604. In other words, a properly submitted summary judgment motion "cannot be defeated if the non-moving party does not 'offer[] any concrete evidence from which a reasonable [fact-finder] could return a verdict in his favor[.]'" Ibid. (first and third alterations in original) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)); see also R. 4:46-2(c) (emphasis added) (providing the court "shall" grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a

matter of law"). Where the non-moving party does not offer such evidence, and thus does not "dispute any of the assertions in [the moving party's] statement of material facts," "[t]he consequence . . . is clearly prescribed": the moving party's statement of material facts is deemed admitted. Housel, 314 N.J. Super. at 602.

In Housel, the plaintiffs moved for summary judgment on the issue of liability and the defendants failed to dispute the plaintiffs' statement of material facts. Id. at 600. The trial court denied the summary judgment motion, observing the plaintiffs' case was "weak, but . . . there is still a factual issue . . . until at least [the court] [has] heard testimony." Id. at 601. We reversed, id. at 605, holding that where the non-moving party "failed to establish affirmatively in the manner prescribed by [Rule 4:46-2] that there was an issue of fact," the record lacked an "adequate basis" to conclude a genuine question of material fact existed, id. at 602-03.

We have similarly affirmed summary judgment awards following Housel where the non-moving party "[sat] on [their] hands," id. at 604, and did not produce any competent evidence to challenge the movant's statement of material facts, see, e.g., Gonzalez v. Ideal Tile Importing Co., Inc., 371 N.J. Super. 349, 357-58 (App. Div. 2004) (affirming grant of summary judgment

where the non-moving party responded to movant's detailed statement of material facts with "counsel's one-page conclusory and unsworn letter" that was not "based upon [counsel's] personal knowledge"); Sanducci v. City of Hoboken, 315 N.J. Super. 475, 487 (App. Div. 1998) (accepting a fact in movant's statement of material facts because, though the non-moving party submitted papers "disput[ing] this fact . . . , she presented no contradictory evidence."); Papergraphics Intern., Inc. v. Correa, 389 N.J. Super. 8, 10-11 (App. Div. 2006) (affirming grant of summary judgment where movant supported its statement of facts with an expert opinion, "while [the non-moving party] failed to establish any contrary contention.").

It follows that the requirement that the non-moving party oppose summary judgment with competent evidence is "relatively undemanding," but it is "critical." Housel, 314 N.J. Super. at 604. Our summary judgment procedure, as outlined in Rule 4:46-2, is "designed to 'focus [our] . . . attention on the areas of actual dispute,'" if any, and to "'facilitate [our] review' of the motion." Claypotch v. Heller, Inc., 360 N.J. Super. 472, 488 (App. Div. 2003) (quoting Pressler, Current N.J. Court Rules, cmt. on R. 4:46-2 (2003)).

Accordingly, our de novo review of defendant's summary judgment motion must be founded on the "factual assertions . . . that were . . . properly

included in the" papers before us. Kenney v. Meadowview Nursing & Convalescent Ctr., 308 N.J. Super. 565, 573 (App. Div. 1998); see also Globe Motor Co., 225 N.J. at 481 (alteration in original) (quoting Perez, 215 N.J. at 405-06) ("the court's task is to determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party[.]"). Moreover, in evaluating a motion for summary judgment, we must consider each element of the asserted causes of action "in light of the substantive standard and burden of proof that a factfinder would apply in the event that the case were tried." Globe Motor Co., 225 N.J. at 480.

Here, plaintiff asserted breach of contract and breach of the implied covenant of good faith and fair dealing claims. To establish its breach of contract claim, plaintiff was required to prove: "the parties entered into a contract containing certain terms"; "plaintiff[] did what the contract required [it] to do"; "defendant[] did not do what the contract required [it] to do"; and "defendant['s] breach, or failure to do what the contract required, caused a loss to . . . plaintiff[]." Goldfarb v. Solimine, 245 N.J. 326, 338-39 (2021) (quoting Globe Motor Co., 225 N.J. at 482).

To prove its claim for breach of the implied covenant of good faith and fair dealing, plaintiff was required to prove a contract existed between the

parties and defendant acted with bad faith and deprived plaintiff of rights or benefits under the contract. See Wade v. Kessler Inst., 343 N.J. Super. 338, 346-52 (App. Div. 2001) (explaining the different ways courts have defined the covenant). Stated differently, plaintiff was required to prove defendant "destroyed [plaintiff's] reasonable expectations and right to receive the fruits of the contract[.]" Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 425 (1997). "Proof of 'bad motive or intention' is vital." Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005) (quoting Wilson v. Amerada Hess Corp., 168 N.J. 236, 241 (2001)); Wade, 343 N.J. Super. at 346 (highlighting the importance of bad faith to this cause of action). "Ultimately, however, the presence of bad faith is to be found in the eye of the beholder[,] . . . [and] [a]ny attempt to provide greater definition is to expect some 'delusive exactness' which . . . is 'a source of fallacy throughout the law.'" Seidenberg v. Summit Bank, 348 N.J. Super. 243, 261-63 (App. Div. 2002) (quoting Truax v. Corrigan, 257 U.S. 312, 342 (1921)).

In its unrefuted statement of material facts submitted in accordance with Rule 4:46-2(a), defendant established it was party to a contract with plaintiff to provide medical insurance claims processing, plaintiff failed to honor its obligations under the contract, and defendant acted at all times in accordance

with the contract's terms. As we have noted, we are obliged to deem those simple facts as admitted and undisputed, R. 4:46-2(b), and we are persuaded they conclusively establish plaintiff cannot prove an essential element of its breach of contract claim — that defendant "did not do what the" parties' agreement "required [it] to do." Goldfarb, 245 N.J. at 338. Similarly, those undisputed facts do not permit a reasonable jury to conclude defendant breached the implied covenant of good faith and fair dealing because they undermine any logical determination defendant acted in bad faith to destroy plaintiff's reasonable expectations under the contract. See Sons of Thunder, Inc., 148 N.J. at 425.

Thus, the undisputed facts presented in support of defendant's summary judgment motion establish plaintiff lacks competent evidence — it presented none — sufficient to establish each of the essential elements of its asserted causes of action as a matter of law. For that reason alone, defendant is entitled to summary judgment and the court erred by denying its motion for summary judgment on the causes of action asserted in the complaint.

We also observe that contrary to the motion court's conclusion, the record does not permit a finding plaintiff presented evidence establishing a genuine issue of material fact as to whether defendant fulfilled its contractual

obligations under the parties' agreement. In the first instance, and as we have explained, we must deem admitted, and therefore undisputed, defendant's assertion in its Rule 4:46-2(a) statement that defendant performed its services in accordance with the agreement's requirements. See Housel, 314 N.J. Super. at 602. That undisputed fact alone undermines any claim defendant breached the parties' agreement or acted in bad faith to destroy plaintiff's expectations under the contract.

The court's apparent reliance on the spreadsheet submitted by plaintiff's counsel as establishing putative genuine issues of material fact precluding a summary judgment award was also in error. As plaintiff's counsel acknowledged in his supporting certification, the spreadsheet was exchanged by the parties during the course of, and in furtherance of, settlement negotiations. Therefore, the spreadsheet did not constitute competent admissible evidence upon which plaintiff could properly rely to raise fact issues in opposition to defendant's summary judgment motion. See N.J.R.E. 408 ("evidence of statements or conduct by parties or their attorneys in settlement negotiations . . . is not admissible either to prove or disprove the liability for, or invalidity of, or amount of the disputed claim."); see also Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72, 89-90 (2008) (explaining

a non-moving party's claim there are factual issues barring proper entry of summary judgment cannot rest upon "settlement negotiations to be admitted as proof of liability").

Moreover, there is a separate but equally dispositive reason plaintiff could not properly rely on the spreadsheet, and plaintiff's commentary written on it, as competent evidence establishing a genuine issue of material fact. The spreadsheet and plaintiff's commentary are untethered to an affidavit or other competent evidence establishing the authenticity of the document or plaintiff's commentary written on it, or demonstrating plaintiff's commentary was based on the personal knowledge of its author or authors.

Under Rule 1:6-6, a party may not rely on documents allegedly constituting competent admissible evidence by attaching the documents to a brief or statement of material facts without an authenticating affidavit or certification. Wells Fargo Bank, N.A. v. Ford, 418 N.J. Super. 592, 600 (App. Div. 2011) (citing Celino v. Gen. Accident Ins., 211 N.J. Super. 538, 544 (App. Div. 1986)). "One who has no knowledge of a fact except for what [they have] read or for what another has told [them] cannot provide" an affidavit in compliance with Rule 1:6-6 and thereby "support a favorable disposition of a summary judgment." Sellers v. Schonfeld, 270 N.J. Super.

424, 428 (App. Div. 1993). Rather, "[a]n affiant must aver that the facts presented are on personal knowledge, identify the source of such knowledge, and must properly authenticate any certified copies of documents referred to therein and attached to the affidavit or certification." New Century Fin. Servs., Inc. v. Oughla, 437 N.J. Super. 299, 317-18 (App. Div. 2014) (citing Ford, 418 N.J. Super. at 599-600).

To that end, "[a]ffidavits by attorneys of facts not based on their personal knowledge but related to them by and within the primary knowledge of their clients constitute objectionable hearsay." Pressler & Verniero, Current N.J. Court Rules, cmt. on R. 1:6-6 (2023). A party may not defeat a summary judgment motion through such an affidavit because counsel is an incompetent affiant as to facts outside counsel's personal knowledge. Gonzalez, 371 N.J. Super. at 358 (citing R. 4:46-5(a)); see Sellers, 270 N.J. Super. at 428 (letters, memoranda, and reports were inadmissible when attached to the certification of an attorney without firsthand knowledge of the facts, and not certified as true copies or authenticated in any way); Cafferata v. Peyser, 251 N.J. Super. 256, 263 (App. Div. 1991) (attorney's certification containing facts beyond his personal knowledge was "gross hearsay and a clear violation of R. 1:6-6").

Plaintiff's opposition to defendant's motion for summary judgment rested solely on counsel's certification attaching a purported "true and accurate copy of [a] spreadsheet" prepared by the parties for purposes of settlement discussions. The spreadsheet purports to be a summary of claims plaintiff contends defendant improperly processed, defendant's explanation of each claim, and plaintiff's commentary on the claims. Counsel's certification offers no basis in his personal knowledge the spreadsheet is what it purports to be or that the information and commentary reflected therein are true, accurate, or based on the personal knowledge of the author or authors.

We are therefore satisfied the spreadsheet and its commentary, as presented by counsel in his certification is "gross hearsay and a clear violation of R. 1:6-6[,]" ibid., that is untethered to any competent evidence based on any witness's personal knowledge demonstrating it is "admissible pursuant to an exception to the hearsay rule[,]" Oughla, 437 N.J. Super. at 317 (quoting Jeter v. Stevenson, 284 N.J. Super. 229, 233-34 (App. Div. 1995)). For those reasons, the spreadsheet and its attendant commentary do not constitute competent evidence supporting a finding there are disputed facts precluding an award of summary judgment to defendant. See Needham v. N.J. Ins. Underwriting Ass'n, 230 N.J. Super. 358, 373 (App. Div. 1989) ("computer

printout of plaintiff's renovation costs" made prior to litigation was inadmissible hearsay "because the entries were not supplied to plaintiff or made in the ordinary course of business.").

In sum, defendant's unrefuted statement of material facts established its agreement with plaintiff and its compliance with the agreement's requirements. Plaintiff's failure to dispute those facts in accordance with Rule 4:46-2(b), and its failure to otherwise present competent evidence establishing disputed issues of material fact in opposition to defendant's motion, require the conclusion defendant is entitled to judgment as a matter of law as to each of the asserted causes of action in the complaint.

Reversed and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.