SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

METROPOLITAN DIAGNOSTIC IMAGING GROUP, LLC, and QUEENS DIAGNOSTIC MANAGEMENT, LLC,

Plaintiffs,

INDEX NO.: 006499/2010
MOTION DATE: 05/14/10
MOTION SEQUENCE: 001

-against-

U.S. HEARTCARE MANAGEMENT, INC., NUCLEAR CARDIAC AND MEDICAL IMAGING SERVICES, P.C., and MEDICAL DIAGNOSTIC MANAGEMENT SERVICES,

Defendants.

The following papers read on this motion:

Order to Show Cause, Affidavits & Exhibits Annexed 1
Affirmation of Glenn T. Nugent in Opposition, Affidavits & Exhibit Annexed 2
Affidavit in Opposition of Kunal Soni 3
Reply Affidavit of Greg S. Zucker, Esq. in Further Support, Reply Affidavit of Alan Winakor in Further Support & Exhibits Annexed 4
Verified Answer with Counterclaims 5

PRELIMINARY STATEMENT

Plaintiff moves by order to show cause (a) for a pre-judgment order of attachment against all property in which defendants have an interest to the extent of $186,796.14, including without limitation:

- a 2006 Dodge Cargo Van, BIN WD0PD744265917565; J.P. Morgan Chase Bank Account # 6902238075; State Bank of Long Island Bank Account # 0917012658; Park

Avenue Bank Account # 200021385; and, all equipment owned by any of the defendants; and all debts owed to defendant U.S. Heartcare;

- all accounts, real property, personal property and other assets of defendant Medical Diagnostic Management Services ("MDMS"), and all debts owed to defendant MDMS; and
- all accounts, real propety, personal proeperty and other assets of defendant Nuclear Cardiac and Medical Imaging Services, P.C. ("Nuclear"), and all debgts owed to defendant Nuclear.

(b) directing plaintiffs post an undertaking of $500;

(c) directing garnishees to serve upon the Sheriff or Marshal a statement of all debts of garnishee owed to defendants, within 10 days of service upon them of order of attachment.

BACKGROUND

Plaintiff is a subtenant of Leyben Realty Corp. by virtue of a sublease agreement dated June 30, 1997 and a July 1, 1998 purchase by Queens Diagnostic Management, LLC of the interests of Medical Marketing Development, Inc., the original subtenant. U.S. Healthcare is an undertenant of plaintiff, occupying two offices at the premises. They further subleased the property Nuclear Cardiac & Medical Imaging, P.C. ("Nuclear"), and, until recently, managed the affairs of Nuclear's medical practice. U.S. Healthcare was in default in rental payments and, after receipt of a notice to terminate, agreed to vacate the premises as of April 30, 2010, but refused to sign documents to this effect.

Plaintiffs contend that Nuclear has ceased paying revenues from their medical practice to U.S. Heartcare, and has begun forwarding payments to Medical Diagnostic Medical Services ("MDMS"), a management company established by U.S. Heartcare. Plaintiffs also assert that Nuclear is attempting to sell the medical practice to a third party. U.S. Heartcare's sub-lease expired on June 30, 2009. Plaintiff notified U.S. Heartcare on December 3, 2009 that it's month-to-month tenancy was terminated as of January 31, 2010. They have held over and retain possession of the premises without consent of the plaintiffs. Plaintiff alleges that U.S. Heartcare failed to pay its rent and additional rent for June 2009. They further assert that the Over-Lease provides that a sub-tenant who holds over after its tenancy is terminated, is liable for "per diem

use and occupancy . . . equal to two times the [rent and additional rent] payable under this Sublease for the last year of the term of this Sublease (which amount [plaintiffs and U.S. Heartcare] presently agree is the minimum to which [plaintiffs] would presently be entitled, is presently contemplated by them as being fair and reasonable under such circumstances and is not a penalty)." Exh. "A" at ¶ 38. Plaintiff calculates these damages as of the date of the filing the Order to Show Cause to be $186,796.14.

Defendants oppose the motion for attachment and contend that U.S. Heartcare is not in default under the terms of the sublease as set forth in the answer and counterclaims. They further contend that defendants Nuclear and MDMS have no contractual obligations to the plaintiffs, and are not subject to attachment.

DISCUSSION

Attachment is governed by Civil Practice Law and Rules § 6201:

> **§ 6201. Grounds for attachment**
>
> An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:
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> 1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or
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> 2. the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
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> 3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts; or
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> 4. the action is brought by the victim or the representative of the victim of a crime, as defined in subdivision six of section six hundred twenty-one of the executive law, against the person or the legal representative or assignee of the person convicted of committing such crime and seeks to recover damages sustained as a result of such crime pursuant to section six hundred thirty-two-a of the executive law; or
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> 5. the cause of action is based on a judgment, decree or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, or on a judgment which qualifies

for recognition under the provisions of article 53.

Plaintiffs primary contention is that defendant U.S. Heartcare, in violation of the provisions of subdivision "3", has extricated itself from the receipt of funds from Nuclear through the creation of a third party, MDMS, to whom the occupant of the premises ostensibly pays for use and occupancy, thereby seeking to either defraud plaintiff, or frustrate the ability of plaintiff to enforce a judgment to which it may be entitled.

There is no question but that Heartcare has not paid rental since June 1, 2009, nor has it paid the use and occupancy fees and other charges after January 31, 2010, the date that their month-to-month tenancy terminated. Heartcare is obligated under the terms of the sublease, which incorporates the obligations of the overlease. Plaintiff has established a prima facie entitlement to attachment of assets owned by Heartcare and debts owed to Heartcare by third parties and the Motion to Attach the assets of Heartcare as set forth in the moving papers to the extent of $186,796.14 is granted.

Plaintiff also seeks to attach assets belonging to defendants MDMS and Nuclear. The Court concludes that MDMS is the alter ego of U.S. Heartcare, with the same office address and phone number, and serving the role previously played by Heartcare, its creator. There has been no evidence submitted to the effect that MDMS has any function other than to perform the work of Heartcare. (*Simplicity Pattern Co., Inc. v. Miami Tru-Color Off-Set Serv., Inc.*, 210 A.D.2d 24 [1st Dept. 1994]). Plaintiffs' motion to attach assets of MDMS to the extent of $186,796.14 is granted.

Entitlement to attach assets of Nuclear, with whom plaintiff has no privity, and which is not an alter ego of U.S. Heartcare, is a more contentious issue. Nevertheless, Civil Practice Law and Rules § 6202 provides that "(a)ny debt or property against which a money judgment may be enforced pursuant to § 5201 is subject to attachment". To the extent that Nuclear has funds which are owed to either U.S. Heartcare or MDMS, it is a debt which attachable in the same respect as it would be subject to enforcement under a money judgment. § 5201 provides that execution is authorized against:

> **(a) Debt against which a money judgment may be enforced.** A money judgment may be enforced against any debt, which is past

> due or which is yet to become due, certainly or upon demand of the judgment debtor, whether it was incurred within or without the state, to or from a resident or non-resident, unless it is exempt from application to the satisfaction of the judgment. A debt may consist of a cause of action which could be assigned or transferred accruing within or without the state.

Since MDMS has taken over the responsibilities of U.S. Heartcare in managing the medical practice of Nuclear, and, in this capacity, are serving as the alter ego of U.S. Heartcare, monies owed to them which is past due, or will become due upon demand of defendant, is attachable in the same manner as it would be in the enforcement of a money judgment.

The motion for an order of attachment of the assets of MDMS to the extent of $186,796.14 is granted.

Defendants Counterclaims

Defendants claim as an Eighth Affirmative Defense and First Counterclaim that MDIG and its principal, Dr. Winakor, promised to refer not less than $30,000 per month in nuclear medicine in return for U.S. Heartcare's promise to pay rental of $9,500 per month, and that this representation was an integral part of the sublease, without which no agreement would have been made.

The second counterclaim is that plaintiff and Dr. Winakor, by tortious interference with the business of U.S. Heartcare, and the spread of disparaging remarks about the company, have precluded counterclaimant from entering into one or more business arrangements, and actively undermined negotiations toward that end.

In its third counterclaim defendant alleges prima facie tort against plaintiff by virtue of its claimed intentional acts, executed solely for the purpose of inflicting physical and economic damages upon defendants. Plaintiff has represented that the counterclaims are not in excess of the amount claimed in the complaint.

As to the first counterclaim, the claimed representation is not in writing and should be barred by the Statute of Frauds. General Obligations Law § 5-705. According to defendant's claim, plaintiff was to make monthly referrals of not less than $30,000 per month in nuclear medicine business during the term of the sublease. The sublease agreement was for more than one year, and the claimed obligation of the plaintiff could therefore not conclude within one year

of the date upon which it was allegedly made. As movant points out, an agreement whereby the amount of rent paid is contingent upon income or receipts from a medical practice is expressly prohibited by Education Law § 6530(19). The entry into a lease agreement by a medical facility which takes into account the volume or value of business or referrals generated between the parties violates 42 U.S.C. §1395nn(e)(1)(A)(iv) and 42 U.S.C. § 1320a-7b(b)(1)(A), 2(A). Thus, even if the representation as to the amount of referrals which U.S. Heartcare could expect from plaintiff is true, it is almost assuredly unenforceable.

The elements of tortious interference with contractual relations are: (1) a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to the plaintiff resulting therefrom. In its counterclaim, there is no reference to a valid contract between U.S. Heartcare and some third party, plaintiff's knowledge of the contract, its efforts to cause the third party to breach it, or otherwise render performance impossible, or what damages have been sustained.

Defendants' third counterclaim is for prima facie tort. Elements which must be pled and proven are (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful. (*Friehofer v. Hearst Corp.*, 65 N.Y.2d 135 (1985). This is essentially a claim that the opposing party has done something lawful in itself, but done for the sole purpose of causing harm to the other party. The allegations to which this counterclaim refer are the spread of disparaging and false information so as to prevent defendant from entering into business arrangements. What defendant describes is trade libel, a recognized form of tort. When the conduct complained of can be categorized as a form of recognized tort, an action for prima facie tort will not stand. (*Ruza v. Ruza,* 286 A.D. 767, 769 — 770 [1st Dept. 1955]).

What defendant has alleged is that plaintiff has disseminated false statements with the intent to damage its business. These claims of slander are not adequately alleged as required by CPLR § 3016 (a). (*Kaminer v. Wexler,* 40 A.D.3d 405 [1st Dept. 2007]).

The claims in the complaint are not outweighed by potential recovery on counterclaims.

Plaintiffs are required to post security in an amount sufficient to reimburse defendants in

the event attachment is subsequently determined to be unwarranted, or in the event of a resolution of the matter in favor of defendants. The Court directs that plaintiffs are to file a surety bond by a licensed New York State insurer in the amount of $100,000 as a condition of exercising the right of attachment granted to them.

This constitutes the Decision and Order of the Court.

Dated: July 21, 2010

J.S.C.