

**Medical Billing Consultants & Collections, Inc. v
Sung**

2007 NY Slip Op 31483(U)

June 5, 2007

Supreme Court, Richmond County

Docket Number: 0012625/2002

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Calendar No.3729 - 006
Index No: 12625/02**

**MEDICAL BILLING CONSULTANTS &
COLLECTIONS, INC. and
DIANE WALLACE, Individually,**

Plaintiffs,

-against-

**DECISION & ORDER
HON. JOSEPH J. MALTESE**

KAREN SUNG,

Defendant.

The following papers numbered 1 to 5 were submitted on this motion the 30th day of March, 2007

Papers Numbered

Defendant’s Notice of Motion for Partial Summary Judgment with Supporting Papers.....	1
Memorandum of Law in Support of Motion.....	2
Plaintiffs’ Affirmation in Opposition.....	3
Supplemental Affirmation in Reply.....	4
Memorandum of Law in Reply.....	5

Upon the foregoing papers, defendant’s motion for partial summary judgment dismissing the fourth and fifth causes of action in the complaint is granted, in part, and denied, in part, in accordance with the following.

This action for, *inter alia*, monetary damages arises out of the former business relationship between the parties herein. Insofar as it appears on the papers before the court, Medical Billing Consultants & Collections, Inc. (hereinafter “MBCC”) is a corporation engaged in the business of medical billing and computerizing physicians’ offices, which includes the sale and installation of Medisoft software, training and technical support.

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It is alleged in the fourth cause of action that defendant Karen Sung breached her fiduciary duty as a shareholder, director and officer of the plaintiff corporation by (1) conspiring to “steal” its physician accounts, (2) using MBCC’s confidential training methods and customization techniques, and (3) diverting the assets, business and corporate opportunities of MBCC “to her own benefit, profit and uses, to the detriment of the [corporate] plaintiff.”

Underlying plaintiffs’ claim of breach of fiduciary duty are the following undisputed facts. On or about March 8, 2001, defendant Sung resigned her position with MBCC as a member of its board of directors, vice president and secretary, as well as terminating her employment. However, she retained her ownership of one-third (33 shares) of the corporation’s common stock. On March 12, 2001, defendant Sung incorporated her own company, CareMD LLC, with the similar aim of providing physicians with medical billing, consulting and management services. Insofar as it is relevant, the one and only account acquired by CareMD was that of Dr. Sarah Sadan, purportedly MBCC’s largest account prior to the Sung resignation. On or about April 20, 2001, MBCC formally severed its relationship with Dr. Sadan in a Release Agreement wherein the doctor agreed to pay MBCC the sum of \$27,000.00, and MBCC expressly reserved its rights against its former officers, shareholders, agents or employees.

In moving to dismiss the fourth cause of action for breach of fiduciary duty, defendant Sung maintains that she did not misappropriate a valuable corporate asset, since the training techniques and support services related to the operation of Medisoft software

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are available in the open market. According to Sung, MBCC could have continued using Medisoft software notwithstanding her departure by simply hiring another individual with the relevant background and training to assume her duties. Defendant also argues that (1) the account with Dr. Sadan ceased to be a “corporate opportunity” of MBCC upon the execution of the Release agreement dated April 20, 2001, (2) that Sung’s subsequent agreement to provide medical billing services to Dr. Sadan could not, therefore, constitute a breach of her fiduciary duty, (3) plaintiffs “actively acquiesced” and waived any objection to Sung’s post-resignation employment by Dr. Sadan by requiring that doctor to pay an additional \$16,000.00 so that Sung could start working for the doctor “sooner”, and (4) there is no evidence of any causal link between Sung’s alleged wrongful conduct and plaintiffs’ unsupported claim of “lost profits.”

It is well settled that on a motion for summary judgment and dismissal of the complaint, the initial burden is on the movant to establish his or her defense by means of admissible evidence sufficient to warrant a judgment in his or her favor as a matter of law (*see Zuckerman v City of New York*, 49 NY2d 557, 562). In this regard, defendant Sung correctly argues that the allegations in the fourth cause of action pertaining to her alleged use of “trade secrets” and “confidential method[ology]” (paragraphs “38” and “40” of the complaint)” are wholly conclusory and lacking in factual support (*see Arc-Com Fabrics v Robinson*, 149 AD2d 311, 312). Furthermore, it is properly noted that Sung’s employment contract with MBCC was oral and did not contain any purported covenant of non-competition or non-solicitation. Nevertheless, as an officer, director and shareholder of the

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plaintiff corporation, Sung had a fiduciary duty “barring not only blatant self-dealing, but also requiring avoidance of situations in which [her] personal interest possibly conflicts with the interest of those owed a fiduciary duty” (Global Minerals & Metals Corp. v Holme, 35 AD3d 93, 98, *lv denied* 8 NY3d 804; *see* Alpert v 28 Williams St. Corp., 63 NY2d 557, 568).

Consonant with these principles, it is the opinion of this Court that defendant Sung has failed to meet her burden of establishing the absence of triable issues of fact regarding the alleged violation of her fiduciary obligations by (1) forming a competing entity, and (2) diverting for her own benefit an account that had been a major asset of the plaintiff corporation (*see* American Baptist Churches of Metro. N. Y. v Galloway, 271 AD2d 92, 99; Alexander & Alexander of N.Y. v Fritzen, 147 AD2d 241, 246). Moreover, defendant has not satisfactorily established that her fiduciary duty was extinguished simply by resigning from MBCC, or that the Release Agreement operated as a waiver of plaintiffs’ rights against her. In view of the foregoing, Sung is not entitled to summary judgment dismissing the fourth cause of action for breach of fiduciary duty (*see* Brunetti v Musallam, 11 AD3d 280, 281).

Turning to the branch of defendant’s motion which is for summary judgment dismissing the fifth cause of action, i.e., to enjoin defendant from utilizing the installation, servicing, computer support and training methodologies allegedly developed by MBCC, there has been no showing that plaintiffs could not be adequately compensated by an award of monetary damages (*see* Coinmach Corp. v Fordham Hill Owners Corp., 3 AD3d 312;

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Mr. Dees Stores v A.J. Parker, Inc., 159 AD3d 389). Moreover, having pleaded an adequate remedy at law, it would appear that injunctive relief is both unnecessary and unwarranted.

Accordingly, it is hereby:

ORDERED, that said branch of defendant's motion which is for summary judgment dismissing the fifth cause of action is granted; and it is further

ORDERED, that the balance of the motion is denied; and it is further

ORDERED, that the Clerk enter judgment accordingly.

All parties shall appear for a **conference** and a **motion** in DCM Part 3 at 9:30 a.m. on **July 13, 2007**.

E N T E R,

Dated: June 5, 2007

Joseph J. Maltese
Justice of the Supreme Court