

**Radiation Oncology Servs. of Cent. N.Y., P.C. v Our  
Lady of Lourdes Mem. Hosp., Inc.**

2024 NY Slip Op 34992(U)

August 30, 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 30<sup>th</sup> day of August, 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.

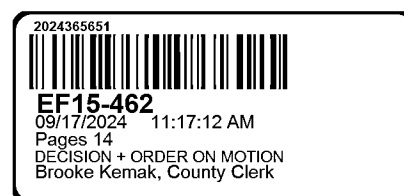
**DECISION AND ORDER**

Index No. EF15-462

**APPEARANCES:**

WILLIAM J. LEBERMAN, ESQ.  
Attorney for Plaintiffs  
One Lincoln Center, Suite 1110  
110 W. Fayette Street  
Syracuse, New York 13202  
Via NYSCEF

GOLDBERG SEGALLA, LLP  
By: Kenneth M. Alweis, Esq.  
Attorneys for Plaintiffs  
5786 Widewaters Parkway  
Syracuse, New York 13214  
Via NYSCEF



HINMAN, HOWARD & KATTELL, LLP

By: Jeanette N. Warren, Esq.

James S. Gleason, Esq.

Attorneys for Defendant

80 Exchange Street

P.O. Box 5250

Binghamton, New York 13902-5250

Via NYSCEF

**MARK G. MASLER, J. S. C.**

Trial of this action was initially scheduled to commence on September 9, 2024, and the parties were provided with a schedule for making pretrial motions in limine. The parties then made several motions in limine. In relevant part, plaintiffs moved 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 (NY St Cts Elec Filing [NYSCEF] motion number 19), and defendant moved for an order 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). A decision and order deciding the motions in limine, in part, was entered on July 22, 2024 (NYSCEF Doc Nos. 1006-1009; herein the prior decision and order).<sup>1</sup> In the prior decision and order, the court also directed counsel to further address issues relevant to the determination and mitigation of damages, specifically, (1) whether profits derived from a post-breach contract by which Radiation Oncology Services (ROS), a corporation solely owned by Fallon that was not a party to the Lourdes contract, provided radiation oncology services to Rome Memorial Hospital, Inc. (RMH) should be considered in mitigation of ROSCNY's damages; (2) the term of the contract over which damages may be awarded; and (3) whether damages awarded for a period extending beyond judgment must be discounted and, if so, how the applicable discount rate is to be determined. The parties timely made further submissions relevant to determination of

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<sup>1</sup> Reference may be made to the prior decision and order for a more detailed summary of relevant facts and prior procedural history. The prior decision and order also adjourned the trial without date because it was anticipated there would not be a working elevator in the courthouse on the dates scheduled for trial as required to provide access to the jury courtroom on the second floor.

mitigation and damages, and oral argument was heard by Microsoft Teams videoconference on August 30, 2024.

As an initial matter, at oral argument on August 30, 2024, counsel advised that the parties intend to perfect their respective appeals from the prior decision and order, and the court encouraged any party aggrieved by this decision and order to also appeal therefrom so that all substantive rules governing the determination of damages, if any, to be awarded to plaintiffs – which is the only issue remaining for trial – are finally determined prior to trial. Inasmuch as this decision and order is made to finally decide issues that were raised by motions that were made on notice (NYSCEF motion numbers 19 and 21), it is appealable of right (*see* CPLR 5701 [a] [2] [iv], [v]). Nonetheless, inasmuch as the record on which this decision and order is based is fully developed, and judicial economy and certainty for the parties will be served by resolution of the issues decided herein prior to trial, the court also grants permission for any party to appeal this decision and order to the Appellate Division, Third Department (*see* CPLR 5701 [c]; *Maisto v State of New York*, 221 AD3d 1141, 1142-1143 [3d Dept 2023]; *Mazzella v Mazzella*, 204 AD3d 1114, 1114-1115 [3d Dept 2022]; *Shields v Carbone*, 99 AD3d 1100, 1101 n 2 [3d Dept 2012]).

#### **ROS Profit on RMH Contract and Mitigation of Damages**

As noted in the prior decision and order, and emphasized by the court at oral argument, whether post-breach income ROS earned from the RMH contract may be applied to mitigation of ROSCNY's damages requires a two-step analysis (*see* prior decision and order at 10-11). The first step is to determine whether such income, ostensibly earned by a corporation that was not a party to the Lourdes contract, and which is not a party to this action, may be considered in mitigation. The second step is the same test to be applied to post-breach income earned by

Fallon individually: whether plaintiffs – acting through ROS – only had the time and resources to enter into the RMH contract as a result of defendant’s breach of contract. The court has already determined that the second element of this two-part test is a factual determination to be made by the finder of fact (*see* prior decision and order at 11).

Returning to the first element of this two-part test, the same principles requiring that the income earned by Fallon individually be considered in mitigation also require that the income from the RMH contract be considered in mitigation. As set forth more fully in the prior decision and order, logic and fairness require that post-breach income earned by Fallon individually be used – to the extent he had the opportunity to earn such income as a result of the breach – to mitigate ROSCNY’s damages because ROSCNY, as a professional services corporation, is allowed to deduct salaries paid to him as sole shareholder of ROSCNY from the corporation’s expenses when determining its profits on which damages are based (*see* prior decision and order at 8-9, citing *Donald Rubin, Inc. v Schwartz*, 191 AD2d 171, 171-172 [1st Dept 1993], and quoting *Bettius & Sanderson, P.C. v National Union Fire Ins. Co. of Pittsburgh, PA*, 892 F2d 34, 35 [4th Cir 1989]).

This same principle applies to income earned by ROS from the RMH contract because the terms of the RMH contract establish that the opportunity to provide radiation oncology services to RMH was based on the contributions to be made by Fallon individually and, accordingly, income earned from the contract with RMH should be treated in the same manner as if earned directly by Fallon. Specifically, the RMH contract (1) requires that Fallon be the physician primarily scheduled to provide services to RMH, and indicates that services may be provided by other physicians in substitution for Fallon only to the extent necessary to meet patient needs when Fallon is unable to provide services “due to illness, vacation or conferences”

(NYSCEF Doc No. 941, ROS/RMH contract, at amendment, p 2); (2) provides that the non-compete provisions apply to Fallon individually (ROS/RMH contract at 5); (3) provides that Fallon will serve as Medical Director (ROS/RMH contract at 11); (4) allows RMH to terminate the contract upon termination or nonrenewal of Fallon's medical staff membership or clinical privileges at RMH, or upon suspension or termination of Fallon's license to practice medicine in New York, or other related professional credentials (ROS/RMH contract at 13); (5) allows RMH to terminate the contract upon Fallon's death or disability (ROS/RMH contract at 13); and (6) prohibits assignment without prior written consent (ROS/RMH contract at 16). These provisions amply demonstrate that RMH was contracting primarily for Fallon's expertise and services.

Thus, the reason that income earned from the RMH contract is eligible to be considered in mitigation of ROSCNY's damages is because it was earned as a result of Fallon's expertise and efforts, which renders unavailing plaintiffs' argument that ROS's separate corporate existence precludes application of profits to mitigation of ROSCNY's damages. In this regard, it once again bears emphasizing that plaintiffs persist in taking inconsistent positions with respect to ROSCNY's corporate status, urging the court to ignore corporate status when it sues them – in determining ROSCNY's damages – but treating it as sacrosanct when it does not, as in determining the income or profits that may be considered in mitigation.

Plaintiffs' further argument that Fallon had legitimate business reasons for having ROS, rather than ROSCNY, enter into the RMH contract is also unavailing. Fallon was the sole shareholder, chief executive officer, and sole physician employee of ROSCNY and ROS when the RMH opportunity became available. When the opportunity to provide radiation oncology services to RMH arose, Fallon had the sole discretion to enter into the RMH contract directly as

an individual, through either existing corporation, or through a new entity. This determination was entirely under his control. In an affidavit submitted in support of plaintiffs' motion in limine, Fallon averred that he placed the contract in ROS primarily because ROSCNY lacked sufficient administrative and clinical resources (NYSCEF Doc No. 924, Fallon aff, at ¶¶ 58, 61). However, this is a new explanation that is contrary to his prior deposition testimony. During his examination before trial, he testified that ROSCNY had maintained its malpractice insurance through the time of his deposition in April 2021 and that all billing for both ROSCNY and ROS was done by yet another corporation owned and controlled entirely by Fallon, Comprehensive Medical Administration (NYSCEF Doc No. 1038 at 3, 6-9; *see also* NYSCEF Doc No. 1039 at 3-5, 8).<sup>2</sup> Thus, based on Fallon's deposition testimony, ROSCNY continued to have access to administrative capabilities through corporations owned and controlled by Fallon that could have been utilized to fulfill the RMH contract. Fallon's self-serving attempt to provide a new reason for having placed the RMH contract in ROS that is contradicted by his prior deposition testimony is not entitled to any weight (*see e.g. Webb v United Health Servs., Inc.*, 221 AD3d 1315, 1320 [3d Dept 2023]).

Moreover, it is notable that Fallon also conceded – in his deposition testimony and his subsequent affidavit – that a reason for placing the RMH contract in ROS was to shield the RMH income from potential liability on a counterclaim that defendant had asserted in this action (*see* NYSCEF Doc No. 949 at 3-4; NYSCEF Doc No. 1038 at 4-5; NYSCEF Doc No. 924, Fallon aff, at ¶ 62). Thus, plaintiffs established no legitimate rationale for precluding consideration of the profits ROS earned from the RMH contract from the principle that income attributable to

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<sup>2</sup> Unless otherwise noted, all citations are made to the page numbers of the record as filed in NYSCEF, and not to the internal page numbering of the original document.

shareholders of professional corporations is eligible to be considered in mitigation of the corporation's damages for breach of contract. Accordingly, the court finds, as a matter of law, that any profit ROS may have earned from the RMH contract may be considered in mitigation. It bears repeating that defendant bears the burden of establishing the amount of any such profit and the second element of the two-part analysis described above: that ROS was only able to enter into the RMH contract as a result of defendant's breach.

### **Term of the Contract for Purposes of Future Damages**

Future damages may be awarded for the anticipated term of the contract had the second breach not occurred. The term of the contract is a determination that must be made upon review of the contract

“in accordance with well-known principles of contractual interpretation. Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms. The court should construe the agreement[] so as to give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose” (*Matter of New York State Workers' Compensation Bd. v Murray Bresky Consultants, Ltd*, 155 AD3d 1408, 1409-1410 [internal quotation marks and citations omitted]).

The coverage agreement is unique because the ability of either party to terminate the contract is restricted. The contract provided for a term of three years, with annual renewal for one-year terms “unless terminated in accordance with the terms hereof” (NYSCEF Doc No. 2, main contract, article VII, section 1). It originally allowed for two means of termination that could be exercised by either party: (1) for cause, to include the permanent disability or death of Fallon; and (2) without cause, upon 180-days' prior written notice (NYSCEF Doc No. 2, main contract, article VII, sections 2, 3). However, the contract was amended to replace the provision

that allowed termination without cause with the following:

“3. Termination for Other Reasons.

a. Discontinuation of Service. Hospital may terminate this Agreement, by providing ninety (90) days’ prior written notice of termination, if Hospital voluntarily or involuntarily discontinues providing radiation oncology services to patients as of the effective date of termination. Hospital shall have sole and unfettered discretion with respect to any such voluntary discontinuance of radiation oncology services.

b. Death, Disability or Departure of Dr. Fallon. Hospital may terminate this Agreement immediately in the event Michael Fallon, M.D. becomes permanently disabled, dies or ceases to provide services at the Hospital’s facility as the result of his separation from the Group” (NYSCEF Doc No. 3, first amendment, at 2).

Plaintiffs argued, based on the foregoing provisions of the contract, that the only certain possible basis for termination of the contract is the future death of Fallon and, therefore, that damages must be awarded for a period not exceeding Fallon’s life expectancy (NYSCEF Doc No. 1025, plaintiffs’ mem, at 7-9; NYSCEF Doc No. 1036, plaintiffs’ mem in reply, at 12). Defendant did not squarely address the issue presented by the court, i.e. the term over which damages may be awarded, instead arguing once again that there are no future damages. However, when pressed at oral argument, defendant’s counsel asserted that defendant contends the maximum possible period over which damages could be awarded is Fallon’s work-life expectancy, as set forth in the opinion of defendant’s expert (*see* NYSCEF Doc No. 1001 at 13, 13 n 55, 17 [citations are to internal page numbering]).

The contract must be construed as a whole to give effect to every material term and to give effect to its general purpose, with the court to determine the meaning of unambiguous provisions as a matter of law. In this regard, the contract plainly and unambiguously requires Fallon’s active participation as Medical Director throughout its term. In this regard, the contract

specifically: (1) requires that Fallon serve as Medical Director, and only permits him to delegate the duties of Medical Director with prior approval and only during periods of temporary unavailability (NYSCEF Doc No. 5, third amendment at 1 [internal page numbering]); (2) permits defendant to terminate the contract for cause should Fallon cease to act as Medical Director (NYSCEF Doc No. 2, main contract, article VII, section 2); (3) permits defendant to terminate the contract upon Fallon becoming permanently disabled or ceasing “to provide services at [defendant’s] facility as a result of his separation from [ROSCNY]” (NYSCEF Doc No. 3, first amendment, at 2 [internal page numbering]); and (4) prohibits assignment without prior written consent (NYSCEF Doc No. 2, main contract, article VIII, section 5).

Based on consideration of these provisions, the court finds, as a matter of law, that the contract unambiguously provides that the maximum term of the contract for which damages may potentially be awarded is the first of the following that would have been likely to occur had the contract remained in effect: (1) Fallon becoming permanently disabled; (2) Fallon ceasing to provide services to defendant as Medical Director; or (3) Fallon’s death. The determination of the maximum term of the contract in accordance with this definition is an inherently factual determination that must be made by the finder of fact. Plaintiffs have the burden of proof to establish the damages period as an element of their claims for damages. The parties may present evidence relevant to the likely occurrence of each of the three potential reasons for termination. However, an argument that the damages period should be based on the permanent disability of Fallon prior to the expected date on which he would have ceased to serve as Medical Director would be entirely speculative absent proof that he presently suffers from a condition that could result in his permanent disability, supported by a nonspeculative opinion from a qualified expert as to when permanent disability would likely to result from such condition.

Accordingly, an argument that the damages period should be limited by Fallon's permanent disability will not be allowed absent such proof.

### **Discount of Future Damages**

The parties agree that postjudgment damages must be discounted by a discount rate determined by the trier of fact, who may be aided by expert testimony, and this rule will be applied at trial (*see e.g. Village of Ilion v County of Herkimer*, 23 NY3d 812, 818-820 [2014]; *American List Corp. v U.S. News & World Report*, 75 NY2d 38, 45 [1989]; *Cornell v T.V. Dev. Corp.*, 17 NY2d 69, 74, 76 [1966]).

### **Other Trial Issues**

In the prior decision and order, the court provided counsel with a statement it plans to read to the jury to introduce the case and invited requests for revisions. Three requests for revisions were made, of which one was granted, and the revised statement now reads in its entirety as follows (the single addition is underlined):

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, if any, 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.

#### **Further Proceedings Prior to Trial**

Upon receiving decision from the Appellate Division, Third Department on all appeals from the prior decision and order and from this decision and order, a schedule will be established for the parties to (1) obtain updated opinions from their respective experts based on the Appellate Division decision; (2) make further expert disclosures based on any revised opinions; and (2) make further motions in limine regarding the final revised expert disclosures. A conference will be held by Microsoft Teams for oral argument on any further motions in limine, to consider whether mediation or other settlement efforts may be productive once the applicable legal standards are finally established, and to schedule 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: September 16, 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: 2024.09.16 16:02:40 -0400

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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; 937-949; 980-984; 987-991; 1000-1001; 1004; 1006-1009; 1022-1023; 1025; 1036-1039; 1041-1042; 1045.