

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NUTRITION MANAGEMENT	:	
	:	
v.	:	CIVIL ACTION
	:	
HARBORSIDE HEALTHCARE	:	NO. 01-CV-0902
CORPORATION and	:	
HARBORSIDE HEALTHCARE	:	
LIMITED PARTNERSHIP	:	

SURRICK, J.

NOVEMBER 30, 2004

MEMORANDUM & ORDER

Presently before the Court is Plaintiff’s Motion for Partial Reconsideration of the Court’s Order of March 19, 2004 (Doc. No. 109). In its Motion, Plaintiff asserts that this Court made a clear error of law when it dismissed Plaintiff’s claims under Chapter 93A of Massachusetts General Laws (Count VII of the Amended Complaint). (Doc. No. 105.) For the following reasons, Plaintiff’s Motion will be denied.

I. BACKGROUND

On March 19, 2004, we granted Defendants Harborside Healthcare Corporation and Harborside Health Care Limited Partnership’s (collectively “Harborside”) Motion for Summary Judgment against Plaintiff Nutrition Management Services Company (“Nutrition Management”) with respect to Count VII of the Amended Complaint.¹ (Doc. No. 105 at 10-15.) Count VII

¹ We also granted summary judgment in favor of Defendants on Count V (conversion) and on Count I (breach of contract) with respect to all losses or lost profits prior to February 2, 2001, and denied summary judgment with respect to Counts II and IV. (Doc. No. 105.) In addition, we denied Plaintiff’s Motion for Summary Judgment in its entirety. (*Id.*) Plaintiff’s Motion does not seek reconsideration of any of these decisions.

alleged that Harborside violated Chapter 93A of Massachusetts General Laws by engaging in deceptive or unfair business practices. To establish liability under Chapter 93A, a plaintiff must prove that: (1) the defendant engaged in an act or practice that was deceptive or unfair; (2) the act or practice occurred “primarily and substantially” in Massachusetts; and (3) the act cause a loss of property or money. Mass. Gen. Laws ch. 93A, § 11 (2002).

After drawing all inferences in Plaintiffs favor, we granted summary judgment for Defendants on Count VII because Plaintiff had offered insufficient evidence to create a genuine issue of material fact as to whether Defendants “had committed ‘unfair’ or ‘deceptive’ acts” within the meaning of Chapter 93A. (Doc. No. 105 at 14-15.) Specifically, we recounted Plaintiff’s allegation that Defendants’ President, Damian Dell’Anno (“Dell’Anno”), orchestrated a scheme to minimize Defendants’ costs by underpaying Plaintiff during the year 2000, while simultaneously promising that Plaintiff would be able to recoup these costs by charging Defendants a premium in 2001. (*Id.* at 14; Pl.’s Mem. in Opp. to Defs.’ Mot. for Partial Summ. J. at 2-3, 5-18, 25.) Plaintiff asserted that Dell’Anno’s representations, which were made while the parties were negotiating the terms of a written contract for Plaintiff’s continued provision of nutrition services in Defendants’ nursing homes,² were a lie, and that Defendants had no intention of allowing Plaintiff to charge a premium in 2001. (Pl.’s Mem. in Opp. to Defs.’ Mot. for Partial Summ. J. at 12, 25.) In support of these contentions, Plaintiff pointed to several emails to and from Dell’Anno in 2000 and early 2001 that discussed the possible termination of Plaintiff’s services and argued that they demonstrated that Defendants’ representations were

² We mentioned in our Memorandum that while “there were extensive conversations” and “significant exchanges of information” during these contract negotiations, “no finalized written agreement was ever completed and signed” by the parties. (Doc. No. 105 at 4.)

made in bad faith. (*Id.* at 12, 14-16, 25, Exs. 4-6.) We concluded, however, that “[n]either of the emails suggest that Defendants had committed ‘unfair’ or ‘deceptive’ acts. Instead, they show that Defendants were simply preparing for the termination of the [business] relationship” between the two parties. (Doc. No. 105 at 15.) Because Plaintiff “fail[ed] 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,” *Celotex, Inc. v. Catrett*, 477 U.S. 317, 322 (1986), we entered summary judgment in favor of Defendant on Count VII.

II. LEGAL STANDARD

“The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence.” *Harsco Corp. v. Zlotnicki* 779 F.2d 906, 909 (3d Cir. 1985). Federal Rule of Civil Procedure 59(e) and Local Civil Rule 7.1(g) allow parties to file motions for reconsideration or amendment of a judgment. *Spence v. Acosta Sales & Mktg. Co.*, No. 03-1437, 2004 U.S. Dist. LEXIS 20062, at *1 (E.D. Pa. Sept. 29, 2004). Courts should grant these motions sparingly, reserving them for instances when: (1) there has been an intervening change in controlling law; (2) new evidence has become available; or (3) there is a need to correct a clear error of law or fact or prevent manifest injustice. *General Instrument Corp. v. Nu-Tek Elecs.*, 3 F. Supp. 2d 602, 606 (E.D. Pa. 1998), *aff’d*, 197 F.3d 83 (3d Cir. 1999).

III. DISCUSSION

On April 2, 2004, Plaintiff filed the instant Motion. Plaintiff argues that this Court made a clear error of law when, according to Plaintiff, we concluded that “smoking gun” evidence of bad faith was necessary for a Chapter 93A violation, and granted Defendants’ motion for summary judgment based on this erroneous standard of proof. (*Id.* at 2.)

In our Memorandum, we discussed the requirements for establishing liability under Chapter 93A. Chapter 93A, which ““was designed to encourage more equitable behavior in the marketplace and impose liability on persons seeking to profit from unfair practices,”” *Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 55 (1st Cir. 1998) (quoting *Linage Corp. v. Trs. of Boston Univ.*, 679 N.E.2d 191, 208 (Mass. 1997)), requires a plaintiff to prove that defendant had engaged in an act or practice that was “deceptive” or “unfair.” (Doc. No. 105 at 10-11.) While Chapter 93A does not specifically define what constitutes unfair or deceptive behavior, *Arthur D. Little, Inc.*, 147 F.3d at 55, a mere breach of contract does not give rise to a Chapter 93A claim “unless it rises to the level of ‘commercial extortion’ or a similar degree of culpable conduct.” *Commercial Union Ins. Co. v. Seven Provinces Ins. Co.*, 217 F.3d 33, 40 (1st Cir. 2000); *see also Ahern v. Scholz*, 85 F.3d 774, 798 (1st Cir. 1996) (“[Chapter 93A] does not contemplate an overly precise standard of ethical or moral behavior. It is the standard of the marketplace.”); *Linkage Corp.*, 679 N.E.2d at 209 (“A practice is unfair if it is within the penumbra of some common-law, statutory, or other established concept of unfairness; is immoral, unethical, oppressive, or unscrupulous; and causes substantial injury to other businessmen.”); *Levings v. Forbes & Wallace, Inc.*, 396 N.E.2d 149, 153 (Mass. App. Ct. 1979) (“The objectionable conduct must attain a level of rascality that would raise an eyebrow of someone inured to the rough and tumble of the world of commerce.”). We noted that a good faith dispute over disputed payments was an insufficient basis for liability under Chapter 93A; rather, a showing of bad faith or wrongful purpose for failure to pay is required. (Doc. No. 15 at 13-14); *see also Quaker State Oil Ref. Corp. v. Garrity Oil Co.*, 884 F.2d 1510, 1513-14 (1st Cir. 1989) (holding that refusal to pay an invoice, without more, was not enough to constitute a Chapter 93A violation).

Plaintiff argues that we accurately summarized the law as it pertains to Chapter 93A, but that we also required that Plaintiff present “smoking gun” evidence of Defendants’ bad faith in order to proceed to trial on this claim. (Doc. No. 109 at 2.) This is simply incorrect. Our Memorandum described the relevant standard for deciding Defendants’ summary judgment motion as follows:

Summary judgment is appropriate “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 judgment as a matter of law.” Fed. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the non-moving party’s legal position. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). The burden then shifts to the nonmoving party who “must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “The nonmoving party . . . cannot ‘rely merely upon bare assertions, conclusory allegations or suspicions to support its claim.’” *Townes v. City of Phila.*, No. 00-CV-138, 2001 WL 503400, at *2 (E.D. Pa. May 11, 2001) (quoting *Fireman’s Ins. Co. v. DeFresne*, 676 F.2d 965, 969 (3d Cir. 1982)). Rather, the party opposing summary judgment must go beyond the pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. *See Celotex*, 477 U.S. at 324. When deciding a motion for summary judgment, the court must construe the evidence and any reasonable inferences therefrom in the non-movant’s favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when “the evidence is such that a reasonable jury could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248.

(Doc. No. 105 at 5-6.) Nowhere in this discussion did we mention that Plaintiff was required to produce “smoking gun” evidence to avoid summary judgment. Rather, we stated that to defeat a motion for summary judgment, Defendant had to produce evidence, through affidavits, depositions, or admissions, sufficient to establish that a reasonable jury could find in Defendants’ favor at trial. (*Id.*) This statement is consistent with the appropriate standard for summary judgment. *See, e.g., Anderson*, 477 U.S. at 248 (“Summary judgment will not lie if the dispute

about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”); *Matsushita Elec. Indus. Co.*, 475 U.S. at 587 (holding that “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine issue for trial,’” and summary judgment is appropriate (quoting *First Nat’l Bank v. Cities Servs. Co.*, 391 U.S. 253, 289 (1968))); *see also Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3d Cir. 1999) (quoting *Anderson* and *Celotex* to explain the appropriate standard for summary judgment).

Plaintiff argues that our reference to a “smoking gun” in the body of our opinion (Doc. No. 105 at 15) indicates that we required Plaintiff to produce “smoking gun” evidence of bad faith in order to establish its Chapter 93A violation. (Doc. No. 109 at 2.) Plaintiff misconstrues our use of the phrase “smoking gun.” We used that language in referring to the evidence of bad faith that the District Court found in the case of *Arthur D. Little Int’l, Inc. v. Dooyang Corp.*, 979 F. Supp. 919 (D. Mass. 1997), *aff’d* 147 F.3d 47 (1st Cir. 1998).³ In that case, the District Court stated that the plaintiff had “easily proven” his allegations that defendant engaged in a pattern of deceptive conduct to avoid its well-defined contractual payment obligations, based upon “smoking gun” evidence from the defendant’s 1992 annual report. *Id.* at 925. We repeated the phrase “smoking gun” in referring to the type of evidence that the court indicated *could* establish a Chapter 93A violation at trial. (Doc. No. 105 at 15.) We did not conclude that such evidence was *required* to defeat a summary judgment motion. *See, e.g., Anderson*, 477 U.S. at 248-49

³ Plaintiff cited the *Arthur D. Little Int’l, Inc.* case in his brief opposing summary judgment and argued that it was “conceptually identical to the case at bar.” (Pl.’s Mem. in Opp. to Defs.’ Mot. for Partial Summ. J. at 23-24.) We disagreed, finding that case inapposite because of its clear evidence that the defendant acted in bad faith in refusing to pay. (Doc. No. 105 at 15.)

("[T]he issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is *not required* to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." (quoting *First Nat'l Bank*, 391 U.S. at 288-89) (emphasis added)). As noted in Plaintiff's brief, "courts have consistently emphasized the fact-specific nature of [a Chapter 93A] inquiry." (Doc. No. 109 at 2.) We discussed the "smoking gun" evidence presented in *Arthur D. Little Int'l, Inc.* merely to distinguish the facts in that case from the facts in the case at bar, not, as Plaintiff asserts, to impose a "smoking gun" standard of proof.

Because no clear error of fact or law was committed in our decision to grant summary judgment in favor of Defendant with respect to Count VII of the Amended Complaint, Plaintiff's Motion for Reconsideration must be denied.

An appropriate Order follows.

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CORPORATION and	:	
HARBORSIDE HEALTHCARE	:	
LIMITED PARTNERSHIP	:	

ORDER

AND NOW, this 30th day of November, 2004, upon consideration of Plaintiff Nutrition Management’s Motion for Reconsideration (Doc. No. 109), and all papers filed in support thereof and in opposition thereto, it is ORDERED that the Motion is DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge