

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 09-02291

PRESENT: SMITH, J.P., FAHEY, CARNI, LINDLEY, AND SCONIERS, JJ.

PARKWAY PEDIATRIC AND ADOLESCENT MEDICINE LLC,
PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

BENEDETTO VITULLO, M.D., DEFENDANT-APPELLANT,
GRETCHEN SMITH-BURKE, M.D. AND PAUL BURKE,
DEFENDANTS-RESPONDENTS.

LECLAIR KORONA GIORDANO COLE LLP, ROCHESTER (MARY JO S. KORONA OF
COUNSEL), FOR DEFENDANT-APPELLANT.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP, ROCHESTER (MATTHEW
J. FUSCO OF COUNSEL), FOR PLAINTIFF-RESPONDENT AND DEFENDANTS-
RESPONDENTS.

Appeal from an order of the Supreme Court, Monroe County (Kenneth R. Fisher, J.), entered August 14, 2009 in an action for, inter alia, breach of contract. The order denied the motion of Benedetto Vitullo, M.D. for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff medical practice commenced this action seeking damages for, inter alia, breach of fiduciary duty and breach of contract. Benedetto Vitullo, M.D. (defendant), one of plaintiff's members, contends on appeal that Supreme Court erred in denying his motion for summary judgment seeking a determination that, pursuant to the terms of the Operating Agreement (agreement) between plaintiff and defendant, plaintiff must indemnify him for the attorney's fees and costs that he incurred in defending this action. We affirm.

"Inasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492). Here, the broad indemnification clause in the parties' agreement does not even refer to litigation between the parties to the agreement. The agreement thus does not make it "unmistakably clear" that the parties intended that plaintiff must indemnify defendant for attorney's fees and costs

arising from the instant litigation (*id.*; see *Digital Broadcast Corp. v Ladenburg Thalmann & Co., Inc.*, 49 AD3d 412; *Wal-Mart Stores, Inc. v United States Fid. & Guar. Co.*, 29 AD3d 315, 316; *cf. Western Beef Mariners Harbor, LLC v Vornado Forest Plaza, LLC*, 61 AD3d 745).

Entered: April 30, 2010

Patricia L. Morgan
Clerk of the Court