SIXTH DIVISION
November 3, 2017

No. 1-17-0047
2017 IL App (1st) 170047-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS NEUROSPINE INSTITUTE, P.C.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 L 4104
	)	
CAROLYN BUTLER and	)	
JOSEPH DOMBROWSKI,	)	Honorable
	)	Bridget McGrath,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in granting summary judgment in favor of defendants where a genuine issue of material fact existed regarding plaintiff's performance under the contract; reversed and remanded.

¶ 2 Plaintiff, Illinois Neurospine Institute, P.C., appeals the trial court's decision that granted summary judgment in favor of defendants, Carolyn Butler and Joseph Dombrowski. Plaintiff asserts that summary judgment was improper because a genuine issue of material fact exists. We agree with plaintiff, and reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 This is the second time this case has been before this court. Our previous decision, *Illinois Neurospine Institute, P.C. v. Butler*, 2015 IL App (1st) 143304-U, sets forth in detail the

facts leading up to that appeal. As a result, the following is a limited recitation of the previous case history in addition to the facts necessary to understand the progression of this case since the initial appeal.

¶ 5 Defendant, Carolyn Butler, was injured in an automobile accident on May 11, 2009. Butler retained codefendant Joseph Dombrowski, an attorney, to represent her in her lawsuit against the driver of the other vehicle involved in the accident. From November 2009 through September 2010, Butler received medical treatment for her injuries including discography and discectomy procedures from plaintiff's owner, Dr. Ronald Michael. On November 16, 2009, plaintiff sent Dombrowski a physician's lien notice, stating that it claimed a lien against any claim by Butler as a result of Dr. Michael's performance of an independent medical examination on Butler. In a letter dated December 8, 2009, Dombrowski responded to the lien notice by requesting that plaintiff send Butler's complete bill and medical records, and that plaintiff explain how an independent medical examination could result in a lien on a personal injury case. The record on appeal does not contain any evidence that plaintiff ever responded to the letter.

¶ 6 On January 27, 2010, Butler signed a one page document entitled "Financial Responsibility Statement" (the contract). In relevant part, the contract read:

> "Payment Guarantee:
> For and in consideration of services rendered by ILLINOIS NEUROSPINE INSTITUTE, patient (responsible person) hereby agrees to and guarantees payment of all charges incurred for the account of the patient.
>
> * * *
>
> Assignment of Insurance Benefits:
> Patient (responsible person) irrevocably assigns and transfers to ILLINOIS NEUROSPINE INSTITUTE all right, title and interest to medical reimbursement benefits under any and all applicable medical insurance policies covering patient for the payment of hospital and medical care being provided. Patient (responsible person) authorizes payment directly to ILLINOIS NEUROSPINE INSTITUTE of said medical reimbursement benefits.
>
> Agreement to Pay Balance:

> In the event that said medical insurance coverage is not sufficient to satisfy the charge in full, patient (responsible person) acknowledges that the resulting balance is not covered by this assignment and agrees to be fully responsible for the payment of any balance due. For any non-contracted insurance carriers, ILLINOIS NEUROSPINE INSTITUTE will submit a courtesy claim and if no payment is received in sixty (60) days, the balance will become patient responsibility. Patient (responsible person) acknowledges responsibility for any expenses incurred by ILLINOIS NEUROSPINE INSTITUTE for collecting any of the charges incurred on the account of the patient." (Emphasis in original.)

¶ 7 Thereafter, Butler's personal injury case against the driver of the other vehicle settled for $325,000. Dombrowski filed a motion to adjudicate liens of Butler's healthcare service providers, none of which was plaintiff. The motion to adjudicate liens was granted and Dombrowski subsequently disbursed the proceeds of the settlement to the lien holders included in the motion.

¶ 8 On May 20, 2011, plaintiff filed the two-count complaint underlying this appeal. Count one alleged the theory of constructive trust against both Butler and Dombrowski for failure to adjudicate plaintiff's lien. Count two alleged breach of contract against Butler for failure to pay for the medical services rendered by plaintiff.

¶ 9 On August 19, 2013, Dr. Michael gave deposition testimony wherein the following relevant exchange occurred:

> "Q. And if the patient has insurance, would you bill the insurance even though it's a personal injury case?"
>
> A. No, for two reasons. If it's personal injury, it's unethical, in my opinion, to bill an insurance company. They have nothing to do with it.
>
> But most importantly, I'm not contracted with any insurance companies; therefore, I wouldn't bill an insurance company, and I generally don't see insurance patients except out of -- basically private patients, out-of-pocket patients, and work comp. [*sic*] things like that.

Q. So back in 2009 most of the patients you treated and operated on didn't have health insurance?

A. No. Some did; some didn't. But I saw them for reasons; namely, if one is in a car accident, commercial health insurance has nothing to do with it. One, I'm not contracted; two, it's not the health insurance company's problem. It's the third-party liability carrier's problem, either the car accident insurance, or if it's a fall at Wal-Mart, it's Wal-Mart's, et cetera. So I generally differentiate between where the liability belongs."

¶ 10 Dr. Michael's second deposition took place on May 14, 2014. During that deposition, he testified:

"I'm not contracted with any insurance companies. I'm not on any of their panels. I'm not in any of their networks[.] I do workers' compensation and personal injury cases only[.] An occasional commercial insurance patient will find me[.] I'll take care of those patients, but then I bill out of network and [have] nothing to do with the insurance company's fee schedule because I'm not bound by it."

Additionally, when asked if Butler had insurance that covered her procedures, would he have accepted it, Dr. Michael responded:

"No. I would have billed work comp [*sic*] or personal injury[.] In this case I would bill the third party payer, the liability payer[.] I mean, we bill the patient, but the patient in turn gives it to her attorney who then negotiates the settlement at the other end."

Another relevant exchange that occurred in Dr. Michael's second deposition was as follows:

"Q. So if Carolyn Butler had insurance for these procedures, okay, you would have told her that, 'I'm not going through your insurance.'?

A. Correct[.]

MR. HENRY [Plaintiff's counsel]: Objection[.] Speculative[.] You can answer[.]

THE WITNESS [Dr. Michael]: We do this regularly because, again, I believe it's unethical to charge an insurance company for a personal injury claim[.] It's not their problem, even though they will pay if a physician decides to do it that way.

***

Q. And you tell the patients all of this verbally?

A. Yes, if it comes up. I don't believe Mrs. Butler or Ms. Butler had a discussion with me regarding she has insurance, why don't you bill that? An occasional patient does. An occasional attorney asks to get the case going rather than, say, wait for approval. But it's -- and just because they ask doesn't mean I ever do it. I don't."

¶ 11 On July 9, 2014, plaintiff filed its motion for summary judgment, arguing that no genuine issue of material fact existed. Defendants responded that summary judgment was inappropriate because plaintiff could not recover under either theory of its complaint where it had materially breached the terms of the contract. Defendants argued that the contract required plaintiff to first bill Butler's insurance before any amount would become due but it failed to do so. On September 3, 2014, the trial court granted plaintiff's motion for summary judgment, finding that "a review of [the contract] does not expressly place a duty or burden upon [p]laintiff to submit the relevant bills directly to Butler's insurance provider. Rather, the [contract] merely states that '[Butler] irrevocably assigns and transfers to [plaintiff] all right, title and interest to medical

reimbursement benefits under any and all applicable medical insurance policies covering [Butler] for the payment of hospital and medical care being provided.' " Additionally, the court stated that, "[n]owhere in the agreement does it state that [p]laintiff is responsible for submitting all bills to Butler's insurance."

¶ 12 Defendants' subsequent motion to reconsider the grant of summary judgment was denied, resulting in defendants' appeal. On appeal, this court reversed the trial court's decision, finding that a genuine issue of material fact existed as to both counts of plaintiff's complaint. *Illinois Neurospine Institute, P.C.*, 2015 IL App (1st) 143304-U, ¶ 47. Specifically, this court held, "[c]ontrary to the trial court, we find that plaintiff was required to bill Butler's insurance carrier prior to her becoming responsible for any remaining balance." *Id.* ¶ 34. We also found that because a question of fact existed regarding whether plaintiff could sustain its cause of action for breach of contract, Dombrowski's liability under a theory of constructive trust was unclear. *Id.* ¶ 41. As a result, the trial court's order was reversed, the judgments entered pursuant thereto were vacated, and the matter was remanded for further proceedings. *Id.* ¶ 47.

¶ 13 Upon remand, on March 14, 2016, defendants filed their motion for summary judgment. Defendants' motion argued that there was no genuine issue of material fact because plaintiff failed to perform under the contract, which precluded its recovery. Defendants attached as an exhibit Dr. Michael's deposition testimony to show that plaintiff materially breached its duty to bill Butler's insurance company. Defendants also attached a copy of Butler's Aetna insurance card that showed Butler had Aetna insurance through her employer, Rush University, and an Aetna document regarding her coverage and benefits that showed her plan was effective as of January 1, 2009.

¶ 14 Plaintiff filed its response on May 5, 2016, asserting that summary judgment was not proper because this court had ruled that a genuine issue of material fact required trial on the issue of plaintiff's performance under the contract. Plaintiff attached an affidavit signed by Dr. Michael in support of its response. Dr. Michael's affidavit stated, "On April 9, 2012, [p]laintiff submitted a Health Insurance Claim Form (HICFA) to the insurance carrier identified by Carolyn Butler ("Butler"), Delphi Casualty Company." Attached to Dr. Michael's affidavit was a copy of the claim form that was submitted to Delphi. Dr. Michael's affidavit also included the following statement: "I have further reviewed [p]laintiff's charts and demographic data and there is no record of any other insurance carrier information provided by Ms. Butler to me or any other person working for [p]laintiff." Plaintiff argued that Dr. Michael's affidavit established that Butler never provided plaintiff with insurance information, except for the third-party liability carrier. Plaintiff further contended that the exhibits, namely the Aetna card, attached to defendants' motion were not authenticated, and did not prove that plaintiff failed to perform under the contract because there is no evidence that Butler ever informed plaintiff that she had Aetna insurance.

¶ 15 Defendants filed their reply in support of their motion on May 12, 2016, emphasizing that no genuine issue of material fact existed where Dr. Michael's own deposition testimony established that plaintiff never billed Aetna. Defendants also asserted that Delphi was not Butler's insurance carrier, but was the automobile insurance carrier of the other driver from the accident. Defendants pointed out that plaintiff had not provided any evidence that Delphi was Butler's carrier, thus the reference to "the HICFA submitted to Butler's insurance" was false.

¶ 16 On August 3, 2016, the trial court conducted a hearing on defendants' motion for summary judgment, wherein the parties presented oral argument. Plaintiff's counsel argued that

Butler failed to provide any insurance information besides that of Delphi. However, in reaching its decision to grant summary judgment in favor of defendants, the court stated that it was "incumbent upon [Dr. Michael] to make sure that the patient provides him with the information that his form requires. And given his testimony as to 'I wouldn't have called them because I feel it's unethical,' I don't think there's a genuine issue of material fact here."

¶ 17 On August 31, 2016, plaintiff filed its motion to reconsider, arguing that the court had erred in its application of law. Defendants filed their response on September 12, 2016, asserting that the court had made the correct decision. In its reply, dated September 26, 2016, plaintiff argued that this court could have directed a judgment in favor of defendants, and because we did not, a triable issue of fact existed. Plaintiff also argued that Dr. Michael's affidavit created a triable issue of fact regarding whether Butler withheld her medical insurance information from plaintiff. The trial court denied plaintiff's motion to reconsider on December 9, 2016. The record on appeal does not contain any indication that a hearing was held on that date.

¶ 18 Plaintiff filed its timely notice of appeal on January 3, 2017.

¶ 19 ANALYSIS

¶ 20 On appeal, plaintiff argues that the trial court erred when it granted summary judgment in favor of defendants. Plaintiff specifically asserts that a genuine issue of material facts exists to preclude summary judgment, and that defendants' summary judgment evidence was insufficient to support the court's finding.

¶ 21 "[S]ummary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2-1005(c) (West 2012)). The court is

required to strictly construe the pleadings, depositions, admissions, and affidavits against the movant and liberally in favor of the opposing party. *Id.* "Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). When examining an appeal from a summary judgment ruling, we conduct a *de novo* review. *Id.* Because our review is *de novo*, "we afford no deference to the trial court's decision and instead, we consider anew the pleadings, affidavits, depositions, admissions, and exhibits on file to determine whether the trial court's decision was correct." *Jackson v. Graham*, 323 Ill. App. 3d 766, 779 (2001).

¶ 22 "To establish a breach of contract claim, a plaintiff must prove the existence of a valid and enforceable contract, performance by the plaintiff, breach of the contract by the defendant, and damages or injury to the plaintiff resulting from the breach." *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 13.

¶ 23 Plaintiff asserts that summary judgment was not proper because the same genuine issue of material fact that this court found to exist in its previous decision still remains because defendants relied upon the same deposition testimony in bringing their motion. Defendants respond that plaintiff attempts to obfuscate the issue because even though this court ruled that a question of fact remained regarding plaintiff's performance of its duty to submit a courtesy claim to Butler's insurance company, defendants have presented ample evidence showing that plaintiff failed to perform.

¶ 24 Our review of the evidence in the record results in our determination that an issue of fact remains regarding plaintiff's performance under the contract. Performance by the plaintiff is one of the requisite elements of a breach of contract claim. *Id.* In this court's previous decision, we

found that in order to satisfy the plaintiff performance element, "plaintiff was required to bill Butler's insurance carrier prior to her becoming responsible for any remaining balance." *Illinois Neurospine Institute, P.C.*, 2015 IL App (1st) 143304-U, ¶ 34. We specifically found that Dr. Michael's deposition testimony, wherein he stated that he would not have billed Butler's insurance even if it covered her procedures, created a question of fact on the issue. *Id.*

¶ 25 Plaintiff stresses that the evidence presented in support of defendants' motion does not settle the question of fact that remained after the initial appeal. We agree with plaintiff that said evidence is insufficient to warrant summary judgment. It is well settled that the movant bears the initial burden of production in a motion for summary judgment. *Bourgonje v. Machev*, 362 Ill. App. 3d 984, 994 (2005). Defendants primarily presented the same evidence that was already before this court on the first appeal, except they also provided a copy of Butler's Aetna insurance card and an Aetna document regarding Butler's coverage. However, even in light of these new documents, we find that defendants did not meet their burden because the record does not contain any evidence that plaintiff was informed or aware that Butler was covered by Aetna insurance during the course of her treatment. According to Dr. Michael's affidavit, plaintiff submitted a health insurance claim form to "the insurance carrier identified by Carolyn Butler [], Delphi Casualty Company." He further attested that "there is no record of any other insurance carrier information provided by Ms. Butler to me or any other person working for plaintiff." Additionally, the record does not contain any testimony or evidence of how plaintiff came to associate Delphi with Butler. Did plaintiff ever request Butler's insurance information? Did Butler ever provide any insurance information to plaintiff? Did Butler identify Delphi as being her insurer? Did Butler identify Aetna as being her insurer? These questions are crucial to the issue of plaintiff's performance, but remain unanswered.

¶ 26 Further, the record does not contain any pertinent forms filled out by Butler during the course of her treatment or any of her medical records. Thus, the means through which plaintiff would have obtained information regarding Butler's insurance is unclear. Further, Butler has not been deposed and did not give testimony via an affidavit. Dr. Michael's affidavit references Delphi as "the insurance carrier identified by Carolyn Butler," but defendants contend this is false, and argue that Butler had Aetna insurance during the relevant time period. Although defendants presented evidence that Butler did, in fact, have Aetna insurance, said evidence does not resolve the genuine issue of material fact that we found present in our previous decision because it does not resolve the issue of plaintiff's performance.

¶ 27 We must construe Dr. Michael's uncontroverted affidavit in a light most favorable to plaintiff, the nonmovant. See *Mashal*, 2012 IL 112341, ¶ 49. Defendants assert that Dr. Michael's affidavit contradicts his deposition testimony solely for the purpose of creating an issue of fact. See *Hansen v. Ruby Construction Co.*, 164 Ill. App. 3d 884, 887 (1987) (finding that a party may not supply evidence through an affidavit or deposition that conflicts with a judicial admission adverse to that party's claim). However, we disagree with defendants because Dr. Michael's affidavit does not contradict his deposition testimony. In his deposition, Dr. Michael testified that he would have billed the third-party payer. His affidavit states that he submitted a claim form to Delphi, which Butler contends is the third party payer, and not her insurance company. Assuming that Delphi is, in fact, the insurer of the driver of the other vehicle, then the contents of Dr. Michael's affidavit are consistent with his deposition testimony.

¶ 28 We also find the hypothetical nature of Dr. Michael's deposition testimony assists in the creation of a genuine issue of material fact. During his depositions, the relevant questions regarding his billing practices began with the word "if." For example, Dr. Michael was asked

"So if Carolyn Butler had insurance for these procedures, okay, you would have told her that, 'I'm not going through your insurance.' ? " and he answered "Correct[.]" This is not evidence that Dr. Michael told Butler he would not bill her insurance or that he was even aware of her Aetna insurance. He was never asked whether he actually told Butler that he was not going to go through her insurance or whether he ever asked her if she had insurance. Dr. Michael further testified hypothetically that he "would have billed work comp [*sic*] or personal injury" and "would bill the third party payer." We consider this language indicative of a hypothetical because Dr. Michael testified what he would have done, rather than what he did. Construing this evidence in favor of the nonmoving party as we are required to do (*Mashal*, 2012 IL 112341, ¶ 49), we find that the evidence before us creates an issue of fact.

¶ 29 We acknowledge that the trial court determined that it was "incumbent upon [Dr. Michael] to make sure that the patient provides him with the information that his form requires," but we nonetheless disagree with this determination due to the wanting nature of the evidence in this case. It is unclear whether Butler was ever asked to provide or ever did, in fact, provide her Aetna insurance information to plaintiff. Although our review is *de novo*, it is important to note that unlike the trial court, we are unwilling to presume that the collection of insurance information was incumbent upon plaintiff such that plaintiff's ignorance to Butler's Aetna insurance was sufficient to prove plaintiff failed to perform. See *Jackson*, 323 Ill. App. 3d at 779 (recognizing that *de novo* review requires that this court "afford no deference to the trial court's decision").

¶ 30 As a final note, although our foregoing analysis primarily centers on plaintiff's breach of contract claim against Butler, we similarly find that summary judgment in favor of defendants on the constructive trust count was also improper because until the issue of whether plaintiff failed

to perform under the contract, and therefore cannot recover, can be resolved, defendants' liability for constructive trust is unclear. The reasoning expressed in our previous decision holds true: "[I]f it is ultimately determined that plaintiff's nonperformance extinguished Butler's debt, then plaintiff would no longer have any putative lien rights." *Illinois Neurospine Institute, P.C.*, 2015 IL App (1st) 143304-U, ¶ 41.

¶ 31 Ultimately, we find that summary judgment is not proper in this case, because defendants' right to judgment is neither clear nor free from doubt. See *Outboard Marine Corp.*, 154 Ill. 2d at 102. Our review of the pleadings, depositions, admissions, and affidavits contained in the record leads to our conclusion that a genuine issue of material fact remains, namely whether plaintiff can show that it performed under the contract.

¶ 32 CONCLUSION

¶ 33 Based on the foregoing, we find that the trial court erred when it granted summary judgment in defendants' favor because a genuine issue of material fact exists. We therefore reverse the trial court's decision and remand for further proceedings.

¶ 34 Reversed and remanded.