

<b>Moadel v Pruitt</b>
2012 NY Slip Op 31392(U)
May 8, 2012
Supreme Court, New York County
Docket Number: 602245/08
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**

PRESENT: DEBRA A. JAMES  
Justice

## PART 59

KENNETH MOADEL, M.D., and KEN  
MOADEL, M.D., P.C.,

Plaintiffs,

Index No.: 602245/08

Motion Date: 12/23/11

Motion Seq. No.: 06

Motion Cal. No.:

- v -

MATTHEW J. PRUITT, JERREYLL TRAVIS  
JACKSON, M.D., JESSICA LEMOINE,  
ALL-STAR MEDICENTERS, LLC, and  
JERREYLL T. JACKSON, M.D., P.C.,

Defendants.

**FILED**

MAY 24 2012

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 5 were read on this motion for partial summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

## Answering Affidavits - Exhibits

## Replying Affidavits - Exhibits

## PAPERS NUMBERED

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2. 3

4. 5

**Cross-Motion:**      ☒ Yes      ☐ No

Plaintiffs Kenneth Moadel, M.D. (Moadel), and Ken Moadel, M.D., P.C. (Moadel PC) move for partial summary judgment pursuant to CPLR 3212, on the first, second, sixth and seventh causes of action in the complaint. Defendants Matthew J. Pruitt, Jerreyll Travis Jackson, M.D., All-Star Medicenters, LLC, and Jerreyll T. Jackson, M.D., P.C. cross-move for summary judgment dismissing the complaint. Defendant Jessica

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):**

Lemoine was dismissed by order of the court dated April 17, 2009.

Dr. Moadel is an ophthalmologist specializing in laser correction procedures. Moadel and defendant Matthew J. Pruitt (Pruitt), a non-physician, each held a 50% interest in CT Laser Management, LLC d/b/a OneVision (OneVision). They agreed to share profits, losses and expenses equally. Pruitt was an operating member of OneVision. The alleged exclusive purpose of OneVision was to provide administrative services to Moadel PC, including marketing, advertising and management services. OneVision compiled a prospective client list and an existing client list for Moadel PC. Additionally, OneVision created a marketing plan for Moadel PC. OneVision was paid for its services.

On February 25, 2008, Moadel requested, in an e-mail to Pruitt, that OneVision suspend its services to Moadel PC and forward all medical records and relevant telephone inquiries to Moadel. The complaint further alleges that Pruitt delayed complying with Moadel's requests, formed All-Star Medicenters, LLC, d/b/a NuVision (NuVision), and began to offer administrative services to Jerreyll Travis Jackson, M.D. (Jackson), an ophthalmologist recently associated with Moadel. These services allegedly included use of Moadel PC's client

lists and marketing plan, and allegedly resulted in an advertising campaign containing purported testimonials for NuVision from actual Moadel PC patients.

This action, commenced on September 3, 2008, asserts causes of action for unfair competition by unauthorized use of proprietary information (first and second), and deceitful advertising by misappropriation of Moadel's image (sixth and seventh), among others.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." Dallas-Stephenson v Waisman, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" People v Grasso, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. Rotuba Extruders v Ceppos, 46 NY2d 223, 231 (1978); Grossman v Amalgamated Hous. Corp., 298 AD2d 224, 226

(1<sup>st</sup> Dept 2002). Where a party fails to meet its prima facie burden, its summary judgment motion shall be denied regardless of the sufficiency of the opposing papers. Matter of Siegel, 90 AD3d 937, 940 (2d Dept 2011), citing Winegrad, 64 NY2d at 853.

The court shall deny the parties' respective motions for summary judgment as there are issues of contested fact which preclude summary disposition.

At a minimum, the parties agree that OneVision operated as a joint venture with Moadel and Pruitt each owning 50% of the venture and Pruitt drawing an agreed upon salary. It also appears that there was no written partnership or venture agreement between Moadel and Pruitt and no written contract between OneVision and Moadel PC.

As stated by a Justice of this Court,

A joint venture has the characteristics of a partnership and many of its legal consequences. It has been said that a joint venture is a partnership for a limited time and purpose. A partnership or a joint venture terminates with the withdrawal of any joint venturer or partner, or on the parties' agreement to terminate the venture. . . . Such termination, however, is not a termination of liability to each other previously incurred. That can only occur among partners and joint venturers upon an accounting or release. The termination which occurs on withdrawal or agreement is a prospective termination, that is, the partnership or joint venture no longer engages in any new undertakings. A partnership or joint venture, however, continues to exist for the purpose of winding up claims and obligations.

North River Ins. Co. v Spain Oil Corp., 135 Misc2d 480, 482-483 (Sup Ct, NY County 1987, Stecher, J.).

In the absence of any written agreements governing the relationship between Moadel, Pruitt, Moadel PC and OneVision, the parties' claims and defenses must rest on their conflicting testimony and evidence about their transactions and interactions in order to determine their respective rights. While plaintiffs claim that defendants misappropriated proprietary information belonging to plaintiffs, plaintiffs fail to establish as a matter of law that the information was in fact proprietary to plaintiffs and not to OneVision and there are also questions of contested fact as to what rights, if any, plaintiffs granted OneVision and the defendants to the allegedly misappropriated information. With respect to the claims between Moadel and Pruitt individually the relationship of the parties is especially germane to a determination of their claims because "[i]t is well settled that one partner cannot sue the other at law, as distinguished from an action in equity, with respect to partnership transactions, except after a full accounting, and balance struck, and such an action is on contract and not ex delicto. If one partner betrays his trust, and converts to his own use partnership property, he incurs the usual

liability that one partner incurs to another respecting partnership affairs, i. e., to be held liable in an accounting, but he cannot be sued by the other partner for damages in an action for conversion." Dalury v Rezinias, 183 AD 456, 460 -461 (1<sup>st</sup> Dept 1918).

Therefore, based upon the failure of the respective parties to establish a prima facie case the court shall deny plaintiffs' motion for partial summary judgment in their favor, pursuant to CPLR 3212, on the first, second, sixth and seventh causes of action in the complaint and shall deny defendants' cross-motion for summary judgment dismissing the complaint.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment pursuant to CPLR 3212 on the first, second, sixth and seventh causes of action in the complaint is DENIED; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that the parties are directed to attend a status conference on Tuesday, June 12, 2012 at 2:30 P.M., at IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 to schedule all remaining discovery in this action; and it is further

action in the complaint and shall deny defendants' cross-motion for summary judgment dismissing the complaint.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment pursuant to CPLR 3212 on the first, second, sixth and seventh causes of action in the complaint is DENIED; and it is further

ORDERED that defendants' cross-motion for summary judgment dismissing the complaint is DENIED; and it is further

ORDERED that the parties are directed to attend a status conference on Tuesday, June 12, 2012 at 2:30 P.M., at IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 to schedule all remaining discovery in this action; and it is further

ORDERED that the deadline to refile the note of issue is extended to July 31, 2012.

This is the decision and order of the court.

**FILED**

Dated: May 8, 2012

ENTER:

**MAY 24 2012**

NEW YORK  
COUNTY CLERK'S OFFICE  
*[Signature]*  
J.S.C.

**DEBRA A. JAMES**