Ditolla v Doral Dental IPA of N.Y., LLC
2011 NY Slip Op 32152(U)
July 21, 2011
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

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

Plaintiff,

-against-

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

Defendants.

---x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 002070/06
Motion Seq. No.: 08 & 09

DECISION AND ORDER

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In motion sequence number eight the attorney for the defendants moves for an order pursuant to CPLR §3212 granting summary judgment to the defendants and dismissing the plaintiff's complaint. In motion sequence number nine the attorney for the plaintiff moves for an order pursuant to CPLR §3212 granting summary judgment on his claim for an accounting, or, in the alternative, pursuant to CPLR

> solely upon an agreement or contractual relation between the fiduciary and the beneficiary . . .' " It has been observed that 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 . . ." (internal citations omitted)

Doral entered into global budget contracts with five health plans in New York: County of Suffolk from 5/99 - 9/05; Empire Blue Cross and Blue Shield/Empire Health Choice HMO from 8/99 - present; Fidelis Care New York from 1/01 - 4/02; New York Presbyterian Community Health Plan (NYPCHP) from 2/03 - 6/08; and, Group Health Incorporated/GHI HMO Select from 3/04 - 8/04. Doral administered these contracts and received administrative fee payments for the services it provided to these plans. The Doral Dental IPA of New York, LLC Dental Provider Service Agreement ("Provider Agreement") was a standard form agreement used by Doral to contract with the dentists who wished to provide services to members of one or more of the health plans administered by Doral in New York. The dentists with whom Doral contracted were independent contractors. Doral made no representations or promises, and undertook no obligations or duties to its dental service providers other than as expressly stated in the Provider Agreement. The term of the Provider Agreement was one year with automatic renewals for successive one year periods, and terminable by the dentist at will and without cause. Over the course of the periods in which the five New York global budget health plans were administered by Doral, dental service providers came and went on a relatively frequent basis. Dentists who agreed to provide services to members of health plans administered by Doral on a global budget basis were included as participants in dental panel reimbursement/dental services pools for purposes of determining the provider's reimbursement for covered services rendered to the plan. These

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funds. The Provider Agreements did not require Doral to provide an accounting or any other aggregate information to providers regarding administration of the pools, but each dentist did receive statements from Doral regarding the amounts due them under their contracts for services provided each month; and, the Provider Agreements established a mechanism for providers to dispute any payment amounts. Dr. William J. DiTolla ("DiTolla") is a dentist with a general practice and is affiliated with Sachem Dental Group, a practice group he helped form about 25 years ago. DiTolla works in Sachem Dental Group's Holbrook, New York office. (DiTolla Deposition pgs. 3-5). DiTolla applied to become a Doral provider in December 2001 and was approved in February 2002. At the time he became a Doral provider, DiTolla did not have any contact or conversations with anybody at Doral. DiTolla understands now that Doral is a third party administrator of dental benefit claims, but, until recently, he had just assumed it was an insurance company. At the time his application was submitted to Doral, DiTolla had not heard the term global budgeting, had never seen a Doral provider service agreement, and did not know with which health plan Doral had contracted. (DiTolla Deposition, pgs. 13-17, 27-29 67-68). DiTolla never signed a Provider Agreement or other contract with Doral and does not recall ever reviewing the draft of a proposed contract with Doral or ever seeing a Doral contract form. (DiTolla Deposition pgs. 42-43, 45; Pedersen Deposition pgs. 16, 19). DiTolla did not personally conduct any investigation or ask anyone else to conduct any type of investigation before his lawsuit was filed, and he did not review the complaint before it was filed (Ditolla Deposition pgs. 10-11). DiTolla never had any discussions with anyone other than his attorneys as to any aspects of how Doral operated its business, including the retention of consultants. DiTolla never had any telephone conversations or meetings with any employee or representative of Doral regarding the interpretation or conditions of any provider service agreement. DiTolla never had any telephone conversations, meetings or other

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communications, including written correspondence, with Doral regarding any dispute about the payments he was receiving from Doral, and he never sent a notice to Doral disputing any particular reimbursement (DiTolla Deposition pgs. 60-651, 70-72; Pedersen Deposition p. 25). DiTolla understood that health plans and third-party administrators did not allow full payment of submitted bills for various reasons, including billing errors, applicable reimbursement schedules, and differing coverages. Shortly after he became a Doral provider, DiTolla began receiving monthly explanation of benefits (EOB) statements from Doral responding to submitted claims and confirming that allowable amounts might be reduced based on global budget adjustments. In some months, claims submitted to Doral were reduced because of global budgeting and in some months they were not. DiTolla never had conversations with anybody at Doral about global budgeting and never submitted any letter or other document to Doral complaining about the payment of any claim or demanding any additional payment. DiTolla was not aware of any evidence to suggest that Doral did not reimburse him in accordance with the terms of its agreements (DiTolla Deposition pgs. 54-57, 60-61, 75-76; Pedersen Deposition pgs. 29-31, 34-42, 51, 60). DiTolla decided in February 2004, to resign from the Doral provider network effective April 30, 2004, because he wasn't receiving what he considered to be sufficient compensation for his services. DiTolla understood at the time of his February 2004 resignation letter was sent to Doral that it was his right to resign as a Doral provider at any time (DiTolla Deposition pgs. 45-47, 50).

During the limited periods of time in which the four New York global budget pools were in place, the only payments from these pools were to general, pediatric and specialty dental providers. Defendants assert that although Doral was authorized under the Provider Agreement to pay consultants from global budget pool funds, it did not do so. Defendants contend the consultants retained by Doral

in New York were paid from the administrative fees that Doral received from the health plans with which it contracted, and treated them the same as other expenses incurred by Doral reducing Doral's net profit (or increasing its net loss). Neither DiTolla nor any other New York provider made a demand for an accounting prior to the commencement of this action. (DiTolla Deposition pg. 74; Pedersen Deposition pg. 51).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611 2d Dept 1987; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133 (1986). The defendants have made an adequate *prima facie* showing of entitlement to summary judgment dismissing the complaint and establishing the lack of a fiduciary relationship by submitting the following documentary evidence: Deposition transcript of plaintiff Dr. DiTolla; Deposition transcript of Beverly Pedersen, employed by Sachem Dental Group for 21 years and since 2001, the office manager for Sachem Dental Group where Dr. DiTolla practices; Affidavit and Supplemental affidavit of Steven J. Pollack, General Counsel and Vice-President of market Development for Doral.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065 (1979). Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240 (1st Dept 1990), *aff'd* 76 NY2d 927 (1st Dept 1990); *Zuckerman v City of*

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New York, 49 NY2d 557 (1980); *see Indig v Finkelstein*, 23 NY2d 728 (1968); *Werner v Nelkin*, 206 AD2d 422 (2d Dept 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781 (1st Dept 1981), *app dism.* 53 NY2d 1028 (1981); *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868 (3d Dept 1993), *lv app den.* 82 NY2d 660 (1993).

In opposition to defendants' motion for summary judgment, plaintiff's attorney argues that this Court has determined as a matter of the law of this case that a fiduciary relationship existed. Plaintiff's characterization of this Court's prior rulings regarding the issue of the fiduciary relation is misplaced. Were the plaintiff's analysis correct, the motions now before the Court would be academic and the application for an accounting would have been granted. Throughout these proceedings, plaintiff's attorney has raised the spectre of criminal proceedings against defendants for nefarious conduct that somehow was relevant to the issue of fiduciary relationship now before the court. On April 2, 2004, DQV Parent Co., LLC, a subsidiary of DentaQuest Ventures, Inc., acquired most but not all of the assets of the former Doral Dental USA, LLC. DQV Parent Co., LLC then changed its name to Doral Dental USA, LLC ("New Doral"), and the former Doral Dental USA, LLC ("Old Doral") changed its name to DD Sale, LLC. Plaintiff has not offered one iota of documentary evidence to demonstrate that either Old Doral, New Doral or any current or former, owner, director, officer or employee of Old Doral or New Doral has ever been advised that he or she was the target or subject of any grand jury proceeding or of any other state or federal criminal investigation in Tennessee; ever been indicted or otherwise charged with any state or federal crime related to any matter involving Managed Care Services Group, Inc. or Senator Ford; that he or she was the target or subject of any grand jury proceeding or of any other state or federal criminal investigation in Wisconsin, Pennsylvania or any other state; or, ever been indicted or otherwise charged with any state or federal crime related to or

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arising from the business of Old Doral or New Doral.

Plaintiff contends the defendants offer nothing but their own word that third-party payments were made out of the global budget pool, as set forth in the sworn affidavit of Steven J. Pollock the Chief Operating Officer of Doral. The affidavit of a knowledgeable corporate representative is probative documentary evidence to establish a *prima facie* case. Determining whether a fiduciary relationship exists involves a fact-specific inquiry. *AG Capital Funding Partners v State Street Bank & Trust Co.*, 11 NY3d 146 (2008). Plaintiff has offered no probative evidence to refute defendant's showing that the relationship between the plaintiff and defendants was an ordinary commercial relationship. Plaintiff fails to indicate why he did not depose any of the principal officers or employees of Doral to raise an issue of fact to preclude the granting of summary judgment. A party opposing a motion for summary judgment must produce "evidentiary proof in admissible form." *Zuckerman v City of New York*, 49 NY2d 557 (1980). Mere conclusions expressions of hope or unsubstantiated allegations or assertions are not sufficient to raise a triable issue of fact. *Billordo v EP Realty Associates*, 300 AD2d 523 (2d Dept 2002).

The court has considered the plaintiff's remaining legal arguments that may have withstood a CPLR §3211(a)(7) motion to dismiss but finds them conclusory, and without being supported by any probative factual evidence to raise a question of fact to defeat the defendants' motion for summary judgment. *See Akkaya v Prime Time Transp., Inc.*, 45 AD3d 616 (2d Dept 2007).

An attorney's affirmation is of no probative value on a summary judgment motion unless accompanied by documentary evidence which constitutes admissible proof. *Zuckerman v City of New York, supra* at p. 563. The opposition to the motion consists only of the affirmations of plaintiff's counsel who demonstrated no personal knowledge of the facts. There is no affidavit from an individual

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with personal knowledge of the facts or a deposition transcript that supports the plaintiff's position. The deposition testimony of Dr. DiTolla and Beverly Pedersen support defendants showing of a *prima facie* case for dismissal. There is nothing in these depositions to rebut the *prima facie* showing by the defendants for summary judgment dismissing the compliant. The discovery of fiscal matters in an action for an accounting may not be obtained unless and until the plaintiff has established a right to an accounting. *LSY Intern., Inc. v Kerzner*, 140 AD2d 256.

It is the determination of this Court that a fiduciary relationship did not exist. Plaintiff is not entitled to an accounting. It is hereby

ORDERED, that the defendants' application is ***granted***. It is further

ORDERED, that the plaintiff's complaint is ***dismissed*** in its entirety. It is further

ORDERED, that the plaintiff's application for summary judgment is ***denied*** as ***moot***.

This constitutes the Decision and Order of the Court.

DATED: July 21, 2011
Mineola, N.Y. 11501

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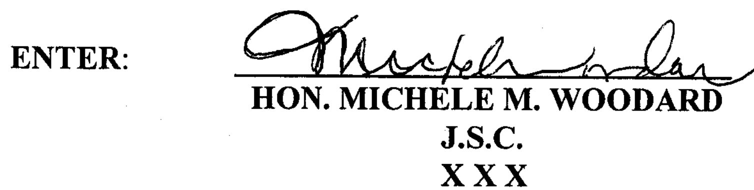

HON. MICHELE M. WOODARD
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