

Firoru Intl. Corp. v Empire State Med. Testing, P.C.

2011 NY Slip Op 33648(U)

October 28, 2011

Supreme Court, Nassau County

Docket Number: 003164-10

Judge: Timothy S. Driscoll

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SCAN

**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:**

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
FIRORU INTERNATIONAL CORP.,

Plaintiff,

-against-

**EMPIRE STATE MEDICAL TESTING, P.C. and
WILLIAM TODD PORDY,**

Defendants.
-----X

MD, MD)
**TRIAL/IAS PART: 22
NASSAU COUNTY**

Index No: 003164-10

**Motion Seq. Nos: 5 & 6
Submission Dates: 10/24/11 and
10/27/11**

The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....X**
- Notice of Cross Motion, Affirmation in Opposition/Support and Exhibits....X**
- Plaintiff's Memorandum of Law in Opposition/Support.....X**
- Affirmation in Opposition.....X**
- Affirmation in Reply.....X**

This matter is before the Court for decision on 1) the motion filed by Defendant William Todd Pordy ("Pordy")¹ on September 30, 2011 and submitted on October 24, 2011, and 2) the cross motion filed by Plaintiff Firoru International Corp. ("Firoru" or "Plaintiff") on October 25, 2011 and submitted on October 27, 2011. For the reasons set forth below, the Court denies the motion and cross motion, and reminds counsel for the parties of their required appearance before the Court on November 4, 2011 at 9:30 a.m., at which time counsel will be

¹ By decision dated August 25, 2010 ("2010 Decision"), the Court granted Pordy's motion to dismiss the fifth and sixth counts of the Complaint. By decision dated January 5, 2011 ("2011 Decision"), the Court granted Plaintiff's motion for a severance of the third and fourth causes of action against Pordy and directed that the severed causes of action against Pordy will proceed.

expected to pre-mark their trial exhibits.

A. Relief Sought

Pordy moves for an Order, pursuant to CPLR § 3126(3), dismissing the Complaint in light of Plaintiff's alleged failure to participate in discovery despite Court orders; or, alternatively, 2) prohibiting Plaintiff from introducing any evidence or testimony at trial on any claims or defenses in this matter; 3) granting counterclaimant Pordy judgment on all counterclaims ("Counterclaims"), including sanctions, attorney's fees and costs of this motion; 4) scheduling the matter for an inquest to determine the amounts due; and 5) entering judgment accordingly at a time designated by the Court.

Plaintiff opposes Pordy's motion and cross moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Counterclaims.

B. The Parties' History

The parties' history is outlined in detail in the 2010 Decision, and the Court incorporates that Decision herein by reference. As noted in the 2010 Decision, the Complaint alleges that this is an action is to recover damages for financing provided by the Plaintiff to the Defendants for purposes of funding the start up costs of a medical professional corporation, which funds were not repaid. The remaining causes of action in the Complaint against Pordy are the third and fourth causes of action which allege Pordy's breach of the loan agreement, and Pordy's unjust enrichment due to his breach of the loan agreement.

In his Answer and Counter Claims (Ex. C to Lang Aff. in Supp./Opp.), Pordy asserts three (3) Counterclaims: 1) for fraud, based on the allegations that Plaintiff a) falsely represented to Pordy that, as part of the parties' business arrangement, Plaintiff would provide Pordy with medical malpractice insurance as well as independent contractor agreements, employee tax arrangements and professional corporate accounting; b) had Pordy's signature forged on a Certificate of Incorporation with the Department of State; c) established a bank account as "a money laundering vehicle to commit insurance fraud" (Counterclaim at ¶ 26); and d) falsely represented to Pordy that he would be paid \$50,000 annually to provide medical services, on which Pordy relied in entering into the business arrangement with Plaintiff, 2) for abuse of process based on the allegation that Plaintiff a) created a fraudulent corporation for an improper purpose and used Pordy's medical license to perpetuate that fraud; b) threatened Pordy "both physically and financially" (*id.* at ¶ 35) when he took measures to distance himself from

Plaintiff's activities; c) urged Pordy to participate in illegal acts to benefit Plaintiff with the expectation of compensation; and d) when Pordy rejected Plaintiff's suggestions, filed this lawsuit which is without merit and "was done in a perverted manner so as to create a collateral objective in favor of Firoru" (*id.* at ¶ 39), and 3) for intentional infliction of emotional distress based on the allegations that a) Firoru used improper means to solicit the services of Pordy in connection with an illegitimate enterprise; and b) when Pordy became aware of Plaintiff's illegal activities and declined to participate, Plaintiff "first threatened[,] then bribed, then finally instituted litigation against Pordy" (*id.* at ¶ 42) with the intent to cause Pordy severe emotional harm, as a result of which Pordy suffered extreme emotional upset.

In his Affirmation in Support, counsel for Pordy affirms that Plaintiff 1) failed to comply with the discovery schedule set forth in the Preliminary Conference Order (Ex. A to Schwartz Aff. in Supp.); 2) failed to respond to discovery requests or provide documentation supporting the allegations in the Complaint; 3) failed to appear for depositions; and 4) failed to provide a letter purportedly signed by Pordy, as directed by the Court, and subsequently advised Pordy that the letter could not be located (*see* Ex. E to Schwartz Aff. in Supp.). Counsel for Pordy affirms, further, that Pordy has complied with his discovery obligations.

In opposition, Plaintiff's counsel provides the procedural history of the litigation, which included the filing of prior motions, Counterclaims and a reply to the Counterclaims. Plaintiff's counsel affirms that "the prime reason for the lack of discovery is the breakdown in the attorney-client relationship between Firoru and our office" (Lang Aff. in Supp./Opp. at ¶ 11). Plaintiff's counsel notes that he moved for leave to withdraw as Plaintiff's counsel, and the Court denied that application by decision dated July 12, 1011 (Ex. G to Lang Aff. in Supp./Opp.). That decision is on appeal. Plaintiff's counsel affirms that, despite his difficulties with Firoru and notwithstanding the pending appeal of the decision denying his application to withdraw, he believes he is ethically obligated to continue to represent Firoru.

In support of Plaintiff's motion to dismiss the Counterclaims, Plaintiff's counsel submits that the Counterclaims are insufficient in light of the fact that 1) assuming *arguendo* that the fraud count is pled with sufficient particularity, Pordy seeks to recover compensation for services rendered to a professional corporation that he claims was fraudulent and involved in illegal activity, and public policy prohibits Pordy from suing to recover the fruits of illegal activity; 2) the claim for abuse of process cannot survive because the mere filing of a summons

and complaint, even if done with malevolent intent or motive, is insufficient to state a claim; and 3) the cause of action for intentional infliction of emotional distress cannot be sustained because Pordy has failed to allege conduct by Firoru that can be considered sufficiently extreme and outrageous.

In response, Pordy's counsel submits that 1) the Counterclaims allege the fraud with adequate particularity; 2) Firoru has demonstrated bad faith, as evidenced by his failure to produce himself for a deposition, at which time Plaintiff would have had the opportunity to probe the allegedly improper conduct of Firoru; 3) the Court should consider Plaintiff's failure to comply with its discovery obligations in considering Plaintiff's motion to dismiss; 4) the abuse of process cause of action is sufficient as service of the Complaint on Pordy constituted regularly issued process, and Pordy has adequately alleged facts supporting the remaining elements of that cause of action; and 5) Pordy has adequately alleged the elements of intentional infliction of emotional distress.

C. The Parties' Positions

Pordy submits that the Court should dismiss the Complaint in light of Plaintiff's willful failure to comply with its discovery obligations or, alternatively, prohibit Plaintiff from introducing any evidence or testimony at trial on its claims or defenses. Pordy further requests that, in light of Plaintiff's failure to comply with its discovery obligations, the Court grant him judgment on his Counterclaims, and schedule the matter for an inquest on the issue of damages.

Plaintiff opposes Pordy's motion, and submits that the Court should dismiss the Counterclaims on the grounds that the fraud claim is not alleged with adequate particularity, and the Counterclaims are insufficient as a matter of law.

RULING OF THE COURT

A. Standards for Dismissal

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion,

however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Relevant Causes of Action

To establish a cause of action sounding in fraud, plaintiff must allege:

1) misrepresentation of a material fact, 2) scienter, 3) justifiable reliance, and 4) injury or damages. *In Re Garvin*, 210 A.D.2d 332, 333 (2d Dept. 1994). A cause of action for fraud does not lie where the only fraud alleged relates to a breach of contract. *Hylan Elec. Contracting, Inc. v. MasTec North America, Inc.*, 74 A.D.3d 1148 (2d Dept. 2010); *Stangel v. Chen*, 74 A.D.3d 1050 (2d Dept. 2010).

Abuse of process has three essential elements: 1) regularly issued process, either civil or criminal, 2) an intent to do harm without excuse or justification, and 3) use of the process in a perverted manner to obtain a collateral objective. *Ettienne v. Hockman*, 83 A.D.3d 888 (2d Dept. 2011), quoting *Curiano v. Suozzi*, 63 N.Y.2d 113, 116 (1984).

The tort of intentional infliction of emotional distress has four elements: 1) extreme and outrageous conduct, 2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, 3) a causal connection between the conduct and the injury, and 4) severe emotional distress. *Bernat v. Williams*, 81 A.D.3d 679, 680 (2d Dept. 2011), quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). The requirements of the rule are rigorous, and difficult to satisfy. *Id.*, citing *Howell, supra*, at 122 quoting Prosser and Keeton, Torts § 12, at 60-61 (5th ed.).

C. Penalties for Failure to Comply with Discovery Obligations

CPLR § 3126 provides as follows:

If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just, among them:

1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or

2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or

3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 lies within the sound discretion of the trial court. *Workman v. Town of Southampton*, 892 N.Y.S.2d 481, 482 (2d Dept. 2010), quoting *McArthur v. New York City Hous. Auth.*, 48 A.D.3d 431 (2d Dept. 2008). The striking of a pleading may be appropriate where there is a clear showing that the failure to comply with discovery demands is wilful or contumacious, or in bad faith. *Workman* at 482 citing, *inter alia*, *Northfield Ins. Co. v. Model Towing & Recovery*, 63 A.D.3d 808 (2d Dept. 2009). The wilful and contumacious conduct can be inferred by a party's repeated failure to respond to demands or to comply with discovery orders, absent a reasonable excuse. *Id.*, citing, *inter alia*, *McArthur* and *Northfield*.

D. Application of these Principles to the Instant Action

The Court denies Pordy's motion, but anticipates that the issue of Plaintiff's compliance with its discovery obligations will be explored at trial. In rendering this decision, the Court takes a dim view of Plaintiff's failure to comply with its discovery obligations. It may well be that preclusion of certain evidence is appropriate, and the Court will entertain that application, or other applications, at trial.

The Court denies Plaintiff's motion based on the Court's conclusion that the Counterclaims assert legally sufficient causes of action for fraud, abuse of process and intentional infliction of emotional distress in light of the allegations, *inter alia*, that 1) Plaintiff made misrepresentations to Pordy on which he relied in entering into a business arrangement with Plaintiff; 2) Plaintiff engaged in improper conduct including forgery of Pordy's signature on an official document; 3) Plaintiff attempted to involve Pordy in an illicit business; and 4) Plaintiff retaliated when Pordy attempted to extricate himself from the illicit enterprise by filing this allegedly baseless action.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for all parties of their required appearance before the Court for a Pretrial Conference on November 4, 2011 at 9:30 a.m., at which time counsel will be expected to pre-mark their trial exhibits.

DATED: Mineola, NY
October 28, 2011

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
NOV 02 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE