| **corrente v Pollack** |
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| 2013 NY Slip Op 32216(U) |
| September 13, 2013 |
| Supreme Court, New York County |
| Docket Number: 653833/2012 |
| Judge: Carol R. Edmead |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. CAROL EDMEAD
*Justice*

**PART** 35

CORRENTE, MICHAEL
-v-
POLLACK, DARREN

**INDEX NO.** 653833/2012
**MOTION DATE** ____
**MOTION SEQ. NO.** 001

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____
Answering Affidavits — Exhibits ____ | No(s). ____
Replying Affidavits ____ | No(s). ____

**Upon the foregoing papers, it is ordered that this motion is**

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that plaintiffs' application for a preliminary injunction, a constructive trust, and an accounting, against defendants is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 9.13.2013

____, J.S.C.
HON. CAROL EDMEAD

1. CHECK ONE: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHAEL CORRENTE and DASHA WELLNESS MEDICAL, P.C.,

Plaintiff,

-against-

DARREN KEITH POLLACK, DASHA WELLNESS CORP., DASHA WELLNESS CHIROPRACTIC, P.C., LEXINGTON CHIROPRACTIC ASSOCIATES, P.C., and SHANNON RUSSON POLLACK,

Defendants.

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Index No.: 653833/2012

Motion Seq. #001

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover damages for monies owed based on an oral agreement, plaintiffs Michael Corrente ("plaintiff") and his medical corporation, Dasha Wellness Medical, P.C. ("Dasha Medical") (collectively, "plaintiffs") move for a preliminary injunction against Darren Keith Pollack ("defendant"), Dasha Wellness Corp. ("Dasha Wellness"), Dasha Wellness Chiropractic, P.C. ("Dasha Chiropractic"), Lexington Chiropractic Associates, P.C. ("Lexington"), and defendant's wife, Shannon Russon Pollack ("Pollack").[1]

*Factual Background*

In support of preliminary injunctive relief, the imposition of a constructive trust, and an

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[1] Plaintiff moved by order to show cause for a temporary and preliminary injunction, which was resolved by stipulation, dated November 8, 2012, to the extent that pending the hearing on the preliminary injunction, defendants shall not hold themselves out as plaintiffs' agents, use or spend any monies collected due to plaintiffs' provision of medical services, or destroy any of plaintiffs' medical records. Defendants then filed a pre-answer cross-motion to dismiss the complaint. After oral argument, by order dated January 18, 2013, the Court granted defendants' cross-motion to the extent of dismissing the eighth cause of action for misappropriation of trade secrets and scheduled a discovery conference. Discovery was conducted, and the parties agreed to submit further briefs and joint exhibits *in lieu* of a hearing on the preliminary injunction. Thus, this decision addresses plaintiffs' request for a preliminary injunction on the remaining bases asserted in the complaint.

accounting, plaintiffs argue that they are likely to succeed on the merits of their claims for conversion, breach of fiduciary duty, money had and received, an accounting, and a constructive trust.[2]

According to plaintiff, he was a licensed physician who established Dasha Medical as its sole shareholder, officer and director in 2009. In 2009, plaintiff entered into an oral agreement with defendant, a chiropractor, to rent an exam room in defendant's office and receive back-office support (*i.e.*, receptionist, bookkeeping, advertising, marketing, and billing services) for plaintiff's medical practice, and to pay defendant the reasonable value of those services plus rent.

In December 2009, defendants and their bookkeeper Rebecca Harvey misrepresented themselves as officers of Dasha Medical and executed false and fraudulent documents in order to open a corporate bank account with JP Morgan Chase Bank ("Chase") in the name of Dasha Medical. Documentation from Chase listed defendant as President, Pollack as Vice President, and Harvey as Business Member. Harvey also signed, as "Secretary" of Dasha Medical, a corporate resolution granting these three individuals alone signatory power over the bank account, notwithstanding that they could not be officers as a matter of law as it is uncontested that they are not licensed physicians. Defendants also used their own accountant, Michael Ferbin, to discuss the proper accounting for the arrangement between defendants and plaintiff and to prepare Dasha Medical's 2010 tax return. Defendants had sole control over the bank

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[2] Plaintiffs also alleged that defendants refused to return the medical records of plaintiffs' patients, which prevented them from obtaining payment of more than $200,000 in uncollected bills. By so-ordered stipulation dated June 6, 2013, defendants agreed to provide "complete copies of Plaintiffs' medical records of patients." Plaintiffs acknowledge that defendants provided the medical records, and points out that the medical records contain "face" sheets depicting the address, insurance, and billing information that plaintiffs' files lack, and associates the patients with "Dasha Wellness Chiropractic, P.C." and "Darren Pollack" without any mention plaintiff. Therefore, the cause of action for replevin based on defendants' alleged retention of such records is moot.

account and all disbursements.

Defendants also put themselves on plaintiffs' payroll as sham "employees." There is no evidence that defendant actually performed any services as an employee of Dasha Medical or was subject to plaintiffs' direction and control in any way.

Plaintiff alleges that from 2009-2011, he billed at least $3.4 million in medical fees. His practice generated revenues of more than $1.2 million in 2010 (of which plaintiff received approximately $500,000 as a "salary") and almost $550,000 in 2011 (of which plaintiff received approximately $220,000 as a "salary"), totaling more than 1.7 million in revenues while at defendant's offices. In contrast, defendant and Pollack (collectively "defendants") took from plaintiffs more than the reasonable value of the services provided, in the form of "wages" amounting to $722,000 in "wages," and received additional tax payments of almost $29,000 made on their behalf, while providing no medical services and not working as employees of Dasha Medical. Defendants also transferred more than $155,000 from Dasha Medical's bank account to an unknown checking account ($108,500 before plaintiff's departure and approximately $46,000 thereafter). Defendants continue to control $20,000 that remains in Dasha Medical's bank account as of June 2012, which defendants refuse to return to plaintiffs. Defendant and his wife, who are not medically licensed or authorized trainees in medicine, admitted, during oral argument, that the parties agreed "to just split it and you take your half, pay all of your expenses, and I will take my half and then take is as my money. . . ." (Transcript, pp. 28-29). The admission of taking "half" constitutes an illegal fee-splitting arrangement, violative of New York Education Law §6509-a. Thus, plaintiffs contend that defendants unjustly enriched themselves by at least $925,000 of plaintiffs' earnings, and that caselaw requires defendants to

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return any such split fees in excess of the reasonable value of defendants' services. Such caselaw also precludes defendants from arguing unclean hands and estoppel (by reliance on the tax returns plaintiffs filed), which are inapplicable in any event under the circumstances.

Plaintiffs also argue that defendants committed a conversion of plaintiffs' earnings. All of plaintiff's fees belonged to plaintiff, the sole physician of Dasha Medical, and defendants, acting as agents and fiduciaries, had a duty to hold such funds in trust for the plaintiffs. Instead, defendants seized control over the funds through the bank account they created. The amount of medical fees converted can be identified from defendants' own records.

Also, defendants breached their fiduciary duty to plaintiffs. Plaintiffs trusted defendants to bill and collect all medical fees he generated and relied upon defendants' representations as to the amounts collected and amounts due plaintiffs. Thus, the parties had a fiduciary relationship, and defendants breached their duties by failing to remit the monies they collected.

A claim for money had and received is also demonstrated. Defendants received all of plaintiffs' medical fees, benefitted from them by retaining a majority of the funds, and there is no principled basis for defendants to keep such funds.

And, as defendants managed and controlled all financial aspects of plaintiffs' medical practice, and failed to turn over ledger entries for dates after June 3, 2011, and accounting is warranted.

Thus, plaintiffs contend that since there was a fiduciary relationship between the parties, and defendants were entrusted to remit the correct amounts of all billings and collections, plaintiffs are entitled to a constructive trust of at least $925,081.92, representing the amount of

medical fees wrongfully diverted by defendants,[3] pending a trial in this matter.

Plaintiffs maintain that absent an injunction, plaintiffs will suffer irreparable harm resulting from the dissipation of property that would render any judgment ineffectual. And, the balance of equities weigh in plaintiffs' favor. Plaintiffs have been deprived of their right to use their patients' records and manage their own finances and bank account, while defendants have no property right in such records or bank account, and have no right to retain the monies they took from plaintiffs under the guise of "wages." An immediate accounting for all monies plaintiffs earned that defendants failed to turn over should be ordered and placed in a constructive trust. And, any claim by defendants to entitlement to some portion of the medical fees on the theory of *quantum meruit* merely raises an issue of fact for trial.

In response, defendants argue plaintiffs' knowledge of, voluntary participation in, and consent to the transaction between the parties preclude any claim for recovery against defendants, and plaintiffs misconstrue caselaw.

Defendants argue that all financial documents, profit and loss statements, and all aspects of the business operation were provided generally on a weekly basis to plaintiffs during the relevant time period (and as of March 2010) and the financial transactions were known to plaintiffs contemporaneously with the operation of the business. Harvey (as bookkeeper) wrote plaintiff in June 2010 that it was "best to give you and Darren a salary each month out of Dasha Medical" and that she was setting up payroll with ADP to pay plaintiff as well as the

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[3] In plaintiffs' original moving papers, plaintiffs argued that NY Bus. Corp. Law §§ 1507(a) and 1508 prohibit defendants from partnering with plaintiff in his professional corporation, and thus, only permit them to be plaintiffs' employees. Plaintiffs point out that the Court held at an in-court conference that due the documentary evidence concerning the undisputed amounts taken by defendants, no evidentiary hearing was required to establish the amount to be held in constructive trust pending trial.

acupuncturist. She also stated, "Darren will speak with you for the two of you to decide what you should receive twice a month in salary." (Exh. 47). Plaintiff responded that he did not "want to take a salary" but wanted to "take money out as a subcontractor . . . ." (Exh. 48). Harvey replied that "the acupuncturist is paid out of Darren's portion of the revenues and does not affect your salary and draw. You split the revenues after office and supply expenses and diagnostic testing and THEN Darren pays the acupuncturist." (Exh. 48). Plaintiff then responded "this is more complicated that my other offices,, let me speak to darren and see what to do . . . ." (Exh. 48). Thereafter plaintiff received financial information for July 2010 and 2010 year to date, and Pollack's August 2010 email to plaintiff, defendant, and Harvey requesting to "send [plaintiff] the distribution for Dasha Medical (July 18) and moving forward the 18th of each month. Also . . . his salary was doubled . . . ." (Exh. 50). Subsequently, plaintiff agreed with a recommendation on September 28, 2010 that he "be paid $150k for you now . . .and $140K for Darren. . . ." (Exh. 51). Subsequent emails indicate that distributions to plaintiff and defendant were classified as payroll for tax purposes. Thus, plaintiff was aware that defendant was receiving the same draw as he did from Dasha Medical.

Also, plaintiff was provided access to all books and records for review and analysis, including all W-2 information and payroll reports for Dasha Medical for 2010, which were forwarded to his accountant. Plaintiff was also provided with online access to the bank account, as requested.

Therefore, plaintiff cannot demonstrate a likelihood of success on the merits, as the payments complained of were authorized, justified, supported by documentation, and not taken in an effort to exclude plaintiffs from these funds, and the illegal fee splitting agreement of which

plaintiff was fully aware precludes all of their claims against defendants.

And, although unwarranted, in the event the Court grants a preliminary injunction, it should fix an undertaking by plaintiffs in an equal amount pursuant to CPLR 6312(b).

*Discussion*

Preliminary injunctive relief is a drastic remedy, which will only be granted if it is established that there is a clear right to the relief under the law and the facts *(Koultukis v Phillips*, 285 AD2d 433, 728 NYS2d 440 [1st Dept 2001]). The decision whether to grant a motion for preliminary relief is committed to the sound discretion of the trial court *(see, Doe v Axelrod*, 73 NY2d 748, 750, 532 NE2d 1272, 1273, 536 NYS2d 44, 45 (1988); *Jiggetts v Perales*, 202 AD2d 341, 342, 609 NYS2d 222, 223 [1st Dept 1994]). The test is whether a movant has shown: "(1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe v Axelrod, supra*, 73 NY2d at 750, 532 NE2d at 1272, 536 NYS2d at 45; *Housing Works, Inc. v City of New York*, 255 AD2d 209, 213, 680 NYS2d 487, 491 [1st Dept 1998]). Proof establishing these elements must be by affidavit and other competent proof, with evidentiary detail (*Scotto v Mei*, 219 AD2d 181, 182, 642 NYS2d 863, 864 [1st Dept 1996]; *Faberge International Inc. v DiPino*, 109 AD2d 235, 240, 491 NYS2d 345, 349 [1st Dept 1985]).

It is uncontested that that fee-splitting agreements between professionals violate public policy and are unenforceable (*Levy v Richstone*, 2008 WL 1923520 [Trial Order] [Sup Ct New York County 20081). Educ. Law $6509-a provides for de-licensure or other penalty where it appears "[t]hat any [doctor] has directly or indirectly requested, received or participated in the

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division, transference, assignment, rebate, splitting or refunding of a fee for . . . the furnishing of professional care, or service."[4] "New York courts uniformly hold fee-splitting arrangements to be illegal, even when the division is between medical providers'" (*Odrich v Trustees of Columbia Univ in City of New York*, 193 Misc 2d 120,126,747 NYS2d 342,347 [Sup Ct New York County 2002], *citing Huuptman v Grand Manor Health Related Facility*, 121 AD2d 151 [1st Dept 19861; *see also United Calendar Mfg. Corp. v Huung*, 94 AD2d 176 [2d Dept 1983] [agreement to provide space, staff, equipment and supplies to doctors in exchange for 30% of doctors' collections held illegal and unenforceable]; *Cook v Hochberg*, NYLJ, September 2, 1999 at 26, col5 [Sup Ct New York County 1999] [holding that a sublease agreement between dentists requiring the subtenant to pay 50% of patient collections as fee for use of facilities was illegal and unenforceable]).

Here, plaintiffs' complaint and submissions do *not* seek to recover the monies allegedly owed by defendants under a breach of contract theory. Instead, plaintiffs seek to recover from defendant on *quasi* contract and equitable principals of law, *i.e.*, conversion, unjust enrichment, constructive trust, breach of fiduciary duty, money had and received, and an accounting. However, it is clear from the Complaint and the submissions, that the parties' professional

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[4] Further, 8 NYCRR 529.1 (b)(4), the regulation promulgated pursuant to Education Law §6509-a, expressly prohibits fee-sharing:

> Unprofessional conduct in the practice of any profession licensed, certified or registered pursuant to title VI11 of the Education Law . . . shall include . . . permitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice the same profession, or a legally authorized trainee practicing under the supervision of a licensed practitioner. This prohibition shall include any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a professional licensee constitutes a percentage OJ or is otherwise dependent upon, the income or receipts of the licensee from such practice.
> (Emphasis added)

relationship and oral agreement giving rise to plaintiffs' claims constitute an illegal fee-splitting arrangement. The record demonstrates that defendants, none of whom were licensed physicians, provided collection and administrative services, in exchange for the receipt of a percentage or portion of the net profits of plaintiffs' medical services. There is no indication that the parties agreed for defendants to receive any set salary or fixed compensation. As such, the financial arrangement violated the public policy of this State for a licensed professional to "split fees" with an unlicensed person.

Therefore, plaintiffs failed to establish a likelihood of success on the merits of their claims (*E. Sachs et al. v Saloshin*, 138 AD2d 586, 526 NYS2d 168 [2d Dept 1988] (rejecting defendant doctor's claim for unjust enrichment; defendant was a "licensed professional and voluntary participant in the unethical arrangement for the prospective splitting of fees . . . ."); *Hartman v Bell*, 137 AD2d 585, 524 NYS2d 477 [2d Dept 1988] ("Where the parties' arrangement is illegal 'the law will not extend its aid to either of the parties . . . or listen to their complaints against each other, but will leave them where their own acts have placed them'" )).

Plaintiffs acknowledge that defendants are entitled to retain a portion of the monies disbursed to them during the parties' relationship. And, plaintiffs do not dispute that plaintiff received compensation for the medical services he performed on his patients. Plaintiffs essentially argues that he did not receive *enough* of the monies collected by defendants for his services.

However, that defendants allegedly received a financial benefit to which they are not *fully* entitled is "irrelevant," if enforcement of the parties' arrangement to pay defendants only the "reasonable value" of their services, would further a purpose in violation of public policy

*(Gorman v Grodensky*, 130 Misc 2d 837, 498 NYS2d 249 [Sup Ct New York County 1985]; *citing United Calendar Mfg. v Huang*, 94 AD2d 176, 463 NYS2d 497 [2d Dept 1983]).

This Court acknowledges that an illegal contract may not necessarily preclude relief under *quasi*-contract theories, and in fact, has suggested that New York Courts have held that where an express contract is unenforceable, an aggrieved party may be able to recover the benefits it conferred on the other party by suing on a *quasi*-contract theory for unjust enrichment or *quantum meruit* (28 NY Prac, Contract Law §7: 12, *citing American Buying Ins. Services, Inc. v S. Kornreich & Sons, Inc.*, 944 F Supp 240, 245 [1996] ["[W]hile courts generally do not grant restitution under agreements that are unenforceable due to illegality, courts will award damages in quantum meruit if it is found that the two parties are not in pari delicto, as when the plaintiff is the victim of misrepresentation by the defendant"); *Katz v Zuckermann*, 119 AD2d 732, 501 NYS2d 144 [2d Dept 1986] [holding that the Supreme Court "properly found that the plaintiffs, as nonprofessionals, were less culpable than the defendant, at whom the prohibitions of Education Law § 6509-a are directed, and accordingly they should not be precluded from recovering under a theory of unjust enrichment"]).

However, caselaw supporting such recovery involved circumstances not shown by plaintiffs to exist herein. Here, the record indicates that plaintiff, was a licensed physician during the relevant time periods, at whom the prohibitions of Education Law § 6509-a are directed. During the relevant time period, plaintiff was plainly aware of the fee arrangement between himself and defendants, was not less culpable in creating the financial arrangement, received financial statements on a periodic basis from defendants, received and accepted his compensation with knowledge as to how much defendants were paid, and had full knowledge of

the disbursements made to the parties in the agreed form of "wages." Plaintiff has not sufficiently established that he was the victim of any misrepresentation as to the amounts defendants paid themselves, in light of his receipt of financial documents and e-mail correspondence he received during the parties' relationship. While plaintiff may not now agree that the amounts defendants paid themselves were reasonable, he failed to show that they made any false representations as the amounts disbursed or the amounts his medical practice generated (from which the amounts were disbursed).

This Court's ruling in *Rosenberg v Chen* (2010 WL 3384637) does not warrant a different result. In *Rosenberg,* the Court declined to dismiss plaintiff's *quantum meruit* and unjust enrichment claims for failure to state a cause of action based on the allegations stated in the Complaint, and declined to dismiss defendant's counterclaim to recover alleged overpayments made to plaintiff, notwithstanding the Court's dismissal of the breach of contract claim premised on an illegal fee-splitting arrangement. Unlike a motion addressed to the sufficiency of the pleadings such as in *Rosenberg*, the Court is not limited to the four corners of the pleadings in addressing the merits of plaintiffs' motion for preliminary injunctive relief herein.[5]

Further, plaintiffs failed to sufficiently establish irreparable injury in the event relief is not granted. The claim that funds to satisfy any judgment in plaintiffs' favor might be dissipated is unsubstantiated. And, in light of the above, it cannot be said that the balance of the equities favor plaintiffs over defendants.

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[5] Based on this conclusion, the Court does not reach the arguments concerning the merits of plaintiffs' causes of action.

*Conclusion*

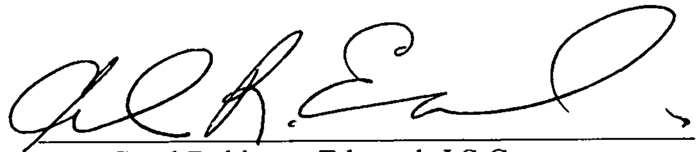
Based on the foregoing, it is hereby

ORDERED that plaintiffs' application for a preliminary injunction, a constructive trust, and an accounting, against defendants is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 13, 2013



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**