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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Shaw, Kevin

INDEX NO. 107215/03

MOTION DATE 1/15/08

- v -

MOTION SEQ. NO. 003

IRBY, Archer

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 21 2008

COUNTY CLERK'S OFFICE
NEW YORK

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the complaint of the plaintiff is granted, and the complaint is dismissed. And it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment accordingly.

Dated: 4/10/08

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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KEVIN SHAW,

Index No. 107215-2003

Plaintiff,

-against- DECISION/ORDER

ARCHER IRBY AND UNIVERSITY PLACE CHIROPRACTIC ASSOCIATES, LLP,

Defendants.

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MEMORANDUM DECISION

In this action for breach of partnership agreement, defendants Archer Irby ("Irby") and University Place Chiropractic Associates, LLP ("University Place") (collectively, "defendants") move for summary judgment pursuant to CPLR 3212, dismissing the complaint. Defendants argue that plaintiff failed to establish that a partnership existed. Additionally, the ninth cause of action, which alleges that Irby's conduct exposed the plaintiff to malpractice claims is time-barred given that the statute of limitations on any professional malpractice claims arising from such conduct expired in April 2005.

Deposition of Plaintiff

In 1999 or 2000, plaintiff, a licensed chiropractor, trademarked and patented the "mobile chiropractic theater," (the "mobile unit") which is a trailer on wheels outfitted to provide a multimedia auditorium to bring to the public information and health screenings.

From 2000 through 2003, plaintiff maintained an office in New Jersey, where he worked two and one-half days a week.

In or about May or April 2002, plaintiff's sister-in-law introduced plaintiff to Irby, as she believed they could benefit from each other's practice.

Plaintiff met with Irby in Irby's office located in New York, New York, several times with the intention to discuss what he had to offer and how his mobile theater may serve "our office." Plaintiff discussed his expertise in treating patients as a practitioner, his success in developing practices at various locations, and his success in developing practices with the mobile unit. Specifically, plaintiff explained that the use of the mobile unit was for marketing purposes, and that it involved using a certain number of spaces at street fairs, delivering the mobile unit, assembling and dismantling it, and staffing it. Plaintiff would provide spinal screenings of individuals on the street, and explain the benefits of chiropractic treatment. Plaintiff also discussed his interest in developing a practice in New York City. Plaintiff stated that he met with Irby for the purposes of entering into a partnership with Irby at Irby's office space in New York City.

In July 2002, plaintiff and Irby began utilizing the mobile unit at street fairs on the weekends. Irby's function was to provide screenings along with plaintiff.

Plaintiff and Irby understood that plaintiff was going "to be laying out dollars for space, . . . manpower and equipment." Plaintiff and Irby clarified the cost considerations and agreed that it was a sensible approach to developing the practice.

In working out the details of the partnership agreement, plaintiff and defendant discussed the billing program they were going to use, which was later implemented, and that overhead expenses such as rent and utilities, were to be paid first. Once there was a surplus in the account,

reimbursements for the expenses plaintiff expended would be made. Plaintiff and defendant "made arrangements to discuss what was going to happen once we started becoming profitable."

Plaintiff went back and forth to Irby's New York office three days a week to work at the street fairs. Plaintiff provided marketing literature to hand out at the street fairs, his New Jersey office staff to assist at the street fairs, and expenditures for travel expenses, fuel, tolls, and parking at the spaces at the street fairs. The mobile unit generated 30 new patients. Plaintiff also brought equipment, such as an adjusting table, a view box, furnishings, posters, literature, and lighting for the single room he was working out of at Irby's New York office.

Plaintiff and defendant intended to draft a one-year renewable partnership agreement. Plaintiff and defendant went back and forth on whether they would be 50/50 partners.

In the beginning of September, Irby had an agreement drafted. When asked why the details regarding the interest of each partner and the capital contributions of plaintiff and Irby were not filled out, plaintiff responded that it was a "matter of timing."

Irby participated with plaintiff at the mobile unit on most occasions.

Irby's Deposition

Irby opened his chiropractic office, "University Place Chirpractic" at 99 University Place in 2001 with his partner and wife, Randy Irby. As partners, Irby and his wife agreed to share profits, and expenses equally.

Irby met plaintiff's sister-in-law at a street fair in the East Village, and she mentioned that he should meet plaintiff. When Irby was at another street fair on Sixth Avenue, plaintiff's sister-in-law brought plaintiff to Irby's booth and introduced them. At that time, Irby was operating a

ten-by-ten tent, with chiropractic screening equipment and literature. Irby owned the equipment used in his tent at the street fairs.

When plaintiff and Irby met at Irby's office a couple of weeks later, they discussed chiropractic philosophical beliefs, photographs plaintiff brought of the mobile unit, and Irby's success at street fairs. Plaintiff then spent most the time at the meeting discussing plaintiff's mobile unit. Plaintiff discussed his successes with the mobile unit and invited Irby and his wife to see the unit. Irby agreed to see the unit when he and his family had the time to do so. The purpose of the meeting was to meet another chiropractor, share different philosophies, and discuss different structures in the State of New York.

The following week, plaintiff contacted Irby to follow up on plaintiff's invitation for Irby to see the mobile unit. When Irby and his wife later went to visit plaintiff, they observed that the mobile unit had an interactive nerve system chart and flat screen television. Irby and his wife toured the mobile unit while plaintiff discussed how it was utilized. The adjusting table in the mobile unit was similar to the one Irby used at the street fairs. At that same meeting, plaintiff informed Irby of his desire to practice in New York. Irby did not agree to meet with plaintiff in the future to discuss it further.

A week later, plaintiff contacted Irby again to inquire about the street fairs and determine when the season ended, and invited Irby and his wife back to his New Jersey office. Irby and his wife met with plaintiff a second time, to discuss the street fairs. Plaintiff again expressed a desire to practice in New York, and explained that the mobile unit could be an effective marketing tool for "University Place Chiropractic," to which Irby agreed.

Then there was a brief discussion about plaintiff bringing the mobile unit to New York City street fairs by using Irby's permit. Irby inquired of two vendors, and advised plaintiff that it would be expensive to operate his mobile unit at the street fairs. Irby had no interest, at this time, in contributing towards the expense of bringing the mobile unit to the street fairs.

Afterwards, plaintiff invited Irby to assist him at the street fairs and Irby allowed plaintiff to use his vendor number. It was agreed that Irby would "be representing University Place Chiropractic and doing spinal screenings, and [plaintiff] will be doing his own screenings with respect to his business."

Before the first street fair, Irby advised plaintiff that if Irby was to do a street fair with plaintiff, it would be strictly on the basis of him "coming out there doing [his] own spinal screening in exchange for . . . the marketing that [plaintiff] was doing. Irby had a free room in his office that he would permit plaintiff to use because he and his wife had not "come up with money to pay for street fairs or any other associated expenses that came along with him." Plaintiff was "going to use" Irby's vendor number because he could not otherwise do the street fairs "in the ones that he wanted . . . . and for that, the patients that he signed up, he would use free office space at University Place Chiropractic." As far as billing patients, "whatever patients he saw . . . would be on his own tax ID number and vice versa for me." Although Irby brought in his own equipment to use, and changed the lighting in the room he used to see his patients, he was not a member of the University Place Chiropractic, and his name was not on the door. During the eight to ten weeks that plaintiff saw patients at University Place Chiropractic, plaintiff never saw any of Irby's patients. However, "at the end" plaintiff's patients who were treated at University Place Chiropractic "left [the plaintiff] to come to" Irby.

Irby attended approximately four to six street fairs with plaintiff, where plaintiff conducted his own screenings, using his own SEMG unit. At the first street fair, Irby brought literature containing the name, University Place Chiropractic and screened patients for four hours using his own machine and table. Although Irby used the space of the mobile unit, plaintiff and Irby did not share equipment at the street fair. Irby used his own appointment book. Plaintiff brought a sign-up sheet for preliminary information, which did not contain either of their names or the name of the practice. Plaintiff never advised Irby that plaintiff was going to purchase literature or other media for the street fairs.

After the third street fair, plaintiff brought a sign-up sheet with their names on it as well as the name of Irby's practice. When Irby addressed the plaintiff's use of Irby's name and practice, plaintiff said that it looked "more professional." Plaintiff then started talking about establishing an affiliation with the office. Plaintiff asked Irby if Irby and his wife were interested in forming an association or partnership with him, and Irby responded that he did not know what an association "would look like." Irby did not have any interest at that time and did not agree to further discuss the issue. However, Irby wanted to ask his wife first, and look at the legal implications of such an association. Irby then contacted his attorney for "a draft of what a partnership would look like and what it involved."

When Irby's attorney forwarded the draft partnership agreement, Irby forwarded it to plainitff. Plaintiff never returned the draft partnership agreement to Irby. There is no written partnership agreement signed by plaintiff and Irby.

With respect to the draft partnership agreement, during the last street fair, when plaintiff asked whether Irby wanted a partnership, Irby replied "No." and conveyed that plaintiff's wife

did not even want to consider a partnership with plaintiff. There was no further discussion of the draft because Irby did not want a partnership.

Afterwards, plaintiff "had to go immediately" and later returned to get his things. There was no writing terminating their relationship.

Plaintiff did not submit any bills to Irby for services he performed at Irby's office, and Irby did not pay plaintiff anything for his services or for the use of the mobile unit. University Place Chiropractic had an accountant, but that accountant did not process patient billing for University Place Chiropractic, since Irby had his own billing software and utilized a billing company in Atlanta, Georgia. The billing company did not perform any billing services with respect to patients seen by plaintiff. Irby did not have a set of keys to the office, and did not observe any literature displayed at his office with plaintiff's name.

Defendant's Motion

Because the testimony of the parties reveals no *indicia* of a partnership, plaintiff's complaint must be dismissed inasmuch as his damages claims are premised entirely on the faulty proposition that a partnership existed between plaintiff and Irby. Plaintiff has never produced a signed partnership agreement or any evidence of indicating anything other than that a partnership may have been contemplated.

A partnership cannot exist without all contracting parties agreeing there is a partnership. Based on the record, the parties had no agreement to share profits and losses, no agreement concerning ownership of partnership assets, had no agreement regarding joint control and management of the chiropractic business, and had no agreement regarding contributions of

property, financial resources, effort, skill or knowledge, and there was no intention by both parties to be partners.

In opposition, plaintiff submits (1) a draft partnership agreement, (2) a sample of University Place Chiropractic forms paid for and printed by plaintiff which lists him alongside Irby and his wife, (3) pages from the University Place Chiropractic office calendar, showing that Irby and plaintiff kept a joint calendar referencing (a) faxes to plaintiff of his appointments and calls to his patients, and (b) a discussion of a renewal of the lease, and (4) documentation showing plaintiff's expenses. Plaintiff argues that he came into the University Place Chiropractic enterprise, funded it, organized it, and devoted many hours of service to it, increasing the office's financial viability. Further, both doctors invited potential clients into the mobile unit at street fairs, impressed them with their education, knowledge, and skill, and continued to see the patients at the office location. Both parties also joined their property, interest, skills and risks so that their respective contributions commingled for the benefit of the partnership, in which they were to share the profits and losses. Plaintiff also submits printouts from the New York State Department of State's Business Entity Database, which demonstrate that University Place Chiropractic, P.C. was first registered during Irby's partnership with his wife, and later registered as University Place Chiropractic & Associates, LLP in September 4, 2002. The partnership agreement bears the same name of the partnership filed on September 4th, when plaintiff was actively seeing patients at University Place. These factors are *indicia* of a partnership, or alternatively, a joint venture. To the extent that there is contradictory testimony regarding whether a 50/50 partnership was ever discussed, the assertions of the non-movant, plaintiff, must be taken as true for purposes of this motion.

Defendant's Reply

The plaintiff's attorney's affirmation in opposition, alone, is insufficient to defeat summary judgment. Plaintiff did not submit an affidavit, and the exhibits submitted in opposition are not authenticated, certified or in admissible form. None of the exhibits were even marked at plaintiff's deposition, or attested to in opposition to the motion. Additionally, plaintiff's purported break down of expenses was never exchanged during discovery.

Furthermore, plaintiff's counsel's assertions are belied by plaintiff's deposition testimony. While plaintiff's counsel claims that a University Place Chiropractic employee "Matt" worked at street fairs with plaintiff and Irby, plaintiff testified that Matt was his employee in his New Jersey office. Similarly, plaintiff's counsel stated that plaintiff contributed property and other financial resources to the existing office through renovations; however, plaintiff testified that his contribution to the office renovation was limited solely to the single room out of which he worked. Additionally, plaintiff never testified that he contributed management skills to the office, as plaintiff's counsel asserts; plaintiff testified that he worked at the office only three days a week by appointment only, and not full time. The brief, three to four month relationship between plaintiff and Irby, where Irby allowed plaintiff to use his vendor's license and small room in his office, where both developed and billed their patients separately, is hardly evidence that Irby intended to enter into a partnership with plaintiff.

Nor was there a joint venture, since there was no joint seeking of profit; Irby attended the street fairs to develop new patients for his already existing partnership with his wife. The patients developed from the street fairs had nothing to do with either of the parties' offices.

Further, Irby had the draft partnership agreement prepared only after plaintiff printed stationary and literature containing the names of Irby and his wife. The draft partnership was prepared because Irby simply wanted to learn more about what plaintiff was trying to force upon him. And, the draft partnership agreement does not contain any agreement on the material terms.

Additionally, University Chiropractic & Associates, LLP never conducted business or operated in any way; it did not have a bank account, checks, or billed patients, and was nothing more than a name.

There was no profit sharing or agreement on how profits would be divided, plaintiff and Irby did not jointly manage a business or contribute skills, efforts or resources to a single business, but rather maintained separate business identities. Nor did they ever intend to be partners.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Uni v Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Uni v Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307

AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a prima facie entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra; Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a prima facie showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York*, 49 NY2d560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman*, supra at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

An indispensable essential of a contract of partnership or joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business and submit to the burden of making good the losses (*Steinbeck v Gerosa*, 4 NY2d 302, 175 NYS2d 1 [1958] *citing Reynolds v Searle*,186 App. Div 202, 203). In other words, there must be an agreement to share profits and losses (*Missan v Schoenfeld*, 95 AD2d 198, 465 NYS2d 706 [1st Dept 1980]; *Kidz Cloz, Inc. v Officially For Kids, Inc.*, 320 FSupp2d 164). Further, an agreement to distribute the proceeds of an enterprise upon a percentage basis does not give rise to a joint venture if the enterprise does not represent a joinder of property, skills and risks *(Gordon Co. v Garcia Sugars Corp.*, 241 App. Div 155). "The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit . . ." (*see Scott v Rosenthal*, 97 Ci v 2143, 2000 WL 1863542, *3, 2000 U.S. Dist. LEXIS 18275, at *9 [SDNY 2000] ["an individual 'who has no proprietary interest in a business except to share profits as compensation for services is not a partner or a joint venturer' "] *quoting Impastato v De Girolamo,* 117 Misc 2d 786, 459 NYS2d 512, 514-15 [Supreme Court, New York County 1983], *aff'd,* 95 AD2d 845, 464 NYS2d 382 [2d Dept 1983]). Thus, the *indicia* of partnership may be found where there is: (1) joint control over the enterprise, (2) profit splitting, and (3) loss sharing (*Zito v Fischbein Badillo Wagner Harding*, 11 Misc 3d 713, 809 NYS2d 444, 2006] *citing Prince v O'Brien*, 256 AD2d 208 [1st Dept 1998]; *see also, Blaustein v Lazar Borck & Mensch,* 161 AD2d 507, 555 NYS2d 776 [1st Dept 1990]). The existence of all three elements is essential to finding the

existence of a partnership (*Id.*). Likewise, among the *indicia* of a joint venture are the intention of the parties and acts manifesting their intent to be associated as joint venturers, such as sharing of profits and losses, and ownership of partnership assets (*see Brodsky v Stadlen,* 138 AD2d 662, 663, 526 NYS2d 478 [1988]).

The issue of whether a partnership exists is generally a question of fact (*Olson v Smithtown Medical Specialists,* 197 AD2d 564, 602 NYS2d 649), where there are sufficient *indicia* of such a relationship to present a jury question as to whether the relationship between the parties as defined by the shareholders' agreement constituted a partnership (*see Bamira v Greenberg*, 256 AD2d 237, 682 NYS2d 174 [1998]). Further, a partnership may be oral (*Missan v Schoenfeld*, 95 AD2d 198, 465 NYS2d 706 [1st Dept 1983]). However, the record fails to indicate that the parties herein agreed to the essential elements of a partnership.

Notwithstanding the fact that plaintiff shared office space with Irby, there is no indication that plaintiff exercised joint control with Irby over the day-to-day operations of Irby's office (*cf. Bereck v Meyer*, 222 AD2d 243, 635 NYS2d 15 [1st Dept 1995] citing *Greenberg v Ladicorbic,* 200 AD2d 465, *lv denied* 83 NY2d 757; *Blaustein v Lazar Borck & Mensch,* 161 AD2d 507, 508).

Nor is there any indication that the parties ever reached an agreement, either in writing or orally, to share losses and profits, an essential element to establishing a partnership.

While the draft partnership agreement tends to show that a partnership may have been contemplated, this agreement contains no agreement to the essential elements of a partnership, *i.e.*, profits and losses. Further, by plaintiff's own deposition testimony, the parties had not reached an agreement on such terms. In fact, plaintiff's own deposition testimony establishes

that he and Irby never discussed what would occur in the event of a loss, or how any profits would be shared between the two.

Furthermore, the forms containing the names of the plaintiff, Irby and Irby's wife, used at the street fairs and the office calendar showing plaintiff's and Irby's office visits at Irby's office may establish an association among the three, but do not establish a partnership, in the absence of any indication to share in the profits and losses of their association.

Also, that plaintiff expended sums to finance and market the street fairs does not indicate that the parties intended to establish partnership or joint enterprise. The deposition of the parties and the submissions fail to indicate that Irby agreed to share in any of these expenses. Instead, the record indicates that in exchange for permitting Irby to use the mobile unit and participate at the street fairs in New York, plaintiff was allowed to use Irby's New York office, and that the parties generated and billed their own clients separate and apart from each other at Irby's office.

Based upon the deposition testimony of the parties and Irby's prior partnership experience with his wife, no reasonable juror could conclude that Irby intended to enter into a fiduciary relationship with plaintiff, or even that plaintiff believed *Irby* intended to enter into such a relationship (*Kidz Cloz, Inc. v Officially For Kids, Inc.*, 320 F.Supp.2d 164 [SDNY 2004]).

It has been stated that "Many companies seek to cooperate with each other and reach agreements to implement such cooperation. However, most of these agreements do not create [partnerships]" (*North Am. Knitting Mills, Inc.*, 2000 WL 1290608, *2, 2000 U.S. Dist. LEXIS 13139, at *5). Analogously, the arrangement between plaintiff and Irby for shared use of the mobile unit at street fairs, in exchange for plaintiff's use of Irby's smaller office, does not amount to a partnership.

Although the record is unclear concerning the purpose of the filing of "University Place Chiropractic & Associates, LLP" on September 2, 2002 with the Secretary of State, this name does not appear on any of the forms created by plaintiff in connection with the street fairs, on any of the documents submitted by plaintiff, and is insufficient to overcome the uncontested fact that the parties never agreed to share in the profits and losses of the purported partnership. Notably, the draft partnership agreement also omits the percentages to be assigned to each party for capital, and is silent of the issue of sharing in the profits and losses of the enterprise.

Based on the foregoing, it is hereby

ORDERED that the motion by defendants for summary judgment dismissing the complaint of the plaintiff is granted, and the complaint is dismissed. And it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry. And it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: April 10, 2008

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED

APR

COUNTY CLERK'S OFFICE

NEW YORK