Island Gastroenterology v Island Anesthesiologists, PC
2012 NY Slip Op 31371(U)
May 17, 2012
Sup Ct, Suffolk County
Docket Number: 08178-2008
Judge: Emily Pines

[* 1]

SHORT FORM ORDER INDEX NO.: 08178-2008

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present:
Hon. Emily Pines
Justice Supreme Court

Motion Date: 08-16-2011
Submit Date: 05-17-2012
Motion No.: 004 MD

[ ] Final
[x] Non Final

X

ISLAND GASTROENTEROLOGY,

Plaintiff,

-against-

ISLAND ANESTHESIOLOGISTS, PC and ANIL PATIL,

Defendants.

X

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In this action for, inter alia, breach of contract, defendants Island Anesthesiology, P.C. ("IA") and its President/shareholder, Anil Patil, move for summary judgment dismissing the complaint and on their counterclaims.

Complaint

In the Complaint, Plaintiff Island Gastroenterology Consultants, P.C. ("Plaintiff") claims that in May 2007 it entered into an oral agreement pursuant to which IA was to provide anesthesia services as an independent contractor to Plaintiff at Plaintiff's premises in its endoscopy unit. Plaintiff claims that the oral agreement provided that IA was to forward all payments received from third-party payors for the provision of anesthesia services to Plaintiff's patients to Plaintiff, and that Plaintiff would then pay IA 60% and retain 40% of the funds. Plaintiff claims that IA breached the agreement by

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refusing to forward all payments received from third-party payors to Plaintiff thus retaining more than 60%. Plaintiff alleges that IA provided services pursuant to the oral agreement for several months, billing third-party payors and depositing funds received into an IA account. On August 21, 2007, IA provided Plaintiff with a check for $180,000, which was cashed by Plaintiff. Plaintiff alleges that over time the amount of payments withheld by IA increased to millions of dollars. Plaintiff claims that the parties discussed potential revisions to the agreement in mid-October 2007, including the manner of compensation. According to Plaintiff, by that time, IA had collected approximately $3,000,000 in fees, which it had not remitted to Plaintiff as required pursuant to the agreement.

On October 24, 2007, IA issued a check to Plaintiff in the amount of $200,000, which was cashed by Plaintiff. IA issued a check dated October 29, 2007, signed by non-party Dr. Raul Masakayan (who was authorized to sign checks and claims that he was a 50% shareholder in IA), to Plaintiff in the amount of $590,000. The check bounced.

Plaintiff alleges that IA terminated the agreement on October 29, 2007.

Plaintiff asserts seven causes of action: (1) breach of contract, (2) unjust enrichment, (3) fraud, (4) negligent misrepresentation, (5) conversion, (6) an accounting, and (7) piercing corporate veil to impose personal liability upon Patil.

Answer

In their answer, Defendants deny the material allegations in the complaint. Defendants admit, among other things, that from May 2007 through October 2007, IA collected more than $4,000,000 from third-party payors for the anesthesia services it provided to Plaintiff's patients. Defendants contend that there were numerous proposed written agreements exchanged between the parties which demonstrate that the parties never

came to an agreement on material terms, including the amount of compensation, such that there was never a meeting of the minds. According to Defendants, it was understood that pending the execution of a written agreement, IA would provide anesthesia services and make payments to Plaintiff consistent with those made by its predecessor, Dr. Bernholc. Defendants claim that the parties continued to negotiate an agreement and that a second draft agreement, with different compensation terms was provided by Plaintiff. IA did not accept.

Defendants claim that the $120,000 check issued by IA on July 9, 2007, was payment for two months at the monthly rate of $60,000, the same amount that had been paid by Dr. Bernholc, equal to fair market value rent and overhead. Defendants contend that the $180,000 check issued by IA on August 21, 2007, was for three months at the same monthly rate ($60,000) paid by Dr. Bernholc. Defendants claim that by the end of August 2007, it had paid Plaintiff $240,000 ($60,000 per months for four months).

Defendants allege that a meeting of the parties and their counsel was held on September 5, 2007, in an attempt to negotiate the material terms of the proposed agreement. An agreement was not reached at that time. Defendants claim that Plaintiff offered yet another proposed agreement with different compensation terms in October 2007.

Defendants claim that the $200,000 check it provided to Plaintiff on October 24, 2007, was not based on percentage compensation and was provided under great duress from Plaintiff. Dr. Patil alleges that he told Dr. Masakayan not to write a substantial check on October 29, 2007, as there were insufficient funds in the account at that time.

Defendants assert counterclaims sounding in (1) conversion (anesthesiology equipment), (2) an accounting, and (3) tortious interference with business relations. Defendants also assert an affirmative defense that the alleged oral agreement is contrary to applicable statutes, rules and

regulations and, therefore, recovery by Plaintiff is barred as a matter of public policy

Defendants' Motion for Summary Judgment

In support of their motion, Defendants submit an attorney's affirmation annexed to which are, among other things, copies of the various draft written agreements, checks from IA to Plaintiff, and unsigned transcripts of examinations before trial of Dr. Saxena, Dr. Patil, Dr. Mariwalla.

Defendants argue that summary judgment should be granted dismissing the complaint because the multiple draft agreements and deposition testimony establish that the parties never came to an agreement regarding the provision of anesthesia services by IA to Plaintiff's patients, as there was never mutual assert on all essential terms of the contract. Specifically, Defendants argue that the multiple draft agreements demonstrate, as a matter of law, that the parties never agreed on the amount of compensation for the provision of services. Defendants rely on Dr. Patil's deposition testimony that he proposed that he take over the provision of anesthesia services from Dr. Bernholc under the same terms (paying Plaintiff $60,000 per month) that Plaintiff had with Dr. Bernholc until a final agreement could be reached. Dr. Patil testified that IA did not agree to spilt revenue 40/60 with Plaintiff once IA started rendering services at Plaintiff's office. Thus, according to Defendants, there was never a contract between the parties for any split of revenue generated from the provision of anesthesia services. Defendants claim that the parties merely had an agreement to agree.

Additionally, Defendants argue that Plaintiff's breach of contract claim is based on an illegal fee splitting agreement, rendering the alleged contract void as against public policy. Defendants contend that Education Law § 6509-a subjects a physician's license to revocation, suspension or annulment for participation in a fee splitting agreement as same constitutes professional misconduct, and that 8 NYCRR 29.1(b)(4) states that unprofessional conduct

includes permitting any person to share in the fees for professional services.

Finally, Defendants argue that they are entitled to summary judgment on their counterclaim for conversion because the evidence establishes that Defendants have legal title to and right of possession of the anesthesiology equipment held at Plaintiff's premises, which Plaintiff continues to withhold from Defendants despite demands for return of the equipment

Plaintiff's Opposition

In opposition, Plaintiff submits, among other things, an affidavit from Dr. Saxena wherein he states, among other things, that Dr. Bernholc paid Plaintiff $60,000 per month for the overhead costs associated with the services he provided. In early 2007, Dr. Saxena discussed with Dr. Patil that Dr. Patil could provide the same services as those provided by Dr. Bernholc on terms more financially favorable to Plaintiff. Dr Saxena states that in May 2007, based on Dr. Patil's proposal, Plaintiff terminated its relationship with Dr. Bernholc and entered into an oral agreement with IA to provide anesthesia services at Plaintiff's facility. Dr. Saxena claims that both Plaintiff and IA agreed to act pursuant to the oral contract which would eventually be put in writing. Dr. Saxena states that the oral contract provided for IA to bill and collect fees for its services and forward the funds to Plaintiff, which was then obligated to pay IA 60%. Dr. Saxena further states that after the parties began operating under the oral agreement, IA refused to remit the full amount of fees collected, although IA made partial payment to Plaintiff. According to Dr. Saxena, after the oral agreement was reached, efforts were undertaken to transcribe it into a formal written contract, including the exchange of proposed draft agreements. Dr. Saxena claims that in the fall of 2007, in an effort to save the failing relationship between the parties, potential modifications to the oral agreement were discussed, including a change in the compensation terms. However, the situation continued to deteriorate and Dr. Patil unilaterally terminated the

agreement on October 29, 2007. Dr. Saxena states that Dr. Patil abandoned the anesthesiology equipment at Plaintiff's facility and never asked to get it back or have it returned.

Plaintiff also provides an affidavit from non-party Dr. Masakayan who states, among other things, that based on representations made to him by Dr. Patil that they were equal partners in IA, he believed that he was a 50% shareholder in IA during the events that are the subject of this action. Dr. Masakayan states that based on Dr. Patil's proposal, Plaintiff terminated its relationship with Dr. Bernholc and entered into an oral agreement with IA pursuant to which IA agreed to provide anesthesia services for Plaintiff in exchange for payment of 60% of the revenues generated therefrom. Essentially, Dr. Masakayan corroborates Dr. Saxena's version of events.

Plaintiff contends that Defendants' reliance on Education Law § 6509-a is misplaced as that statute does not apply to gastroenterologists or anesthesiologists. Rather, the applicable statute, Education Law § 6530(19), specifically states that a contractual arrangement such as the oral agreement between the parties is permissible. Thus, Plaintiff argues that Defendants have not demonstrated their entitlement to judgment as a matter of law. Additionally, Plaintiff contends that the conflicting versions of the parties as to whether an oral agreement was entered into creates issues of fact. Plaintiff also contends that Defendants have failed to address their conversion claim, and that Defendants have failed to establish that they demanded return of the anesthesia equipment. Plaintiff asserts that based on Dr. Masakayan's alleged ownership interest in IA, there are issues of fact as to who owns the equipment.

Discussion

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact

(*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85, 487 NYS2d 316 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713, 641 NYS2d 701 [2nd Dept. 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride, LLC*, 63 AD3d 895 [2d Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*Salino v IPT Trucking, Inc.*, 203 AD2d 352 [2d Dept 1994]).

Assuming that there was an oral contract between the parties to split the fees generated from IA's provision of anesthesia services at Plaintiff's facility, Defendants have failed to demonstrate that the agreement was illegal and therefore unenforceable. Rather, such an agreement does not appear to violate Education Law § 6530(19), which defines professional misconduct for physicians as including: "Permitting any person to share in the fees for professional services, ***other than: a . . . professional subcontractor or consultant authorized to practice medicine . . .***" (emphasis added). Here, it appears that IA may be a "professional subcontractor or consultant authorized to practice medicine" making it permissible for Plaintiff to share in IA's fees. Thus, summary judgment to Defendants on this ground is denied.

One of the requirements for the formation of a contract is mutual assent to the terms of the contract. The manifestation of mutual assent must be sufficiently definite to assure that the parties are truly in agreement with respect to all material terms (*Express Industries and Terminal Corp. v. New York State Dept. of Trans.*, 93 NY2d 584, 589 [1999]). If the parties contemplate a formal written contract and that they will not be bound until

such contract is signed, there is no binding agreement absent such contract (*Patrolmen's Benev. Ass'n of City of New York, Inc. v. New York*, 27 NY2d 410 [1971]; *ADCO Elec. Corp. v. HRH Constr., LLC*, 63 AD3d 653 [2d Dept. 2009]). A question of fact arises as to the parties intent to enter into an enforceable obligation where the intent must be determined by disputed evidence or inferences outside the written words of the instrument (*id.*). A mere agreement to agree, in which a material term is left for future negotiations is unenforceable (*166 Mamaroneck Ave. Corp. v. 151 East Post Road Corp.*, 78 NY2d 88 [1991]).

Here, the conflicting factual accounts given by the parties (Dr. Patil and Dr. Saxena) together with the affidavit of non-party Dr. Masakayan, clearly demonstrate the existence of triable issues of fact as to whether there was mutual assent on all essential terms of the alleged oral contract. Therefore, Defendants motion for summary judgment dismissing Plaintiff's complaint is denied.

Moreover, the evidence demonstrates the existence of an issue of fact as to legal ownership of the anesthesia equipment at issue on Defendants' counterclaim for conversion. To prove a cause of action for conversion, plaintiff must establish legal ownership of a specific identifiable piece of property and the defendant's exercise over or interference with the property in defiance of plaintiff's rights (*Hamlet at Willow Creek Development Co., LLC v. Northeast Land Development Corp.*, 64 AD3d 85 [2d Dept. 2009]). Where one is rightfully in possession of property, one's continued custody of the property and refusal to deliver it on demand of the owner until the owner proves his or her right to the property does not constitute a conversion (*Trans-World Trading, Ltd. v. North Shore Univ. Hosp. at Plainview*, 64 AD3d 698 [2d Dept. 2009]).

Here, although Dr. Patil states that he is the owner of the equipment, Dr. Masakayan claims that he had an ownership interest in IA. Therefore, the Defendants have not demonstrated their exclusive right to the anesthesia

equipment and that branch of Defendants' motion is denied.

With regard to IA's statements, set forth in its reply papers, for the first time, concerning allegations that the so called 60/40 agreement is in violation of Federal Law, such will be referred to trial, as it was not properly raised in the initial motion papers.

This constitutes the ***DECISION*** and ***ORDER*** of the Court.

Dated: May 17, 2012
Riverhead, New York

Emily Pines

Emily Pines
J. S. C.

[ ] Final
[x] Non Final