

**Prohealth Care Assoc., LLP v Martins**

2011 NY Slip Op 31757(U)

June 20, 2011

Sup Ct, Nassau County

Docket Number: 022245/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

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PROHEALTH CARE ASSOCIATES, LLP,

Plaintiff,

-against-

DAMION MARTINS, M.D.,

Defendant.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 022245/10

MOTION DATE: April 27, 2011  
Motion Sequence # 001

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Memorandum of Law..... XX
- Reply Memorandum..... X

Motion by defendant Damion Martins to dismiss the second through sixth causes of action based on a defense founded upon documentary evidence or failure to state a cause of action is **granted** in part and **denied** in part.

This is an action for breach of an employment agreement. Plaintiff Prohealth Care Associates, LLP engages in general medical practice. Defendant Damion Martins is a physician who practices sports medicine and was employed by Prohealth pursuant to a written employment agreement dated March 11, 2002. Martins' employment contract provided that he was to devote his entire time and attention to Prohealth's medical practice. The agreement further provided that either party was permitted to terminate the agreement on 90 days prior written notice. The agreement provided for attorney's fees to the prevailing

**PROHEALTH CARE ASSOCIATES, LLP**

Index no. 022245/10

party if litigation was brought to enforce the agreement.

Plaintiff alleges that on or about January 1, 2008 Martins formed his own practice known as Comprehensive Sports Medicine Performance. Plaintiff further alleges that Martins provided services to another company, Support Claims Services, which provides independent medical examinations, peer review, MRI referrals, and other services. Plaintiff alleges that on July 27, 2009 Martins became a physician for the New York Jets football team. Plaintiff alleges that on August 17, 2009 Martins served Prohealth with written notice of termination effective August 21, 2009.

This action was commenced on December 2, 2010. Plaintiff asserts claims for breach of the no outside practice and 90 day notice provisions in the contract, breach of the implied covenant of good faith, breach of fiduciary duty, forfeiture of earnings for employee disloyalty, unjust enrichment, and conversion.

Defendant moves to dismiss the second through sixth causes of action based upon a defense founded upon documentary evidence and failure to state a cause of action. Defendant argues that these causes of action are duplicative of plaintiff's breach of contract claim. Alternatively, defendant argues that plaintiff's request for punitive damages on its conversion claim should be stricken because defendant's conduct did not evidence a high degree of moral culpability.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction....[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" (*Arnav Industries, Inc. v. Brown*, 96 NY2d 300, 303 [2001]).

There is an implied and enforceable obligation of good faith and fair dealing on the part of both parties in all contracts. The implied obligation is in aid of and furtherance of other terms of the agreement of the parties. No obligation can be implied which would be inconsistent with other terms of the contractual relationship (*Horn v New York Times*, 100 NY2d 85, 92 [2003]). Plaintiff alleges that Martins breached the 90 day written notice provision by giving Prohealth only 4 days notice that he was terminating the contract. Since the implied obligation of good faith and fair dealing is in aid and furtherance of the 90 day notice provision, plaintiff has sufficiently alleged a violation of the implied covenant of good faith. Defendant's motion to dismiss the second cause of action for breach of the implied covenant of good faith for failure to state a cause of action is **denied**.

## PROHEALTH CARE ASSOCIATES, LLP

Index no. 022245/10

Causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed (*Bullmore v Ernst & Young*, 45 AD3d 461 [1<sup>st</sup> Dept 2007]). However, conduct amounting to breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract which is independent of the contract (Id). An employee owes a fiduciary duty of loyalty to the employer which is independent of the employment agreement (*DDS Partners v Celenza*, 16 AD3d 114 [1<sup>st</sup> Dept 2005]).

Plaintiff's allegations concerning Martins' forming his own practice and performing services for another medical provider constitute a breach of his employment agreement. However, Martins' actions also constitute a breach of the duty of loyalty owed to his current employer. Defendant's motion to dismiss plaintiff's third cause of action for breach of fiduciary duty for failure to state a cause of action is **denied**.

One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary (*X-Med, Inc. v Western New York Spine*, 74 AD3d 1708 [4<sup>th</sup> Dept 2010]). While a faithless agent forfeits his right to compensation, such forfeiture is limited to compensation paid during the time period of disloyalty (Id).

Plaintiff has alleged that Martins began his outside medical practice prior to terminating his employment with Prohealth. Thus, plaintiff has alleged a sufficient claim of forfeiture due to disloyalty for at least part of the period of Martins' employment. Defendant's motion to dismiss plaintiff's fourth cause of action for forfeiture due to disloyalty for failure to state a cause of action is **denied**.

An action for unjust enrichment is based upon an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned (*IDT Corp. v Morgan Stanley*, 12 NY3d 132, 142 [2009]). Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded (Id).

The parties executed a valid and enforceable written contract governing Martins' employment relationship with Prohealth. Accordingly, plaintiff may not maintain an action against Martins for unjust enrichment based upon his acquiring an unjust benefit through that relationship. Defendant's motion to dismiss plaintiff's fifth cause of action for unjust enrichment for failure to state a cause of action is **granted**.

PROHEALTH CARE ASSOCIATES, LLP


Index no. 022245/10

A claim for conversion which merely restates a claim for breach of contract, without alleging a separate taking of personal property, is legally insufficient (*Tornheim v Blue & White Food Products*, 56 AD3d 761 [2d Dept 2008]). Plaintiff alleges that Martins took checks and other funds paid directly to him for medical services he provided to Prohealth's patients. Since those checks and other funds were Prohealth's property, plaintiff's exercise of dominion and control over those items was unauthorized. While plaintiff has also alleged the wrongful taking of these monies within the context of its breach of contract claim, the gravamen of plaintiff's breach of contract cause of action is violation of the no outside practice and 90 day notice provisions. Thus, the court concludes that plaintiff has alleged an unauthorized taking of personal property which is separate from its breach of contract claim. Defendant's motion to dismiss plaintiff's sixth cause of action for conversion for failure to state a cause of action is **denied**.

Plaintiff may recover punitive damages in conversion if defendant acted with actual malice involving intentional wrongdoing, or his conduct amounted to a wanton, willful, or reckless disregard of plaintiff's right of possession (*Irving Land Corp. v A.J. Richard & Sons*, 262 AD2d 286 [2d Dept 1999]). Plaintiff's allegations that Martins converted checks and other funds representing fees for services provided to Prohealth's patients are sufficient to state a claim that Martins acted intentionally with actual malice or willful or reckless disregard of plaintiff's rights to those monies. Accordingly, plaintiff has stated a claim for punitive damages. Defendant's motion to dismiss plaintiff's cause of action for punitive damages on its conversion claim for failure to state a cause of action is **denied**.

So ordered.

Dated JUN 20 2011

  
**ENTERED**  
JUN 22 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE