

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D21360  
O/kmg

\_\_\_\_\_AD3d\_\_\_\_\_

Argued - October 21, 2008

ROBERT A. SPOLZINO, J.P.  
ANITA R. FLORIO  
WILLIAM E. McCARTHY  
THOMAS A. DICKERSON, JJ.

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2007-11396  
2008-02381

DECISION & ORDER

Staten Island Emergency Physicians, P.C.,  
appellant-respondent, v Staten Island University  
Hospital, respondent-appellant.

(Index No. 11739/03)

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Hoffman Polland & Furman, PLLC, New York, N.Y. (Jessica L. Leonard of counsel),  
for appellant-respondent.

Venable, LLP, New York, N.Y. (Michael J. Volpe of counsel), for respondent-  
appellant.

In an action to recover damages for breach of contract, (1) the plaintiff appeals from a judgment of the Supreme Court, Richmond County (Ajello, J.), entered June 16, 2008, which, after a nonjury trial, is in favor of the defendant dismissing the complaint, and (2) the defendant cross-appeals, as limited by its brief, from so much of an order of the same court dated February 7, 2008, as denied that branch of its cross motion which was to dismiss the complaint on the alternative ground of waiver. The plaintiff's notice of appeal from an order dated November 7, 2007, is deemed to be a notice of appeal from the judgment entered June 16, 2008 (*see* CPLR 5520[c]).

ORDERED that the cross appeal from the order dated February 7, 2008, is dismissed;  
and it is further,

ORDERED that the judgment is affirmed; and it is further,

December 9, 2008

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ORDERED that one bill of costs is awarded to the defendant.

The cross appeal from the intermediate order dated February 7, 2008, must be dismissed because the right of direct appeal therefrom terminated with the entry of judgment in the action (*see Matter of Aho*, 39 NY2d 241, 248). The issues raised on the cross-appeal from that order, although brought up for review on the appeal from the judgment (*see CPLR 5501[a][1]*), have been rendered academic.

Contrary to the plaintiff's contentions, the record at trial supports the Supreme Court's determination that the defendant showed: (1) the parties orally agreed to modify the defendant's obligations under section 5.4(iii) of the parties' series of one-year agreements dating from April 1994 through December 31, 2001 (hereinafter the obligations), (2) the parties acted in accordance with those oral modifications in fulfilling the obligations, and (3) the defendant completed its obligations in compliance therewith. Specifically, the plaintiff's failure to identify any services billed by the defendant with respect to which the plaintiff claimed entitlement to a fee under the series of agreements can be explained only by the oral modification eliminating such entitlement that the plaintiff now disputes. Therefore, the defendant was entitled to rely on those oral modifications in defending this action (*see Rose v Spa Realty Assoc.*, 42 NY2d 338, 343; *B. Reitman Blacktop, Inc. v Missirlan*, 52 AD3d 752; *J&R Landscaping v Damianos*, 1 AD3d 563, 564-565), and the Supreme Court properly dismissed the complaint.

The plaintiff's remaining contentions are without merit or not properly before this Court.

SPOLZINO, J.P., FLORIO, McCARTHY and DICKERSON, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court