Lau v Lazar
2017 NY Slip Op 30115(U)
January 18, 2017
Supreme Court, New York County
Docket Number: 651648/2013
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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GLEN LAU, MD, MEDICAL FOREFRONTS OF BROOKLYN, LLC, MEDICAL FOREFRONTS EQUIPMENT, LLC, MEDICAL FOREFRONTS FINANCIAL SERVICES, LLC, MEDICAL FOREFRONTS MANAGEMENT SOLUTIONS, LLC, and MEDICAL FOREFRONTS, LLC,

Plaintiffs,

-against-

TERRY LAZAR, TMS ENTERPRISES, LP, TDK HEALTHCARE CONSULTING, LLC, and THE AMBULATORY SURGERY CENTER OF BROOKLYN, LLC d/b/a NEW YORK CENTER FOR SPECIAL SURGERY,

Defendants.

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Index No.: 651648/2013

DECISION & ORDER

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 011 and 012 are consolidated for disposition.

Defendants Terry Lazar, TMS Enterprises, LP (TMS), TDK Healthcare Consulting, LLC (TDK), and the Ambulatory Surgery Center of Brooklyn, LLC, d/b/a, New York Center for Special Surgery (the Surgery Center or the Center) move, pursuant to CPLR 3212, for summary judgment dismissal of plaintiffs' first through third, seventh, eighth, tenth, twelfth, fourteenth, sixteenth, eighteenth, nineteenth, and twenty-fourth through twenty-eighth causes of action in the third amended complaint (the TAC). Seq. 011. Plaintiffs Glen Lau, Medical Forefronts of Brooklyn, LLC (MFB), Medical Forefronts Equipment, LLC (MFE), Medical Forefronts Financial Services, LLC (MFS), Medical Forefronts Management Solutions, LLC (MMS), and Medical Forefronts, LLC oppose, and move for summary judgment on each of defendants' sixteen counterclaims. Seq. 012. For the reasons that follow, the motions are granted in part and denied in part.

I. Factual Background[1]

Lau is a physician who manages outpatient surgery centers across the United States. Dkt. 234 [Transcript of November 17, 2014 Deposition of Dr. Glen Lau] at 10-14.[2] Lau's company, MFB, owns the centers and then sells partial ownership interests to the surgeons who operate in them in exchange for a percentage of the centers' profits. *Id.* at 10-14, 25, & 33-34. Through this process, Lau has developed working relationships with a network of surgeons and transformed multiple surgery centers into successful businesses. *Id.* at 10-14.

Lazar is an accountant who owns a 99% interest in the Surgery Center, an LLC that operates a licensed, Article 28 ambulatory surgery center in Sunset Park, Brooklyn.[3] Dkt. 236 [Transcript of January 9, 2015 Deposition of Terry Lazar] at 7, 12. He also owns a 50% membership interest in TMS, the entity that owns the building at 313 43rd Street in Brooklyn, where the Surgery Center is located. Dkt. 236 at 7. Lazar contracts with physicians who perform surgeries at the Center. *See, e.g.*, Dkt. 236 at 9-10, 12. His daughter, Kim Lazar, helps manage the Center. Dkt. 209 [August 26, 2015 Affidavit of Kim Lazar] ¶ 1.

For almost twenty years, the Surgery Center exclusively operated as an abortion clinic. Dkt. 236 at 9. In early 2012, Lazar began to explore the possibility of expanding the Surgery

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[1] Plaintiffs submit an over-long moving brief (34 pages) [Dkt. 178] and opposition brief (32 pages) [Dkt. 192], lacking tables of contents and authorities, that are not text-searchable, and that contain almost no case law in violation of this part's rules and Commercial Division Rule 18. Both parties submit fact statements without citations to the record, forcing the court to piece together the factual background from the parties' exhibits, which until recently did not include complete deposition transcripts. These issues have substantially delayed the court in resolving the instant motions. Nonetheless, the court, *nunc pro tunc*, has considered the filings.

[2] References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system. Page numbers in citations to court documents refer to the page number of the .pdf filed on NYSCEF.

[3] "Article 28" refers to Article 28 of the New York Public Health Law. *See* NY Pub Health L § 2801 (2016).

[* 3]

Center to provide a wider range of services, including orthopedic, podiatric, general, and ear, nose, and throat surgery services. *Id.* at 28, 36-38. Because Lazar lacked experience with managing a multi-specialty surgery center, he interviewed several potential management companies to help him expand and manage the Center. *Id.* at 38-40. One of those companies was MFB. *Id.* at 41.

For several months, Lau and Lazar negotiated the terms of a potential joint venture between MFB and the Surgery Center, ultimately agreeing that MFB would purchase a small interest in the Center in exchange for the right to grow it ***and collect management fees***. Dkt. 138 [Membership Interest Purchase Agreement] at 9. Lau met with Lazar several times, toured the Center, and negotiated a sale price that Lazar "would be happy with." Dkt. 236 at 43-46; Dkt. 234 at 166. Lazar and his daughter concede that they were impressed with MFB's financial credentials, as well as MFB's success managing the nearby Midtown Surgery Center in Manhattan. Dkt. 236 at 43-44; Dkt. 241 [Transcript of February 11, 2015 Deposition of Kimberly Lazar] at 67-68. If successful, the parties planned to eventually sell a majority interest in the Center to the surgeons who operated in it. Dkt. 234 at 68.

On August 1, 2012, MFB and the Surgery Center entered into a letter of intent (the LOI) setting forth the joint venture's basic terms. Dkt. 194. The LOI stated that it "represent[ed] a memorandum of the parties' intent and [wa]s subject to the execution of final definitive agreements mutually acceptable to the parties and counsel. In the event that such definitive agreements [we]re not executed by August 15, 2012, [the LOI]... [would] automatically convert to a binding contract." Dkt. 194 [LOI] at 6. On August 15, 2012, the parties executed an Operating Agreement [Dkt. 138 at 21], a Membership Interest Purchase Agreement, and a

Membership Interest Option Agreement. Nonetheless, the parties reference the LOI throughout their motion papers.

The parties' contracts are discussed below.

A. The Membership Interest Purchase Agreement and the Membership Interest Option Agreement

Through the August 15, 2012 Membership Interest Purchase Agreement, MFB purchased a .6225% interest in the Surgery Center from Lazar for $52,000.[4] Dkt. 211 [Membership Interest Purchase Agreement]. The Membership Purchase Option Agreement provided MFB with a 5-year option to purchase an additional 5.6% interest from Lazar for $468,000 on condition that MFB loan the Surgery Center $250,000. Dkt. 212 [Membership Purchase Option Agreement]. If MFB were to exercise its option, the $250,000 loan would be part of the $468,000 purchase price. *Id.* If MFB declined to exercise its option, the Surgery Center was to repay the $250,000 at 5% annual interest. *Id.* On October 2, 2012, the parties submitted an application to the New York State Department of Health (DOH) seeking approval of the membership change, which was approved on February 21, 2013. Dkt. 138 at 18; *see also* Public Health Law § 2801-a.

B. The Amended Operating Agreement

On January 17, 2013, MFB and Lazar entered into an Amended and Restated Operating Agreement (the Amended Operating Agreement or the Operating Agreement). *See* Dkt. 195. The Surgery Center would begin doing business under a new name – the New York Center for Specialty Surgery. *Id.* ¶ 2.2. Also, Lazar replaces TDK, the original counterparty to MFB, as a

[4] The Operating Agreement provides that the $52,000 was an initial capital contribution to the LLC. Dkt. 195 at 37. Under this agreement, MFB has no right to recoup its capital contribution without the approval of all the managers. *Id.* ¶ 5.5. However, MFB is entitled to reimbursement for reasonable and ordinary expenses incurred in furthering the Center's business. *Id.* ¶ 10.2.

member. *See* Dkt. 138 at 21. The Amended Operating Agreement is otherwise identical to the original.

MFB and Lazar are designated as the Surgery Center's sole managing members [Dkt. 195 at 2], and Lazar is named "tax matters partner". Dkt. 195 ¶ 11.4.4. As such, Lazar is given access to all of the Center's financial information and is to represent the Center before the government in all tax matters. *See id.* ¶ 11.4.4, referencing 26 USC § 6231(a). Then too, the company's books and records were open to all LLC members at any time on reasonable prior notice to the managers [*id.* ¶ 11.3], and the Surgery Center was to provide the members with quarterly analyses of the Center's financial condition. *Id.*

The managers, Lazar and MFB, have broad power to "manage and control the business, affairs and properties of [the Center], to make all decisions regarding those matters and to perform any and all other acts and activities customary or incident to the management of [the Center's] business." *Id.* ¶ 6.1. Both managers also could "open bank accounts in the name of [the Center], in which event the Managers" will be signatories on the account. *Id.* ¶ 6.2.8. Additionally, the agreement gives MFB the sole authority to manage the Center's day-to-day activities, including (as in the LOI [Dkt. 194 ¶¶ 10 & 12]) entering into a billing agreement with MFS, hiring staff, procuring equipment, and maintaining the company's books and records. *Id.* ¶ 6.2.11. However, Paragraphs 6.3.11 requires majority member approval before the Center can enter into "**any contracts in excess of $50,000[,] pursuant to which any of the Managers shall have a conflict of interest**, or any material modifications or waivers of any provision of any such contracts." *Id.* ¶ 6.3.11 (emphasis added). Similarly, special approval is required when the Center incurs "any liability or [makes] any single expenditure in an amount exceeding $250,000." *Id.* ¶ 6.3.4.

Under Paragraph 6.7 of the agreement, the Center and its members cannot hold a manager personally liable for breach of contract or breach of fiduciary duty except for the "willful failure to deal fairly with [the Center] or its Members in connection with a matter in which the Manager or officer has a material conflict of interest'" [*Id.* ¶ 6.7(a)]; "transaction[s] from which the Manager derived an improper personal benefit or profit" [*id.* ¶ 6.7(c)]; or "willful misconduct," generally. *Id.* ¶ 6.7(d). But, the Operating Agreement specifically permits MFB and Lau to engage in competing businesses. *Id.* ¶ 6.7.2. A majority of the members may vote to remove a manager only "in the event that such Manager has committed an act of fraud, deceit, gross negligence, willful misconduct, breach of fiduciary duty or a wrongful taking." *Id.* ¶ 6.6.4.

In exchange for MFB's services, paragraph 6.12 of the Operating Agreement entitles MFB to 10% of the Surgery Center's gross revenue, to be paid monthly. *Id.* ¶ 6.12. Moreover, provides that MFB and Lazar can loan money to the Surgery Center for any business purpose. *Id.* ¶ 8.3.1. The Surgery Center must repay the loan at the "Prime Rate" (defined as the prime interest rate of the Surgery Center's primary financial institution), or as otherwise agreed. *Id.*

The term of the joint venture is "perpetual," until dissolution. *Id.* ¶ 2.5. A member with at least 75% of the Center's membership units can dissolve the Center. *Id.* ¶ 13.1.1. On dissolution, the Center must perform an accounting and wind up its assets, including allocating profit and loss to each member's capital account and paying of the Center's debts. *Id.* ¶ 13.2.

The Operating Agreement contains a standard "entire understanding" clause [*id.* ¶ 15.5], and the following waiver provision: "The failure of any [party] to seek redress for violation of or to insist upon the strict performance of any covenant or condition of this Operating Agreement will not prevent a subsequent act, which would have originally constituted a violation, from

having the effect of an original violation." *Id.* ¶ 15.9. New York law governs the agreement. *Id.* ¶ 15.3.

C. The Administrative Services Agreement (the Services Agreement)

The September 1, 2012 Services Agreement between MFB and the Surgery Center describes MFB's responsibilities as manager. Dkt. 196. It provides that MFB was to manage the Center's day-to-day operations [*id.* ¶ 1.01] and pay the Center's costs and expenses, including employee salaries, equipment leases, and MFB's 10% service fee.[5] *Id.* ¶ 3.07. Section 1.01 summarizes MFB's responsibilities as follows:

> [MFB] hereby is authorized to provide and perform for and on behalf of the Facility all services required of [MFB] pursuant to the terms of this Agreement in such manner as [MFB] deems reasonable and appropriate in order to meet the day-to-day requirements of the Facility. In performing such services for the Facility, [MFB] may advance or pay on ASCB's behalf all necessary or appropriate sums pursuant to this Agreement. [MFB] may subcontract with other persons to perform all or part of the services required of [MFB] hereunder...

Id. ¶ 1.01. Thus, the Services Agreement authorizes MFB to subcontract its responsibilities to third-parties and to "perform every act necessary and proper to be done" in connection with its services. *See id.* ¶ 3.11.

The Serviwces Agreement provides for MFB to loan $750,000 in cash to the Surgery Center. *Id.* ¶ 3.10.1. The loan carries a five-year term and a 5% annual interest rate. *Id.* Additionally, section 3.10 permits MFB to loan the Surgery Center money to allow the Surgery Center to meet its financial obligations.[6] *Id.* Notwithstanding MFB's ability to loan the Center

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[5] Unlike the Operating Agreement, the Services Agreement conditions MFB's service fee on the Center generating at least $1,000,000 in gross monthly revenue. ¶ 3.03

[6] The agreement reads:

> Should [the Surgery Center]'s funds not be sufficient at any time during the terms of this Agreement to make disbursements and to meet [the Surgery Center]'s

money, the Services Agreement states that "**it shall be the responsibility of [the Surgery Center] to satisfy any shortfall between revenues and expenses of the Business.**" *Id.* ¶ 3.10 (emphasis added). Consequently, MFB did not assume any personal financial responsibility for the Surgery Center's expenses. *Id.* ¶ 3.10.2. MFB also reserved the right, "in its sole discretion," to defer its management compensation from time to time as it deems necessary. *Id.* ¶ 3.06.

Notably, the Services Agreement obligates MFB to hire Lazar's children, Kim and Damon Lazar, to work for the Surgery Center for at least three years at a combined annual salary of $300,000 per year. *Id.* ¶ 2.08.1. The Services Agreement further provides that MFB was to cause the Surgery Center to enter into a consulting agreement with TDK (which the Lazars own), pursuant to which the Surgery Center would pay TDK $500,000 per year.[7] *Id.* ¶ 2.08.2.

The Services Agreement was to run for a three-year term (*id.* ¶ 4.01), but could be terminated by either party for cause, on written notice to the other party. *Id.* ¶ 4.02. "Cause" includes material breach of any provision of the agreement and failure to cure the breach within 180 days of receiving written notice of the breach from the non-breaching party. *Id.* ¶ 4.02(a). Where the breach cannot be cured within 180 days, the breaching party can avoid termination by beginning to cure during the 180-day notice period and diligently completing the cure. *Id.*

The Services Agreement contains a New York choice of law clause [*id.* at ¶ 7.11] and an arbitration clause that applies to "any dispute or controversy aris[ing] between the [p]arties out of or relationship to [the Services] Agreement…". *Id.* ¶ 7.20. Neither party invoked the arbitration

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financial obligations, [MFB] shall have the right (but not the obligation) upon [the Surgery Center]'s approval to loan to [the Surgery Center] funds in an amount sufficient to allow [the Surgery Center] to meet its financial obligations… ¶ 3.10.

[7] Lazar testified at his deposition that he owns a controlling, 80% membership interest in TDK and his children, Kim and Damon, each own 10%. Dkt. 236 at 10.

clause.[8] Finally, the Services Agreement states that the parties "agree that each has had the benefit of representation by legal counsel in negotiating th[e] [a]greement." *Id.* ¶ 7.18. The parties also acknowledge, in section 3.12.4, that they entered into a separate Membership Interest Option Agreement (in which the parties agreed to give MFB the option to purchase 9 shares of the Surgery Center for $52,000 per share). *Id.* ¶ 3.12.4.

D. Other Side Agreements (the Billing, Staffing Services, and Equipment Lease Agreements)

1. The Billing Agreement

On August 6, 2012, after MFB became a managing member of the Surgery Center, MFB entered into a Billing Agreement on behalf of the Surgery Center with Lau's company, MFS. Dkt. 141 at 37 [Billing Agreement]. Lau signed the Billing Agreement on behalf of MFB and the Surgery Center. His son, David Lau, signed for MFS.[9] The Billing Agreement provides that MFS would bill the Surgery Center's patients and handle collections. *Id.* MFS' specific responsibilities included "coding and initial submission of [insurance] claims, appeals, re-billing and follow-up on patient accounts." *Id.* ¶ 1.1. After collecting payment, MFS was to deposit the funds into a trust account that MFS would manage on the Center's behalf. *Id.* ¶ 1.3. MFS agrees to forward funds to the Surgery Center "in a regular and timely manner, less any commissions due to MFS." *Id.* The agreement entitles MFS to a 6% commission on gross collections. *Id.* ¶ 1.6.

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[8] The parties do not discuss the arbitration provisions at issue in any of the agreements. By electing to litigate the dispute, they have waived their right to arbitrate. *See Sherrly v Grayco Builder, Inc.*, 64 NY2d 261 (1985) ("Once the right to arbitrate a particular dispute is waived by an election to litigate, it cannot be recaptured."); *accord Ramapo Central School District v East Ramapo Teachers Assoc.*, 91 Ad2d 969 (2d Dept 1983).

[9] David Lau is a "managing partner" of MFS. Dkt. 239 at 8-9.

The Billing Agreement provides for a 1-year term, which automatically renews until terminated. *Id.* ¶ 3.1. The parties could terminate the agreement without cause by giving 90 days' written notice. *Id.* ¶ 3.3. If the Surgery Center terminates the agreement, MFS is to receive a fee equal to 2% of all pending or unresolved claims. *Id.* ¶ 3.4. Notably, Nevada law governs the Billing Agreement [*id.* ¶ 4.3], and the agreement is subject to an arbitration clause requiring the parties to arbitrate disputes in Contra Costa County, California.[10] *Id.*

2. The Staffing Services Agreement

On November 1, 2012, the Surgery Center entered in a Staffing Services Agreement with MMS. Dkt. 141 at 43 [Staffing Services Agreement]. Again, Lau signed the agreement for MFB and the Surgery Center. Candice Liu, as "Director," signed for MMS. *Id.* at 53. The agreement states that MMS will provide the Surgery Center with short-term staff, as needed (*id.* ¶ 1.1), including recruiting workers, paying them, maintaining personnel records, conducting background checks, and investigating worker complaints. *Id.* ¶ 1.2. The agreement specifically provides that "[e]ntering into th[e] [a]greement in no way obligates [the Surgery Center] to retain [MMS] to perform any minimum amount of ... services." *Id.* ¶ 1.2. The services provided under the Staffing Services Agreement are not exclusive, and the Surgery Center may procure staff and services from other sources. *Id.* The Surgery Center has the right to audit MMS's compliance with the agreement on reasonable notice, including accessing MMS's books and records. *Id.* ¶ 2.4. Lazar never objected to the agreement.

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[10] The parties do not discuss the agreements' various choice of law provisions in their briefs, and apply only New York law. Accordingly, the court will apply New York law. *See MMA Meadows at Green Tree, LLC v Millrun Apts., LLC*, 130 AD3d 529, 531 (1st Dept 2015) ("The partnership agreement is governed by Indiana law, while the Partnership is a Delaware limited partnership. Since the parties cite a plethora of Delaware cases but no Indiana law directly on point or to the contrary as to whether breach of fiduciary duty is duplicative of breach of contract, we will apply Delaware law on this point.").

The Staffing Services Agreement provides that the Surgery Center is to compensate MMS for its overhead, including the employee wages and employment taxes that MMS pays on behalf of the Surgery Center. *Id.* ¶ 2.1(a). MMS receives a fee equal to 5% of any employee wages and taxes on those wages. ¶ 2.1(b). MMS is to provide the Surgery Center with an invoice on a weekly basis reflecting MMS's fees during the previous week (*id.* ¶ 2.1(c), and the Surgery Center is to provide MMS with an up-front deposit equal to one week's average overhead and wages. *Id.* ¶ 2.3.

Both parties represent that the agreement does not conflict with any other agreement or any other restriction to which either party is bound. *Id.* ¶ 5.2. The agreement runs for 12 months, renewing automatically every year unless either party elects not to renew by giving written notice at least 30 days before the 12-month period expires. *Id.* ¶ 8.1. The Surgery Center, however, has the right to terminate the agreement at any time for any reason. *Id.* ¶ 8.2. If the Surgery Center terminates the agreement without notice, MMS may stop performing staffing services immediately. *Id.* The Surgery Center then is not obligated to make any further payments, except for services performed before termination. *Id.* The Staffing Services Agreement is governed by California law and contains an arbitration clause designating Oakland as the place of arbitration. *Id.* ¶¶ 9.1-9.2.

3. The Equipment Lease Agreements

On December 1, 2012, the Surgery Center entered into 12 separate Equipment Lease Agreements with MFE. Dkt. 140 at 30-53 & Dkt. 141 at 2-35. Lau signed the agreements on behalf of the Surgery Center [Dkt. 140 at 33], and David Liebenson signed for MFE.[11] Dkt. 240 at 30. The agreements are identical except for the type of leased equipment in each agreement

[11] Liebenson served as a project manager for Medical Forefronts, LLC, in which capacity he managed MFE. Dkt. 240 at 8-9.

and the monthly payment amount. The agreements all run for 60 months. Dkt. 140 at 33, ¶ 3. They include the following equipment, with the following monthly payment amounts:

(1) Art-Y-Bill Equipment – $3,542.07/mo. ($212,524.20 total over 5 years)

(2) ConMed Equipment – $912.26/mo. ($54,735.60 total over 5 years)

(3) Smith & Nephew Equipment – $6,476.53/mo. ($388,591.80 total over 5 years)

(4) Arthrex Equipment – $2,482.77/mo. ($148,966.20 total over 5 years)

(5) Steris Equipment – $1,659.91/mo. ($99,594.60 total over 5 years)

(6) Medtronic Equipment – $3,373.67/mo. ($202,420.20 total over 5 years)

(7) Karl Storz Equipment – $3,434.37/mo. ($206, 062.20 total over 5 years)

(8) ConMed Equipment – $2,257.39/mo. ($135,443.40 total over 5 years)

(9) Hologic Equipment – $1,519.90/mo. ($91,194 total over 5 years)

(10) Sterrad Equipment – $3,452.07/mo. ($207,124.20 total over 5 years)

(11) Stryker Equipment – $988.59/mo. ($59,315.40 total over 5 years)

(12) Medtronic Equipment – $913.29/mo. ($54,797.40 total over 5 years)

See Dkt. 140 at 30-53 & Dkt. 141 at 2-35 (paragraphs 1 & 5(a) of the agreements).

Title to the equipment was to remain in MFE's name throughout the life of the leases. *Id.* ¶ 4. Upon default, MFE could terminate the lease and repossess the leased equipment. *Id.* ¶ 5(k). Lazar never objected to the Equipment Lease Agreements.

E. The Joint Venture

On September 1, 2012, MFB began managing the Surgery Center. Dkt. 234 at 80. MFB immediately closed the Center for renovations, to bring in new equipment and to recruit surgeons. Dkt. 238 [Transcript of December 22, 2014 Deposition of Julia Ferguson] at 23-24; Dkt. 234 at 127 ("I think we closed [the Center] for a month to bring everything back up to

standards..."). It is undisputed that plaintiffs either leased or purchased the equipment for the Surgery Center[12] [Dkt. 238 [Ferguson Dep] at 44-46] and that MFB paid for the renovations. *Id* at 25. MFB also recruited surgeons to perform operations at the Center, and held cocktail hours and recruitment events to entice surgeons to buy into the joint venture. Dkt. 178 [Pltf. Br.] at 20, citing Dkt. 241 [Kimberly Lazar Dep.] at 177-179; Dkt. 234 [Lau Dep] at 33-34.

Despite MFB's efforts, no surgeons agreed to buy into the Center. Dkt. 234 at 169. Lau testified that he did not expect surgeons to buy in right away, as the practice was not yet established. *Id.* at 169-170 ("Q: When you got involved with the deal, you didn't anticipate you would be selling any shares in the immediate future? A: I told him we would not be. It was understood. He had been trying to sell them for almost a year."); *see id.* at 161 & 163. Lau further testified that he did not expect the Surgery Center to generate any revenue for three to four months, or to break even until the end of the first year. Dkt. 234 at 161.

During the eight months that MFB managed the Center, it generated only $40,000 in gross revenue out of approximately $2 million billed. Dkt. 168 ¶ 3; Dkt. 234 at 153. David Lau and Jeffrey Wong, two MFS officers, deposited the revenue into an account with the East West Bank in California (the trust account). Dkt. 239 at 128. They were the only signatories on the account. *Id.* MFS used the revenue in the trust account to cover basic operating expenses, such as payroll and rent. *Id.* at 129. Ultimately, the Center did not generate enough revenue to cover basic operating expenses. Dkt. 239 [David Lau Dep.] at 47-48. As a result, MFB, MMS, MFS, and MFE did not deduct any commissions or monthly payments from the trust account. Dkt. 234 at 105-106.

[12] Ferguson testified that Midtown Surgery Center, one of Lau's other centers, purchased some of the equipment (Aesculap instruments) being used at the Surgery Center. Dkt. 238 at 64

To keep the Center operating, Lau personally loaned Lazar approximately $700,000 through the Center's operating account (around $60,000 per month) [Dkt. 234 at 81, 98-99, 256], and over $1 million for equipment and renovations. *Id.* at 92; Dkt. 236 at 253-257. Plaintiffs do not attach documentation establishing the loans, but provide bank statements that show several wire transfers of smaller amounts to Lazar's entities, TMS and TDK. Dkt. 203 at 7. Defendants do not dispute that Lau and MFB loaned Lazar's companies money. Lazar does not dispute that he inadvertently cashed approximately $17,000 in checks and deposited them into his personal bank account. *See* Dkt. 234 [Dr. Lau Dep.] at 76-81.

The parties dispute: why MMS only collected a small percentage of the amount billed; whether the Center was on sound financial footing before MFB took over as manager; and whether Lazar used any of the money plaintiffs loaned to pay his personal debts or debts that he personally had guaranteed. Mark Zafrin, Lazar's former attorney, and Kim Lazar, Lazar's daughter, testified that the Center was badly overleveraged and in debt when the parties entered into the Letter of Intent. Dkt. 237 [Tr. of April 16, 2015 Dep. of Mark Zafrin] at 8-9; Dkt. 241 [Kimberly Lazar Dep.] at 192-199; Dkt. 180 [Letter of Intent] ¶ 12 (noting debt to at least three entities totaling over $400,000); Dkt. 236 at 77-80.

Relations between the parties broke down on April 25, 2013, when Lau, Lazar, and Zafrin had a phone call in which Lau confronted Lazar about the amount of money that MFB was contributing to the Center. Dkt 237. [Transcript of April 16, 2015 Deposition of Mark Zafrin] at 6, 12-13. During the call, Lau inquired about increasing his stake in the Center. *Id.* at 12-13. According to Zafrin, Lazar became angry and accused Lau of trying to steal Lazar's business license. *Id.*; *see also* Dkt. 236 at 149-150. The next day, after meeting with Kim Lazar and calling his attorney, Lazar locked plaintiffs out of the Center. Dkt. 236 at 151. Lazar did not

notify plaintiffs of the lockout and states that he intended to remove MFB as manager. *Id.* Since the lockout, Lazar admits that the Surgery Center has continued operating. Dkt 168 ¶ 6 ("At no point (other than during the Lau regime when the Center was closed for renovation) did the Center cease operations.").

F. This Lawsuit

Plaintiffs commenced this action on May 7, 2013, and moved by order to show cause for repossession of the leased medical equipment inside the Center. Dkt. 16. In a stipulation so-ordered on May 29, 2013, defendants agreed to allow plaintiffs and their movers to enter the Surgery Center to repossess the leased equipment. Dkt. 25. However, on June 12, 2013, when plaintiffs arrived at the Surgery Center, defendants did not allow them full access to the Center. Plaintiffs were able to take possession of only some of the equipment. They then moved for contempt and sanctions, but withdrew the motion after defendants partially complied with the stipulation.

Plaintiffs returned to the Center in August of 2013, at which time they retrieved most of the remaining, leased equipment. Dkt. 205 [July 22, 2015 Affidavit of Julia Ferguson] ¶ 7. Ferguson, who oversaw the equipment removal, states that only four pieces of medical equipment, worth approximately $23,491.08, remain at the Center. *Id.* Kim Lazar, the Surgery Center's current manager, claims that plaintiffs removed gastrointestinal scopes worth approximately $200,000 while removing their other equipment. Dkt. 209 [August 26, 2015 Affidavit of Kim Lazar] ¶ 6.

Plaintiffs allege the following causes of action, numbered here as in the TAC: (1) tortious interference with the Services Agreement against Lazar (via the lockout); (2) tortious interference with the Billing Agreement against Lazar (via the lockout); (3) tortious interference

with the Billing Agreement against Lazar (for refusing to consent to change in Center's billing address); (4) tortious interference with the LOI against Lazar (the LOI's recruitment provisions); (5) breach of the Operating Agreement against Lazar (for failing to pay MFB's service fee); (6) breach of the Operating Agreement against Lazar (via the lockout); (7) unjust enrichment against Lazar ($86,765.31 payment to Center's creditors); (8) unjust enrichment against Lazar ($90,800 payment to TMS' creditors); (9) unjust enrichment against TMS (same); (10) unjust enrichment against Lazar ($45,400 payment to TMS' creditors); (11) unjust enrichment against TMS (same); (12) unjust enrichment against Lazar ($198,000 loan TDK); (13) unjust enrichment against TDK (same); (14) unjust enrichment against Lazar ($33,000 loan to TDK); (15) unjust enrichment against TDK (same); (16) unjust enrichment against Lazar (capital improvements to the Surgery Center); (17) unjust enrichment against the Surgery Center (same); (18) breach of the Services Agreement against the Surgery Center (for failing to pay MFB's service fee); (19) breach of the Services Agreement against the Surgery Center (for prematurely terminating the agreement); (20) breach of the Billing Agreement against the Surgery Center (for failing to pay MFS' commission); (21) breach of the Billing Agreement against the Surgery Center (for improperly cashing payments submitted to MFS); (22) breach of the Billing Agreement against the Surgery Center (for prematurely terminating the agreement); (23) breach of the Billing Agreement against the Surgery Center (for failing to pay MFS an early termination fee); (24) breach of the Staffing Services Agreement against MMS (for failing to pay MMS its staffing services fee); (25) breach of the Equipment Lease Agreements against the Surgery Center (for arrears under twelve different equipment lease agreements); (26) conversion against the Surgery Center (for refusing to return various pieces of equipment); (27) anticipatory breach of contract against the Surgery Center (for locking MFB out before repaying a $612,600 loan from MFB made pursuant

to section 3.10.1 of the Services Agreement); and (28) anticipatory breach of contract against the Surgery Center (for locking MFB out before repaying a $744,328.47 loan from MB made pursuant to section 3.10.1 of the Services Agreement).

The defendants assert the following counterclaims, numbered here as in the answer to the TAC: (1) fraudulent misrepresentation against Lau (for representations about what constituted a fair share price); (2) fraudulent misrepresentation against MFG (for representing that MFB was required to be a member of the Surgery Center to provide administrative services); (3) breach of section 6.3.11 of the Operating Agreement (the conflicts provision) against MFB (for entering into the Equipment Lease Agreements on the Center's behalf without Lazar's consent); (4) breach of the Services Agreement's implied covenant of good faith and fair dealing against MFB (for entering into the Equipment Lease Agreements on the Center's behalf while maintaining a financial interest in MFE); (5) breach of section 6.3.11 of the Operating Agreement (the conflicts provision) against MFB (for entering into the Staffing Services Agreement on the Center's behalf without Lazar's consent); (6) breach of the Services Agreement's implied covenant of good faith and fair dealing against MFB (for entering into the Staffing Services Agreement on the Center's behalf while maintaining a financial interest in MMS); (7) breach of the Services Agreement against MFB (for failing to submit invoices to the Center and make various payments on the Center's behalf); (8) misappropriation of a business opportunity against MFB (for recruiting surgeons from the Center to operate at other facilities); (9) tortious interference with the Equipment Lease Agreements, Staffing Services Agreement, and Billing Agreement against Lau and MFB (for causing MFB to breach those agreements); (10); breach of the Operating Agreement against MFB (for failing to pay its own service fee); (11) breach of the Operating Agreement against MFB (for opening the East West bank account without Lazar's signature);

(12) breach of the Services Agreement against MFB (for failing to pay its own service fee); (13) breach of the Services Agreement against MFB (for failing to pay MMS its staffing services fee); (14) breach of the Services Agreement against MFB (for failing to make MFB's equipment lease payments to MFE); (15) breach of the Billing Agreement against MFS (for failing to properly bill); and (16) conversion of Surgery Center equipment and supplies against all plaintiffs.

II. Discussion

The court may grant summary judgment only when it is clear that no triable fact issue exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The moving party bears the initial burden of showing its *prima facie* entitlement to summary judgment. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). Failure to make such a showing requires the court to deny the motion, regardless of the sufficiency of the opposition papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If the moving party makes its *prima facie* showing, the burden shifts to the opposing party to produce evidence sufficient to establish a triable issue of fact. *Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562.

The court must examine the parties' summary judgment papers in the light most favorable to the opposing party. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). If there is any doubt as to whether a triable fact issue exists, the court must deny the motion. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978). Nevertheless, a non-moving party cannot overcome an adversary's *prima facie* case with mere conclusions, unsubstantiated allegations, or expressions of hope. *Zuckerman*, 49 NY2d at 562.

A. Defendants' Motion for Summary Judgment on Plaintiffs' First Through Third, Seventh, Eighth, Tenth, Twelfth, Fourteenth, Sixteenth, Eighteenth, Nineteenth, and Twenty-Fourth Through Twenty-Eighth Causes of Action

1. Plaintiffs' First Through Third Causes of Action, against Lazar, for Tortious Interference with Contract

The first and second causes of action allege that Lazar tortiously interfered with the Services Agreement between MFB and the Surgery Center and the Billing Agreement between the Surgery Center and MFS, respectively. MFB and MFS contend that Lazar knew about the agreements and intentionally interfered with them by locking MFB and MFS out of the Surgery Center. Dkt 146 [TAC] ¶¶ 75-87. They further contend that the lockout made it impossible for them to perform under the agreements, or to collect the revenue to which the agreements entitled them (10% of gross revenue for MFB, and 6% of gross collections for MFS). *Id.* MFB and MFS seek to hold Lazar personally liable for any revenue that they would have collected under the agreements had Lazar not locked them out. *Id.* ¶ 80. Additionally, to the extent that the lockout prematurely terminated the agreements, plaintiffs allege that Lazar caused the Center to breach the agreements' required termination procedures. *Id.* MFB and MFS seek costs associated with the agreements' early termination, including 2% of all pending or unresolved Surgery Center bills. *Id.* ¶ 80; Dkt. 141 at 37 [Billing Agreement] ¶ 3.4.

Lazar does not dispute that he knew about the Services and Billing Agreements, or that he intentionally caused the Surgery Center to breach those agreements. Instead, Lazar argues that he is entitled to summary judgment because he locked plaintiffs out "on behalf of the [Surgery] Center[,] and solely and only in his capacity as manager of the [Surgery] Center." Dkt. 168 [July 9, 2015 Affidavit of Terry Lazar] ¶ 2. Lazar contends that MFS was not billing clients properly and was violating the billing agreement by not paying creditors.[13] *Id.* at ¶¶ 2-3. He

[13] Lazar also claims that plaintiffs improperly opened a California bank account without giving him co-signing authority on the account. *See* Dkt. 168 ¶ 2. According to Lazar, this breached the Operating Agreement and justified locking plaintiffs out of the Surgery Center. This issue is discussed in the context of defendants' eleventh counterclaim, below. *See infra* § II(B)(5).

argues that in locking plaintiffs out of the Center, he acted "solely and only for the benefit of the Center and its survival." Dkt. 168 at ¶ 3.

Defendants' motion for summary judgment on plaintiffs' first two causes of action is denied. A claim of tortious interference with contract requires proof of (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages. *Foster v Churchill*, 87 NY2d 744, 749-50 (1996). To maintain a tortious interference with contract claim against a corporate officer, it is not enough that the officer, while acting on his company's behalf, caused the company to breach a contract. *See Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 108–09 (1st Dept 2002). Rather, a plaintiff must show that the officer's conduct was beyond the scope of his employment, or "motivated by personal gain." *Petkanas v Kooyman*, 303 AD2d 303, 305 (1st Dept 2003). The First Department has explained "motivated by personal gain" means that the officer acted "with malice . . . calculated to impair the plaintiff's business for [personal profit]." *Id.* (internal citations omitted). The court finds that, at a minimum, a question of fact exists as to whether Lazar acted outside the scope of his employment, or for "personal gain," when he locked MFB and MFS out of the Surgery Center.

The court cannot conclude as a matter of law that Lazar acted within the scope of his authority as manager under the Operating Agreement in locking MFB and MFS out of the Surgery Center. Lazar concedes that by locking MFB out of the Center, he intended to remove MFB as manager. *See* Dkt. 236 [Tr. of January 29, 2015 Deposition of Terry Lazar] at 152. The Operating Agreement, however, permits Lazar to remove a manager only if the manager "has committed an act of fraud, deceit, gross negligence, willful misconduct, breach of fiduciary duty

or a wrongful taking." *See* Dkt. 181 ¶ 6.6.4. Here, Lazar fails to establish as a matter of law that MFB "committed an act of fraud, deceit, gross negligence, willful misconduct, breach of fiduciary duty or a wrongful taking" such that Lazar was justified in locking MFB out of the Center. Instead, he contends that the "normal" collection rate on insurance claims is "in excess of 20%" of the amount billed, and that MFS collected at a much lower rate. He cites no support for this proposition and produces no billing or financial records, expert testimony, or other evidence to support his claim that MFB (through MFS) billed patients improperly.[14] *See* Dkt. 168 at ¶ 3. Additionally, Lazar provides no evidence to support his claim that the Center was profitable before MFB took over as manager. All of the evidence suggests that, to the contrary -- that Lazar was badly overleveraged and in debt. *See* Dkt. 237 at 8-9; Dkt. 241 at 192-199; Dkt. 180 ¶ 12.

Similarly, Lazar fails to establish that the lockout was "solely and only for the benefit of the Center and its survival" and not for his own personal gain. Dkt. 168 at ¶ 3. Lazar does not dispute that he benefitted financially from plaintiffs' ouster. By removing MFB as co-manager of the Surgery Center (without compensating MFB), Lazar reestablished full ownership and control over the Center, into which MFB had injected approximately $2 million in capital. *See* Dkt. 234 [Tr. of November 17, 2014 Deposition of Dr. Glen Lau] at 86-87. Lazar's conclusory statements that he "was not motivated by [his] desire to benefit himself" and that he "received no personal benefit" from the lockout do not establish his *prima facie* entitlement to summary judgment. *See Hauptman v New York & Presbyterian Hosp.*, 92 AD3d 423 (1st Dept 2012) (conclusory statements from plaintiff's expert insufficient to raise issue of fact); *Estate of*

[14] Lazar also attempts to compare the Surgery Center's profitability as a single-purpose abortion clinic, to its profitability in its first year as a multi-specialty surgery center, without accounting for any differences between the two.

Nevelson v Carro, Spanbock, Kaster & Cuiffo, 259 AD2d 282, 284 (1st Dept 1999) (same); *Bitici v New York City Transit Auth.*, 245 AD2d 157 (1st Dept 1997) (same).

Plaintiffs produce undisputed deposition testimony that the night before the lockout, Lazar and Lau had a heated argument over monies Lau extended and his stake in the Surgery Center, during which Lazar accused Lau of trying to steal his building license. *See* Dkt 237 at 6, 12-13; Dkt. 236 at 149-150. This testimony alone raises a question of fact as to Lazar's motivation. *See Petkanas*, 303 AD2d at 305.

In any event, if Lazar's conduct was based on dissatisfaction with the level of MFB's and MFS's performance, something he must have been aware of due to his position as tax partner, 90 days' notice to MFB, not a lockout, was required. Accordingly, defendants' motion for summary judgment on plaintiffs' first two causes of action is denied.

The third cause of action alleges that Lazar interfered with the Billing Agreement by refusing to consent to changing the Surgery Center's billing address to the address of the trust account in California that MFS maintained on the Center's behalf. TAC ¶¶ 88-94. Plaintiffs argue that because of Lazar's refusal, MFS was not able to process $64,915.19 in pre-lockout insurance payments (which might partially account for MFS' "low" collection rate), and is, therefore, liable MFS' commissions and fees on this amount. *Id.* ¶¶ 90-92, 94. MFS also seeks to hold Lazar liable for MFS' commissions on all pre-lockout insurance payments, as well as all costs associated with the Billing Agreement's early termination. *Id.* ¶ 93-94.

Lazar does not dispute that he caused the Surgery Center to breach the Billing Agreement by refusing to consent to a change in the Surgery Center's billing address to the address of MFS' trust account.[15] *See* Dkt. 141 at 37 [Billing Agreement] ¶¶ 1.1 & 1.3. Further,

[15] Lazar counterclaims that plaintiffs improperly opened a California bank account without giving him co-signing authority on the account. *See* Dkt. 168 ¶ 2. According to Lazar, this

Lau testified at his deposition that Lazar siphoned funds mailed to the Surgery Center's old billing address and deposited those funds into his personal bank account. *See* Dkt. 235 [Lau Dep.] at 4 & 12. This evidence, combined with Lazar's complete failure to address the third cause of action in his summary judgment motion, does establish that Lazar's conduct in refusing to change the billing address was motivated by personal gain. Accordingly, the court denies Lazar summary judgment on this cause of action, but in searching the record, grants MFS summary judgment on liability as to its commission and fees on the $64,915.19. *See New Hampshire Ins. Co. v MF Global, Inc.*, 108 AD3d 463, 467 (1st Dept 2013) (court deciding motion for summary judgment empowered to search record and grant summary judgment to nonmoving party on issue before court, even in absence of cross-motion).

2. Plaintiffs' Seventh, Eighth, Tenth, Twelfth, Fourteenth, and Sixteenth Causes of Action, against Lazar, for Unjust Enrichment

The TAC alleges unjust enrichment against Lazar as to monies plaintiffs paid on behalf of various Lazar-controlled companies, which monies were outside of the parties' various agreements:

- From March 20, 2013 to April 26, 2013, a series of loans totaling $86,765.31 to Sterling Bank and Somerset Capital, Ltd., which Lazar allegedly personally guaranteed (Cause of Action 7)
- A January 31, 2013 loan of $90,800 to an unnamed New York Commercial Bank on behalf of TMS (Cause of Action 8)
- A January 31, 2013 loan of $45,400 to an unnamed New York Commercial Bank on behalf of TMS (Cause of Action 10) [Dkt. 203 at 7]
- From August 2013 to April 26, 2013, a series of loans to TDK totaling $198,000 (Cause of Action 12)
- A January 31, 2013 loan of $33,000 to TDK (Cause of Action 14) [Dkt. 203 at 7]

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breached the Operating Agreement, and justified locking plaintiffs out of the Surgery Center. This issue is discussed in the context of defendants' eleventh counterclaim, below. *See infra* II(B)(5).

- A series of capital improvement projects to the Surgery Center (Cause of Action 16)

See TAC Counts 7, 8, 10, 12, 14, & 16.

In this Court's October 7, 2014 decision on defendants' motion to dismiss, the court determined that plaintiffs had failed to state facts sufficient to justify piercing the corporate veil of Lazar's companies to hold Lazar personally liable for the loans. *See* Dkt. 155 at 5-7. Nevertheless, the court held that plaintiffs had stated a claim against Lazar for unjust enrichment by alleging that Lazar used plaintiffs' loan proceeds to Lazar's companies to pay off Lazar's personal debts, or company debts that he personally guaranteed. *See* TAC ¶¶ 112-120.

Plaintiffs now concede that they premised each of their unjust enrichment claims against Lazar solely on a piercing the corporate veil theory. *See* Dkt. 176 [Def's Br.] at 15; Dkt. 171 [Page 24 Plaintiffs' Appellate Brief] (stating that the seventh, eighth, tenth, twelfth, fourteenth, and sixteenth causes of action were all veil-piercing claims); Dkt. 219 [November 10, 2015 Tr.] at 35-36 ("Mr. Soto: 10, 12, 14, and 16 are veil piercing claims...[t]hey are out. . . The Court: What about 7 and 8...? Mr. Soto: ...7 and 8 were pleaded as veil piercing claims. The Court: So they are out. So all of that is out. Mr. Soto: But we still have the remaining unjust enrichment claims against the corporate defendants."). Lazar also submits an affidavit stating that all of MFB's loans were to the Surgery Center's creditors (i.e. not his creditors), and that Lazar never retained any of the loan proceeds. Dkt. 168 ¶ 5. Plaintiffs do not dispute that MFB made no payments toward the Signature Bank debt, the only debt that Lazar admits he personally guaranteed.[16] Dkt. 236 [Lazar Dep.] at 59-60.

[16] Plaintiffs cite parts of the Glen Lau and Mark Zafrin deposition transcripts, which suggest that Lau was loaning money to Lazar to keep the Surgery Center running and that Lazar was having financial problems. *See* Dkt. 192 [Pltf. Opp. Br.] at 20. This testimony is not sufficient to raise an issue of fact as to whether Lazar was using the loan proceeds to satisfy his personal debts, or

Lazar's undisputed affidavit, together with plaintiffs' admission that they based their unjust enrichment claims solely on an inadequately pled veil-piercing theory, entitle defendants' to summary judgment on plaintiffs' unjust enrichment claims against Lazar. Thus, defendants' motion to dismiss the seventh, eighth, tenth, twelfth, fourteenth, and sixteenth causes of action is granted.

3. Plaintiffs' Eighteenth and Nineteenth Causes of Action Against the Surgery Center for Breach of the Services Agreement

Plaintiffs' eighteenth cause of action alleges that the Surgery Center breached the Services Agreement by failing to pay MFB its monthly service fee. TAC ¶¶ 202-208; Dkt. 196 ¶¶ 3.02 & 3.05. The nineteenth cause of action alleges that the Surgery Center breached the Services Agreement by terminating the agreement before its 3-year term expired [*see* Dkt. 196 ¶ 4.01] without following its early termination procedures. TAC ¶¶ 209-212; Dkt. 196 ¶ 4.02.

Defendants admit that the Services Agreement entitled MFB to a monthly service fee and that the Surgery Center never paid the fee. Nevertheless, defendants argue that the Services Agreement obligated MFB to pay all operating expenses on behalf of the Surgery Center, including the service fee. *See* Dkt. 176 at 17, citing Dkt. 196 ¶ 3.07. If MFB never received its fee, defendants contend, it was because MFB failed to pay itself. *Id.* Based on these allegations, defendants argue that MFB's alleged failure excuses the Surgery Center from paying the service fee or continuing to perform under the agreement. *See* Dkt. 176 at 17-18. Defendants also argue that that plaintiffs frustrated defendants' performance by denying them access to the Surgery Center's checking account. *Id.*, citing Dkt. 235 [Lau Dep.] at 12 and *Grad v Roberts*, 14 NY2d

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debts that he personally guaranteed. *See Caraballo v Kingsbridge Apt. Corp.*, 59 AD3d 270 (1st Dept 2009) ("[M]ere speculation and conjecture, rather than admissible evidence, is insufficient to sustain the action [on summary judgment].").

70, 75-76 (1964) (holding that in every contract, there is an implied agreement not to intentionally prevent the other side from performing).

The court finds defendants' arguments unavailing. MFB agreed to pay all expenses on behalf of the Center and agreed to defer payment of its management compensation as necessary. *See* Dkt. 196 ¶ 3.06 ("[MFB], in its sole discretion, agrees to defer (accrue) its management compensation from time to time as it deems necessary."). There is no question that, if MFB had access to sufficient revenue to cover its service fee, it would have paid itself. Defendants do not dispute that MFB lacked the funds in its East West bank account (the trust account) to cover its service fee, and instead used those funds to pay expenses, such as rent paid to the landlord, a Lazar entity, necessary to keep the Center running. This revenue shortfall does not discharge the Surgery Center's obligation to pay MFB's service fee.[17]

Additionally, the court finds that a question of fact exists as to whether Lazar wrongfully withheld revenue from MFB, preventing MFB from using that revenue to pay the Center's operating expenses. Lazar does not dispute that he "accidentally" diverted at least $17,000 in insurance payments to his personal bank account. Dkt 235 [Lau Dep] at 255-256 ("When the money c[a]me [sic] into the Surgery Center at one point, [Lazar] took it . . . He siphoned it off and put it in his own account, and told us it never c[a]me in [sic] ... [W]e identif[ied] [sic], from the insurance company, that [the check] c[a]me into the [Surgery Center's] mailbox and was cashed and deposited in[to] [Lazar's] own account."); Dkt. 236 [Lazar Dep] at 76-79. Hence,

[17] Dr. Lau testified that he did not expect the Surgery Center to generate any revenue for three to four months, or to break even until the end of the first year. Dkt. 234 at 161. By terminating the joint venture before its three-year term had expired, Lazar deprived MFB of the 10% service fee on the $44,000 of revenue the Center generated before the lockout. Lazar also deprived MFS of its 2% fee for any post-lockout outstanding bills. Dkt. 141 at 37 ¶ 3.4.

defendants' motion for summary judgment on plaintiffs' eighteenth and nineteenth causes of action is denied.

4. Plaintiffs' Twenty-Fourth and Twenty-Fifth Causes of Action Against the Surgery Center for Breach of the Staffing Services Agreement with MMS and the Lease Agreements with MFE

The twenty-fourth cause of action alleges that the Surgery Center breached the Staffing Services Agreement with MMS by failing to pay MMS $318,416.98 in staffing services fees. TAC ¶¶ 230-236. The twenty-fifth cause of action alleges that the Surgery Center breached 12 Equipment Lease Agreements with MFE by failing to make monthly lease payments totaling over $250,000. ¶¶ 237-264.

Defendants do not dispute that MMS provided staffing services to the Surgery Center or that the Surgery Center leased medical equipment from MFE. Instead, defendants argue MFB exceeded its managerial authority under Operating Agreement section 6.3.11 (the conflicts provision) by entering into the Staffing Services and Equipment Lease Agreements on behalf of the Center without Lazar's approval.[18] Defendants contend that, as a result, New York Limited Liability Company Law (LLCL) § 412(d) renders the Staffing Services and Lease Agreements non-binding on the Center. *See* LLCL § 412(d) (agency of members or managers) (McKinney 2016) ("No act of a member, manager or other agent of a limited liability company in contravention of a restriction on authority shall bind the limited liability company to persons having knowledge of the restriction."). Defendants further claim that the Equipment Lease Agreements were "fraudulently backdated" to make it appear that the Center received the equipment before it actually did.

[18] The Letter of Intent specifically allows MFB to entering into a Billing Agreement and Services Agreement with Lau's companies [Dkt. 194 ¶¶ 20-21] but is silent to the Staffing Services or Equipment Lease Agreements.

The court finds that a question of fact exists as to whether section 6.3.11 applies to the Staffing Services Agreement. As set forth above, section 6.3.11 only requires a majority member approval of "any contracts in excess of $50,000[,] pursuant to which any of the Managers shall have a conflict of interest..." Dkt. 195 ¶ 6.3.11. Here, defendants present no evidence that the Staffing Services Agreement was worth $50,000. Lazar states in his affidavit that the value of the agreement "on its face" exceeds $50,000, but cites no portion of the agreement. The agreement itself contains no express price terms, and ties the Surgery Center's payment obligation to employee wages plus a 5% commission. *See* Dkt. 141 at 41 [Staffing Services Agreement] ¶ 2.1. Defendants submit no documentation of employee wages. Therefore, the court cannot conclude as a matter of law that the Staffing Services Agreement exceeded $50,000 in value, or that section 6.3.11 applies. Moreover, there is no dispute that Kim Lazar, Lazar's daughter, was involved in the day-to-day management of the Center and that Lazar had substantial involvement at least in financial oversight. A question exists as to whether Lazar ratified that agreement if it was worth in excess of $50,000. *See Johnson v Johnson*, 191 AD2d 257 (1st Dept 1993) (conduct by voluntarily adhering to terms of agreement and accepting benefits of plaintiff's performance ratified agreement and prevented attack on its validity); *Leasing Servs. Corp. v Vita Italian Restaurant*, 171 AD2d 926, 927 (3d Dept 1991) (contract entered into by person unauthorized to do so is voidable but may be ratified by failing to timely disaffirm or repudiate contract or by acts consistent with intent to be bound following discovery).

As to the twenty-fifth cause of action, the Operating Agreement likely required MFB to obtain Lazar's approval before entering into the Equipment Lease Agreements on the Surgery Center's behalf. The equipment leases all run for five-year terms and call for monthly payments that total over $50,000. *See* Dkt. 140 at 30 [Equipment Lease Agreements] ¶¶ 5(a) & (c).

Although defendants fail to cite any evidence demonstrating a conflict of interest with MFE, Lau admits that MFB "organized" MFE and had a financial stake in it. *See* Dkt. 234 at 111-112. Lau's stake in MFE could potentially create a conflict that triggered Lazar's special approval rights. MFB's general power to manage the Surgery Center's day to day operations does not override Lazar's special approval rights specifically set forth in section 6.3.11. *See Bank of Tokyo-Mitsubishi, Ltd., New York Branch v Kvaerner a.s.*, 243 AD2d 1, 8 (1st Dept 1998) (Where there is "an inconsistency between a general provision and a specific provision of a contract, the specific provision controls.").

Nonetheless, again, a question fact exists as to whether Lazar ratified the Equipment Lease Agreements, thereby rendering them binding on the Center. "An agreement executed without proper authority may be enforceable under the doctrine of ratification." *IRB-Brazil Resseguros, S.A. v Inepar Investments, S.A.*, 83 AD3d 573, 575 (1st Dept 2011) (guarantee of notes was implicitly ratified by guarantor, although officers who executed guarantee allegedly lacked actual authority). "Ratification is the act of knowingly giving sanction or affirmance to an act that would otherwise be unauthorized and not binding." 57 N.Y. Jur. 2d Estoppel, Etc. § 94 (2016); *see also Dinhofer v Med. Liab. Mut. Ins. Co.*, 92 AD3d 480, 481 (1st Dept 2012) (plaintiffs' claims barred by doctrine of ratification where plaintiffs failed to act promptly to seek rescission of settlement agreement and "accepted and retained" benefits of agreement).

An entity ratifies an act by "(a) manifesting assent that the act shall affect the person's legal relations, or (b) conduct that justifies a reasonable assumption that the person so consents." Restatement (Third) Of Agency § 4.01 (2006); *see also Glidepath Holding B.V. v Spherion Corp.*, 590 FSupp2d 435, 461 (SDNY 2007). The effect of ratification is that the unauthorized act is given effect as if done by an agent acting with actual authority, and is therefore attributable

to the principal. Restatement (Third) Of Agency § 4.01 (2016). Under New York law, ratification "may be express or implied, or may result from silence or inaction." *In re Adelphia Recovery Trust,* 634 F3d 678, 692 (2d Cir 2011). "Mere negligence is not ratification [,] ... [but] an act, such as an acceptance of benefits, may constitute a ratification, and acquiescence may give rise to an implied ratification ..." *Cammeby's Mgmt., Co., LLC v Affiliated FM Ins. Co.,* 152 FSupp 3d 159, 165 (SDNY 2016) (Rakoff, J.). Furthermore, ratification

> must be performed with full knowledge of the material facts relating to the transaction, and the assent must be clearly established and may not be inferred from doubtful or equivocal acts of language . . . However, the intent can be implied from knowledge of the principal coupled with a failure to timely repudiate, where the party seeking a finding of ratification has in some way relied upon the principal's silence or where the effect of the contract depends upon future events.

Id.

Here, MFB executed the Staffing Services and Equipment Lease Agreements on behalf of the Surgery Center on November 1, 2012 (Staffing Services Agreement) and December 1, 2012 (Equipment Lease Agreements), respectively. For the next five months, MFE brought in new, leased medical equipment. Lazar does not dispute that he knew that MFB leased new equipment for the Center, or that the Center, which had specialized only in abortion services, needed the new equipment to become a multi-specialty surgery center. Dkt. 236 at 162. Likewise, Lazar does not dispute that he knew MMS retained staff to operate the Surgery Center. Dkt. 234 at 20-21.

Had Lazar wanted to void the agreements, Lazar had potential remedies under LLCL §§ 411 (interested managers) and 412 (agency of managers) to do so.[19] The Staffing Services

[19] Under § 411, if Lazar could show that MFB failed to disclose a conflict of interest with MMS and MFE, he could have voided the agreements unless MFB could show that they were fair and reasonable. *See* LLCL § 411(b). Under § 412, Lazar could have voided the agreements if he could show that the agreements violated Lazar's special approval rights under the Operating

Agreement itself was not exclusive and permitted the Surgery Center to use another staffing agency at any time, or to audit MMS' performance under the agreement. Dkt. 141 at 43 ¶ 1.2 ("Entering into th[e] [a]greement in no way obligates [the Surgery Center] to retain [MMS] to perform any minimum amount of ... services."). But Lazar never inquired about the agreements and accepted all of the benefits the agreements afforded the Center without expending any of his or his entities' money. Indeed, his children were on payroll and involved in the Center's day-to-day affairs. Lazar, with the aid of counsel, even entered into an Amended Operating Agreement with MFB after the Billing and Staffing Services Agreements went into effect. Only after locking MFB out of the Center did Lazar challenge the enforceability of the agreements. Lazar offers no admissible evidence to support his claim that the agreements were unfair.[20] His only

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Agreement and that MMS and MFE knew about the Operating Agreement's restrictions when they entered into their respective agreements. *See id.* § 412(b-d).

The court notes that Lazar has not established as a matter of law that the agreements were unfair or that MMS and MFE knew about the Operating Agreement's restrictions when they entered into their respective agreements with the Surgery Center. *See* LLCL §§411-412. Thus, even if Lazar had not ratified the agreements, LLCL §§ 411 and 412 would not entitle Lazar to summary judgment.

[20] In their opposition papers, Defendants submit, for the first time, an affidavit from a Fred Ferrara to show that the Lease Agreements were unfair to the Surgery Center. *See* Dkt. 210 [August 28, 2015 Affidavit of Fred Ferrara]. Mr. Ferrara purports to have "extensive experience in the area of [equipment] leasing." *Id.* at ¶1. He concludes, based on his "experience and expertise," that the Surgery Center's equipment lease terms "are not consistent with industry standards and norms." *Id.* Plaintiffs' counsel objects to Ferrara's affidavit on the grounds that defendants did not identify Ferrara as a witness or tender an expert report from Ferrara during discovery.

The court will not consider Ferrara's testimony here, as defendants failed to timely disclose Ferrara as a witness, thereby preventing plaintiffs from deposing him or retaining a rebuttal expert. *See* Dkt. 218 [Defendants' Responses to Plaintiffs' Third Set of Interrogatories] at 2; CPLR § 3101(d)(1) (a party must disclose "in reasonable detail the subject matter on which each expert is expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness, and a summary of the grounds for each expert's opinion."). It is unclear from Ferrara's affidavit what qualifies him as an expert in "the area of leasing," how he determined that the Equipment Leases deviated from "normal market terms," or whether such subject matter would require expert testimony.

evidentiary basis for this claim is that Lau owned a stake in MFE. *Id.* at 201. That Lau owned a stake in MFE, however, does not render the Surgery Center's Equipment Lease Agreements with MFE unfair.

A triable issue exists as to whether Lazar ratified the agreements by accepting their benefits and not timely exercising any right to void them. *In re 1545 Ocean Ave., LLC*, 72 AD3d 121, 132 (2d Dept 2010) ("Beyond complaining about the cost of VHC's work and seeking to withdraw from 1545 LLC, the record is clear that [the LLC] ratified, albeit grudgingly at times, [a manager]'s unilateral [contract]."); *Glidepath*, 590 FSupp2d at 461; *see also Restatement (Third) Of Agency* § 4.01 (2016).

Finally, Defendants' claim that the Equipment Lease Agreements were "fraudulently backdated" borders on frivolous.[21] MFE's corporate representative, Liebenson, testified that MFE shipped the majority of the leased equipment to the Center before the December 1, 2012 lease start date. Dkt. 192 [Pltf. Opp. Br.] at 28-29, citing Dkt. 240 at 35-38. Although plaintiffs admit that MFE shipped some of the leased equipment to the Surgery Center after that date, Liebenson confirms (and defendants do not dispute) that the Center should have received all of the equipment by January 2013. *See* Dkt. 240 at 41-42, 45, 55 & 57. Plaintiffs' counsel, in turn, has represented that plaintiffs are only seeking damages for missed leased payments accruing from January 2013 until plaintiffs repossessed the equipment. Dkt. 192 at 29. In light of the foregoing considerations, defendants' motion for summary judgment on plaintiffs' 24th and 25th causes of action is denied.

5. Plaintiffs' Twenty-Sixth Cause of Action against the Surgery Center for Conversion of Leased Equipment

[21] Defendants argue that because the Surgery Center didn't receive all of the leased equipment until after the leases' start date of December 1, 2012, MFB committed fraud. Dkt. 176 at 21.

The twenty-sixth cause of action alleges that the Surgery Center converted four pieces of medical equipment worth approximately $23,000 from MFE. TAC ¶¶ 265-279. Defendants argue that Lau and Ferguson testified at deposition that the Surgery Center returned all of the equipment that it leased from MFE. *See* Dkt. 167 [Legum Aff.] ¶ 9, citing Dkt. 234 [Lau Dep] at 119-120; Dkt. 238 [Ferguson Dep] at 63-64. Defendants treat this as an informal judicial admission. Because MFE did not lease any of the remaining equipment at the Center, defendants contend, plaintiffs have no "superior right of possession" to these items and cannot maintain a conversion claim. Plaintiffs respond that Lau lacked any personal knowledge of what equipment plaintiffs had removed when he made the alleged admission. They attach an affidavit from Julie Ferguson, identifying all remaining equipment subject to the Lease Agreements. *See* Dkt. 205 [Ferguson Aff.] ¶ 7. Ferguson identifies four pieces of equipment worth approximately $6,500. *Id.*

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." *Colavito v N.Y. Organ Donor Network, Inc.*, 8 NY3d 43, 48-50 (2006). A question of fact exists as to what equipment still remains at the Surgery Center. Both Lau and Ferguson testified that they weren't sure how much, if any, leased equipment remained at the Center. *See* Dkt. 238 [Ferguson Dep] at 63-64; Dkt. 234 [Lau Dep] at 119-120. That Ferguson and Lau may have offered conflicting testimony at some points in their depositions does not defeat plaintiffs' conversion claim as a matter of law. *See Matter of Liquidation of Union Indem. Ins. Co. of New York*, 89 NY2d 94, 103 (1996) ("Informal judicial admissions are recognized as facts incidentally admitted during the trial or in some other judicial proceeding... To be sure, they are not conclusive, though they are 'evidence' of the fact or facts admitted.").

The court further finds no meaningful distinction between converted equipment that plaintiffs leased to defendants and converted equipment that belonged to plaintiffs that was not subject to a formal lease agreement. In either scenario, plaintiffs enjoy a superior right of possession to the equipment and are entitled to its return. Hence, defendants' motion for summary judgment on plaintiffs' twenty-sixth cause of action is denied.

6. Plaintiffs' Twenty-Seventh and Twenty-Eighth Causes of Action against the Surgery Center for Anticipatory Breach of the Services Agreement's Loan Provisions

The twenty-seventh and twenty-eighth causes of action allege that the Surgery Center anticipatorily breached the Services Agreement by locking plaintiffs out of the Center, thereby repudiating the Center's obligation to repay loans from Lau and from MFB made pursuant to section 3.10 of the agreement in the five years required. *See* TAC ¶¶ 280-285. The first loan was for $612,600, and the second was for $744,000, "predicated on [MFB]'s participation in the Surgery Center as a member." *Id.* at 282.

Defendants seek summary judgment on the twenty-seventh and twenty-eighth causes of action on a judicial admission theory. They claim Lau testified at his deposition that plaintiffs based their twenty-seventh and twenty-eighth causes of action on the premise that the Surgery Center was no longer operational and would be unable to generate sufficient revenue to repay the loans made under the Services Agreement. Dkt. 167 ¶ 11, citing Dkt. 235 [Lau Dep Day 2] at 15-16. Because defendants are in fact still operating the Center, the Center argues [Dkt. 168 ¶ 6] they are still able to repay the loans and have not repudiated their loan obligations. Plaintiffs do not address this argument in their motion papers.

The doctrine of anticipatory breach applies where a party repudiates its contractual duties "prior to the time designated for performance [,] and before all of the consideration has been

fulfilled..." *Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, 92 NY2d 458, 462-63 (1998) (internal citations omitted). The "repudiation [then] entitles the non-repudiating party to claim damages for total breach." *Id.* A repudiation can be either "a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach[,] or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Id.* Nevertheless, "[f]or the doctrine of anticipatory breach to apply, there must be some dependency of performances..." *Long Island R.R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 464 (1977). "[F]or this reason, a party who has fully performed cannot invoke the doctrine even though the other party has repudiated." *Id.*

Here, there is no evidence that defendants have "clearly and unequivocally" repudiated their obligation to repay the loans they received under Services Agreement section 3.10. While the lockout may have constituted a direct breach of the Services Agreement's other provisions (i.e. to allow MFB to manage the Center), it does not constitute an anticipatory breach of the Agreement's loan provisions. The Services Agreement provides for a five year-term of repayment and 5% interest. It contains no acceleration clause that would entitle plaintiffs to immediate payment or, for that matter, any substantive terms governing when interest payments are to be made.

Additionally, MFB had fully performed at the time of the lockout by loaning the Surgery Center the money. There was no "dependency of performances" with respect to the loan provisions. *See Long Island R.R. Co.*, 41 NY2d at 464. Consequently, even if the Surgery Center unequivocally repudiated its loan repayment obligations, MFB cannot invoke the anticipatory breach doctrine. *Id.* ("[A] party who has fully performed cannot invoke the doctrine even though

the other party has repudiated."). Defendants' motion for summary judgment on the twenty-seventh and twenty-eighth causes of action is granted.

B. Plaintiff's Motion for Summary Judgment

1. Defendants' First and Second Counterclaims against Lau and MFB for Fraud in the Inducement

Defendants' first counterclaim alleges that Lau fraudulently induced Lazar into entering into the Letter of Intent and Operating Agreement by misrepresenting: (1) that $52,000 was a fair price for MFB's .6225% interest in the Surgery Center; and (2) that Lau and his agents would attempt to recruit surgeons to operate the Center. Dkt 158 [Answer with Counterclaims] ¶¶ 122-133. The second counterclaim alleges that MFB, through Zafrin, fraudulently induced the Surgery Center into entering into the Membership Interest Purchase Agreement and Membership Interest Option Agreement by representing that MFB was legally required to be a Surgery Center member to manage the Surgery Center. *Id.* ¶¶ 134-141. Defendants claim that Lazar reasonably relied on the foregoing representations in entering into the agreements. *Id.* They seek compensatory and punitive damages of $10,000,000 on the first counterclaim, and rescission of the Membership Interest Purchase Agreement and the Membership Interest Option Agreement on the second. *Id.*

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). A plaintiff must prove each element of fraud by clear and convincing evidence. *See Vermeer Owners, Inc. v Guterman*, 78 NY2d 1114, 1116 (1991). New York courts look skeptically at a sophisticated party's claim that it relied on allegedly false or misleading statements in entering into a contract. *See Basis Yield Alpha Fund Master v Stanley*, 136 AD3d 136, 141 (1st Dept

2015). Moreover, it is well established that "if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations." *ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 (2015).

Here, there is no question that Lazar was a counseled, sophisticated party with more than adequate means to determine a fair share price for his own business. Lazar, an accountant, admits that he ran the Surgery Center for 20 years, acted as the Center's tax partner, and knew the syndication business. *See* Dkt. 236 at 6, 12-13. He further admits that he negotiated the share price with Lau, had direct input into the wording of the LOI, and that he and his daughter met with Lau several times before entering into the Letter of Intent. *Id.* at 41-44, 48-50; *see also* Dkt. 234 at 166. ("Mr. Lazar and I sat together for six hours talking about how much this operation is worth, what his need would be, what he would be happy with."). Information concerning what constituted a fair share price was not peculiarly within Lau's knowledge. Lazar also specifically represented in the Services Agreement (which acknowledges the Membership Interest Purchase Agreement) that the Center had "the benefit of representation by legal counsel in negotiating th[e] [a]greement." Dkt. 196 at ¶ 7.18

Additionally, as plaintiffs point out, Lazar had other reasons for entering into the Letter of Intent and Operating Agreement. Lazar concedes that he needed an outside company like MFB to transform his abortion clinic into a multi-service specialty center, reached out to MFB first, and selected MFB from among several potential management companies. Dkt. 236 at 37-41. Further, Kim Lazar testified that she was in favor of entering into the joint venture with

plaintiffs because she was impressed with MFB' work on other surgery centers and liked their financial qualifications. Dkt. 178 at 21-22, citing Dkt. 241 at 67-68. Indeed, by entering into the Operating Agreement with MFB, the Surgery Center enjoyed an ongoing, substantial capital stream. Dkt. at 234 at 156 (Lau loaned Lazar $60,000 per month). Based on the foregoing, the court finds that no triable issue of fact exists as to whether Lazar reasonably relied on plaintiffs' share price representations in entering into the Letter of Intent or Operating Agreement.

Similarly, MFB's promise to recruit surgeons for the Surgery Center does not give rise to a fraud claim. In New York, fraud claims based on mere promises to perform some future action are generally not actionable. *See Sabo v Delman*, 3 NY2d 155, 160 (1957); *see also First Bank of Americas v Motor Car Funding, Inc.*, 257 AD2d 287, 291 (1999) ("A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, *i.e.*, when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract.").

Here, Lazar has presented no admissible evidence that MFB had a preconceived and undisclosed intention of not recruiting surgeons for the Surgery Center.[22] To the contrary, Julia Ferguson detailed MFB's substantial recruitment efforts, including "reaching out to physicians, going to their offices, speaking to their scheduling staff... [w]e would have recruitment hors d'oeuvres hour and take doctors out to dinner where they could hear about the Surgery Center and what we would be doing." Dkt. 178 [Pltf. Br.] at 20. Additionally, Lau testified that he warned Lazar that MFB might not be able to sell shares in the Center until it started generating a profit.

[22] Lazar's entire basis for this allegation appears to be that MFB ended up not selling any shares in the Center during its first seven-and-one-half months as manager. Dkt. 236 at 184.

Dkt. 234 at 168-169. Plaintiffs' motion for summary judgment on defendants' first counterclaim, therefore, is granted.[23]

The court also grants plaintiffs' motion for summary judgment on defendants' second counterclaim, alleging that MFB misrepresented that it had to be a Surgery Center member to provided management services. "[A]s a general proposition[,] an action for fraud cannot be based, nor relief granted, upon a misrepresentation of the law or the legal effect or consequence of a personal transaction or contract." *Lefferts v Lefferts*, 243 AD 278, 279 (1st Dept 1935); *De Franco v Shedden*, 251 AD 720, 721 (2d Dept 1937).

Here, the parties dispute both whom Zafrin represented and whether he actually advised Lazar that MFB needed to be a Surgery Center member to carry out administrative and managerial functions. Still, defendants produce no evidence that they reasonably relied on Zafrin's alleged representations in entering into the Membership Interest Purchase Agreement and Membership Interest Option Agreement. Rather, as set forth above, all of the evidence on the record supports the conclusion that defendants entered into the Membership Agreements because they were impressed with MFB's work in other surgery centers, and needed an immediate influx of capital. Lazar easily could have sought clarification from Zafrin or another attorney on the applicable law. Plaintiffs' motion for summary judgment on defendants' second counterclaim is granted.

2. *Defendants' Third through Sixth Counterclaims against MFB for Breach of the Operating and Staffing Services Agreements*

[23] MFB also promised to recruit new surgeons in the LOI. Lazar's fraud claim is really one for breach of contract. *Clark–Fitzpatrick Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987) (where plaintiff and defendant are parties to contract, and plaintiff seeks to hold defendant liable in tort, plaintiff must prove that defendant breached a duty "independent" of its duties under the contract; otherwise, plaintiff is limited to action in contract).

The third and fifth counterclaims allege that MFB breached section 6.3.11 of the Operating Agreement (the conflicts provision) by entering into the Equipment Lease (counterclaim 3) and Staffing Services Agreements (counterclaim 5), respectively. TAC ¶¶ 142-151. The fourth and sixth counterclaims allege that MFB breached the Services Agreement's implied covenant of good faith and fair dealing by entering into the Equipment Lease (counterclaim 4) and Staffing Services Agreements (counterclaim 6), respectively. ¶¶ 152-161. Defendants seek $10,000,000 in punitive and compensatory damages for breach of the Services Agreement. They seek indemnification from MFB for the amount MFE claims Lazar owes MFE under the Equipment Lease Agreements.

The court discusses the relevant issues related to the third and fifth counterclaims above, in connection with defendants' motion for summary judgment on plaintiffs' twenty-fourth and twenty-fifth causes of action. *See supra* II(A)(4). For the reasons stated above, a question of fact exists as to whether MFB violated the Operating Agreement by entering into the Staffing Services Agreement. *Id.* Since a question of fact exists as to whether Lazar ratified the agreements, the court cannot conclude that MFB exceeded its authority under the Operating Agreement. *Id.* Accordingly, plaintiffs' motion for summary judgment on the third and fifth counterclaims is denied.

Plaintiffs do not address defendants' fourth and sixth counterclaims, which allege breach of the Services Agreement's implied covenant of good faith and fair dealing. Neither party sets forth the standard for a breach of the covenant of good faith and fair dealing claim or makes any attempt to analyze defendants' claims under that standard. Instead, plaintiffs argue that Lau had no "conflict of interest" with MMS or MFE within the meaning of the Operating Agreement.

Defendants restate their argument that Lau had a conflict of interest because he was "the acknowledged principal of each of them." Dkt. 213 at 13.

The court finds that the evidence on the record supports dismissal of defendants' fourth and sixth counterclaims. In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance. *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* "While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they do encompass any promises which a reasonable person in the position of the promisee would be justified in understanding were included." *Id.*, quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 (1978), quoting 5 Williston, Contracts § 1293, at 3682 (1937).

Here, the Services Agreement called for MFB to operate the Surgery Center's day to day operations and gave MFB near complete authority do to so. In entering into the Staffing Services and Equipment Lease Equipment Agreements, MFB attempted to procure staff and equipment necessary to run the Service Center. Although defendants argue that the agreements were "commercially unreasonable," they provide no evidence to support this claim. *See supra* II(A)(4). This is true despite the fact that defendants have enjoyed ample discovery in this three-year old case, and could have retained an expert. That Lau may have had a conflict of interest with MFE, without more, does not deprive the Surgery Center of any benefit under the Services Agreement. Ergo, the court grants plaintiffs' motion for summary judgment on defendants' fourth and sixth counterclaims. *See Schiraldi v U.S. Mineral Prod.*, 194 AD2d 482, 483 (1st Dept 1993) ("The absence of [any supporting evidence] established appellant's facial non-

liability and shifted to plaintiff the burden of demonstrating by admissible evidence the existence of a factual issue requiring a trial of the action or of tendering an acceptable excuse for his failure to do so."); *Genger v Genger*, 123 AD3d 445, 447 (1st Dept 2014) (A party opposing a motion for summary judgment must "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ...") (internal citations omitted).

3. Breach of Contract and Tortious Interference, Against MFB and Lau, for Failing to Pay Various Surgery Center Expenses (Counterclaims 7, 9-10, and 12-14)

The seventh counterclaim alleges that MFB breached Services Agreement ¶¶ 3.05-3.07 (payment of costs and expenses) by failing to pay its own service fee, failing to pay MMS its staffing services fee, failing to pay TMS rent, and failing to pay MFE for its equipment leases. It further alleges that MFB breached Services Agreement ¶ 2.08.2 (service contracts) by not entering into a consulting agreement with TDK, and by entering into commercially unreasonable contracts, including the Equipment Lease, Billing, and Staffing Services Agreements. The ninth counterclaim alleges that Lau and MFB tortiously interfered with the Equipment Lease, Billing, and Staffing Services Agreements by causing the Surgery Center to breach the agreements. Likewise, the tenth counterclaim alleges that MFB breached Operating Agreement ¶ 6.12 (compensation of MFB) by failing to pay its own service fee. Defendants seek indemnification from MFB to the extent the Surgery Center is liable for the service fee. Again, the twelfth through fourteenth counterclaims allege that MFB breached Operating Agreement ¶ 3.07 by failing to pay MFB's own service fee (counterclaim 12), MMS's staffing services fee (counterclaim 13), and MFE's lease payments (counterclaim 14). Defendants seek indemnification from MFB to the extent the Surgery Center is liable for the unpaid expenses.

The parties adopt similar positions here as they did with respect to defendants' motion for summary judgment on plaintiffs' eighteenth and nineteenth causes of action. *See supra* II(A)(3).

Plaintiffs argue that the Surgery Center did not generate enough revenue to pay the amounts owed under its various side contracts. Dkt. 178 at 27, citing Dkt. 239 at 47 & Dkt. 236 at 239. This was true despite Lau's injection of hundreds of thousands of dollars into the Surgery Center for rent and other expenses. *Id.* at 28. Plaintiffs contend the revenue shortfall made payment impossible.

Defendants argue that had plaintiffs made Lazar a signatory on the Surgery Center's bank account, Lazar could have "taken steps to remedy the Center's financial situation to ensure that proper payments were made." Dkt. 213 at 14. They assert that Lazar, the tax partner and principal of the landlord whose daughter was involved in the Center's day-to-day affairs, had no idea how much revenue the Surgery Center collected or what bills were due. *Id.* He claims that the Center was profitable before MFB became manager, that the Equipment Lease Agreements were commercially unreasonable, and that MFB's negligent billing created the revenue shortfall. *Id.* at 15.

The court finds that defendants are responsible for the reasonable expenses the Surgery Center incurred under the Equipment Lease, Billing, and Staffing Services Agreements. As set forth above, MFB did not breach the Operating Agreement by deferring payment on certain expenses and did not discharge defendants' payment obligations under the various side agreements. *See supra* II(A)(3). The evidence on the record shows that, contrary to defendants' assertions, MFB kept the Lazars apprised of the Surgery Center's billing and revenue status and the Lazars complained about billing before the lockout. Dkt. 241 at 157-161; Dkt. 217 [March 16, 2013 Email from Terry Lazar to David Lau]. Defendants present no evidence to support their claim that, if only Lazar had had access to the Surgery Center's bank account, Lazar could have somehow paid off the Surgery Center's expenses. *See* Dkt. 237 [Tr. of April 16, 2015 Dep.

of Mark Zafrin] at 8-9; Dkt. 241 [Kimberly Lazar Dep.] at 192-199; Dkt. 180 [Letter of Intent] ¶ 12. Moreover, defendants present no evidence that any of the subject contracts were commercially unreasonable. *See supra* note 20.

Defendants rely on Kim Lazar's affidavit, rather than expert evidence, to create an issue of fact as to what caused the Surgery Center's revenue shortfall. The same problems that plague Terry Lazar's affidavit on this issue apply to Kim Lazar's affidavit. Kim Lazar is not qualified as an expert. She fails to cite any objective standard as to what constitutes an acceptable billing rate, fails to provide any documentary evidence that shows plaintiffs billed improperly or that the Center was profitable before MFB took over, and fails to account for alternative causes for the billing shortfall, such as the fact that the Center was in the early stages of a dramatic expansion.

Finally, defendants present no evidence that MFB breached Services Agreement ¶ 2.08.2 by not entering into a $500,000 per year consulting agreement with TDK, Lazar's entity. The Services Agreement does not provide a timeframe for MFB to enter into the TDK agreement; it would have been commercially unreasonable for MFB to do so when the Center was unable to cover basic operating expenses. *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012) ("[A] contract should not be interpreted to produce an absurd result, one that is commercially unreasonable, or one that is contrary to the intent of the parties."); *Baker v Robert I. Lappin Charitable Found.*, 415 FSupp2d 473, 484 (SDNY 2006) ("Where essential terms are missing, a court may not rewrite a contract for the parties to impose obligations not bargained for, but the court must consider whether the missing terms can be supplied in a reasonable fashion consistent with the intent of the parties.").

Plaintiffs' motion for summary judgment on counterclaims 7, 9-10, and 12-14 is granted.

4. Defendants' Eighth Counterclaim, against MFB, for "Misappropriation" of Doctors

Counterclaim 8 alleges that MFB "misappropriated" five doctors (Loringer, Chernabilsky, Montalbano, Rovner, and Meyerson) from the Surgery Center to another outpatient facility that MFB operated. In particular, defendants allege that MFB "induced" each doctor to perform surgery at a Midtown Surgery Center, despite the fact that the Surgery Center expected the doctors to perform surgeries at the Surgery Center. The Surgery Center seeks $25 million in damages.

However, defendants have presented no evidence that any of the five doctors ever worked at any other facility that MFB operated. Additionally, plaintiffs' counsel states in his affirmation that plaintiffs' "records" indicate that none of the doctors worked elsewhere. *See* Dkt. 179 ¶ 4. Somewhat inconsistently, Dr. Lau testified that of the five doctors at issue, only Dr. Montalbano ever performed surgery at Midtown Surgery Center before the lockout and that he did so only once. Dkt. 234 at 158-160.

Defendants counter that plaintiff's counsel does not state what records plaintiffs reviewed to determine where each of the doctors worked, or who reviewed them. *See Marinelli v Shifrin*, 260 AD2d 227, 228-29 (1st Dept 1999) ("It is well settled that the opposing affidavit should indicate that it is being made by one having personal knowledge of the facts and, therefore, the affidavit of counsel is of no probative value in opposing a motion for summary judgment."). Defendants maintain that "[p]laintiffs know that defendants have evidence that some, if not all, of the doctors set forth in the eight counterclaim worked at a[nother] facility owned and/or operated by Dr. Lau..." Dkt. 213 at 19. However, once more, they fail to set forth the required evidence.

Plaintiffs' motion for summary judgment on the eighth counterclaim is granted. Although not at all clear from the pleadings or motion papers, defendants' eighth counterclaim

appears to be for misappropriation of a corporate opportunity (one cannot "misappropriate" a person). Under New York's corporate opportunity doctrine, "corporate fiduciaries and employees cannot, without consent, divert and for their own benefit any opportunity that should be deemed an asset of the corporation." *In re Gupta*, 38 AD3d 445, 447 (1st Dept 2007), quoting *Alexander & Alexander of N.Y. v Fritzen,* 147 AD2d 241, 246 (1st Dept 1989) ("The obligation of loyalty implied by the relationship between an employee and his (her) employer rests upon the rule that a person who undertakes to act for another shall not in the same matter act for himself (herself)."). A business opportunity is deemed an asset if the "corporation has a 'tangible expectancy'[,] which means something much less tenable than ownership, but, on the other hand, more certain than a desire or a hope." *Berman v Sugo LLC*, 580 FSupp2d 191, 206 (SDNY 2008). "The degree of likelihood of realization from the opportunity is, however, the key to whether an expectancy is tangible." *Abbott Redmont Thinlite Corp. v Redmont*, 475 F2d 85, 89 (2d Cir 1973).

Here, the evidence on the record indicates that the Surgery Center had no tangible expectancy that the five doctors would perform surgeries exclusively for the Surgery Center. Lau testified at length at his deposition about how difficult it was for him to convince surgeons to work at a new, unestablished surgical facility like the Surgery Center. Dkt. 234 at 170 ("Q: How many surgeons did you say you spoke to during the period you were in operation? A: Forty or fifty easy. Q: Did any of them make any offers lower than $52,000? A: No one offered a single penny. Nobody signed up. All they wanted to do was come do surgery and make sure [the Surgery Center] worked."); *id.* at 168-169 ("Q: When you got involved with the deal, you didn't anticipate you would be selling any shares in the immediate future? A: I told [Lazar] we would not be. It was understood. He had been trying to sell them for almost a year... people

cannot generate fire [without] fire material. Fire material [in] business means cash."). Defendants, produce no evidence that any of the doctors ever committed to buying into the Surgery Center.

Additionally, the Operating Agreement expressly allows MFB to run a competing business. *See* Dkt. 195 ¶ 6.7.2. That MFB may have recruited the same doctors to two different surgery centers does not mean that they misappropriated a Surgery Center business opportunity. *See Pane v Citibank, N.A.*, 19 AD3d 278, 279 (1st Dept 2005) ("where there [is] a formal written agreement covering the precise subject matter of the alleged fiduciary duty, there is no actionable tort for a breach of fiduciary duty."). Plaintiffs' motion for summary judgment on the eighth counterclaim is granted.

5. Defendants' Remaining Counterclaims: 11, 15, and 16

Defendants' remaining counterclaims duplicate defendants' other claims or defenses. Nor do defendants specifically address counterclaims 11, 15, and 16 in their opposition papers.

Counterclaim 11 alleges that MFB breached the Operating Agreement by opening a bank account without Lazar's signature, for which Lazar seeks $10 million in damages. MFB admits that it opened an operating account and a trust account with East West Bank and that Lazar was not a signatory on either account, but argues the Operating Agreement is ambiguous as to whether all managers must sign an account opened by one manager. They further correctly contend that even if MFB breached the Operating Agreement by opening a bank account on which Lazar was not a signatory, defendants have failed to show how the breach injured them. Counterclaim 11 is dismissed. Defendants fail to establish the requisite element of damages for this claim, much less the requested $10 million.

Counterclaim 15 alleges that MFB breached the Billing Agreement by failing to properly bill patients and follow up with insurance companies, for which the Surgery Center seeks $1.9 million. The sole basis for this claim appears to be Terry and Kim Lazar's conclusory opinion that because MFE's collection rates were low, MFB must not have been properly collecting payment. *See* Dkt. 236 at 239; Dkt. 209 ¶¶ 2-5. Kim Lazar also alleges that she reviewed MFB's billing records and discovered multiple errors, *id.*, though she does not attach copies of any of the records.

Plaintiffs' motion for summary judgment on counterclaim 15 is denied. Despite defendants' lack of supporting evidence, a question of fact exists as to whether MFB breached the Billing Agreement by failing to properly bill for services rendered at the Surgery Center. David Lau testified that many insurers denied Surgery Center claims after the Center started doing business under a different name (the New York Center for Specialty Surgery). Dkt. 239 at 49. Other insurers sent payment to a Brooklyn address that the Center had previously used for collections (some of which was cashed), even though MFE's billing office was in California. *Id.* at 49-50. In other cases, it appeared as though insurers denied claims because MFE did not input valid billing codes. *Id.* at 93. Plaintiffs also attach several hundred pages of billing records, but do not attempt to explain how the records show the allegedly proper billing.

While it may be that MFE substantially complied with its obligations under the Billing Agreement, this is not clear from plaintiffs' motion papers. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986) ("The court may grant summary judgment only when it is clear that no triable issue of fact exists."). Plaintiffs themselves admit that "[w]hile the shortfall of revenues is undisputed, the reasons for that shortfall are hotly contested." Dkt. 192 at 23 n.8. The court

cannot resolve "hotly contested" fact issues via summary judgment. Accordingly, plaintiffs' motion for summary judgment on the fifteenth counterclaim is denied.

Counterclaim 16 alleges that MFE converted $250,000 in medical equipment and supplies from the Surgery Center, for which the Center seeks $1.25 million in compensatory and punitive damages. Plaintiffs argue that Kim Lazar either allowed plaintiffs to remove the equipment or remained silent. Kim Lazar states in her affidavit that that plaintiffs removed gastrointestinal scopes worth approximately $200,000 without her consent. Dkt. 209 ¶ 6.

Plaintiffs' motion for summary judgment on the sixteenth cause of action is denied. "Conversion occurs when a defendant exercises unauthorized dominion over personal property in interference with a plaintiff's legal title or superior right of possession." *Bankers Trust Co. v Cerrato, Sweeney, Cohn, Stahl & Vaccaro,* 187 AD2d 384, 385 (1st Dept 1992). The tort of conversion does not require defendant's knowledge that he is acting wrongfully, but merely an intent to exercise dominion or control over property in a manner inconsistent with the rights of another." *LoPresti v Terwilliger*, 126 F3d 34, 42 (2d Cir 1997).

Here, Kim Lazar testifies, allegedly based on her personal knowledge, that plaintiffs intentionally removed gastrointestinal scopes that belonged to the Surgery Center. Defendants present no further proof, such as evidence that they owned such gastrointestinal scopes. Nonetheless, dismissal is denied. This is plaintiffs' motion for summary judgment, and they present no evidence demonstrating they did not remove these gastrointestinal tubes or what was removed. That Kim Lazar may not have protested the removal of the Surgery Center's personal property does not show that she authorized it. According it is

ORDERED that the motion of defendants for summary judgment is granted to the extent of dismissing the seventh, eighth, tenth, twelfth, fourteenth, sixteenth, twenty-seventh, and twenty-eighth causes of action, and is otherwise denied; and it is further

ORDERED that plaintiffs are granted summary judgment on liability as to the third cause of action and damages will be determined at trial; and it is further

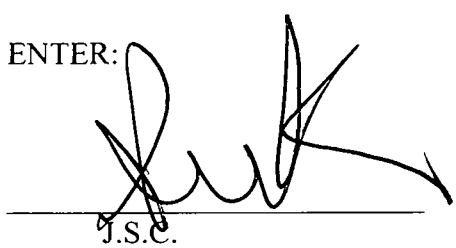
ORDERED that the motion of plaintiffs for summary judgment is granted and the first, second, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth counterclaims are dismissed, and it is otherwise denied; and it is further

ORDERED that the first, second, fourth, fifth, sixth, ninth, eleventh, thirteenth, fifteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, and twenty-sixth causes of action; damages as to the third cause of action; and the third, fifth, fifteenth, and sixteenth counterclaims are severed and shall continue; and it is further

ORDERED that the parties are to appear by telephone on February 7, 2017 at 12:00 noon (646-386-3362) to arrange for a pre-trial conference.

Dated: January 18, 2017

ENTER:



J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C