Dated: June 26 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 02-37161
	)	
Medi-Care Orthopedic & Hospital Equipment, Inc.,	)	Chapter 11
	)	
	)	Adv. Pro. No. 04-3424
Debtor.	)	
	)	Hon. Mary Ann Whipple
Medi-Care Orthopedic & Hospital Equipment, Inc.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Health II of Ohio, LLC, et al.,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER REGARDING CROSS MOTIONS FOR SUMMARY JUDGMENT

This proceeding is before the court on a motion for summary judgment [Doc. # 32] filed by Plaintiff/Debtor Medi-Care Orthopedic Hospital Equipment, Inc., ("Medi-Care"), the response and cross motion for summary judgment [Doc. # 39] filed Health II Ohio, LLC, ("Health II"), and Medi-Care's reply [Doc. # 40]. In its complaint, Medi-Care alleges a breach of the Asset Purchase Agreement under which

Health II acquired substantially all of Medi-Care's assets. The Asset Purchase Agreement provided for Health II holding back a total of $660,000 of the purchase price for a specified period, which amount would be payable at the end of that period if no specified events of default had occurred. Both parties move for summary judgment, each arguing that it is entitled to the full amount held back by Health II.

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. This is a core proceeding "affecting the liquidation of the assets of the estate" that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(O). For the reasons that follow, both Medi-Care's motion for summary judgment and Health II's cross-motion for summary judgment will be denied.

FACTUAL BACKGROUND

The following facts are undisputed. Health II, Medi-Care, and J. Michael Frantz ("Frantz"), former President of Medi-Care, entered into an Asset Purchase Agreement ("Agreement") on November 19, 2003. Pursuant to that Agreement, Health II agreed to purchase substantially all of Medi-Care's assets for the sum of $2,000,000. Health II paid $1,340,000 of the purchase price at closing as required under the Agreement, and retained the $660,000 balance under the "Hold Back" provisions of the Agreement. The Agreement provided that $500,000 would be held back ("Hold Back 1") "subject to the provisions set forth in Section 1.2" and $160,000 would be held back ("Hold Back 2") "subject to the provisions set forth in Section 1.3." [Ruse Aff., Ex. A, §§ 1.1]. Health II retained Hold Back 1 to ensure that Frantz would not interfere or compete with Health II's operation of the purchased business. [*Id.* at § 1.2]. And it retained Hold Back 2 in order to protect it from extraordinary contract loss or contract cancellation unrelated to Health II's operation of the business after acquisition of the assets. [*Id*. at § 1.3]. The Agreement provides that, at the expiration of the "Hold Back Period," defined as a period of eighteen months "from the date of the letter of intent, dated May 2, 2003," [*id.* at §1.1.], Health II must pay the Hold Back amounts to Medi-Care unless a breach of the Hold Back provisions has occurred [*id.* at §§ 1.2, 1.3].

The sections of the Agreement setting forth the events constituting a breach of Hold Back I provide in relevant part as follows:

> 1.2.1 Frantz, either directly or indirectly, engages in, has an interest in, or aids or assists any person or entity in conducting, engaging or having an interest in . . . any business or enterprise . . . which relates to medical equipment, durable medical equipment or uniform sales and rentals in any of [thirty-five Ohio counties and five Michigan counties].

> 1.2.2 Frantz, either directly or indirectly, solicits customers, suppliers or patients of Buyer, or Induces or otherwise contacts any customers, suppliers or patients of Buyer, or interferes with or disturbs the relationships (contractual or otherwise) any customers, suppliers or patients of Buyer for business purposes in the Non-Compete Area. . . .
>
> 1.2.3 Frantz, either directly or indirectly, solicits or attempts to employ or solicit (in any capacity whatsoever), any employee, independent contractor, or consultant, of Buyer or Induces or otherwise advises any employee, independent contractor, or consultant to leave the employ of Buyer or otherwise terminate its relationship with Buyer.
>
> 1.2.4 Frantz, either directly or indirectly, attempts to collect the accounts receivable of Seller and/or Buyer, whether accruing prior to or after the Closing Date.

[*Id.* at §§ 1.2.1 - 1.2.4]. In addition, the Agreement provides that "[i]n the event of a claimed breach by Frantz, buyer shall timely notify Seller, in writing, of such breach and Seller shall be afforded a reasonable opportunity to cure such claimed breach." [*Id.* at § 1.2.5].

Section 1.3 of the Agreement provides that an "extraordinary contract loss or cancellation" constitutes a breach of the Hold Back 2 provisions. The Agreement defines "extraordinary contract loss or cancellation" as follows:

> [A] contract loss or cancellation which results in losses in excess of ten percent (10%) of the patient census of the continuing business (as determined by a patient census prepared in accordance with standard industry practices) during the Hold Back Period as compared to patient census levels (excluding patients of Seller's Emergency Response Center, which Seller sold to another buyer) that existed as of the date [of] the Letter of Intent, unless such cancellations or losses arise from conduct, acts or omissions of Buyer, its employees, agents or assigns."

[*Id.* at § 1.3.1]. The Agreement further provides that "[i]n the event of a breach under Section 1.2 or Section 1.3, Buyer shall be entitled to retain as liquidated damages the respective hold back amounts set forth in Section 1.1 applicable to such breach, without any requirement that Buyer prove it has incurred damages or the amount thereof," [*id.* at § 1.4], and that "[b]uyer acknowledges and warrants that as of the date of execution of this Agreement, that it has no knowledge of any breach of the provisions of Sections 1.2 or 1.3 of this Agreement," [*id.* at §1.5].

Between October 7 and October 16, 2003, before the Agreement was executed by the parties, an exchange of email communication occurred between Anthony M. Anderson ("Anderson"), the Administrative Member of Health II, and William Ruse, the general manager of Medi-Care, regarding lost business under Medi-Care's contract with Hospice of Northwest Ohio. [*See* Anderson Aff., Ex. 1-A to 1-D].

Ruse responded to Anderson's inquiry regarding the lost business, explaining that Medi-Care lost the Hospice inpatient business but would continue to service home customers. [*Id*. at Ex. 1-B]. Anderson, in turn, requested specific information and documents relating to the Hospice contract. In his email dated October 16, 2003, Anderson indicated that he had received Ruse's response to his document request. [*Id*. at Ex. 1-D]. Thereafter, on November 19, 2003, the parties entered into the Agreement.

On or about the last day of the Hold Back Period,[1] on November 2, 2004, counsel for Health II sent a letter to Ruse and Debtor's counsel notifying them that Health II will not remit the hold back amounts due to claimed breaches of the conditions of both Hold Back 1 and Hold Back 2 as specified in the letter. [Ruse Aff., Ex. B]. The letter specified the conditions of Hold Back 1 that Health II claims were breached as follows:

> **1st Breach**: During and around the period November 20, 2003 through December 5, 2003, upon information and belief, [Frantz] aided and contributed to the loss of a certain Health II manual wheelchair patient to the Scooter Store, a competitor of Health II . . . .
>
> **2nd Breach:** In and around September 2004, upon information and belief, Frantz usurped and interfered with an interest expressed by a prospective buyer of Health II's locations.
>
> **3rd Breach:** Prior to and continuing after October 1, 2004, Frantz aided, advised, consulted with, influenced, and steered a competitor of Health II into directly competition (sic) with Health II in the territory defined as the Non-Compete area.
>
> **4th Breach:** On or about October 1, 2004, and continuing, Frantz impeded and interfered with Health II's ability to service its patients, provide employment for its employees, continue critical operating functions (such as billing and collecting claims reimbursements), and generally conduct business by locking Health II out of the locations leased from Frantz in Findlay, Ohio and Fremont, Ohio.
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> **5th Breach:** On October 1, 2004, and continuing, Frantz aided, assisted, and conspired with Mitchell Home Medical ("Mitchell") to set up businesses in the locations previously leased by Health II to compete directly with Health II and to deceive customers of Health II by

[1] The parties disagree on what day constitutes the last day of the Hold Back Period, that is, the period during which Health II was entitled to retain the hold-back funds regardless of the occurrence or non-occurrence of a breach. Medi-Care apparently believes the last day occurred on November 1, 2004, as it argues that the hold-back payments became due on November 2, 2004. Health II, on the other hand, contends that the last day of the Hold Back Period was November 3, 2004. As indicated earlier, the Hold Back Period is the eighteen-month period "from the date of the letter of Intent, dated May 2, 2003." If the relevant time period is computed by including May 2, 2003, in the calculation, the day from which the period of time begins to run, then Medi-Care is correct and November 1, 2004, was the last day of the Hold Back Period. However, if the time period is calculated by excluding May 2, 2003, from the calculation, *cf.* Fed. R. Bankr. P. 9006(a), then November 2, 2004, was the last day of the Hold Back Period. The court need not resolve the question, however, as it does not affect the court's decision.

falsely claiming Mitchell is the successor provider of services to Health II's patients.

> **6th Breach:** Frantz caused other competitors of Health II, including Health Aide of Toledo and a unit of Blanchard Valley Hospital, to lure and hire certain employees and market Health II customers by falsely stating "Health II is out of business."

[*Id.*] The letter also specified the conditions of Hold Back 2 that Health II claims were breached:

> **1st Breach:** [Medi-Care] directly caused the loss of the Northwest Ohio Hospice contract . . . in and around November 2003, which loss of business was never recovered by Health II.
>
> **2nd Breach:** Upon information and belief, Frantz is an agent and assignee for [Medi-Care]. Frantz caused and contributed to Health II's loss of business by his actions, which are substantially described above in the paragraphs related to Hold Back 1.

[*Id.*] Before the November 2, 2003, letter, certain email communications also occurred, which the court discusses in more detail below.

LAW AND ANALYSIS

I. Summary Judgment Standard

This case is before the court on the parties' cross-motions for summary judgment. Under Fed. R. Civ. P. 56, made applicable to this proceeding by Fed. R. Bankr. P. 7056, a party will prevail on a motion for summary judgment when "[t]he pleadings, depositions, answers to interrogatories, 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 judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). In order to prevail, the movant must prove all elements of the cause of action or defense. *Taft Broadcasting Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991). Once that burden is met, however, the opposing party must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249-51 (1986); *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-88 (1986).

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's

entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Fed. R. Civ. P. 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

II. Overview

In its complaint, Medi-Care alleges that Health II breached the Agreement by failing to remit the $660,000 it held back under the terms of the Agreement but which, according to Medi-Care, became due and payable at the end of the Hold Back Period. In its motion, Medi-Care relies on its contention that Health II failed to give timely notice of the claimed breaches of the conditions of Hold Back 1 and Hold Back 2 and, thus, is not entitled to retain the hold-back amounts.

Health II defends against Medi-Care's motion and moves for summary judgment on the complaint, arguing that it gave timely notice of the claimed breaches of both Hold Back 1 and 2. It further argues that the Agreement contains no notice requirement regarding a breach of Hold Back 2 and that it is entitled to retain the $160,000 held back due to an extraordinary contract loss resulting in a breach of the conditions of Hold Back 2. In its Reply, Medi-Care has abandoned its notice argument relating to Hold Back 2, stating that the only issue as to Hold Back 2 is "did an extraordinary contract loss or contract cancellation unrelated to [Health II] occur?"[2] [Doc. # 40, Plaintiff's Reply, p. 2]. Thus, the issues presented in the parties' motions are (1) whether there was timely notice of a breach of the conditions of Hold Back 1 and (2) whether an extraordinary contract loss or contract cancellation unrelated to Health II occurred.

A. Hold Back 1: Did Health II Timely Notify Medi-Care of Alleged Breaches by Frantz of the Conditions of Hold Back 1?

Health II does not dispute the fact that timely notice to Medi-Care of a claimed breach by Frantz was required under the Agreement in order for it to retain the $500,000 under the provisions relating to Hold Back 1. It argues, however, that it provided such notice.

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[2] The court agrees that the Agreement only requires notice of any breach of the conditions of Hold Back 1, and not of Hold Back 2. The Agreement differentiates the section to which Hold Back 1 is subject, that being section 1.2, from that which Hold Back 2 is subject, that being section 1.3. The notice requirement is found under the provisions of section 1.2 and relates only to a "claimed breach by Frantz," which, of course, relates to the purpose of Hold Back 1, that is, to ensure that Health II will be free from any form of interference or competition by Frantz. [*See* Ruse Aff., Ex. A, § 1.2.5].

Whether notice is timely is generally determined by asking whether notice was provided "within a reasonable time in light of all the surrounding facts and circumstances." *Ferrando v. Auto-Owners Mut. Ins. Co.*, 98 Ohio St.3d 186, 208 (2002). In this case, the Agreement not only requires notice of a claimed breach but also requires that Medi-Care "be afforded a reasonable opportunity to cure such claimed breach." [Ruse Aff., Ex. A, § 1.2.5]. Thus, timely notice under the Agreement must be such notice as affords Medi-Care a reasonable opportunity to cure any breach that Health II claims to have occurred. While the adequacy of notice is ordinarily a question of fact, *Chemtrol Adhesives, Inc. v. American Mfrs. Mut. Ins. Co.*, 42 Ohio St.3d 40, 51, (1989), where the undisputed facts are such that no reasonable trier of fact can find that notice was timely, the court may find as a matter of law that notice was inadequate.

Health II relies in part on the November 2, 2004, letter sent to Medi-Care itemizing Frantz's breaches as constituting timely notice of the claimed breaches. The first claimed breach, which involved losing the business of an individual wheelchair patient, occurred nearly one year earlier. The second claimed breach, that Frantz interfered with an interest expressed by a prospective buyer of Health II's locations, allegedly occurred over one month earlier. And the letter provides no information regarding the identity of the prospective purchaser. The third, fourth and fifth claimed breaches involve Frantz locking Health II out of certain locations approximately one month earlier and permitting a competitor of Health II to set up business at those locations. The sixth claimed breach involved two employees being hired by a competitor after the lock-out and after Frantz allegedly told them that "Health II is out of business." [*See* Ruse Aff., Ex. B; Anderson Aff., Ex. 4, Response to Interrogatory No. 4]. The court finds that no reasonable trier of fact could conclude that the November 2 notice, sent on or about the last day of the Hold Back Period and well after the occurrence of each alleged breach, afforded Medi-Care a reasonable opportunity to cure any of the claimed breaches.

Nevertheless, Health II argues that the November 2 letter was not the first and only notice received by Medi-Care, but was the last of many notices alerting Medi-Care to the claimed breaches. In so arguing, Health II relies on one email communication addressed to Ruse and a series of emails addressed to Frantz or Frantz's attorney and copied to Ruse and Medi-Care's attorney. [*See* Anderson Aff., Ex. 1-E through 1-H].

The first email referencing Hold Back 1 was sent to Ruse on August 10, 2004. [*Id.*, Ex. 1-E]. The only statement in that email regarding the held back funds is as follows:

Notwithstanding [Health II] has already stated a claim for the loss of a certain contract,

> debtor-counsel should not presume there are no claims against the holdback by [Health II]. With respect to the other portion of the holdback, [Health II] continues to investigate a potential violation of Frantz'[s] non-compete agreement. It is [Health II's] intent to fully disclose the findings of the investigation at the appropriate time, prior to the November 2004 date any holdback would be potentially due and payable to [Medi-Care].

[*Id.*]. This email does not constitute notice of a breach. It indicates only a continuing investigation regarding a potential breach.

The second claimed breach in the November 2 letter alleges that Frantz interfered with an interest expressed by a prospective buyer of Health II's locations." [Ruse Aff., Ex. B]. Emails relating to this subject exchanged between Anderson and Frantz's counsel from September 27 to 30, 2004, and copied to Medi-Care's representatives, indicate only that Anderson was receptive to Frantz's attorney passing on contact information to a possible buyer. [Anderson Aff., Ex 1-G]. There is no indication of any wrongdoing by Frantz.

The remaining emails relied upon by Health II as providing notice of a breach of the conditions of Hold Back I were exchanged between Anderson and Frantz or Frantz's attorney and again copied to Medi-Care's representatives. These emails occurred between September 9, 2004, and October 4, 2004, and, according to Health II, provide notice of breaches as defined in sections 1.2.1 and 1.2.2 of the Agreement. Specifically, Health II argues that the emails provide notice that Frantz interfered with patient and employee relationships and aided a competitor by wrongfully and illegally locking Health II out of its Findlay, Ohio locations, which Frantz owned and leased to Health II, and by leasing those locations to a competitor, Mitchell Home Medical. Medi-Care, on the other hand, characterizes the emails as evidencing nothing more than a landlord-tenant conflict.

The emails certainly give notice of a landlord-tenant conflict as Medi-Care contends and make no mention at all of Frantz leasing to a competitor the locations from which Health II was evicted. The court does not believe that evicting Health II for failure to pay rent as agreed and the attendant consequences of such eviction constitutes a breach of the conditions of Hold Back 1. In such case, Health II's failure to pay rent would be the cause of any interference with patient and employee relationships. However, in the emails at issue, Anderson denies that Health II's rent was past due and states that Health II is being wrongfully denied access to the properties, that Frantz has seized patient records, files, equipment, and generally interrupted overall patient communication. [*See* Anderson Aff., Ex. 1-G (email dated October 4, 2004) & 1-H]. These emails were copied to Ruse as well as Medi-Care's attorney. A reasonable factfinder could

conclude that the emails provided notice that Frantz was wrongfully disrupting Health II's business operations and causing interference with patient and employee relationships, which constitutes a breach as defined in section 1.2.2 of the Agreement. The relevant emails were sent on October 4, 2004, just two days after Health II was locked out of the leased premises. As such, a reasonable factfinder could also conclude that such notice afforded Medi-Care a reasonable opportunity to cure the breach to the extent a breach, in fact, occurred and, therefore, that such notice was timely.

As Medi-Care's motion is premised solely on Health II's failure to provide timely notice of a breach by Frantz, it is not entitled to summary judgment on its breach of contract claim as it relates to Health II's retention of Hold Back 1. However, neither is Health II entitled to summary judgment in its favor on this claim. It is not enough that Health II offer evidence of timely notice of a claimed breach, it must also establish that the claimed breach actually occurred.[3] Health II offers no such evidence.

B. Hold Back 2: Did an Extraordinary Contract Loss or Contract Cancellation Unrelated to Health II Occur?

Health II argues that it is entitled to retain the $160,000 under the provisions relating to Hold Back 2. In support, it offers Anderson's affidavit stating that the "contract with Northwest Ohio Hospice ("Hospice") . . . was lost and the number of Hospice patients declined by an amount exceeding 10%" and that "[t]his loss was caused by, among other things, [Medi-Care's] failure to maintain sufficient inventory to meet its Hospice contract and patient needs prior to closing [the Agreement]." [Anderson Aff., ¶ 4]. Anderson states that the number of patients serviced under the Hospice contract dwindled during the Hold Back Period from 289 in September 2003 to 231 in October 2003 to 106 in May of 2004. Medi-Care, on the other hand, argues that the Hospice contract loss is not an extraordinary contract loss as defined in § 1.3.1 of the Agreement and that this fact was acknowledged by Health II in the Agreement after being informed as to the loss of that contract.

Medi-Care does not dispute the decrease in the Hospice patient census as stated by Anderson, which decrease was more than ten percent during the Hold Back Period. However, the Agreement specifically defines an "extraordinary contract loss or contract cancellation" as being a contract loss or cancellation resulting in "losses in excess of ten percent (10%) of the patient census of the continuing business . . . during

[3] The Agreement provides that "[a]t the expiration of such time Hold Back 1 will be timely paid to Seller unless the conditions of the Hold Back 1, as described below, have been breached, which breach, if any, shall be determined by the United States Bankruptcy Court. . . ." [*See* Ruse Aff., Ex. A, § 1.2].

the Hold Back Period as compared to patient census levels (excluding patients of Seller's Emergency Response Center, which Seller sold to another buyer) that existed as of the date of the Letter of Intent" unless such losses are due to Health II's acts or omissions. [Ruse Aff., Ex. A, § 1.3.1]. Thus, an extraordinary contract loss under the Agreement is one that results in a loss during the Hold Back Period of more than ten percent of the total patient census as of the date of the Letter of Intent. The loss of ten percent of the Hospice patients, without more information, does not satisfy this definition. The court cannot determine under the facts presented whether or not an extraordinary contract loss has occurred since neither party has offered evidence indicating the patient census level that existed on the date of the Letter of Intent.

Notwithstanding, Medi-Care argues that Health II acknowledged in the Agreement that there had been no breach of the Hold Back 2 provisions after being informed as to the Hospice contract loss. While Health II did acknowledge that "it has no *knowledge* of any breach" of the conditions of Hold Back 2 as of November 19, 2003, the date of the Agreement, [*see id.*, § 1.5 (emphasis added)], it is not clear what information it had regarding patient census numbers at that time and, presumably, it could have acquired additional information after the execution of the Agreement. Furthermore, according to Anderson, additional losses occurred during the Hold Back Period after execution of the Agreement.

Finally, although not relied upon in support of its motion for summary judgment, Health II also claims a breach of the conditions of Hold Back 2 due to the loss of business caused by Frantz's actions as described in its claimed breaches of Hold Back 1. [Ruse Aff., Ex. B]. However, as indicated above, Health II has submitted no evidence regarding the patient census figures necessary to determine the existence of an extraordinary contract loss or cancellation as defined in the Agreement nor has it submitted any evidence that Frantz was actually the cause of any loss of business.[4]

As genuine issues of material fact exist regarding the parties' rights under the provisions of the Agreement relating to Hold Back 2, neither Health II nor Medi-Care is entitled to summary judgment.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Medi-Care's motion for summary judgment [Doc. # 32] and Health II's cross-motion for summary judgment [Doc. # 39] be, and hereby are, **DENIED**; and

IT IS FINALLY ORDERED that a further pre-trial conference will be held on **August 8, 2006,**

[4] While the email evidence submitted by Health II may be evidence of notice of a claimed breach, it is not evidence that a breach actually occurred.

at 1:30 o’clock p.m.