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Ex-NJ Hospital Owner Keeps Win Over Medicare Consultancy

By **Bill Wichert**

Law360 (July 13, 2022, 9:08 PM EDT) -- A New Jersey state appeals court on Wednesday refused to disturb a more than \$1.7 million arbitration award for a former hospital owner over claims that a consulting agency botched an analysis for establishing a residency program and ultimately left the business on the hook for Medicare overpayments.

The appellate panel upheld a trial court ruling affirming the award that MHA LLC — former owner of Meadowlands Hospital Medical Center, which is now known as Hudson Regional Hospital — won against Besler & Co. Inc. in connection with its inaccurate evaluation of projected Medicare payments for a stand-alone residency program at the facility.

MHA went forward with the program in 2013 based on Besler's analysis, but it ultimately had to reimburse the hospital's new owner for overpayments recouped by Medicare, the panel said. MHA later brought a lawsuit against Besler, and the parties ultimately agreed to go to binding arbitration, the panel said.

Among other findings, the panel rejected Besler's assertion that the arbitrator improperly relied on MHA's 2016 asset purchase agreement with the new owner. Besler had claimed the arbitrator ignored Superior Court Judge Kimberly Espinales-Maloney's 2019 order that MHA could not introduce or rely on evidence in arbitration that was not produced during discovery.

Besler "opened the door concerning the 2016 APA when, after plaintiff rested its case, defendant raised the theory that, due to the sale of Meadowlands, plaintiff might not be responsible for the reimbursement payments," the panel said in its **opinion**.

"Given that defendant raised the issue of the sale after plaintiff rested its case, exclusion of evidence regarding the 2016 APA would have unfairly prejudiced plaintiff," the panel said.

The panel also shot down Besler's argument that the arbitrator erred in relying on testimony from MHA consultant Patrick Metzger — who calculated the Medicare overpayments in a one-page summary during the period in question — after Judge Espinales-Maloney had barred him from testifying as an expert witness at trial.

His testimony during the arbitration was as a fact witness, and the summary did not include the damages estimates outlined in his expert report, the panel said.

"Because Metzger did not testify as an expert witness, his testimony did not violate the court order barring his expert report inadmissible opinion," the panel said. "Metzger's testimony was limited to facts he had personal knowledge of, namely, his [graduate medical education] impact summary, which was not part of his prohibited expert report."

The dispute between MHA and Besler goes back to when the then-hospital owner in 2012 asked the consulting agency to perform an analysis of Medicare payments for a proposed resident sharing program with Palisades Medical Center, according to the appellate opinion.

For that analysis, Besler used a per-resident amount, or PRA, calculated by Novitas Solutions — which contracts with the Centers for Medicare and Medicaid Services for administrative services — the opinion said.

With that calculation, however, Novitas relied in part on Besler's incorrect claim that the program "would be the first time 'residents in an approved GME program trained' at Meadowlands," the opinion said, noting that the hospital had two podiatry residents in 2002.

Besler's analysis projected an overall net loss, but MHA began the resident sharing program with Palisades Medical Center, the opinion said.

In 2013, MHA asked Besler for a similar analysis for the stand-alone program and said it would establish the program only if it would "financially 'break even'" within five years, the opinion said. Unlike in 2012, the parties had no written agreement for those services, the opinion said.

Besler first projected an overall net loss but then estimated net losses for fiscal years 2013 and 2014 and net profits in fiscal years 2015 through 2017, the opinion said. In both estimates, Besler "used the same incorrect PRA as it did in its 2012 analysis," the opinion said.

After Novitas in late 2016 realized that the hospital had been "overpaid due to the miscalculated PRA," MHA had to reimburse the new owner for the overpayments recouped by Medicare, the opinion said.

The arbitrator, retired Superior Court Judge Hector R. Velazquez, ultimately found that Besler "breached its implied contractual obligation to perform and complete its contractual undertaking in a competent and professional manner" in connection with its 2013 analyses, court documents state. Judge Espinales-Maloney affirmed the award in November 2020.

On Besler's appeal of that ruling, the agency argued in part that Judge Velazquez improperly ruled "there was a June 2013 implied contract that it breached," the panel said. Velazquez "found the parties had an implied-in-fact contract, agreeing to terms based on the 2012 agreement," the panel said.

"Considering that an implied-in-fact contract occurs where '[a party manifests] assent to the terms of an offer through ... conduct,' we discern no reason to upset the arbitrator's finding that the parties' conduct and payment confirmed the formation of a binding implied-in-fact contract that was breached," the panel said, citing the New Jersey Supreme Court's 1992 *Weichert Co. Realtors v. Ryan* opinion.

Counsel for Besler did not immediately respond to a request for comment Wednesday.

In a statement on Thursday, MHA attorneys, Eric D. Katz and David M. Estes of Mazie Slater Katz & Freeman LLC, told Law360, "We are pleased with the Appellate Division's decision, as it recognizes that the arbitration and Law Division proceedings were thorough and correct, and the seven-figure judgment against the defendant vindicates the contractual rights of our client, the Meadowlands Hospital."

Judges Thomas W. Sumners Jr. and Lisa A. Firko sat on the appellate panel.

MHA is represented by Eric D. Katz and David M. Estes of Mazie Slater Katz & Freeman LLC.

Besler is represented by Mark A. Trokan and Stephanie Imbornone of Gordon Rees Scully Mansukhani LLP.

The case is MHA LLC v. Besler & Co. Inc., case number A-0789-20, in the Superior Court of New Jersey, Appellate Division.

--Editing by Rich Mills.

Update: This article has been updated with a statement from MHA attorneys.