

**Marcus v Antell**

2018 NY Slip Op 32527(U)

October 5, 2018

Supreme Court, New York County

Docket Number: 650942/2013

Judge: Barry Ostrager

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION

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ANDREW MARCUS,	INDEX NO. <u>650942/2013</u> <u>652561/2012</u>
Plaintiff,	
- v -	MOTION DATE <u>Oct. 3, 2018</u>
CRAIG ANTELL, CRAIG ANTELL, D.O., P.C., STEVEN MASLOW, CAAM, LLC, MAAC PAYROLL PROCESSING INC.,	MOTION SEQ. NO. <u>007 008</u> <u>012 013</u>
Defendants.	

**DECISION AND ORDER**

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HON. BARRY R. OSTRAGER:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 259, 260, 268, 269

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 008) 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 261, 262, 263, 264, 265, 266, 267

were read on this motion to/for SUMMARY JUDGMENT

HON. BARRY R. OSTRAGER:

Plaintiff Andrew Marcus (“Marcus”) commenced two related actions against his former business partner, Craig Antell (“Antell”), alleging direct and derivative claims for, *inter alia*, breach of fiduciary duties and breach of contract. Marcus also asserts various claims, both derivative and direct in nature, against the three intimately related companies that operate the parties’ medical practice: Craig Antell, D.O., P.C. (the “PC”); CAAM, LLC (“CAAM”); and MAAC Payroll Processing Inc. (“MAAC”). Finally, Marcus asserts claims against the PC’s chief financial officer, Steven Maslow (“Maslow”).

Presently before the Court are Antell's motions for summary judgment dismissing the claims asserted against him in both actions, as well as Maslow's motions for summary judgment dismissing the claims asserted against him in both actions. For the reasons stated herein, the motions are granted in part.

### **Background**

In 2001, Antell, a doctor specializing in physiatry, and Marcus, a licensed chiropractor, began a business relationship (the PC) that is the subject of this litigation. In the PC, Antell continued his physiatry practice and Marcus continued to provide chiropractic services. Marcus also managed both his and Antell's practice through CAAM—in which each was a 50% owner—which provided non-medical administrative services, including facilities, equipment, and supplies to the PC. In 2005, MAAC was formed by Antell and Marcus—each as a 50% owner—to provide CAAM and the PC with payroll processing services.

CAAM leased two offices spaces: one on Madison Avenue and the other at Columbus Circle (collectively, the "Premises"). Although CAAM was the named tenant on both leases for the Premises, the spaces were primarily used for the PC's practice. Accordingly, the PC and CAAM entered into two written License Agreements, pursuant to which CAAM provided the PC with administrative services and facilities in exchange for a monthly fee.

In January 2012, the parties' relationship deteriorated and Antell began negotiating to buy-out Marcus' interests in the venture. In May 2012, the PC hired Maslow as CFO to provide a smooth transition once the buy-out was consummated. Around such time, Marcus alleges that Antell and Malsow conspired to oust Marcus from the venture instead of buying him out for fair consideration. For example, Marcus alleges that Antell and Maslow froze Marcus out of certain bank accounts and credit lines, barred Marcus from accessing CAAM's computer systems,

intimidated CAAM and MAAC employees into resigning and joining the PC, and transferred certain funds from MAAC and CAAM to accounts controlled by Antell or the PC.

### Claims Against Antell

Of the remaining claims in the two actions, four are directed at Antell in his individual capacity: (1) breach of the License Agreements; (2) breach of fiduciary duties to CAAM and MAAC; (3) breach of fiduciary duty to Marcus; and (4) trespass. During oral argument on October 3, 2018, Plaintiff consented to dismissal of the claims for breach of the License Agreements and trespass.<sup>1</sup> In all other respects, the Court denies Antell's motions for summary judgment dismissing the breach of fiduciary duty claims for the reasons stated *infra*.

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” *O'Brien v. Port Auth., of NY & New Jersey*, 29 N.Y.3d 27, 36-7 (2017). “Summary judgment is a drastic remedy for those cases where there is no doubt as to the existence of material and triable issues of fact.” *Id.* at 37. In determining a motion for summary judgment, “evidence should be analyzed in the light most favorable to the party opposing the motion.” *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dep't 1997).

To establish a claim for breach of fiduciary duty, Plaintiff must show “(1) the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty; and (3) resulting damages.” *Jones v. Voskresenskaya*, 125 A.D.3d 532, 533 (1st Dep't 2015).

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<sup>1</sup> In any event, dismissal of these claims is proper. The only two parties to the License Agreements are CAAM and the PC. Antell is not a party to the License Agreements and therefore cannot be held liable for a breach thereunder. See *Leonard v. Gateway II, LLC*, 68 A.D.3d 408, 408 (1st Dep't 2009).

The trespass claim must also be dismissed because Antell's purported trespass on the Premises was admittedly well within the scope of his employment as a member of the PC. See *Young Bai Choic v. D&D Novelties, Inc.*, 157 A.D.2d 777, 778 (2d Dep't 1990).

Antell argues that he did not owe a fiduciary duty to CAAM or Marcus because New York law only imposes a fiduciary duty on a *managing member* of an LLC which, Antell asserts, he was not. In opposition, Marcus contends that CAAM's Operating Agreement clearly provides that the LLC will be managed by its members, including Antell, who necessarily has fiduciary obligations.

New York's Limited Liability Company Law, § 401(b) states: "If management of a limited liability company is vested in its members, then ... any such member shall have and be subject to all of the duties and liabilities of a manager provided in this chapter." The chapter provides: "A manager shall perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances." § 409(a). Further, "New York case law is replete with cases demonstrating that a managing member of an LLC has a fiduciary duty to other members of the LLC." *Kalikow v. Shalik*, 986 N.Y.S.2d 762, 767 (Sup. Ct., Nassau Cty. 2014).

Here, Article Five of CAAM's Operating Agreement clearly states: "The authority to establish the overall business policy and direction of the LLC shall be vested in the Members, with all actions requiring the unanimous consent of the Members." (Sullivan Aff. Ex. P [NYSCEF Doc. 199]). Thus, all members of CAAM are considered managing members pursuant to the terms of the Operating Agreement. Antell and Marcus are both defined as members under the Operating Agreement. *Id.* Therefore, "[a]s a managing member of the company and as a comember with the plaintiff, the defendant owed the plaintiff a fiduciary duty to make full disclosure of all material facts." *Salm v. Feldstein*, 20 A.D.3d 469, 470 (2d Dep't 2005). Regardless of how active Antell was or was not in managing the affairs of CAAM, the explicit

terms of the Operating Agreement make clear that any member of CAAM, including Antell, is a managing member and has fiduciary obligations to CAAM and Marcus as such.

In any event, there are abundant triable issues of fact as to whether Antell breached his various fiduciary duties. The record contains at least circumstantial evidence that Antell transferred money from CAAM bank accounts, lured CAAM employees to work for the PC, failed to collect some \$2.5 million in arrears the PC owed CAAM, and caused CAAM to breach its leases on the Premises. To be clear, all these allegations are vigorously disputed based on documentary and testimonial evidence in the record.

Further, while much of the damage alleged by Marcus may be derivative in nature, Marcus arguably has some individual damages that are separate and apart from those of the companies. For example, Marcus alleges that he has incurred significant legal expenses after the Premises' landlord named Marcus as a defendant in an action for breach of CAAM's lease agreement. If proven, these damages would necessarily be separate and apart from damages CAAM sustained as a result of Antell's purported breach of fiduciary duty. Therefore, Marcus' injuries may not be wholly duplicative of injuries the companies incurred by Antell's purported breaches.

Thus, whether Antell breached his fiduciary obligations to CAAM, MAAC, and/or Marcus must be determined by the finder of fact after trial, thereby precluding dismissal of such claims on summary judgment. Antell's motion for summary judgment is denied except as to those claims Plaintiff has consented to dismissal of.

### Claims Against Maslow

Marcus asserts claims against Maslow for aiding and abetting Antell's breach of fiduciary duty owed to CAAM, MAAC, and Marcus, as well as a claim for trespass.<sup>2</sup> Maslow moves for summary judgment dismissing those claims. Maslow's motions for summary judgment are denied.

"A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." *Id.* at 126. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Id.*

Plaintiff contends Maslow, an employee with significant business experience, was well aware that the PC, CAAM, and MAAC were inextricably woven together and that Antell and Marcus each owned a 50% interest in CAAM. Further, the record is replete with correspondence between Antell and Maslow in which Antell instructs Maslow to: solicit CAAM employees to join the PC; communicate with Premises landlords concerning the CAAM leases; and close the bank accounts of CAAM and MAAC.

Maslow contends that every action he took was at the behest of Antell or the PC's general counsel. Thus, Maslow asserts that his purportedly tortious conduct was well within the scope of his employment as CFO of the PC. And, even if Maslow's actions were not within the scope of

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<sup>2</sup> Plaintiff consented to dismissal of the trespass claim against Maslow as well. *See supra* note 1.

his employment, Maslow had no knowledge of Antell's fiduciary obligations to Marcus and the companies.

It is well settled that an employee may be held personally liable for aiding and abetting a breach of fiduciary duty if the employee's conduct was "in any capacity other than his capacity as a corporate officer." *AHA Sales, Inc. v. Creative Bath Prods., Inc.*, 58 A.D.3d 6, 10 (2d Dep't 2008). Here, the issues of whether Maslow ever exceeded the scope of his employment in purportedly aiding and abetting Antell's breach of fiduciary duty, and whether Maslow knew that Antell may have been breaching fiduciary duties to CAAM, MAAC, and/or Marcus, present material issues of fact that necessitate a trial.

Accordingly, it is hereby

ORDERED that Defendant Antell's motions for summary judgment is denied; it is further

ORDERED that Defendant Maslow's motions for summary judgment is denied; it is further

ORDERED that Plaintiff's trespass claims against Defendants Maslow and Antell are withdrawn on consent, as well as that Plaintiff's claim against Defendant Antell for breach of the License Agreements, as stated on the record of October 3, 2018; and it is further

ORDERED that the parties appear for a pre-trial conference on December 18, 2018 at 9:30 a.m.

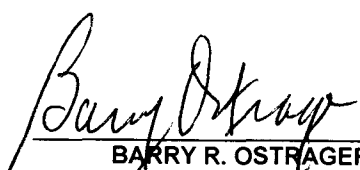
10/5/2018  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  SUBMIT ORDER  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  FIDUCIARY APPOINTMENT  REFERENCE

INCLUDES TRANSFER/REASSIGN

  
BARRY R. OSTRAGER, J.S.C.