

Superior Transcribing Serv. v Smith

2008 NY Slip Op 32833(U)

October 10, 2008

Supreme Court, New York County

Docket Number: 602955/07

Judge: Richard B. Lowe

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

PRESENT: _____

PART 56

Index Number : ~~602955/2007~~ ^{Justice} ~~602955/2007~~

SUPERIOR TRANSCRIBING SERVICES

vs
SMITH, MILTON, M.D.

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 6/4/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

FILED

OCT 16 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/10/08

HON. RICHARD S. LEVINE, JJ.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 56

X

SUPERIOR TRANSCRIBING SERVICE,
GLADYS PEMBERTON, MITCHELL S.
RAPS, M.D., FRANK MINISSALE, D.C.,
and HAL ROSENFELD, D.C.,

Index No.: 602955/07

Plaintiffs,

- against -

MILTON SMITH, M.D., CYDCO
EVALUATIONS, P.C., and
MILTON M. SMITH M.D., P.C.

Defendants.

FILED
OCT 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Richard B. Lowe, III:

In this action, plaintiffs sue to recover damages allegedly sustained as a result of defendants' failure to pay for services provided in connection with defendants' independent medical examination (IME) practice, and seek damages and injunctive relief in connection with alleged fraudulent conveyances in violation of the New York Debtor and Creditor Law. Defendants make this pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(1), (3), (4), (5) and (7), and CPLR 3016(b).

BACKGROUND

At the outset, although plaintiffs oppose the motion as untimely, defendants' counsel, at oral argument, demonstrated a reasonable excuse for the delay (see Transcript of Oral Argument, dated June 4, 2008, at 11-12). Absent any showing of prejudice to plaintiffs due to the delay, the court will consider the motion.

It is well settled that on a motion to dismiss pursuant to CPLR 3211, the pleading is to be

afforded a liberal construction. See CPLR 3026. The court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” Leon v Martinez, 84 NY2d 83, 87-88 (1994). See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 (2002). When documentary evidence is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, LLP., 96 NY2d 300, 303 (2001). Further, the court may consider a plaintiff’s opposing affidavits to amplify the pleadings. Rovello v Orofino Realty Co., 40 NY2d 633, 635 (1976); Eastern Consol. Prop., Inc. v Lucas, 285 AD2d 421, 422 (1st Dept 2001). “When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.” Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977).

The instant complaint alleges that, at all times relevant to the complaint, defendant Cydco Medical Evaluations, P.C. (Cydco) provided IMEs for various clients (Complaint, ¶ 11), and defendant Dr. Milton Smith, the principal of Cydco, was a medical doctor who had an IME practice (id., ¶¶ 8, 12). Plaintiff Superior Transcribing Service (Superior), of which plaintiff Gladys Pemberton is the sole proprietor and owner, provides medical transcription and other services (id., ¶¶ 1, 2). According to the complaint, in or around September 2001, Superior entered into an agreement with defendants to provide transcription and other services at agreed upon rates in connection with defendants’ IME practices (id., ¶¶ 13-15). Superior alleges that, from September 15, 2001, through February 15, 2002, it provided services to defendants for

which it has not been paid, despite demands for payment (id., ¶¶ 16-17). Plaintiffs Dr. Mitchell S. Raps (Raps), Dr. Frank Minissale (Minissale), and Dr. Hal Rosenfeld (Rosenfeld) each alleges that he had an oral agreement to provide services at agreed upon rates to defendants in connection with defendants' IME practices, and each alleges that, despite demands for payment, he has not been paid for services rendered.

Dr. Raps alleges that he entered into an agreement with defendants in or around March 1997 to conduct IMEs at agreed upon rates (id., ¶¶ 18-20), was paid for IMEs that he conducted from March 1997 through October 2000 (id., ¶ 21), but was not paid for services provided from October 2000 through February 12, 2002 (id., ¶¶ 22-23). Dr. Minissale alleges that he entered into an agreement with defendants in September 1999 to provide chiropractic services (id., ¶¶ 24-25), was paid for IMEs that he conducted from September 8, 1999 through September 30, 2001 (id., ¶ 26), but was not paid for services rendered from October 1, 2002¹ through February 28, 2002 (id., ¶¶ 27-28). Dr. Rosenfeld alleges that he entered into an agreement with defendants in or around June 2000 to provide chiropractic services (id., ¶¶ 29-30), was paid for IMEs conducted from June 2000 through August 2001 (¶ 31), but was not paid for exams conducted from August 2001 through February 2002 (id., ¶¶ 32-33). Superior claims it is owed approximately \$103,000 (id., ¶ 16); and Drs. Raps, Minissale, and Rosenfeld claim that they are owed, respectively, \$31,725, \$7,110, and \$10,080 (id., ¶¶ 22, 27, 32).

Plaintiffs also allege that, beginning in or about September 15, 2001 and continuing, defendants Cydco, Dr. Smith, and Milton M. Smith, M.D., P.C (Smith PC), took actions, at times

¹While the complaint contains the date October 1, 2002, this is obviously an error, and an earlier date applies.

when plaintiffs were creditors, to convey and otherwise transfer money, assets and property to other parties, including the other defendants (id., ¶¶ 36-38). According to the complaint, these conveyances and transfers were used to pay for one or more residences of Dr. Smith and to support Dr. Smith individually, and were made without a fair consideration, with the intent to defraud defendants' creditors, at a time when defendants were insolvent or were rendered insolvent as a result of the transfers (id., ¶¶ 39-53). Plaintiffs further allege that the conveyances and transfers were made at a time when Cydco and Dr. Smith were defendants in an action for money damages commenced by plaintiffs, and that defendants "have failed, or will fail, to satisfy the debt due and owing to Plaintiffs and/or any judgment entered against them in said action" (id., ¶ 87). The complaint alleges that Dr. Smith exercised complete domination and control over Cydco and the Smith PC, that Cydco and the Smith PC failed to keep adequate corporate records and were never adequately capitalized, and that Cydco and the Smith PC primarily transacted the business of Dr. Smith rather than their own, and acted as the alter ego of Dr. Smith (id., ¶¶ 123-133). It is not disputed that Cydco filed a bankruptcy petition in April 2004.

The complaint asserts 10 causes of action based on the above allegations. The first, for breach of contract, and the second, for unjust enrichment, seek damages in the amount that each plaintiff claims it is owed for its services, plus attorneys' fees and punitive damages.

The third through ninth causes of action assert fraudulent conveyance claims in violation of various sections of Article 10 of the New York Debtor and Creditor Law (DCL), including sections 273 (third), 273-a (fourth), 274 (fifth), 275 (sixth), 276 and 276-a (seventh), and 279 (eighth and ninth). These causes of action seek to have the transfers set aside, seek money damages and attorneys' fees, and seek a permanent injunction restraining defendants from

disposing or transferring assets, and for the appointment of a receiver. The tenth cause of action seeks a declaratory judgment that Dr. Smith is personally responsible for the debts of Cydco and the Smith PC (id., ¶ 33).

DISCUSSION

With respect to the fourth cause of action, defendants seek dismissal on the ground that it fails to state a cause of action. The fourth cause of action alleges a violation of Debtor and Creditor Law § 273-a, which provides:

Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

It is well settled that “the existence of an unsatisfied judgment is an essential element of this [cause of] action.” Frybergh v Weissman, 145 AD2d 531, 531 (2d Dept 1988); Cohan v Mithopoulos, 118 AD2d 530, 531 (2d Dept 1986). See also Mega Personal Lines, Inc., v Halton, 9 AD3d 553, 555 (3d Dept 2004); Cabrera v Ferranti, 89 AD2d 546 (1st Dept 1982). Here, it is undisputed that no judgment has been entered against any of the defendants. Notably, plaintiffs offer no opposition to this branch of defendants’ motion. Although plaintiffs point out that defendants incorrectly argue, in their memorandum of law, that the third cause of action is based on § 273-a, plaintiffs do not address the fourth cause of action, which is based on § 273-a. The fourth cause of action accordingly is dismissed.

Plaintiffs also offer no opposition to the branch of defendants' motion which seeks dismissal of the eighth and ninth causes of action, based on DCL § 279. The eighth cause of action seeks a permanent injunction restraining defendants from disposing, conveying, or otherwise transferring any of their assets, and the ninth cause of action seeks the appointment of a receiver. DCL § 279 provides that "[w]here a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction" to seek a restraint or appointment of a receiver. As plaintiffs do not dispute that their claims are matured², this section is not applicable, and the eighth and ninth causes of action should also be dismissed.

Defendants also move to dismiss the third, fifth, sixth and seventh causes of action on the grounds that they are not pleaded with the specificity required by CPLR 3016 (b).

The third cause of action is brought pursuant to DCL § 273, which provides that: "Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

The fifth cause of action is brought pursuant to DCL § 274, which provides that: "Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to

²In fact, plaintiffs argue that they are entitled to money damages under DCL § 278, which applies to creditors who have matured claims. See Plaintiffs' Memorandum of Law in Opp, at 16.

his actual intent.”

The sixth cause of action is brought pursuant to DCL § 275, which provides that: “Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors.”

The seventh cause of action is brought pursuant to DCL § 276, which provides that: “Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.” The seventh cause of action also asserts a related claim for attorneys’ fees under § 276-a.

As to the third, fifth, and sixth causes of action, DCL §§ 273, 274 and 275 pertain to constructive fraud, they do not require that a plaintiff plead or prove intent, and therefore, are not required to meet the heightened pleading requirements of 3016 (b). See Menaker v Alstaedter, 134 AD2d 412, 413, (2d Dept 1987); UBS Real Estate Sec., Inc. v Fairmont Funding Ltd., 19 Misc 3d 1123A, 2008 NY Slip Op 50829U, *5 (Sup Ct, NY County 2008). CPLR 3016 therefore is inapplicable to these sections. Menaker, 134 AD2d at 413.

Section 276 does require that the plaintiff prove that the defendant acted with intent to defraud, and therefore, pursuant to CPLR 3016 (b), the plaintiff must state the circumstances constituting the wrong in detail. However, considering plaintiffs’ supplemental submissions, including the affidavit of plaintiff Gladys Pemberton (“Pemberton”), and given that the parties have not yet conducted pre-trial discovery, and the facts regarding any transfers of defendants’ assets are exclusively within the knowledge of the defendants, the motion to dismiss the third,

fifth, sixth, and seventh causes of action are denied. Defendants may move for summary judgment dismissing these, or any other cause of action, after discovery. See UBS Real Estate Sec., Inc., 19 Misc 3d 1123A, 2008 NY Slip Op 50829U, *5.

The court has considered defendants' other arguments with respect to the third, fifth, sixth, seventh, and tenth causes of action and finds them unavailing. Defendants' argument that plaintiffs are barred from asserting the third through tenth causes of action based on judicial estoppel and lack of standing, is unsupported by any relevant legal authority. The cases relied upon by defendants are inapplicable, as they address circumstances in which bankruptcy proceedings were still active, or where debtors, not creditors, were seeking to assert post-bankruptcy claims. See, e.g., Samuel H. Pardes, Inc. v Henley Fashions, Inc., 118 NYS 2d 578 (Sup Ct, NY County 1953), aff'd 282 AD 935 (1st Dept 1953) (bankruptcy proceeding still pending); Kunica v St. Jean Financial, Inc., 233 BR 46, 58 (SD NY 1999) (failure of debtor to schedule or disclose a cause of action will result in judicial estoppel against asserting it post-bankruptcy; rationale is that "the integrity of the bankruptcy system depends on full and honest disclosure by debtors of all their assets"); Cafferty v Thompson, 223 AD2d 99 (3d Dept 1996) (debtor who omits claims in bankruptcy is judicially estopped from later asserting them). Moreover, the tenth cause of action, to pierce the corporate veil assign personal liability to Dr. Smith, is sufficiently pleaded to withstand the instant motion to dismiss. See 9 E. 38th St. Assocs., LP v George Fehrer Assocs., Inc., 226 AD2d 167 (1st Dept 1996); 29/35 Realty Assocs. v 35th St. NY Yarn Ctr., Inc., 181 AD2d 540 (1st Dept 1992).

Turning to the motion to dismiss the first and second causes of action, the allegations of the complaint are sufficient to plead claims for breach of contract and unjust enrichment.

Further, as amplified by the supplemental affidavit of plaintiff Pemberton, the complaint sufficiently alleges causes of action for breach of contract and unjust enrichment against Dr. Smith individually. However, defendants also move to dismiss the first and second causes of action, pursuant to CPLR 3211 (a) (4), based on a prior pending action.

It is undisputed that in 2002, plaintiffs commenced an action against Cydco and Dr. Smith for breach of contract and unjust enrichment, which is still pending in New York Supreme Court, Nassau County (the 2002 action). A review of the complaint in the 2002 action shows that the first two causes of action in the instant complaint are based on the same set of facts and seek the same relief as the 2002 action. It is also undisputed that the 2002 action was stayed during Cydco's bankruptcy proceedings from 2004 to 2007, and since then has been inactive. Plaintiffs contend that, in view of the additional claims in the instant action, and given the discretion granted to the courts under CPLR 3211 (a) (4), the instant complaint should not be dismissed and, instead, plaintiffs should be permitted to discontinue or consolidate the 2002 action into the instant action.

Pursuant to CPLR 3211 (a) (4), a court has "broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action." Whitney v Whitney, 57 NY2d 731, 732 (1982). CPLR 3211 (a) (4) expressly provides that "the court need not dismiss upon this ground but may make such order as justice requires." Accordingly, a court may order consolidation of the two actions (see MediaAmerica, Inc. v Rudnick, 156 AD2d 174 [1st Dept 1989]; Security Mut. Life Ins. Co. of NY v DiPasquale, 271 AD2d 268 [1st Dept 2000]), or may "dismiss a prior pending action instead of dismissing the later action." Great W. Bank v Terjo, 200 AD2d 608, 609 (2d Dept

1994). See Dunn v Dunn, 86 AD2d 772 (4th Dept 1982).

Here, the instant complaint asserts additional causes of action, involves additional parties, and seeks different relief than the prior action. Under these circumstances, and considering the inactivity of the prior action, dismissal is not appropriate. Moreover, plaintiffs seek leave to discontinue the 2002 action. "In the absence of special circumstances, such as particular prejudice to the defendant or other improper consequences, an application for a voluntary discontinuance should be granted." Great W. Bank, 200 AD2d at 609. See Parraguirre v 27th St. Holding, LLC, 37 AD3d 793 (2d Dept 2007). Defendants claim no prejudice as a result of discontinuance of the 2002 action, nor do they oppose plaintiffs' application, which therefore should be granted.

CONCLUSION

Accordingly, it is ORDERED that the motion is granted only to the extent that the fourth, eighth and ninth causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that, with respect to the first and second causes of action, the motion is denied on condition that plaintiffs move to discontinue the 2002 action in Supreme Court, Nassau County, subject to approval of that court, within 30 days of service of a copy of this order with notice of entry.

Dated: October 10, 2008

ENTER

FILED
OCT 16 2008
HON. RICHARD B. LOWE, NJ
J.S.C.
COUNTY CLERK'S OFFICE 10-
NEW YORK