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Cmtly. Infusion Servs. v. Nat'l Org. for Rare Disorders Inc.

United States District Court for the Central District of California

June 14, 2011, Decided; June 14, 2011, Filed

Case No. SACV 11-00719-JVS(MLGx)

Reporter

2011 U.S. Dist. LEXIS 68450 *

Community Infusion Services Inc. v. The National Organization for Rare Disorders Inc., et al

Subsequent History: Motion denied by [Cmtly. Infusion Servs. v. Nat'l Org. for Rare Disorders, Inc., 2011 U.S. Dist. LEXIS 163981 \(C.D. Cal., Sept. 1, 2011\)](#)

Summary judgment denied by [Cmtly. Infusion Servs. v. Nat'l Org. of Rare Disorders, Inc., 2012 U.S. Dist. LEXIS 198747 \(C.D. Cal., Apr. 11, 2012\)](#)

Motion granted by [Cmtly. Infusion Servs. v. Nat'l Org. of Rare Disorders, Inc., 2012 U.S. Dist. LEXIS 198746 \(C.D. Cal., May 25, 2012\)](#)

Counsel: [*1] Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

Judges: Present: The Honorable James V. Selna.

Opinion by: James V. Selna

Opinion

CIVIL MINUTES - GENERAL

Proceedings: (In Chambers) Order Granting Defendant's Motion to Dismiss (fld 5-18-11)

On April 6, 2011, plaintiff Community Infusion Services, Inc. ("CIS") brought suit against defendant National Organization for Rare Disorders, Inc. ("NORD") in the Superior Court of California, County of Orange. On May 11, 2011, NORD removed the action to federal court. NORD now moves to dismiss the Complaint for failure to state a claim under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) ("Motion").

I. Background

In a letter dated April 14, 2010 to CIS, NORD advised CIS that it approved Adrienne Daggett "for assistance with the insurance co-payment responsibility for the FDA approved treatment of Paroxysmal Nocturnal Hemoglobinuria (PNH)" (hereafter, NORD Letter). ¹ (Decl. of Pamela Gavin ("Gavin Decl."), May 18, 2011, Doc. No. 9, Ex. A.) The NORD Letter stated that "[t]he award is for one year from 04/01/2010 to 03/30/2011," and went on to provide more information about NORD and its program. (*Id.* (emphasis omitted).) For example, it explained **[*2]** that "[t]his program is one of last resort that provides insurance co-payment assistance to individuals requiring FDA approved pharmaceutical treatment for PNH," and that "[i]t is administered by NORD, a charitable organization that is dedicated to providing information and services to families affected by uncommon disorders." *Id.* It requested that CIS fax or mail a "Health Insurance Claim Form" and "Corresponding Explanation of Benefits Form (EOB)" to NORD "[i]n order to facilitate assistance for your patient," and requested CIS to "inform NORD if the patient discontinues use of the PNH therapy" (*Id.* (emphasis omitted).)

It also provided the following information about payments: The first invoice for payment should be received by NORD with 60 days of the patient's first DOS in order to retain an active status in the program. If NORD does not receive an invoice for payment within 90 days of the start date we, will assume the patient is no longer in need of assistance. NOTE: Because NORD is a charity with limited resources this award will be dependent upon funding availability.

(*Id.* (emphasis omitted).) Based on the NORD Letter, CIS brings claims for breach of contract and common **[*3]** counts against NORD. (Compl., Ex. A at 3-4.)

¹ The Court takes judicial notice of the April 14, 2010 letter because it was referenced in the Complaint (Compl., May 11, 2011, Doc. No. 1, Ex. A at 3.), and no party questions its authenticity. [Dunn v. Castro](#), 621 F.3d 1196, 1205 n.6 (9th Cir. 2010) ("Under the 'incorporation by reference' doctrine, we may consider 'documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff's] pleading.'" (quoting [Knievel v. ESPN](#), 393 F.3d 1068, 1076 (9th Cir. 2005))).

For its claim for breach of contract, CIS identifies the "essential terms" of the agreement as follows: on April 14, 2010, NORD "approved payment to Plaintiff [CIS] for one year (4/1/10 - 3/30/11), for Paroxysmal Nocturnal Hemoglobinuria (PNH) treatments for Adrienne Daggett." (*Id.*) CIS alleges that NORD breached this "oral contract" in August 2010 when it failed to pay CIS "for the approved claim." (*Id.* at 3.) CIS suffered damages by providing "Soliris Intravenous Solution 10 MG/Sodium Chloride 0.9%[,] 500 m1 Bags given to Adrienne Daggett on various dates between 2010 and 2011." (*Id.*)

For its claim [*4] for common counts, CIS alleges that NORD became indebted to CIS (1) within the last four years, on an open book account for money due, which was in writing between NORD and CIS, and in which NORD agreed that it was indebted to plaintiff, and (2) within the last two years for work, labor, services and materials rendered at the special instance and request of NORD and for which NORD promised to pay CIS in the sum of \$598,204.06 for "infusion and nursing services rendered to a Paroxysmal Nocturnal Hemoglobinuria (PNH) patient, Adrienne Daggett." (*Id.* at 4.)

Based on these claims, CIS requests damages for \$598,204.06, interest according to proof, and attorneys' fees.

II. Summary of Parties' Positions

A. NORD's Motion

NORD is a voluntary, charitable health agency that assists persons with rare disorders to cover the out-of-pocket expenses of their disease. (Mem. at 3.) Although it is true that NORD sent a letter to CIS that indicated NORD had approved Adrienne Daggett for assistance in paying for her future insurance co-payments, NORD "did not say that it would cover all treatment by CIS." (*Id.* at 4.) Instead, NORD's letter explicitly stated: "**NOTE:** Because NORD is a charity with limited resources [*5] this award will be dependent upon availability." (*Id.*) "On May 21, 2010, NORD informed Ms. Daggett that CIS was 'out of network' according to her insurance company and NORD would not be able to pay Ms. Daggett's future treatment costs unless she switched to an 'in network' treatment facility." ² (*Id.*) "NORD gave Ms. Daggett a list of treatment facilities that were in

² The Court declines to take judicial notice of the May 21, 2010 letter because it was not referenced in the Complaint and is not otherwise susceptible to judicial notice. See [Fed. R. Evid. 201\(b\)](#) ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.").

network, at which NORD would provide payment, but Ms. Daggett continued to receive care at CIS." (Id.)

According to NORD, CIS's breach of contract claim fails because "the so-called 'contract' was a verbal promise to give a gift, which is unenforceable under California law." (Id. at 5 (citing [Cal. Civ. Code § 1147](#)).) Even if the promise had been [*6] in writing, NORD argues it would have been unenforceable as a promise to make a future gift. (Id. (citing [Cal. Civ. Code § 1146](#)).) There was no consideration for the alleged contract because "[t]he promise concerned the flow of money from NORD to a facility that would treat Ms. Daggett, and nothing more": "NORD received nothing in exchange for its promise." Id. Moreover, even if a contract had been formed, CIS "has not alleged such a contract with sufficient specificity or definiteness so to be enforced." (Id. at 6.) Were the Court to enforce NORD's promise of a gift, it would curtail the ability of NORD to provide medical coverage for others. (Id.)

As to CIS's common counts claim, NORD argues that this claim fails because CIS's breach of contract claim is deficient. (Id. at 7-8 (citing [Maselli v. E. H. Appleby & Co.](#), 117 Cal. App. 2d 634, 637, 256 P.2d 618 (1953)).) There was no contract from which debts could arise, and "[m]erely recording amounts that CIS believed it was due in a book account does not create any obligation for NORD to pay those amounts." (Id. at 8.) There is no proof of financial transactions or a contract, and the services giving rise to the claim for common counts did not benefit [*7] NORD. (Id. a 8-9.)

For these reasons, NORD argues that CIS's Complaint in its entirety should be dismissed with prejudice. (Id. at 9.)

B. CIS's Opposition

In 2009, the treating physician of Adrienne Daggett prescribed Soliris infusion therapy to treat Ms. Daggett's PNH. (Opp'n at 3.) Because Soliris is extremely expensive, NORD was approached for financial assistance. (Id.) On May 18, 2009, NORD sent written approval to CIS for payment of Ms. Daggett's out-of-pocket expenses for Soliris. (Id.) CIS purchased the Soliris drug for use during the initial period from May 18, 2009 through March 30, 2010. On April 14, 2010, NORD sent written approval to CIS for Ms. Daggett's second year of Soliris therapy. (Id.) In reliance on NORD's promise to pay for a second year, CIS procured another supply of Soliris. (Id. at 3-4.) NORD refuses to pay for any of Ms. Daggett's second year of treatment. (Id. at 4.)

NORD's motion to dismiss the breach of contract claim fails because the Complaint sufficiently alleges an oral contract. (*Id.* at 6-10.) NORD's characterization of its promise to pay as a "verbal gift" under [California Civil Code § 1147](#) is unavailing because NORD's promise was written. (*Id.* at 6.) **[*8]** Moreover, even if NORD's promise could be characterized as a "gift," it was complete and enforceable upon delivery of the writing. (*Id.*) As for NORD's argument that the promise was a "future gift" and lacked consideration, NORD's argument fails because "the Complaint alleges an oral contract which, by definition, includes consideration." (*Id.*) Consideration may also be established under the doctrine of promissory estoppel, which is satisfied here because CIS incurred substantial detriment in reliance on NORD's Letter by incurring tens of thousands of dollars in procuring the Soliris drug and administering the infusion therapy to Ms. Daggett. (*Id.* at 6-7.) As to NORD's argument that the contract is not alleged with sufficient specificity to be enforced, California law is clear that an otherwise illusory agreement is enforceable where a party has rendered at least part performance. (*Id.* at 9 (citing [Steiner v. Thexton](#), 48 Cal. 4th 411, 106 Cal. Rptr. 3d 252, 226 P.3d 359 (2010).) CIS has substantially performed by purchasing the Soliris drug, providing therapy, and sending invoices to NORD, rendering the contract binding and enforceable.

Because the Complaint sufficiently alleges an enforceable contract, CIS's claim for **[*9]** common counts should not be dismissed. (*Id.* at 10.)

Finally, should the Court grant NORD's Motion, CIS requests leave to amend because "extrinsic evidence consisting of NORD's previous agreement to pay for the prior year's Soliris therapy provided to the patient, is offered to demonstrate the existence of additional facts to support consideration based on promissory estoppel, as well as for the common count claims." (*Id.* at 11.)

C. NORD's Reply

In CIS's opposition, it introduces a new, previously unpled theory of promissory estoppel to support its oral contract claim. (Reply at 2.) CIS's promissory estoppel argument fails because it has not pled a claim for promissory estoppel, and CIS cites no authority for the proposition that detrimental reliance constitutes consideration. Furthermore, CIS does not explain why it was induced to spend "tens of thousands of dollars in costs," but requests damages for \$598,204.06. (*Id.*) Because CIS's oral contract claim fails as a matter of law, its claim for common counts fails as well. (Reply at 4.)

III. Discussion

A. Legal Standard

Pursuant to [Rule 12\(b\)\(6\) of the Federal Rules of Civil Procedure](#), a plaintiff must state "enough facts to state a claim [*10] to relief that is plausible on its face." [Bell Atl. Corp. v. Twombly](#), 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim has "facial plausibility" if the plaintiff pleads facts that "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [Ashcroft v. Iqbal](#), 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009).

In resolving a [Rule 12\(b\)\(6\)](#) motion under [Twombly](#), the Court must follow a two-pronged approach. First, the Court must accept all well-pleaded factual allegations as true, but "[t]hread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." [Iqbal](#), 129 S. Ct. at 1949. Nor must the Court "accept as true a legal conclusion couched as a factual allegation." [Id.](#) at 1949-50 (quoting [Twombly](#), 550 U.S. at 555). Second, assuming the veracity of well-pleaded factual allegations, the Court must "determine whether they plausibly give rise to an entitlement to relief." [Id.](#) at 1950. This determination is context-specific, requiring the Court to draw on its experience and common sense; there is no plausibility "where [*11] the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct." [Id.](#)

B. Analysis

1. Breach of Contract

Under California law, a prima facie claim for breach of contract consists of four elements: (1) a contract, (2) the plaintiff's performance or excuse for non-performance, (3) defendant's breach, and (4) damages to the plaintiff from defendant's breach. [Walsh v. W. Valley Mission Cmty. Coll. Dist.](#), 66 Cal. App. 4th 1532, 1545, 78 Cal. Rptr. 2d 725 (1998). A contract requires an offer that articulates the terms of the agreement, and an acceptance that mirrors the offer. [Chaganti v. I2 Phone Int'l, Inc.](#), 635 F. Supp. 2d 1065, 1071 (N.D. Cal. 2007) ("An offer must clearly articulate the terms of the agreement and the acceptance must be absolute, unqualified and a mirror image of the offer."). The offer and acceptance must be supported by consideration. See [Mattel, Inc. v. MGA Entm't, Inc.](#), 782 F. Supp. 2d 911, 2010 U.S. Dist. LEXIS 136922, 2011 WL 1114250, at *52 (C.D. Cal. Jan. 5, 2011) ("A promise is not enforceable unless consideration was given in exchange for the promise.") (quoting [US Ecology, Inc. v. California](#),

[92 Cal. App. 4th 113, 128-29, 111 Cal. Rptr. 2d 689 \(2001\)\)](#); [Murphy v. T. Rowe Price Prime Reserve Fund, Inc.](#), 8 F.3d 1420, 1423 (9th Cir. 1993) [***12**] ("An oral agreement is not enforceable without consideration.").

Consideration is present when the promisee confers a benefit or suffers a prejudice. [Steiner v. Thexton](#), 48 Cal.4th 411, 420-21, 106 Cal. Rptr. 3d 252, 226 P.3d 359 (2010) (citing [Cal. Civil Code § 1605](#)). Although "either alone is sufficient to constitute consideration," the benefit or prejudice "must actually be bargained for as the exchange for the promise." [Id.](#) at 421 (internal quotation marks omitted). "Put another way, the benefit or prejudice must have induced the promisor's promise." [Id.](#) ("The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange.")

Here, the Complaint alleges an "oral contract" between CIS and NORD on April 14, 2010. As currently pled, however, CIS fails to state a plausible claim.

First, CIS alleges an "oral contract," but CIS concedes in its Opposition that NORD's Letter dated April 14, 2010 was *written*. (See Opp'n at 6 "NORD's promise to CIS was *written*." (emphasis in original).) It is unclear how a written offer constitutes an "oral contract." Perhaps CIS's "acceptance" was oral, but the Complaint [***13**] is completely silent as to the manner of CIS's acceptance. Indeed, CIS never alleges that it accepted NORD's alleged offer. Because the Complaint does not contain requisite factual allegations evidencing a valid offer and acceptance, CIS's claim for breach of contract is deficient. [Chaganti](#), 635 F. Supp. 2d at 1071.

Second, the Court agrees with NORD that the alleged oral contract is not supported by consideration. While CIS argues that it was "prejudiced" by incurring tens of thousands of dollars in procuring the Soliris drug and administering the infusion therapy to Ms. Daggett, it does not allege that procuring and administering Soliris induced NORD's promise to pay for the drug infusions. See [Steiner](#), 48 Cal.4th at 421. CIS's allegations undoubtedly establish that it relied on NORD's promise to its injury, but that alone is insufficient when CIS fails to tie the injury to the bargained-for exchange.³ [Id.](#) Because the Complaint does not adequately allege consideration, CIS's claim for breach of contract is likewise deficient.

³ CIS's claims might be sufficient to state a claim for promissory estoppel. See [Aceves v. U.S. Bank, N.A.](#), 192 Cal. App. 4th 218, 225, 120 Cal. Rptr. 3d 507 (2011) (stating that a claim [***14**] for promissory estoppel consists of "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance.") (quoting [Advanced Choices, Inc. v. State Dept. of Health Servs.](#), 182 Cal. App. 4th 1661, 1672, 107 Cal. Rptr. 3d 470 (2010)). However, promissory estoppel is

Accordingly, the Court dismisses CIS's claim for breach of contract.⁴

2. Common Count

A common count "is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory." [McBride v. Boughton](#), 123 Cal. App. 4th 379, 394, 20 Cal. Rptr. 3d 115 (2004). "When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is admirable if the cause of action is demurrable." *Id.*

Because the Court dismisses CIS's claim for breach of contract, it also dismisses CIS's claim for common counts. *See id.*

IV. Conclusion

The Court deems this matter appropriate for decision without oral argument. *See Fed. R. Civ. P. 78*; Local Rule 7-15. Accordingly, the hearing set for June 20, 2011, is hereby vacated.

The Court grants NORD's Motion without prejudice. CIS is granted leave to replead within thirty days in accordance with the federal pleading standards discussed above.

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conceptually distinct from breach of contract — or the requirement of consideration. *See Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 235 F.3d 1184, 1195 (9th Cir. 2000) (describing the distinct doctrines of breach of contract and promissory estoppel and remedies thereunder) (citing [C & K Eng'g Contractors v. Amber Steel Co.](#), 23 Cal. 3d 1, 151 Cal. Rptr. 323, 587 P.2d 1136(1978)).

⁴ Because the Court dismisses CIS's breach of contract claim on other grounds, it does not reach NORD's argument that its promise to pay is a "verbal gift." Although the transfer of personal property without consideration is a "gift," [Cal. Civil Code § 1146](#), it is unclear on this record whether CIS can plead additional facts to support consideration. Likewise, the [*15] Court does not reach NORD's argument that the alleged contract is too uncertain or indefinite to be enforceable.