SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PART 39

Index Number : 602547/2007

LOWER MANHATTAN DIALYSIS

VS.

LANTZ, JOHN P., M.D.

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

This motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 4/16/12

BARBARA R. KAPNICK J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39

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LOWER MANHATTAN DIALYSIS CENTER, INC., L-M DIALYSIS CORPORATION, LANTZ-MATALON CHINATOWN ASSOCIATES, INC. and CHINATOWN DIALYSIS CENTER, LLC,

Plaintiffs,

-against-

JOHN P. LANTZ, M.D. and MARIE LANTZ,

Defendants.

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JOHN P. LANTZ, M.D. and MARIE LANTZ,

Counterclaim Plaintiffs,

-against-

LOWER MANHATTAN DIALYSIS CENTER, INC., LANTZ-MATALON CHINATOWN ASSOCIATES, INC., CHINATOWN DIALYSIS CENTER, LLC, ROBERT MATALON, M.D.,

Counterclaim Defendants.

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DECISION/ORDER
Index No. 602547/07
Motion Seq. No. 003

BARBARA R. KAPNICK, J.:

Before the Court is counterclaim defendants' motion to dismiss the counterclaims, to strike prejudicial material unnecessarily inserted in a pleading, and to preclude expert depositions.

At the outset, the Court notes that defendant/counterclaim plaintiff John P. Lantz, M.D. ("Dr. Lantz") passed away on June 1, 2009, after the commencement of this litigation. His widow, defendant/counterclaim plaintiff Marie Lantz ("Mrs. Lantz") stated

in her papers that she moved pursuant to CPLR 1021 to substitute the Estate of Dr. Lantz (the "Estate") for her deceased husband. However, it is unclear when that motion was made and what the outcome was. Nevertheless, Mrs. Lantz, who prosecutes the counterclaims in her capacity as executor of the Estate, was the attorney-in-fact for Dr. Lantz under a power of attorney which granted her all of the rights, powers and privileges of Dr. Lantz as a shareholder of Lower Manhattan Dialysis Center, Inc. ("LMDC") and Lantz-Matalon Chinatown Associates, Inc. ("LMCA") during his life. (Amended Counterclaims, ¶¶ 1-2.)

In 1985, Dr. Lantz and counterclaim defendant Robert Matalon, M.D. ("Dr. Matalon") organized LMDC as an independent, free-standing dialysis center in order to provide out-patient dialysis care. A decade later, Drs. Lantz and Matalon established an additional dialysis center, L-M Dialysis Corporation ("L-M"). Drs. Lantz and Matalon were the sole, equal shareholders of both LMDC and L-M. (Verified Complaint, ¶¶ 4, 5.)

Thereafter, in 2001, Drs. Lantz and Matalon established Chinatown Dialysis Center, LLC ("CDC"), also an independent, free-standing dialysis center, located at 9-11 Crosby Street/150 Lafayette Street ("150 Lafayette"). LMCA holds the lease for 150

Lafayette and CDC is its only subtenant.[1] (Verified Complaint, ¶ 6; Amended Counterclaims, ¶ 13).

From 2001 until his death on June 1, 2009, Dr. Lantz was gravely ill and required around-the-clock care at his home in New Jersey. (Amended Counterclaims, ¶ 14.)

The counterclaim plaintiffs assert that, unbeknownst to them, between 2005 and 2007, Dr. Matalon was engaged in the negotiation of a lease buy-out (the "Buyout") with the landlord of 150 Lafayette. Further, the counterclaim plaintiffs allege and Dr. Matalon admits that Dr. Matalon did not inform either Dr. or Mrs. Lantz of the proposed Buyout until after all negotiations with the landlord were finalized. (Amended Counterclaims, ¶¶ 17, 18; Lapatine Affirm., Ex. N at 174:20-176:5 [Deposition of Robert Matalon]). While it seems from the Amended Counterclaims and the Declaration of Marie Lantz, sworn to on September 9, 2007, that Mrs. Lantz first learned of the Buyout negotiations on May 20, 2007 when she signed the Buyout Agreement, the Court notes that counsel for Dr. and Mrs. Lantz states in a letter dated July 23, 2007 that Mrs. Lantz and her family "were not notified of the $15,000,000

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[1] Currently, Dr. Matalon holds a 100% interest in both LMDC and LMCA. (Amended Counterclaims, ¶ 8.) LMDC owns a ninety percent (90%) membership interest in CDC. (Verified Complaint, ¶ 6.)

lease buyout until approximately two weeks prior to May 20, [2007]." (Lapatine Affirm., Ex. E [9/9/07 Declaration of Marie Lantz and Errata thereto], Ex. I [7/23/07 Letter from Jerome A. Deener, Esq. to Arthur Katz, Esq.], Ex. L [Amended Counterclaims]).

On May 20, 2007, Dr. Matalon called Mrs. Lantz and asked to visit the Lantz home that same day. The counterclaim plaintiffs allege that during this visit, Dr. Matalon requested that Mrs. Lantz sign a one-page handwritten agreement, drafted by Dr. Matalon, authorizing the Buyout and governing the allocation of the anticipated $15 million proceeds (the "Buyout Agreement"). (Amended Counterclaims, ¶¶ 20, 22). Also present at this meeting were the adult children of Dr. and Mrs. Lantz, Pericles and Athena Lantz, both of whom are physicians.[2] (Lapatine Affirm, Ex. E, ¶¶ 6, 10-11 [Declaration of Marie Lantz]).

During Dr. Matalon's visit to the Lantz home, Dr. Matalon, in his capacity as shareholder of LMDC, L-M and LMCA, and Mrs. Lantz, as attorney-in-fact for Dr. Lantz in his capacity as shareholder of those same entities, entered into the Buyout Agreement, which provided, in pertinent part, that:

(1) [LMCA] will be bought out of its lease at

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[2] Although physically present in another room at their home at the time of the "meeting," Dr. Lantz was very ill and unresponsive and, therefore, did not participate.

> 150 Lafayette Street, NY, NY, currently the site of the [CDC], for the sum of 15 million dollars. The proceeds will be disbursed as follows:
>
> (a) 4 million dollars will be set aside in LMDC for the relocation, renovation and re-equiping [sic] of [CDC] and related costs (the "Set-aside Provision")
>
> (b) the remaining 11 million dollars will be divided equally between John P. Lantz and Robert Matalon, except that:
>
> (c) up to 10% of the 11 million dollars, less expenses including professional fees and other related costs, to be paid to Miriam Sinitzky in recognition of her future role in the operation and expansion of LMDC and related entities.

Although neither Dr. Matalon nor Dr. or Mrs. Lantz had the benefit of legal counsel at the time of the signing of the Buyout Agreement, both had previously been represented by counsel in other matters between the parties. (Declaration of Marie Lantz, ¶ 14).

The counterclaim plaintiffs allege that the day after signing the Buyout Agreement, Mrs. Lantz consulted with her attorney to gain clarification of the terms of the Buyout Agreement. Thereafter, Mrs. Lantz, through counsel, contacted Dr. Matalon to inform him that Dr. Lantz's half of the $4 million to be set-aside

for the relocation, renovation and re-equipping of CDC (the "Set-aside") should be treated as a loan as opposed to a capital investment. Counsel for Drs. Lantz and Matalon continued to communicate regarding this issue over the course of the four months following the execution of the Buyout Agreement. (Amended Counterclaims, ¶¶ 26, 28.)

Although copies were not provided to the Court, the lease and sublease cancellation documents were apparently executed on June 26, 2007, more than a month after Dr. Matalon and Mrs. Lantz entered into the Buyout Agreement. (See Counterclaim defendants' Memo. of Law in Support, p. 4.) Almost two weeks earlier, on June 12, 2007, counterclaim plaintiffs' attorney received a copy of the near-final drafts of the documents to be executed in connection with the cancellation of the lease and sublease. (Beitel Decl., Ex. H.)

The counterclaim plaintiffs contend that Dr. Matalon knew or should have known that Dr. Lantz's half of the $4 million Set-aside would be treated as a loan because Dr. Lantz was unlikely to live long enough to reap the benefits of any capital investments in LMDC or CDC. (Amended Counterclaims, ¶ 29.)

On July 27, 2007, plaintiffs commenced this action alleging two causes of action, but according to counsel, all that is left in this case are the counterclaims. (3/24/11 Oral Arg. Tr. at 4:17-5:21.)

On August 9, 2010, the counterclaim plaintiffs filed their Amended Counterclaims for (1) breach of fiduciary duty; and (2) breach of implied covenant of good faith and fair dealing. The counterclaim plaintiffs request relief in the form of fifty percent (50%) of the $4 million Set-aside, an accounting, and compensatory and consequential damages.

Counterclaim defendants now move this Court:

(a) pursuant to CPLR 3211(a)(1) and (7) to dismiss the Amended Counterclaims on the grounds that (i) they fail to state a cause of action, (ii) they are barred by documentary evidence, and (iii) that no cause of action is asserted by Mrs. Lantz in her individual capacity;

(b) pursuant to CPLR 3024 to strike prejudicial matter unnecessarily inserted in a pleading; and

(c) pursuant to CPLR 3101, 3103 and 4515 for an order precluding pre-trial expert depositions and the submission of any testimony, including that of expert witnesses, as to the construction or interpretation of

the Shareholders Consent, dated May 20, 2007, upon the grounds that expert testimony is impermissible and extraneous given that the issues before this Court solely involve the interpretation and enforcement of an unambiguous contract, which is a matter of law.

Motion to Dismiss

It is well settled that

> on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint [or counterclaim] as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

Leon v. Martinez, 84 NY2d 83, 87-88 (1994) (internal citations and quotation marks omitted). Allegations consisting of bare legal conclusions, with no factual specificity, however, "are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 NY3d 358, 373 (2009); (*citing Caniglia v. Chicago Tribune N.Y. News Syndicate*, 204 AD2d 233, 233-34 [1st Dep't 1994]).

Breach of Fiduciary Duty

The counterclaim plaintiffs allege that Dr. Matalon breached his fiduciary duty by (1) not presenting the buyout opportunity to Dr. Lantz at the time he was approached by, and negotiating with, the landlord; (2) treating Dr. Lantz's share of the $4 million in question as a capital investment in CDC, and (3) failing to disclose to Dr. or Mrs. Lantz how Dr. Lantz's share of the $4 million Set-aside was spent. (Amended Counterclaims, ¶¶ 35, 37, 38.)

"To plead a claim for breach of fiduciary duty, plaintiff must allege (1) the existence of a fiduciary relationship; (2) misconduct by defendant; and (3) damages directly caused by defendant's misconduct." *Kohler v. Errico*, 2011 WL 1077722, at *8 (SDNY Feb. 23, 2011) (citing *Rut v. Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dep't 2010]).

New York courts recognize that the "'relationship between shareholders in a close corporation, vis-à-vis each other, is akin to that between partners and imposes a high degree of fidelity and good faith.'" *Brunetti v. Musallam*, 11 A.D.3d 280, 281 (1st Dep't 2004)(*citing Fender v. Prescott*, 101 A.D.2d 418, 422 (1st Dep't 1984), *aff'd*, 64 NY2d 1077, 1079 (1985)).

The duty of a fiduciary "imposes a stringent standard of conduct that requires a fiduciary to act with 'undivided and undiluted loyalty.'" *Frame v. Maynard*, 83 AD3d 599, 602 (1st Dep't 2011)(citations omitted). Thus, "...'when a fiduciary . . . deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make "full disclosure" of all material facts,' meaning those "that could reasonably bear on [the beneficiary's] consideration of [the fiduciary's] offer.'" (*Id.*)

Here, there is no dispute that Drs. Matalon and Lantz owed each other a fiduciary duty. Thus, the Court must consider whether the counterclaim plaintiffs have sufficiently alleged a claim for breach of fiduciary duty against Dr. Matalon.

Dr. Matalon was engaged in negotiating the Buyout with the landlord of 150 Lafayette between 2005 and 2007. He did not inform Dr. or Mrs. Lantz about the negotiations until after the final terms of the Buyout had been reached. Although there is some ambiguity in the record about when exactly, on behalf of herself and Dr. Lantz, Mrs. Lantz first learned of the Buyout proposal, there is no dispute that Dr. Matalon did ultimately present the Buyout to the Lantz family for their approval and that Mrs. Lantz did in fact sign the Agreement.

Further, the Court notes that Mrs. Lantz has not alleged duress and has admitted under oath that she freely entered into the Buyout Agreement. (Lapatine Affirm., Ex. G at 109:17 - 112:24 [5/6/08 Deposition of Marie Lantz]). Moreover, approximately five weeks passed between Mrs. Lantz first consulting with counsel regarding the meaning of the Buyout Agreement and Dr. Matalon's execution of the lease cancellation documents. In light of the foregoing, the Court finds that Dr. Matalon's presentation of the landlord's offer to Dr. and Mrs. Lantz, while perhaps dilatory, cannot constitute a breach of his fiduciary duty.

The Court will next consider counterclaim plaintiffs' argument that Dr. Matalon "breached his fiduciary duty to Dr. Lantz by treating Dr. Lantz's share of the $4,000,000 governed by the Set-Aside Provision as a capital reinvestment in CDC," as opposed to a loan. According to counterclaim plaintiffs, "[s]uch treatment is a breach of fiduciary duty in that it places Dr. Matalon's interests above those of Dr. Lantz who was seriously ill and unlikely to survive long enough to enjoy the benefits of any capital reinvestment" (Amended Counterclaims, ¶ 37). In this regard, counterclaim plaintiffs argue that they merely seek judicial interpretation of an allegedly "ambiguous contractual provision through examination of extrinsic evidence of the parties' intent at the time the contract was entered into." (Counterclaim

Plaintiffs' Memo. of Law in Opp., pp. 17-18). To this end, the Court must first look to the four corners of the Buyout Agreement to interpret its meaning and determine whether it is ambiguous, as counterclaim plaintiffs argue. *See W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162 (1990).

Under New York law, a contract is ambiguous if "on its face [it] is reasonably susceptible of more than one interpretation." *Telerep, LLC v. U.S. Intl Media, LLC*, 74 AD3d 401, 402 (1st Dep't 2010)(internal citation omitted). "A contractual provision is not ambiguous merely because the parties urge different interpretations of it." *Pfizer, Inc. v. Stryker Corp.*, 348 FSupp2d 131, 142 (SDNY 2004) (applying New York law). If a court concludes that a contract is ambiguous, "it cannot be construed as a matter of law." *Telerep, LLC v. U.S. Intl Media, LLC, supra* at 402.

On the other hand, "[a] contract is unambiguous if the language it uses has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion (citation omitted)." *Telerep, LLC v. U.S. Int'l Media, LLC, supra* at 402 (internal quotations omitted).

On its face, the Buyout Agreement uses language which is

"definite and precise" and is "unattended by danger of misconception in the purport of" the agreement. There is no reasonable basis for counterclaim plaintiffs' allegation that the Set-aside was intended to be treated as a loan, most notably because the Buyout Agreement is silent regarding an applicable interest rate, maturity date of the principal or other repayment terms. Therefore, the argument that Dr. Matalon breached his fiduciary duty by not treating the Set-aside as a loan is unavailing and is hereby rejected.

Lastly, the Court will consider counterclaim plaintiffs' argument that Dr. Matalon breached his fiduciary duty by failing to disclose how Dr. Lantz's half of the Set-aside was spent. Counterclaim defendants contend that this information was produced to counterclaim plaintiffs on June 18, 2010 and August 2, 2010, and additional records were made available for inspection by counterclaim plaintiffs on September 14, 2010. Because counterclaim plaintiffs do not refute this statement in their opposition papers, this allegation is rejected.

Accordingly, counterclaim plaintiffs' first counterclaim for breach of fiduciary duty is dismissed.

Breach of the Implied Covenant of Good Faith and Fair Dealing

The counterclaim plaintiffs next allege that Dr. Matalon breached the implied covenant of good faith and fair dealing by treating Dr. Lantz's share of the Set-aside funds as a capital investment in CDC, as opposed to a loan. Further, Dr. Matalon allegedly breached the implied covenant of good faith and fair dealing by refusing to repay with interest Dr. Lantz's $2 million share of the Set-aside funds upon Dr. Lantz's death. (Amended Counterclaims, ¶¶ 42, 44.)

The Court of Appeals has articulated "the well-established principle that the implied covenant of good faith and fair dealing will be enforced only to the extent it is consistent with the provisions of the contract." *Phoenix Capital Invs. LLC v. Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 (2008)(citing to *Murphy v. American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]). For the same reasons discussed *supra* regarding the meaning of the Buyout Agreement, it cannot be alleged that Dr. Matalon breached the implied covenant of good faith and fair dealing. Therefore, the second counterclaim is also dismissed.

Motion to Strike Prejudicial Matter from Pleading

Counterclaim defendants further argue that paragraph 31 and decretal paragraph 2 of the Counterclaims are false and should be

stricken from the pleadings. Paragraph 31 states that "Dr. Matalon never provided [the counterclaim plaintiffs] with an accounting of Dr. Lantz's share of the $4,000,000 [actually $3,745,635.39] governed by the Set Aside Provision of the Lease Buyout Agreement." Decretal paragraph 2 contains counterclaim plaintiffs' request for an accounting related to same.

Counterclaim defendants contend that the information at issue was produced to counterclaim plaintiffs on June 18, 2010 and August 2, 2010. In addition, counterclaim defendants assert that additional records were made available for inspection by counterclaim plaintiffs on September 14, 2010.

Counterclaim plaintiffs do not oppose the foregoing argument in their opposition papers. Accordingly, counterclaim defendants' motion to strike the language contained in paragraph 31 and decretal paragraph 2 of the Counterclaims is hereby granted.

Motion to Preclude Expert Testimony

Counterclaim defendants also moved to preclude expert depositions and testimony regarding the interpretation of the Buyout Agreement. In light of the Court's findings above, it is not necessary to reach this issue.

Accordingly, counterclaim defendants' motion to dismiss the counterclaims is granted, and the Amended Counterclaims are dismissed with prejudice and without costs or disbursements. The Clerk shall enter judgment accordingly.

Moreover, Paragraph 31 and Decretal Paragraph 2 are stricken from the Amended Counterclaims.

That portion of the motion seeking to preclude expert depositions and testimony is denied as moot.

This constitutes the decision and order of this Court.

Date: April 16, 2012

Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.