IN THE SUPREME COURT OF THE STATE OF DELAWARE

HEALTH SOLUTIONS NETWORK, LLC, Formerly known as MILLENIUM PHARMACEUTICALS, LLC,	§	No. 380, 2010
Defendant Below-Appellant,	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
GRIGOR ARSOV GRIGOROV, as Administrator of the Estate of OGNIAN GRIGOROV GRIGOROV,	§	C.A. No. 07C-05-102
Plaintiff Below-Appellee.	§	

Submitted: January 10, 2011
Decided: February 9, 2011

Before **STEELE**, Chief Justice, **BERGER** and **RIDGELY**, Justices.

O R D E R

This 9th day of February 2011, it appears to the Court that:

(1) Defendant-Below/Appellant, Health Solutions Network, LLC ("HSN"), appeals from a Superior Court order, which granted summary judgment in favor of Plaintiff-Below/Appellee, Grigor Arsov Grigorov, in this breach of contract action to recover sales commissions. HSN raises four arguments on appeal. First, HSN contends that the Superior Court erred in granting the summary judgment motion because HSN presented genuine issues of material fact. Second, HSN contends that the Superior Court erred in shifting the evidentiary burden from

Grigorov to HSN and in improperly weighing the evidence. Third, HSN contends that the Superior Court erred in relying on hearsay exhibits to grant the summary judgment motion. Fourth, HSN contends that the Superior Court erred in granting summary judgment before HSN deposed Grigorov. We find no merit to HSN's appeal and affirm.

(2) Nearly seven years ago, Grigorov's son (Ognian) and HSN executed an agreement, whereby Ognian promised to maintain a website that directed customers to HSN's website, and HSN promised to pay Ognian commissions on the resulting sales. Shortly thereafter, Ognian died, but his website remained, continuing to direct customers to HSN's website and earn sales commissions.

(3) Grigorov, as administrator of his son's estate, filed a complaint in the Superior Court to recover sales commissions for an approximately ten-month period, which began shortly before Ognian's death. The Superior Court denied HSN's motion to dismiss, and the parties continued to nonbinding arbitration. The arbitrator found in favor of Grigorov. HSN then filed a timely appeal *de novo* to the Superior Court.

(4) HSN sought to depose Grigorov in Delaware. Grigorov moved for a protective order, requiring a video deposition. Grigorov resides in Bulgaria and allegedly has health issues, so he did not want to travel to Delaware. The Superior Court never decided that motion, but it did stay HSN's discovery for a period of

time, pending HSN's compliance with a discovery order. Grigorov then moved for summary judgment. The Superior Court held a hearing and ultimately granted the summary judgment motion, in part, awarding Grigorov $51,199.18. HSN moved for reargument, and the Superior Court denied that motion. This appeal followed.

(5) "The entry of summary judgment is appropriate only when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."[1] We review the Superior Court's decision *de novo*, as to both the facts and the law.[2] On a summary judgment record, "we are free to draw our own inferences in making factual determinations and in evaluating the legal significance of the evidence."[3] But, the facts of record, including any reasonable inferences to be drawn therefrom, must be viewed in the light most favorable to the nonmoving party.[4] We review rulings regarding the admissibility of evidence for abuse of discretion.[5] We also review discovery rulings for abuse of discretion.[6]

---

[1] *LaPoint v. AmerisourceBergen Corp.*, 970 A.2d 185, 191 (Del. 2009) (citing *Williams v. Geier*, 671 A.2d 1368, 1375 (Del. 1996)).
[2] *Id.*
[3] *Id.*
[4] *Id.* (citing *Williams*, 671 A.2d at 1375–76).
[5] *Miller v. State Farm Mut. Auto. Ins. Co.*, 993 A.2d 1049, 1052–53 (Del. 2010) (citing *Spencer v. Wal-Mart Stores East, LP*, 930 A.2d 881, 886 (Del. 2007)).
[6] *Alaska Elec. Pension Fund v. Brown*, 988 A.2d 412, 419 (Del. 2010) (citing *Coleman v. PricewaterhouseCoopers, LLC*, 902 A.2d 1102, 1106 (Del. 2006)).

(6) This Court has explained the burdens that parties bear in a summary judgment motion pursuant to Superior Court Civil Rule 56.[7] In *Burkhart v. Davies*,[8] this Court adopted the standard that the United States Supreme Court articulated in *Celotex Corporation v. Catrett*.[9] The *Burkhart* court approvingly quoted from *Celotex* as follows:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.[10]

The United States Supreme Court, in *Anderson v. Liberty Lobby, Inc.*,[11] further explained the nonmoving party's burden: "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict

---

[7] Superior Court Civil Rule 56(c) relevantly provides: "The judgment sought shall be rendered forthwith if the 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 a judgment as a matter of law." We have accepted the United States Supreme Court's interpretation of the analogous federal rule. *See Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991) (explaining that "[t]he Superior Court's Civil Rules are patterned upon the Federal Rules of Civil Procedure" and that "[t]he *ratio decidendi* of *Celotex* is persuasive and directly applicable") (citation omitted).

[8] *Id.*

[9] 477 U.S. 317 (1986).

[10] *Burkhart*, 602 A.2d at 59 (quoting *Celotex*, 477 U.S. at 322–23).

[11] 477 U.S. 242 (1986)

for that party."[12] The *Anderson* court concluded: "If the evidence is *merely colorable, or is not significantly probative,* summary judgment may be granted."[13] We similarly have explained that we will not draw "unreasonable inferences" in the nonmoving party's favor.[14]

(7) HSN raises two arguments related to the Superior Court's grant of summary judgment in favor of Grigorov. HSN argues that the Superior Court erred in granting the summary judgment motion because HSN presented genuine issues of material fact. HSN also argues that the Superior Court erred in shifting the evidentiary burden from Grigorov to HSN and in improperly weighing the evidence. Specifically, HSN argues that the Superior Court erred in requiring HSN to produce records that show payment of the sales commissions.[15] HSN argues that its executive's testimony on payment created a genuine issue of material fact.

---

[12] *Id.* at 250 (citation omitted).

[13] *Id.* at 250–51 (citations omitted). *Cf. McLaughlin v. Dover Downs, Inc.*, 974 A.2d 858, 2009 WL 1474707, at *2 (Del. 2009) (TABLE) (explaining that "conclusory assertions," which lack sufficient probative value, are insufficient to raise genuine issue of material fact). *See also N. Am. Philips Corp. v. Aetna Cas. & Sur. Co.*, 1995 WL 628444, at *7 (Del. Super. Apr. 20, 1995) ("Bare assertions or conclusory allegations are insufficient to create a genuine issue of material fact for trial.") (citing *Celotex*, 477 U.S. at 324).

[14] *Deuley v. DynCorp Int'l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010) (citing *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

[15] HSN argues, in substance, that the Superior Court should have required Grigorov to prove the absence of payment. To the contrary, HSN bore the burden of producing evidence that established a genuine issue of material fact as to its affirmative defense of payment. *See* Super Ct. Civ. R. 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively . . . payment, . . . and any other matter constituting an avoidance or affirmative defense.").

(8) Here, Grigorov established that Ognian and HSN executed an agreement and that HSN owed Ognian sales commissions. Consequently, HSN had the burden of showing a viable defense to that breach of contract.[16] The only evidence that HSN presented to dispute that allegation was the deposition testimony of one of its executives. He stated: "Everything we were due to pay him was paid, correct, 100 percent, absolutely."[17] During his deposition, the following exchanges also occurred:

> Q: So there is nobody that can actually testify and say that a specific payment was made on a specific date?
>
> A: I would be shocked. That would be a gutsy call. . . .
>
> Q: You can't even do it yourself?
>
> A: I can't. I mean, wish I could. . . .
>
> * * *
>
> Q: . . . [I]t's your position it's been paid but you have no records to support it?
>
> A: No one in the world does. If anyone has them, I will find them. But no one in this world has them from what I found out to date. But to date, they don't exist. So it's not that I don't have the records. The physical space we occupy known as earth they do not exist in. And there is nothing I can do about that. And there is nothing you can do about that.
>
> * * *
>
> Q: And your statement that is no money owing is --

[16] *Burkhart*, 602 A.2d at 59 (quoting *Celotex*, 477 U.S. at 322–23).

[17] HSN's lawyer similarly made conclusory statements in his deposition: "My understanding is that Mr. Grigorov's son, the affiliate, was paid in full all commissions due him and there was no past commissions due."

> A: To the best of my knowledge, I don't owe this guy a dime. I've maintained it from the beginning. Could I have missed a payment from the time I shoveled things over to dad and there, I don't think I did. But is it possible? Yeah, I'm sure it's possible. It's ludicrous to think I owe this guy even $40,000 let alone $118,000.
>
> Q: But that's your opinion and you have no records, as we sit here today, because nobody has any records to prove --
>
> A: You have zero records to prove that I do. I have no records to prove that I don't. . . . So, yeah I guess you have no evidence that I didn't. I have no evidence that I did. . . .

HSN did not supplement its executive's testimony with *any* record of payment or a reasonable explanation for the absence of a record of it anywhere. HSN produced voluminous and detailed records as to all others similarly situated to Grigorov. But, none of the business records contained any indication of payment to Ognian for the disputed sales commissions. Under the facts and circumstances of this case, the executive's bare assertion that payment was made, without any other corroborating evidence (despite otherwise complete records of comparable payments), is "merely colorable, [and] is not significantly probative." Consequently, HSN has failed to make a sufficient showing to defeat the summary judgment motion.[18] The Superior Court did not err in granting summary judgment

[18] *See Burkhart*, 602 A.2d at 59 (quoting *Celotex*, 477 U.S. at 322–23).

in favor of Grigorov. It neither shifted the evidentiary burden inappropriately, nor weighed the evidence improperly.

(9) HSN next argues that the Superior Court erred in relying on hearsay exhibits to grant the summary judgment motion. But, those exhibits were business records that HSN, itself, produced in discovery. Thus, the exhibits likely were admissible pursuant to Delaware Rule of Evidence 803(6). In any event, HSN did not contest their admissibility until the hearing on the motion for reargument, at which time the Superior Court explained that it likely did not rely on those exhibits in granting the summary judgment motion.[19] Accordingly, HSN has not shown that the Superior Court abused its discretion in admitting those exhibits.

(10) Finally, HSN argues that the Superior Court erred in granting summary judgment before HSN deposed Grigorov. But, HSN does not explain how deposing Grigorov in person would have changed the outcome of this case. Grigorov has shown that HSN was obligated to pay sales commissions to him. HSN has been unable to produce any record that indicates that it paid those sales commissions. Grigorov's testimony would not change those facts. The Superior Court gave HSN the opportunity to depose Grigorov by video, but HSN's failure to

[19] The Superior Court explained: "And I said if there's anything -- any documents that you contend are not accurate, . . . let me know. But I gave you time to determine whether any payments had been made. So I don't know that I relied upon any analysis [of those exhibits] that was done, but rather either -- either by virtue of your client's destruction or the lack or the absence of them every occurring, there was no record of payment for a debt that's claimed to be owed."

comply with the Superior Court's discovery order delayed and ultimately precluded that opportunity. Accordingly, HSN has not shown that the Superior Court abused its discretion in granting summary judgment before HSN deposed Grigorov.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice