

**Greenfield v Long Beach Imaging Holdings, LLC**

2012 NY Slip Op 33807(U)

December 17, 2012

Supreme Court, Nassau County

Docket Number: 000636/12

Judge: Stephen A. Bucaria

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

**ORIGINAL**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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ALAN B. GREENFIELD, M.D., P.C.,

Plaintiff,

-against-

LONG BEACH IMAGING HOLDINGS, LLC  
and LENOX HILL RADIOLOGY & MEDICAL  
IMAGING ASSOCIATES, P.C.,

Defendants.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 000636/12

MOTION DATE: Oct. 26, 2012  
Motion Sequence # 004

The following papers read on this motion:

- Notice of Motion..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion by defendant Lenox Hill Radiology & Medical Imaging Associates, PC to dismiss the amended complaint for failure to state a cause of action is **granted**.

This is an action for breach of contract. Dr. Alan Greenfield is a radiologist who practices as a professional corporation, plaintiff Alan B. Greenfield, M.D., P.C. In 2003, the professional corporation filed an assumed name certificate for the name "Islandwide Medical Imaging," and Dr. Greenfield began to practice under that name.

On March 1, 2010, Dr. Greenfield's professional corporation entered into a lease and services agreement with defendant Long Beach Imaging Holdings, LLC. Pursuant to the

agreement, Long Beach Imaging subleased a medical office located at 210 West Park Avenue to the professional corporation for a term of ten years. The agreement provided that Long Beach Imaging would lease an MRI, a mammography, and an ultrasound system to the PC and provide diagnostic imaging technologists to operate the equipment. Additionally, Long Beach Imaging was to provide non-medical personnel for administration, bookkeeping, scheduling, maintaining patient files, and complying with managed care contracts. Long Beach Imaging is owned indirectly 60 % by Merik Dobler, a non-physician, and 40 % by Dr. Greenfield.

As compensation for these services, Long Beach Imaging was to be paid "usage fees" in the amount of \$162,500 per month per month through February 28, 2011, \$212,500 per month through February 29, 2012, and \$254,167 per month through February 28, 2013. The fees were due and payable 60 days after the invoice was presented. The agreement provided that, to secure payment of the usage fees, Long Beach Imaging was to have a "continuing security interest" in the PC's bank accounts in which revenues received from the diagnostic imaging services were to be deposited. The agreement provides that it may be terminated by either party based upon material breach by the other party on ten days written notice.

On the same date, the parties entered into a security agreement. In the security agreement, the PC granted Long Beach Imaging a security interest in all bank accounts established for the purpose of depositing revenues received from the provision of medical services rendered by or on behalf of the PC with respect to the 210 West Park Avenue office. The PC also granted Long Beach Imaging a security interest in all accounts receivable generated from medical services performed at the office.

On January 6, 2012, Long Beach Imaging sent the professional corporation notice of default based upon 1) its removal of Long Beach Imaging's signatory authority over the PC's bank account, 2) underpayment of fees in the amount of \$1.8 million, 3) unauthorized removal of a computer, and other claimed breaches of the agreement. On January 18, 2012, Long Beach Imaging notified the PC that it was terminating the lease and services agreement effective immediately. Plaintiff alleges that Long Beach Imaging instructed medical office employees not to report to work, cancelled patient appointments, removed the office computer, and turned off the telephone service. Plaintiff alleges that the practice was then taken over by defendant Lenox Hill Radiology & Medical Imaging Associates.

In the first cause of action, plaintiff alleges that defendant Long Beach Imaging breached the lease and services agreement by failing to pay rent to the landlord, failing to pay

vendors of the professional corporation, and evicting plaintiff from the office. In the second cause of action, plaintiff alleges that defendant Long Beach Imaging tortiously interfered with plaintiff's contractual and business relations with its patients. In the third cause of action, plaintiff alleges that defendant Lenox Hill Radiology was unjustly enriched by taking over plaintiff's practice and using the Islandwide Medical Imaging name. In the fourth cause of action, plaintiff seeks a declaratory judgment that defendant Long Beach Imaging is obligated to defend and indemnify the professional corporation for liabilities incurred pursuant to the lease and services agreement.

In its answer, defendant Long Beach Imaging asserted a counterclaim for breach of contract, claiming that it was owed \$2,784,542 in usage fees earned pursuant to the lease and services agreement. Defendant also asserts a claim for foreclosure of its security interest in the PC's bank accounts established for the purpose of depositing revenues received from diagnostic imaging services performed in the Long Beach office.

Defendant Lenox Hill Radiology moves to dismiss the amended complaint, as asserted against it, for failure to state a cause of action.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Arnav Industries, Inc. v. Brown*, 96 NY2d 300, 303 [2001]).

An action for unjust enrichment is based upon an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned (*IDT Corp. v Morgan Stanley*, 12 NY3d 132, 142 [2009]). Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (Id).

As a matter of public policy, patients have the right to choose their own doctors. Thus, plaintiff's claim against Lenox Hill is based, not upon appropriating the practice, but upon appropriating practice's name.

General Business Law § 130 provides that, "No person shall...conduct..business in this state under any name or designation other than his or its real name..., unless a) such person, if other than a corporation, limited partnership or limited liability company, shall file in the

**GREENFIELD**

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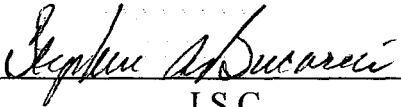
office of the clerk of each county in which such business is conducted...a certificate setting forth the name or designation under which” the business is conducted, the address where it is conducted, and the names of the persons conducting the same. The purpose of the statute is to protect the public, to afford the public information as to the identity of the persons conducting the business, and to prevent deception and confusion (*Cifone v Andros Broadway, Inc.*, 40 AD3d 549 [1<sup>st</sup> Dept 2007]). Thus, General Business Law § 130 does not confer upon the person filing the certificate a right of action against someone using his assumed name.

In order to maintain an action for trademark infringement, plaintiff must show that it possesses a “strong mark,” one which has a distinctive quality or has acquired a “secondary meaning,” such that the trade name has become so associated in the public’s mind with the plaintiff that it identifies goods or services sold by that entity as distinguished from goods or services provided by others (*Fireman’s Ass’n v French Amer. School*, 41 AD3d 925, 928 [3d Dept 2007]). The name “Islandwide Medical Imaging” is not distinctive and has no secondary meaning. Since the name “Islandwide Medical Imaging” cannot support an action for trademark infringement or unfair competition, it cannot support an action for unjust enrichment.

Accordingly, defendant Lenox Hill Radiology & Medical Imaging Associates’ motion to dismiss the amended complaint for failure to state a cause of action is **granted**.

So ordered.

Dated DEC 17 2012

  
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J.S.C.

**ENTERED**

DEC 20 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE