

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

NUTRITION MANAGEMENT SERVICE COMPANY : December Term, 2010
Plaintiff : Case No. 02597

v.

NEWCOURTLAND, INC.

And

NEWCOURTLAND ELDER SERVICES

Defendants

DOCKETED

DEC 20 2013

C. HART
CIVIL ADMINISTRATION

Commerce Program

Nutrition Management Services Company Vs New-ORDER



ORDER

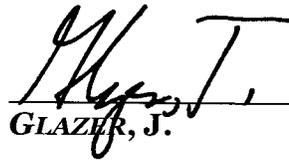
AND NOW, this 20th day of December, 2013, after a trial held on 5-6 August 2013, upon proposed findings-of-fact and conclusions-of-law submitted by the parties, and consistent with this court's Findings-of-Fact and Conclusions-of-Law issued simultaneously therewith, it is **ORDERED** that **JUDGMENT** is entered in favor of plaintiff and against defendants in the following amounts:

1. **\$55,418.60** representing the amount owed by defendants for their failure to pay variable cost invoices nos. 51422 and 52259;
2. **\$38,750.15** representing the amount owed by defendants for their failure to pay adjustment cost invoices nos. 50249, 52119, 52139 and 52260;
3. **\$4,134.31** representing the amount owed by defendants for their failure to pay adjustment cost invoice no. 48916;
4. **\$22,319.31** representing the amount owed by defendants for their failure to pay the balance on twenty (20) adjustment cost invoices as identified at Trial Exhibit

P-23.

The parties shall file no later than thirty (30) days from entry of this Order their respective calculations of interest in accordance with this court's instructions contained in paragraph 45 of its Findings-of-Fact and Conclusions-of-Law.

BY THE COURT,



GLAZER, J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION—CIVIL

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G. HART
CIVIL ADMINISTRATION

NUTRITION MANAGEMENT SERVICE COMPANY	:	December Term, 2010
	:	
<i>Plaintiff</i>	:	Case No. 02597
	:	
v.	:	
	:	
NEWCOURTLAND, INC.	:	
	:	
And	:	Commerce Program
	:	
NEWCOURTLAND ELDER SERVICES	:	
	:	
<i>Defendants</i>	:	

FINDINGS-OF-FACT

1. Defendants New Courtland, Inc. and New Courtland Elder Services (“New Courtland” or “Defendants”), are Pennsylvania entities engaged in the management of skilled nursing facilities.
2. Plaintiff Nutrition Management Services Company (“Nutrition Management” or “Plaintiff”), provides contract food and services to various institutions, including skilled nursing facilities in Pennsylvania.
3. On January 1, 2000, Nutrition Management and New Courtland entered into four identical Food Service Provider Agreements (the “Contracts”), whereby Nutrition Management agreed to operate the food service departments at four nursing facilities owned or managed by New Courtland. The four nursing facilities were respectively named Cheltenham York Road Nursing & Rehabilitation Center (“CYR”), Cliveden Convalescent Center (“Cliveden”), Maplewood Manor

("Maplewood"), and Tucker House ("Tucker House").¹

4. Each of the four Contracts contained a section titled "Exhibit A." Pursuant to each Exhibit A—

The term of this food Service Agreement shall begin on June 1, 2000. The term will be automatically extended for additional one year periods thereafter unless either party shall provide written notice of its desire to terminate....

This Agreement may be terminated by Provider [Nutrition Management] or Owner [New Courtland] at any time with sixty (60) days written notice of such termination....

The parties agree that no later than ninety (90) days prior to the end of the then current term they will discuss the financial and operating parameters for the following year.²

5. In addition to an Exhibit A, each of the four Contracts contained a section titled "Exhibit B." Each Exhibit B stated:

In return for the services to be rendered by Provider [Nutrition Management], Owner [New Courtland] shall pay to Provider the rate per patient day and monthly fixed amount set forth below. Patient days shall be measured on a monthly basis and shall be derived from the midnight census sheets maintained by Owner. **These rates shall be subject to an annual adjustment as shall be mutually agreed upon by Provider and Owner.**³

6. Pursuant to the Contracts, Nutrition Management was required to issue three types of invoices: fixed costs, variable costs and adjustment costs invoices.
7. The invoiced fixed costs and variable costs were always calculated on the basis of an agreed-upon rate, and were payable within thirty (30) days from the date of invoicing.⁴ Failure by New Courtland to pay the fixed cost invoices within forty-five (45) days from the billing date resulted in an additional charge to New

¹ Food and Services Provider Agreements, Trial Exhibits P1–P4.

² Id. Exhibits A to the Food Service Provider Agreements (emphasis supplied).

³ Id. Exhibits B to the Food Service Provider Agreements (emphasis supplied).

⁴ Id. at p. 2.

Courtland of 1.25% per month on the unpaid balance.

8. Unlike the fixed and variable costs invoices, the adjusted costs invoices were not based on an agreed-upon rate. Instead, these adjusted cost invoices had to “be pre-approved by the Administrator, a member of the Board of Directors of the Owner, President and Chief Financial Officer of New Courtland, Inc., in writing.”⁵
9. The rate terms for the first contract-year, from June 1, 2000 through May 31, 2001, were negotiated by the parties and were included in the agreements under Exhibit B of each Contract.
10. During the first contract-year, the parties tried to negotiate new terms for the upcoming second contract-year. However, no agreement was reached.⁶
11. Since no agreement was reached, Nutrition Management invoiced New Courtland during the second contract-year, from June 1, 2001 through May 31, 2002, with the rates agreed-upon at the beginning of the first contract-year.
12. During the second contract-year, the parties successfully negotiated a rate increase for the upcoming third contract-year. In addition to rate adjustments, the parties agreed that the third contract year, and all subsequent contract-years, would begin to run on July 1 of each year and end on June 30 of the following year.⁷
13. Throughout the third contract year, from July 1, 2002 through June 30, 2003, Nutrition Management submitted invoices consistent with the rate increases which had been agreed-upon by the parties during the second contract-year.
14. Near the end to the third contract-year, the parties discussed rate adjustments for the fourth contract-year, but failed to reach any agreement.

⁵ *Id.*, Exhibits B to the Food Service Provider Agreements, pp. 12–13.

⁶ Testimony of Joseph Roberts, CEO of Nutrition Management 08/05/2013, Trial Notes of Testimony, p 108:9–19.

⁷ First Addenda to Contracts, Exhibit P–7.

15. Since no agreement had been reached, Nutrition Management submitted throughout the fourth contract-year, from July 1, 2003 through June 30, 2004, invoices reflecting the rates last agreed-upon by the parties.
16. Near the end of the fourth contract year, the parties discussed rate adjustments for the fifth contract-year, but failed to reach any agreement.
17. During the first months of the fifth contract-year, Nutrition Management submitted invoices reflecting the adjustments agreed-upon by the parties in the second contract-year. However, in March 2005 of the fifth contract-year, the parties reached an agreement which retroactively adjusted the rates for that year, beginning July 1, 2004 through June 30, 2005.⁸
18. During the fifth contract year, the parties discussed rate adjustments for the upcoming sixth contract-year, from July 1, 2005 through June 30, 2006. No agreement was reached.
19. However in July 2005, after commencement of the sixth contract-year, the parties did agree to adjust the rates for that ongoing year. The invoices subsequently issued by Nutrition Management for the sixth contract-year reflected this agreement.⁹
20. Throughout the sixth contract-year, the parties discussed adjusting the rates for the upcoming seventh contract-year, from July 1, 2006 through June 30, 2007. Specifically, Nutrition Management proposed a rate increase of 9.69% and New Courtland rejected and counter-offered a rate increase of 3.42%.¹⁰ The parties

⁸ Testimony of Joseph Roberts, CEO of Nutrition Management dated 08/05/2013, Trial Notes of Testimony, p. 115—116.

⁹ *Id.* pp. 116:18—117:11.

¹⁰ Trial Exhibit P—247; Testimony of Joseph Roberts, CEO of Nutrition Management, dated 08/05/2013, Trial Notes of testimony pp. 121:20—122:23.

failed to agree on any rate.

21. Beginning in March 2007 of the seventh contract-year, Nutrition Management unilaterally adjusted its rates. The new rates invoiced by Nutrition Management to the CYR, Cliveden, Maplewood and Tucker House facilities were nearly identical to the proposed rates of 9.96% which New Courtland had previously rejected.
22. New Courtland disregarded the unilaterally adjusted invoices for the CYR, Cliveden and Maplewood facilities, and continued to pay Nutrition Management based on the old rates which had been agreed-upon by the parties in July 2005 of the sixth contract-year, from July 1, 2005 through June 30, 2006. However, New Courtland did pay all the unilaterally increased invoices under the Tucker House Contract.
23. On August 1, 2007 of the seventh contract-year, New Courtland terminated the Maplewood Contract.¹¹
24. There was no agreement adjusting the rates for the eighth contract-year, from July 1, 2007 through June 30, 2008. During the eighth contract year, Nutrition Management continued to issue invoices bearing the unilaterally increased rates, whereas New Courtland continued to disregard the increased rates as to the CYR and Cliveden. However, New Courtland continued to fully pay the Tucker House invoices bearing Nutrition Management's unilaterally increased rates.
25. During the eighth contract year, the parties continued to discuss rate adjustments for the upcoming ninth contract-year, from July 1, 2008 through June 30, 2009. However, the parties failed to agree on any new rate.
26. On October 1, 2008 of the ninth contract-year, New Courtland terminated the

¹¹ Termination letter, Trial Exhibit D-1.

Cliveden Contract.¹²

27. During the ninth contract-year, Nutrition Management continued to issue invoices bearing its unilaterally increased rates, while New Courtland continued to pay consistently with the rates last agreed-upon in July 2005 of the sixth contract-year. New Courtland continued to pay the Tucker House invoices at their full face value throughout the same period.
28. There was no agreement to adjust the rates for the tenth contract-year, from July 1, 2009 through June 30, 2010. During that period, Nutrition Management continued to issue invoices bearing unilaterally increased rates, while New Courtland continued to pay the invoices based on the rates which had last been agreed-upon in July 2005 of the sixth contract year, with the exception of the Tucker House invoices which New Courtland continued to pay at full face value.
29. On June 21, 2012 of the tenth contract-year, New Courtland terminated the Tucker House Contract.¹³
30. On August 23, 2010 of the tenth contract-year, New Courtland terminated the CYR contract.¹⁴
31. On December 22, 2010, Nutrition Management filed a complaint against New Courtland.
32. The complaint asserts that New Courtland breached the four contracts by failing to pay the invoices containing Nutrition Management's unilaterally increased rates. Essentially, the complaint asserts that New Courtland breached the four Contracts by "paying less than the total amount[s] due each month" as invoiced by Nutrition

¹² Termination letter, Trial Exhibit D-1.

¹³ Termination letter, Trial Exhibit D-1.

¹⁴ Termination letter, Trial Exhibit D-1.

Management.¹⁵

33. The complaint also asserts against New Courtland four alternative claims based on unjust enrichment.
34. Trial in this action was held on August 5-6, 2013.
35. In the course of trial, the litigants stipulated that New Courtland fully paid on behalf of the Tucker House facility all the invoices containing Nutrition Management's unilaterally increased rates.¹⁶ A representative of New Courtland testified as follows regarding these specific invoices:

Q. Do you recall ever having an agreement as to a price adjustment with Nutrition Management after July of 2005?

A. No.

* * *

Q. Prior to receiving [Nutrition Management's unilaterally adjusted invoices] were you aware that Mr. Roberts [of Nutrition Management] was going to do that?

A. No.

* * *

Q. How did you respond when the 4 facilities started receiving invoices in March of 2007 at the rates you hadn't agreed to?

A. I responded and instructed the accounts payable staff to continue to pay the rates, the last rates that we had agreed upon.

Q. Did the accounts payable staff for each of the four buildings continue to pay the rates according to the 2005/2006 rates?

A. For the most part.

Q. Who didn't?

A. The accounts payable person a Tucker House.

Q. Did you know why not?

¹⁵ Complaint, ¶¶ 31, 53, 72, 91.

¹⁶ Stipulations, Trial Notes of Testimony, pp. 30–31.

- A. I don't know why not.
- Q. At what point did you discover the accounts payable person responsible for Tucker House hadn't followed your instruction?
- A. At our audit, our annual audit, when we started auditing the invoices....¹⁷

36. At trial, Nutrition Management presented credible evidence that New Courtland had failed to pay on behalf of the CYR facility invoice No. 51422, dated April 30, 2010, and invoice no.52259, dated July 31, 2010. Both invoices were billed by Nutrition Management as variable cost invoices.¹⁸ Nutrition Management had billed such variable cost invoices at unilaterally adjusted rates for a total amount of \$60,388.50. These invoices would have amounted to \$55,418.60 if Nutrition Management had billed them consistently with the rates last agreed-upon by the parties in July 2005 of the sixth contract-year.¹⁹ New Courtland countered the testimony of Nutrition Management with evidence to support that it had already paid invoice No. 51422 by means of a lump-sum wire transfer.²⁰ However, the court did not find New Courtland's evidence credible because New Courtland did not clearly demonstrate which portion, if any, of its lump-sum wire transfer had been allocated to the payment of invoice No. 51422. As to invoice No. 52259, New Courtland concedes that it was never paid.²¹ Nutrition Management is entitled to collect payment on the above mentioned variable cost invoices for a total amount of \$55,418.60 which reflects the rates last agreed-upon by the parties in July of the sixth contract-year.

¹⁷ Testimony of Donald Levesque, New Courtland's vice president of finance, Notes of Testimony dated 8/6/2013, pp.24–26:11.

¹⁸ Exhibit P–22.

¹⁹ *Id.*

²⁰ Trial Exhibit D–17.

²¹ Proposed Findings-of-Fact and Conclusions-of-Law of defendant New Courtland, ¶ 84.

37. At trial, a representative of Nutrition Management testified that New Courtland had failed to pay five adjustment cost invoices, four on behalf of the CYR facility, and one on behalf of the Cliveden facility.²² These adjustment cost invoices were issued to collect payments for catering and doctor-requested dietary supplements pursuant to Exhibits B of each of the four Contracts. Nutrition Management credibly testified that the adjusted cost invoices were issued to recover expenses for provisioning nurses' meetings with refreshments such as coffee and cookies, feeding nursing-home volunteers with a lunch of sandwiches and soup, and providing underweight patients with doctor-ordered food supplements.²³ Pursuant to Exhibits B to each Contract, these adjustment cost invoices were not based on an agreed-upon rate; rather, they had to be "pre-approved by the Administrator, a member of the Board of Directors of [New Courtland], President and Chief Financial Officer of New Courtland ... in writing."²⁴ Notwithstanding this strict pre-approval requirement, Nutrition Management credibly testified that the adjustment cost invoices were always approved on behalf of New Courtland by a single administrator. Challenging this testimony, New Courtland asserted in its proposed findings-of-fact and conclusions-of-law that Nutrition Management had failed to introduce evidence showing proper pre-approval of the above mentioned adjusted cost invoices.²⁵ However, this court finds it realistic and credible that provisioning staff-meetings with coffee, cookies, sandwiches and soup, and

²² Testimony of Joseph Mazzoni, operation controller of Nutrition Management; Notes of testimony dated 8/5/2013, p. 149:6–10; Trial Exhibit P–22.

²³ Testimonies of Joseph Roberts, chief executive officer of Nutrition Management and Kathleen A. Hill, president and chief operating officer of Nutrition Management, Notes of Testimony dated 8/5/2013, pp. 40–41, 163.

²⁴ Food Service Provider Agreements, Exhibits P1–P4, pp. 13.

²⁵ Proposed Findings-of-Fact and Conclusions-of-law of defendant New Courtland, ¶¶ 75, 76.

providing underweight patients with dietary supplements, was realistically accomplished by obtaining pre-approval from a single administrator of New Courtland rather than by involving the additional efforts of “a member of the Board of Directors [and] President and Chief Financial Officer” thereof.

38. At trial, Nutrition Management credibly testified that New Courtland underpaid a total of twenty other adjustment cost invoices for a total balance of \$22,319.31, exclusive of interest.²⁶ Nutrition Management credibly testified that it provided the necessary justification for the amounts billed through these twenty adjustment cost invoices, whereas New Courtland’s rebuttal testimony as to why it did not pay the invoices was not credible.²⁷
39. After the end of trial, the parties respectively filed proposed Findings-of-Fact and Conclusions-of-Law.

CONCLUSIONS-OF-LAW

40. “To successfully maintain a cause of action for breach of contract the plaintiff must establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages.”²⁸ Modification of a contract “must be agreed to by both parties.”²⁹ “The burden of proving modification of a contract is carried by the party asserting the modification.”³⁰ In this case, Nutrition Management has failed to demonstrate that New Courtland and Nutrition Management had agreed to the increased rates contained in the

²⁶ Testimony of Joseph Mazzoni, operation controller of Nutrition Management, Notes of Testimony dated 8/5/2013, p. 149:23–24; Trial Exhibit P–23.

²⁷ Testimony of Kathleen A. Hill, chief financial officer of Nutrition Management, Notes of Testimony dated 8/5/2013, pp. 158:13–166:5. See also Testimony of Donald Levesque, New Courtland’s vice president of finance, Notes of Testimony dated 8/6/2013, pp. 50:19–56:11.

²⁸ Hart v. Arnold, 2005 Pa. Super. 328, 884 A.2d 316, 332 (Pa. Super. 2005).

²⁹ Trombetta v. Raymond James Fin. Servs., Inc., 2006 Pa. Super. 229, 907 A.2d 550, 559 (Pa. Super. 2006).

³⁰ Id. at 558.

invoices issued by Nutrition Management under the CYR, Cliveden and Maplewood Contracts. There was no modification because New Courtland clearly rejected the increased rates and continued to pay consistently with the rates which the parties had last agreed-upon in July 2005 of the sixth contract-year.

41. “Modification of a contract may be demonstrated by words, conduct, or both.”³¹ In this case, New Courtland rejected the increased rates under the CYR, Cliveden and Maplewood Contracts, but fully paid the Tucker House invoices containing Nutrition Management’s unilaterally increased rates. At trial, a representative of New Courtland testified that he had instructed his “accounts payable person at Tucker House” to “continue to pay ... the last rates that [had] been agreed upon.”³² However, when asked why the Tucker House facility failed to follow such instructions, the representative replied “I don’t know....”³³ Indeed, the testimony of this representative shows that Tucker House continued to pay the unilaterally increased rates even after New Courtland conducted an annual audit disclosing the alleged overpayments. Thus New Courtland failed to convince this court that it had rejected the increased rates contained in the Tucker House invoices; consequently, Nutrition Management properly retained the full amounts billed to New Courtland under the Tucker House Contract.
42. New Courtland failed to pay Nutrition Management invoices nos. 51422 and 52259 which represented variable cost invoices billed for services provided under the CYR Contract. These invoices amounted to a total of \$55,418.60, an amount consistent with the rates agreed-upon by the parties in July 2005 of the sixth contract-year.

³¹ Id.

³² Testimony of Donald Levesque, vice president of finance of New Courtland, Notes of Testimony dated 8/6/2013, p. 25:1820.

³³ Id.

Nutrition Management is entitled to collect from New Courtland the amount of \$55,418.60 plus interest.

43. New Courtland failed to pay four adjustment cost invoices for services provided by Nutrition Management under the CYR Contract, and one adjustment cost invoice for services provided by Nutrition Management under the Cliveden Contract.³⁴ Nutrition Management credibly testified that the costs for these invoices were approved by New Courtland; therefore, Nutrition Management is entitled to collect payment on such invoices in the amount of \$42,884.46 plus interest.
44. New Courtland underpaid twenty (20) adjustment cost invoices issued by Nutrition Management for services provided under the CYR, Cliveden, Tucker House and Maplewood Contracts.³⁵ Nutrition Management credibly testified that the costs for these invoices were approved by New Courtland; therefore, Nutrition Management is entitled to collect the balance of such underpaid invoices in the amount of \$22,319.31 plus interest.

45. In Pennsylvania,

[o]ur courts have generally regarded the award of prejudgment interest as not only a legal right, but also as an equitable remedy awarded to an injured party at the discretion of the trial court.³⁶

If the breach [of contract] consists of a failure to pay a definite sum in money or to render a performance with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due....³⁷

³⁴ Exhibit P—22: unpaid CYR adjustment cost invoices at 2005—2006 rates, nos. 50249, 52119, 52139 and 52260; unpaid Cliveden adjustment cost invoice at 2005—2006 rates, no. 48916.

³⁵ Underpaid adjustment cost invoices, Exhibit P—23.

³⁶ Melley v. Pioneer Bank, N.A., 2003 Pa. Super 389, 834 A.2d 1191, 1204 (Pa. Super. 2003).

³⁷ Cresci Const. Servs., Inc. v. Martin, 2013 Pa. Super. 66, 64 A.3d 254, 259 (Pa. Super. 2013).

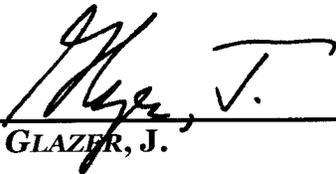
Contract cases in general, where damages are known or ... ascertainable through mathematical calculations, are limited to a 6% rate of simple interest.³⁸

In this case, New Courtland has failed to remit to Nutrition Management:

- two (2) variable cost invoices under the CYR Contract for a total amount of \$55,418.60;
- four (4) adjustment cost invoices under the CYR Contract for a total amount of \$38,750.15;
- one (1) adjustment cost invoice under the Cliveden Contract in the amount of \$4,134.31;
- the balance on twenty (20) adjustment cost invoices, in the total amount of \$22,319.31, under the CYR, Cliveden, Tucker House and Maplewood Contracts.³⁹

The amounts above are payable to Nutrition Management with interest at the simple rate of 6% per year, to be calculated from the time each invoice became due.⁴⁰

BY THE COURT,



GLAZER, J.

³⁸ Spang & Co. v. USX Corp., 410 Pa. Super. 254, 266; 59 A.2d 978, 984 (1991) (citing 41 PS. § 202).

³⁹ Exhibits P-22, P-23.

⁴⁰ Neither party has identified any provisions in the Contracts requiring payment of interest, at whatever rate, in the event of late payment of variable cost invoices and adjustment cost invoices. Since neither party has identified such a provision, this court finds that statutory interest at the rate of 6% per year is proper, pursuant to 41 P.S. § 202.