2019 IL App (2d) 180458-U
No. 2-18-0458
Order filed May 16, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MICHAEL SULLIVAN, Individually and as a Taxpayer of Waukegan Community School District #60 and on Behalf of All Other Individuals or Entities in Illinois Similarly Situated and Derivatively on Behalf of Waukegan Community School District # 60, Plaintiff-Appellant, v. HEALTH CARE SERVICE CORPORATION, An Illinois Corporation, and Its Individual Officers and Directors, TIMOTHY LEE BURKE, MILTON CARROLL, MICHELLE LYNN COLLINS, MONTE E. FORD, DENNIS JOSEPH GANNON, DIANNE BREWER GASBARRA, CHASE TYLER HIBBARD, THOMAS RUSSELL HIX, ELAINE MARIE MENDOZA, MARLIN RAY PERRYMAN, PAULA AMY STEINER, WANETA COESTER TUTTLE, GREGORY DAVID WASON, COLLEEN REITAN, FRANK MICHAEL, TED HAYNES, DAN McCOY, M.D., KURT SHIPLEY, MAURICE SMITH, OPELLA ERNEST, M.D., ERIC FELDSTEIN, THOMAS LUBBAN, NANZEEN RAZI, BLAIR TODT, and WAUKEGAN COMMUNITY SCHOOL DISTRICT # 60,	)	Appeal from the Circuit Court of Lake County. No. 16-CH-1246 Honorable Luis A. Berrones,

Defendants-Appellees.) Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err by denying plaintiff's motion for a preliminary injunction, where plaintiff failed to establish a clearly ascertainable right regarding his claim of fraud and misrepresentation because the contract between the District and defendant disclosed the fee structure. Additionally, plaintiff failed to address the elements of irreparable harm and an inadequate remedy at law in order to establish an abuse of discretion. Trial court affirmed.

¶ 2 In this interlocutory appeal, brought as of right pursuant to Supreme Court Rule 307(a)(1) (eff. Nov. 1, 2017), plaintiff, Michael Sullivan, appeals from the trial court's order denying his motion for a preliminary injunction. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, Health Care Service Corporation ("HCSC"), acts as the third-party administrator of the self-funded employee health care plan of Waukegan Community School District No. 60 ("District"). In this capacity, defendant pays for medical services provided to persons covered by the District's health care benefit plan. Defendant then sends the health care providers' bills to the District on a monthly basis and receives a monthly reimbursement from the District for the provider payment amounts listed on the bills, plus an administrative charge.

¶ 5 On February 27, 2017, plaintiff filed a verified second-amended complaint for mandamus, for an accounting, and for compensatory, exemplary, and injunctive relief. The ten-count second-amended complaint was eventually reduced to a single count (count three), a derivative claim by plaintiff on behalf of the District for common-law fraud.

¶ 6 In count three, plaintiff alleged that defendant misrepresented to the District the amount of fees and other payments it received under its contract with the District for the services it

provided as third-party administrator of the District's employee health care plan. According to plaintiff, the contract provided only for a set fee and not for any additional payments. Plaintiff alleged that the District relied on defendant's representation that the District would pay a set fee and was deceived in the following ways. Defendant had separate financial arrangements or contracts with certain "affiliates" and plan providers from which, "under certain circumstances described in its contracts with [them]," defendant received substantial payments with respect to services it was obligated to pay the plan providers. Defendant failed to disclose the actual amounts it paid plan providers and the amount of the payments it may receive from them. Defendant sent bills to the District and its employees that contained fictitious figures relating to the amounts due the plan providers rather than the amount that Defendant paid. Defendant omitted from the contract with the District information regarding its actual financial arrangements with its plan providers. Count three also contained a request for "a preliminary and then a [p]ermanent [i]njunction" prohibiting the continuation of defendant's conduct.

¶ 7 At the hearing on the preliminary injunction, plaintiff raised two additional theories of liability. According to plaintiff, the contract for third-party administrator services between the District and Defendant is void as a matter of law because (1) it violated the prior appropriation rule in that any additional payments defendant received for its services were not included in the amounts appropriated by the District to pay defendant's fees; and (2) it violated the public trust doctrine as derived from article VIII, section 1 of the Illinois Constitution in that a taxpayer cannot determine the actual amount that defendant was paid for the services that it provided to the District and, therefore, the agreement contravened the safeguards relating to the misuse of public funds established by the Illinois Constitution.

¶ 8 Three witnesses, called by plaintiff, testified at the preliminary injunction hearing: Thomas A. Morris, the District's General Counsel; Marciela Jimenez, the District's manager of benefits; and Nathan Linsley, the Divisional Vice President for Finance and Strategy in the Illinois division. The District did not intervene or take an active role in plaintiff's lawsuit and neither supported nor opposed plaintiff's position on behalf of the District. The relevant hearing testimony and exhibits established the following.

¶ 9 The 2018 Administrative Services Agreement (ASA) between defendant and the District provided in part:

> "13.1 All amounts payable to [defendant] by [the District] for Claim Payments provided by [defendant] and applicable service charges pursuant to the terms of the Agreement and all required deductible and Coinsurance amounts under Agreement shall be calculated on the basis of the Provider's Eligible Charge or Provider's Claim Charge les ADP [average discount percentage], unless otherwise directed in writing by [the District], for Covered Services rendered to a Covered Person, irrespective of any separate financial arrangement between any Administrator Provider or [the District] and Claim Administrator.
>
> 13.2 [The District] acknowledges that [defendant] has contracts with certain Providers ('Administrator Providers') for the provision of, and payment for, health care services to all persons entitled to health care benefits under individual certificates, agreements and contracts to which [defendant] is a party, *** and that pursuant to [defendant's] contracts with Administrator Providers, under certain circumstances described therein, [defendant] may receive substantial payments from Administrative Providers with respect to services rendered to all such persons for which [defendant] was

obligated to pay Administrative Providers other allowances under [defendant's] contract with them. [The District] acknowledges that in negotiating the service charges set forth in the Agreement, it has taken into consideration that [defendant] may receive such payments, discounts and/or other allowances during the term of the Agreement and that the service charges specified in the Agreement reflect the amount of additional consideration expected to be received by [defendant] in the form of such payments, discounts or allowances. Neither [the District] or Covered Persons hereunder are entitled to receive any portion of any such payments, discounts and/or other allowances in excess of the ADP as part of any Claim settlement or otherwise except as such items may be indirectly or directly reflected in the service charges specified in the Agreement.

13.3 [Defendant's] compensation for its services under the Agreement shall include the difference between the Net Claim Payments reimbursed to [defendant] by [the District] under the Agreement and the net amounts paid to Providers by [defendant] after giving effect to [defendant's] separate financial arrangements.

SECTION 14: [DEFENDANT'S] SEPARATE FINANCIAL ARRANGEMENTS WITH PRESCRIPTION DRUG PROVIDERS

14.2 [Defendant] hereby informs [the District] and all Covered Persons that it has contracts, either directly or indirectly, with Participating Prescription Drug Providers for the provision of, and payment for, prescription drug services to all persons entitled to prescription drug benefits under individual certificates, group health insurance policies and contracts to which [defendant] is a party, including Covered persons under the Agreement, and that pursuant to [defendant's] contracts with Participating Prescription

Drug Providers, under certain circumstances described therein, [defendant] may receive discounts for prescription drugs dispensed to Covered Person under the Agreement. ***

14.3 [The District] understands that [defendant] may receive such discounts during the term of the Agreement. Neither [the District] nor the Covered Persons hereunder are entitled to receive any portion of any such discounts except as such items may be indirectly or directly reflected in the service charges specified in the Agreement. The drug fees/discounts that [defendant] has negotiated with Prime Therapeutics LLC ('Prime') through the Pharmacy Benefit Management (PBM) Agreement will be used to calculate Covered Persons deductibles and Coinsurance for both retail and mail/specialty drugs, except as otherwise mutually agreed to by the parties. *** [Defendant] pays a fee to Prime for pharmacy benefit services, which may be included in the Administrative Charge charged by [defendant] to [the District]. ***

SECTION 15: [DEFENDANT'S] SEPARATE FINANCIAL ARRANGEMENTS WITH PHARMACY BENEFIT MANAGERS

15.1 [Defendant] hereby informs [the District] and all Covered Persons that it owns a significant portion of the equity of Prime and that [defendant] has entered into one or more agreements with Prime or other entities (collectively referred to as 'Pharmacy Benefit Managers'), for the provision of, and payment for, prescription drug benefits to all persons entitled to prescription drug benefits under individual certificates, group health insurance policies and contracts to which [defendant] is a party, including Covered Persons under the Agreement. Pharmacy Benefit Managers have agreements with pharmaceutical manufacturers to receive rebates for using their products. In

addition, the mail-order pharmacy and specialty pharmacy operate through an affiliate partially owned by Prime Therapeutics, LLC.

15.2 The Pharmacy Benefit Manager(s) ('PBM') negotiates rebate contracts with pharmaceutical manufacturers and has agreed to provide rebates made available pursuant to such contract to the [defendant] under the PBM's agreement with [defendant]. This negotiation is conducted by the PBM for the benefit of [defendant] and not for the benefit of [the District] or Covered persons. The PBM collects the rebates for the pharmaceutical manufacturers, for drugs covered under both the prescription drug program and medical benefit, and forwards the entire amount collected to [defendant] ***. Each year, [defendant] will calculate a projection of the amount of rebates it expects to receive for the PBM. *** Expected Rebates are calculated based on a number of factors *** none of which [defendant] directly controls. [Defendant's] estimate of the Expected Rebates is set forth in the proposal or renewal packet, as appropriate, which is hereby incorporated into this Agreement. *** The Rebate Credit provided to [the District] will be provided from [defendant's] own assets and may or may not be equal to the entire amount of rebates provide to [defendant] by the PBM. [The District] acknowledges that it has negotiated for the specific Rebate Credit included as part of this Agreement and that it and its groups health plan have no right to, or legal interest in, any portion of the rebates provided by the PBM to [defendant] and consents to [defendant's] retention of all such rebates. Rebate Credits shall not continue after termination of the prescription drug program.

15.3 As of the Effective Date, the maximum that a Pharmacy Benefit Manager will receive from any pharmaceutical manufacturer for manufacturer administrative fees

> is four and one quarter percent (4.25%) of the Wholesale Acquisition Cost ('WAC') for all products of such manufacturer dispensed during any given calendar year to members of [defendant] and to members of other Blue Cross and/or Blue Shield operating division of Health Care Service Corporation or for which Claims are submitted to Pharmacy Benefit Manager at [defendant's] request; provided, however, that [defendant] will advise [the District] if such maximum has changed."

¶ 10 Thomas Morris, Jr., the District's general counsel, testified as follows. The District did not wish to intervene or take an active role in plaintiffs' lawsuit and neither supported nor opposed plaintiffs' position. Morris and the District's board approved the 2017 and 2018 ASA's after Morris discussed plaintiff's lawsuit with plaintiff's lawyer. Morris did not ask defendant for any information regarding rebates defendant may receive from prescription drug providers or pharmacy benefit managers. Morris did not ask defendant for any information regarding the contracts defendant had with providers that render services to the District's employees, nor did Morris ask defendant for any information regarding the amounts defendant charged the District or the amounts defendant paid for those services. The district hired Steve Bushue, an expert on human resources, to advise and assist the District to determine which company it should hire as its third-party administrator. Morris was aware that defendant's program had alternative compensation arrangements with providers. Morris had not received information regarding whether defendant received additional discounts and, if so, the amounts of those discounts.

¶ 11 During direct examination by defense counsel, Morris testified that the District and defendant agreed that neither the District nor its employees would be entitled to receive any portion of any payments, discounts and/or allowances received in excess of the ADP. Morris

also understood that the District had separate financial arrangements as indicated in paragraphs 13-15 of ASA regarding prescription drug providers and pharmacy benefit managers and that the District was not entitled to those discounts or rebates. Morris testified that this ASA was signed by the superintendent of schools.

¶ 12 Plaintiff submitted exhibit 12, four binders containing various provider contracts with defendant. Exhibit 12 contained approximately 1669 pages, typed in single space. Defendant objected to the relevance of this exhibit, and the trial court ruled that it was not relevant.

¶ 13 On May 30, 2018, the trial court denied plaintiff's motion for a preliminary injunction. On June 11, 2018, plaintiff filed a notice of appeal.

¶ 14 II. ANALYSIS

¶ 15 A. Standard of Review

¶ 16 In an interlocutory appeal taken pursuant to Rule 307(a)(1), we decide neither controverted facts nor the merits of the case. *Department of Health Care & Family Services v. Cortez*, 2012 IL App (2d) 120502, ¶ 14. The only question on review is whether there was a sufficient showing to affirm the trial court's order. *Id.* "A decision to grant or deny a preliminary injunction is generally reviewed for an abuse of discretion." *Mohanty v. St. John Heart Clinic, S. C.*, 225 Ill. 2d 52, 62-63 (2006). An abuse of discretion occurs only when the ruling "is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the court's view." (Internal quotation marks omitted.) *World Painting Co., LLC v. Costigan*, 2012 IL App (4th) 110869, ¶ 12. However, where the issuance of a preliminary injunction depends upon the validity of a contract, the appellate court's review is *de novo*. See *Mohanty*, 225 Ill. 2d at 63 ("whether injunctive relief should issue to enforce a restrictive covenant not to

compete in an employment contract depends upon the validity of the covenant, the determination of which is a question of law.").

¶ 17 A preliminary injunction is an "extraordinary" remedy that "should be granted only in situations of extreme emergency or where serious harm would result if the preliminary injunction was not issued." *Clinton Landfill, Inc. v. Mahomet Valley Water Authority*, 406 Ill. App. 3d 374, 378 (2010). To obtain a preliminary injunction, the moving party is required to show: "(1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case." *Mohanty*, 225 Ill. 2d at 62 (2006).

¶ 18 B. A Clearly Ascertainable Right

¶ 19 The trial court did not err by denying plaintiff's motion for a preliminary injunction, because plaintiff failed to establish a clearly ascertainable right regarding any of his claims.

¶ 20 1. Fraud and Misrepresentation

¶ 21 To prevail on a claim of fraudulent misrepresentation, a plaintiff must establish the following elements: (1) a false statement of material fact; (2) known or believed to be false by the person making it; (3) an intent to induce the plaintiff to act; (4) action by the plaintiff in justifiable reliance on the truth of the statement; and (5) damage to the plaintiff resulting from such reliance. *Doe v. Dilling*, 228 Ill. 2d 324, 342-43 (2008).

¶ 22 Plaintiff argues that the ASA is fraudulent on its own terms and should have been enjoined. Plaintiff contends that the terms of the ASA are fraudulent and misrepresented the amount and the basis upon which the defendant was to be paid for administering the District's self-funded plan. Defendant counters that plaintiff presented no evidence of fraud and that the

fee structure complained of by plaintiff was fully disclosed in the ASA. We agree with defendant.

¶ 23 The interpretation of a contract presents a question of law subject to *de novo* review in accordance with the general rules applicable to contract interpretation. *Gallagher v. Lena*, 226 Ill. 2d 208, 219 (2007). We construe a clear and unambiguous contract as a matter of law. See *Ritacca Laser Center v. Brydges*, 2018 IL App (2d) 160989, ¶ 17. Our primary goal in interpreting a contract is to give effect to the intent of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). When the words in the contract are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. *Id*.

¶ 24 A review of the ASA reveals that defendant's fee structure was fully disclosed to the District. The ASA provided, in part, that defendant "may receive substantial payments from Administrator Providers [and that these provider discounts] reflect the amount of additional consideration expected to be received by [defendant as part of its business model.]" The ASA further provided that the District "acknowledges that in negotiating the service charges set forth in the [ASA], it has taken into consideration that [defendant] may receive such payments, discounts, and/or other allowances. Neither [the District] or Covered Persons hereunder are entitled to receive any portion of any such payments, discounts and/or other allowances in excess of the ADP." Further, the District's general counsel testified that he was aware of this fee structure when the school District board approved the ASA. Thus, the District was aware of the separate financial arrangement defendant had with providers, pharmacy drug providers, and pharmacy benefit managers and the District knew that it was not entitled to any of the rebates, discounts, or allowances. For these reasons, plaintiffs failed to establish a clearly ascertainable right regarding his fraud and misrepresentation claim.

¶ 25 Plaintiff contends that defendant's monthly billing statements contained false statements of material fact because defendant paid the provider substantially less than the billed rate. However, this disparity is fully disclosed in paragraphs 13 through 15 of the ASA.

¶ 26 Plaintiff also argues that the trial court erred by determining that Exhibit 12 was inadmissible because it was not relevant. Exhibit 12 consists of four binders containing contracts between defendant and providers that treated the District's employees and billed the District for services.

¶ 27 The admission of evidence is a matter within the discretion of the trial court, and evidentiary rulings will not be reversed absent an abuse of discretion**.** *Bulger v. Chicago Transit Authority*, 345 Ill. App. 3d 103, 110-11 (2003). An abuse of discretion occurs only when the trial court's ruling is arbitrary, fanciful, unreasonable, or when no reasonable person would adopt the trial court's view. *Roach v. Union Pacific R.R.*, 2014 IL App (1st) 132015, ¶ 20. "Evidence which is not relevant is not admissible." Ill. R. Evid. 402 (eff. Jan. 1, 2011). " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 402 (eff. Jan. 1, 2011).

¶ 28 The issue before the trial court was whether defendant committed common-law fraud. Plaintiff asserted that Exhibit 12 was relevant because it contained "secret" or undisclosed rebates, discounts, or allowances that defendant received from certain providers. After reviewing the exhibit, and, in particular, the pages specified in plaintiff's brief, we conclude that the exhibit contains no evidence regarding secret rebates, discounts, or allowances relating to payments defendant received from the District. Therefore, Exhibit 12 is not relevant to the issue of

common-law fraud in this case. Accordingly, the trial court did not abuse its discretion by finding Exhibit 12 not relevant and inadmissible.

¶ 29 2. The Local Records Act

¶ 30 Plaintiff argues that the ASA is void because defendant did not disclose a "limit on and the detailed record of the amount of compensation paid" by the District to defendant. Plaintiff relies on article VIII, section 1(c) of the Illinois Constitution of 1970, which provides that "reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law." Plaintiff also relies on section 3a of the Local Records Act which provides, "Reports and records of the obligation, receipt and use of public funds of the units of local government and school districts, *** are public records available for inspection by the public." 50 ILCS 205/3a (West 2016). Plaintiff asserts that the trial court erred by refusing to enjoin defendant from continuing to take public funds because the ASA is void "as they did not disclose the actual amount of compensation paid to [defendant] in any manner whatsoever." Defendant argues that plaintiff's argument fails because he did not attempt to inspect public records; the information he seeks to disclose is confidential information and, therefore, not public records, and plaintiff has not established a clearly ascertainable right to the relief he seeks.

¶ 31 Nothing in the record indicates that plaintiff made a request for defendant's records. Further, plaintiff fails to establish that defendant's records are "public" for purposes of section 3a of the Public Records Act. Finally, plaintiff fails to explain how these arguments would entitle him to a preliminary injunction.

¶ 32 Plaintiff cites *Kiehn v. Love*, 143 Ill. App. 3d 434 (1986) to support his argument. In *Kiehn*, the appellate court upheld the dismissal of the plaintiff's derivative fraud claim on behalf

of the Chicago School Board. Plaintiff's complaint alleged that Blue Cross administered the school board's employee health care program, processed all claims, and conspired with hospitals and providers for "secret rebates, commissions and kickbacks." *Id*. at 436. The plaintiff also alleged that the illegal rebates resulted in the board's payment of additional funds to Blue Cross under the contract, and that these extra payments constituted a fraud upon the taxpayers of the City of Chicago. *Id*. After the plaintiff filed suit against Blue Cross, the board filed a complaint against Blue Cross. *Id*. at 436. Without determining the validity of the contract at issue, the appellate court affirmed the dismissal of the plaintiff's complaint, stating that "nothing suggests that the Board acted in such a way that it inadequately protected the public interest." *Id*. at 437. *Kiehn* is distinguishable from this case because the *Kiehn* court did not address any issue regarding the sufficiency of evidence in support of issuing a preliminary injunction and the validity of the contract at issue. Therefore, *Kiehn* is not controlling, here.

¶ 33 Plaintiff also relies on *Oberman v. Byrne*, 112 Ill. App. 3d 155 (1983) to support his argument. In *Oberman*, the plaintiff wrote to then-mayor of the City of Chicago, Jane Byrne, and other city officers, requesting access to the "Mayor's Contingency Fund and the Hay Reports." His requests were refused. *Id*. at 157. Plaintiff filed a complaint for a writ of *mandamus* and for injunctive relief, asserting his right to the records pursuant to the disclosure provisions of the Illinois Constitution and the Local Records Act. *Id*. at 157, 160. The appellate court held that the mayor and city officials were required "to permit inspection and copying of certain public records in their custody" relating to public expenditures. *Id* at 157. In this case, not only did plaintiff not request the documents he now seeks from defendant, the documents he seeks are not public records, and there is no evidence that they are in the District's custody. Further, nothing in *Oberman* supports plaintiff's argument that the lack of disclosure

mandates a preliminary injunction based on a finding that a contract is void. Thus, *Oberman* does not support plaintiff's position.

¶ 34 Plaintiff cites *Diversified Computer Service, Inc. v. Town of York*, 104 Ill. App. 3d 852 (1982), for support, but he fares no better here. In *Diversified Computer Service*, this court held that a township's five-year contract with a computer services company was void because the township had not obtained prior appropriation for the contract pursuant to the Municipal Budget Law. *Id*. at 852, 858. Here, the District is not a municipality, and plaintiff fails to cite to any law that required the District to obtain prior approval for the contract at issue here. Thus, *Diversified Computer Service* is distinguishable from this case.

¶ 35 Finally, we note that, even if plaintiff had established a clearly ascertainable right in need of protection, he would not be entitled to reversal, because he failed to address the other elements necessary to obtain a preliminary injunction. Here, plaintiff failed to address the elements of irreparable harm and an inadequate remedy at law in his opening brief and, consequently, has forfeited them on appeal. Points not raised in an appellant's brief are forfeited. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018); *In re K.E.-K.*, 2018 IL App (3d) 180026, ¶ 21.

¶ 36 III. CONCLUSION

¶ 37 The judgment of the circuit court of Lake County is affirmed.

¶ 38 Affirmed.