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

D27885
Y/prt

_____AD3d_____ Argued - April 26, 2010

JOSEPH COVELLO, J.P.
THOMAS A. DICKERSON
RANDALL T. ENG
LEONARD B. AUSTIN, JJ.

2008-08497 DECISION & ORDER
2008-08498
2008-08753

Robert I. Gluck, M.D., LLC, et al., respondents, v
Kenneth M. Kamler, M.D., LLC, et al.,
appellants.

(Index No. 18776/05)

Robert L. Dougherty, Garden City, N.Y., for appellants.

David A. Bythewood, Mineola, N.Y. , for respondents.

In an action, inter alia, to recover damages for breach of fiduciary duty, unfair competition, and fraud, the defendants appeal (1) from an order of the Supreme Court, Nassau County (Warshawsky, J.), dated August 4, 2008, which granted the plaintiffs' motion for summary judgment on the issue of liability on the seventh cause of action alleging unfair competition, (2) from an order of the same court dated August 13, 2008, which denied their motion for summary judgment dismissing the sixth cause of action alleging breach of fiduciary duty, the seventh cause of action alleging unfair competition, and the eighth and ninth causes of action alleging fraud and (3), as limited by their brief, from so much of an order of the same court, dated September 17, 2008, as denied that branch of their motion which was for leave to renew their opposition to the plaintiffs' prior motion for summary judgment on the issue of liability on the seventh cause of action alleging unfair competition and as, upon reargument, adhered to the original determination granting that motion.

ORDERED that the appeal from the order dated August 4, 2008, is dismissed, as that order was superseded by the order dated September 17, 2008, made upon reargument; and it is

further,

ORDERED that the order dated August 13, 2008, is affirmed; and it is further,

ORDERED that the order dated September 17, 2008, is affirmed insofar as appealed from; and it is further,

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

On their motion for summary judgment on the issue of liability on the seventh cause of action alleging unfair competition, the plaintiffs demonstrated their prima facie entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.,* 68 NY2d 320, 324) by submitting evidence establishing that the defendants wrongfully diverted the plaintiffs' business to themselves (*cf. Anesthesia Assoc. of Mount. Kisco, LLP v Northern Westchester Hosp. Ctr.,* 59 AD3d 473, 478). In opposing the motion, and in moving for leave to reargue, the defendants failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.,* 68 NY2d at 324). Accordingly, upon reargument, the Supreme Court properly adhered to its original determination granting the plaintiffs' motion.

The defendants failed to demonstrate their prima facie entitlement to judgment as a matter of law on the sixth cause of action alleging breach of fiduciary duty, and the eighth and ninth causes of action alleging fraud (*id.* at 324). Accordingly, the Supreme Court properly denied those branches of the defendants' motion which were for summary judgment dismissing those causes of action, regardless of the sufficiency of the plaintiffs' opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853).

The defendants' remaining contentions are without merit.

COVELLO, J.P., DICKERSON, ENG and AUSTIN, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court