| **Signature Med. Mgt. Group, LLC v Carlin** |
| --- |
| 2009 NY Slip Op 31483(U) |
| June 29, 2009 |
| Supreme Court, Nassau County |
| Docket Number: 012156/2002 |
| Judge: Ira B. Warshawsky |
| Republished from New York State Unified Court System's E-Courts Service.<br>Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

[* 1 ]

SCAN

**SHORT FORM ORDER**

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

**PRESENT:**
**HON. IRA B. WARSHAWSKY,**
**Justice.**

**TRIAL/IAS PART 9**

SIGNATURE MEDICAL MANAGEMENT GROUP, LLC,

Plaintiff,

INDEX NO.: 012156/2002
MOTION DATE: 05/12/2009
MOTION SEQUENCE: 003, 004 and 005

-against-

MICHAEL CARLIN, M.D., GRAND CONCOURSE MEDICAL SERVICES, PLLC,

Defendants.

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion, Affirmation & Exhibits Annexed .......................................... | 1 |
| Notice of Cross-Motion, Affirmation & Exhibits Annexed ............................... | 2 |
| Notice of Cross-Motion, Affirmation & Exhibits Annexed ................................ | 3 |
| Affirmation of Craig D. Bloom in Opposition & Exhibits Annexed .................... | 4 |
| Reply Affirmation in Further Support of Craig B. Sanders ................................ | 5 |
| Reply Affirmation in Further Support of Craig D. Bloom & Exhibits Annexed .. | 6 |
| Sur-Reply Affirmation in Further Opposition of Craig B. Sanders ...................... | 7 |

## PRELIMINARY STATEMENT

The Plaintiff moves for leave pursuant to Civil Practice Law and Rules for Leave to Reargue and to Amend Complaint. The Defendants cross-move for leave to reargue, to dismiss the complaint in its entirety, and for the disqualification of the Plaintiff's attorney.

[* 2 ]

## BACKGROUND

Signature provides non-medical administrative services to medical providers, and contracted to do so for Grand Concourse by 11/17/97. The agreement was for thirty years, but within two months there were allegations of breach. By Settlement Agreement dated December 30, 1999, the parties sought to put their difficulties behind them, apparently unsuccessfully.

The Summons and Complaint[1] were originally filed on July 23, 2002, and remained dormant for almost seven years. This delay was occasioned by a combination of the bankruptcy protection of the Plaintiff through December 2005, and the deteriorating health, and ultimate passing, of the former counsel for the Plaintiff.

The Plaintiff moved by a motion originally returnable on December 10, 2008 for leave to amend the July 2002 complaint to include grievances generated as a result of the putative settlement agreement[2]. The Defendants opposed the motion on the grounds that the new claims raised were released by the Settlement Agreement; the new claims were barred by the Statute of Limitations; there was no showing of merit of the new claims; the alleged fraud was not pled with required particularity; and, the claims for breach of fiduciary duty, unjust enrichment and fraud are duplicative of thee claims for breach of contract. The Court ruled in a decision dated March 9, 2009 that the amended claim for Breach of the Management agreement was not barred by either the Statute of Limitations or the release provision contained in the Settlement Agreement; the amended claim for breach of the Settlement Agreement was the same as the claim as made in the original complaint and therefore was not barred; the claim for breach of fiduciary duty was dismissed; the claim for unjust enrichment arose from the same claim as the

[1] The provisions of the original complaint were outlined in detail in the courts decision to the Plaintiff's earlier motion to amend the complaint which was decided on March 9, 2009 and attached as Exhibit B in Plaintiff's motion Sequence # 003.

[2] A copy of Plaintiff's amended complaint is attached as Exhibit A in Plaintiff's motion Sequence # 003

breach of contract claims and was dismissed; the claim for fraud was insufficient and alleged no more than the claims of the breach of contract and was dismissed; and, Defendants' motion for sanctions were denied.

Prior to serving the amended complaint pursuant to the Court's March 9, 2009 decision, Plaintiff filed a motion on March 23, 2009 to renew and reargue the Court's decision with respect to the dismissal of the unjust enrichment claim against defendant Dr. Carlin individually. In its motion papers the Plaintiff included a proposed amended complaint entitled Second Amended Complaint[3]. This amended complaint contained the following three causes of action: breach of the Management Agreement against defendant GCMS; breach of the Settlement agreement against both Dr. Carlin and GCMS; and, unjust enrichment against Dr. Carlin. In response to Plaintiff's motion Defendants' cross-moved, in a motion dated April 7, 2009, requesting leave to reargue the Court's decision with respect to release of the Management Agreement not taking effect; dismissing the proposed Second Amended Complaint in its entirety; and, disqualifying Plaintiff's counsel in this matter.

The proposed Second Amended Complaint was never served, and Plaintiff's motion to reargue and renew was withdrawn at a conference with the Court on April 15, 2009. The Plaintiff subsequently filed a cross-motion to amend its pleadings on April 24, 2009 in accordance with CPLR §3025. In its motion papers the Plaintiff includes a copy of the proposed amended complaint entitled Third Amended Complaint. The Third Amended Complaint alleges a claim for breach of the Management Agreement against GCMS in the amount of $2,973,000; claims to pierce the corporate veil against Dr. Carlin individually with respect to the Management Agreement and Settlement Agreement for $377,756 and $30,228.37 respectively;

[3] Second Amended Complaint is attached to plaintiff's motion Sequence #3 Exhibit D

and indemnification against Dr. Carlin for violation of paragraphs 5(c) or 8(c) of the Settlement Agreement. In opposition to this motion, defendants reiterate the objections raised in response to Plaintiff's motion to renew and reargue and in their cross-claim namely that any claims for breach of the Management Agreement were released as a result of the Settlement Agreement; any claims for breach of the Settlement Agreement should be dismissed because Plaintiff failed to provide the required written notice of breach and provide five (5) days to cure; and, Plaintiff's new allegations based on fraud are insufficient and fail to allege anything more than breach of contract.

**DISCUSSION**

In accordance with Civil Practice Law and Rules §3025(b) "leave to amend a complaint shall be freely given unless the proposed amendment would cause prejudice or surprise." *(39 College Point Corp. v Transpac Capital Corp.*, 27 A.D. 3d 454 [2d Dept. 2006]). In its Third Amended Complaint (although the Second was never served) the Plaintiff now alleges the following:

- breach of the management agreement against Grand Concourse in the amount of $2,973,000;
- action to pierce the corporate veil of Grand Concourse for breach of the Management Agreement in the amount of $377,756;
- Piercing of Corporate veil to impose personal liability on Defendant Carlin for failure to turn over the sum of $30,228.37 pursuant to the Settlement Agreement;
- indemnity against Defendant Carlin for failure to turn over $30,228.37 pursuant to ¶¶ 5 (c) and 8 (c) of the Settlement Agreement;

[* 5 ]

The motion to amend the complaint to allege piercing of the corporate veil to impose personal liability upon Defendant Carlin in the Second and Third Causes of Action is denied. There are no allegations adequate to support a contention that Dr. Carlin abused the privilege of acting in a corporate capacity for the purpose of perpetrating a fraud upon the Plaintiffs. *Gateway I Group, Inc. V. Park Avenue Physicians, P.C.*, 877 N.Y.S.2s 95 (1st Dept. 2009) states indicia which warrant veil-piercing as among related and dominated corporations. The same principles apply with respect to an effort to disregard a corporate entity to proceed against an individual owner. It is essentially an equitable remedy designed to relieve the victim of fraud. (*Heim v. Tri-Lakes Ford Mercury, Inc.*, 25 A.D.3d 901 [3d Dept. 2006]). Among the allegations which may support a claim for veil-piercing are lack of corporate formalities, comingling of funds, and self-dealing. (*International Credit Brokerage Co., Inc. v. Agapov,* 249 A.D.2d 77 [1st Dept. 1998]).

The Second and Third Causes of Action do not sufficiently allege an adequate basis for the imposition of personal liability upon Dr. Carlin. It must also be noted that piercing of a corporate veil does not constitute an independent cause of action separate from the claim against the corporation. (*Hart v. Jassem,* 43 A.D.3d 997 [2d Dept. 2007]). A motion to deny leave to amend a complaint to add causes of action for corporate veil-piercing is appropriately denied, where there is inadequate documentation of fraud or other corporate misconduct. (*Sheinberg v. 177 E. 77 Inc.,* 248 A.D.2d 176 [1st Dept. 1998]).

The Fourth Cause of Action in the Third Amended Complaint claims indemnity against Dr. Carlin for violations of ¶¶ 5( c) and 8 (c) of the Settlement Agreement. The Agreement is annexed as Exh. "D" to the motion to amend the pleading. Dr. Carlin signed individually, but only with respect to ¶¶ 4 (b) and 10 (c). Leave to amend the Complaint to include an indemnity

[* 6 ]

claim for violations of provisions of the agreement for which Dr. Carlin did not assume personal responsibility is denied.

The First Cause of Action in the proposed Third Amended Complaint alleges that Grand Concourse failed to pay management fees due under the Management Agreement in the amount of $2,973,000. (Exh. "D" to Motion to Amend). The Management Contract, however, was terminated by the Settlement Agreement of December 30, 1999. (Exh. "D" to Motion). Giving the pleading the broadest latitude, as the Court must on a motion to dismiss, the First Cause of Action is adequate for pleading purposes to state a cause of action, in that the Settlement Agreement specifically provides that " . . . on the date of execution of this Agreement, Grand Concourse owes Signature unpaind management fees due under the Management Agreement in an amount approximating two million nine hundred seventy-three thousand ($2,973,000) dollars (the "Unpaid Management Fees") and Signature hereby acknowledges that Dr. Carlin has no personal obligation to pay any such Unpaid Management Fees; . . ."

The Defendants claim that the obligations under the Settlement Agreement were automatically released under the terms of the Settlement Agreement, but the prior Order of this Court dated March 9, 2009 (Exh. "B" to Defendants' Opposition to Motion to Amend) is to the contrary. This issue appears to be sub judice in the Appellate Division. (Exh. "G" to Defendants' Cross-Motion).

The Cross-Motion seeks the following relief:

- re-argument and reconsideration of the denial of the motion to dismiss on the basis of Release;
- dismissal of the proposed Second (sic.) Amended Complaint in its entirety;

[* 7 ]

- disqualification of counsel for the Plaintiff from representation in this matter on the ground that he is likely to be a witness in the proceeding;

The Court is constrained to adhere to its prior determination of the language of the Settlement Agreement. It appears that some or all of the provisions of that Agreement were not complied with, and an interpretation which nevertheless releases a party from further performance does not appear to be the clear intention of the parties. If it didn't matter whether or not parties complied with the Settlement Agreement, there is no rational purpose to drafting one. Again, this appears to be presently before the Appellate Division.

With respect to the application to dismiss the complaint, the Court, in denying leave to include the Second, Third and Fourth Causes of Action effectively grants the Defendants' motion in this respect. For the purpose of clarity, the Second, Third and Fourth Causes of Action are, to the extent that the Plaintiff alleges them, dismissed.

The Defendants also claim that they never received a 5-day notice of termination of the Settlement Agreement, and were deprived of a 5-day cure period. (Affirmation of Craig D. Bloom, Esq. at ¶ 18). It does not appear that either party sought to terminate the Agreement, and it simply expired under its own terms on December 31, 2000, the end of the "Wind Down Period." In the absence of a termination notice, there is no 5-day cure period, and thus this argument fails. The motion to dismiss for failure to provide a period within which to cure a default is denied.

The third aspect of the Cross-Motion is for the disqualification of counsel for the Plaintiff. Rule 3.7 of the Rules of Professional Conduct provides as follows:

> (a) A lawyer shall not act as an advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:

[* 8 ]

(1) the testimony relates solely to an uncontested issue;

(2) the testimony relates solely to the nature and value of legal services rendered in the matter;

(3) disqualification of the lawyer would work substantial hardship on the client;

(4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony;

(5) the testimony is authorized by the tribunal.

Defendants contend, and there has been no statement to the contrary, that counsel for the Plaintiff is the President and sole member of Signature Medical Group, LLC. If such is the case, his continued representation would appear to by precluded by both Rule 3.7 and decisional law.(*Gasoline Expwy, Inc. v. Sun Oil Co. of Pennsyslvania,* 64 A.D.2d 647 (2d Dept. 1978). Granted, this case, as opposed to the instant matter, involved a corporation as opposed to a limited liability company, but the advocate-witness disqualification is not so limited. *S & S Hotel Ventures Ltd. Partnership v. 777 S.H. Corp.*, 69 N.Y.2d 437 (1987) involved the disqualification of counsel for a limited partnership, and there is no rational reason why the same rule should not apply to a limited liability company.

On the record before it, the Court cannot conclude the issue of Plaintiff's counsels status vis a vis the Plaintiff, nor can it determine whether or not such representation falls within one of the enumerated exceptions to Rule 3.7. Counsel for the Defendant is directed to communicate with the Court, with notice to counsel for the Plaintiff, within 30 days of the receipt of a copy of this Order, to schedule a mutually convenient date for a hearing on the issues relating to counsel's qualifications to continue representing the Plaintiff. The Court suggests that such contact be by telephone conference initiated by either the Plaintiff or Defendant, during which time a date for such hearing will be scheduled.

The motion to disqualify counsel for the Plaintiff is denied, subject to a hearing before the Court on the foregoing issues.

To the extent relief has not been specifically granted by this Order, it is denied.

This constitutes the Decision and Order of the Court.

Dated: June 29, 2009

J.S.C.

ENTERED

JUL 0 6 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE