

THOMAS C. BURM,

Plaintiff,

v.

GREECE PEDIATRIC DENTISTRY, LLP,
DAVID P. DURR, and THOMAS C. BORK,
Defendants.

DECISION AND ORDER

Index #2005/10193

Defendants, Greece Pediatric Dentistry, LLP, David P. Durr, and Thomas C. Bork, have moved pursuant to CPLR §3124 for an order compelling disclosure as to Defendants' interrogatories or for dismissal pursuant to CPLR §3126. In the alternative, Defendants seek summary judgment dismissing plaintiff's complaint. Plaintiff, Thomas C. Burm, has cross moved for summary judgment pursuant to CPLR §3212. In submitting his cross motion for summary judgment, plaintiff has also provided responses to the interrogatories to which he previously refused to respond. While plaintiff asserts that such provision moots defendants' motion to compel, Defendants' reply alleges that some of the responses are insufficient.

This action relates to the withdrawal of a partner from a pediatric dentistry practice located in Greece, New York, Greece Pediatric Dentistry, LLP. On January 2, 2002, plaintiff and Defendants entered into an Amended Partnership Agreement. After

differences arose between plaintiff and Defendants, an Agreement for Withdrawal was signed by the parties on June 30, 2005.

Defendants allege that the June 30, 2005 Agreement was incomplete and did not create a contract, but further note that even if a contract was created, they had and have grounds to repudiate the contract and rescind. A review of the June 30, 2005 Agreement reveals that certain terms were left blank on the Agreement at the time of execution.

While reserving their assertion that a valid contract was not formed, Defendants allege that an announcement of plaintiff's new dental association and office violated Paragraph 9 of the June 30, 2005 Agreement and provided a basis for repudiation:

9. *Public Notice.* The partnership will make a notice to patients announcing the reformation of the Partnership with Durr and Bork as partners. Burm may issue an announcement of any new association, however not to any patient of Greece Pediatric Dentistry and he may not mention Greece Pediatric Dentistry, Durr or Bork in said advertisement.

An announcement of plaintiff's new association following his departure from Greece Pediatric Dentistry mentioned Greece Pediatric Dentistry. See Defendants' motion papers, Exhibit F. The evidence before the court reveals that at this juncture, the parties began to renegotiate the partnership withdrawal, resulting in the Amended Agreement for Withdrawal dated August 24, 2005. While the Amended Agreement was complete in its terms

and resulted from a series of negotiations between the parties, it was never executed by Defendants. Plaintiff signed the Amended Agreement on August 24, 2005.

Shortly after defendants sent the Amended Agreement to plaintiff for his execution, on August 18, 2005 defendants were contacted by the Department of Health ("DOH") regarding an investigation of plaintiff for forging defendants Durr and Bork's signatures on prescriptions to himself. Because of this development and their unawareness of both the forgeries and plaintiff's drug abuse, defendants never signed the Amended Agreement. Plaintiff has admitted to the court in his submissions that he was charged by the Greece Police on felony counts of possessing forged instruments. Plaintiff has further admitted to drug addiction and forging the prescriptions, and the admissions reveal that plaintiff was forging prescriptions for about two and a half years prior to the June 30, 2005 Agreement for Withdrawal.

Summary Judgment

It is well settled that "the 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." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also Potter v. Zimmer, 309 A.D.2d 1276 (4th Dept. 2003) (citations

omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), citing Alvarez, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

The June 30, 2005 Agreement for Withdrawal

Defendants contend that the June 30, 2005 Agreement for Withdrawal contained unfilled blanks relating to payment terms and that, as a result, it never became a binding contract. The court's review of the June 30, 2005 Agreement reveals that it left open installment payment terms, as well as due dates for payment to be made, interest, and the date by which the

accountant was to complete his calculation. A breach of contract cause of action will not lie where the evidence does not demonstrate a "meeting of the minds" as to "essential terms of an agreement...." Rion Corp. v. McLean, 23 A.D.3d 298, 299 (1st Dept. 2005). See also Harlock v. Scott Kay, Inc., 14 A.D.3d 343 (1st Dept. 2005); Gui's Lumber & Home Center, Inc. v. Mader Constr. Co., Inc., 13 A.D.3d 1096 (4th Dept. 2004). "[W]hile the existence of a contract is a question of fact, the question of whether a certain or undisputed state of facts establishes a contract is one of law for the courts." Gui's, 13 A.D.3d at 1097, quoting Cortland Asbestos Prod., Inc. v. J&K Plumbing and Heating Co., Inc., 33 A.D.2d 11 (3d Dept. 1969). Defendants assert that the first inquiry to be made herein revolves upon whether the blanks left open on the June 30, 2005 Agreement were essential terms, the absence of which rendered the Agreement invalid. Defendants would, of course, answer this query in the affirmative. The court's review of the missing payment terms, however, compels the conclusion that they were not essential to the contract formation process given the price term in the contract. See Garcete v. Lazar, 294 A.D.2d 118, 119 (3d Dept. 2002). See also Boyd v. Haritidis, 239 A.D.2d 820, 821 (3rd Dept. 1997).

Defendants' more compelling argument relates to rescission of the June 30, 2005 Agreement. The dealings between the parties

relating to plaintiff's withdrawal from the partnership required "a high degree of fidelity and good faith." Ajjetix v. Raub, 9 Misc.3d 908, 912 (Sup. Ct. Monroe Co. 2005), quoting Fender v. Prescott, 101 A.D.2d 418, 422 (1st Dept. 1984). In Ajjetix, the court noted in a shareholder context that "[e]ven on dissolution, partners owe a continuing fiduciary duty to one another with respect to dealings effecting the winding up of the partnership and the preservation of the partnership assets." Ajjetix, 9 Misc.3d at 912. Moreover, this fiduciary duty, the court noted, relates not only to avoiding self-dealing, but also requires a fiduciary to avoid "situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty." Id. at 913, quoting Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466 (1989). Fiduciaries are consequently compelled to maintain the "utmost candor" and "to make full disclosure of any and all material facts within his or her knowledge relating to a contemplated transaction with the other party to the relationship." Ajjetix, 9 Misc.3d at 913, quoting 60A NY Jur.2d, Fraud and Deceit §99.

As in Ajjetix, the situation presented here related, without question, to matters involving plaintiff's fiduciary relationship with Defendants as partners in Greece Pediatric Dentistry. In negotiating the June 30, 2005 Agreement for Withdrawal plaintiff was thereby required "to disclose any information that could

reasonably bear on [Defendants'] consideration....'" Id. quoting Dubbs v. Stribling & Assoc., 96 N.Y.2d 337, 341 (2001). "Indeed, where a fiduciary relationship exists between the parties, there must be clear proof of the integrity and fairness of a transaction between them, 'or any instrument thus obtained will be set aside or held as invalid.'" Id. quoting Mtr. of Gordon v. Bialystoker Ctr. & Bikur Cholim, 45 N.Y.2d 692, 698 (1978).

Here, plaintiff did not disclose his drug abuse and his forgeries of partners' names on prescriptions during the negotiations surrounding his withdrawal from the partnership. Because plaintiff's admissions with respect to his drug abuse while a practicing member of Greece Pediatric Dentistry, and his forgeries of his partners names to support that habit, would constitute, if material, a breach of the fiduciary duties owed to his partners when negotiating his Agreement for Withdrawal, Defendants' motion for summary judgment on its first affirmative defense and separately denominated counterclaim, declaring rescission of the June 30, 2005 Agreement for Withdrawal, should be granted, but only if the fact of plaintiff's misdeeds is considered material. It is to that question that the court now turns.

Defendants conceded at oral argument and otherwise in their papers that, when negotiating plaintiff's withdrawal package, they gave him the package called for under the retirement

provisions of the Agreement, which included an enhanced calculation under §7.07.1. All parties agreed at oral argument that the price term in the Agreement for Withdrawal, the predicate for plaintiff's complaint, was based on §7.07.1, notwithstanding that, even in the ostensible circumstances of plaintiff's withdrawal, the calculation of the price term should have been under the Voluntary Withdrawal formula of §7.05. Defense counsel explained, again at oral argument, that defendants were having enough trouble with plaintiff in other areas of performance that they were content to give him the enhanced formula just to get rid of him.

Plaintiff, however, insists that Section 7.05 contemplates and requires the distribution formula set forth in Section 7.07.1 in any event, and that therefore knowledge of plaintiff's drug use and prescription forgeries was not material enough to the parties' negotiations to permit rescission of the Agreement to Withdrawal. The court therefore must analyze both Section 7.05 and 7.07.1, as well as other sections shedding light on the meaning and impact of the phrase "Net Practice Income," the specific phraseology of the Agreement upon which plaintiff relies.

Article IV of the Amended Partnership Agreement relates to partnership allocations and distributions. "Net Practice Income" is introduced and described in the Amended Partnership Agreement

in Section 4.01.2, a subsection of Section 4.01 which is entitled
"Net Income or Loss":

The net profit ("Net Practice Income") and/or losses of the Partnership shall be allocated and distributed as follows:

4.01.2.1 Before any division of Net Practice Income, the managing Partner shall receive a \$20,000 management fee.

4.01.2.2 Each Partner may withdraw \$50,000 Dollars per annum from the Partnership as a draw against his distribution of Net Practice Income, said draws to be payable in convenient installments during the course of the year.

4.01.2.2.1 Notwithstanding the above, in any Partnership year during the first six years commencing January 2, 2002, in which the total Partnership distributions to Burm shall be less than \$80,000, Burm may receive an additional advance against future Net Practice Income in an amount which, when added to any other distributions to him, will equal \$80,000 for that year, provided the other Partners' shares are \$175,000 or in excess thereof. These additional distributions shall be "excess payments" to Burm to be recouped in future years, after the sixth year, by decreasing his share of the Net Practice Income and correspondingly increasing Durr's and Bork's shares thereof. The adjusted decrease to Burm and increase to Durr and Bork shall not include an interest factor. The accountant regularly employed by the Partnership shall make the determination of the total adjustments required hereunder.

4.01.2.3 The division of the Net Practice Income and other available cash not necessary for the continued proper operation of the Dental Practice, after the amounts set forth above are paid, shall be in accordance with each Partner's then percentage of

interest in the Partnership.

4.01.2.4 The division of profits or losses of the Partnership shall be determined on an annual basis ending on December 31st of each year. Distribution of Net Practice Income and other available cash not necessary for the continued proper operation of the Dental Practice shall be made as soon as practicable following December 31st of each year. A separate income account shall be maintained for each Partner. Partnership profits and losses shall be charged or credited to the separate income accounts on a monthly basis, unless a Partner has no credit balance in his income account, in which event losses shall be charged to his capital account. Profits and losses of the Partnership shall be determined in the same manner in which the Partnership reports its income and expenses for federal income tax purposes.

4.01.3 Upon admission of new Partners and in the event of any assignment or issuance of a unit of partnership interest, or upon death of a Partner, net income or loss for that fiscal period shall be allocated among the Partners or assignees to reflect their varying interests during the fiscal period. For purposes of computing the varying interests of each Partner, the Partnership shall make an interim closing of its books as of the effective date of the admission of a Partner, assignment of a unit or death of a Partner, and compute the items of net income or loss applicable to the period of time before and after that date using the accrual method of accounting.

Article IV thus explains the calculation of "Net Practice Income" and provides for such calculation on an annual basis. See id.
§4.01.2.4. Section 7.05 states:

Voluntary Withdrawal. A party may voluntarily withdraw from the Partnership by giving the other Partner or Partners six (6) month's notice in advance. In that event, the withdrawing Partner shall sell, and the remaining Partners shall purchase the Partnership interest of the withdrawing Partner. The purchase price for such interest shall be equal to the withdrawing Partner's capital account. In addition, the withdrawing Partner shall be paid a proportionate amount of his guaranteed payment, management fee, if applicable, prorated to the date of withdrawal and his Net Practice Income to the date of withdrawal. In the alternative, the remaining Partners may elect to liquidate the Partnership pursuant to Article X above, and said election shall be made by notifying the withdrawing Partner thereof in writing within sixth (60) days after the effective date of the withdrawing Partner's withdrawal as set forth in his notice of withdrawal. This Paragraph shall not prevent a withdrawing Partner from finding a buyer of his Partnership interest who is acceptable to the remaining partners, in their sole discretion. Said assignment shall be subject to the provisions of Section 7.02 hereof. In that event, the Partnership shall only pay the withdrawing Partner a proportionate amount of his guaranteed payment and management fee, if applicable, prorated to the date of withdrawal and his share of Net Practice Income to the date of withdrawal.

Finally, Section 7.07.1, which plaintiff alleges is applicable because the calculation contained therein is also required by Section 7.05, states:

The purchase price shall be equal to one hundred (100%) percent of the average annual gross income of the practice, multiplied by the percentage that equals the deceased

Partner's percentage interest in the Partnership. Such amount shall be for the deceased Partner's entire interest in the capital of the Partnership. In addition, the deceased Partner shall be paid an amount equal to the pro rata portion of his management fee, guaranteed payment and Net Practice Income to the date of death. The average annual gross income of the Practice shall be the average of the gross annual incomes for the past three (3) complete calendar years of the Partnership.

Contrary to plaintiff's argument, there is no correlation between Section 7.05 and Section 7.07.1, and there is no contractual pretext for incorporating the calculation provided for in Section 7.07.1 into Section 7.05. At the outset, the court notes that a basic reading of both Section 7.05 and Section 7.07.1 reveals that no attempt was made in the drafting of the Amended Partnership Agreement to tie these sections together. For instance, neither section refers specifically, or even alludes, to the other, and neither implements any language requiring the any sort of reference, incorporation, or inclusion of the calculation required by the other. Moreover, to the extent plaintiff bases his argument on the fact that both Section 7.05 and Section 7.07.1 include phraseology relating to the "Net Practice Income," plaintiff's argument is both incorrect and ignores Article IV. Section 7.05 states, in part: "In addition, the withdrawing Partner shall be paid a proportionate amount of his guaranteed payment, management fee, if applicable, prorated to the date of withdrawal and his Net Practice Income to the date

of withdrawal.” Likewise, Section 7.07.1 states, in part: “In addition, the deceased Partner shall be paid an amount equal to the pro rata portion of his management fee, guaranteed payment and Net Practice Income to the date of death.” The mere fact that both sections incorporate “Net Practice Income” into their calculations does not inextricably tie the sections together or require any sort of incorporation of the provided calculations into one another. Rather, a reading of the entire Amended Partnership, including in particular Article IV, demonstrates that both sections simply incorporate “Net Practice Income,” a term introduced and described in Article IV, into their respective calculations to be completed upon the event of partner withdrawal (Section 7.05) or death (7.07.1). The mere presence of the term “Net Practice Income” within a very similar sentence in both Section 7.05 and Section 7.07.1 is inconsequential.

Most importantly, and most damaging to plaintiff’s theory raised at oral argument, a plain reading of both Section 7.05 and Section 7.07.1 reveals that each section results in a different calculation of what is owed the partner upon withdrawal in one stance, or death in another instance. Although each section provides for the payment of the partner’s Net Practice Income earned (to the date of withdrawal or the date of death), the sections differ greatly in other respects. While Section 7.05 provides for payment to the withdrawing partner of his capital

account (in addition to other amounts), Section 7.07.1 has a more generous potential, as it provides a deceased partner with a payment incorporating the partner's percentage interest in the average annual gross income of the practice over the three years preceding the death (in addition to other amounts). The fact that the payment to a partner is different in the event of death under Section 7.07.1 makes plaintiff's concealment of his drug abuse and forgeries material. As set forth above, the parties' negotiations leading to the use of the calculation in Section 7.07.1 were tainted by plaintiff's breach of fiduciary duties to his partners. Contrary to plaintiff's argument, the fraud perpetrated by plaintiff is not immaterial because the price to be paid to him in either event does not depend upon the formula set forth in Section 7.07.1. Plaintiff is entitled to the payment resulting from the calculation based on Section 7.05, which does not incorporate Section 7.07.1's calculation in any respect; defendants have agreed to as much at oral argument.

Plaintiff's cross motion for summary judgment is denied. Defendants' motion for summary judgment on its first affirmative defense and separately denominated first counterclaim is granted. Defendants' motion for summary judgment dismissing the complaint in its entirety, however, is denied because the court interprets the complaint to encompass a claim for the \$7.05 payout to which defendants concede plaintiff is entitled. Defendants' motion to

compel is thereby rendered moot.

(1) File note of issue by May 1, 2006.

(2) Conference to set day certain for trial: May 15, 2006, at 9:00am.

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: March 3, 2006
Rochester, New York