

**Peter J. Kurweil, M.D., P.C. v Ferraro**

2011 NY Slip Op 33401(U)

December 15, 2011

Sup Ct, Nassau County

Docket Number: 600206-10

Judge: Timothy S. Driscoll

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

-----X  
**PETER J. KURZWEIL, M.D., P.C.,**

**Plaintiff,**

**-against-**

**JOHN FERRARO,**

**Defendant.**

-----X

**JOHN FERRARO,**

**Third-Party Plaintiff,**

**-against-**

**NORTH SHORE-LONG ISLAND JEWISH  
HEALTH SYSTEM, GLEN COVE HOSPITAL and  
LUIGI M. CAPOBIANCO, M.D.,**

**Third-Party Defendants.**

-----X

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 600206-10**

**Motion Seq. No: 1  
Submission Date: 11/2/11**

**The following papers having been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Memorandum of Law in Support.....X**
- Affirmation in Opposition and Affidavit in Opposition .....X**
- Affirmation of J. Levy and Exhibits.....X**
- Reply Memorandum of Law in Further Support.....X**

This matter is before the Court for decision on the motion filed by Third-Party Defendants North Shore-Long Island Jewish Health System (“North Shore”), Glen Cove Hospital (“Hospital”), and Luigi M. Capobianco (“Capobianco”) (collectively “TPDs”) on June 30, 2011 and submitted on November 2, 2011, following oral argument before the Court. For the reasons set forth below, the Court denies the motion.

### BACKGROUND

#### A. Relief Sought

TPDs move for an Order, pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing the Third Party Complaint (“TPC”) in its entirety.

Defendant/Third-Party Plaintiff John Ferraro (“Ferraro”) opposes the motion.

Plaintiff Peter J. Kurzweil, M.D., P.C. (“Kurzweil” or “Plaintiff”) takes no position on the merits of the motion, but requests that, if the Court grants the motion, the Court condition its Order on a requirement that the TPDs appear and produce documents as non-parties at depositions in this matter.

#### B. The Parties’ History

In the Complaint (Ex. B to Rosenberg Aff. in Supp.) (“Main Action”), Plaintiff alleges that he and Ferraro entered into an agreement (“Agreement”), pursuant to which Ferraro agreed to render medical professional services on behalf of Plaintiff. Plaintiff alleges that Ferraro violated the restrictive covenants (“Restrictive Covenants”) in the Agreement, following Ferraro’s resignation from Plaintiff’s employment, by operating a medical practice out of the office of Capobianco, which is within the Restricted Territory as defined in the Restrictive Covenants. Capobianco is an employee of the Hospital.

In his Verified Answer to the Main Action (Ex. C to Rosenberg Aff. in Supp.), Ferraro asserts numerous affirmative defenses. In his Nineteenth Affirmative Defense, Ferraro alleges that:

As a result of Plaintiff’s conduct, including but not limited to plaintiff’s fraudulent inducements to Defendant to enter the alleged contractual relationship on misrepresentations both in the affirmative and by omission and its later conduct in conducting fraudulent billing practices and ordering unnecessary tests on patients and residents of certain nursing homes and assisted care living facilities and requiring defendant to engage in that activity on behalf of the PC, which Defendant refused, Defendant, John Ferraro was constructively terminated by

the Plaintiff from his employment and therefore the Contract or any of its provisions regarding any restrictive covenants are null and void and unenforceable against this answering Defendant.

Ferraro also asserted counterclaims in which he alleged that, 1) pursuant to a contract between Ferraro and Plaintiff, Plaintiff was obligated to provide payment to Defendant for services rendered by Defendant for a period of three (3) years on behalf of Plaintiff; 2) Plaintiff engaged in tortious interference with a contract by advising the TPDs via letter dated March 24, 2009 ("Letter") that Ferraro had violated the Agreement, which resulted in the Hospital prematurely terminating its contract with Ferraro; and 3) Ferraro is entitled to rescission of the Agreement in light of Plaintiff's allegedly fraudulent statements and omissions that induced Ferraro to enter into the Agreement.

The TPC (Ex. A to Rosenberg Aff. in Supp.) contains five (5) causes of action. They are: 1) Capobianco, individually and as an agent of the other TPDs, represented to Ferraro that the TPDs would defend, indemnify and hold Ferraro harmless in the event that Plaintiff pursued legal action in connection with the Restrictive Covenant, and Ferraro reasonably relied on those representations to his detriment; 2) the TPDs breached their agreement to defend, indemnify and hold Ferraro harmless by failing to defend Ferraro in the Main Action and terminating Ferraro's employment with the Hospital; 3) the TPDs breached their January 21, 2009 agreement with Ferraro ("Hospital Agreement") by terminating Ferraro's employment with the Hospital following their receipt of the Letter; 4) TPDs breached their implied duty of good faith and fair dealing by failing to comply with their obligations under the Capobianco promise and Hospital Agreement; and 5) Ferraro has adequately pled facts that would support indemnification and/or contribution by TPDs to the extent that their conduct contributed to Ferraro's damages.

In opposition to the motion, Ferraro affirms the truth of the allegations in the TPC regarding Capobianco's promises to him to defend and/or indemnify Ferraro if Plaintiff took legal action against him in connection with his prior employment. Ferraro avers, *inter alia*, that Capobianco 1) reviewed Ferraro's Agreement with Kurzweil; 2) repeatedly assured Ferraro that he wanted to employ Ferraro; 3) assured Ferraro that the TPDs would "take care of me" by defending and/or indemnifying him if Plaintiff took legal action, and the Hospital had a "stable of lawyers" that would defend him (Ferraro Aff. in Opp. at ¶ 7); and 4) advised Ferraro that he

had notified North Shore and the Hospital of the promises Capobianco made to Ferraro and provided them with a copy of the Agreement. Ferraro affirms that, based on these representations, he entered into the Hospital Agreement.

Ferraro submits that his employment with TPDs was terminated based on the Letter or, alternatively, in bad faith because it was easier for TPDs to terminate his employment than honor Capobianco's promises to Ferraro. Ferraro affirms that TPDs labeled his termination as one for cause, but disputes that characterization. As a result of the termination, Ferraro suffered damages including 1) sudden unemployment, 2) a loss of his affiliation with certain insurance companies, resulting in his having to reapply for insurance credentials which took several months, 3) a loss of privileges at the Hospital, 4) injury to his reputation as a result of the foregoing, and 5) an inability to pay the mortgage on his home and amassing of other financial debts.

### C. The Parties' Positions

TPDs submits, *inter alia*, that 1) Ferraro's allegations that TPDs agreed orally to indemnify him are not viable because they are barred by a) the Statute of Frauds, as set forth in General Obligations Law ("GOL") § 5-701(a)(2), and b) the merger clauses in the Hospital Agreement; 2) Ferraro's first cause of action for promissory estoppel cannot be sustained because he has not pled a clear and unambiguous promise, which is a required element of this cause of action; 3) in light of Ferraro's assertions in his Verified Answer that he was constructively terminated from his employment with Plaintiff, based on Plaintiff's allegedly unethical behavior, Ferraro should be judicially estopped from asserting that his resignation was attributable to his detrimental reliance on representations by the TPDs; 4) Ferraro's third cause of action for breach of contract must be dismissed because the Hospital properly terminated his employment for cause and without notice, pursuant to the Hospital Agreement; 5) Ferraro's fourth cause of action for breach of the implied duty of good faith and fair dealing is duplicative of his breach of contract claims and, therefore, should be dismissed; and 6) the Court should dismiss the fifth cause of action, seeking contribution or indemnification, in light of Ferraro's failure to allege facts under which some indemnification or contribution would be applicable.

Ferraro opposes the motion, submitting that 1) Ferraro has adequately pled the first cause of action in the TPC, based on promissory estoppel by alleging that the TPDs promised Ferraro

that they would defend, indemnify and hold Ferraro harmless in the event that Plaintiff instituted legal action against Ferraro regarding his employment with the Hospital, on which he reasonably relied to his detriment; 2) there are no merger clauses applicable to the second cause of action, related to the oral agreement between Ferraro and Capobianco; the merger clauses relate to the Hospital Agreement, to which Capobianco is not a party; 3) the second cause of action is not barred by the Statute of Frauds, as it is not a promise to answer for the debt of another that must be in writing; 4) assuming *arguendo* that Capobianco's promise to indemnify Ferraro was required to be in writing, the doctrine of promissory estoppel is an exception to that writing requirement; 3) the third cause of action, for breach of the Hospital Agreement, is adequately pled in light of the allegations that North Shore and the Hospital breached the Hospital Agreement by improperly terminating Ferraro's employment, resulting in money damages and injury to Ferraro's reputation; 4) the fourth cause of action for breach of the implied duty of good faith and dealing is sufficiently pled so that, in the event that the breach of contract causes of action cannot be sustained, Ferraro may recover from the TPDs for their breach of the duty of good faith and fair dealing; and 5) it would be inappropriate to dismiss the fifth cause of action for indemnification and/or contribution in light of the parties' dispute as to the existence of the oral agreement between Ferraro and Capobianco.

#### RULING OF THE COURT

##### A. Standards for Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

Pursuant to CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of the statute of frauds.

In addition, it is well settled that a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law.

*Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986). See also *JP Morgan Chase v. J.H. Electric*, 69 A.D.3d 802 (2d Dept. 2010) (complaint sufficient where it adequately alleged existence of contract, plaintiff's performance under contract, defendant's breach of contract and resulting damages), citing, *inter alia*, *Furia, supra*.

The elements of a cause of action based on promissory estoppel are a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise. *Schwartz v. Miltz*, 77 A.D.3d 723, 724 (2d Dept. 2010), *lv. app. den.*, 16 N.Y.3d 701 (2011), citing *Agress v. Clarkstown Cent. School Dist.*, 69 A.D.3d 769, 771 (2d Dept. 2010), quoting *Williams v. Eason*, 49 A.D.3d 866, 868 (2d Dept. 2008).

The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted). The implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract. *Adams v. Washington Group, LLC*, 42 A.D.3d 475, 476 (2d Dept. 2007), citing, *inter alia*, *Horn v. New York Times*, 100 N.Y.2d 85, 93 (2003).

### C. Judicial Estoppel

The doctrine of estoppel against inconsistent positions precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding. *Kimco of New York, Inc. v. Devon*, 163 A.D.2d 573, 574 (2d Dept. 1990). It is to be distinguished from collateral estoppel which assumes a full and fair opportunity to litigate the issue in the prior action. *Id.*, citing *Kaufman v. Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. *Id.*, quoting *Environmental Concern v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593 (2d Dept. 1984).

### D. Statute of Frauds

GOL § 5-701 provides, in pertinent part, as follows:

- a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:
2. is a special promise to answer for the debt, default or miscarriage of another person...

The promise by one person to indemnify another for becoming a guaranty for a third is not within the statute of frauds, and need not be in writing. *Barclays Bank of New York v. Goldman*, 517 F. Supp. 403, 414 (S.D.N.Y. 1981), quoting *Jones v. Bacon*, 145 N.Y. 446, 449 (1895). In *Barclays*, plaintiffs sued defendants as guarantors of debts incurred by the third-party defendant known as DDIL. 517 F. Supp. at 406. The defendants commenced a third-party action for indemnity against DDIL and two individuals affiliated with the DDIL. *Id.* One of those individuals ("Moshe") was an officer and controlling shareholder of DDIL. *Id.* at 407-408. In the third-party complaint, the defendants alleged that they signed the guarantee agreement only on Moshe's personal assurance that all of DDIL's debts would be paid and on his oral promise that he would indemnify them against all claims asserted by plaintiff. *Id.* at 408. The defendants also alleged that Moshe orally promised one of the defendants that DDIL or Moshe would reimburse the defendant for any of DDIL's debts to other creditors that defendant paid out



of his personal funds. *Id.*

The *Barclays* court held that 1) Moshe's alleged promise to indemnify defendants for becoming guarantors, and 2) Moshe's alleged promise to reimburse the individual defendant for his payment of DDIL's debts, were not within the Statute of Frauds. *Id.* at 415. In so doing, the Court relied on the reasoning in *Gilinsky v. Kliensky*, 140 Misc. 724 (Sup. Ct. Broome Co. 1931). The *Gilinsky* court held that defendant's oral promise that if plaintiffs guaranteed the notes of his brother ("Israel"), defendant would then indemnify the plaintiffs against loss was not within the Statute of Frauds. In *Gilinsky*, the plaintiffs became guarantors on Israel's notes and when Israel defaulted they were required to pay Israel's creditors. In holding that defendant's promise was not within the Statute of Frauds, the *Gilinsky* Court held as follows:

The defendant's promise was not to pay the indebtedness of his brother Israel to the banks; his promise was to pay an indebtedness not in existence, but which would come into existence if and when these plaintiffs as guarantors of the banks' indebtedness were required to pay and did pay that indebtedness.

*Gilinsky*, 140 Misc. at 725-726, cited in *Jones*, 517 F. Supp. at 414.

#### E. Indemnification

A party's right to indemnification may arise from a contract or may be implied based on the law's notion of what is fair and proper as between the parties. *McCarthy v. Turner Construction, Inc.*, 17 N.Y.3d 369, 374-375 (2011), quoting *Mas v. Two Bridges Assocs.*, 75 N.Y.2d 680, 690 (1990). Implied, or common law, indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other. *Id.* at 375, quoting *Mas, supra*, citing *McDermott v. City of New York*, 50 N.Y.2d 211, 216-217 (1980), *reh. den.*, 50 N.Y.2d 1059 (1980).

#### F. Application of these Principles to the Instant Action

The Court denies the motion by TPDs based on the Court's conclusion that 1) Ferraro has adequately pled a cause of action based on promissory estoppel by alleging that the TPDs promised Ferraro that they would defend, indemnify and hold Ferraro harmless in the event that Plaintiff instituted legal action against Ferraro regarding his employment with the Hospital, on which he reasonably relied to his detriment; 2) the Court cannot, at this nascent stage of the litigation, conclude as a matter of law that Capobianco's oral promise to indemnify Ferraro is

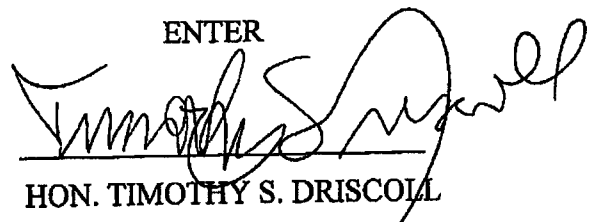
barred by the Statute of Frauds; 3) Ferraro has adequately alleged that the TPDs breached their oral agreement to indemnify him against legal action by Kurtzweil, and improperly terminated him under the Hospital Agreement; 4) Ferraro has adequately pled the fourth cause of action for breach of the implied duty of good faith and dealing in connection with the promises allegedly made by Capobianco to Ferraro; 5) it would be inappropriate to dismiss the fifth cause of action for indemnification and/or contribution at this state of the litigation in light of the Court's denial of TPDs' motion to dismiss the substantive causes of action in the TPC, and the allegations in the TPC which might support indemnification or contribution by the TPDs if Ferraro is determined to be liable to Kurtzweil on the Main Action; and 6) the principle of judicial estoppel, based on assertions made by Ferraro in his Answer in the Main Action, does not bar the TPC based on the Court's conclusions that Ferraro has taken positions that, though different, are not so inconsistent as to warrant application of the doctrine to this action.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on January 11, 2012 at 9:30 a.m.

DATED: Mineola, NY  
December 15, 2011

ENTER  
  
 HON. TIMOTHY S. DRISCOLL

J.S.C.

**ENTERED**

DEC 21 2011

NASSAU COUNTY  
COUNTY CLERK'S OFFICE