

Fusco v Direct Access Mgt., L.L.C.

2011 NY Slip Op 33367(U)

December 7, 2011

Supreme Court, Nassau County

Docket Number: 4450-09

Judge: Timothy S. Driscoll

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SCAN

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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THOMAS G. FUSCO and ANTHONY FASULO,

Plaintiffs,

**TRIAL/IAS PART: 20
NASSAU COUNTY**

-against-

**Index No: 4450-09
Motion Seq. Nos. 1 and 2
Submission Date: 10/7/11**

**DIRECT ACCESS MANAGEMENT, L.L.C. and
AXCESS, INC. and MEDFORD DIALYSIS ACCESS,
P.C. and DR. PURSHOTAM LAL NAGWANI, M.D.,**

Defendants.

-----X

Papers Read on these motions:

- Notice of Motion, Affirmation in Support, Memorandum of Law,
Affidavit in Support and Exhibits.....X**
- Notice of Motion, Affirmation and Memorandum in Support,
Affidavits in Support and Exhibits.....X**
- Affirmation in Opposition and Exhibit.....X**
- Affirmation in Opposition, Affidavit in Opposition,
Attorney Affirmation and Exhibits.....X**
- Memorandum of Law in Opposition to Motion to Amend.....X**
- Affirmation in Opposition, Affidavit in Opposition and Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Affidavits in Opposition and Exhibits.....X**
- Affirmation in Reply.....X**
- Deposition Transcript of W. Roche.....X**
- Deposition Transcript of T. Fusco.....X**
- Deposition Transcript of A. Fasulo.....X**

This matter is before the Court on 1) the motion filed by Defendants Medford Dialysis Access, P.C. ("Medford Dialysis") and Purshotam Lal Nagwani, M.D. ("Nagwani") on January 25, 2011, and 2) the motion filed by Plaintiffs Thomas G. Fusco ("Fusco") and Anthony Fasulo

("Fasulo") (collectively "Plaintiffs") on February 15, 2011, both of which were submitted on October 7, 2011 following oral argument before the Court. For the reasons set forth below, the Court 1) grants Plaintiffs' motion to amend (motion sequence # 2); and 1) denies, as moot, the motion by Medford Dialysis and Nagwani motion for summary judgment dismissing the complaint (motion sequence # 1). The Court directs counsel for the parties to appear before the Court for a Certification Conference on January 25, 2012 at 9:30 a.m. **Counsel for the parties shall not be required to appear before the Court on December 14, 2011 at 9:30 a.m. as previously scheduled.**

BACKGROUND

A. Relief Sought

Medford Dialysis and Nagwani move, pursuant to CPLR § 3212, for an Order granting summary judgment in favor of the moving Defendants, dismissing the Plaintiffs' claims in their entirety and awarding costs and sanctions in favor of the moving Defendants.

Plaintiffs move, pursuant to CPLR §§ 3025(b) and 1003, for an Order granting Plaintiff leave to 1) amend its complaint to add causes of action, in the form of the proposed Amended Verified Complaint ("Proposed Amended Complaint") (Ex. B to Meth Aff. in Supp.); and 2) add John DeNoble, Keith Greenberg and Darrell Sharpelletti, Esq. as party-defendants. Defendants oppose Plaintiffs' motion.

B. The Parties' History

The Verified Complaint ("Complaint") (Ex. A to Sledjeski Aff. in Supp.) alleges as follows:

Fusco and Fasulo were members of Defendant Direct Access Management LLC ("Direct Access") before it was sold.

The first cause of action, asserted against Medford Dialysis Access, P.C. ("Medford") and Nagwani, alleges breach of contract. Plaintiffs allege that on or about July 31, 2006, Plaintiffs and Defendants entered into a contract regarding the management of Medford. Pursuant to that contract, Plaintiffs provided the labor, services and material required for the construction and operation of Medford, and Plaintiffs were to be compensated \$31,250 per month for expenses and operating costs, and \$13,000 per month as salary. Defendants allegedly breached the contract by failing to pay the monies due for which Plaintiffs seek monetary damages.

The second cause of action, asserted against Medford and Nagwani, alleges tortious interference with business relations. Plaintiffs allege that, pursuant to the parties' agreement, Defendants were to refer their patients to Plaintiffs. Defendants referred patients to other facilities, in violation of the parties' agreement. These referrals deprived Plaintiffs of patients and income and necessitated Plaintiffs selling Direct Access, resulting in lost profits. Plaintiffs seek monetary damages.

The third cause of action is asserted against Axxess, Inc. ("Axxess") for breach of contract. On April 13, 2008, Direct Access was sold to Axxess. Plaintiffs allege that they were to receive \$155,000.00 as proceeds of that sale, but have received only \$20,700.00. Plaintiffs seek damages of at least \$134,300.00.

In support of the motion to amend, counsel for Plaintiffs affirms that Plaintiffs learned, during discovery, that Defendants were negotiating the sale of Direct Access and Medford, without notice to Plaintiffs. Counsel avers, further, that Plaintiffs have a basis to allege that Defendants committed fraudulent acts in connection with that sale and the negotiation of the sale documents. The proposed amendments, *inter alia*, 1) plead with greater specificity the allegations in the original first and second causes of action against Nagwani and Medford; 2) include allegations against Nagwani and proposed party Darrell Sharpelletti, Esq. ("Sharpelletti") for fraud in the inducement and fraud in the execution regarding dealings addressed in the original Complaint; 3) allege unjust enrichment by Nagwani based on information learned during discovery; and 4) request rescission and reformation of the contribution agreement based on information learned during the deposition of a representative of Axxess.

Plaintiffs' counsel notes that Plaintiffs have complied with the discovery schedule set by the Court, and have filed this motion prior to the expiration of that discovery schedule and prior to the filing of a note of issue. Depositions of the four original parties were completed on February 3, 2011 and Plaintiffs filed the instant motion on February 9, 2011. Thus, Plaintiffs submit, they have filed this motion promptly upon learning the information on which the motion is based.

C. The Parties' Positions

Plaintiffs seek leave to file the Proposed Amended Complaint to add new causes of action against the original parties based on the same "underlying fact pattern" in the initial

Complaint (Meth Aff. in Supp. at ¶ 9), and to add new parties, two of which are the individual actors on behalf of a corporation that was a Defendant in the initial action. Plaintiffs affirm that, as a result of discovery that was conducted, they learned information supporting the proposed amendments. Plaintiffs submit that the Proposed Amended Complaint will not prejudice Defendants, as it relates to the agreements referred to in the original Complaint.

Defendants oppose Plaintiffs' motion to amend, submitting, *inter alia*, that 1) with respect to the proposed amendments involving Sharpelletti, Plaintiffs are precluded from pursuing those causes of action because they never retained Sharpelletti, he is not a party to any of the relevant agreements and the parties to the subject transaction were at all times represented by independent counsel; 2) with respect to the proposed amendments involving Axxess, the proposed amendment would be "futile" (Berman Aff. in Opp. at ¶ 3) because the proposed fraud causes of action are duplicative of the existing causes of action for breaches of contract, the new causes of action are asserted in bad faith and after undue delay, and the proposed causes of action for reformation of a contract and breach of an alleged oral agreement are barred by the merger clause and parol evidence rule; and 3) with respect to the proposed amendments involving Nagwani and Medford, Plaintiffs were aware of the proposed claims at the time they filed the initial Complaint, the proposed fraud claims are duplicative of the breach of contract claims, and the proposed claims for fraud in the execution lack merit in light of the fact that Plaintiffs were represented by independent counsel at the closing and were aware of all relevant documentation.

RULING OF THE COURT

A. Leave to Amend

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CLR § 3025(b) and *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

B. Application of these Principles to the Instant Action

In light of the liberal amendment policy and the Court's conclusion that the proposed amendment is not palpably insufficient or patently devoid of merit, the Court grants Plaintiffs' motion. The Proposed Amended Verified Complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry

thereof. Defendants shall serve an answer to the Amended Verified Complaint or otherwise respond thereto within 20 days from the date of said service.

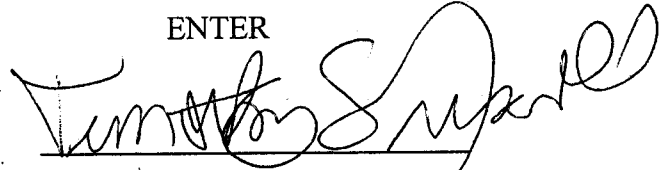
In view of the fact that the Court has granted Plaintiffs' motion to amend the complaint, the original complaint is rendered a nullity and the motion for summary judgment is denied as moot.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Certification Conference on January 25, 2012 at 9:30 a.m. **Counsel for the parties shall not be required to appear before the Court on December 14, 2011 at 9:30 a.m. as previously scheduled.**

DATED: Mineola, NY
December 7, 2011

ENTER

HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED
DEC 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE