

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

<b>NATIONAL DIAGNOSTIC IMAGING, LLC</b>	)	
	)	<b>CASE NO. CV 11 770896</b>
	)	
<b>Plaintiff,</b>	)	<b>JUDGE JOHN P. O'DONNELL</b>
	)	
<b>vs.</b>	)	
	)	
<b>OPEN AIR IMAGING, INC.</b>	)	<b><u>JOURNAL ENTRY</u></b>
	)	
<b>Defendant.</b>	)	

*John P. O'Donnell, J.:*

**STATEMENT OF THE CASE**

The plaintiff filed its complaint for breach of contract on December 8, 2011. On April 24, 2012, the defendant answered and asserted a breach of contract counterclaim. A bench trial was held on October 3, 2012, and this entry follows.

**STATEMENT OF THE FACTS**

Only two witnesses testified at the trial: David Berns, M.D., the president and chief executive officer of plaintiff National Diagnostic Imaging, LLC, and Laurie Joseph, D.V.M., the president and owner of defendant Open Air Imaging, Inc. Plaintiff's exhibits A, B, B-2 through B-10, C, D, E, and G, and defendant's exhibits 1 through 4, 6 and 7 were admitted into evidence.

National Diagnostic Imaging, LLC, is a teleradiology company. NDI employs radiologists who read films transmitted to NDI's office over the internet. In addition to being the president of NDI, Berns also works as a radiologist for the company. On July 11, 2005,

NDI and Open Air entered into a contract captioned as a “professional radiology services agreement.”<sup>1</sup> By the contract, NDI agreed to read and interpret radiological images created by Open Air. NDI specifically agreed to provide its services “in a competent, efficient and satisfactory manner, consistent with approved methods and practices, and in accordance with all applicable laws and regulations and professional standards.”<sup>2</sup>

The evidence showed that after the parties entered into the contract, Open Air would create images by taking X-rays, mammograms, MRI scans and other similar studies at its facility in Uniontown, Pennsylvania. The studies were transmitted by computer to the plaintiff’s office in Beachwood. NDI radiologists then interpreted the images and dictated reports of their findings using a proprietary system called PACS. The radiologists’ reports typically had four sections: indications, procedures, findings, and impression.

The PACS system used voice recognition software to directly transcribe the radiologists’ dictation without the use of a human transcriptionist. The radiologists would then electronically sign their reports and send them back over the internet to Open Air, where the reports were printed by Open Air and sent to the patients’ referring physicians. Under the contract, NDI received a flat fee depending on the kind of study interpreted.

The parties proceeded in this fashion until Open Air terminated the contract effective July 1, 2009. By then, NDI had produced thousands of reports for Open Air. Joseph estimated the total number of studies as around 10,000 while Berns testified it was more likely 17,000 to 20,000.

Open Air noticed repeated deficiencies in the reports from the beginning of the companies’ relationship in 2005. None of these deficiencies ever involved medical negligence,

---

<sup>1</sup> Plaintiff’s exhibit A and defendant’s exhibit 1.

<sup>2</sup> *Id.*, at page 1, ¶2(a).

*i.e.* misreading an image and misdiagnosing a medical condition. Instead, these errors usually took the form of typographical, spelling or other transcription errors that rendered parts of the reports unintelligible and suggested NDI did not proofread them before sending them to Open Air. Some reports inaccurately summarized patient indications or misnamed the exact body part that was the subject of the study. For example, Joseph described a cervical spine MRI that the NDI radiologist referred to in a report as showing lumbar vertebrae. As another example, on one report interpreting a pelvic ultrasound the radiologist referred in the report to the patient's left elbow.

Because these errors were so frequent, Open Air was never able to forward NDI's reports directly to the referring physicians without scrupulously proofreading them. Joseph estimated that during the life of the contract, about 1,200 deficient reports required Open Air's time and attention to get corrections from the radiologist before they could be sent to the physician ordering the study.

For NDI's part, Berns acknowledged that some reports needed to be corrected after changes were requested by Open Air, but he denied that these errors made the reports unprofessional because the radiologists' ultimate interpretations were always comprehensible to the referring physicians even with the errors.

Despite the errors, Open Air paid NDI for every invoice from July, 2005, through November 1, 2008.

After November 1, 2008, and through the conclusion of the contract in July, 2009, NDI produced and transmitted to Open Air approximately 2,000 reports with a total contract value of \$137,890. Joseph admits that those reports were completed and acknowledges that, if they

were done correctly, the amount claimed as owed is accurate. However, none of those invoices has been paid.

While Open Air concedes that NDI is entitled to some payment for those reports, it argues that the payment should be offset by the time and effort that Open Air spent ensuring that NDI's mistaken reports were corrected before being sent to the referring physicians. Joseph estimated the total amount of expense for that time and effort at \$77,259. Yet Joseph concedes that a large portion of that estimate includes time and effort spent rectifying reports prior to November 1, 2008, and for which Open Air has already paid NDI in full.

### **LAW AND ANALYSIS**

The plaintiff claims the defendant breached the contract by failing to pay for \$137,890 worth of radiology reports.

To prove a breach of contract, a plaintiff must demonstrate by a preponderance of the evidence that a contract existed, the plaintiff fulfilled its obligations, the defendant failed to fulfill its obligations, and damages resulted from the defendant's breach. *Kirkwood v. FSD Dev. Corp.*, 8th Dist. No. 97371, 2012-Ohio-2922, ¶13.

Here, the parties acknowledge the existence of the contract. The defendant also concedes that the amount of claimed damages -- \$137,890 -- is correct if the plaintiff fully performed. Since nothing has been paid, it is also beyond question that the defendant has not performed.

That leaves the point of contention in this case: whether the plaintiff properly performed its obligations under the contract. Ordinarily, only the plaintiff would bear a burden of proof on that issue. However, for its counterclaim Open Air has asserted that the because of the "plaintiff's failure to perform as agreed, [Open Air] incurred additional labor and staff

expenses”<sup>3</sup> for which NDI is responsible as damages. By making that counterclaim, Open Air has undertaken a burden of proving that NDI failed to perform, but NDI still has the burden of proving performance and any evidence produced by Open Air to support its burden on the counterclaim can be taken into account in determining whether NDI has met its own burden to prove performance.

As to the scope of NDI’s performance, the contract requires “the dictation and transcription of a report reflecting” the radiologist’s interpretation.<sup>4</sup> As noted above, the contract also requires that NDI’s services be “competent, efficient and satisfactory.” The contract is no more definite than that and the court does not read it as requiring that the final reports be completely free of typographical or similar errors. Instead, the difference between a satisfactory report and an unsatisfactory report can be determined only by reviewing the particular errors on any given report. Mistakes that render part of a report unintelligible do not result in a product that falls short of what the plaintiff promised to deliver when the radiologist’s ultimate interpretation can be readily inferred from the intelligible components of the report.

In support of its defense and counterclaim, Open Air produced 18 reports made by NDI between November 4, 2008, and March 24, 2009. These reports were admitted into evidence as part of defendant’s exhibit four and are Bates-stamped in the bottom right corner as OPEN 0001 through OPEN 0025.<sup>5</sup> These are the only reports in exhibit four for which NDI is seeking payment in this lawsuit. Open Air has paid NDI for the rest of the defective reports that are part of exhibit four.

---

<sup>3</sup> Amended answer and counterclaim of defendant, filed April 24, 2012, p. 2, ¶15.

<sup>4</sup> Contract, *supra.*, p. 9, definition of professional services.

<sup>5</sup> With the exception of OPEN 0002, 0005, and 0020, each of which are the second page of three different reports.

An inspection of these 18 reports – a tiny percentage of the approximately 1,200 reports for which NDI seeks payment – shows the following:

<u>Patient #</u>	<u>Date</u>	<u>Error</u>
3032	11/04/2008	“discs” instead of “disc”
5867	11/06/2008	“disc and her” instead of “disc or”
5848	11/07/2008	“and” instead of “at”
5849	11/07/2008	“distal to facet” instead of “distal facet”
5396	11/07/2008	“discogenic ration” instead of “disc degeneration”
5901	11/13/2008	“molding of is sac” instead of “molding of the sac”
5914	11/17/2008	“contrast one” instead of “contrast T1”
5976	11/26/2008	“of this herniation” instead of “of disc herniation”
4164	11/26/2008	“and a headaches” instead of “and headaches” and “one” instead of “T1”
930 US	12/02/2008	The impression section is ambiguous about whether it was the current or past study that did not show the left ovary
5639	12/03/2008	“and/or gradient” should be deleted, and “discogenic rate and” should read “disc degeneration”
1141 US	12/23/2008	“cyst” instead of “cysts”
3846	01/16/2009	“at L5-S1. There is a disk. Throat with facet hypertrophy.”
1347 US	03/24/2009	“heel pain she and anatomy” in the indications section of a fetal ultrasound
1349 US	03/24/2009	“a” for “an” <sup>6</sup>

Since the court, as a finder of fact, can not only easily perceive the errors but also what each report was intended to say, the reports are intelligible despite the errors and meet the plaintiff’s obligation under the contract to produce a satisfactory, not perfect, report. The

---

<sup>6</sup> The court cannot even guess at the claimed errors on the reports at OPEN 0006 and 0024.

defendant has, therefore, neither sufficiently contradicted the plaintiff's proof of performance nor met its counterclaim burden to prove that the plaintiff failed to perform as required by the contract with respect to these, or any other, reports for the November 1, 2008 through July 1, 2009, billing period.

### CONCLUSION

Based upon the evidence at trial, the court finds in favor of the plaintiff on its complaint against the defendant and in favor of the plaintiff on the defendant's counterclaim against it. Judgment is hereby entered for plaintiff National Diagnostic Imaging, LLC, and against the defendant Open Air Imaging, Inc., in the total amount of \$137,890.00, with interest and court costs.

As to interest, the court finds that the amount of contract interest accruing to the end of trial is in the total of \$19,262.84, and a separate award is made in that amount. Interest at the statutory rate is awarded on the principal balance of \$137,890.00 beginning October 12, 2012.

The plaintiff also seeks an award of its attorney's fees in prosecuting this lawsuit. Ohio courts follow the American rule of litigation, by which a party cannot ordinarily recover as damages the expenses of litigation, including attorney's fees, other than the usual court costs. *Theodorou Real Estate Ventures, L.L.C. v. Rogers*, 8<sup>th</sup> Dist. No. 97883, 2012-Ohio-4282, ¶19. However, one exception to the general rule is where there is an enforceable contract that specifically provides for the non-prevailing party to pay the prevailing party's attorney's fees. *Weisman v. Blaushild*, 8<sup>th</sup> Dist. No. 93928, 2010-Ohio-3199, ¶10. A review of the contract here reveals two provisions that might justify such an award. First, section 9(b) provides that Open Air will indemnify NDI for "reasonable attorney's fees arising from or in connection with

any act or omission by Open Air under or in connection with this agreement.”<sup>7</sup> Second, section 12(d) provides that “the party seeking enforcement shall be entitled to an award of all costs, fees and expenses, including attorneys fees, to be paid by the party against whom enforcement is ordered.”<sup>8</sup> These provisions do not give NDI the right to recover its fees in this action. The first is in the context of a mutual indemnification provision, whereby Open Air agrees to indemnify NDI if NDI is subject to a third party’s claim for damages caused by Open Air. The second is in the context of an arbitration provision and, by its terms, applies only to expenses and fees in connection with an arbitration, not a lawsuit. Therefore, the plaintiff’s claim for attorney’s fees is denied.

**IT IS SO ORDERED:**

\_\_\_\_\_  
Judge John P. O’Donnell

Date: \_\_\_\_\_

<sup>7</sup> Contract, supra, p. 5, ¶9(b).

<sup>8</sup> *Id.*, p. 6, ¶12(d).

**SERVICE**

A copy of this journal entry was sent by email, this 31st day of October, 2012, to the following:

Paul M. Greenberger, Esq.  
[pgreenberger@ernsockner.com](mailto:pgreenberger@ernsockner.com)  
*Attorney for Plaintiff*

Gregory R. Glick, Esq.  
[glickllc@sbcglobal.net](mailto:glickllc@sbcglobal.net)  
*Attorney for Defendant*

---

Judge John P. O'Donnell