

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JANERIO ALDRIDGE, M.D., HASHMAT
ASHRAF, M.B.B.S., F.R.C.S., LUJEAN
JENNINGS, Ph.D., M.D. and BUFFALO
THORACIC SURGICAL ASSOCIATES, P.C.

Plaintiffs

MEMORANDUM
DECISION

vs.

Index No. 10120/03

RICHARD F. BRODMAN, M.D. and
BUFFALO CARDIOTHORACIC SURGICAL PLLC,

Defendants

RICHARD F. BRODMAN, M.D. and BUFFALO
CARDIOTHORACIC SURGICAL PLLC,

Third-Party Plaintiffs

vs.

KALEIDA HEALTH

Third-Party Defendant

BEFORE:

HON. JOHN M. CURRAN, J.S.C.

APPEARANCES:

Jaekle Fleischmann & Mugel, LLP

Attorneys for Third-Party Plaintiffs
Charles C. Swanekamp, Esq., of Counsel
Beverly S. Braun, Esq., of Counsel

Hodgson Russ LLP

Attorneys for Third-Party Defendant
Robert L. Lane, Jr., Esq., of Counsel
Kathleen Sellers, Esq., of Counsel
Brent J. Nowicki, Esq., of Counsel

CURRAN, J.

Before the Court is Third-Party Defendant Kaleida Health's ("Kaleida") motion to dismiss the Third-Party Complaint pursuant to CPLR 3211 (a) (7).

BACKGROUND

On or about October 16, 2003, this action was commenced by Janerio Aldridge, M.D. ("Aldridge"), Hashmat Ashraf, M.B.B.S., F.R.C.S. ("Ashraf"), LuJean Jennings, PhD, M.D. ("Jennings") and Buffalo Thoracic Surgical Associates, P.C. ("BTSA") against Richard F. Brodman, M.D. ("Brodman") and Buffalo Cardiothoracic Surgical PLLC ("BCS") to recover damages allegedly sustained by them. The action was subsequently amended and converted, culminating in a Third Amended and Converted Complaint (the "Aldridge Action").

Third-Party Plaintiffs Brodman and BCS (collectively hereinafter referred to as "Third-Party Plaintiffs") allege that Kaleida contracted with Brodman to form a single group to be the exclusive provider of cardiothoracic surgery services at Kaleida and to consolidate Kaleida's cardiothoracic surgery program at Buffalo General Hospital in order to improve the quality of services. Specifically, on January 13, 2003, Brodman entered into an Employment Agreement with Kaleida governing his role as Chief of Service of Cardiothoracic Surgery, effective February 1, 2003 ("Employment Agreement"). Brodman was hired by Kaleida on a part-time (50%) basis and his duties included, but were not limited to: (1) recruiting and employing an appropriate number of physicians within a PLLC to be formed by Brodman to provide cardiothoracic surgery services to Kaleida; (2) designing, overseeing and administering the development of "best practices" in cardiac surgery to allow Kaleida to achieve a risk-adjusted mortality and major complication rate ranking in the top one-third of all cardiac

surgical programs in New York; (3) developing a quality assurance and performance improvement program; (4) assisting Kaleida in planning for the consolidation of cardiac surgery at Buffalo General Hospital; and (5) assuring appropriate behavior and professionalism of all staff working in the cardiothoracic service (Employment Agreement, Ex. A) (Third-Party Complaint ¶ 15). In January of 2003, Brodman formed BCS to be the exclusive cardiothoracic surgery group.

Pursuant to the Employment Agreement, Kaleida was responsible for the administration and operation of cardiothoracic surgery at Kaleida and was responsible for setting policies and procedures pursuant to which Brodman and BCS were to perform (Employment Agreement ¶ 14 [a]; Third-Party Complaint ¶ 16). Kaleida also was responsible for providing such resources as were reasonably required for performance of those duties and for ensuring that any service provided pursuant to the Employment Agreement complied with all pertinent provisions of federal, state and local statutes, rules and regulations (Employment Agreement ¶¶ 14 [c], [d]; Third-Party Complaint ¶ 16).

Paragraph 5 (b) of the Employment Agreement provides: “In the event that the Physician is sued by another employee of Kaleida Health or any other third party in connection with the Physician’s services under this Agreement, to the extent such action is not covered by Kaleida Health’s self-insurance program or by an insurance policy that may be obtained by Kaleida Health, Kaleida Health shall be obligated to indemnify and hold harmless the Physician from and against any and all third party claims, damages, judgments, costs, expenses, interest and penalties (including, without limitation, attorneys’ fees) unless it is determined that the

Physician did not act reasonably within the scope of his employment” (Employment Agreement ¶ 5 [b]; Third-Party Complaint ¶ 17).

On February 1, 2003, BCS entered into an Independent Contractor Agreement with Kaleida to exclusively provide cardiothoracic surgical services to Kaleida’s patients, effective June 1, 2003 (“Independent Contractor Agreement”). The rationale for the exclusivity of the Independent Contractor Agreement was to improve the quality of care to cardiothoracic surgery patients which had been in decline prior to Brodman’s engagement as Chief of Service of Cardiothoracic Surgery. According to Third-Party Plaintiffs, under the Independent Contractor Agreement, “BCS was required to implement a contractual relationship with each cardiothoracic surgeon to provide services at Kaleida. Officials at Kaleida and their legal counsel, Hodgson Russ, reviewed the form of such individual physician’s contract before it was delivered” (Third-Party Complaint ¶ 28).

Pursuant to the Independent Contractor Agreement, Kaleida was responsible for scheduling cardiothoracic surgical services, providing office space and facilities, and providing access to hospital facilities and personnel necessary to provide cardiothoracic services commensurate with generally accepted standards of medical practice in the community. Kaleida also was responsible for setting all policies and procedures pursuant to which the physicians provided services and for ensuring that any service provided pursuant to the Independent Contractor Agreement complied with all pertinent provisions of federal, state and local statutes, rules and regulations (Employment Agreement ¶ 3 [d]) (Third-Party Complaint ¶ 16).

Paragraph 8 (b) of the Independent Contractor Agreement provides: “Group and Kaleida Health each agree to indemnify and hold harmless the other and the other’s employees from any claim made against the indemnified party arising out of the indemnifying party’s or its employees’ acts, failure to act or conduct in the course of such party’s performance of its obligations pursuant to this Agreement.”

The Aldridge Action alleges that the contract offered to Drs. Aldridge, Ashraf and Jennings to enter into an exclusive provider group with BCS was an illegal contract which required the physicians to engage in unlawful and unethical rationing of health care and constituted an unlawful and unethical fee-splitting and kickback scheme. The Aldridge Action contains three causes of action: (1) declaratory judgment that the proposed BCS contract was illegal and unethical¹; (2) unfair trade practices; and (3) tortious interference with business relationships. Specifically, it is alleged that Brodman and BCS took unlawful steps to damage or destroy the Aldridge Plaintiffs’ medical practice by selecting a similar mark and trade name, manipulating Kaleida’s demographic, scheduling and lab results network (“Infoclique”) to create confusion among referral sources, redirecting and/or misdirecting referrals intended for the Aldridge Plaintiffs, rerouting the Aldridge Plaintiffs’ telephone line to BCS, disparaging the Aldridge Plaintiffs and threatening to terminate Kaleida employees for referring patients to the Aldridge Plaintiffs. In addition to declaratory judgment, the Aldridge Plaintiffs seek compensation for economic harm and emotional distress.

¹

On March 28, 2008, Defendants/Third-Party Plaintiffs’ motion for summary judgment seeking to dismiss the first cause of action for declaratory judgment was granted.

On or about November 24, 2004, an action was commenced by Thomas Z. Lajos, M.D. against Brodman, BCS, Kaleida and others alleging that Lajos was not a member of BCS but rather an independent contractor entitled to the fair market value of his services allegedly billed to patients by defendants (the “Lajos Action”)(Index No. 12111/04). The Answer served by Brodman and BCS in the Lajos Action asserted that Dr. Lajos had entered into a contract with BCS. Brodman and BCS settled the Lajos Action and it has been discontinued.

On or about March 3, 2005, an action was commenced by Norman Lewin, M.D., Gary Grosner, M.D. and Hratch L. Karamanoukian, M.D. against Brodman and BCS alleging that the cardiothoracic surgeons providing surgical services at Kaleida were compelled to enter into a contract of adhesion with BCS and that Brodman and BCS engaged in various acts of mismanagement and malfeasance (the “Lewin Action”)(Index No. 2324/05). The complaint sought appointment of a receiver for BCS, an accounting, and an injunction, as well as damages for breach of fiduciary duties, breach of contract and conversion. Brodman and BCS settled the Lewin Action and it has been discontinued.

On or about July 26, 2005, an action was commenced by Leon Levinsky, M.D. against Brodman and BCS alleging that Brodman and BCS failed to properly bill Levinsky’s patient accounts, and that as a result, Brodman and BCS failed to pay Levinsky all compensation that was due him under his employment agreement with BCS (the “Levinsky Action”)(Index No. 6931/05).

The Third-Party Complaint contains four causes of action:

(1) On behalf of Brodman for indemnity pursuant to the Employment Agreement with regard to the Aldridge Action, the Lewin Action, the Levinsky Action, and the Lajos Action;

(2) On behalf of BCS for indemnity pursuant to the Independent Contractor Agreement with regard to the Aldridge Action, the Lewin Action, the Levinsky Action, and the Lajos Action;

(3) On behalf of Brodman for contribution with regard to the Aldridge Action and the Levinsky Action; and

(4) On behalf of BCS for contribution with regard to the Aldridge Action and the Levinsky Action.

Kaleida asserts that none of the claims for which Brodman and/or BCS seek indemnification fall within the scope of the indemnification clauses of the Employment Agreement or Independent Contractor Agreement. According to Kaleida, the indemnification clause of the Employment Agreement applies only to claims which arise in connection with actions taken by Brodman as Chief of Service of Cardiothoracic Surgery and the indemnification clause of the Independent Contractor Agreement applies only to claims which arise in connection with actions taken by Kaleida or its employees. Kaleida argues that, since Brodman seeks indemnification for claims arising out of his conduct as the managing member of BCS, and not as Chief of Service of Cardiothoracic Surgery, and BCS seeks indemnification for claims arising out of actions taken by Brodman and BCS, and not Kaleida or its employees, neither Brodman nor BCS can state a cause of action for contractual indemnification.

Similarly, Kaleida contends that contribution is not available for the Aldridge or Levinsky actions since they either arise out of a breach of contract or allege only economic loss damages, and that in any event, Kaleida did not have a part in causing or augmenting the injury for which contribution is sought.

PROCEDURAL STANDARDS

On this motion, Kaleida asserts that the Third-Party Complaint fails to state any cause of action and therefore must be dismissed under CPLR § 3211 (a) (7). The Court of Appeals has held: “Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists . . . Modern pleading rules are designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634-636 [1976], citing 6 Carmody-Wait 2d § 38.19; *Kelly v Bank of Buffalo*, 32 AD2d 875 [4th Dept 1969]). Initially, the sole criterion is whether the pleading states a cause of action, and if from the four corners of the complaint “factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977], citing *Foley v D’Agostino*, 21 AD2d 60, 64-65 [1st Dept 1964]; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3211:24; Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.36). “On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]

[citation omitted]). Nonetheless, “allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration” (*Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 233-234 [1st Dept 1994]).

INDEMNIFICATION

Indemnification clauses must be narrowly construed. “When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances” (*Hooper Assocs. Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *see also Lipshultz v K & G Indus., Inc.*, 294 AD2d 338 [2d Dept 2002]; *Sumba v Clermont Park Assocs., LLC*, 45 AD3d 671, 672 [2d Dept 2007], *lv dismissed* 10 NY3d 732 [2008]; *Wisniewski v Kings Plaza Shopping Ctr. of Flatbush Ave., Inc.*, 279 AD2d 570, 571 [2d Dept 2001]). Where the language of the parties is not clear enough to enforce an obligation to indemnify, courts will not rewrite the contract and supply a specific obligation the parties themselves did not spell out (*Tonking v Port Auth. of New York & New Jersey*, 3 NY3d 486, 490 [2004]).

CONTRIBUTION

CPLR § 1401 does not permit a claim for contribution between two parties whose potential liability to a third party is for economic loss resulting only from a breach of contract (*Board of Educ. of the Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 24 [1987]). As noted by the Fourth Department, “the right to contribution

is statutory and is limited to actions sounding in tort” (*Edgewater Constr.*, 252 AD2d at 952; *see also Bristol-Myers Squibb v Delta Star, Inc.*, 206 AD2d 177, 181 [4th Dept 1994]; *United Servs. Auto. Assoc. v R. Maurice Assocs., Inc.*, 188 AD2d 1021, 1022 [4th Dept 1992]).

Contribution does not lie where the defendant/third-party plaintiff is sued for economic loss due to a breach of fiduciary duty (*Scalp & Blade, Inc. v Advest, Inc.*, 300 AD2d 1068, 1069 [4th Dept 2002]; *Queens Structure Corp. v Jay Lawrence Assocs., Inc.*, 304 AD2d 736, 738 [2d Dept 2003]). Indeed, where the damages claimed are solely for economic loss, contribution may not be had for such loss (*United Servs. Auto. Assoc.*, 188 AD2d at 1022).

The critical requirement for apportionment under CPLR article 14 is that the breach of duty by the contributing party “must have had a part in causing or augmenting the injury for which contribution is sought” (*Nassau Roofing & Sheet Metal Co., Inc. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]).

A. The Aldridge Action

Brodman and BCS seek both indemnification and contribution with regard to the Aldridge Action. As noted above, the Aldridge Action alleges that the contract offered to Drs. Aldridge, Ashraf and Jennings to enter into an exclusive provider group with BCS was an illegal contract which required the physicians to engage in unlawful and unethical rationing of health care and constituted an unlawful and unethical fee-splitting and kickback scheme. The Aldridge Action seeks declaratory judgment that the proposed BCS contract was illegal and unethical (a claim which has been dismissed) and seeks compensation for alleged unfair trade practices and for tortious interference with business relationships based upon actions allegedly taken by Brodman and/or BCS and its members, agents and employees.

Brodman and BCS assert that each of the causes of action relate to either Brodman's performance under the Employment Agreement and/or the execution of his duties under that agreement, or BCS' performance under the Independent Contractor Agreement, all of which was undertaken at Kaleida's behest. More specifically, Third-Party Plaintiffs allege that Kaleida alone made the determination to enter into an exclusive arrangement and that the claims alleged in the Aldridge Action arise directly from Brodman and BCS' compliance with that directive (Third-Party Plaintiffs' Memo of Law, p. 8).

The Employment Agreement required Brodman to recruit and employ an appropriate number of physicians within a PLLC to be formed by Brodman to provide cardiothoracic surgery services to Kaleida. The Independent Contractor Agreement required BCS to provide physicians meeting the requirements of Kaleida to provide cardiothoracic surgery services for Kaleida. According to Third-Party Plaintiffs, the alleged "contract of adhesion" proffered by BCS and Brodman was reviewed by Kaleida and offered to the Aldridge Plaintiffs in furtherance of Kaleida's directives to enter into the exclusive practice group model (Third-Party Plaintiffs' Memo of Law, pp. 7, 11). Similarly, Third-Party Plaintiffs assert that the alleged tortious actions and/or unfair competition complained of by the Aldridge Plaintiffs were all actions that were undertaken at the behest of Kaleida in connection with the execution and performance by Brodman and BCS of their duties under the agreements with Kaleida (Third-Party Plaintiffs' Memo of Law, pp. 7-8; 11).

Construing the Third-Party Complaint liberally, as the Court must on a pre-answer motion to dismiss, Brodman and BCS are essentially asserting two theories: (1) that the

Aldridge Plaintiffs are really complaining about the single practice group model; and (2) that the actions underlying the alleged tortious interference and unfair competition claims were undertaken at the direction and/or behest of Kaleida when implementing the single practice group model (Third-Party Plaintiffs' Memo of Law, pp. 5-8). Although the Aldridge Plaintiffs' first cause of action based upon the alleged illegality of the contract offered by Brodman and BCS has been dismissed, the Aldridge Plaintiffs continue to allege the proffering of the purported illegal contract as part of their unfair trade practices and tortious interference claims (Aldridge Complaint, ¶¶ 39, 59). Therefore, even though Brodman and BCS have not set forth any specific directives made by Kaleida within the Third-Party Complaint, to the extent that the execution of the single practice group model furthered the tortious interference and/or unfair competition activities alleged in the Aldridge Action, Brodman and BCS have stated a cause of action for contractual indemnification.

Likewise, although the Third-Party Complaint is devoid of any allegations detailing what Kaleida specifically did to cause or augment the injury to the Aldridge Plaintiffs, in construing the Third-Party Complaint liberally, to the extent that the execution of the single practice group model at Kaleida's direction and behest furthered the tortious interference and/or unfair competition activities alleged in the Aldridge Action resulting in emotional distress to the Aldridge Plaintiffs, Brodman and BCS have stated a cause of action for contribution.

B. The Lewin Action

Brodman and BCS seek only indemnification with regard to the Lewin Action. As noted above, the Lewin Action alleges that the cardiothoracic surgeons providing surgical services at Kaleida were compelled to enter into a contract of adhesion with BCS and that

Brodman and BCS engaged in various acts of mismanagement and malfeasance. The complaint sought appointment of a receiver for BCS, an accounting, and an injunction, as well as damages for breach of fiduciary duties, breach of contract and conversion.

Brodman and BCS admit that most of the causes of action in the Lewin complaint stem from Brodman's role as a manager of BCS and therefore are not covered by the indemnification provisions of the Employment Agreement or the Independent Contractor Agreement (See Third-Party Plaintiffs' Memo of Law, pp. 9; 11). Nevertheless, both Brodman and BCS claim that at least the sixth cause of action for rescission of the contract directly relates to Brodman's duties under the Employment Agreement and/or BCS' duties under the Independent Contractor Agreement because a "contract was only offered to the Lewin Plaintiffs at Kaleida's directive" (Third-Party Plaintiffs' Memo of Law, p. 11).

First, it should be noted that no such allegations appear in Third-Party Plaintiffs' complaint or in any affidavit in opposition to this motion². Second, as stated in the Third-Party Complaint, the Lewin action was settled by Brodman and BCS and the claims therein were discontinued (Third-Party Complaint, ¶ 22). As a result, no determinations were made regarding the validity of the claims asserted therein. Since the sixth cause of action for rescission in the Lewin Action was plead in the alternative, and in the absence of an allegation

²

In fact, although it is of no evidentiary value, the Affidavit of Third-Party Plaintiffs' attorney, Beverly S. Braun, Esq., submitted in opposition to this motion states that "Dr. Brodman and BCS, with the knowledge and consent of Kaleida, **and under no obligation to do so**, offered employment at BCS to Drs. Janerio Aldridge, Hashmat Ashraf, LuJean Jennings, Norman Lewin, Gary Grosner, Hratch Karamanoukin, Leon Levinsky, and Thomas Lajos" (Braun Aff. ¶ 11)(emphasis added).

that the settlement involved rescission (the only claim for which Third-Party Plaintiffs seek indemnification), Brodman and BCS have failed to state a cause of action for indemnification.

C. The Lajos Action

Brodman and BCS sought only indemnification with regard to the Lajos Action. Since Third-Party Plaintiffs have failed to address the dismissal of these claims in their papers opposing this motion, those claims are dismissed.

D. The Levinsky Action

Brodman and BCS sought both indemnification and contribution with regard to the Levinsky Action. Since Third-Party Plaintiffs have failed to address the dismissal of these claims in their papers opposing this motion, those claims are likewise dismissed.

SUMMARY

For all of the foregoing reasons, Kaleida's motion is granted in part, and denied in part, as follows: the motion to dismiss the first cause of action on behalf of Brodman for indemnity pursuant to the Employment Agreement with regard to the Aldridge Action is denied, with regard to the Lewin Action is granted, and with regard to the Levinsky Action and the Lajos Action is granted without opposition; the motion to dismiss the second cause of action on behalf of BCS for indemnity pursuant to the Independent Contractor Agreement with regard to the Aldridge Action is denied, with regard to the Lewin Action is granted, and with regard to the Levinsky Action and the Lajos Action is granted without opposition; the third cause of action on behalf of Brodman for contribution with regard to the Aldridge Action is denied and with regard to the Levinsky Action is granted without opposition; and the fourth

cause of action on behalf of BCS for contribution with regard to the Aldridge Action is denied and with regard to the Levinsky Action is granted without opposition.

Kaleida's counsel shall settle the order with counsel for Brodman and BCS.

DATED: June 17, 2009

HON. JOHN M. CURRAN, J.S.C.