STATE OF MAINE
Cumberland, ss.

BUSINESS AND CONSUMER COURT

NICOLE RICHMAN, JULIE HOWARD, JOHN THIBODEAU, and MARYANN CARROLL, on behalf of themselves and others similarly situated,

Plaintiffs

v.

Docket No. BCD-CV-10-53

POSSIBILITIES COUNSELING SERVICES, INC., WENDY L. BERGERON, AFFILIATE FUNDING, INC., EMILE L. CLAVET, KEVIN DEAN, AND FOSTER CARE BILLING, LLC d/b/a PROVIDER FINANCIAL

Defendants

ORDER ON AFI DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the court is the Motion for Summary Judgment of Affiliate Funding, Inc., ("AFI") and Foster Care Billing, Inc. d/b/a Provider Financial, Kevin Dean, Emile Clavet, ("the AFI Defendants") and the opposition thereto of the Plaintiff class. For the reasons stated, the Motion is granted.

Background

In 2005, Defendant Wendy Bergeron started Defendant Possibilities Counseling Services, Inc. ("PCS"). (Def. S.M.F. ¶ 1.) PCS entered into service agreements with numerous mental health service providers, including members of the Plaintiff class, pursuant to which PCS handled the submittal and

processing of insurance claims for services rendered by the providers to their clients. (Def. S.M.F. ¶2.) There are two types of insurance claims under the terms of these service agreements: 1) those billable to Maine's Medicaid program known as MaineCare, and 2) those billable to other third party or private insurers. The parties have referred to the second type as Explanation of Benefits ("EOB") claims. Under the service agreements, PCS would pay the clinician the amount due on a MaineCare claim within two weeks of receipt of the billing, and would remit payment on the EOB claims fifteen days after PCS received payment from the third party payer. (Def. S.M.F. ¶¶6,8.)

PCS entered into a purchase agreement with AFI's predecessor in April 2006, under which AFI would purchase PCS's accounts receivable that were less than 60 days old.[1] (Def. S.M.F. ¶¶11-14.) As a result of this agreement, it was possible for PCS to make timely payment to the clinicians on a weekly basis even before PCS received payment on those claims from MaineCare or the third party insurers. (Def. S.M.F. ¶16.)

Plaintiffs were not parties to this contract, but allege that they were intended third-party beneficiaries to the contract between PCS and AFI. Prior to commencement of this lawsuit, however, none of the named plaintiffs (or the class members) had ever been in communication with any of the AFI defendants. (Def. S.M.F. ¶¶38-41.)

[1] The agreement was amended on July 25, 2010.

In August 2010, due to several disagreements between PCS and AFI, AFI gave PCS 30 days notice that it intended to terminate the purchase agreement, effective September 24, 2010. (Def. S.M.F. ¶22.)

Meanwhile, individuals with an ownership interest in AFI founded a new mental health agency, Health Affiliates of Maine ("HAM"), to perform essentially the role as PCS had been. (Def. S.M.F. ¶¶25-26, as qualified.) Because HAM was not able to secure a necessary operating license until November 1, 2010, AFI agreed to continue its relationship with PCS for the month of October.

In November 2010, the individuals who controlled AFI and HAM caused the clinician class members to receive an advance of funds sufficient to reimburse them for their October MaineCare billings. (S.M.F. ¶26.) This advance came in the form of a direct payment from HAM to the individual clinicians totaling $550,275.[2] (Def. S.M.F. ¶26, as qualified.)

On December 1, 2010, AFI and PCS entered into a settlement agreement and corresponding service agreement that obligated both parties to conduct claims processing activities on behalf of the clinicians. (Pl. S. Add'l M.F. ¶45.) Based on indications that the State of Maine had reservations about making payments for MaineCare services directly to either PCS or AFI, the court in this case elected in January 2011 to create a mechanism under which the State could

[2] Plaintiffs contend that the actual amount was $561,000. (Pl. Opp'n S.M.F. ¶26.) AFI Defendants characterize this disbursement as payment from HAM on behalf of AFI because the funds to support the disbursement were first advanced from AFI to HAM. (Def. Reply to Pl. S. Add'l M.F. ¶78.) Plaintiffs contend that the payment was made by HAM merely to advance its own business interests, and the payment was not made in compensation for the unpaid October claims.

make the payments into a court-supervised fund established and controlled by a court-appointed referee. *See* Order Appointing Referee, *Richman, et al. v. Possibilities Counseling Services, Inc., et al.*, Docket No. BCD-WB-CV-10-53 (Me. Super. Ct., Jan. 25, 2011). The State of Maine elected to make payment of amounts due to the plaintiff class members for MaineCare-covered into one or more accounts managed by the referee, for distribution to the clinicians entitled to receive the proceeds, even though the State presumably could have directed the payments instead to one or more of the Defendants. *See* Order Permitting Release of Funds, *Richman, et al. v. Possibilities Counseling Services, Inc., et al.*, Docket No. BCD-CV-10-53, 2 (Me. Super. Ct., Apr. 14, 2011).

In July 2011, the court certified a class that included the following:

> All social service providers licensed in Maine with written agreements as independent contractor affiliates of possibilities Counseling Services, Inc. in effect any time from November 1, 2009 through October 31, 2010 ("the Class Period"), whose claims are limited to damages for unpaid claims for payment submitted by the provider (including any claim that no processing fee should be deducted from the face amount of the claim), interest and costs. Any providers whose claims for damages extend beyond the just-stated limitation are hereby excluded from the class because their claims are not typical of those of the Class.

Order Granting Class Certification, *Richman, et al. v. Possibilities Counseling Services, Inc., et al.*, Docket No. BCD--CV-10-53, 1-2 (Me. Super. Ct., Jul. 12, 2011).

AFI's claims-processing activity focused initially on claims for MaineCare reimbursement, for which AFI collected a total of $1,674,373, of which $757,137 was paid over to the clinicians, resulting in the reimbursement of 100% of their

MaineCare claims.[3] (Def. S.M.F. ¶¶27-29.)

After all claims for MaineCare reimbursement were completed, AFI turned its attention to processing EOB claims. (Def. S.M.F. ¶30.) Many of the EOB claims had become "stale," and as a result only a small amount has been received for reimbursement of EOB claims. (Def. S.M.F. ¶33.) AFI and PCS agreed with the Referee that, notwithstanding the inability to collect payment on most of the EOB claims submitted by the plaintiff class clinicians, the clinicians should be paid the full value of their EOB claims from funds held by the referee that had been received from MaineCare but had not been used to reimburse the MaineCare claims. (Def. S.M.F. ¶4.) The referee then released a total of $293,971 to clinicians for their EOB claims. (Def. S.M.F. ¶35.) In total, class members have received $1,051,108.00 from the referee's account for EOB and MaineCare disbursements. (Pl. S. Add'l M.F. ¶76.)

In April 2011, the court ordered the referee to release $338,000 of funds to AFI, stating that the action "should be taken as more of a cash flow decision than a pronouncement on the merits of either side's position." *See* Order Permitting Release of Funds, *Richman, et al. v. Possibilities Counseling Services, Inc., et al.*, Docket No. BCD-CV-10-53, 3 (Me. Super. Ct., Apr. 14, 2011). AFI had requested this release of funds as compensation for performing claims processing activities and for reimbursement of the October advances. (Pl. S. Add'l M.F.

[3] There is a dispute regarding whether, at some point, AFI ceased processing claims in violation of the terms of the service agreement. (Pl. Opp'n S.M.F. ¶27.) However, there is no dispute that any violation has not caused actual loss to the plaintiff class, which has been paid the full amount of MaineCare and EOB claims for the class period.

¶57, as qualified.) The disbursement was made on the basis of AFI's representation that it had used its own funds to reimburse the plaintiff class. *See id.* In total, AFI has received $430,237,76 in distributions from the referee's account. (Pl. S. Add'l M.F. ¶48.)

Currently, although not all EOB claims attributable to the class period have been formally processed between AFI and the third party payers because some claims have expired, the clinicians in the plaintiff class have been paid what they would have received had all EOB claims been timely processed. (Def. S.M.F. ¶36, as qualified.)

AFI Defendants have moved for summary judgment on all remaining counts of Plaintiffs' Complaint, contending that they are not liable under any of the theories of recovery set forth therein, and, alternatively, that Plaintiffs cannot demonstrate that they have suffered any damages as a result of AFI's actions.

In opposition to the AFI Defendants' motion, Plaintiffs assert that there are genuine issues of material fact relating to AFI's liability and the amount of damages that remain uncompensated.

Plaintiffs' primary contentions include the following: Plaintiffs are third party beneficiaries to the service agreement between PCS and AFI; AFI breached that agreement when it ceased to process claims; under the collateral source rule, the AFI Defendants cannot be "credited" with the HAM disbursement, thus Plaintiffs have remaining claims for damages; the court should order AFI Defendants to set aside an award of attorney fees under *Savoie v. Merchants Bank*

et al., 84 F.3d 52 (2d Cir. 1996); and the court should impose a sanction of attorney fees on AFI defendants for their alleged misrepresentation of the source of the HAM disbursement.

Discussion

This analysis addresses each of the counts of the complaint as to which the court certified the plaintiff class, and examines whether there are any genuine issues of material fact and whether the AFI defendants are entitled to judgment as a matter of law.

To survive a motion for summary judgment on a claim as to which the non-moving party has the burden of persuasion, the non-moving party must make out a *prima facie* case on each element of the claim that the motion puts into contention. *See Quirion v. Geroux*, 2008 ME 41, ¶9, 942 A.2d 670, 673 (negligence claim); *Reliance Nat'l Indem. v. Knowles Indus. Servs. Inc.*, 2005 ME 29, ¶9, 868 A.2d 220 (subrogation); *Rippett v. Bemis, supra*, 672 A.2d at 84 (defamation). Here, the Plaintiffs have the burden of proof on all of their claims.

As a threshold matter, it is undisputed that the named Plaintiffs and Plaintiff class have been paid for all claims within the scope of class certification.[4] Admittedly, the Plaintiff class received full payment of claims later than contemplated by class members' agreements with PCS, but any damages apart from the face amount of the claims resulting delay in payment are outside the scope of the class certification, because such damages would be consequential,

[4] The providers who opted out of the class and thereby excluded themselves from this case have evidently also received payment in full for the claims covered in the complaint, as amended.

arising from an individual provider's particular circumstances, rather than common to the entire class of providers.

The AFI Defendants suggest that the fact that the Plaintiff class has been made whole for all class claims should bring an end to the entire case. For two reasons, the court disagrees. First, as a general principle, the fact that a plaintiff is made whole during the pendency of a case does not preclude an award of costs should the plaintiff otherwise deserve such an award. Second, the Plaintiff class argues that the Defendants should not be credited with the payment made by HAM. Accordingly, it remains necessary to address the merits of the AFI Defendants' motion.

I. Breach of Contract (Count II)

Plaintiffs allege that the AFI Defendants breached both the initial purchase agreement with PCS and the subsequent service agreement executed with PCS as part of the settlement agreement. Plaintiffs seek to enforce their rights under the contracts as intended third party beneficiaries of those agreements.

In order for Plaintiffs to survive a summary judgment motion and proceed as third party beneficiaries on a contract theory, they must generate a genuine issue of material fact on the element of the contracting parties' intent that they receive an enforceable benefit under the respective contracts. *Devine v. Roche Biomedical Lab.*, 659 A.2d 868, 870 (Me. 1995) ("*Devine II*"). It is not enough that plaintiffs did benefit or could have benefited from the performance of the

contract. *Id.* The intent to benefit must be clear and definite, whether it is expressed in the contract itself or in the circumstances surrounding its execution. *F.O. Bailey Co., Inc. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992). If PCS and AFI did not intend to confer upon the clinicians an enforceable right, any benefit enjoyed by the clinicians as a result of the performance of the contract renders them incidental beneficiaries who cannot sue to enforce third party beneficiary rights. *Id.*

The inquiry turns to each of the two contracts at issue.

A. Purchase Agreement Between PCS and AFI

The record clearly demonstrates that the clinicians who contracted with PCS for billing services were not intended third-party beneficiaries of the purchase agreement between PSC and AFI.

The purchase agreement details the terms of AFI's exclusive right to purchase PSC's accounts receivable that are less than 60 days old, and contains details about the purchase price and processing fees applicable to such accounts. The contract requires creation of various accounts that will facilitate the parties' relationship. Paragraph 14 states that AFI shall not be deemed to have assumed liabilities relating to, or arising out of, the accounts. The amendment to the purchase agreement, dated July 24, 2010, states that AFI shall incur no liability for failing or refusing to fund the Purchase of Accounts, unless doing so would constitute a breach of the underlying agreement.

This was in effect a financing arrangement designed to enable PCS to meet the cash flow needs associated with its commitment to pay clinicians on their claims before actually receiving payment from MaineCare and the EOB insurers. There was nothing about this arrangement that suggests any intention to benefit the clinicians, as opposed to benefiting PCS and AFI. In that regard, this financing arrangement was similar to the myriad financing arrangements in the business world. Absent special circumstances, the customers of a business that obtains financing do not have third-party beneficiary status for purposes of the financing, and those special circumstances do not appear here. *See Devine II*, 659 A.2d at 870. Plaintiffs have failed to demonstrate that there is any question of material fact unique to the nature of this specific purchase agreement that demonstrates any intent on the part of PCS and AFI to create an enforceable right for the third party class members.

Accordingly, the AFI Defendants' motion for summary judgment on the breach of contract claim arising from the purchase agreement is granted.

B. The Settlement and Service Agreements of December 1, 2010 between PCS and AFI

In February 2012 the Plaintiffs supplemented their Amended Consolidated Class Action Complaint to include a breach of contract claim arising from AFI's alleged failure to timely process EOB claims in violation of the Service Agreement between PCS and AFI executed on December 1, 2010.

The Plaintiffs' contentions, as explained at the hearing held on April 27, 2012, proceed as follows: 1) Plaintiffs were third-party beneficiaries under the

settlement agreement; 2) AFI breached the agreement when it ceased processing EOB claims; 3) but for AFI's failure to process some of the claims, there would be more money in the referee's account. The depleted funds in the referee's account could potentially harm the plaintiffs in two ways: a) if PCS and AFI defendants should not be "credited" with HAM advance, Plaintiffs are owed additional funds, and if there were more money in the referee's account, Plaintiffs could recover such funds; or 2) if Plaintiffs are entitled to attorney fees under *Savoie*, or as a sanction, they would benefit from more funds available in the referee's account.

The court does not accept Plaintiffs' reasoning. First, the service agreement was executed after the October advances had been distributed to clinicians, and therefore that disbursement could not have been made in fulfillment of AFI's obligations under a subsequent service agreement. Second, the collateral source rule would not bar subtraction of those amounts from AFI's total liability, assuming AFI was found liable for damages resulting from its alleged failure to process all claims in a timely fashion.

Under the collateral source rule, a collaterally provided benefit, such as unemployment insurance or workers' compensation benefits, is not to be subtracted from a plaintiff's recovery from the defendant, thus avoiding a potential windfall to the party liable for the harm suffered. *See Potvin v. Seven Elms, Inc.*, 628 A.2d 115, 116 (Me. 1993). The same rule applies in non-tort contexts, including actions for breach of contract. *Id.* The rule would be inapplicable in regard to the HAM payment, however, because payments made by

an entity that is not jointly liable, such as HAM, will diminish the claim of the injured person against others responsible for the same harm if the payments are made in compensation of that claim. *See* Restatement (Second) of Torts § 885 Comment F.

Payments from a source independent of the party liable do not operate to reduce the party's liability, but payments from a source on behalf of a liable party are credited to the party. Thus, an injured party's health insurance benefits and workers' compensation benefits are not credited against the defendant's liability, whereas payments made by the defendant's own insurance carrier are. Within this framework, HAM is associated with all of the defendants. The payment by HAM was plainly intended to substitute for the payments due to the plaintiff class members from PCS, so payments by HAM indeed serve to reduce and eliminate the liability of any and all defendants to the Plaintiff class members.

The Plaintiffs argue that the HAM payment should not be credited because HAM made the payment for its own business purposes. They also cite to cases involving voluntary payments in which the payor was denied recoupment. Neither point is relevant here—HAM is not seeking to recover what it paid and it matters not why HAM made the payment. It is sufficient that HAM's payment was clearly intended to compensate the Plaintiff class for the amounts due on their claims from any Defendant or other source.

Accordingly, HAM's payment does operate to reduce and eliminate any liability of the Defendants to the Plaintiff class for claims within the scope of the class certification.

Second, even assuming, without deciding, that Plaintiffs were third party beneficiaries under the December 1 service agreement, and that AFI breached that agreement, the Plaintiff class's asserted harm remains speculative. Plaintiffs' loss is predicated on there being insufficient funds in the referee's account with which to fund a potential award of attorney fees, even though there is no applicable fee-shifting provision in the service agreement under which plaintiffs assert their claims.[5]

In a breach of contract action, the defendant may not be liable for damages that were not within the contemplation of the parties when the contract was entered into. *Forbes v. Wells Beach Casino, Inc.*, 409 A.2d 646, 654-55 (Me. 1979).

Plaintiffs' argument is that, at the time AFI entered into the service agreement, it should have foreseen that its failure to maximize the funds in the referee's account would harm the Plaintiffs because, at some future date, Plaintiffs would be entitled to an attorney fee award which AFI would be unable to satisfy from its own funds, and therefore Plaintiffs would need to collect additional money from the referee's account as compensation for the fee award. The

[5] The only fee-shifting agreement that even arguably applies to the providers is a provision in the PCS agreement obligating the provider to pay PCS's attorney fees if PCS prevailed in an action against the provider under a non-solicitation provision in the same agreement. That attorney fee provision could be applied reciprocally if the provider prevailed in such a suit under the same non-solicitation provision, but it cannot reasonably be expanded to apply reciprocally to any and all breaches of the PCS-Provider contract by either party.

potential fee award, when coupled with the other necessary contingencies in plaintiff's theory of injury, is insufficient to constitute a definite and foreseeable harm for the purposes of sustaining a breach of contract action.

Also, the Plaintiff class's requests for attorney fees, both under *Savoie* or as a sanction for litigation misconduct, are more appropriately considered in regard to the separate motions addressing those issues, and should not be entangled with questions pertaining to Defendants' liability raised in the current motion for summary judgment. The United States Supreme Court has explained, that as a general rule, "a claim for attorney fees is not part of the merits of the action to which the fees pertain" because such an award is separate from remedy the injury giving rise to the action.[6] *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988).

The AFI Defendants' motion for summary judgment on the breach of contract claim arising from the service agreement is therefore granted.

II. Tortious Interference (Count III)

To prevail on a tortious interference claim, plaintiffs must show: (1) the existence of their valid contract with PCS; (2) the defendant interfered with that contract through fraud or intimidation, and (3) that such interference proximately caused damages.

A valid contract existed between PCS and the Plaintiff clinician class in the form of the service agreements. Plaintiffs allege that AFI interfered with this

[6] For this same reason, plaintiffs' allegation that there are genuine disputes of material fact as to whether the class has a viable claim for attorney fees does not preclude the grant of summary judgment for the AFI defendants. (*See* Pls.' Opp'n to AFI Defs.' Mot. Summ. J. 16.)

relationship through a "prolonged pattern of intimidation." (Pl. Opp'n Def. Mot. Summ. J. 10.) Intimidation is defined as "unlawful coercion, extortion, duress, or putting in fear." *State v. Janisczak*, 579 A.2d 736, 738 (Me. 1990) (citation omitted).

Plaintiffs assert that the acts of intimidation included: AFI controlling revenue generated by the PCS-AFI purchase agreement; cutting checks to clinicians with AFI's business address on them; switching the forwarding address on a joint mail box to AFI's address; and asserting its rights regarding the amount of money in the "reserve account" created under the purchasing agreement. No reasonable jury could conclude that these alleged actions amounted to acts of extortion, duress, or intimidation. Summary judgment is granted to the AFI defendants on the claim of tortious interference.

III. "Equitable" Claims

Plaintiffs also allege Accounting[7] (Count V), Money had and Received[8] (Count VIII), Unjust Enrichment (Count IX), Conversion (Count X), and Constructive Trust (Count XI). All of these claims share the common requirement that the AFI Defendants have been in possession of funds or property to which the Plaintiff class held title or some other ownership interest, or that the Plaintiff class conferred a benefit upon Defendants. *See Ketch v. Smith*, 161 A. 300, 300 (Me. 1932) (money had and received); *Estate of White*, 521 A.2d

[7] "Accounting" is more appropriately characterized as an equitable remedy for a potential unjust enrichment claim.

[8] An action of assumpsit for money had and received arises in law, though it is "equitable in spirit and purpose." *Greenlaw v. Rodick*, 158 Me. 440, 446, 185 A.2d 895, 898 (Me. 1962).

1180, 1183 (Me. 1987) (unjust enrichment); *Baizley v. Baizley*, 1999 ME 115, ¶ 6 734 A.2d 1117 (constructive trust); *Withers v. Hackett*, 1998 ME 164, ¶ 7, 714 A.2d 791 (conversion).

In support of its unjust enrichment claim, the Plaintiff class contends that AFI failed to process EOB claims yet still received distributions from the referee's account for its processing services. Even were such the case, there is no indication in the record that AFI received funds in which the Plaintiff class had any ownership interest or that any class members have bestowed any benefit upon the AFI Defendants. The Plaintiffs assert that it would be unfair for AFI to receive funds for processing claims if it did not perform the full extent of that service. Given that the Plaintiff class has been paid in full for class claims, it simply lacks standing to make that argument. There are no facts in the summary judgment record suggesting that this perceived inequity has affected any legal rights of any class members. No accounting is not necessary. The AFI Defendants are entitled to summary judgment on Counts V, VII, IX, X, and XI.

IV. Fraud (Count IV) and Negligent Misrepresentation (Count VI)

The elements of fraud include (1) that one party made a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of whether it is true or false; (4) for the purpose of inducing another party to act in reliance upon it; and (5) the other party justifiably relied upon the representation as true and acted upon it to its damage. *Flaherty v. Muther*, 2011 ME 32, ¶ 45, 17 A.3d 640 (citation omitted).

One may be found liable for negligent misrepresentation if, in the course of any transaction in which he has a pecuniary interest, he fails to exercise reasonable care in communicating false information to others and causes pecuniary loss by their justifiable reliance upon the information. *Rand v. Bath Iron Works Corp.*, 2003 ME 122 (Me. 2003).

Because fraud and negligent misrepresentation claims both require proof of actual reliance, these counts were not certified as to the plaintiff class, and can only be asserted by individual plaintiffs. *See* Order Granting Class Certification, *Richman, et al. v. Possibilities Counseling Services, Inc., et al.*, Docket No. BCD-CV-10-53, 4 (Me. Super. Ct., Jul. 12, 2011).

Moreover, both causes of action require some showing that AFI or its representatives made some representation or communication to the Plaintiff class. The evidence is undisputed that no individual affiliated with AFI ever made any relevant representations to any named Plaintiff or class member. The AFI defendants' motion for summary judgment on these counts is granted.

V. Negligence (Count VII)

The AFI Defendants also move for summary judgment on Plaintiff's negligence claim. Plaintiffs do not directly oppose the motion for summary judgment on this specific count. Moreover, the record does not contain facts, disputed or otherwise, sufficient to establish that the AFI Defendants owed any duty of care to Plaintiffs. *Brawn v. Oral Surgery Assocs.*, 2003 ME 11, ¶ 17, 819

A.2d 1014 ("whether a party owes a particular duty of care to another is a question of law"). Summary judgment is therefore granted on Count VII.

Conclusion

Based on the foregoing analysis the court concludes and orders:

The AFI Defendants' Motion for Summary Judgment is GRANTED.

Pursuant to M. R. Civ. P. 79(a), the clerk is hereby directed to incorporate this Order by reference in the docket.

Dated: 18 July 2012

A. M. Horton
Justice, Business & Consumer Court

Entered on the Docket: 7/20/12
Copies sent via Mail __ Electronically ✓