

Ditolla v Doral Dental IPA of N.Y., LLC

2009 NY Slip Op 30744(U)

March 26, 2009

Supreme Court, Nassau County

Docket Number: 002070/06

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----x

DR. WILLIAM J. DITOLLA, on behalf of
himself and all others similarly situated,

Plaintiff,

-against-

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 14
Index No.:002070/06
Motion Seq. No.: 04**

DORAL DENTAL IPA OF NEW YORK, LLC,
DORAL DENTAL USA, LLC and DENTAQUEST
VENTURES, LLC,

Defendants.

DECISION AND ORDER

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Motion pursuant to CPLR § 3211[a][7] by the Defendants Doral Dental IPA of New York, *et. al.*, for an order dismissing the Plaintiff's complaint.

In February of 2006, the Plaintiff William J. Ditolla, DDS, commenced the within, putative class action against the Defendants Doral Dental IPA of New York, LLC, Doral Dental USA, LLC and Dentaquest Ventures, Inc., [collectively "Doral"], seeking an accounting and "to compel disclosure" from Doral – "the largest multi-state, Medicaid dental administrator in the country" (Cmplt., ¶ 4).

More particularly, the Plaintiff contends that Doral regularly enters into contracts with various health maintenance organizations and state governments, pursuant to which it administers dental plans in some seventeen different states, including New York (Cmplt., ¶¶ 3-6).

According to the Plaintiff, he and other similarly situated dentists or providers, entered into a "Restated Dental Provider Service Agreement" by which they agreed to provide dental services to medicaid patients – in exchange for which Doral was to make payments in accord with a published fee schedule (Cmplt., ¶¶ 10-12).

In sum, and pursuant to the parties' agreement and relevant attachments, the total "amount available to be paid to participating dentists is deposited in a 'Dental Reimbursement Pool'" out of which Doral would then pay participating dentists (Cmplt., ¶ 12) (Attachment for * * * Dental Reimbursement, ¶ 1.02). The Plaintiff alleges that the pool represents the sole source for provider compensation under the agreement.

Significantly, the parties' agreement also permits Doral in its discretion to "enter into contracts with * * * certain brokers and consultants" and further provides that the Pool may be reduced by any commissions and/or other fees ultimately paid by Doral to these third parties (Cmplt., ¶ 5; Attachment,

supra, ¶ 1.02).

The Plaintiff contends that the effect of these third party payments, is therefore to reduce the Pool amounts available to participating dentists for “services rendered to the Medicaid population”(Cmplt.,¶ 21).

The Plaintiff further avers that the since the contract permits Doral to retain these third parties without effective limitation – and then to deduct their compensation from the provider fee pool, it essentially imposes upon the Plaintiff – not Doral – the burden of paying these third parties. In light of these factors, the Plaintiff alleges that a fiduciary relationship of fidelity, trust and accountability arose in connection with, *inter alia*, Doral’s administrative control over the income stream which funds the Pool (Cmplt.,¶ 16).

Although the Plaintiff’s complaint does not currently accuse Doral of any wrongful acts, the Plaintiff advises that grand juries in various states are currently investigating whether, *inter alia*, Doral fraudulently paid out sums from the pool to public officials in exchange for, *inter alia*, political favors (Cmplt.,¶¶ 16-20).

Based upon the facts recited above, the Plaintiff has interposed a single cause of action, which requests an “equitable accounting of all amounts by which the pool was funded and reduced throughout the period in which * * * [Doral] has been under contract to provide dental services to the New York Medicaid and Medicare populations * * *” (Cmplt.,¶¶ 33-36).

Specifically, the Plaintiff’s accounting claim requests information relating to, *inter alia*, the amount, date and basis for each payment, as well as the identity of each recipient and the recipient’s legal and/or familial relationship – if any – to employees, directors, agents or officers of Doral (Cmplt.,¶ 36).

The Defendant now moves to dismiss the complaint pursuant to CPLR § 3211[a][7]. The motion should be **denied**.

On a motion to dismiss pursuant to CPLR § 3211[a][7], the Court must accept as true, the facts “alleged in the complaint and submissions in opposition to the motion, and accord Plaintiffs the benefit of every possible favorable inference,” determining only “whether the facts as alleged fit within any cognizable legal theory” (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001] *see, AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 591 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). “Whether a Plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). It is settled that “[t]he right to an accounting rests on the existence of a trust or fiduciary relationship regarding the subject matter of the controversy at issue” (*Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616, 617, *quoting from, Town of New Windsor v New Windsor Volunteer Ambulance Corps, Inc.*, 16 AD3d 403, 404 *see also, LoGerfo v Trustees of Columbia University in City of New York*, 35 AD3d 395, 397 *see generally*, 1 NY Jur2d, Accounts & Accounting, § 34).

It has been held that a fiduciary relationship arises “between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation” (*EBC I, Inc. v Goldman, Sachs & Co.*, *supra*, 5 NY3d at 19 *see also, Marmelstein v Kehillat New Hempstead*, 11 NY3d 15, 22 [2008]; *AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 11 NY3d 146, 158 [2008]; *AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6; *Pergament v Roach*, 41 AD3d 569, 571). Although a “conventional business relationship”, does not

create a fiduciary duty (*AHA Sales, Inc. v Creative Bath Products, Inc.*, 58 AD3d 6; (*Surge Licensing, Inc. v. Copyright Promotions Ltd.*, 258 AD2d 257, 258; *Feigen v Advance Capital Management Corp.*, 150 AD2d 281, 283), “it is fundamental that fiduciary ‘liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary * * *’” (*EBC I, Inc. v Goldman, Sachs & Co.*, *supra*, 5 NY3d at 20, quoting from, (Restatement [Second] of Torts § 874, Comment b).

It has been observed in this respect that, “a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another * * *” (*Penato v George*, 52 AD2d 939, 842 accord, *AHA Sales, Inc. v Creative Bath Products, Inc.*, *supra*, 58 AD3d 6).

Notably, “[d]etermining whether a fiduciary relationship exists necessarily involves a fact-specific inquiry” (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, *supra*, at 158 see also, *Northeast General Corp. v. Wellington Advertising, Inc.*, 82 NY2d 158, 162 [1993]; *Chasanoff v Perlberg*, 19 AD3d 635, 636).

With the foregoing principles in mind, and according the allegations made the “benefit of every possible favorable inference” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *McCarthy v Young*, 57 AD3d 955), the Court agrees that the Plaintiff’s claims have, at this juncture, adequately pleaded the existence of a fiduciary relationship which would support the granting of an accounting.

A review of the subject provider service agreement and attachments thereto, reveals that Doral apparently possesses unfettered authority to retain third parties and compensate them from the premium pool. The net effect of this provision is to confer upon Doral, the power to reduce at will, the monthly “net premiums” and in turn, diminish without meaningful accountability, the income stream out of which the provider-dentists exclusively receive their plan compensation.

The Court agrees that the discretionary power alleged to exist here, *i.e.*, the right to maintain and compromise an income stream constituting the sole source of provider compensation – could give rise to a “higher” duty of “trust and confidence” “in the integrity and fidelity” of the Defendant’s conduct with respect to third-party hiring (*LoGerfo v Trustees of Columbia University in City of New York*, *supra*, 35 AD3d 395; *El-Khoury v Karasik*, 265 AD2d 372 see generally, *AHA Sales, Inc. v Creative Bath Products, Inc.*, *supra*, 58 AD3d 6; *Penato v George*, *supra*, 52 AD2d at 842).

It is true that conventional business relationships implicating the sensibilities of “the workaday world” will not suffice to create a fiduciary duty (*Northeast General Corp. v Wellington Advertising, Inc.*, *supra*; *Meinhard v Salmon*, 249 NY 458, 464 [1928]). Here, however, the Defendant’s exclusive knowledge relative to the disputed expenditures, coupled with its uniquely unbounded, “de facto control and dominance” over third party hiring – and thus the size of the provider income pool (*Marmelstein v Kehillat New Hempstead*, *supra*, at 21 cf., *Chasanoff v Perlberg*, *supra*), can be viewed as commercially anomalous and unconventional, thereby further supporting the existence of the claimed fiduciary relationship (*El-Khoury v Karasik*, *supra*).

Nor are the facts at bar on all fours with the holding in *Gerstel v Workmen's Benefit Fund of U.S.A., Inc.*, 5 Misc.2d 1012, *affd*, 4 AD2d 937), relied upon by the Defendant. In *Gerstel*, *supra*, which also involved the provision of group medical services, the Defendant administered a premium-funded pool from which it deducted its own flat 15% fee. However, the Defendant there lacked the authority to

further and unilaterally deplete pool proceeds through the retention of third party consultants – the linchpin, factual distinction underlying the Plaintiff’s fiduciary duty claim.

Lastly, “the fact that the agreement refers to * * * [the Plaintiff] as an ‘independent contractor’ does not defeat the existence of a fiduciary relationship where one would otherwise exist”(Pergament v Roach, 41 AD3d 569, 572; El-Khoury v Karasik, supra, 265 AD2d 372).

It is settled that “a motion to dismiss pursuant to CPLR § 3211(a)(7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the Plaintiff, “the complaint states in some recognizable form any cause of action known to our law” (McCarthy v Young, supra, 57 AD3d 955). Moreover, “[w]hether the complaint will later survive a motion for summary judgment, * * * of course, plays no part in the determination of a pre-discovery CPLR § 3211 motion to dismiss” (Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38 [2006]).

In accord with these principles, and keeping in mind that the fundamentally “fact-specific” nature of whether a fiduciary relationship exists in any given circumstance (AG Capital Funding Partners, L.P. v State Street Bank and Trust Co., supra, at 158), the Court concludes that at this “CPLR § 3211 motion stage” (Held v Kaufman, 91 NY2d 425, 433 [1998]), the Defendant’s motion to dismiss should be denied.

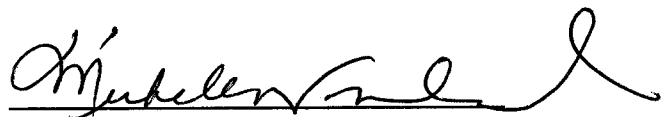
The Court has considered the Defendant’s remaining contentions and concludes that they are lacking in merit.

Accordingly it is,

ORDERED that the motion pursuant to CPLR § 3211[a][7] by the Defendants Doral Dental IPA of New York, et., al., for an order dismissing the Plaintiff’s complaint, is **denied**. Counsel are directed to appear for a certification conference in Part 14 on May 1, 2009.

The foregoing constitutes the decision and order of the Court

DATED: March 26, 2009
Mineola, N.Y. 11501

ENTER: 
HON. MICHELE M. WOODARD
J.S.C.

ENTERED
MAR 31 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE