South Shore Neurologic Assoc., P.C. v Mobile Health Mgt. Servs., Inc.

2012 NY Slip Op 32796(U)

November 20, 2012

Supreme Court, Suffolk County

Docket Number: 32347-2008

Judge: Emily Pines

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SHORT FORM ORDER

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

COPY

Present: **HON. EMILY PINES**
J. S. C.

Original Motion Date: 03-09-2012
Motion Submit Date: 09-21-2012
Motion Sequence No.: 008 MG; 009 MD; 010 MD; 011 MD

SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.

Plaintiff,

-against-

MOBILE HEALTH MANAGEMENT SERVICES, INC., LEE MANAGEMENT, INC., BROOKHAVEN MAGNETIC RESONANCE IMAGING, INC., NORMAN CHERNIK, M.D. and BERT BRODSKY,

Defendants.

Index No. 32347-2008 (Action #1)

LEE MANAGEMENT, INC. and MOBILE HEALTH MANAGEMENT SERVICES, INC.,

Counter-Plaintiffs,

-against-

SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.

Counter-Defendant,

MARK GUDESBLATT, M.D., STEVEN ROSEN, M.D., SAMSON MEBRAHTU, M.D., NORMAN PFLASTER, M.D., HUGH XIAN, M.D., EDWARD FIROUZTALE, D.O., D.S.C., individually and in their capacity as Directors, Officers and Shareholders of South Shore Neurologic Associates, P.C., HENRY MORETA, M.D., individually and in his capacity as an Officer and Director of South Shore Neurologic Associates, P.C., and ARKS RADIOLOGY MANAGEMENT, INC.,

Additional Counter-Defendants on Counter Claim.

NORMAN CHERNIK, M.D., and NORMAN L. CHERNIK, , M.D. , P.C.,

Plaintiff,

-against-

SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.,

Defendant

Index No. 5210-2009 (Action # 2)

SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C.,

Plaintiff,

-against-

BROOKHAVEN MAGNETIC RESONANCE IMAGING, INC., and BERT BRODSKY,

Defendants,

Index No. 30745-2009 (Action # 3)

In the Matter of the Application of SOUTH SHORE NEUROLOGIC ASSOCIATES, P.C., the Holder of Two-Thirds of All Outstanding Shares of Stock of Brookhaven Magnetic Resonance Imaging, Inc,

Petitioner,

for the Judicial Dissolution of
BROOKHAVEN MAGNETIC RESONANCE IMAGING, INC.,

Index No. 27031-2010 (Action # 4)

In its Order dated November 24, 2010, this Court appointed Ronald J. Rosenberg, Esq. as Special Referee to hear and report on the issue concerning whether certain agreements entered into between and among the parties in these related actions were in violation of New York

Education Law § 6530 (19) and 8 NYCRR § 29.1 (b) (4) (prohibiting fee splitting between physicians and non-physicians) and/or whether such agreements violated 42 USC § 1395 nn (known as the Stark Law) as well as its State counterpart, New York Public Health Law § 238 a(1)(a).

The above related actions are centered around the commercial relationship among a neurological medical practice and several other entities. In the first action listed above, South Shore Neurologic Associates PC ("SSNA") seeks money damages against Norman L. Chernik MD ("Chernik"), a declaratory judgment and money damages against Brookhaven Magnetic Resonance Imaging, Inc. ("BMRI"), Mobile Health Management Services, Inc. ("Mobile Health"), Bert Brodsky ("Brodsky"), and Lee Management, Inc. ("Lee"). In the second action, Chernik seeks damages in connection with alleged breaches of his employment agreement with SSNA. The third lawsuit involves disputes between SSNA and BMRI and Brodsky concerning a sublease; and in the fourth action, SSNA seeks dissolution of BMRI. The Special Referee issued his Report on January 13, 2012. Although not parties to the specific issue submitted to the Special Referee, there is a fifth related action pending before this Court, in which SSNA seeks disgorgement of attorneys' fees from its prior counsel, Ruskin Moscou.

SSNA moves, by Notice of Motion (motion sequence # 008), to confirm and adopt the report and recommendation of the Special Referee. Brodsky, Lee and Mobile Health move, by Notice of Motion (motion sequence #009), BMRI moves, by Notice of Motion (motion sequence #010), and Chernik moves, by Notice of Motion (motion # 011) to reject the report and recommendation of the Special Referee.

SSNA was formed in 1989. SSNA's President, Dr. Chernik (now deceased), along with Brodsky and Gerald Shapiro ("Shapiro") formed an entity known as Brookhaven Magnetic Resonance Imaging, Inc. The ownership of BMRI as of the time of these litigations was 2/3 by SSNA and 1/3 by Brodsky (who purchased Shapiro's share after Shapiro's death). Under their agreement, SSNA was to provide medical services and BMRI would provide a facility and MRI equipment. Brodsky is not a physician; nor was Shapiro. BMRI as well as several entities owned by certain shareholders of BMRI entered into a series of written agreements which are at the crux of the current motions.

First, SSNA and BMRI entered into a Turnkey Lease agreement in 1990, under which BMRI would build out space for an MRI facility, acquire MRI machinery and provide managerial and administrative services and a lease. Although the lease contained a basic rental fee, it also provided that "[t]he rent payment for any given month shall be based on the procedures performed during the previous calendar month." The documents submitted to the Referee demonstrate that the flat fee fluctuated from $51,000 per month in 1990 to $110,000 per month in 2007. A second agreement was entered into between SSNA and Lee Management, Inc., an entity owned by Brodsky. In 1990, that agreement provided that Lee would receive 23% of the amounts collected for SSNA's services as its fee. This was amended in 1994 to provide Lee with 16% of amounts collected, in 2001 to provide for a flat fee of $55,000 per month, and again in 2004 to pay Lee a flat fee of $45,000 per month. A third agreement was entered into after a series of depositions in 1994, in an unrelated matter, during which Shapiro (an owner of both Lee and BMRI at the time) stated under oath with respect to Lee's fees that "[T]he profits were always at one-third of the distribution." He testified further that although Lee was to be paid 23 % under the agreement, "what they actually get paid is one-third the profit."

SSNA has argued in these four litigations and in the issue submitted by this Court to the Referee, that a review of the history of these agreements when taken together with the uncontested written and sworn admissions by Brodsky, Shapiro, SSNA's administrator, Anne Dunne (the spouse of Chernik), as well as the attorneys for these parties, demonstrates that they were designed to conceal a fee splitting arrangement in violation of State and Federal laws.

As noted in the Referee's report, shortly after the Shapiro deposition testimony, a series of memos by the law firm of Ruskin Moscou, the attorneys who defended Shapiro at the deposition, determined that the basis of compensation of Lee and BMRI was risky and sought ways to maximize Brodsky and Shapiro's profits while avoiding illegal fee splitting issues. One memo states that: "The goal is to justify fees to Bert and Jerry as non-fee split income." Yet another memorandum from the law firm sets forth that this issue was discussed with Brodsky and Shapiro and that since 23% is not a fair market value rate for billing, they should utilize a third entity to provide administrative services for a flat fee. Thereafter, in the Summer of 1994, under Chernik's guidance, SSNA entered into new agreements. The first was a new Turnkey Lease increasing SSNA's rent from $51,000 to $90,000; the second, a new billing agreement providing for the payment of 16% of amounts received rather than 23%; and the third, a brand new Management and Administrative Services Agreement ("MASA"), entered into

with a new party, Mobile Health Management Services, Inc. (owned by Shapiro and Muriel Brodsky, Brodsky's spouse), for $25,000 per month ($300,000 annually).

In documents, submitted by SSNA in support of its argument of entitlement to Summary Judgment on the issue of the illegality of these arrangements, the Referee noted the following: 1) a March 1, 2007 Brodsky memo to file setting forth a discussion with SSNA regarding the "MRI split and the fact that I am now getting 1/3 and the partners 2/3 . . ."; 2) a Brodsky memo of May 23, 2007 regarding another meeting with SSNA again referencing his "1/3"; 3) a December 13, 2007 memo from SSNA's administrator to Brodsky, stating : "Based upon the contractual agreement between SSNA and Lee Management (2/3 SSNA and 1/3 Lee Management), SSNA would be eligible to receive 1.0 million for the year in distribution;" 4) a Brodsky writing on December 20, 2007 to SSNA stating that net profits were $1,600,000 and that SSNA's share was $1,067,000 (which the Court notes just happens to be 66.6% or 2/3); 5) an April 1, 2008 e-mail from SSNA's administrator to SSNA doctors informing them of the first quarter distributions and specifying in its title "Brodsky 1/3; SSNA 2/3" with actual figures that equal those percentages; 6) an April 2, 2008 e-mail from Ruskin Moscou, the attorneys for the parties on these agreements, asking for a meeting with clients to discuss the consequences of the "one-third/two-third situation . . .;" 7) an April 4, 2008 e-mail to SSNA's administrator attaching a schedule demonstrating the 2/3- 1/3 split for "Brookhaven MRI Distribution Schedules" the period 1998 through 3/31/08"; 8) attorneys' notes from April 10, 2008 of a meeting with Chernik and Moretta of SSNA asking "What does Brodsky do for 1/3"? and setting forth that Mobile Health "does nothing"; 9) an April 23, 2008 e-mail from the attorneys for the parties referencing documents showing the fact that dissident SSNA shareholders were aware of the two- thirds/one-third split; 10) an April 4, 2008 e-mail from Brodsky to SSNA's administrator attaching a document entitled "Brookhaven MRI Distribution Schedules" for the years 1998 through 2008, referencing that Lee Management is entitled to "½ of distr to SSNA;" 11) an undated chart from the attorneys' file demonstrating net profits collected for the period 2005 thorough 2008 , and distributions made, indicating an adjustment in 2007 to ensure that profits were divided two-thirds/one third (the Court notes that, interestingly, this chart coincides to the dollar to the December 20,2007 Brodsky memo referred to above); and 12) the deposition testimony of Gregory Erber (November 22, 2010), a former employee of Brodsky, stating that Brodsky knew of and spoke of the illegality of the fee splitting arrangement and was unconcerned because, as a non-physician, he faced no regulatory consequences, unlike the doctors.

The Referee noted further that in response to these extremely incriminating documents and testimony, all of which constitute significant admissions on the part of BMRI, Brodsky, Lee and SSNA's administrator (who acted under Chernik's control), not one of the opposing parties on the issue of the legality of these aforesaid agreements submitted an affidavit of anyone with personal knowledge of the facts, such as Brodsky, Chernik, or the Administrator. Rather, these parties opposed SSNA's motion

for Summary Judgment on the illegality issue essentially on the grounds that 1) the documents do not on their face refer to any illegal fee split; 2) the lawyers' documents merely show they were attempting to set up agreements that were legal; 3) the documents merely raise issues of fact which entitle the opposing parties to continue with discovery; and 4) the actual, financial data demonstrates that the parties were paid in accordance with their agreements and not under some guise of a fee splitting arrangement. In support of their arguments, the opposing parties submitted the affidavit of an attorney, Richard Weiss, Esq., who stated that the various agreements, on their face, were not violative of any State or Federal fee splitting law. In addition, the opponents submitted a "joint affidavit" from two accountants from the firm of RSM McGladrey, Inc., who concluded that all payments made to BMRI, Lee Management and Mobile Health were consistent with the above cited written agreements. In addition, these accountants provided the Referee with schedules which purported to show that the parties' respective split of income varied from a low of 36.5% in 2000 to a high of 55 % in 2008.

The Referee noted that in response to the spreadsheet presented by the accountants, SSNA took the accountant's figures and added back into them the missing component of the amounts paid on a yearly basis to Lee Management. Once the spreadsheet was adjusted to provide actual figures for all distributions, for the period 2000 through 2008, it demonstrated clearly that SSNA received 66.5% of revenues and the Brodsky entities received 33.5%. He opined, in addition, that once the Lee Management expenses (mysteriously absent from the accountant's analysis) were placed back onto the spreadsheet provided by the Brodsky parties' expert, it demonstrated that the amounts distributed to those parties actually fluctuated over the years and were not flat fees.

The Referee was confronted with the additional argument that counsel for the parties had somehow agreed in his presence, without the benefit of a record that his only job at this juncture was to determine whether the subject agreements were illegal on their face; and, if not, he was to continue in his appointed role to supervise discovery. The Referee concluded that this was not the case and agreed with counsel for SSNA that this argument was contradicted by the Court's appointment Order which contained no such limitation, especially in light of the fact that it has never been asserted that the agreements were facially defective; but, rather, that they were formulated as a ruse to hide their true purpose, which was to effectuate an illegal fee split of physician fees with non-physicians in violation of law. With regard to the further argument by the Brodsky defendants that SSNA should not be permitted to utilize documents either obtained from the attorneys' files or from SSNA's own files, which were the subject of a Notice to Admit, such is contradicted by letters from attorneys representing SSNA and Chernik from July 2012 identifying documents that would be used in SSNA's summary judgment motion. The Referee noted that on July 30, 2010, counsel for BMRI and Chernik responded to a letter from SSNA's counsel setting forth the documents he intended to use in his motion. Such letter stated that the opposing parties agreed that if they were told the identity of documents to be used and they were

satisfied as to their authenticity, they would not be obstructive. Although the letter stated that these parties would get back to counsel for SSNA with regard to this issue, they never objected to the authenticity of a single document. In addition, when confronted with the argument that the Referee could not treat the attorneys' documents as admissions on behalf of Lee, Mobile Health, BMRI or Brodsky as they were solely counsel for SSNA, the Referee noted that this was directly contradicted by those very same parties who first objected to any disclosure of these documents on the grounds that the Ruskin, Moscou firm had represented them all in formulating the various agreements.

Applying the law applicable to Summary Judgment motions, the Referee found that SSNA had sustained its burden of establishing prima facie entitlement to Summary Judgment, and that upon the shifting of the burden, the opposing parties failed to produce any evidence by any party with knowledge of the facts to establish the existence of any material facts which would require a trial on the issue of whether these agreements constituted an illegal fee splitting scheme. **See, Zuckerman v City of New York**, 49 NY 2df 557 (1980); **Alvarez v Prospect Hospital**, 68 NY 2d 320 (1986). The Referee set forth the prohibition against fee splitting applicable to the medical profession, contained in New York Education Law § 6530 (19):

> "19. Permitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice medicine, or a legally authorized trainee practicing under the supervision of a licensee. This prohibition shall include any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personal services used by a licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice,. . . ."

The Referee relied on the documents submitted by SSNA, which included BMRI distribution schedules initialed by Brodsky and sent by Brodsky stating they were made on the two-thirds/one-third percentage basis; the deposition testimony of both Shapiro and Erber confirming the two-thirds/one-third fee splitting arrangement; the memos authored by Brodsky and the SSNA administrator continuously referencing the agreement to split profits one-third/two-thirds; the numerous e-mails and memos of the attorneys for all the parties setting forth a plan to create agreements which appeared valid but were meant to justify fees consistent with the two-thirds/one-third split; the 2007 and 2008 memos and e-mails by Brodsky and SSNA's administrators consistently confirming the two-thirds/one-third distributions; and the spread sheets demonstrating that what actually occurred was a two-thirds/one-third split.

With regard to the Billing Agreement, the Referee set forth that although it was amended to

provide for an annual fee of $540,000 in 2001, the actual billing services were provided by a non-party, paid $150,000 annually by Lee Management, leaving the additional amount paid to Lee of $390,000 unaccounted for, outside an unwritten fee-splitting arrangement. Concerning the Management and Administrative Services Agreement, the documentary evidence established, as per the Referee, that Mobile Health in fact performed no services whatsoever for SSNA. With regard to the Turnkey Lease Agreement, it originated with a rent of $51,000 per month and a term of 20 years; yet, it was inexplicably modified to increase the rent during its terms to $90,000 per month after four years. It was obvious to the Referee from the 1994 documents drafted by Ruskin Moscou that the lease payments were increased from $51,000 to $90,000 and the new management agreement was entered into providing for a $25,000 monthly payment, all so that Lee could decrease its percentage of distributions from 23% to 16%. This is clearly set forth on the documents themselves. In response to all of the above, according to the Referee, the opposing parties submitted not one iota of factual evidence. Moreover, the financial analyses, when corrected as SSNA did in its submissions in opposition to the accountants' spreadsheets, demonstrate the unlawful split from year to year.

The Referee rejected the argument of the opposing parties that they were entitled to further discovery under CPLR 3212(f) because the same entities are the ones who possess the knowledge of the facts surrounding these agreements yet chose not to submit any affidavits or other documentary evidence demonstrating any issues of fact. He concluded that there was no issue raised concerning the fair market value of services rendered. With regard to the MASA agreement, noone with personal knowledge refuted the repeated statement that Mobile Health provided no services for its fee; with regard to the billing agreement, it was demonstrated by documentary evidence to be valued at $150,000 (the amount actually paid for the service to a third party) with no response by anyone from Lee regarding its collection of the additional $390,000; with regard to the Turnkey lease, it was demonstrated by overwhelming documentary evidence that it was merely a component of the scheme initially based on a percentage of the doctors' income and then varied so that the results came out to the proper percentages.

Based upon the above, the Referee found that SSNA sustained its burden of demonstrating entitlement to Summary Judgment on the issue raised; i.e., that the agreements between and among SSNA, BMRI, Lee and Mobile Health constituted an unlawful fee splitting scheme in violation of the New York State Education Law.

Finally, the Referee found that SSNA failed to demonstrate that referrals for Medicare or Medicaid patients were made in violation of 42 USC § 1395 nn, which prohibits physicians from self-referring Medicare and Medicaid patients to a health care provider where a financial relationship or compensation agreement exists between the referring physician and the health care provider. Thus he

denied that party summary judgment on such issue. None of the parties have moved with regard to the federal claim nor its state counterpart.

The above constitutes this Court's review of the record and for all of the reasons set forth herein the Court adopts the recommendation of the Referee that SSNA is entitled to Summary Judgment declaring that the agreements entered into with BMRI, Lee Management and Mobile Health are unlawful fee splitting arrangements.

In the Court's view, the findings are legally correct, based upon comprehensive analysis of documentary evidence and sworn testimony, which the opposing parties simply ignored and/or refused to contradict. The Court agrees with the Referee's conclusions concerning the scope of his role, as the allegations by SSNA in this case encompass the history of the subject agreements, when taken together in view of the strikingly clear admissions of the parties opposing the motion. The Brodsky memos and e-mails, the documents prepared by the SSNA administrator, the Ruskin Moscou memos and e-mails, the evolution of the various agreements and their amounts, the actual payments made as compared to profits earned – all demonstrate a knowing participation by the parties in an agreement to split the fees earned on a two-thirds/one-third basis in violation of the New York State Education Law.

Although not part of this Court's assignment, because it was raised by the parties opposing the illegality argument, the Referee considered whether the illegality of the various agreements would have any impact on their enforceability in view of the decision by the New York Court of Appeals in **Glassman v Prohealth Ambulatory /Surgery Center Inc**, 14 NY 3d 898 (2010). In that case, the Court of Appeals, in a lawsuit where a physician sued his employer after his termination, dealt with the defense raised that the agreement was unlawful because it contained a provision for sharing of fees with the employer physicians for services earned at off-site locations in violation of the Public Health law. The Court found that although illegal contracts are generally unenforceable, where they simply violate statutory provisions that are *malum prohibitum* rather than *malum in se* and the denial of relief would be out of proportion the requirements of public policy, the right to recover would not be denied, as forfeitures by operation of law are disfavored. **Id**.

The Referee agreed with SSNA that the **Glassman** holding did not apply in the cases set forth above, with regard to the issue of the legality of the three agreements under the Education Law. Thus, the Referee distinguished **Glassman** because in its holding, the Court in **Glassman** specifically rejected forfeiture where, as in that case, there existed regulatory sanctions and statutory penalties in place to redress the violations of law. In the case at bar, the three subject agreements, i.e. the billing agreement, the management agreement and the turnkey lease agreement, are all contracts with non-physicians not subject to the regulations that prohibit the fee splitting arrangements. Accordingly, unless this Court

were to take the position that such agreements could not be enforced, there would be no basis for any non-physician party to heed the State Education Law. This Court agrees that **Glassman** does not in any way apply to the issue of the legality of the three agreements which this Court has now determined constitute unlawful fee splitting.

The more complex issue is whether the **Glassman** decision applies to claims brought by Chernik to enforce the terms of his employment agreement, as well as Brodsky and Lee's claims to enforce the terms of their promissory notes with SSNA. The Court does agree with SSNA's counsel that Dr. Chernik's employment agreement, like the employment agreement at issue in **Glassman,** is not barred from enforcement and will not be forfeited solely as a result of the findings herein. That agreement was both one involving physicians subject to the regulatory provisions herein, as in **Glassman,** and a declaration that it was illegal would subject a person (now an estate) to forfeiture regarding an employment agreement that is collateral to the agreements this Court has found to violate the Education Law.

As to the claim on certain promissory notes by Brodsky and Lee Management, the Court will permit the parties to that action to provide it with additional papers, because the allegation by SSNA that such notes were inextricably related to the three unlawful agreements has not been fully submitted. In his determination, the Referee specifically refrained from opining on this very issue.

Accordingly, the very scholarly and in-depth Report and Recommendation of the Court appointed Referee, Ronald Rosenberg, Esq., that the Court declare the commercial relationship among the parties set forth herein to constitute illegal fee-splitting arrangements, are confirmed in every respect. This constitutes the **DECISION** and **ORDER** of the Court.

The Court is now prepared to set forth which portions of the above described actions are resolved and require submission of Judgments and which require continued discovery. Accordingly, counsel for all parties are directed to appear for a discovery conference on December 4, 2012, at 2:30 p. m.

Dated: November 20, 2012
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

[X] NON FINAL
[ ] FINAL

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