

Falk v Gallo
2007 NY Slip Op 34541(U)
June 11, 2007
Supreme Court, Nassau County
Docket Number: 19472-06
Judge: Leonard B. Austin
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INDEX
No. 19472-06

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 2-20-07

Submission Date: 3-22-07

Motion Sequence No.: 001/MOT D

**JEFFREY FALK M.D. and
ANESTHISYSTEMS, INC.,**

Plaintiffs,

- against -

**VICTOR A. GALLO M.D., VICTOR A.
GALLO M.D., P.C. and GARDEN CITY
MEDICAL PLAZA CORP.,**

Defendants.

COUNSEL FOR PLAINTIFFS

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COUNSEL FOR DEFENDANT

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Great Neck, New York 11021

ORDER

The following papers were read on Defendants' motion to dismiss:

Notice of Motion dated January 30, 2007;

Affirmation of Wilhelmina A de Harder, Esq. dated January 30, 2007;

Defendants' Memorandum of Law;

Affirmation of Allen H. Weiss, Esq. dated February 28, 2007;

Affidavit of Jeffrey Falk sworn to on March 1, 2007;

Supplemental Affirmation of Allen H. Weiss, Esq. dated March 6, 2007;

Defendants' Reply Memorandum of Law.

Defendants move to dismiss the first and second causes of action, all the causes of action brought by Anesthisystems, Inc. ("Anesthisystems") and the third cause of action to the extent it seeks punitive damages.

BACKGROUND

Defendant Victor M. Gallo, M.D. ("Gallo") is a physician duly licensed to practice medicine pursuant to the laws of the State of New York with a specialty in gastroenterology. Gallo practices medicine through a professional corporation, Defendant Victor M. Gallo M.D., P.C. ("MDPC"). Defendant Garden City Medical Plaza Corp. ("Med Plaza") is a domestic corporation that owns real property located at 1075 Franklin Avenue, Garden City New York. Gallo maintains his office for the practice of medicine in Med Plaza's premises.

Plaintiff Jeffrey Falk M.D. ("Falk") is a physician duly licensed to practice medicine pursuant to the law of the State of New York with a specialty in anesthesiology. Falk is the principal and sole shareholder of Anesthisystems.

In or about 2002, Gallo opened an ambulatory surgical center in Med Plaza's premises. Gallo has used the facility primarily to perform colonoscopies. In order to perform surgery or colonoscopies at Med Plaza's facilities, Gallo needed an anesthesiologist.

At about the same time the ambulatory surgical center was opened, Gallo and Falk purportedly entered into an oral agreement whereby Falk was to have the exclusive right to administer anesthesia and pain relief to patients being treated by Gallo

[* 3]
FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

at his ambulatory surgical center. The term was to be for the rest of Falk's life or for so long as Gallo was providing medical services at the Med Plaza facility. Under the oral agreement, Falk would be acting as an independent contractor maintaining his own medical malpractice and liability insurance and billing the patients directly for his services.

In November 2002, Falk set up an office in Med Plaza's premises and began to pay Med Plaza a monthly rent.

Falk provided anesthesia services and paid rent for his space through September 2006 when Gallo is alleged to have barred him from the premises. Falk alleges that Gallo's actions were a result of his refusal to sign an employment agreement which Falk alleges would have required him to kick back or split fees with Gallo in violation of federal and state law.

On September 12, 2006, Gallo advised Falk that he was terminating his services as the anesthesiologist at the Med Plaza facility. Falk has not worked at the Med Plaza facility since that date.

Plaintiffs allege three causes of action. The first cause of action alleges breach of contract and seeks to recover the income Falk lost from September 2006 through the end of the contract year. The second cause of action alleges that Falk and Gallo had entered into an agreement pursuant to which Gallo agreed to pay Falk \$300 per case from fees received from patients covered by Vytra Health Plan. Falk alleges that between May 2005 and September 2006, Gallo treated at least 100 patients insured by

[* 4]
FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

Vytra Health Plan for whom Gallo has not made payment to Falk. In the third cause of action, Plaintiffs allege that Gallo has received checks and other payment for medical services rendered by Falk and has failed and refused to turn or deliver those checks to Falk. Falk seeks to recover the money wrongfully withheld by Gallo and punitive damages.

DISCUSSION

A. Anesthisystems

Defendants move to dismiss all of the actions asserted by Anesthisystems on the ground that the corporation was dissolved by proclamation on June 26, 2002 as a result of its failure to file franchise taxes.

A corporation that has been dissolved by proclamation for failure to pay its corporate franchise taxes cannot sue except to the extent that the action is part of the winding up of corporate affairs. Lorisa Capital Corp. v. Gallo, 119 A.D.2d 99 (2nd Dept. 1986); and Brady v. State Tax Commission, 176 Misc. 1053 (Sup. Ct. Kings Co. 1941); Tax Law § 203-a(10); and Business Corporation Law §§1005(a)(1) and 1006(a)(4).

A corporation that has been dissolved by proclamation may sue after dissolution with regard to claims arising from transactions that predate dissolution. Race Safe Systems, Inc. v. Indy Racing League, 251 F.Supp.2d 1106 (E.D.N.Y. 2003); and School of Music of the Brooklyn Free Musical Society v. Moritt, 145 N.Y.S.2d 645 (Sup. Ct. Kings Co. 1955).

Anesthisystems' claims are not related to the winding up of its affairs. The causes of action all relate to events that took place in September 2006, more than four years after its dissolution.

A corporation that has been dissolved by proclamation may be reinstated *nunc pro tunc* upon the filing of a certificate from the tax commission that all back franchise taxes, penalties and interest have been paid. Lorisa Capital Corp. v. Gallo, *supra*. Upon reinstatement, the corporation's transactions during the period of its dissolution are retroactively validated because its corporate status has been reinstated *nunc pro tunc*. See, Propp v. Chaya Amusement Corp., 155 A.D.2d 251 (1st Dept. 1989).

By certificate dated March 27, 2007, the Commissioner of Taxation and Finance has indicated that Anesthisystems has paid all of its back corporate franchise taxes, penalties and interest. Upon the filing of the certificate with the Department of State, Anesthisystems' corporate status has been reinstated *nunc pro tunc*. Since Anesthisystems' corporate status is no longer in issue, the motion to dismiss the claims brought by Anesthisystems on the ground that it was dissolved must be denied.

B. First Cause of Action

Defendants assert that this cause of action is barred by the Statute of Frauds. See, General Obligations Law §5-701(a)(1), which requires that a contract which cannot be performed within one year or before the end of a lifetime to be in writing.

Plaintiffs allege that, in this cause of action, they seek to recover damages for breach of an oral lease. They assert that they entered into an oral lease for space in

[* 6]
FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

Med Plaza's facilities for a period of April 1, 2006 through March 31, 2007. Pursuant to that oral lease, Plaintiffs paid rent of \$15,500 per month and paid other financial obligations including paying certain of Defendants' employees. Plaintiffs assert that the damages they seek to recover are the losses sustained as a result of being wrongfully deprived of the use of the demised premises from September 2006 through March 31, 2007. Since the period of the lease is one year, it is not subject to either General Obligations Law §§ 5-701(a)(1) or 5-703(1) which require that leases for a period of in excess of one year be in writing.

When deciding a motion to dismiss, the court must determine whether the pleader has a cause of action, not whether the cause of action has been properly plead. Guggenheimer v. Ginzburg, 43 N.Y.2d 268 (1977); Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976); and Well v. Yeshiva Rambam, 300 A.D.2d 580 (2nd Dept. 2002); and Frank v. DaimlerChrysler Corp., 292 A.D.2d 118 (1st Dept. 2002). The complaint must be liberally construed, and the plaintiff must be given the benefit of every favorable inference. Paterno v. CYC, LLC, 8 A.D.2d 544 (2nd Dept. 2002). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion. 511 West 232rd Street Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144 (2002); Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); and Also Enterprises, Ltd. v. Premier Lincoln-Mercury, Inc., 11 A.D.3d 493 (2nd Dept. 2004).

[* 7]
FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

If, from the facts alleged in the complaint and the inferences which can be drawn from those facts, the court determines that the pleader has a cognizable cause of action, the motion must be denied. Sokoloff v. Harriman Estates Development Corp., 96 N.Y.2d 409 (2001); and Stucklen v. Kabro Assocs., 18 A.D.3d 461 (2nd Dept. 2005).

The one year period for the Statute of Frauds is calculated from the date the agreement is made and must be capable of being performed within one year. N.Y. *Prac., Landlord and Tenant Practice in New York* §4:7.

When read broadly and giving Plaintiffs the benefit of every favorable inference, the first cause of action can be read as a cause of action for wrongful eviction. See, Romanello v. Hirschfeld, 63 N.Y.2d 613 (1984) See also, 2 NY PJI3d 6:17, comments at ¶¶1234-1236. Plaintiffs claim that they had a one year lease. Such a lease need not be in writing. Defendants denied Plaintiffs access to the premises without legal process. The rent was agreed upon. The allegations that Falk was to be the anesthesiologist at the Med Plaza premises as long as Gallo practiced medicine at that location and for the rest of his life are irrelevant and unnecessary to this cause of action.

Since the first cause, when read broadly, states a claim upon which relief can be granted, the motion to dismiss the first cause of action must be denied.

C. Second Cause of Action

The second cause of action is premised upon an alleged agreement between Falk and Gallo pursuant to which Falk was to receive \$300 per case from fees received by Gallo for services rendered to patients with medical coverage from Vytra Health

FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

Plan. Falk alleges that during the period May 2005 through September 2006, Gallo treated upwards of 100 Vytra Health Care patients for whom Falk did not receive payment.

Defendants assert the claim is also barred by the Statute of Frauds. They assert it is not a contract that by its terms it can be performed within one year. See, General Obligations Law §5-701(a)(1).

A party's partial performance of an agreement, however, removes it from the ambit of Statute of Frauds, if the plaintiff's performance is "unequivocally referable" to the agreement. Anostario v. Vincinanzo, 59 N.Y.2d 662 (1983); and Klein v. Jamor Purveyors, Inc., 108 A.D.2d 344 (2nd Dept. 1985). Falk asserts that he performed the services required by the agreement. Falk attaches a copy of a check issued by MDPC to Anesthisystems issued on July 5, 2005 which indicates the sum is for "Vytra Payments." At the pleading stage of the action, Plaintiffs' providing services to patients of Gallo who were covered by Vytra Health Care coupled with the check issued by MDPC to Anesthisystems can be considered unequivocally referable to the alleged agreement. Falk has established that, for pleadings purposes, the cause of action is not barred by the Statute of Frauds.

D. Third Cause of Action - Punitive Damages

The third cause of action alleges that Defendants have received payments for medical services rendered by Falk and have failed to remit those payments to Falk.

[* 9]
FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

Plaintiffs demand for punitive damages in the third cause of action must be dismissed whether the cause of action is deemed one for breach of contract or conversion.

To recover punitive damages in a breach of contract action, plaintiff must allege that defendant's conduct was "... (1) egregious, (2) directed at the plaintiff and (3) part of a pattern of similar conduct directed at the public at large." Seynaeve v. Hudson Moving and Storage, Inc., 261 A.D.2d 168, 169 (1st Dept. 1999). See, Rocanova v. Equitable Life Assurance Society of the United States, 83 N.Y.2d 603 (1994). This action is a private contractual dispute that does not involve any conduct directed at the public.

This cause of action may also be viewed as one for conversion. Gallo and/or MDPC received checks payable to Falk and/or Anesthisystems and failed to deliver them to Falk or Anesthisystems.

Conversion involves exercising control over specific items of personalty contrary to the rights of the owner or one with a superior right of possession. Fiorenti v. Central Emergency Physicians, PLLC, 305 A.D.2d 453 (2nd Dept. 2003); and Hart v. City of Albany, 272 A.D.2d 668 (3rd Dept. 2000). Checks may be converted. See, 23 NY Jur2d Conversion §12. See also, 470 West End Corp. v. East River Savings Bank, 102 Misc.2d 1024 (Civ. Ct. NY Co. 1980). Conversion is a tort. Spodek v. Liberty Mutual Insurance Co., 155 A.D.2d 439 (2nd Dept. 1989).

FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

To establish a claim for punitive damages in tort, a plaintiff must establish that the defendant engaged in intentional or deliberate wrongdoing, the conduct includes aggravating or outrageous circumstances, the defendant had a fraudulent or evil motive or evidenced willful or wanton disregard for the rights of others. Don Buchwald & Assoc., Inc. v. Rich, 281 A.D.2d 329 (2nd Dept. 2001); and Swersky v. Dreyer & Traub, 219 A.D.2d 321 (1st Dept. 1996). Plaintiffs have not alleged any facts to support their claim that defendants actions were wanton, willful or reckless. 8902 Corp. v. Helmsley-Spear, Inc., 23 A.D.3d 316 (1st Dept. 2005); and Boston Concession Group, Inc. v. Criterion Center Corp., 250 A.D.2d 435 (1st Dept. 1998). Plaintiffs' conclusory allegations that defendants' conduct was willful, malicious or wanton are insufficient to support a cause of action for punitive damages. Goldin v. Conway Motors, Inc., 122 A.D.2d 834 (2nd Dept. 1986).

Therefore, the demand for punitive damages in the third cause of action must be dismissed.

Accordingly, it is,

ORDERED, that Defendants' motion to dismiss is **granted** to the extent of dismissing the demand for punitive damages in the third cause of action and is, in all other respects, **denied**; and it is further,

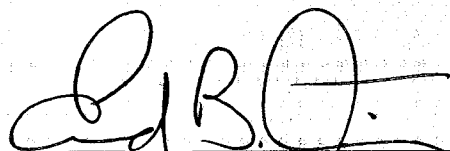
ORDERED, that Defendants shall serve an answer within twenty days of the date of this order; and it is further,

FALK, *et ano.* v. GALLO, *et al.*
Index No. 19472-06

ORDERED, that counsel and the parties directed to appear for a Preliminary
Conference on July 13, 2007 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
June 11, 2007


Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

JUN 13 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE