Mostovoy v Billing & Collection Inc.
2021 NY Slip Op 32250(U)
November 9, 2021
Supreme Court, Kings County
Docket Number: Index No. 510597/21
Judge: Leon Ruchelsman
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INDEX NO. 510597/2021
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMM. PART 8
---x
DR. ALEKSANDR MOSTOVOY, APAK CHIROPRACTIC
P.C. and OCEANA CHIROPRACTIC P.C.,
Plaintiff,

Decision and order

- against -

Index No. 510597/21

BILLING AND COLLECTION INC., PRACTICE WIZ,
INC., EPIONE MEDICAL, P.C.,
INNOVATIVE BUSINESS STRATEGIES INC.,
MBCC SUPPORT LTD. D/B/A BILLING PROS,
MEDREX, INC., WEB PRO SERVICES, INC.,
NEW YORK CITY MEDICAL TREATMENTS P.C.
SIMON DAVYDOV, MICHAEL JACOBI,
ELENA MUMIN-AKHUNOV, STELLA RAYTSIN
And EMANUEL DAVID,
Defendants,

November 9, 2021
---x
PRESENT: HON. LEON RUCHELSMAN

The defendants Epione Medical P.C., MedRex, Inc., NYC Medical Treatments P.C., Michael Jacobi, and Stella Raytsin have moved seeking to dismiss the case on the grounds an arbitration clause in the contract requires the matter be resolved via arbitration. They further move to dismiss for the failure to state a cause of action. In addition the plaintiff has moved seeking contempt against Billing & Collection Inc. (hereinafter "Billing & Collection"), Practice Wiz Inc., MBCC Support Ltd, Simon Davydov, and Elena Mumin-Akhunov and those defendants have cross-moved seeking sanctions against the plaintiff. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

According to the complaint the plaintiff Dr. Mostovoy is the owner of two medical practices, APAK Chiropractic P.C., and Oceana Chiropractic, P.C. On January 1, 2021 the entity Oceana Chiropractic, P.C. entered into a Facilities Use License and Services Agreement with defendant NYC Medical Treatments P.C. whereby the plaintiff would lease certain space from within an existing medical office located in Queens. The agreement provided the plaintiff with exclusive use of one examination room and non-exclusive use of the waiting room and other common areas. Further, the plaintiff was entitled to the non-exclusive use of all telephone equipment, office equipment and all computers. Moreover, the agreement provided the plaintiff's entitlement to certain services including office and medical supplies, heat, water air-conditioning and the non-exclusive use of a receptionist and a secretary both with enumerated duties. The agreement contained an arbitration clause wherein all disputes must be handled by American Arbitration Association.

Essentially, the complaint alleges the defendants offered the same benefits to other doctors and in fact took care to meet the needs of the other doctors while ignoring plaintiff's needs. The Complaint even alleges that the "defendants were directing the *same patients* who were treated by Dr. Mostovoy to other doctors for treatment for the same conditions, and were submitting requests to same insurance carriers for reimbursements

for those services - while deliberately delaying submission of the requests for reimbursements on behalf of the Plaintiffs" (Complaint, ¶ 70). The Complaint asserts these practices financially harmed the plaintiffs. The complaint alleges causes of action for breach of fiduciary duty, breach of contract, conversion and illegal lockout although the conversion cause of action has since been withdrawn.

The moving defendants now argue that regardless of the merits of the claims an arbitration clause demands the case be heard at a arbitration panel and thus the court has no jurisdiction to hear the matter. In any event, the defendants also move seeking to dismiss on the grounds the complaint fails to allege any cause of action.

Conclusions of Law

"It is firmly established that the public policy of New York State favors and encourages arbitration and alternative dispute resolutions" (Westinghouse Electric Corporation v. New York City Transit Authority, 82 NY2d 47, 603 NYS2d 404 [1993], citing earlier authority). It is well settled that a party cannot be subject to arbitration absent a clear and unequivocal agreement to arbitrate (see, Waldron v. Goddess, 61 NY2d 181, 473 NYS2d 136 [1984]). Thus, where an arbitration clause encompasses all disputes between the parties and is unambiguous such arbitration

clause will be enforced (Stoll America Knitting Machinery Inc., v. Creative Knitwear Corp., 5 AD3d 586, 772 NYS2d 863 [2d Dept., 2004]). In contrast, a clause will be held ambiguous if key terms are not defined in the agreement (Spataro v. Hirschhorn, 40 AD3d 1070, 837 NYS2d 258 [2d Dept., 2007]).

The plaintiffs argue the court should deny the motion to compel arbitration because the plaintiff's breach of fiduciary duty cause of action "is based on allegations that Defendants offered their turnkey medical practice billing solution to other physicians, favored those other physicians over Plaintiffs, and submitted billing on behalf of Plaintiffs without their knowledge or consent. (*See* Compl. ¶¶ 69-80; Section I.A.1., above.) These allegations involve dozens of parties - a majority of whom are not signatories to the Practice Wiz Agreement - and involve conduct which does not arise from, or relate to, the Practice Wiz Agreement, because resolution of the allegations supporting this claim do not involve any interpretation of the terms of the Practice Wiz Agreement, and do not involve any issues relating to Practice Wiz or Plaintiffs' performance (or breach) of that agreement" (Memorandum in Opposition, page 15). However, at root the allegation is only directed against Practice Wiz for allegedly directing business away from the plaintiffs in violation of the agreement. There is no demonstration why those allegations do not fit squarely within the duties enumerated in

the agreement. The fact that arbitration does not necessarily permit discovery is a consequence of the freely made choice to agree to arbitration. That can hardly be a reason to avoid arbitration. Thus, the motion seeking to compel arbitration is granted as to defendants NYC Medical Treatments P.C., Epione Medical P.C. and Michael Jacobi, the parties to that agreement.

The court will now address the specific claims concerning the remaining defendants.

To succeed on a claim for breach of a fiduciary duty, a plaintiff must establish the existence of the following three elements: (1) a fiduciary relationship existed between plaintiff and defendant, (2) misconduct by the defendant, and (3) damages that were directly caused by the defendant's misconduct (Kurtzman v Bergstol, 40 AD3d 588, 835 NYS2d 644, 646 [2d Dept., 2007], see, Birnbaum v. Birnbaum, 73 NY2d 461, 541 NYS2d 746 [1989]).

A fiduciary relationship is not created where the parties have merely entered into an arm's length business relationship (Gall v. Colon-Sylvain, 151 AD3d 698, 55 NYS3d 424 [2d Dept., 2017]). As the court in Faith Assembly v. Titledge of New York Abstract LLC, 106 AD3d 47, 961 NYS2d 542 [2d Dept., 2013] stating quoting the Court of Appeals in EBC I Inc., v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005], "the core of a fiduciary relationship is 'a higher level of trust than normally present in

the marketplace between those involved in arm's length business transactions'" (id).

In this case, the only parties that could possibly have breached any fiduciary duty to the plaintiffs will proceed in arbitration. The remaining defendants cannot possibly have breached any duty. The crux of the allegations contained in the complaint assert that the "defendants" essentially harmed the plaintiff's business by offering the same services to other defendants, undercutting the plaintiff's profits. However, defendants IBS and Web Pro-Services were hired to conduct marketing and maintain a web-site respectively. Whether or not they fulfilled those duties does not comprise any claim for the breach of a fiduciary duty. Likewise, MBCC Support Ltd., merely conducted billing services. The allegations of the complaint do not implicate this entity at all. Moreover, Billing and Collection Inc., and Med Rex were hired to manage and maintain medical records. Again, according to the complaint the plaintiff entered into a contract with Practice Wiz "to provide business coaching, monitor the business side of the practice, monitor day-to-day billing and collections, provide advice on compliance and ensure base quality improvement" (see, Complaint, ¶ 50). There are no allegations any of those entities were in any way involved with the core allegations of the lawsuit, namely that the defendants acted to harm his business by steering patients away

from him and by providing the same services to other doctors which necessarily created an unfair competitive environment.

Moreover, the complaint does not allege any basis for claims against any individuals. It is well settled that if a defendant so dominated the activities of the corporation then piercing of the corporate veil would be permitted and defendant could then be liable personally (see, Matter of Morris v. New York State, 82 NY2d 135, 603 NYS2d 807 [1993]). To succeed on a request to pierce the corporate veil the plaintiff must demonstrate that "(1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Conason v. Megan Holding LLC, 25 NY3d 1, 6 NYS3d 206 [2015]). As the Court of Appeals observed, at the pleading stage "a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in 'bad faith' while representing the corporation" (East Hampton Union Free School District v. Sandpebble Builders Inc., 16 NY3d 775, 919 NYS2d 496 [2011]). Rather, the plaintiff must allege facts demonstrating such dominion over the corporation and that "through such domination, abused the privilege of doing business in the corporate form to perpetuate a wrong or injustice against the plaintiff such that a court in equity will intervene" (Oliveri Construction Corp., v. WN weaver Street LLC, 144 AD3d

765, 41 NYS3d 59 [2d Dept., 2016]). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to [corporate or] LLC formalities, inadequate capitalization, commingling of assets, and the personal use of [corporate or] LLC funds" (see, Grammas v. Lockwood Associates LLC, 95 AD3d 1073, 944 NYS2d 623 [2d Dept., 2012]). Thus, mere conclusory statements that the individual dominated the corporation are insufficient to defeat a motion to dismiss (AHA Sales Inc., v. Creative Bath Products Inc., 58 AD3d 6, 867 NYS2d 169 [2d Dept., 2008]).

In this case the plaintiff does not describe any manner in which the individual defendants, namely, Emmanuel David, Simon Davydov, Elena Mumin-Akhunov or Stella Raytsin so dominated their respective corporations that they abused the privilege of doing business in the corporate form and that they may be sued individually. Therefore, the motion seeking to dismiss the breach of fiduciary claim as to all defendants is granted.

Turning to the breach of contract cause of action, it is well settled that to succeed upon a claim of breach of contract the plaintiff must establish the existence of a contract, the plaintiff's performance, the defendant's breach and resulting damages (Harris v. Seward Park Housing Corp., 79 AD3d 425, 913 NYS2d 161 [1st Dept., 2010]). Further, as explained in Gianelli

v. RE/MAX of New York, 144 AD3d 861, 41 NYS3d 273 [2d Dept., 2016], "a breach of contract cause of action fails as a matter of law in the absence of any showing that a specific provision of the contract was breached" (id). The complaint does not provide any provisions regarding any of the contracts allegedly breached. provides the actual provisions that were allegedly violated by the plaintiff. The complaint merely states in conclusory fashion that "defendants breached their agreements because they have not performed many of the services for which they charged, or performed far fewer services than what they charged for" (see, Complaint, ¶ 100). That is insufficient to establish a cause of action for breach of contract. Therefore, the motion seeking to dismiss this cause of action is granted.

Thus, the motion seeking to dismiss the entire complaint is granted without prejudice. All motions seeking contempt and sanctions are denied.

So ordered.

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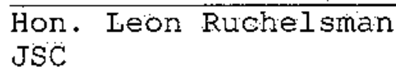

DATED: November 9, 2021
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC