

IP 01-1439-C H/K National Recovery v. Bartle  
Judge David F. Hamilton

Signed on 7/3/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

NATIONAL RECOVERY & CONSULTING )  
GROUP LLC, )

Plaintiff, )

vs. )

BARTLE, JOHN, )  
BARTLE, REBECCA J, )  
NEW, LARRY M, )  
PILGRIM MANOR, INC, )  
FIRST HEALTH CORP, )

Defendants. )

CAUSE NO. IP01-1439-C-H/G

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

NATIONAL RECOVERY & CONSULTING )  
GROUP, LLC, )

Plaintiff, )

v. )

CAUSE NO. 01-1439-C H/K

JOHN BARTLE, REBECCA J. BARTLE, )  
LARRY M. NEW, PILGRIM MANOR, INC., )  
and FIRST HEALTH CORP., )

Defendants. )

ENTRY ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This diversity case presents a contract dispute between plaintiff National Recovery & Consulting Group, LLC ("NRCG"), and defendants Pilgrim Manor, Inc., John Bartle, Rebecca Bartle, Larry New, and First Health Corp. The defendants entered into a settlement agreement with NPF VI, Inc. that was intended to resolve litigation pending in the United States District Court for the Southern District of Ohio. On August 14, 2001, NPF VI, Inc. assigned to NRCG all of its rights in the settlement agreement. NRCG claims that the defendants breached the settlement agreement by failing to pay money owed according to its terms.

NRCG has moved for summary judgment on its claims. For the reasons stated below, the court grants NRCG's motion with respect to claims against defendants John Bartle, Rebecca Bartle, Larry New, and First Health Corp., and denies the motion with respect to defendant Pilgrim Manor, Inc.

### *Summary Judgment Standard*

The purpose of summary judgment is to “pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is appropriate when there are no genuine issues of material fact, leaving the moving party entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party must show there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A factual issue is material only if resolving the factual issue might change the suit's outcome under the governing law. An issue is genuine if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Baucher v. Eastern Ind. Prod. Credit Ass'n*, 906 F.2d 332, 334 (7th Cir. 1990).

### *Undisputed Material Facts*

The settlement agreement was executed on May 17, 1999, and was intended to resolve litigation pending in the United States District Court for the Southern District of Ohio, Eastern Division (Civil Action No. C2-97-902). Cplt., Ex. A. At the same time the settlement agreement was signed, defendants John Bartle, Rebecca Bartle, Larry New, and First Health entered into an agreement entitled "Agreement with Respect to Letter of Credit." Cplt., Ex. B. That agreement established an irrevocable letter of credit in favor of NPF VI for \$100,000.

According to the settlement agreement, Pilgrim Manor was to pay NPF VI, Inc. \$2,100,000 from any payments Pilgrim Manor received from third-party payors for its services. Specifically, the settlement agreement stated: "From the date hereof through eighteen months hereafter, [Pilgrim Manor] agrees to pay or cause to be paid to NPF all payments made by third party payors (including Medicare, Medicaid, private payors, insurance companies, health maintenance organizations and similar payors) with respect to receivables owned or generated by [Pilgrim Manor] until the amounts paid to NPF pursuant to this Section 1(A) aggregate an amount equal to Two Million One Hundred Thousand Dollars

(\$2,100,000) . . . , which payments shall be made to NPF upon receipt of such payments by or on behalf of [Pilgrim Manor].” Settlement Agreement § 1(A).

Defendants John Bartle, Rebecca Bartle, Larry New, and First Health each agreed to guaranty a portion of Pilgrim Manor’s obligations. The guarantors agreed, jointly and severally, to pay NPF VI, Inc. an amount equal to 25 percent of the difference between \$2,100,000 and the total amount of all payments made by Pilgrim Manor pursuant to Section 1(A) of the settlement agreement. The guarantors were required to pay all amounts required under Section 2(A) of the settlement “on or before eighteen months and ten days” after the settlement agreement was executed.

Pursuant to the settlement agreement, the guarantors’ failure to make payment within eighteen months and ten days, by November 12, 2000, would be deemed a default. Settlement Agreement § 2(A). The settlement agreement further provided: “Upon any default in the timely payment of amounts required to be paid by the Guarantors pursuant to this Section 2, all amounts owing pursuant to this Section 2 shall bear interest at the rate of ten percent (10%) per annum.” Settlement Agreement § 2(A).

NPF VI demanded payment from the guarantors on December 1, 2000 and demanded performance of Pilgrim Manor's settlement obligations on December 4, 2000. Pilgrim Manor failed to make any payments pursuant to Section 1(A) of the settlement agreement. Poulsen Aff. ¶ 4. The guarantors also failed to make any payments as required by Section 2(A) of the settlement agreement. Poulsen Aff. ¶ 5. Since Pilgrim Manor did not make any payments, under the settlement agreement the guarantors would be required to pay \$525,000 (25 percent of \$2,100,000). However, since Pilgrim Manor, John Bartle, Rebecca Bartle, Larry New, and First Health failed to make payment as required under the settlement agreement, NPF exercised its rights to draw on the irrevocable letter of credit, posted by the guarantors, and recovered \$100,000 on or about November 21, 2001. Poulsen Aff. ¶ 6. After accounting for the \$100,000 recovery, according to plaintiff NRCG, the guarantors still owe the principal sum of \$425,000. Poulsen Aff. ¶ 6.

On August 14, 2001, NPF VI assigned to NRCG all of its rights in the settlement and to all claims and causes of actions against the defendants resulting from the breach of the settlement agreement. Cplt., Ex. C; Poulsen Aff.

¶ 8.<sup>1</sup> Other facts are noted below, keeping in mind the standard that applies on a motion for summary judgment.

### *Discussion*

The defendants argue that Pilgrim Manor was not required to make any payments to NPF VI because it did not receive any payments from third party payors on receivables owned or generated by Pilgrim Manor. SMF 1-2; New Aff.

¶ 2. Under the settlement agreement, Pilgrim Manor was required to turn over to NPF VI all third party payments. If there were no third party payments, Pilgrim Manor was not required to make payments. There is a genuine issue of material fact on the issue of Pilgrim Manor's breach of the settlement agreement, as NRCG concedes in its reply brief. Summary judgment against Pilgrim Manor is denied.

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<sup>1</sup>Plaintiff NRCG moved to strike portions of the affidavits submitted by the defendants. Rule 56(e) provides: "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Paragraph four of John Bartle's affidavit and the first sentence in paragraph four of Larry New's affidavit assert their beliefs that Pilgrim Manor received payments for which no credit had been given. Bartle's and New's beliefs are inadmissible speculation with respect to whether any such payments were made. See *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 986 (7th Cir. 2001) (affidavits must be based on personal knowledge). However, those portions of the Bartle and New affidavits are admissible and relevant with respect to whether NRCG should receive an award of attorney fees for defendants' maintenance of a meritless defense. Finally, paragraph five of Larry New's affidavit is not stricken because it is not hearsay.

The guarantors are not relieved of their obligations, however, by the assumed absence of any third party payments to Pilgrim Manor. The guarantors argue that their obligation to pay \$425,000 has not been properly reduced by all of the payments made to NPF VI and that NPF VI failed to perform an accounting. This argument does not present a genuine issue of material fact, because no evidence has been presented that any payments were made to satisfy Pilgrim Manor's settlement obligation. Since there is no evidence in the record of any payments being made, the accounting is unnecessary and the debt owed by the guarantors does not need to be reduced.

Furthermore, in their brief, the guarantors "agree that they owe an amount equal to 25% of the difference between \$2,100,000 and the total amount of all payments made on behalf of Pilgrim Manor less the \$100,000 letter of credit amount pursuant to Section 1(A) of the settlement agreement." Def. Br. at 3. The guarantors also agree that ten percent interest has accrued from November 12, 2000 on all amounts owed. Def. Br. at 3. Thus, NRCG is entitled to a judgment against the guarantor defendants, jointly and severally, for \$425,000 plus ten percent interest accruing from November 12, 2000.

NRCG also seeks to recover its attorney fees in this case under Indiana Code § 34-52-1-1(b)(2) from the guarantors. The statute provides that a court



may award attorney fees to a prevailing party in a civil case if the court finds that an opposing party continued to litigate a defense (or claim) that had clearly become “frivolous, unreasonable, or groundless.” A claim or defense is groundless if no facts exist that support the claim or defense presented by the losing party. *Kahn v. Cundiff*, 533 N.E.2d 164, 171 (Ind. App. 1989), *opinion adopted on transfer*, 543 N.E.2d 627 (Ind. 1989). The decision to award attorney fees and the amount of the award are matters left to the trial court’s sound discretion. *Mitchell v. Mitchell*, 695 N.E.2d 920, 924 (Ind. 1998) (affirming award of fees against party who breached settlement agreement and presented groundless and bad faith defense to suit to enforce agreement).

NRCG argues that the guarantors’ defense was frivolous, unreasonable, or groundless. The complaint and case management plan assert that NRCG is entitled to recover \$525,000 from the guarantors. It was not frivolous, unreasonable, or groundless for the defendants to make sure that they received credit for the \$100,000 in collateral available to and taken by NRCG. However, the guarantors admit that as of January 30, 2002, they knew that NRCG was seeking only \$425,000. From that point forward, the guarantor defendants have had no reasonable basis for contesting their obligations to NRCG for \$425,000, and their defenses have been “groundless” within the meaning of Ind. Code § 34-52-1-1. See *Tipton v. Roerig*, 581 N.E.2d 1279, 1281 (Ind. App. 1991) (plaintiff’s

claim became groundless during case, warranting fee award, when plaintiff's counsel received affidavit from his expert witness opining that plaintiff's condition was caused by drug not manufactured by defendant). Thus, NRCG is entitled to attorney fees and costs incurred after January 30, 2002, with respect to its claims against the guarantor defendants.

To determine the amount of such attorney fees and costs, NRCG shall submit a petition no later than August 1, 2002. The guarantor defendants shall respond no later than August 15, 2002 with any objections, and NRCG may submit a reply no later than August 29, 2002. If any party requests an evidentiary hearing on the amount of fees and costs, the court will schedule a hearing, but in the absence of such request, the court will decide the amount based on written submissions.

### *Conclusion*

For the foregoing reasons, plaintiff NRCG's motion for summary judgment is granted to the extent that defendants John Bartle, Rebecca Bartle, Larry New, and First Health Corporation are jointly and severally liable to NRCG for the sum of \$425,000, plus interest and attorney fees and costs. NRCG's motion is denied

with respect to its claims against Pilgrim Manor, Inc. No separate judgment shall be entered at this time.

So ordered.

Date: July 3, 2002

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DAVID F. HAMILTON, JUDGE  
United States District Court  
Southern District of Indiana

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