SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

----------X

DR. KIRSTEN O. HEALY,

Plaintiff,

- v -

DR. BERNARD KRUGER,

Defendant.

----------X

INDEX NO. 656130/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for **SUMMARY JUDGMENT**.

Plaintiff commenced this action against defendant by summons and complaint, wherein she alleges breach of contract (first and second causes of action); account stated (third cause of action); and fraud (fourth cause of action), premised on claims that defendant has failed and refused to pay rent, commitment payments, and medical services performed by plaintiff to defendant's patients, services which plaintiff agreed to provide pursuant to the parties' written agreement. Plaintiff further claims that defendant committed fraud by telling her that, if she bought the condominium unit where they practiced medicine together, he would make commitment payments and ultimately sell his practice to her, and then, thereafter, refusing to transition his practice to her or make the promised payments (NYSCEF Doc. Nos. 1-2, *summons and complaint*).

Defendant now moves, pursuant to CPLR 3212, for partial summary judgment dismissing the first, second, and third causes of action, which arise out of the agreement entered between the parties on or about October 8, 2018, wherein defendant allegedly agreed to sell his medical practice to plaintiff in due time. The crux of defendant's motion is that dismissal of the breach of contract claims is warranted because the agreement is illegal and unenforceable insofar as plaintiff agreed to split her revenue with defendant as payment for the buy-out of defendant's practice (NYSCEF Doc. No. 42, *notice of motion*).

Plaintiff opposes the motion and cross-moves, pursuant to CPLR 3212, for an order granting her summary judgment on her claim against defendant for an account stated and directing that judgment be entered in her favor against defendant in the amount of $433,333.37 (NYSCEF Doc. No. 52, *notice of cross-motion*).

In support of his motion for summary judgment, defendant submits, *inter alia*, the subject agreement, which states, in relevant part:

> "3. The Tenant shall pay rent as follows: (i) for the first 12 months following the Healy Possession Date at a rate of $5,000 per month and (ii) for the second 12 months at the rate of $4,000 per month, and (iii) one-half (50%) of any assessments imposed upon the demised premises by the Condominium not to exceed $25,000 per year for the two year period,

prorated for the months Kruger actually utilizes the premises during the first two years, if he terminates the lease earlier as provided in paragraph 5 below. . .

4. During the Term, Owner and tenant shall share equally all office expenses including, without limitation, utilities, phone, cable and office cleaning. With reference to equipment rental, that expense shall be prorated based on actual usage. . .

7. Commencing on Healy Possession Date and for the following 12 months, Owner agrees to provide medical services to Tenant's patients for 20% of the Owner's time (34.67 hours per month) for which Tenant shall pay Owner $16,667 per month as a commitment payment. For the following 12 months Owner agrees to provide medical services to Tenant's patients for 40% of Owner's time (69.33 hours per month) for which Tenant shall pay Owner $33,333 per month as a commitment payment. For purposes of this paragraph, hospital and home visits after hours are not included and will be billed separately by Owner. . .

8. Tenant agrees to sell and transfer to Owner and Owner agrees to purchase and assume the practice presently conducted by Tenant in the demised premises. For the 12 months immediately following the Kruger Buy-out Date, Owner will remit to Tenant 45% of the gross revenues received by Owner on account of Tenant's patients, including hospital and home visits ("Tenant's Revenues"). For the 12 months thereafter, Owner will remit to Tenant 35% of such Tenant's Revenues. For each of the two (2), 12-month periods thereafter, the amount remitted will equal 10% of such Tenant's Revenues. This provision shall survive the end of the Lease, Tenant shall be entitled to retain all fees collected by his concierge patients until the Kruger Buy-out date; provided however all such fees related to the period of time in which Tenant is no longer at the premises will be credited against the 45% due Tenant from Owner. . .

9. Commencing on the Kruger Buy-out Date, the Tenant's concierge fees will be billed and collected by Owner and will be distributed as set forth herein. The distributions to Tenant are for the purchase of Tenant's medical practice and not as a consulting fee or income to the Tenant. Owner will provide Tenant with semi-annual accountancy each year of monies received by Owner and paid to Tenant . . ."

Defendant argues that the agreement contemplates an arrangement for the splitting of fees, which contravenes Education Law § 6509-a and state public policy. Defendant claims that the agreement in fact pertained to the acquisition of defendant's medical practice; thus, the entire agreement is unenforceable. Defendant further argues that dismissal of the claims is warranted because he terminated the lease pursuant to section 5 of the lease, which states: "[t]enant shall have the right to terminate this Lease upon 60 days advance written notice if [t]enant, for health reasons only, is unable to continue to practice medicine." According to defendant, during the COVID-19 shutdown in March 2020, and given his advanced age (79) and health concerns, he was forced to shut down his medical practice and not see any patients and informed plaintiff of same on April 1, 2020. (NYSCEF Doc. No. 49, *defendant's memo of law*).

In opposition to the motion and in support of the cross-motion, plaintiff argues that contrary to defendant's contention that the agreement is solely an agreement for the sale of his practice, it clearly is not. Plaintiff argues that the cause of action for account stated seeks only damages based on paragraphs 3, 4 and 7 of the agreement between the parties. She contends that these claims in no

way implicate or contravene Education Law § 6509-a. Plaintiff further maintains that, to the extent section 8 of the agreement could be construed as being an improper future pay-out of the sale of a professional medical practice, the provision should be severed, and defendant should be held accountable for the remaining terms of the agreement.

Plaintiff submits, *inter alia*, an affidavit from her husband Michael Healy ("M. Healy"), who attests that "[a]s is . . . plainly evident in the October 31, 2020 [i]nvoice no monies are being sought from [defendant] on that invoice based on paragraph 8 of the parties' agreement, which [defendant] claims in his motion for partial summary judgment is invalid." M. Healy claims that $433,333.37 is now past due and owing. M. Healy also denies that defendant ever objected to any invoices sent to him (NYSCEF Doc. No. 56, *M. Healy's affidavit, p 10 and 11, respectively*). M. Healy also proffers invoices to support these claims (NYSCEF Doc. Nos. 57-58, *invoices*).

Plaintiff also argues that her cross-motion for summary judgment on the account stated claim should be granted because it cannot be disputed that detailed monthly invoices were regularly prepared and timely forwarded by plaintiff to and received by defendant. Defendant also made partial payments towards the invoices. Thus, plaintiff asserts that she is entitled to summary judgment on this claim in the amount of $433,333.37. (NYSCEF Doc. No. 59, *memorandum in opposition*).

In opposition to the cross-motion and in further support of the motion, defendant argues that contrary to plaintiff's contention, the illegal clause cannot be severed from the entire contract because the clear intention of the agreement was to purchase defendant's medical practice. The account stated claim, argues defendant, lacks merit because defendant objected to the balances allegedly due and owing pertaining to any commitment payments for services plaintiff rendered to defendant's patients. (NYSCEF Doc. No. 60, *Kruger affidavit*.) Defendant further claims that, since the contract is unenforceable, an account stated cause of action cannot be maintained (NYSCEF Doc. No. 65, *memorandum of law in reply*).

"It is well settled that fee-splitting agreements between professionals violate public policy and are unenforceable" (*Rosenberg v Chen*, 2010 NY Slip Op 32218[U], **10 [Sup Ct, NY County 2010], citing *Levy v Richstone*, 2008 NY Slip Op 31198[U], **7 [Sup Ct, NY County 2008]; see *Odrich v Trustees of Columbia Univ. in NY*, 193 Misc 2d 120, 126 [Sup Ct, NY County 2002].) These arrangements violate the fee-splitting prohibition contained in Education Law § 6509-a, as well as, 8 NYCRR § 29.1(b)(4), the regulation promulgated pursuant to Education Law § 6509-a, which expressly prohibits fee-sharing:

> "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 of, or is otherwise dependent upon, the income or receipts of the licensee from such practice, except as otherwise provided by law with respect to a facility licensed pursuant to article 28 of the Public Health Law or article 13 of the Mental Hygiene Law."

"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" (*LoMagno v Koh*, 246 AD2d 579 [2d Dept 1998] [internal quotation marks and citations omitted]; see *Hartman v Bell*, 137 AD2d 585 [2d Dept 1988].) However, "where an agreement consist[s] of both unlawful and lawful objectives, a court may sever the illegal aspects of an agreement and enforce the legal ones, so long as the illegal aspects were incidental to the legal aspects and not the main objective of the agreement." (*Glassman v ProHealth Ambulatory Surgery Ctr., Inc.*, 14 NY3d 898 [2010].)

Here, upon a review of the agreement, motion papers, and the relevant statutes and case law, this court finds that defendant has established *prima facie* that the subject agreement is illegal and, therefore, unenforceable, to the extent it contains impermissible fee-splitting. Although plaintiff attempts to argue that the fee-splitting was incidental and not the main objective of the agreement and that the agreement is otherwise enforceable, this court is not persuaded insofar as it finds that the main objective of the agreement was, in fact, the purchase of the medical practice. Thus, the court will not sever the portions of the agreement plaintiff claims are enforceable, standing alone, where the agreement, as a whole is unenforceable. (*Levy v Richstone*, 2008 NY Slip Op 31198[U] [Sup Ct, NY County 2008].) Thus, defendant's motion seeking dismissal of the first, second and third causes of action is granted. Consequently, that branch of the cross-motion seeking summary judgment on plaintiff's claim for unjust enrichment is denied as moot (*Racwel Constr., LLC v Manfredi*, 61 AD3d 731 [2d Dept 2009] ["(a) claim which is void by reason of its illegality will not support an account stated"]; see also *Sachs v Saloshin*, 138 AD2d 586, 587 [2d Dept 1988].) All other arguments have been considered and are either without merit or need not be addressed given the findings above. Thus, it is hereby

ORDERED that defendant's motion, pursuant to CPLR 3212, is granted to the extent it seeks dismissal of the first, second and third causes of action; and it is further

ORDERED that plaintiff's cross-motion, pursuant to CPLR 3212, for summary judgment on the claim for account stated is denied as moot; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff.

This constitutes the decision and order of this court.

May 1, 2023

HON. VERNA L. SAUNDERS, JSC

CHECK ONE: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**