2014 IL App (1st) 131390-U

FIRST DIVISION
May 27, 2014

Nos. 1-13-1390, 1-13-2629 (cons.)

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL G. BELL, THOMAS A. YOUNG, JR., and BRUCE R. YOUNG,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellants,	)	
v.	)	No. 10 CR 06549
WALGREEN CO., OPTION CARE, INC., OPTION CARE ENTERPRISES, INC., and I.V. ASSOCIATES, INC.,	)	
Defendants-Appellees.	)	Honorable John C. Griffin, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court properly granted summary judgment to defendants on plaintiffs' breach of contract claim. The trial court's allowance of defendants' petition for attorney fees was not an abuse of discretion and is therefore affirmed.

¶ 2 Plaintiffs, Michael G. Bell, Thomas A. Young, Jr., and Bruce R. Young, filed an amended complaint against defendants Walgreen Co. (Walgreens), Option Care, Inc. (Option Care), Option Care Enterprises, Inc. (Enterprises), and I.V. Associates, Inc. (IVA), alleging, *inter* *alia*, breach of contract.[1] The trial court subsequently granted defendants' motions for summary judgment (735 ILCS 5/2-1005 (West 2012)) and granted in part defendants' petition for attorney fees. On appeal, plaintiffs contend that the trial court erred in finding that there was no genuine issue of material fact with respect to whether Walgreens (i) assumed the obligations of Enterprises under the contract at issue; or in the alternative, (ii) used reasonable efforts to cause IVA to operate on an exclusive basis within a certain territory. In addition, plaintiffs challenge the trial court's granting of defendants' petition for attorney fees. We affirm.

¶ 3 **BACKGROUND**

¶ 4 Plaintiffs (collectively, the Shareholders) owned IVA, a New Jersey-based corporation that provided "home infusion therapy" services, injectible drugs, and enteral and parenteral nutrition in various counties in New Jersey. Option Care[2] was a publicly-traded corporation that provided specialty pharmacy services, infusion therapy, and related healthcare services through a national network of company-owned and franchised locations; Enterprises was its wholly-owned subsidiary. Walgreens is a nationwide publicly-traded drugstore chain, that, among other things, sells pharmaceutical and nonpharmaceutical drugs, and provides health and wellness services.

¶ 5 On May 15, 2006, the Shareholders and IVA entered into a Stock Purchase Agreement (the Agreement) with Option Care and Enterprises. Under the Agreement, the Shareholders agreed to sell their stock in IVA to Enterprises (the "Buyer") for an amount not to exceed $25.55 million (the "Maximum Purchase Price"). At closing, the Shareholders would receive $17.1 million in cash and Option Care stock (less certain adjustments that are not relevant to this appeal) (the Closing Date Payment). In addition, the Shareholders would receive an additional

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[1] Plaintiffs do not appeal the trial court's prior dismissal of the remaining counts.

[2] Option Care is now known as Walgreens Infusion Services, Inc., and Enterprises is now a wholly-owned subsidiary of Walgreens Infusion Services, Inc. For clarity, we refer to the companies as Option Care and Enterprises, respectively.

payment (the "earn-out" payment) at the end of each of the first and second anniversaries of the closing, based primarily upon IVA's financial performance. On the first anniversary of the closing date (May 15, 2007), the Shareholders would receive the lesser of: (i) 6.7 times IVA's EBITDA[3] less the Closing Date Payment or (ii) the Maximum Purchase Price less the Closing Date Payment (*i.e.*, $8.45 million). If, however, IVA's EBITDA was less than the Closing Date Payment ($17.1 million), the Shareholders would receive nothing. On the second anniversary of the closing, the Shareholders would be eligible to receive the lesser of: (i) 7 times EBITDA less the Closing Date Payment or (ii) the Maximum Purchase Price less the Closing Date Payment and less any payment made on the first anniversary of the closing. Again, however, if IVA's EBITDA was less than the sum of the Closing Date Payment and the first anniversary payment, the Shareholders would receive nothing. Plaintiffs received no payment on either anniversary.

¶ 6 Section 1.11 of the Agreement provided in pertinent part:

> "Notwithstanding any provision of this Agreement to the contrary, if prior to the second anniversary of the Closing Date (i) more than fifty percent (50%) of the assets *** or *** common stock of Option Care is sold in a single transaction or multiple transactions, if such transactions *** result in a change of the controlling party, to a third party that is not an affiliate of Option Care ***, and (ii) the third party purchaser does not assume [Enterprises's] obligations under this Agreement either by operation of law or by agreeing in writing to assume such obligations, then [Enterprises] shall *** pay to Shareholders the

[3] EBITDA was defined in the Agreement as earnings before: interest, taxes, depreciation, amortization, and royalties payable to Option Care.

> Maximum Purchase Price less the Closing Date Payments, less the Year One Payment paid (if any) ***."

¶ 7 In addition, section 8.6 of the Agreement provided that, for two years following the closing date, Enterprises would allow Bell to continue managing and operating IVA "consistent with past practice," and that Enterprises would "use reasonable efforts to cause [IVA] to operate on an exclusive basis and exclusively within" certain counties of New Jersey, as well as within Morristown, New Jersey, and the portion of Morris county east of Morristown.

¶ 8 Sections 13.10 and 13.11 addressed successors/assigns to the Agreement and the governing law and jurisdiction of any disputes arising under it, respectively. Section 13.10 provided that the Agreement's terms and provisions would be "binding upon and inure to the benefit of and be enforceable by the respective successors and permitted assigns of the parties hereto, whether expressed or not." Section 13.11 stated that the internal laws of New Jersey, without regard to that state's conflicts-of-law principles, would govern the construction and interpretation of the Agreement. Under section 13.11, jurisdiction and venue were established as either the Circuit Court of Cook County or the United States District Court for the Northern District of Illinois, and the parties waived any challenge to the jurisdiction or venue of either court. Finally, section 13.11 allowed the prevailing party to recover "all attorney's fees" in pursuing or defending an action under the Agreement.

¶ 9 ***The Complaint and the Walgreens-Bison-Option Care Merger***

¶ 10 On July 7, 2007, Walgreens, its wholly-owned subsidiary, Bison Acquisition Sub, Inc. (Bison), and Option Care entered into an "Agreement and Plan of Merger." Under the terms of this merger agreement, Bison would acquire all of the stock of Option Care and then merge into Option Care, at which point Option Care would then become a wholly-owned subsidiary of

Walgreens. Finally, the merger agreement provided that the internal laws of the state of Delaware (excluding any choice- or conflict-of-law provisions and rules) would govern questions of interpretation and construction.

¶ 11 On May 5, 2010, plaintiffs filed an amended three-count complaint against defendants, alleging, *inter alia*, breach of contract.[4] Although plaintiffs asserted that defendants breached the Agreement on numerous grounds, only two are relevant to this appeal. First, plaintiffs alleged that defendants, in violation of section 1.11 of the Agreement, failed to pay defendants the remaining Maximum Purchase Price, *i.e.*, \$8.45 million (\$25.55 million less the \$17.1 million Closing Date Payment). Plaintiffs asserted that Walgreens did not assume Option Care's obligations under the Agreement when Walgreens agreed to acquire Option Care. According to plaintiffs, defendants were therefore required to pay the remaining Maximum Purchase Price. Plaintiffs' second ground was that defendants breached section 8.6(e) of the Agreement by operating competing businesses in various counties in New Jersey and in the area of Morristown, New Jersey, which plaintiffs characterized as being the exclusive sales territory of IVA.

¶ 12 ***Defendants' Motion for Summary Judgment (Section 1.11)***

¶ 13 On April 16, 2012, defendants filed a motion for summary judgment directed at plaintiffs' allegation that defendants breached section 1.11 of the Agreement for failing to assume Option Care's obligations under the Agreement when Walgreens acquired Option Care. Attached to their motion were various written communications between plaintiffs and defendants.

¶ 14 The first series of correspondence begins with a September 26, 2007, letter in which plaintiffs' counsel, Nancy McDonald, wrote to the "General Counsel" of Option Care to

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[4] As noted above, plaintiffs do not challenge the trial court's dismissal of counts II and III of the amended complaint, which left only count I, the breach of contract claim.

determine whether "Walgreen's [*sic*] intends to honor the Buyer's obligation under [section 1.11 of] the *** Agreement and has agreed to do so in writing." Mark Goran, an attorney representing Option Care, responded on October 23, 2007, "Under the Option Care transaction agreements with Walgreens, Walgreens did assume Buyer's obligations under [section 1.11 of] the *** Agreement." On December 3, 2007, McDonald wrote to Goran disputing various parts of Goran's October 23, 2007, letter. In that letter, she noted that Goran "represented that Walgreens assumed the Buyer's obligations under [section 1.11 of] the *** Agreement and we accept and rely upon your representation."

¶ 15 The next set of correspondence in defendants' motion starts with a letter dated July 25, 2008, from McDonald to Joseph Bonaccorsi of "Walgreens Home Care." In pertinent part, McDonald's letter challenged Walgreens's calculation of EBITDA and its compliance with section 8.6(e) of the Agreement, and claimed that Walgreens was in material breach of section 8.6(e). Again, McDonald noted that "Goran has previously confirmed to [McDonald] in writing that Walgreens assumed the Buyer's obligations under [section 1.11 of] the *** Agreement and we accepted and relied upon that representation." Six days later, Karen Fine, a senior attorney with the Law Department at Walgreens, responded, indicating that it would investigate McDonald's claims and respond accordingly. On September 10, 2008, McDonald wrote to Fine seeking the status of Walgreens's investigation. Fine responded on September 15, 2008, that her colleague, Pete Wilson, would be handling this matter going forward and would respond within the subsequent few weeks. In neither response did Fine challenge whether Walgreens had assumed the obligations under section 1.11 following the merger of Option Care into Walgreens.

¶ 16 The last series of correspondence attached to defendants' motion starts on October 15, 2008, when Wilson, a senior attorney in the Walgreens Law Department, wrote to McDonald stating in part that, based upon IVA's EBITDA for the previous year, plaintiffs did not earn a "Year Two Payment" (*i.e.*, the earn-out payment on the second anniversary of the closing). Wilson rejected McDonald's claims with respect to the calculation of IVA's EBITDA, but his letter omits any claim that Walgreens assumed no responsibility for this prior obligation of Option Care. McDonald responded to Wilson's letter on February 24, 2009. She disagreed with his rejection of her proposed adjustments to IVA's EBITDA relevant to the Year Two Payment. With respect to Walgreens's efforts to ensure IVA operated exclusively within certain territories under section 8.6(e) of the Agreement, McDonald reiterated that Walgreens and its affiliates' revenues within that area were relevant, since Walgreens had assumed Option Care's obligations under the Agreement pursuant to section 1.11. Otherwise, according to McDonald, plaintiffs would be entitled to the remaining Maximum Purchase Price of $8.45 million. On April 7, 2009, Wilson responded to this letter, again without challenging whether Walgreens assumed Option Care's obligations under section 1.11 of the Agreement. Wilson maintained that no Year Two Payment was owed and disputed the other assertions in McDonald's February 24, 2009, letter.

¶ 17 On June 22, 2012, the trial court issued an order granting defendants' motion. The court found no genuine issue of fact as to whether Walgreens assumed Option Care's obligations under the Agreement. The trial court stated that Walgreens's assumption took place both by operation of law and Walgreens's express written statement "by their duly-authorized agent," Goran. The trial court also observed that plaintiffs expressly acknowledged Goran's statement when McDonald wrote that plaintiffs " 'accepted and relied upon that representation.' "

¶ 18 ***Cross-Motions for Summary Judgment (Section 8.6(e))***

¶ 19 After granting defendants' motion for summary judgment as to claims related to section 1.11 of the Agreement, the trial court addressed plaintiffs' motion to compel defendants' production of various documents and defendants' response to certain interrogatories. During the hearing on plaintiffs' motion, the trial court informed plaintiffs that they "may have follow-up discovery if [they] take a dep[osition] or two, but at this point we need to be moving on." The trial court later added, "[Y]ou know at depositions the way things go, you start peeling the layers of the onion off, and *** they refer to a document they you don't have, we've all done all of that, you'll get everything you need."

¶ 20 On October 5, 2012, plaintiffs filed a motion for summary judgment, asserting that, since defendants had assumed Option Care's obligations under section 1.11 of the Agreement, defendants breached section 8.6(e) of the Agreement by admitting that they had made competing sales within IVA's defined territory. A month later, defendants filed a motion for summary judgment addressing the remaining breach of contract claims, including the claim that Walgreens breached section 8.6(e) of the Agreement by failing to cause IVA to operate exclusively within certain areas of New Jersey. Defendants argued that the plain language of the Agreement provides that only "reasonable" efforts were required, which necessarily implied that there would be some competing sales within the defined territory of IVA and some IVA sales outside of its defined territory. Defendants further argued that Bell admitted in his deposition that he would not have a viable claim if IVA were credited with the EBITDA earned from other Walgreens entities within IVA's defined territory, but the adjusted EBITDA was still too low to merit any earn-out payment.

¶ 21 Defendants supported their motion with a transcript of Bell's deposition and a sworn declaration by Robert Monahan, director of acquisitions at Walgreens (and former vice president of merger and acquisitions at Option Care). Bell's deposition included the following exchanges between defense counsel and Bell:

> "Q. [Defense counsel] If you got full credit for the sales by Trinity [and] any other Option Care or Walgreen's entity within your territory, do you have any harm in this case *** with respect to [an alleged breach of section 8.6(e) of the Agreement]?
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> A. [Bell] If we got full credit? Then it would meet the terms of the agreement.
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> * * *
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> Q. ***. And my question to you so it's clear in your mind is, if it were the case that any revenue for Trinity or any other Option Care or Walgreen's entity was *** added to the revenue that was shown for I.V.A. and it still did not qualify you for an earn-out, would you agree with me that you don't have any claim for breach of [contract under section 8.6(e) of the Agreement]?
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> * * *
>
> A. If we got credit for all the revenue that all the Walgreen's offices did and any Option Care / Walgreen's affiliate, whatever, in our territory and it didn't exceed, then we wouldn't have grounds."

¶ 22 Monahan's declaration stated that, for the first year payment, adding the EBITDA from the non-IVA entities to IVA's EBITDA and multiplying that sum by 6.7 still resulted in a shortfall of approximately $1.68 million, resulting in no payment owed to plaintiffs. Monahan's declaration also indicated that, after adjusting IVA's EBITDA for IVA's sales outside of its defined territory, the shortfall increased to nearly $6 million. With respect to the second anniversary payment, Monahan's calculations (again including the EBITDA from all non-IVA entities in IVA's defined territory) resulted in a shortfall of about $5.9 million, but after excluding IVA's sales outside of its defined territory, the shortfall worsened to over $10 million, which also resulted in no payment owed to plaintiffs.

¶ 23 The trial court issued a written opinion addressing the parties' cross-motions for summary judgment. The court first denied plaintiffs' motion, finding that there were genuine issues of material fact whether defendants undertook "reasonable" efforts to allow IVA to operate exclusively within its defined territory.

¶ 24 Turning to defendants' motion, the trial court noted that plaintiffs did not dispute the accuracy of either Monahan's calculations or the underlying financial data. The court further recounted that, at the hearing on this motion, plaintiffs merely offered "certain unspecified businesses that allegedly competed with IVA" in violation of section 8.6(e), but plaintiffs failed to provide the names of those entities. The court further observed that plaintiffs did not apprise the court of this deficiency prior to defendants' motion being presented, nor did they file an affidavit under Supreme Court Rule 191(a) (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)) indicating that material facts that would defeat defendants' summary judgment motion were only known to defendants and could not be obtained. Finally, the court noted that plaintiffs did not challenge defendants' claim at the hearing on the summary judgment motion that plaintiffs failed to pursue any further discovery during the period following the trial court's June 26, 2012, decision on plaintiffs' motion to compel. The trial court thus found that there was no genuine issue of material fact with respect to plaintiffs' entitlement to any additional payment on the first or second anniversaries of the closing. The trial court granted defendants' motion.

¶ 25 ***Defendants' Petition for Attorney Fees***

¶ 26 On April 26, 2013, defendants filed a petition seeking their attorney fees pursuant to section 13.11 of the Agreement. Defendants sought a total of $546,145.81, plus attorney fees and electronic legal research fees related to the briefing and argument of their fee petition. Attached to the petition was an affidavit from Robert E. Shapiro, a partner with defendants' law firm. Shapiro stated that he was the lead counsel in the litigation, admitted to the Illinois bar in 1979, and primarily responsible for client billing in this matter. Shapiro added that he primarily performed the work, but that he was assisted by Daniel M. Tardiff, another partner (who was admitted to practice law in Illinois in 2002), and Vito S. Solitro, an associate who was admitted to the Illinois bar in 2010. According to Shapiro, his, Tardiff's, and Solitro's time were billed at the hourly rates of $575, $335, and $212, respectively. Shapiro said that his, Tardiff's, and Solitro's standard hourly rates charged to existing clients (which Shapiro said were commensurate with rates charged by attorneys of similar experience and ability in Chicago) were $695 - $770, $385 - $460, and $265 - $315, respectively.

¶ 27 Shapiro explained that, through March 31, 2013, attorney fees totaled $532,002.32, and electronic legal research fees amounted to $14,143.49. The attorney fees excluded 431.8 hours ($112,850.75) of billable time for which defendants were not charged. In addition, Shapiro stated in his affidavit that the attorney fees did not include an additional 20% discount that had been applied to certain invoices as a "professional courtesy."

¶ 28 At the hearing on defendants' petition, the trial court stated that it had applied "New Jersey's standards" with respect to the awarding of attorney fees. The trial court recalled that there had been a "significant" amount of discovery in the case and noted plaintiffs' petition, which stated that there were "19 sets of discovery, 136 requests, 80 document requests, 43 interrogatories, 13 requests to admit, [and] 70,000 pages of documents exchanged." The trial court found, however, that defense counsel's inclusion of $2,000 of "IT Services" was improper and ordered that the fee award be reduced by that amount. The trial court then granted the petition in part and awarded defense counsel $544,000 in fees and costs.

¶ 29 This appeal follows.

¶ 30 ANALYSIS

¶ 31 ***Principles of Contract Construction***

¶ 32 The parties agreed that the substantive law of New Jersey would govern any disputes under the Agreement (without regard to New Jersey's conflicts-of-law principles). The question presented here concerns the interpretation of a contract, which is question of law subject to *de novo* review. *Kieffer v. Best Buy*, 205 N.J. 213, 222 (2011). It is well established that the "polestar" of contract construction is to discover the parties' intent "as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded." *Atlantic Northern Airlines, Inc. v. Schwimmer*, 12 N.J. 293, 301, 96 A.2d 652, 656 (1953). We interpret the language used " 'in accord with justice and common sense and the probable intention of the parties.' [Citation.]" *Krosnowski v. Krosnowski*, 22 N.J. 376, 386-87, 126 A.2d 182, 188 (1956). As noted in *Tessmar v. Grosner*, 23 N.J. 193, 201, 128 A.2d 467, 471 (1957), "In the quest for the common intention of the parties to a contract the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain. An agreement must be construed in the context of the circumstances under which it was entered into and it must be accorded a rational meaning in keeping with the express general purpose."

¶ 33 If the terms of a contract are clear and unambiguous, there is no need for interpretation or construction and the courts must enforce those terms as written. *Kampf v. Franklin Life Insurance Co.*, 33 N.J. 36, 43, 161 A.2d 717, 720 (1960). We may not rewrite a contract simply because "it might well have been functionally desirable to draft it differently." *Brick Township Municipal Utilities Authority v. Diversified R.B. & T. Construction Co.*, 171 N.J. Super. 397, 402, 409 A.2d 806, 808 (App. Div. 1979). In addition, it is improper for a court to remake a "better" contract for the parties than they have agreed to enter into, or to alter it to the benefit of one party and the detriment of another. *James v. Federal Insurance Co.*, 5 N.J. 21, 24, 73 A.2d 720, 721 (1950).

¶ 34 If, however, there is an ambiguity in a written agreement, the writing is to be strictly construed against the party preparing it. See *In re Miller's Estate*, 90 N.J. 210, 221, 447 A.2d 549, 555 (1982). This rule of construction, however, is somewhat tempered by the principle that "the [strict] construction should be sensible and in conformity with the expressed intent of the parties." *Broadway Maintenance Corp. v. Rutgers*, 90 N.J. 253, 271, 447 A.2d 906, 915 (1982). In other words, "Even where the intention is doubtful or obscure, the most fair and reasonable construction, imputing the least hardship on either of the contracting parties, should be adopted [citation], so that neither will have an unfair or unreasonable advantage over the other." *Tessmar*, 23 N.J. at 201, 128 A.2d at 471.

¶ 35 ***Summary Judgment on Plaintiffs' Breach of Contract Claim***

¶ 36 Plaintiffs contend that, with respect to their breach of contract claim, the trial court erred in granting defendants' motion for summary judgment in two respects. First, plaintiffs argue that the trial court erred in finding no genuine issue of material fact as to whether, as required by section 1.11 of the Agreement, Walgreens assumed Option Care's obligations by operation of law or in writing. Second, plaintiffs claim there were genuine issues of material fact as to whether Walgreens, pursuant to section 8.6(e) of the Agreement, undertook reasonable efforts to ensure IVA would operate exclusively within its territory.

¶ 37 Although the parties have agreed that the substantive laws of New Jersey would apply in construing the Agreement, the Agreement also provides that Illinois would be the forum state for any disputes arising thereunder. Accordingly, the procedural laws of Illinois apply. See *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 565 (2000) (citing *Nelson v. Hix*, 122 Ill. 2d 343, 346-47 (1988); Restatement (Second) of Conflict of Laws §§ 122, 127 (1971); 16 Am. Jur. 2d *Conflict of Laws* §§ 153, 163 (1998)). We therefore examine the propriety of the trial court's decision on summary judgment with respect to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2010)).

¶ 38 Summary judgment is appropriate "if 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." 735 ILCS 5/2-1005(c) (West 2010). Summary judgment is a drastic measure and should only be granted when the moving party's right to judgment is "clear and free from doubt." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). "In determining whether a genuine issue as to any material fact exists, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the movant and liberally in favor of the opponent." *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied." *Id.* We review a trial court's entry of summary judgment *de novo*. *Virginia Surety Co. v. Northern Insurance Company of New York*, 224 Ill. 2d 550, 556 (2007).

¶ 39 With respect to the breach of contract allegation concerning section 8.6(e), we note that the parties filed cross-motions for summary judgment. As such, the parties acknowledge that no material questions of fact exist and that only a question of law is involved that the court may decide based on the record. *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The mere filing of cross-motions for summary judgment, however, does not establish that there is no issue of material fact, nor is a trial court obligated to render summary judgment for either party. *Id.* Our review of cross-motions for summary judgment is also *de novo*. *Id.* ¶ 30.

¶ 40 Under New Jersey law, a party alleging a breach of contract claim must plead the following: " '(1) a contract; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party performed its own contractual duties.' " *MK Strategies, LLC v. Ann Taylor Stores Corp.*, 567 F. Supp. 2d 729, 735 (D.N.J. 2008) (construing New Jersey law) (quoting *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*, 210 F. Supp. 2d 552, 561 (D.N.J. 2002)). "In order to state a claim for damages arising from a breach of contract, a plaintiff must also plead damages resulting from the alleged breach." *Brader v. Allegheny General Hospital*, 64 F.3d 869, 878 (3d Cir. 1995) (construing New Jersey law).

¶ 41 The court below properly granted summary judgment in favor of defendants regarding the alleged breach of section 1.11 of the Agreement. Bison assumed the obligations of Option Care, and thus by extension those of Enterprises (Option Care's wholly-owned subsidiary), by operation of law. Here, the transaction was a "reverse triangular merger," in which the acquiring corporation's wholly-owned subsidiary (in this case, Bison) purchases the selling corporation (Option Care) and then merges into the selling corporation. See Black's Law Dictionary 1078 (9th ed. 2009). As defendants point out, when Walgreens and Option Care merged, their merger was governed by Delaware law. Under section 259(a) of the General Corporation Law of the

State of Delaware, the surviving corporation following a merger assumes the nonsurviving corporation's contractual obligations by operation of law. Del. Code Ann. tit. 8, § 259(a) (West 2006). The supreme court of Delaware has held that this applies even in the case of a triangular merger. See *Lambrecht v. O'Neal*, 3 A.3d 277, 288 (Del. 2010) (holding that, in a hypothetical where Merrill Lynch merges and disappears into BofA, "BofA could sue directly and in its own name [and not only derivatively on behalf of Merrill Lynch]," and that "No different result should obtain where, as here, the merger is structured as a three party transaction with Merrill Lynch ending up as BofA's wholly owned subsidiary."). Therefore, consistent with the reasoning in *Lambrecht*, where, as here, Option Care ended up as a wholly owned subsidiary of Walgreens, Walgreens equally assumed Option Care's obligations by operation of law.

¶ 42 In addition, the record is replete with documents indicating that Walgreens accepted Option Care's obligations under the Agreement. In September 2007, its counsel wrote to the general counsel of Option Care (which at that time had been a wholly-owned subsidiary of Walgreens) seeking assurance that Walgreens had assumed Option Care's obligations under the Agreement. Option Care's counsel confirmed that Walgreens had assumed the obligations. During the 2½ years before this lawsuit began, plaintiffs' counsel exchanged correspondence with counsel for Walgreens regarding whether plaintiffs were entitled to an earn-out payment based upon IVA's financial performance. Although Walgreens disagreed with plaintiffs' claims regarding certain adjustments to IVA's EBITDA—which would determine the amount owed to plaintiffs, Walgreens never challenged whether it would owe plaintiffs anything regardless of IVA's financial performance. In other words, Walgreens disputed "how much" but not "whether" it owed plaintiffs anything. Construing these facts strictly against defendants and liberally in favor of plaintiffs (see *Williams*, 228 Ill. 2d at 417), we hold that no reasonable person could draw the inference that Walgreens did not assume the obligations under the Agreement. Therefore, summary judgment in favor of defendants was warranted.

¶ 43 Nonetheless, plaintiffs maintain that section 1.11 is not an unenforceable penalty clause but is instead an enforceable liquidated damages clause. Liquidated damages clauses are enforceable under New Jersey law and defined as a sum that a party agrees to pay in the event of a breach and that has been determined by a good faith estimate of actual damages that would result from the breach. *Wasserman's Inc. v. Township of Middletown*, 137 N.J. 238, 248-49, 645 A.2d 100, 105-06 (1994). In contrast, a penalty clause, which is unenforceable, is also a sum that a party agrees to pay in the event of a breach, but is not an estimate of probable actual damages resulting from the breach, but rather is fixed and is established to punish the breaching party and therefore stands as a threat to prevent any such breach. *Id.* Plaintiffs' argument is meritless.

¶ 44 Here, section 1.11 is clearly a penalty clause and not a liquidated damages provision. Nothing in that section indicates that the remaining Maximum Purchase Price of $8.45 million was the result of a good-faith estimate of plaintiffs' damages in the event of a breach. No reasonable reading of that provision can conclude anything other than that the provision is designed as a threat to prevent a party from breaching the agreement by requiring the maximum possible payment under the contract in the event of a breach. This construction is also more consistent with the rule announced in *Krosnowski*, 22 N.J. at 386-87, 126 A.2d at 188, that we must interpret the Agreement's language consistent with " 'justice and common sense and the probable intention of the parties.' [Citation.]" As such, we are compelled to further hold that section 1.11 is an unenforceable penalty provision under New Jersey law, and the trial court's judgment may be sustained on this additional ground.

¶ 45 Plaintiffs further argue that section 1.11 is a mechanism allowing for "alternate performance," namely, Walgreens could either assume obligations under the Agreement or pay the remaining Maximum Purchase Price. In support of this argument, plaintiffs cite *In the Matter of the Community Medical Center*, 623 F.2d 864 (3d Cir. 1980). Plaintiffs' reliance on *Community Medical Center*, however, is misplaced. In that case, a hospital (the debtor) filed a Chapter 11 bankruptcy petition. *Id.* at 865. The debtor signed a three-year contract to purchase data processing services from InfoMed (the claimant). *Id.* at 865. The contract provided for monthly charges based upon the number of "transactions," subject to a minimum monthly charge of $1,500. *Id.* at 865-66. The debtor, however, rejected the contract within a year, at which point the average monthly billings had been $3,411.45. *Id.* at 866. The bankruptcy judge allowed InfoMed's claim for the average monthly billings multiplied by the remaining time left on the contract (less various deductions not relevant here), and the district court affirmed. *Id.*

¶ 46 On further appeal to the Third Circuit Court of Appeals, the debtor contended that the contract allowed for alternative performance and consequently the amount allowed should have been the minimum charge of $1,500, rather than the average monthly charge. *Id.* The Court of Appeals agreed. *Id.* at 865. The court rejected any argument that the minimum charge provision was a liquidated damages clause because the provision did not apply only in the event of a breach; instead, it applied in any month where the costs of the services were less than $1,500. *Id.* at 867. The court held that the clause, "fairly interpreted, looks more to a continuance of the relationship between InfoMed and the debtor rather than termination." The court commented that its holding was "consistent with the admonition of the New Jersey courts that 'the primary object of (alternative) contracts *** is deemed to be performance, not nonperformance.' " (Alteration in original.) *Id.* (quoting *Nolan v. Kirchner*, 98 N.J. Eq. 452, 453, 131 A. 104, 105

(1925)). The court thus concluded that the minimum payment provision was not a liquidated damages provision, but rather an alternative performance provision. *Id.*

¶ 47 Here, the primary object of section 1.11 is nonperformance, rather than performance. Specifically, it applies at any time during the two-year earn-out period in which the acquirer of Option Care fails to assume Option Care's obligations. Section 1.11 requires that the purchaser (here, Walgreens) immediately pay to plaintiffs the remaining Maximum Purchase Price of $8.45 million if the purchaser fails to assume the obligations under the Agreement, after which point plaintiffs would be entitled to no further payments. As such, this provision is the mirror image of the provision at issue in *Community Medical Center*: fairly interpreted, section 1.11 looks more to a termination of the relationship between IVA and Walgreens rather than a continuance of it. See *id.* at 867. Accordingly, section 1.11 does not provide for alternative performance, and plaintiffs' reliance upon *Community Medical Center* is misplaced.

¶ 48 With respect to the alleged breach of section 8.6(e), defendants rely on Bell's deposition in which he admitted that he would have no damages (and thus no claim) if IVA's EBITDA, after adjustments reflecting competing sales within its defined territory, still were insufficient to merit any earn-out payment. Defendants also rely on the sworn declaration of Robert Monahan, director of acquisitions at Walgreens, who stated that, for each of the two earn-out years, adding the EBITDA from the non-IVA entities to IVA's EBITDA and multiplying that sum by the relevant coefficient still resulted in a shortfall, and therefore no earn-out payment was owed to plaintiffs for either year. One of the necessary elements in a breach of contract claim in New Jersey is damages resulting from the alleged breach. *MK Strategies, LLC*, 567 F. Supp. 2d at 735; *Brader*, 64 F.3d at 878. Here, Monahan's declaration established that, even adding in all the purportedly improper sales of the non-IVA entities to those of IVA within IVA's territory, no earn-out payment was required. Plaintiff Bell conceded in his deposition that he would have "no grounds" in such a scenario. On these facts, the trial court properly found that plaintiffs' breach of contract claim as to section 8.6(e) could not stand. We therefore find no reversible error in the trial court's granting of summary judgment in favor of defendants with respect to section 8.6(e).

¶ 49 Plaintiffs, however, repeated their claim that Walgreens has additional undisclosed affiliates or sales that were made in IVA's defined territory, and if that information were available, IVA's adjusted EBITDA would be far greater, and likely merit an earn-out payment. This amounts to pure speculation, which is insufficient to defeat a motion for summary judgment. *Judge-Zeit v. General Parking Corp.*, 376 Ill. App. 3d 573, 584 (2007) ("Mere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment."). Although the trial court invited plaintiffs to conduct discovery depositions, which could then have warranted additional document requests, plaintiffs did nothing, nor did they file a Rule 191 affidavit that would have indicated that information that would defeat defendants' summary judgment motion was known only to defendants and could not be obtained. The trial court therefore correctly granted defendants' motion for summary judgment with respect to the breach of contract claim under section 8.6(e) of the Agreement.

¶ 50 ***The Award of Defendants' Attorney Fees***

¶ 51 Finally, plaintiffs claim that the trial court erroneously granted defendants' petition for attorney fees. Specifically, plaintiffs claim that the plain language of section 13.11 of the Agreement allows awards of attorney fees only, and therefore the trial court abused its discretion in also allowing those amounts billed for paralegal services. Plaintiffs further argue that the 20% discount applied against certain invoices should have been applied across-the-board, that attorney Shapiro's ¼-hour minimum billing increment was inherently improper, and that various discrepancies as to one attorney billing for a task (such as teleconferences, client meetings, etc.) but not the other attorney(s) that had been present indicates improper billing. Plaintiffs ask that we either reverse the trial court's granting of defendants' fee petition, or in the alternative, reduce the amount awarded.

¶ 52 In determining the reasonableness of an attorneys' fee award, the threshold issue is "whether the party seeking the fee prevailed in the litigation." *Litton Industries, Inc. v. IMO Industries, Inc.*, 200 N.J. 372, 386 (2009) (quoting *North Bergen Rex Transport, Inc. v. Trailer Leasing Co., a Division of Keller Systems, Inc.*, 158 N.J. 561, 570 (1999)). The next step is to determine the "lodestar," *i.e.*, the number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a reasonable hourly rate. *Id.* "The computation of the lodestar mandates that the trial court determine the reasonableness of the hourly rate of the prevailing attorney in comparison to rates for similar services by lawyers of reasonably comparable skill, experience, and reputation in the community." (Internal quotation marks removed.) *Id.* at 387. Finally, the trial court may also consider the damages sought and the damages actually recovered when determining the reasonableness of the fee award. *Id.* The allowance of attorney fees is within the sound discretion of the trial court, and its determination will not be overturned unless the trial court has clearly abused its discretion. *Hofmann v. Hofmann*, 94 Ill. 2d 205, 229 (1983); accord *Rendine v. Pantzer*, 141 N.J. 292, 317 (1995) (holding that a trial court's fee award will be disturbed "only on the rarest of occasions, and then only because of a clear abuse of discretion"). A court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view. *TruServ Corp. v. Ernst & Young, LLP*, 376 Ill. App. 3d 218, 227 (2007); accord *Flagg v. Essex County Prosecutor*, 171 N.J. 561, 571, 796 A.2d 182, 187-88 (2002).

¶ 53 In this case, there is no dispute that defendants prevailed in every respect in this litigation: their motions for summary judgment were granted, and plaintiffs obtained no relief. Rather, plaintiffs assert that the plain language of the Agreement's fee-shifting provision prohibits the award of paralegal fees and that, with respect to reasonableness, the trial court merely "rubber stamped" defendants' fee petition. Plaintiffs' claims, however, are meritless.

¶ 54 We hold that, in interpreting the fee-shifting provision of the Agreement through the lens of "justice and common sense" (*Krosnowski*, 22 N.J. at 386-87, 126 A.2d at 188), an award of paralegal fees was properly included. To hold as plaintiffs suggest would require an attorney to perform (and then bill at a substantially higher rate) for tasks that could be easily accomplished by a paralegal, which would be contrary to justice and common sense. Furthermore, as defendants note, the United States Supreme Court has similarly held that paralegal fees are to be considered eligible for a statutory provision that allowed for the shifting of reasonable attorney fees. *Missouri v. Jenkins*, 491 U.S. 274, 285 (1989). Plaintiffs argue that we should disregard the holding in *Jenkins*, because the Court in that case was construing a statutory fee-shifting provision and the parties did not dispute whether the paralegal fees should be included. We disagree. We see nothing in *Jenkins* limiting its holding solely to statutory fee-shifting provisions combined with a concession as to the propriety of including paralegal fees. Instead, the *Jenkins* Court pointedly stated as follows:

> "Clearly, a 'reasonable attorney's fee' cannot have been meant to compensate only work performed personally by members of the bar. Rather, the term must refer to a reasonable fee for the work product of an attorney. Thus, the fee must take into account the work not only of attorneys, but also of secretaries, messengers,

> librarians, janitors, and others whose labor contributes to the work product for which an attorney bills her client; and it must also take account of other expenses and profit." *Id.* at 285.

Accordingly, plaintiffs' attempt to distinguish *Jenkins* is unavailing.

¶ 55 Turning to the reasonableness of the fees, plaintiffs assert that the fees sought were inherently suspect because certain invoices (but not all) were discounted by 20%, attorney Shapiro's ¼-hour minimum billing increment (unlike the other attorneys' $^{1}/_{10}$-hour minimum) was *ipso facto* overbilling, and that overbilling was present because only one attorney (out of several) billed for certain tasks, *e.g.*, teleconferences or client meetings.

¶ 56 None of these arguments have merit. We are puzzled how the failure to discount all, rather than some, invoices constitutes overbilling.[5] Plaintiffs present nothing to indicate that the nondiscounted invoices were excessive. The mere fact that one attorney charges in 15-minute increments rather than 6-minute increments does not inexorably lead to the conclusion that the former is improper. In the end, it is the amount billed, not the minimum increment *per se*, that determines the reasonableness of the fee. We are similarly unpersuaded by plaintiffs' claim that, because only one attorney billed for performing a task, rather than all of the attorneys working on that task, the amount charged was excessive.

¶ 57 Defendants also complain that the trial court did not recite the appropriate lodestar on the record. Defendants characterize the trial court's actions as either having "rubber-stamped" or "uncritically accepted the grand total" submitted by defendants. We note, however, that the trial court rejected defendants' attempt to include "IT services" in their fee petition, and the trial court also recalled the "significant" discovery involved in this case and recounted the information

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[5] Defendants point out that only six of the eleven invoices Shapiro stated in his affidavit were discounted by 20%. The record, however, indicates that the eleven invoices were discounted by 16.5%. We consider this difference to be immaterial.

provided by defendants in their petition. Moreover, there is nothing in *Litton Industries* requiring a trial court to announce on the record a detailed calculation of the lodestar. Here, the trial court was presented with sworn affidavits as to the hourly rate, whether that rate was commensurate with prevailing market rates, and the amount of time expended in defending against the lawsuit. Although the trial court agreed with most, but clearly not all, of the calculations in defendants' fee petition, it was not required to reinvent the wheel to calculate the lodestar. Defendants' argument is therefore without merit.

¶ 58 Finally, we note that plaintiffs sought damages of $8.45 million but received nothing. That proportion, when compared to defendants' fee award of $544,000, further supports the trial court's decision. See *Litton Industries*, 200 N.J. at 387. On this record, we cannot hold that the trial court's decision was "arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the court's view" (*TruServ Corp.*, 376 Ill. App. 3d at 227). As such, the trial court did not clearly abuse its discretion, and plaintiffs' final contention on appeal must be rejected.

¶ 59 **CONCLUSION**

¶ 60 The trial court did not err in granting summary judgment in favor of defendants as to plaintiffs' breach of contract claim. In addition, the trial court's allowance of defendants' petition for attorney fees was not a clear abuse of discretion. Accordingly, we affirm the judgment of the Circuit Court of Cook County.

¶ 61 Affirmed.