Radiation Oncology Servs .of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc.
2024 NY Slip Op 34991(U)
July 22, 2024
Supreme Court, Cortland County
Docket Number: Index No. EF15-462
Judge: Mark G. Masler
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, via Microsoft Teams at the Cortland County Courthouse, in the City of Cortland, New York, on the 24th day of June, 2024.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

RADIATION ONCOLOGY SERVICES OF CENTRAL NEW YORK, P.C. and MICHAEL J. FALLON, M.D.,

Plaintiffs

v.

OUR LADY OF LOURDES MEMORIAL HOSPITAL, INC.,

Defendant.

DECISION AND ORDER

Index No. EF15-462

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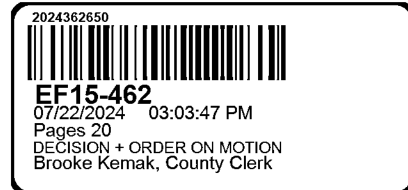

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MARK G. MASLER, J. S. C.

Michael Fallon is a physician specializing in radiation oncology and the sole shareholder of Radiation Oncology Services of Central New York, P.C. (ROSCNY). From June 1, 2001 through April 10, 2015, ROSCNY was the exclusive provider of radiation oncology services at Our Lady of Lourdes Memorial Hospital, Inc. (Lourdes) pursuant to a written agreement dated June 19, 2001 that was amended three times – in 2006, 2011, and 2014 (herein the coverage agreement or contract). Lourdes suspended Fallon's clinical privileges on April 10, 2015 and plaintiffs commenced this action on July 24, 2015. Although Lourdes conditionally restored Fallon's clinical privileges on August 10, 2015, it terminated the coverage agreement, effective immediately, on August 11, 2015. Plaintiffs thereafter served amended complaints asserting additional causes of action based on termination of the contract.[1] All parties ultimately moved for summary judgment. On appeal from this court's decision and order, the Appellate Division, Third Department: (1) granted summary judgment to plaintiff ROSCNY establishing the liability of defendant Lourdes on the first and second causes of action; (2) affirmed this court's grant of summary judgment to ROSCNY establishing the liability of Lourdes on the fourth cause of action; (3) affirmed this court's grant of summary judgment to plaintiff Fallon establishing the liability of Lourdes on the fifth cause of action; and (4) affirmed, or granted, dismissal of all remaining causes of action and counterclaims (*see Radiation Oncology Servs. of Cent. N.Y., P.C. v Our Lady of Lourdes Mem. Hosp., Inc.*, 221 AD3d 1324 [3d Dept 2023]). Accordingly, Lourdes is the only remaining defendant, and the only issues remaining for trial are the damages

[1] The second amended complaint filed on March 7, 2018 (NY St Cts Elec Filing [NYSCEF] Doc No. 295) is the controlling complaint to which reference may be made with respect to the causes of action referred to herein.

that may be awarded to plaintiffs on the four surviving causes of action for breach of contract.[2]

In connection with the jury trial that is scheduled to commence on September 9, 2024, the parties have made several motions in limine. Plaintiffs move for an order precluding defendant from offering any evidence at trial that plaintiffs had a duty, or failed, to mitigate their damages, or that plaintiffs' damages should be reduced by post-breach income earned by Fallon or any non-party corporation owned by him (NYSCEF motion number 19). Defendant moves for an order: (1) precluding plaintiffs from offering any evidence at trial regarding Fallon's reputation (NYSCEF motion number 20); (2) requiring that all damage calculations adhere to strict corporate form and, therefore, precluding plaintiffs from offering any evidence at trial calculating damages based on an alter-ego theory (NYSCEF motion number 21); and (3) precluding plaintiffs from calling V. James Sinopoli or Lowell A. Seifter to offer expert opinion testimony at trial or offering into evidence any affidavit, report, or other statement from either of them (NYSCEF motion number 22).

NYSCEF Motion No. 21 – Damage Calculations and
NYSCEF Motion No. 19 – Mitigation of Damages

In the first and second causes of action, ROSCNY asserts breach of contract claims for the period from April 10, 2015 through August 10, 2015, respectively consisting of professional service fees and medical director fees it would have earned. In the fourth cause of action, ROSCNY asserts a breach of contract claim seeking compensation for professional service fees it would have earned after defendant terminated the contract on August 11, 2015. In the fifth cause of action, Fallon asserts a breach of contract claim, as an intended third-party beneficiary of the contract, for fees he would have received as medical director had defendant not terminated

[2] An order amending the caption is filed concurrently herewith.

the contract on August 11, 2015. Notwithstanding the multiple grounds for liability, plaintiffs may only recover proven damages once; double recovery is not permitted. As plead: (1) ROSCNY is entitled to seek damages for two different periods of time, for (a) professional service and medical director fees during the period of suspension, pursuant to the first and second causes of action; and (b) professional service fees following termination of the contract on August 11, 2015, pursuant to the fourth cause of action; and (2) Fallon is entitled to seek damages for loss of compensation as medical director following termination of the contract on August 11, 2015, pursuant to the fifth cause of action. As plead, Fallon's direct claim is limited to loss of compensation as medical director following defendant's termination of the contract on August 11, 2015, and, to the extent that a determination is made on this cause of action, ROSCNY is precluded from recovering damages therefor.

The fundamental dispute between the parties is how plaintiffs' damages are to be calculated, given that ROSCNY is a professional services corporation taxed as a separate entity pursuant to subchapter C of chapter 1 of the Internal Revenue Code. In summary, plaintiffs contend that salaries paid to shareholders who provide services to the corporation, like Fallon, must be deducted from the corporation's expenses when determining profit, thereby increasing the corporation's profit by a like amount, while defendant asserts that salaries paid to shareholders are expenses which must be included in the corporation's expenses when determining profit. This dispute must be resolved first to allow proper consideration of the extent of any duty plaintiffs may have had to mitigate damages and the admissibility of the opinions of the parties' respective expert witnesses regarding calculation of damages.

Defendant's argument is based primarily upon the principle applicable to ordinary business corporations that all expenses, including salaries paid to shareholders, are expenses of

the corporation that must be deducted when determining the corporation's profit. Plaintiffs, on the other hand, argue that professional corporations that are taxable under subchapter C must be treated differently because they commonly distribute all, or nearly all, of their profits to shareholders to avoid double-taxation of income at both the corporate and shareholder levels. They further assert, therefore, that including shareholder salaries in corporate expenses that are deducted in determining profit understates the benefit earned pursuant to the contract. Whether a professional services corporation is to be treated differently than an ordinary business corporation for the purpose of determining damages for breach of contract appears to be an issue that has not been directly addressed in New York.

Defendant principally relies on two cases which stand for the proposition that professional corporations are to be treated no differently than business corporations, on the basis that one who obtains the advantages of the corporate form must also bear its disadvantages, thereby requiring that the salaries of shareholders be included in expenses and deducted from income when determining damages for breach of contract (*see Anesthesiologists Associates of Ogden v St. Benedict's Hospital*, 884 P2d 1236 [Utah 1994]; *Southern Bell Telephone and Telegraph Company v Kaminester*, 400 So 2d 804 [Fla 3rd Dist Ct App 1981]). Defendant did not cite, and the court did not locate, any cases favorably following either *Anesthesiologists Associates of Ogden* or *Southern Bell Telephone and Telegraph Company* outside of Utah or Florida, respectively, with respect to breach of contract damages incurred by professional corporations.

Plaintiffs principally rely on *Bettius & Sanderson, P.C. v National Union Fire Ins. Co. of Pittsburgh, PA*, 839 F2d 1009 (4th Cir 1988). The *Bettius* court began by considering the principle underlying *Southern Bell Telephone and Telegraph Company* – that the salaries of all

employees, including any who may be shareholders, are included in the expenses of an ordinary business corporation when determining profit or damages – and noted that it resulted in the earnings of the corporation being taxed twice: once at the corporate level and again on the shareholders' receipt of dividends. The *Bettius* court noted that this disadvantage is accepted by business corporations as a necessary cost of obtaining capital. However, it reasoned that

> [t]he aim of a professional corporation is different. In a professional corporation, the shareholders and the principals are, in fact, one and the same. Therefore, the professional corporation desires to disburse its earnings in order to avoid having income taxes imposed twice on what is in reality the same group of people – the principals who are required by law to be both shareholders and professional employees. This is accomplished by distributing all or most of its earnings to the principals as compensation before calculating the professional corporation's net income. The result, of course, is that the corporation's net income for tax purposes is almost always at or near zero, but it is unrealistic to suggest that the corporation is not earning a profit. If we were to treat a professional corporation's net income as its net profit for the purpose of proving loss of profits it would rarely, if ever, show a profit even when its shareholders were earning large incomes. It would never be able to prove damages for lost profits if the wrongful act of another caused it harm (*id.* at 1013).

On this basis, the *Bettius* court concluded that the salaries of shareholders in a professional corporation must be considered in determining its actual profits. The court finds this reasoning to be persuasive, and notes that – unlike *Anesthesiologists Associates of Ogden* or *Southern Bell Telephone and Telegraph Company* – *Bettius* has been extensively followed in other jurisdictions (*see Stat Imaging, LLC v Medical Specialists, Inc., P.C.*, 2014 WL 5310256, *3, 2014 US Dist LEXIS 148597, *8-10 [ND Ill 2014] [applying the rule of *Bettius* and noting that the rule applied in *Anesthesiologists Associates of Ogden* would deprive the injured party of the benefit of its bargain]; *Sisters of Providence in Washington v A.A. Pain Clinic, Inc.*, 81 P3d 989, 1005-1007 [Alaska 2003] [comparing *Anesthesiologists Associates of Ogden* and *Bettius* before concluding that the reasoning in *Bettius* better reflects the actual losses of a professional corporation and prevents a wrongdoer from avoiding liability based on a technicality in corporate structure]; *see*

also HC Consulting, Inc. v Goodman, 2006 WL 3165035, *2, 2006, US Dist LEXIS 79821, *6-7 [ED Pa 2006]; *Atkins v Robbins, Salomon & Patt, Ltd.*, 2018 IL App [1st] 161961 [Ill App Ct 2018]; *Fidelity Nat. Bank v Jeffrey M. Kneller*, P.C., 194 Ga App 55 [Ga Ct App 1989]). Thus, the court adopts the rationale of *Bettius* and concludes that salaries ROSCNY paid to Fallon, its sole shareholder, are not to be included in the expenses of ROSCNY when determining its profit, or damages.[3]

The following well-known general principles govern mitigation of damages in this action. The law imposes upon an injured party the duty to mitigate damages (*see Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 74 [1966]; *Losei Realty Corp. v City of New York*, 254 NY 41, 48 [1930]). The failure to mitigate damages is an affirmative defense to be proven by the breaching party, which bears the burden of establishing not only that the injured party failed to make reasonable efforts to mitigate its damages, but also the extent to which such efforts would have diminished its damages (*see Fitzpatrick v Animal Care Hosp., PLLC*, 104 AD3d 1078, 1083 [3d Dept 2013]; *Assouline Ritz1 LLC v Edward I. Mills & Assoc., Architects, PC*, 91 AD3d 473, 474 [1st Dept 2012]; *LaSalle Bank N.A. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107 [1st Dept 2007]).

In addition to the foregoing general principles, there are two additional principles that are of particular import in this action. The first is that when a contract did not require the full-time services of the injured party, the post-breach income of the injured party is applied in mitigation of damages only when the breach afforded the injured party the ability to earn such income.

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[3] As noted above, double recovery of damages is not permitted; thus, with respect to the fifth cause of action, to the extent that medical director fees are included in ROSCNY's income, either (1) such medical director fees must be included in ROSCNY's expenses, which would allow Fallon to seek recovery of damages for loss of post-termination medical director fees; or (2) such medical director fees must be deducted from ROSCNY's expenses, which would result in them being included in ROSCNY's damages, thereby precluding Fallon from seeking recovery of damages for loss of post-termination medical director fees.

Specifically,

> "Where there is a breach of a contract for full-time personal services, ' "[t]he actual damage is measured by the wage that would be payable during the remainder of the term reduced by the income which the discharged employee has earned, will earn, or could with reasonable diligence earn during the unexpired term." ' (*Cornell v T. V. Dev. Corp.*, 17 NY2d 69, 74, quoting *Hollwedel v Duffy-Mott Co.*, 263 NY 95, 101.) It does not necessarily follow, however, that if the contract is not full-time, the nondefaulting party has no duty to mitigate damages. The obligation to mitigate damages turns upon the particular facts in the individual case, and applies when the employee or contractor is freed from his or her obligation to perform services called for in the contract, and as a consequence may turn his or her time and efforts, which otherwise would have been expended in performance of the contract, to other remunerative employment.
>
> "If the person relieved of his or her duties is *thereby* enabled to earn additional income, such additional income will mitigate the damages regardless of whether the contract requires full-time services. We emphasize '*thereby*', because if there is a factual finding that 'the injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he [or she] can be said to have "lost volume" and the subsequent transaction is not a substitute for the broken contract. The injured party's damages are then based on the net profit that he [or she] has lost as a result of the broken contract.' (Restatement [Second] of Contracts § 347, comment *f*, illustration 16; *see also*, § 350, comment *d*, illustration 10.) Thus, 'gains which were or could have been received by the nondefaulting party by entering into another contract or transaction should be used in reducing damages caused by a breach of contract promise *only where the breach gave rise to the opportunity to enter into those other contracts or transactions*' " (*Donald Rubin, Inc. v Schwartz*, 191 AD2d 171, 172 [1st Dept 1993] [internal quotation marks, footnote, and citations omitted; final emphasis added]; *accord Rebh v Lake George Ventures*, 241 AD2d 801, 803-804 [3d Dept 1997], citing *Donald Rubin, Inc. v Schwartz*, 191 AD2d at 171-172).

Thus, income earned by plaintiffs following breach will be used to reduce damages in mitigation only to the extent that defendant establishes that plaintiffs gained the ability to participate in the transaction from which the income was derived because of the breach. This is an inherently factual determination that must be made by the finder of fact.

The second additional principle concerns whether income earned personally by Fallon following breach may be applied to mitigate damages sustained by ROSCNY, or by him

personally. As a threshold matter, and as noted above, income may be considered in mitigation only if the resources used to generate the income were available only as a result of the breach. It is well-settled that such income may be applied to mitigate damages Fallon may recover individually, as an intended third-party beneficiary of the coverage agreement (*see Koch v Consolidated Edison Co. of N.Y.*, 62 NY2d 548, 558-559 [1984], *cert denied* 469 US 1210 [1985]; *Wenfang Liu v Mund*, 686 F3d 418, 421 [7th Cir 2012], citing Restatement [Second] of Contracts § 309 [4]).

It must next be determined whether qualifying income earned by Fallon following breach may be used to mitigate ROSCNY's damages. It can, and must be, to be consistent with the determination that salaries paid to him as sole shareholder of ROSCNY are to be deducted from the corporation's expenses when determining its profits on which damages are based. The Appellate Division, First Department has held that the sole shareholder of a corporation providing personal services, in the nature of a professional corporation like ROSCNY, has the duty to mitigate damages arising from breach of contract (*see Donald Rubin, Inc. v Schwartz*, 191 AD2d at 171-172). Further, it is especially noteworthy that on remand in *Bettius & Sanderson, P.C. v National Union Fire Ins. Co. of Pittsburgh, PA* – the foundational case for plaintiffs' argument that salaries paid to Fallon must be excluded from ROSCNY's expenses in determining profits, or damages – the court specifically held that amounts earned by the professional corporation's shareholders following breach were to be applied to mitigation of damages, observing that

> "[t]he professional corporation was permitted to show the amount disbursed to its principals in order to prove the loss caused by the defendant. *See Bettius I*, 839 F.2d at 1012–14. The principals, however, continued to practice law with other firms. Their earnings offset the loss they suffered when the defendant harmed the professional corporation in which they were formerly principals. The district court quite properly treated the professional corporation in effect as a partnership

> for the purpose of determining the principals' loss. *Cf. Johnson v. Oroweat Foods, Inc.*, 785 F.2d 503, 508–10 (4th Cir.1986) (partners' loss caused by breach of contract terminating partnership's business must be offset or mitigated by future earnings of partners)" (*Bettius & Sanderson, P.C. v National Union Fire Ins. Co. of Pittsburgh, PA*, 892 F2d 34, 35 [4th Cir 1989]).

It bears emphasizing that the determinations made herein regarding calculation of damages and mitigation thereof are consistent because they *include* income earned by the individual plaintiff to determine damages, and also *include* income earned by him following breach in mitigation of damages (to the extent defendant's breach of contract gave him the opportunity to earn such post-breach income). By contrast, plaintiffs advanced internally inconsistent and illogical positions regarding determination and mitigation of damages by arguing that income earned prior to breach should be treated differently than income earned after breach. In this regard, plaintiffs argued that they should be permitted to recover damages for all income realized by the corporate and individual plaintiffs prior to breach, without there being any corresponding duty for the individual plaintiff to mitigate damages after breach. In other words, plaintiffs proposed to *include* income earned by the individual plaintiff prior to breach in determining damages, and *exclude* income he earned after breach in mitigation of damages. Based on the foregoing, NYSCEF motion numbers 19 and 21 are denied.[4] The parties are afforded the opportunity to have their respective experts review this decision and order and revise their reports as they may believe warranted based on the determinations made herein regarding determination and mitigation of plaintiffs' damages. Revised expert disclosure, if

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[4] Notwithstanding that these issues were raised by motion in limine, the provisions of this order regarding determination and mitigation of damages are appealable of right (*see* CPLR 5701 [a] [2] [iv], [v]; *Calabrese Bakeries, Inc. v Rockland Bakery, Inc.*, 139 AD3d 1192, 1194 [3d Dept 2016], citing *Scalp & Blade v Advest, Inc.*, 309 AD2d 219, 224 [4th Dept 2003], *Franklin Corp. v Prahler*, 91 AD3d 49, 54 [4th Dept 2011]; *see also Kennedy v Nimons*, 205 AD3d 1119, 1119 [3d Dept 2022]; *Hauser v Fort Hudson Nursing Ctr., Inc.*, 202 AD3d 45, 48 n 1 [3d Dept 2021]).

any, shall be filed via NYSCEF by the deadline set forth below.

The foregoing determinations regarding mitigation of damages will be applied at trial as follows. No evidence will be admitted that ROSCNY had any duty to mitigate damages during the first breach period, from April 10, 2015 through August 11, 2015, for two reasons. First, the nature of the breach and the uncertain period of suspension make it unreasonable as a matter of law to impose a duty of mitigation on ROSCNY. The Appellate Division, Third Department granted ROSCNY summary judgment as to liability on the first and second causes of action, on the basis that that Lourdes breached the contract during this period by refusing to allow ROSCNY to hire locum tenens physicians or designate another medical director in Fallon's stead. There were not reasonable substitutes for loss of the opportunity to hire replacement physicians. Moreover, it would be manifestly unreasonable to impose a duty on plaintiffs to mitigate a short-term breach that was founded on the suspension of Fallon for an unknown duration – a suspension that Fallon was vigorously contesting. Second, and in any event, defendant has not represented that it will offer proof that plaintiffs earned income during this period that should be considered in mitigation.

To meet its burden of proof on mitigation of damages, defendant represented that it intends to rely solely upon three sources of post-breach income: income derived from a contract by which Radiation Oncology Services, P.C. (ROS), another corporation owned solely by Fallon, provided radiation oncology services to the Rome Memorial Hospital, Inc. (RMH), and Fallon's employment by Guthrie Medical Group, P.C. and Quincy Medical Group. With respect to the ROS contract with RMH, it must first be determined whether the profit must be considered in mitigation of ROSCNY's damages, or whether Fallon had legitimate business reasons for having ROS, rather than ROSCNY, enter into the contract that preclude the application of such income

to mitigation of ROSCNY's damages. The parties may address this issue in the supplemental memoranda of law they are hereinafter directed to file.

With respect to the ROS contract (if it is determined that income therefrom can be considered in mitigation of ROSCNY's damages) and the income Fallon earned from Guthrie Medical Group and Quincy Medical Group, it must be determined whether ROS and Fallon were able to take advantage of these opportunities only because of Lourdes's breach of contract; in other words, that they only had the time and resources to participate in such opportunities as a result of the breach. This is a factual determination to be made by the finder of fact. Any income that meets the foregoing tests can then be considered by the finder of fact in mitigation of plaintiffs' damages.

Finally, the parties' arguments identify two additional issues regarding calculation of damages that were not squarely raised by the motions or fully addressed, specifically (1) how the term of the contract for which damages may be awarded is to be determined in light of the fact that the contract provides for annual renewal, and only allows defendant to terminate it (a) for cause; (b) upon Lourdes no longer providing radiation oncology services; or (c) upon the permanent disability or death of Fallon, or upon him ceasing to provide services to Lourdes as a result of separating from ROSCNY (*see* NYSCEF Doc No. 3, first amendment to coverage agreement, at 2; and (2) the standards for determining whether damages awarded for a period extending beyond judgment must be discounted and, if so, the applicable discount rate (*see e.g.* *Village of Ilion v County of Herkimer*, 23 NY3d 812, 818-820 [2014]). The parties are directed to submit memoranda of law on the three additional issues identified in this section of this decision and order (i.e. whether income from ROS's contract with RMH can be considered in mitigation of ROSCNY's damages; the term over which damages are to be calculated; and issues

related to the potential discount of future damages) on the schedule set forth below.

NYSCEF Motion 20 – Fallon Reputation Evidence

Defendant moves to preclude plaintiffs from offering any evidence regarding the reputation of Fallon at trial. Plaintiffs concede that Fallon's reputation, or any damage thereto, is not relevant to their breach of contract damages claims, but note that Fallon is expected to testify at trial and, in that capacity, is entitled to provide background information regarding his career in support of his testimony (*see* NYSCEF Doc No. 986, Leberman affirmation, ¶¶ 4-5, 9-12). Based on the foregoing, the motion is granted to the extent of precluding plaintiffs from offering any evidence regarding Fallon's reputation, or any damage allegedly caused thereto by any act of defendant, or any of its officers, employees, or agents. However, this order shall not preclude Fallon from offering background information regarding his qualifications and experiences that may be relevant to testimony he is permitted to offer at trial, such as his education, training, licenses, certifications, and work history.

NYSCEF Motion 22 –Plaintiffs' Expert Witness Testimony

Defendant moves to preclude plaintiffs from calling V. James Sinopoli or Lowell A. Seifter to offer expert opinion testimony at trial. Defendant contends that Sinopoli lacks the qualifications to testify as an expert witness on the issue of plaintiffs' damages, and that the substance of his opinion fails to meet the *Frye* standard based on their criticism of the methodology he employed in determining revenues and expenses. Sinopoli's curriculum vitae was included in plaintiffs' expert disclosure. Sinopoli provided further information about his experience, particularly in the area of health care law, in the affidavit that plaintiffs submitted in opposition to defendant's motion (*see* NYSCEF Doc No. 995). Taken together, they presumptively establish his qualifications to testify as an expert in the trial of this action.

Consideration of the substance of Sinopoli's initial report is not warranted at this time, in light of the opportunity afforded to the parties' experts to consider revising or amending their respective reports based on the court's determination of the methodology to be employed in calculation of plaintiffs' damages and mitigation thereof.

Defendant argues that Seifter may not be permitted to offer his legal opinion regarding interpretation of the contract, which is solely the province of the court. The court agrees (*see Booston LLC v 35 W. Realty Co., LLC*, 213 AD3d 553, 554 [1st Dept 2023], *lv denied* 40 NY3d 909 [2024]; *Good Hill Master Fund L.P. v Deutsche Bank AG*, 146 AD3d 632, 637 [1st Dept 2017]; *Roman v 233 Broadway Owners, LLC*, 99 AD3d 882, 886 [2d Dept 2012]). However, plaintiffs explain that they do not plan to seek Seifter's opinion regarding interpretation of the contract, but rather to elicit his testimony if necessary to rebut defendant's proof regarding mitigation of damages. Specifically, plaintiffs contend that Seifter should be permitted to testify, based on his extensive experience in the area of health care law and knowledge of the market for health care services in upstate New York, that plaintiffs were unable to replace the contract at issue because major health care providers in the market area no longer contract to obtain radiation oncology services from outside providers, such as ROSCNY.

Seifter's anticipated testimony is not relevant to mitigation of damages. First, plaintiffs' duty to mitigate is not limited to replacement of the contract with a new one containing similar terms. Rather, the duty to mitigate requires plaintiffs, as the injured parties, to utilize resources that became available as the result of the breach in a reasonably productive fashion to earn income, or profit, to offset against any losses caused by the breach. Further, Seifter's proffered testimony that plaintiffs would be unable to obtain other contracts similar to the one at issue in this action is not relevant to the issue of mitigation because defendant does not intend to argue

that plaintiffs failed to mitigate their damages by obtaining a similar contract with a different healthcare provider. Rather, defendant has represented that it is limiting its proof regarding mitigation of damages to three specific instances, namely, income derived from ROS's contract with RMH and Fallon's employment by Guthrie Medical Group, P.C. and Quincy Medical Group. Thus, Seifter's proffered testimony that plaintiffs would be unable to obtain other contracts similar to the one at issue in this action is not relevant to the issue of mitigation and, therefore, plaintiffs are precluded from calling Seifter as a witness.

Based on the foregoing, defendant's motion is granted to the extent of precluding Seifter from testifying and is otherwise denied, without prejudice to defendant making another motion to preclude all, or any part, of Sinopoli's opinion after the deadline established herein for plaintiffs to file any revised or amended expert disclosure regarding Sinopoli.

Other Trial Issues

The only issue in this trial is damages. Evidence regarding the facts underlying defendant's breach of contract is not relevant and would be prejudicial to the parties. Accordingly, the court will make every effort to ensure that only evidence that is directly related to determination of damages is presented to the jury, and that any evidence that is not directly relevant to the determination of damages, or that is unduly prejudicial, is excluded. Further, counsel will be precluded from making any argument or statement in the presence of the jury that is not based on evidence that is determined to be admissible under the foregoing standards. In this regard, in addition to the rulings set forth above, no evidence, including testimony, or statement will be permitted that refers in any way to the "suspension" of Dr. Fallon. Finally, to provide the jury with the appropriate context, the court will read the following introductory statement to the jury prior to opening statements:

Plaintiff Michael Fallon is a physician specializing in radiation oncology and he is the sole shareholder of plaintiff Radiation Oncology Services of Central New York, P.C., a professional corporation which you may hear referred to by the acronym R-O-S-C-N-Y, or ROSCNY. From June 1, 2001 through April 10, 2015, ROSCNY was the exclusive provider of radiation oncology services at Our Lady of Lourdes Memorial Hospital, Inc., or Lourdes, in Binghamton, pursuant to a written contract dated June 19, 2001 that was amended three times – in 2006, 2011, and 2014. The contract, with all amendments, will be in evidence, the witnesses and attorneys may refer to its terms during the trial, and it will be available for you to examine during deliberations.

In previous court proceedings, it has been determined that plaintiffs are entitled to claim damages based on Lourdes's breach of the contract. In this trial, the only issue you as the jury will be asked to address is to determine what damages, if any, are to be awarded to plaintiffs for Lourdes's breach of the contract. You will be asked to separately determine damages for two different time periods: The first time period consists of the four months from April 10, 2015 through August 10, 2015, when Lourdes breached the contract by refusing to permit ROSCNY to hire replacement physicians – which you may hear referred to as locum tenens physicians – when plaintiffs were precluded from providing services to Lourdes under the contract for reasons not relevant to the determination of damages. The second time period begins on August 11, 2015, when Lourdes breached the contract by unilaterally terminating the contract without giving plaintiffs sufficient advance notice as required by the contract. You will now hear the opening statements from counsel.

Conference and Trial Schedules

The jury trial is currently scheduled to commence on September 9, 2024. The court was recently notified that the elevator in the Cortland County Courthouse will be replaced over a 10-week period. Work began today. Thus, it is not anticipated that there will be a working elevator in the building when the trial is presently scheduled. Inasmuch as the main courtroom is located on the second floor of the courthouse, a jury trial may not proceed in the absence of an elevator. Consequently, the trial must be, and hereby is adjourned without date. The pretrial conference that was scheduled to be held on August 30, 2024 is canceled, and the deadline for submission of proposed jury charges and verdict sheets prior to that conference is adjourned without date. A conference to consider further proceedings in light of this decision and order, and to hear argument on the additional issues related to damages identified above (whether income from ROS's contract with RMH can be considered in mitigation of ROSCNY's damages; the term over which damages are to be calculated; and issues related to the potential discount of future damages), will instead be held at the time previously scheduled for the pretrial conference, i.e. **August 30, 2024 at 9:00 a.m.**, by Microsoft Teams at a link which the court will provide prior to the conference. By **August 12, 2024**, counsel shall file via NYSCEF memoranda of law addressing the additional issues related to damages identified above. By **August 19, 2024**, any revised or supplemental expert disclosure must be filed via NYSCEF. By **August 26, 2024**, counsel shall file via NYSCEF: (1) reply memoranda of law on the additional damages issues; and (2) any requests for revision to the statement set forth above that the court proposes to read to the jury at the commencement of trial.

This decision constitutes the order of the court. The filing of this decision and order, or transmittal of copies hereof, by the court shall not constitute notice of entry (*see* CPLR 5513).

Dated: July 22, 2024
Cortland, New York

ENTER

MGML Digitally signed by Hon. Mark G. Masler
DN: C=US, OU=Cortland County Supreme Court, O=Sixth Judicial District, CN=Hon. Mark G. Masler, E=crtmasler_chambers@nycourts.gov
Date: 2024.07.22 13:54:55 -04'00'

HON. MARK G. MASLER
Supreme Court Justice

The following documents filed with the Cortland County Clerk via the New York State Courts Electronic Filing System were considered herein (*see* CPLR 2219 [a]):

Document Numbers 922-931; 934-935; 937-949; 951-964, 966-969; 971-976; 978-984; 986-991; 993-997; 1000-1001; 1004.