INDEX NO.33559-2008

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 001MotD

Present:
Hon. SANDRA L. SGROI

***Preliminary Conference Scheduled on July 9, 2009***

Adj. Date: 5-7-09
Return Date: 12-23-08

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LONG ISLAND FAMILY MEDICAL GROUP, P.C. and WALK IN MANAGEMENT CORP.,
Plaintiffs,

-against-

JOHN ZIMMERLY, M.D.,
Defendant.

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Upon the following papers numbered 1 to 24 read on this Motion: Notice of Motion and supporting papers 1-9; Affidavit in opposition and supporting papers 10-15; Affirmation in Reply and supporting papers 16-18; 19-20; 21-24; it is,

***ORDERED*** that the motion of the Plaintiffs Long Island Family Medical Group, P.C. and Walk in Management Corp for an order removing the summary proceeding commenced by the Defendant John Zimmerly in the Fifth District Court, Suffolk County (ISLT -08-2666) to this Court and consolidating it with this action is granted to the extent that the landlord tenant proceeding is removed from the District Court and joined with this civil action in the Supreme Court; and it is further

***ORDERED*** that the attorneys for all parties are directed to appear on ***July 9, 2009*** at the John P. Cohalan Courthouse, Central Islip, New York, Courtroom S23, at 10:00 a.m. for a preliminary conference to schedule all discovery and depositions; and it is further

***ORDERED*** that the Plaintiffs are directed to serve a copy of this order on the Calendar Clerk of this Court, the Chief Clerk of the Suffolk County District Court and Clerk of the Islip District Court and the parties shall arrange for the transfer of the landlord tenant proceeding commenced under Index No. ISLT 2666-2008 in the Suffolk County District Court to Supreme Court; and it is further

***ORDERED*** that all other requested relief is denied at this time.

The Plaintiffs herein, Long Island Family Medical Group, P.C. and Walk In Management Corp., commenced this action for a permanent injunction against the Defendant, John Zimmerly, M.D., by service of a summons and complaint in September of 2008. An amended verified Complaint was served by the Plaintiffs on or about April 14, 2009. The amended Complaint in the action alleges four separate causes of action. In the first cause of action the Plaintiffs allege that the Defendant's conduct "will cause a loss of goodwill and adversely affect plaintiffs' business and professional reputation." The second cause of action alleges that the "Defendant has breached the shareholders' agreement, pertaining to the plaintiff corporation, Walk In Management Corp., by virtue of the self-dealing, oppressive and bad faith conduct described above and has otherwise breached the implied covenant of good faith and fair dealing contained in the shareholder's agreement." The third cause of action alleges that the "Defendant has breached his fiduciary duty to plaintiffs by wrongfully impairing and converting their goodwill and reputation and, otherwise, by acting in bad faith and in failing to cooperate with plaintiffs and harming them by defendant's actions." Finally, the fourth cause of action alleges that the "Defendant's undivided duty of loyalty and fiduciary" duties(as a director, officer and shareholder of the plaintiff corporations) "are breached by, inter alia, profiting from the lease of the premises at 160 Middle Road, Sayville, New York.

The Plaintiffs are corporations that were organized to manage and conduct a medical practice and they are inter-related corporate entities. The Defendant John Zimmerly, M.D. is a shareholder of both Plaintiffs Long Island Family Medical Group, P.C. and Walk In Management Corp. In addition to being a shareholder of the Plaintiffs, Zimmerly is also an officer of the Plaintiff Walk In Management Corp. In his individual capacity and apart from his relationship from the Plaintiffs, the Defendant is the landlord and sole owner of commercial real estate located at 160 Middle Road, Sayville, New York. The Plaintiffs have maintained a medical office specializing in walk-in general practice for over twenty years at this location. It is alleged by the Plaintiffs that the Defendant proposes to evict the Plaintiffs from their office in Sayville and that he intends to rent this leased space to another medical practice which will be in direct competition with the Plaintiffs at a rent that is above market value. The Defendant has commenced a summary proceeding to evict the Plaintiffs from the Sayville office.

The Plaintiffs state that the additional rental that the space may command for a competing medical practice is based upon the good will and reputation established by the Plaintiffs during their tenure in the Sayville office. The civil action commenced by the Plaintiffs seeks to prevent the Defendant from terminating the lease, to enjoin the Defendant from evicting the Plaintiffs, and for damages for converting the good will and reputation of the Plaintiffs corporations.

After the summary proceeding was commenced in the Suffolk County District Court, the Plaintiffs brought this order to show cause seeking to remove the summary proceeding to the Supreme Court and to consolidate it with this action.[1]

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[1]The court notes that the summary proceeding was commenced against L.I. Family Medicine and it appears that the tenant on the property was Walk In Management Corp. until the name of the tenant was changed without explanation to L.I. Family Medicine in the addendum to the lease dated July 7, 2005.

In opposition to the order to show cause, John Zimmerly has provided the Court with the history of his involvement with the rental property. He states that Philip Peters, D.D.S. and he purchased the real property which is the subject of this action in 1984 and that they arranged to have a commercial building constructed on that property. In or around March of 1985, after construction was finished, Suite 3 of this building was rented to the Plaintiffs. Zimmerly disclosed at that time that he was a fifty (50) per cent owner of the building and a twenty-five (25) per cent shareholder of Walk In Management and Long Island Family Medical Group. During the tenancy of Walk In Management Care and Long Island Family Medical Group, the former owner of the property, Peters & Zimmerly Co. entered into a series of leases with the Plaintiff Walk In Management Corp. and the last lease addendum between Peters & Zimmerly Co. and L.I. Family Medicine expired on October 1, 2007.[2] Therefore, the Plaintiffs have been occupying the premises since 2007, without benefit of a written lease, although the terms for a new lease have been discussed extensively by the parties.

The last written lease extension, signed on July 7, 2005, ran for approximately 1 1/2 years and terminated on March 31, 2007, by its terms. Approximately six months prior to the expiration of this lease extension between Peters & Zimmerly Co. and Long Island Family Medicine (which the Court assumes is either the Plaintiff Long Island Family Medical Group, P.C. or the Plaintiff Walk In Management Corp.), negotiations for a new lease began between the parties in this litigation. The negotiations were conducted by Philip Peters, D.D.S.,.and Marge Simat who acted on behalf of the Plaintiffs. At that time, the landlord asked for a pass through of all tax increases on the real property and an increase in the rent calculated upon the garbage collection fees associated with the tenants' trash. The Plaintiffs refused to agree to increases of the rent for the leased medical office space.

On April 23, 2007, the Defendant purchased the interest of Philip Peters in the building and property at 160 Middle Road, Sayville. As a result, Zimmerly became the sole owner of this commercial property and he became responsible for the negotiation of the new lease with the Plaintiffs. By this time, the written lease had lapsed and the Plaintiffs were occupying as a month to month tenant.

According to Zimmerly, he offered several different variations of proposed terms for a new lease but the Defendants have refused to pay additional monies to rent the medical offices in the Sayville building and the parties have been unable to agree upon terms for a new lease for over two years. Initially, the landlord continued to accept rent from the Plaintiffs and the Plaintiffs were occupying pursuant to a verbal agreement on a temporary month to month basis until a new lease could be negotiated. When a new lease was not agreed to by the parties, the Plaintiff Long Island Family Medicine (as named in the summary proceeding) was advised in writing on or about July 29, 2008, that its month to month tenancy was terminated and that it should vacate the premises by September 30, 2008. When the tenants did not vacate the premises, and a new lease was not agreed to by the parties, the Defendant Zimmerly commenced a summary proceeding in Islip District Court in November of 2008 to recover the real property.

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[2]The Court is assuming that L.I. Family Medicine is a name under which one of the named Plaintiffs is doing business. The parties should stipulate as to the relationships between the Plaintiffs and L.I. Family Medicine and, if the parties are unable to stipulate, it would be proper to conduct discovery on this issue.

The Plaintiffs commenced this action shortly thereafter, and this order to show cause was submitted by the attorneys for the Plaintiffs and signed by Justice Peter Fox Cohalan, J.S.C. on December 9, 2008.

Although the Plaintiffs have not entered into a new lease with the Defendant and they are now holdovers at the premises because both the lease and the written extension have expired and the subsequent month to month tenancy established by a verbal agreement between the parties appears to have been properly terminated, the Plaintiffs do not wish to vacate the space in the Defendant's building. It is undisputed that during the lengthy negotiations for a new lease between the parties that have now spanned two years, the Defendant has consistently asked for an increase in the price per square foot of occupied space and an increase in the payment of the common charges. The Plaintiffs have refused to agree to the terms requested by the Defendant and have steadfastly asserted that a tenancy should be continued without the larger increases requested by the Defendant.

In the usual situation, where the landlord and the tenant cannot agree as to the terms that should be included in a new lease and the lease term has expired, the tenant would be forced to vacate the premises. The Supreme Court would not remove the landlord tenant proceeding pending in the District Court and consolidate it with a Supreme Court action for injunctive relief. However, here, the Plaintiffs allege that the Defendant intends to lease the space occupied by the Plaintiffs to a competing medical practice for a rental inflated by the good will, reputation and client base of the Plaintiffs in breach of his fiduciary duties owed to them by virtue of Defendant's ownership and involvement in the management of the corporate Plaintiffs.

There are two different relationships that connects Zimmerly with the Plaintiffs. One involves his capacity as an officer or director of a corporate entity and the other is based upon his ownership of stock.

It cannot be disputed that the directors and officers of a corporation occupy a fiduciary relationship both to the shareholders and to the corporation that they serve(***Schwartz v. Marien***, 37 N.Y.2d 487, 373 N.Y.S.2d 122, 335 N.E.2d 334). Directors and officers have this relationship by virtue of their responsibility to act as guardians of the corporate interests (see, ***Alpert v. 28 Williams Street Corp.***, 63 N.Y.2d 557, 483 N.Y.S.2d 667, 473 N.E.2d 19). They may not exercise authority to conduct the business of the corporation in violation of those fiduciary duties owed to the corporation. This fiduciary duty arises because when a director or officer benefits himself or herself at the expense of the corporation, the duty to the shareholders is breached because the shareholders are prevented from realizing their expectation to share fairly in the corporate profits. The directors and majority shareholders of a corporation have an obligation to all shareholders to adhere to fiduciary standards of conduct and to exercise their responsibilities in good faith when undertaking any corporate action, including a merger.

In attempting to determine whether a director or officer has violated his fiduciary duty to the corporation ,it is not enough that his acts may accord with statutory requirements. The complexities of business interrelationships requires a fluidity of definition that subjects a director or officer's conduct to scrutiny where his activities may not be for the aggrandizement of the corporate entity or may result in undue advantage to the fiduciary to the exclusion or detriment of the shareholders (see, ***AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*** , 11 N.Y.3d 146, 866 N.Y.S.2d 578, 896 N.E.2d 61). When the trier of fact determines that a breach of fiduciary duty occurs, that action will be considered unlawful and the aggrieved shareholder or corporation may be entitled to equitable relief and even, in the appropriate instance, money damages (see generally, ***Marmelstein v. Kehillat New Hempstead,*** 11 N.Y.3d

15, 21, 862 N.Y.S.2d 311, 892 N.E.2d 375).

A different standard to determine liability is applied when it is alleged that a shareholder has breached its duty to the corporation. A fiduciary obligation is not imposed on every shareholder of every small or close corporation. It is true that a *majority* shareholder in a close or small corporation is in a fiduciary relationship with the minority shareholders of that corporation (see, ***Global Mins. and Metals Corp. v. Holme***, 35 AD3d 93, 824 N.Y.S.2d 210; ***Barbour v. Knecht***, 296 A.D.2d 218, 227, 743 N.Y.S.2d 483; ***Richbell Info. Serv., Inc. v. Jupiter Partners, L.P.***, 309 A.D.2d 288, 765 N.Y.S.2d; ***Alpert v. 28 Williams St. Corp***., 63 N.Y.2d 557, 483 N.Y.S.2d 667). Those shareholders who are in control of a close corporation owe a fiduciary duty to the other shareholders in their actions ( see, ***O'Neill v. Warburg, Pincus & Co.***, 39 AD3d 281; ***Richbell Info. Servs. v. Jupiter Partners***, 309 A.D.2d 288). However, here there has been no showing that Zimmerly is in control of the Plaintiffs nor has there been a showing that he is a majority shareholder of either of the Plaintiffs. Therefore, to the extent that the Plaintiffs' claims are based upon a showing that the Defendant violated a duty emanating from his status as a shareholder, the Plaintiffs have failed to show a likelihood of success on the merits, and this decision to grant the motion of the Plaintiffs to the extent that they seek removal of the summary proceeding is not based upon the Defendant's capacity as a minority shareholder of the Plaintiffs.

While it may not be clear if Zimmerly owes a fiduciary duty to the Plaintiffs as a result of his status as a shareholder, since it is undisputed that he is an officer of the Plaintiff Walk in Management Corp., and officers undisputedly owe a duty of good faith and fair dealing to the corporation that they serve, Zimmerly does have a fiduciary duty in any of his dealings with the Plaintiff as a result of that status (see, ***Laro Maintenance Corp. v. Culkin***, 267 A.D.2d 431, 700 N.Y.S.2d 490). Simply having a fiduciary duty does not prohibit an officer or director of a corporation from doing business with that corporation and profiting from that business (see generally, ***Sternheimer v. Sternheimer***, 155 S.E.2d 41; ***McGraw v. Andes***, 978 S.W.2d 794; ***Turner v. Ferguson***, 149 F.3d 821).

The attorney for the Plaintiffs alleges that the Defendant intends to lease the space in the suite presently occupied by the Plaintiffs to a primary care medical practice and that this new tenant will compete directly with the business of the Plaintiffs. Most importantly, the Plaintiffs allege that the Defendant "***intends to profit from plaintiffs' long established reputation and goodwill, at the same time, depriving plaintiffs of patients, revenue and other resources***" (see generally, ***Meinhard v. Salmon***, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1; ***Commodities Research Unit (Holdings) Ltd. v. Chemical Week Associates***, 174 A.D.2d 476, 477, 571 N.Y.S.2d 253, 254; ***Poling Transp. Corp. v. A & P Tanker Corp.***, 84 A.D.2d 796, 443 N.Y.S.2d 895).

The Plaintiffs have not requested that the Court stay the District Court summary proceeding but they have moved to consolidate the landlord tenant proceeding pending in Suffolk County District Court with the action pending in the Supreme Court.

The Supreme Court, as the statewide court of original jurisdiction, has jurisdiction over a summary eviction proceeding, and a landlord tenant proceeding may be removed to Supreme Court and consolidated with a pending Supreme Court action or proceeding if warranted in appropriate circumstances (see, ***CPLR*** 602(b)). Removal of the summary proceeding is at the discretion of the Supreme Court and it is not automatic (see, ***La Torre v. Mountcastle***, 88 A.D.2d 724, 451 N.Y.S.2d 280).

Consolidation or removal of the landlord tenant proceeding will not be permitted unless the Plaintiffs show that the Suffolk County District Court cannot provide complete relief between the parties in the proceeding pending before it (see, ***Lun Far Co. v. Aylesbury***, 40 A.D.2d 794, 338N.Y.S.2d 84). Further, the Plaintiffs cannot use an action commenced in Supreme Court as a device to obtain an injunction against prosecution of a summary proceeding where equitable and other defenses could be interposed in the lower court proceeding (see, ***Kanter v. East 62nd St. Assocs.***, 111 A.D.2d 26, 488 N.Y.S.2d 692).

Here, the Suffolk County District Court cannot provide the relief requested by the Plaintiffs in this action, damages for breach of a fiduciary duty and injunctive relief, and the Plaintiffs cannot raise the issues presented in this case, to the extent relevant, as an effective equitable defense in the District Court summary proceeding.

As noted above, where the claims asserted by the Plaintiffs in the Supreme Court are available as equitable defenses in the landlord tenant summary proceeding, the Supreme Court will generally decline to enjoin or stay the summary eviction proceeding, although at times, depending upon the circumstances, the Supreme Court has stayed the lower Court proceedings pending the resolution of the Supreme Court matter (see, ***Childress v. Lipkis***, 72 A.D.2d 724, 443 N.Y.S.2d 63; ***Parksouth Dental Group, P.C. v. East River Realty***, 122 A.D.2d 708, 505 N.Y.S.2d 633; ***Amoo v. Eastlake Co.***, 133 A.D.2d 657, 519 N.Y.S.2d 831; ***Mannino v. Toasa Corp. of New York***, N.Y.L.J., Dec. 30, 1987, at 10, col. 5, Sup. Ct. New York County- the Supreme Court enjoined holdover proceeding pending determination of tenant's declaratory judgment action regarding insider rights).

At this time, the Plaintiffs have not requested that the Court enjoin the summary proceeding pending a determination of the Supreme Court action. It has only alleged that the Court remove the action from the District Court and consolidate it with the Supreme Court action. Since the issue involved in the Supreme Court action, the alleged violation of the fiduciary duty owed by the Defendant to the Plaintiff, must be determined prior to the trial of the summary landlord tenant proceeding, the Court will remove the landlord tenant proceeding from District Court to the Supreme Court at this time and order expedited discovery in the civil Supreme Court action pending before this Court. After the Supreme Court action has been resolved, unless the Court orders otherwise, the assigned trial justice, at his discretion, may remand the landlord tenant summary proceeding to the District Court or continue with the trial of the landlord tenant proceeding.

Dated: 6/12/09

SANDRA L. SGROI, J. S. C.