STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

ROCHESTER DIAGNOSTIC IMAGING ASSOCIATES, R.L.L.P., MARTINE S. BACKENSTOSS, M.D., JONATHAN D. BRODER, M.D., ATUL GUPTA, M.D., SARA IFTHIKHARUDDIN, M.D., DANIEL R. JACOBSEN, M.D., ROMAN M. KOWALCHUK, M.D., ROBERT M. LERNER, M.D., JAMES J. MONTESINOS, M.D., AVICE O'CONNELL, M.D., NICHOLAS C. RUSSO, M.D., ARTHUR J. SEGAL, M.D., ERIC M. SPITZER, M.D., SANJEEV TANEJA, M.D., ADAM S. ZINKIN, M.D., and EDWARD B. ZINKIN, M.D.,

Plaintiffs,

v.

THOMAS STEPHENSON, M.D. and MONROE RADIOLOGICAL ASSOCIATES, P.C.,,

Defendants/
Counterclaim Plaintiffs,

v.

ROCHESTER RADIOLOGY ASSOCIATES, P.C.,

Counterclaim Defendant.

DECISION AND ORDER

Index #2005-07452

Defendants, Thomas Stephenson, M.D. and Monroe Radiological Associates, P.C., move for an order granting partial summary judgment dismissing the claims asserted against the defendants/ counterclaim plaintiffs, declaring the rights of the partnership agreement, declaring as to multiple ongoing alleged breaches of fiduciary duty, and ordering interim accounting to include Rochester Radiology Associates P.C. for purposes of determining

Dr. Stephenson's rights relative to partnership distributions.

Facts

Plaintiff RDIA was formed in 1985 as a partnership comprised by the partners of two practices: Rochester Radiological Associates, P.C. ("RRA") and Monroe Radiological Associates, P.C. ("Monroe"). RDAI's Partnership Agreement ("the Agreement") states the following as to its "Creation, Continuation, and Purpose":

> Pursuant to an agreement dated December 1, 1985, certain persons associated themselves as a partnership (the "Partnership") pursuant to the Partnership Law of the State of New York for the purpose of engaging in the medical practice of diagnostic imaging, under the name Rochester Diagnostic Imaging Associates and/or such other names as may be chosen by the Partners and to acquire, lease, hold, use and dispose of real and personal property in connection therewith. Pursuant to this Partnership Agreement, which replaces the December 1, 1985 agreement in its entirety, the persons whose signatures are set forth below (the "Partners") hereby continue that Partnership, but solely for the purpose of engaging in the medical practice of diagnostic imaging using magnetic resonance scanning technology and, at the Hudson Avenue location referred to in Section 1.3 below, engaging also in plain film imaging and mammography.

Agreement, ¶1.1.

There are two components to the MRI diagnostic process. The first is the "technical" component, which involves the process of taking the scan and the attendant costs. This process usually involves a technologist and an assistant and sometimes involves

injecting a contrast media. If such an injection is necessary, it must be injected by a nurse or physician. The second component is the "professional" component and involves a radiologist viewing and interpreting the images and rendering a diagnostic report. The Agreement provides that income from the professional component is split "in proportion to the number of hours the members of each Group spend providing professional services on behalf of the Partnership." Id. *at* ¶3.4.2. The Agreement further states:

> All expense items, whatever their source, shall be allocated pursuant to Section 3.4.1, and shall not be taken into account in computing Partnership Professional Service Income. The Groups shall be afforded opportunities to earn Professional Service Income proportionate to their members' aggregate Pro Rata Shares.

Id. As such, professional income is calculated without deductions for expenses. Id. Technical income, however, is calculated by deducting expenses and then distributed by pro rata share. Id. at ¶3.4.1.

The disagreement between the parties herein initially arose over the interpretation of Paragraphs 3.4.1 and 3.4.2. Defendants contend, and plaintiffs dispute, that the former could opt not to provide any professional services under the Agreement. Defendants rely upon Paragraph 3.4.2's reference to "opportunities to earn Professional Service Income" provided to RRA and Monroe as evidence that provision of such services was

voluntary, and not required by the Agreement. Defendants further point to the absence of any mandate in the Agreement as to the provision of such services. It is not disputed that the technical component income generated by RDIA is substantially higher than the professional service income.

From the inception of the partnership until the fall of 2000, RRA provided professional services coverage for RDIA five out of every eight weeks, and Monroe provided professional services coverage three out of every eight weeks. By 2000, however, several Monroe partners had withdrawn from the RDIA partnership, and Monroe purchased their shares on each occasion. By 2001, defendant Stephenson was the sole Monroe partner in RDIA.

On September 8, 2000, Dr. Stephenson notified plaintiffs that he was "no longer available to do regular reading at RDI." Affidavit of Dr. Segal, Exhibit F. Plaintiffs responded to this correspondence, indicating that he was abandoning his professional involvement with RDIA and breaching the Agreement. Id. at Exhibit G. The parties then underwent efforts to resolve the dispute by buying out Dr. Stephenson's interest in RDIA. These efforts were not ultimately fruitful, and Dr. Stephenson ceased the negotiations.

Since approximately October of 2000, RRA began fully staffing the professional services coverage for RDIA.

Thereafter, plaintiffs contend they decided to increase the compensation paid to physicians fulfilling professional services to RDIA.

Plaintiffs further contend that Dr. Stephenson has not participated or contributed to the administrative functioning of RDIA since August of 2000. Thus, plaintiffs contend that, in early 2001, RRA began charging RDIA $800 monthly as an administrative fee. The fee was later increased to $1,200.00.

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. Zimber, 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). CPLR 3212(e) allows a court to grant partial summary judgment, as is sought by defendants.

Provision of Professional Services

The principles of contract interpretation are well settled. "'The best evidence of what parties to a written agreement intend is what they say in their writing.'" Greenfield v. Philles Records, 98 N.Y.2d 562, 569 (2002), *quoting* Slamow v. Del Col, 79 N.Y.2d 1016, 1018 (1992). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Id.

> A familiar and eminently sensible proposition of law is that, when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing (see, e.g., Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 269-270, 557 N.Y.S.2d 851, 557 N.E.2d 87; Judnick Realty Corp. v. 32 W. 32nd St. Corp., 61 N.Y.2d 819, 822, 473 N.Y.S.2d 954, 462 N.E.2d 131; Long Is. R.R. Co. v. Northville

> Indus. Corp., 41 N.Y.2d 455, 393 N.Y.S.2d 925, 362 N.E.2d 558; Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365, 239 N.Y.S.2d 865, 190 N.E.2d 230). That rule imparts "stability to commercial transactions by safeguarding against fraudulent claims, perjury, death of witnesses * * * infirmity of memory * * * [and] the fear that the jury will improperly evaluate the extrinsic evidence." (Fisch, New York Evidence § 42, at 22 [2d ed].) Such considerations are all the more compelling . . . where commercial certainty is a paramount concern.

W.W.W. Associates, Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). See also Lee v. Tetra Tech, Inc., 14 Misc.3d 1235(A), *5 (Sup. Ct. Monroe Co. 2007). "Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous." South Rose Associates, LLC v. International Business Machines Corp., 4 N.Y.3d 272, 277-78 (2005). See also, Lee, 14 Misc.3d at *6 (stating that the extrinsic evidence "is not admissible so long as the court finds that the contractual provisions in question are unambiguous").

As the party moving for summary judgment, defendants "bore the burden of establishing that its interpretation of the buy-sell agreement is the only construction that can fairly be placed upon it." Sullivan v. Troser Management, Inc., 34 A.D.3d 1233 (4th Dept. 2006). Defendants have met their burden in this regard. Plaintiffs' proposed interpretation of the Agreement is not reasonable, as it lacks any support in the unambiguous language of the Agreement. The Agreement is not "reasonably

susceptible of more than one interpretation." Chimart Assoc. v. Paul, 66 N.Y.2d 570, 573 (1986).

Not only does the Agreement not require the provision of any certain level of professional services, but it does not require the provision of professional services at all. The only reference to the provision of professional services is in Paragraph 3.4.2, where the parties are "afforded opportunities to earn Professional Service Income proportionate to their members' aggregate Pro Rata Shares." An opportunity to provide professional services is, by definition, not a mandate to provide such services, whether at any particular level or at all. Stevenson receives no professional service income and does not claim the right to any. As such, plaintiffs' reading of the Agreement, which seeks to require defendants to provide professional services, is not plausible. Paragraph 3.4.2, as quoted herein, merely gives RRA and Monroe the opportunity to elect to perform services. There is no ambiguity in the Agreement, and plaintiffs' proposed reading defies the Agreement's clear language. As there is no ambiguity, the court need not look to extrinsic evidence. See Lee, 14 Misc.3d at *4-6.[1] See also, Eustis Mining Co. v. Bear, Soundheimer & Co.,

[1] Which collected authority as follows:
South Road Associates, LLC v. International Business Machines Corporation, 4 NY3d 272, 278 (2005)("extrinsic evidence such as the conduct of the parties may not be considered"); Slatt v. Slatt, 64 N.Y.2d 966, 967

Inc., 239 F. 976, 984-85 (S.D.N.Y. 1917)(L. Hand, J.).

Defendants' motion for summary judgment is granted in this respect. Defendants' motion for partial summary judgment seeks, in part, a declaration as to the rights of the parties under the Agreement. The court declares that the provision of professional services is not required by the Agreement.

(1985)("no need here to examine the conduct of the parties over the intervening years to ascertain their intent in respect to" an unambiguous contractual provision), citing City of New York v. New York City Ry. Co., 193 N.Y. 543, 549("controlling distinction between the two series of cases is that in one there was an ambiguity in the grant and in the other there was not"), 550("the doctrine is never applied unless the door is opened by an ambiguity, which is the foundation of the principle upon which the doctrine is founded"); Brad H. v. City of New York, 33 AD3d 301 (1st Dept.2006), . . . [;] Robinson v. Robinson, 81 A.D.2d 1028, 1029 (4th Dept.1981)("It is only on the determination of the meaning of an indefinite or ambiguous contract that the construction placed upon the contract by the parties themselves as established by their conduct is to be considered by the court and is of importance in ascertaining the contract meaning.") See also, Surlak v. Surlak, 95 A.D.2d 371, 375 (2d Dept.1986)(quoting Robinson). . . [;] International Klafter Co., Inc. v. Continental Cas. Co., Inc., 869 F.2d 96, 100 (2d Cir.1989)("any conceptions or understandings any of the parties may have had during the duration of the contracts is immaterial and inadmissible"); Metro. West Asset Mgmt., LLC v. Shenkman Capital Mgmt., Inc., 2005 WL 1963943, No. 03-5539, slip opn. at 8 & n. 22 (S.D.NY Aug 16, 2005); 11 Richard A. Lord (ed.), Williston on Contracts § 32:14, at 493-94 & cases collected at n. 28 (citing the Fourth Department's decision in Robinson v. Robinson, supra) (4th ed.1999)("the parties' conduct, no matter how probative in the abstract, will not be considered by many and perhaps most courts unless the contract is ambiguous").

Alleged Unauthorized Transfers

The balance of defendants' motion for partial summary judgment seeks a declaration as to multiple alleged ongoing breaches of fiduciary duty and an order for interim accounting to include Rochester Radiology Associates P.C. for purposes of determining Dr. Stephenson's rights relative to partnership distribution. Defendants contend that the daily stipends, administrative fees, and payments to residents are unauthorized transfers of RDIA assets violative of the Agreement. In response, plaintiffs claim that there is a question of fact as to whether RRA is entitled to additional compensation.

The fee paid by RDIA in consideration of RRA allegedly providing 100% of the administrative support to RDIA is not authorized by the Agreement, New York's Partnership Law, or the case law. It is undisputed that the Agreement does not allow for the payment of such a fee. As defendants contend, there are only three authorized distributions under the Agreement: (1) share of profits under §3.4.1; (2) professional services revenue under §3.4.2; and (3) reimbursement at "actual direct cost" of technical and clerical services provided to the partnership by RRA under §5.9 of Agreement. Inasmuch as there is no provision in the Agreement for compensation of partners, Partnership Law Section 40(6) does not allow a partner to be compensated for the performance of partnership duties.

Plaintiffs, however, cite Steinberg v Goodman, 27 N.Y.2d 304 (1970), as authority for the proposition that Partnership Section 40(6) applies where partners have equal interests, liabilities, and responsibilities and does not apply "where the interests, liabilities and responsibilities of the general partners and the special partners were not equal." Id. at 309. Steinberg involved a partnership formed to hold title to a shopping center. After the lessee defaulted on the lease and the partnership determined to sell the property, the general partners took a $10,000 fee for services rendered in negotiating the sale. The limited partners sued to recover the fee. Id. at 306-07. Even though the $10,000 was not contemplated in the partnership agreement, and in fact was contrary to its language which allowed only for a draw of $1,200 annually in consideration for acts performed by the general partners, the Court of Appeals determined that there was an issue of fact and reversed a lower court ruling. Id. at 308. The Court of Appeals decided that there was a question of fact as to whether the general partners were entitled to that additional compensation which arose solely due to the unexpected default under the lease by the lessee. Id.

Plaintiffs argue that the instant matter is similar to Steinberg, in that the administrative fee arose only when Monroe ceased providing professional services in derogation of the Agreement's requirements. As stated above, defendants have no

requirement to provide any particular level of professional services under the Agreement. Consequently, the instant case bears no similarity to the situation posed to the Court of Appeals in Steinberg. Defendants' motion is granted as to the administrative fee. The court declares that plaintiffs were not entitled by the Agreement or New York law to pay themselves an administrative fee.

As to the charges for residents, there is a question of fact as to the nature of the charges: professional or technical. If the payments were technical, then the court fails to understand defendants' contention that how such payments had to be authorized by both Managing Partners under the Agreement. Paragraph 5.9 of the Agreement, pertaining to technical and clerical services, does not include such a requirement. Defendants' motion for partial summary judgment is denied as to the resident charges.

No question of fact exists as to whether defendants suffered damage as a result of the payment of $1,000 daily stipends. Plaintiffs contend that even if the $1000 daily stipends had not been paid, but were included as technical income, that income would have been offset by the significant expense associated with hiring, as suggested by Defendants, *locum tenens* physicians to cover the weeks previously covered by Monroe. Plaintiffs go on to admit that Dr. Stephenson actually received $2,005,411 in

technical income over the past five years, and that had *locum tenens* physicians been utilized, he would have received $2,017,481 in technical income. The difference, as noted by Plaintiffs, is $12,070. While plaintiffs appear to dismiss this difference as creating a question of fact or not constituting a cognizable damage, plaintiffs are incorrect. Plaintiffs' calculations demonstrate that, even under their calculation (which may or may not be accurate), defendants suffered damage as a result of the $1,000 daily stipend payment. Defendants' motion is granted as to the daily stipend payments. The court declares that plaintiffs were not entitled by the Agreement or New York law to pay themselves a daily stipend.

Fiduciary Duty

Defendants seek a declaration as to the alleged multiple ongoing breaches of fiduciary duty allegedly committed by Dr. Segal. "[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466 (1989). The Court of Appeals has further stated:

> This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty (citation omitted).

Id. These concepts apply fully to partners in a partnership.

Partners cannot engage in self-dealing, or otherwise put "personal interests in conflict with those of the partnership." See Reiff v. Shifrel, 268 A.D.2d 514, 515 (2d Dept. 2000). See also Kantor v. Mesibov, 8 Misc.3d 722, 724 (Sup. Ct. Nassau Co, 2005).

Here, defendants' claims as to fiduciary breaches hinge upon the alleged unauthorized transfers under the Agreement discussed above. As determined above, those transfers (the administrative fee and daily stipend) were in fact made in derogation of the Agreement. In making the transfers, Dr. Segal took money out of the partnership for the benefit of himself, RRA, and RRA's partners. These actions constitute breaches of his fiduciary duties to RDIA. Defendants' motion seeks a declaration as to the multiple ongoing breaches of fiduciary duty. Defendants' motion in that regard is granted. The court declares that the transfers for payment of the administrative fee and daily stipends constituted breaches of fiduciary duty.

Accounting

Defendants' request for an accounting is premised upon Dr. Stephenson's allegations that he has been wrongfully excluded from partnership business and that Dr. Segal has committed breaches of his fiduciary duties. New York Partnership Section 44 states:

> Any partner shall have the right to a formal account as to partnership affairs:

> 1. If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
>
> 2. If the right exists under the terms of any agreement,
>
> 3. As provided by section forty-three,
>
> 4. Whenever other circumstances render it just and reasonable.

Partnership Law Section 43 makes partners accountable as fiduciaries:

> 1. Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

The circumstances before the court compel an interim accounting. Dr. Segal and RRA must account for all improper transfers, as discussed above. Defendants' motion is granted in that regard.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: July 25, 2007
Rochester, New York