

**Five Towns Heart Imaging Med., P.C. v Clear
Diagnostic Solutions, Inc.**

2012 NY Slip Op 32261(U)

July 27, 2012

Supreme Court, Nassau County

Docket Number: 2705-12

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO

Justice

TRIAL/IAS, PART 15
NASSAU COUNTY

FIVE TOWNS HEART IMAGING MEDICAL, P.C.,

Plaintiff,

-against-

**CLEAR DIAGNOSTIC SOLUTIONS, INC.,
SUPERIOR DIAGNOSTIC SOLUTIONS, INC.,
JAMES MAGINN, and MATTHEW MCALLISTER,**

Defendants.

**MOTION SUBMITTED:
July 12, 2012
MOTION SEQ. NO.: 01**

**ACTION ONE
INDEX NO.: 2705-12**

**CLEAR DIAGNOSTIC SOLUTIONS, INC.,
and JAMES MAGINN,**

Plaintiffs,

-against-

**SERGIO SOKOL, SERGIO SOKOL, M.D.,
F.A.A.C., P.C., and FIVE TOWNS HEART
IMAGING MEDICAL P.C.,**

Defendants.

**ACTION TWO
INDEX NO.: 4890-12**

The following papers and the attachments and exhibits thereto have been read on this motion:

Affirmation in Opposition	2
Reply Affirmation	3

Defendants in Action No. 2 (“Instant Action”) move for an order pursuant to: CPLR 3211(a)(4) dismissing the complaint insofar as asserted against Defendant Five Towns Heart Imaging Medical P.C. (“Five Towns”), and; CPLR 602 consolidating the “balance” of the instant Action with a prior action pending in the Supreme Court, Nassau County (“Prior Action”).

For the reasons that follow, the motion is granted in part and denied in part.

The Prior Action

On March 2, 2012, Five Towns commenced an action against Clear Diagnostic Solutions, Inc. (“Clear Diagnostic”), Superior Diagnostic Solutions, Inc. (“Superior Diagnostic”), James Maginn (“Maginn”) and Matthew McAllister in the Supreme Court, Nassau County, Index No. 2705/12 asserting causes of action for: 1) constructive trust and accounting; 2) breach of contract; 3) conversion; 4) fraud; and 5) replevin (Ex. “A” to Motion).

The Defendants in the Prior Action answered the complaint and asserted various affirmative defenses and two counterclaims. Specifically, in the first counterclaim, Defendants asserted that Sergio Sokol (“Sokol”), the principal of Five Towns, “leased certain medical equipment in the name of [Five Towns] for the benefit of [Clear Diagnostic]”; that Five Towns has “wrongfully claimed said equipment in contravention to the agreements between [Sokol and Clear Diagnostic] . . . in violation of public policy (Stark Act)” and that Five Towns “has wrongfully interfered with defendants’ business relationships” (Ex. “B” to Motion at ¶¶ 23-25).¹ The second counterclaim states that “by reason of [Five Town’s] wrongful claim over the subject equipment and the taking of same, a resulting constructive trust should be declared to exist and that [Five Towns] be ordered to convey said equipment to [Clear Diagnostic] . . . and all profits wrongfully obtained by it through the use of the equipment” (Ex. “B” to Motion at ¶ 26).

The Instant Action

On April 18, 2012, Clear Diagnostic and Maginn commenced an action against Sokol, Sergio Sokol, M.D., F.A.A.C., P.C. (“Sokol P.C.”) and Five Towns in the Supreme Court, Nassau

¹ The medical equipment, which is at the core of both actions, is hereinafter referred to as “the equipment”.

County, Index No. 4890/12 asserting causes of action for: 1) breach of contract (against Sokol and Sokol P.C. only); 2) action for labor and services; 3) account stated; 4) unjust enrichment; and 5) constructive trust. Specifically, in the fourth cause of action, Plaintiffs asserted that “Sokol’s assertion of ownership and control over the subject equipment is in violation of public policy” and has damaged Clear Diagnostic; that Defendants “have taken possession of the equipment” given to Clear Diagnostic; and that Defendants have been “unjustly enriched” (Ex. “D” to Motion at ¶¶ 32-34). Plaintiffs asserted in the fifth cause of action that in “breach of the agency and trust relationship” between Plaintiffs and Sokol, Sokol .P.C., and Five Towns, the Defendants “wrongfully and unlawfully claim ownership and/or exercise dominion and control over the equipment” and that by reason thereof, “a resulting constructive trust should be declared to exist” by which the Defendants should be ordered to convey the equipment and “all profits wrongfully obtained by their use of the equipment” (Ex. “D” to Motion at ¶¶ 37-38).

The Defendants in the Instant Action (“movants”) move for an order “pursuant to CPLR § 3211(a)(1)” dismissing the complaint as against Five Towns and consolidating the “balance of the action” with the Prior Action on the ground that “the claims against [Five Towns] in the Instant Action are duplicative of the counterclaims asserted by the same parties against [Five Towns] in the Prior Action” and, as such, the “Instant Action should be dismissed in its entirety as and against [Five Towns]” (Affirmation in Support at ¶¶ 12, 20).

In opposition, Clear Diagnostic and Maginn argue that the motion should be denied because the “Instant Action is broader in scope and contains parties that are not named in the Prior Action” and because the claims being asserted in the Instant Action involve “more than the narrow issues raised in the Prior Action” (Affirmation in Opposition at ¶¶ 10-11).

The Court’s Determination

Dismissal

Initially, the court notes that the Notice of Motion purports to seek dismissal pursuant to CPLR 3211 (a)(1), however, a review of the supporting papers reveals that relief is being sought under CPLR 3211(a)(4).

Pursuant to 3211(a)(4), a party may move to dismiss one or more causes of action on the ground that “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires”, including consolidation (Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:19, at 33).

A claim asserted as a counterclaim may give rise to a “prior action pending” (*see Frank*

Pompea, Inc. v Essayan, 36 AD2d 745 [2d Dept 1971]; see also *Packes v Cendant Mortgage Corp.*, 19 AD3d 386 [2d Dept 2005]).

Here, the Plaintiffs in the Instant Action (Clear Diagnostic and Maginn) seek a constructive trust as well as “all profits wrongfully obtained” by Five Towns, Sokol, and Sokol P.C.’s use of the equipment. This claim, which is the fifth cause of action asserted in the Instant Action, is the same as the second counterclaim asserted in the Prior Action wherein Clear Diagnostic similarly seeks a constructive trust as well as “all profits wrongfully obtained” by Five Towns. Accordingly, the fifth cause of action asserted in the complaint in the Instant Action, insofar as asserted against Five Towns, is hereby dismissed pursuant to CPLR 3211(a)(4).

In the exercise of its broad discretion, however, the court denies the branch of the motion seeking dismissal of the fourth cause of action in the Instant Action. In this regard, movants have failed to demonstrate that the relief sought in the first counterclaim in the Prior Action is the same or substantially the same as that sought in the fourth cause of action (*Goldman v A&E Club Properties, LLC*, 89 AD3d 681 [2d Dept 2011]).²

Consolidation

Movants also seek to consolidate the Instant Action with the Prior Action because both actions “are based on and arise under the same common nexus of facts: the ownership of certain medical equipment and the business relationships among the parties to the actions” (Affirmation in Support at ¶ 23).

In a true consolidation of actions, as opposed to a “consolidation” for joint trial, the captions merge and only one action and one caption remain. In the case at bar, however, (ture) consolidation would be inappropriate since Clear Diagnostic, a Plaintiff in the Instant Action, is a Defendant in the Prior Action. Notwithstanding, the court hereby orders joinder of the actions

² In the first counterclaim in the Prior Action, Defendants asserted that Sergio Sokol, the principal of Five Towns, leased the equipment in the name of Five Towns for the benefit of Clear Diagnostic; that Five Towns has wrongfully claimed the equipment in contravention to the agreements between Sokol and Clear Diagnostic and in violation of public policy; and that Five Towns “has wrongfully interfered with defendants’ business relationships” (Ex. “B” to Motion at ¶¶ 23-25). Clear Diagnostic asserted in the fourth cause of action in the Instant Action that Sokol’s assertion of ownership and control over the equipment is in violation of public policy and has damaged Clear Diagnostic; that Sokol and Five Towns “have taken possession of the equipment” given to Clear Diagnostic; and that Sokol and Five Towns have been “unjustly enriched” (Ex. “D” to Motion at ¶¶ 32-34).

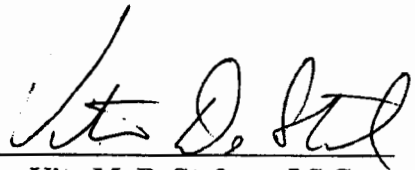
for purpose of discovery and trial (see *M&K Computer Corp. v MBS Industries*, 271 AD2d 660 [2d Dept 2000]; *Geneva Temps, Inc. v New World Communications, Inc.*, 24 AD3d 332 [1st Dept 2005]; *Bass v France*, 70 AD2d 849 [1st Dept 1979]).

Accordingly, it is hereby ordered that the motion to dismiss the complaint in the Instant Action is granted only to the extent that the fifth cause of action asserted in the Instant Action is dismissed insofar as asserted against Defendant Five Towns; and it is further ordered that the branch of the motion seeking relief pursuant to CPLR 601 is granted to the extent that a joint trial of the Instant Action and the Prior Action is granted. In all other respects, the motion is denied.

The attorneys for the parties are to appear in Part 15 on August 23, 2012, at 9:30 a.m. for a status and scheduling conference.

This constitutes the decision and order of the court.

Dated: July 27, 2012



Hon. Vito M. DeStefano, J.S.C.

ENTERED
AUG 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE