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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

RISK SOLUTIONS CAPTIVE, INC., ("Captive") and HEALTH COST SOLUTIONS ("HCS"),	)	
Plaintiffs,	)	
vs.	)	**No. 16-0583-BC**
EVERS CONSTRUCTION COMPANY INC. ("Evers"),	)	
Defendant.	)	

MEMORANDUM AND ORDER: (1) GRANTING PLAINTIFFS' MOTION FOR $72,496.87 SUMMARY JUDGMENT AWARD AND PRE AND POST JUDGMENT INTEREST; AND (2) SETTING 1/26/18 DEADLINE FOR ERISA PREEMPTION NOTICE, IF ANY, TO BE FILED ON COUNTERCLAIM

This lawsuit arises out of an agreement for "captive" insurance coverage. This is a kind of insurance enacted by the Tennessee Legislature which enables smaller employers to obtain the benefits larger employers have of self-insuring thereby avoiding purchasing health insurance policies for their employees on the open market. *Defendant's Educational Narrative*, January 23, 2017, at 2.

Pursuant to Tennessee law, Plaintiff Risk Solutions Captive, Inc. ("RSC") is a Protected Cell Captive Insurance Company. In this case, RSC provided medical stop loss insurance to help the Defendant fulfill its obligations to its employees for medical care

claims in exchange for payment by Defendant Evers, of what the Plaintiffs term "premium." Plaintiff Health Cost Solutions ("HCS") was the Claims Administrator who collected premium, remitted fixed costs and paid claims.

The lawsuit was filed by the Plaintiffs to recover $72,496.87 of premium and additional amounts of interest the Plaintiffs assert the Defendant owes.

The Defendant denies that it owes the premium and interest. Also, the Defendant has filed a Counterclaim asserting related but different and separate claims from the *Complaint*.[1]

The status of the case is that the preliminary, jurisdictional issue of federal ERISA preemption of the Complaint had to be determined. After extensive briefing, the Court ruled that the Complaint was not preempted by ERISA and could proceed.

The next step is that the Plaintiff has filed a motion for summary judgment to recover the $72,496.87 asserted in the Complaint. It is that Motion which is decided herein. The Plaintiff's Motion for Summary Judgment does not entirely interface with the Counterclaim, is not dispositive of the Counterclaim, and, thus, disposition of the Counterclaim is not provided herein.

[1] The Counterclaim asserts that the alleged refusal of the Plaintiff Administrator HCS to pay claims unless the additional premium is paid to Plaintiff RSC constitutes a misdirection of Plan assets, conversion and breach of fiduciary duty. The Defendant seeks an accounting of all sums received and disbursed, and for an order requiring the Plaintiffs to process, administer and pay all outstanding covered claims or, alternatively, for an order requiring the Plaintiffs to return any and all remaining Plan assets with any income generated.

After considering the summary judgment record, the law and argument of Counsel, it is ORDERED that the Plaintiffs' motion for summary judgment is granted, and Plaintiffs are awarded $72,496.87 against the Defendant; prejudgment interest accruing from the June 7, 2016 date the lawsuit was filed; and post judgment interest.

As to the Counterclaim, its status is that no determination has yet been made on whether it is preempted by federal jurisdiction of ERISA claims. The July 5, 2017 *Memorandum And Order* only determined that the Complaint was not preempted. Accordingly, it is ORDERED that by February 9, 2018 Counsel for each party shall file a notice stating whether they assert the Counterclaim is preempted by ERISA. Upon receiving that notice the Court will determine the next step for disposition of the case and notify Counsel.

The undisputed facts and law, on which the ruling granting summary judgment to the Plaintiffs of $72,496.87 and interest is based, are as follows.

Parties' Positions

At issue on summary judgment is the claim of the Plaintiffs' Complaint that the Defendant owes more money, than it has already paid, under the terms of a 2015 Participation Agreement entered into by the parties containing a captive insurance arrangement.

The 2015 Participation Agreement ("2015 PA") was entered into after the parties had already performed a similar agreement from April 1, 2014, to March 31, 2015. *Defendant's Response to Plaintiffs' Undisputed Material Facts* ("*Defendant's Response*") ¶ 2.

In support of summary judgment the Plaintiffs cite to the wording of the 2015 PA, related documents, and admissions by the Defendant.

The Defendant opposes summary judgment and denies it owes more payment based upon (1) an alleged oral agreement asserted to have been reached just prior to execution of the 2015 PA and (2) that the terms of the 2015 PA are ambiguous and require a trial with parol evidence to ascertain the meaning.

Defendant's Alleged Oral Agreement

Beginning with Evers' defense to summary judgment of an oral agreement, the Court concludes that it is clear from the outset that the oral agreement can not be considered. The wording and terms of the 2015 PA at section 10 provide that the Agreement can not be modified orally, and section 11 of the 2015 PA provides prior agreements and understandings are superseded by the written terms of the 2015 PA. Under these circumstances Tennessee law does not allow the Court to consider the alleged oral agreement.

> [T]he parol evidence rule excludes testimony of prior conversations for the purpose of altering, contradicting, or varying the terms of a clear and

> unambiguous written agreement. *Faithful v. Gardner*, 799 S.W.2d 232 (Tenn.App.1990). The contract contains a merger clause reciting that the agreement between the parties has been included in the agreement. Moreover, the agreement spells out its essential terms and consideration. The terms are clear and do not contradict each other. Nor do they refer to other agreements or terms. Further evidence that the agreement contained only the terms stated is found from the parties performance according to the terms of the contract for several years. *See Minor v. Minor*, 863 S.W.2d 51 (Tenn.App.1993); 17 Am. Jur. 2d Contracts § 193 (1991).

Book-Mart of Florida, Inc. v. Nat'l Book Warehouse, Inc., 917 S.W.2d 691, 694 (Tenn. Ct. App. 1995). Thus, until an ambiguity is demonstrated, the oral agreement asserted by the Defendant is barred from consideration by the Court by the terms of the parties' contract.

With preclusion of the alleged oral agreement asserted by Defendant, the Court next examines whether there exists an ambiguity in the construction and application of the 2015 PA.

Examination of Text, Terms and Provisions of 2015 PA

Relevant context for construing the 2015 PA is the reference above to the reason/policy for adoption of captive insurance in Tennessee: to provide some of the advantages to employers with a lesser number of employees of insurance analogous to the self-insurance model used by employers with more employees.

As to the captive insurance in this case the Arrangement under the 2015 PA was that claims coverage was paid by different entities at three established levels.

— Coverage level 1—This is the Participant Cell Coverage in which claims of $10,000 or less per employee per year are paid by the Participant Cell. Evers' self-insures the Participant Cell and is the sole Participant in the Participant Cell. If Evers' funds in the Participant Cell are exhausted, then Captive continues to pay the claims of the Participant Cell. *Participant Agreement, Section 3*; *Defendant's Response* at ¶ 13. At termination of the Participation Agreement, any funds in the Participant Cell are refunded to Evers. *Participant Agreement, Section 8(c)*; *Defendant's Response* at ¶ 14.

— Coverage level 2—This is the Captive Coverage. Evers pays a premium for RSC to assume the portion of claims over $10,000 to $100,000 per employee per year. *Participant Agreement, Section 4*; *Defendant's Response* at ¶ 15.[2]

— Coverage level 3— This is coverage assumed by Gerber Life Insurance Company ("Gerber"), a Tennessee licensed insurance company. In exchange for payment of a premium, Gerber assumes the risk for three types of coverage: (1) Specific Excess Stop Loss Coverage, (2) Aggregate Stop Loss Coverage, and (3) Termination Stop Loss Insurance or Terminal Liability Option or TLO. Gerber's premium was paid by Evers and is not in dispute. *Defendant's Response* at ¶ 17. The Specific Excess Stop Loss Coverage transfers the risk to Gerber for paying the portion of claims in excess of $100,000. *Participant Agreement, Section 5*; *Defendant's Response* at ¶ 18. The Aggregate Stop Loss Coverage transfers the risk to Gerber for paying claims in excess of 125% of the projected claims factors Evers will pay for the year. Because the number of employees participating in Evers' medical benefit plans can change during the year, as can their coverage, i.e., individual, family, etc., the claims factors for the year can only be projected. The projection is called the Annual Attachment Point. Gerber's risk for Aggregate Stop Loss Coverage is capped at $1,000,000. *Participant Agreement, Section 5*; *Defendant's Response* at ¶ 19. The Termination Stop Loss Insurance or Terminal Liability Option or TLO transfers the risk to

[2] RSC has several employer participants. Each participant's plan involves coverage level 1 where the participant self-insures claims, and coverage level 2 where the participant funds RSC to provide coverage within a certain range. RSC pools the funds it receives from the participants to address the coverage it assumes on behalf of Evers and the other participants. *Participant Agreement, Section 4*; *Defendant's Response* at ¶ 16.

> Gerber for paying claims after termination of the Plan that exceed 35% of Evers' claims factors. *Defendant's Response* at ¶ 20.

The funding for the Plan is set forth in Schedules 1 of the 2015 PA and the PA's Flow Chart. The first Schedule 1 sets forth the funding for the medical benefit plan with a $2000 deductible. The second Schedule 1 sets forth the funding for the medical benefit plan with a $5000 deductible. *Participation Agreement, Section 1, Schedules 1*; *Defendant's Response* at ¶ 21.

The cost of the Plan to Evers is the sum of the two Schedules 1. *Defendant's Response* at ¶ 22.

It is undisputed that the terms of the 2015 PA were that the Defendant self-funded the claims of its employees at $10,000 or less per employee per year (the "Participant Cell"). Plaintiff RSC covered claims of the employees over $10,000 to $100,000 per year (the "Captive Coverage"). Additionally, if the self-funding provided by the Defendant was inadequate to cover all employee claims of $10,000 or less, then the Plaintiff RSC covered the overage.

The payments to be made by Defendant derived from "Aggregate Factors" applied to the enrolled employees and totaled each month. The Plan Participant ("Participant") paid the totaled Aggregate Factors, with 50% of the payment applied to self-fund the Participant Cell and 50% applied to the Captive Premium. A Participant also paid the fixed costs. [3]

[3] The premium to Gerber was a Fixed Cost, not part of the Claims Factors.

According to the terms of the 2015 PA, the "Aggregate Factors" are the projected claims each month for each enrolled employee, both for the Participation Cell (claims of $10,000 or less) and for the Captive Coverage (claims of more than $10,000 up to $100,000). The Aggregate Factors for the Defendant are listed on Schedules 1 of the 2015 PA as *Maximum Aggregate Factors* and *Expected Aggregate Factors*. The Maximum Aggregate Factors are the most the Defendant is required to pay for Claims Factors regardless of the claims of employees. The Expected Aggregate Factors are 80% of the Maximum Aggregate Factors. Because the terms of the 2015 PA provided that Defendant's payment was equally divided between the Participant Cell and the Captive Premium, the Defendant's obligation to self-insure the Participant Cell was capped at 50% of the Maximum Aggregate Factors applied monthly to the enrolled employees. The Plaintiff RSC paid the claims in the Participant Cell in excess of the Defendant's cap. *Participation Agreement Section 3*. At termination of the Participation Agreement, any funds remaining in the Participant Cell were to be refunded to the Defendant. *Participation Agreement Section 8(c).*

Undisputed Facts Concerning Payment

The undisputed facts are that the Defendant did not make its payments at the rate of the Maximum Aggregate Factors but at the lesser rate of the Expected Aggregate

Factors. It is undisputed that the difference between the maximum and expected rate of payments is the $72,496.87 the Plaintiffs seek to be awarded.

It is also undisputed that the claims under the 2015 PA at the Participant Cell level excluded the payments the Defendant paid into the Participant Cell, and the Captive covered the excess claims for the Participant Cell, paying $69,688.00.

Parties' Differing Constructions of 2015 PA

The Plaintiffs' construction of the 2015 PA is that the Defendant was required to make payments on the Participant Cell and the Captive Premium at the totaled Maximum Aggregate Factors.

From the outset the Defendant has noted that the parties in this case do not fit the more conventional Captive insurance program where the Captive is owned by the employer for whom the Participant Cell is maintained. *Defendant's Educational Narrative*, January 23, 2017, at 4. The Defendant also asserts that the 2015 PA is not particularly "reader-friendly." *Id*. at 4. The Defendant's construction of the 2015 PA is that it owed Plaintiff RSC more money only if the total payment of claims by the Participation Cell and the Captive Coverage exceeded the Expected Aggregate Factors, and that the Defendant would reimburse Plaintiff RSC only for the actual amount it paid in claims.

> Mr. Evers and Mr. Beeler reached an oral agreement, borne out by monthly invoices for Plan Contributions sent to Defendant on a monthly basis, that

> Evers would make contributions based on "expected" aggregate claims factors. Any obligation Evers would ever have to pay more than the expected aggregate claims factors was expressly conditioned upon the actual claims experience exceeding the liability predicted by expected aggregate claims factors. Evers Affidavit ¶ 11, Beeler Affidavit Exhibit J. The aggregate claims factors (whether "maximum" or "expected") are calculated based upon the probability of claims below $100,000.00 per Plan participant and do not specifically address the specific probability of claims aggregating claims of $10,000.00 per participant or less. Evers Affidavit ¶¶ 12, 13, and Participation Agreement Schedule 1. Accordingly, whether the agreed condition to payment above the expected aggregate claims factors cannot be determined by looking only at a shortfall in the Participant Cell. Evers Affidavit ¶¶ 12, 13. Rather, one must look at all claims below $100,000.00 to determine whether the liability predicted by the expected aggregate claims factors has been exceeded. Evers Affidavit ¶ 12. Plaintiffs have never claimed, much less demonstrated, that actual liability below the $100,000 per participant level exceeded that predicted by the expected aggregate claims factors. Evers Affidavit ¶ 14.

Defendant's Response at ¶ 46.

Applicable Law

Under Tennessee law, the Court must apply the following procedure in deciding the meaning and terms of a contract.

> Where the language of the contract is clear and unambiguous, its literal meaning controls the outcome of contract disputes. *Planters Gin Co.,* 78 S.W.3d at 890. If the contract is unambiguous, then the court may not look beyond its four corners to ascertain the parties' intention. *Rogers v. First Tennessee Bank National Ass'n,* 738 S.W.2d 635,637 (Tenn.Ct.App.1987). *Bokor v. Holder,* 722 S.W.2d 676, 679 (Tenn.Ct.App.1986). But, where a contractual provision is ambiguous, *i.e.,* susceptible to more than one reasonable interpretation, the parties' intent cannot be determined by a literal interpretation of the language. *Planters Gin Co.,* 78 S.W.3d at 890. In that situation, courts must resort to other rules of construction, and only if ambiguity remains after

> application of the pertinent rules does the legal meaning of the contract become a question of fact. *Id.* Then, the court must examine other evidence to ascertain that intention. Such evidence might include the negotiations leading up to the contract, the course of conduct the parties followed as they performed the contract, and any utterances of the parties that might shed light upon their intentions. *Pinson & Associates Ins. v. Kreal,* 800 S.W.2d 486, 487 (Tenn.Ct.App.1990), *Jackson v. Miller,* 776 S.W.2d 115, 118 (Tenn.Ct.App.1989), *Patterson v. Anderson Motor Co.*, 45 Tenn.App. 35, 319 S.W.2d 492, 497 (Tenn.Ct.App.1958).

Stephenson v. The Third Co., No. M2002-02082-COA-R3CV, 2004 WL 383317, at *4 (Tenn. Ct. App. Feb. 27, 2004). This is the procedure the Court has applied in deciding the Plaintiffs' summary judgment motion.

Upon applying this procedure, the Court concludes that (1) there is no ambiguity, (2) that the 2015 PA is not susceptible to two reasonable interpretations, and (3) Plaintiffs' interpretation is the only reasonable one. The Court arrives at this conclusion from the way the 2015 PA operates and Defendant's admissions about that operation explained as follows.

Beginning with admissions by the Defendant and the four corners of the 2015 PA, which includes the attachments, the Court finds that Schedules 1 and the Flow Chart attached to the 2015 PA show that the Defendant's funding of the claims factors is capped at the Maximum Aggregate Factors. Additionally, section 3 of the 2015 PA provides that the "Participant Cell shall pay all specific claims of the Participant up to $10,000 per member," and Defendant admits that it self-funds the Participant Cell, *Defendant's Response* at ¶ 13.

Further, section 3 of the 2015 PA provides the Participant Cell receives 50% of the aggregate claims factors, and Defendant admits this. *Defendant's Response* at ¶ 25. Defendant also admits that the same amount paid to the Participant Cell is also paid for the Captive Premium. *Defendant's Response* at ¶ 39. Evers admits that its obligation to self-fund the Participation Cell is capped at 50% of Maximum Aggregate Factors. *Defendant's Response* at ¶ 28. The Participation Agreement requires Evers to self-fund the Participation Cell and to fund the Captive Premium.

> WHEREAS, the Participant intends to pay the Administrator (i) a premium amount for insurance coverage to be provided by the Captive (the "Captive Premium"), (ii) a premium amount for specific and aggregate medical stop loss insurance coverage (the "Carrier Premium") to be purchased from Gerber Life Insurance Company (the "Carrier") (collectively, the Captive Premium and the Carrier Premium amounts being referred to herein as the "Premium"), and (iii) the self-funded aggregate claim factors (the "Participant's Claims Factors") to be paid to the Captive on behalf of the Participant Cell as set forth below, and the Administrator shall collect such amounts on behalf of the Carrier, the Captive and the Participant Cell;

Participation Agreement, 4th WHEREAS clause.

These payment obligations are elaborated after the *NOW, THEREFORE* clause of the 2015 PA. It provides the amount to be paid for the Participation Cell shall "constitute fifty percent (50%) of the total of the Participant's Claims Factors and the Captive Premium. . . ." *Participation Agreement, Section 3*. The same amount is also to be paid for the Captive Premium. The 2015 PA provides the amount to be paid to the Captive for the Captive Premium shall "constitute fifty percent (50%) of the total of the Participant's Claims Factors and the Captive Premium. . . ." *Participation Agreement, Section 4*.

As just established, Evers was obligated to self-fund the Participant Cell at 50% of the totaled Aggregate Factors and to pay the Captive Premium at 50% of the totaled Aggregate Factors. Evers' obligation was capped at the total Maximum Aggregate Factors. Because Evers' payments to its Participate Cell were insufficient to fund the claims of $10,000 or less, Evers was required to fund the Participant Cell and the Captive Premium at the totaled Maximum Aggregate Factors.

Schedules 1 list Annual Attachment Point under Expected Claims Information and Annual Attachment Point under Maximum Claims Information. The Annual Attachment Points reflect the projected Aggregate Factors for the year based upon the projected enrolled employees and types of coverage. The Annual Attachment Points under Expected Claims Information uses Expected Aggregate Factors for its calculation, and the Annual Attachment Points under Maximum Claims Information uses Maximum Aggregate Factors for its calculation.

At the bottom of Schedules 1 are Total Expected Plan Cost and Total Maximum Plan Cost. This is the projection that the Participant will be required to pay for the Plan. The difference between the calculation of the two is: Total Expected Plan Cost uses the Expected Annual Attachment Point for claims factors, and the Total Maximum Plan Cost uses the Maximum Annual Attachment Point for claims factors. Total Maximum Plan Cost is the projection of the most that the Participant will be required to pay for the Plan.

This is further illustrated in the Flow Chart which is the last page of the Participation Agreement. The Flow Chart reflects payment to the Participation Cell of $254,416.44 for coverage up to $10,000 per member, and payment to the Captive of $254,416.44 for coverage over $10,000 per member. The total of these two payments is the Maximum Aggregate Information, Annual Attachment Point for the $2000 Deductible Plan plus the Maximum Aggregate Information, Annual Attachment Point for the $5000 Deductible Plan, as they appear on the two Schedules 1 attached to the 2015 PA.

If the 50% of the totaled Maximum Aggregate Factors that is to be paid to the Participant Cell is insufficient to cover the claims of $10,000 or less, then the overage is paid by RSC.

> Notwithstanding the foregoing, in the event that such specific claims exceed the Participant's Claims Factors paid to the Participant Cell, the Captive shall continue to pay such claims, subject to the aggregate stop loss limit set forth in Section 5 below. The coverage set forth in this Section 3 shall be referred to herein as the "Participant Cell Coverage."

Participation Agreement, Section 3, in part.

All of these provisions are consistent with and support Plaintiffs' construction that the Defendant is to fund the Participant Cell to pay its claims with the 50% of the claims factors applied to the Participant Cell up to the capped Maximum Aggregate Factors. In contrast the foregoing text does not support that the Defendant was to make its payments at the lesser Expected Aggregate Factors.

Additionally detracting from Defendant's construction that payment by the Defendant of more than the Expected Aggregate Claims Factors was conditioned upon the actual claims experience below the $100,000 per participant level (Captive Coverage) exceeding the liability predicted by Expected Aggregate Claim Factors is that that construction would require a reference to the Defendant reimbursing Plaintiff RSC for the Captive Coverage. There is no such reference in the 2015 PA and attachments. Further, such a construction is inconsistent with the *Defendant's Response* at ¶ 28, that the 2015 PA requires the Defendant to fully fund the Participant Cell up to 50% of the Maximum Aggregate Factors with the other 50% being paid to the Captive Coverage.

In sum, the Plaintiffs' construction of the 2015 PA is reasonably derived from the literal provisions of the 2015 PA and is consistent with contract provisions and illustrations (Flow Chart) the operation of the 2015 PA. The Defendant's construction is not reasonably derived nor consistent with the 2015 PA text.

Under these circumstances, the Court may not look beyond the four corners of the contract to ascertain the parties' intentions, and the Plaintiffs' construction derived from the literal meaning of the 2015 PA controls. On this basis, Plaintiffs' Motion for Summary Judgment is granted.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

cc by U.S. Mail, email, or efiling as applicable to:

William B. Hubbard
Robyn E. Smith
Daniel H. Puryear
Thomas T. Pennington
Bynum Tudor III