

Nanomedicon, LLC v Research Found. of State Univ. of N.Y.
2012 NY Slip Op 33742(U)
March 15, 2012
Supreme Court, Suffolk County
Docket Number: 36815-2010
Judge: Emily Pines
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NUMBER: 36815-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

FILED

Present: HON. EMILY PINES
J. S. C.

Original Motion Date: 10-18-2011
Motion Submit Date: 12-20-2011
Motion Sequence No.: 002 MOTD
003 MOTD

[] FINAL
[x] NON FINAL

_____ X
NANOMEDICON, LLC.,

Plaintiffs,

-against-

THE RESEARCH FOUNDATION OF STATE
UNIVERSITY OF NEW YORK., et al,

Defendants.
_____ X

PELAGIA-IRENE GOUMA,

Third Party Plaintiff,

-against-

MEDICON, INC., et al.,

Third Party Defendants.
_____ X

ORDERED that motion (motion sequence # 002) by third-party defendant Medicon, Inc. to dismiss the third-party complaint as asserted against it is granted in part and denied in part, as set forth herein; and it is further

ORDERED that the motion (motion sequence # 003) by plaintiff Nanomedicon and third-party defendant Anastasia Rigas to dismiss the counterclaims and third-party complaint as asserted against them is granted in part and denied in part, as set forth herein.

[* 2]

In this action, plaintiff Nanomedicon, LLC (“Nanomedicon”) asserts causes of action against defendant The Research Foundation of State University of New York (“Research Foundation”) for a judgment declaring the rights and obligations of each under a contract, breach of contract, specific performance, and a permanent injunction. Nanomedicon also asserts causes of action against defendant Pelagia-Irene Gouma (“Gouma”) for breach of contract and tortious interference with prospective economic advantage. Gouma commenced a third-party action against Medicon, Inc. (“Medicon”) and Anastasia Rigas (“Anastasia”), individually and in her capacity as officer, employee and/or shareholder of Nanomedicon and Medicon. In motion sequence # 002, Medicon moves pursuant to CPLR 3211 (a)(1), (5), and (7) to dismiss the third-party complaint as asserted against it. In motion sequence # 003, Nanomedicon and Rigas move pursuant to CPLR 3211(a)(1), (2), (3), and (7) to dismiss the counterclaims and third-party complaint as asserted against them.

BACKGROUND

Familiarity with the facts of this case, as set forth in this Court’s Decision and Order in motion sequence # 004 dated March 8, 2012, is presumed. Additional facts are set forth herein as necessary.

On February 27, 2009, the Research Foundation, Medicon and Nanomedicon executed a document entitled “Assignment and Transfer of Option and Exclusive Patent License Agreement” (hereinafter “Assignment”). Pursuant to the Assignment, Nanomedicon, as assignee assumed all rights and obligations under the OEPLA and related agreements.

On December 4, 2010, while this case was pending in the United States District Court for the Eastern District of New York, having been removed thereto by Gouma, Gouma filed an Answer and Counterclaims and Third-Party Complaint. On July 19, 2011, after the case was remanded to this Court, Gouma filed a Verified Amended Answer and Counterclaims and Third-Party Complaint. The Counterclaims are asserted against Nanomedicon and the third-party claims are asserted against Medicon and Anastasia. Gouma has not asserted any claims against the Research Foundation.

In the Counterclaims and Third-Party Complaint Gouma alleges, among other things, that non-party Basil Rigas (“Basil”) is the spouse of Anastasia, that he is the President of Medicon,

and that in 2004, he came to SUNY Stony Brook as a professor in the Department of Medicine in the School of Medicine. Gouma claims that Basil became particularly interested in her work and he shared her belief that her technology had potential for commercial success. It is alleged that Basil, on behalf of Medicon set out to obtain and capture the commercial benefits of Gouma's work and inventions, and that he and Anastasia (1) induced and/or pressured Gouma to prepare and/or submit New Technology Disclosures improperly naming Basil and/or Anastasia as developers/inventors, (2) induced and manipulated Gouma and her students to participate in drafting and revising grant applications, based on Gouma's and her research group's work, for funding for Medicon to develop Gouma's single breath ammonia detector, and (3) induced and/or pressured Gouma to sign off on questionable documents, agreements, and "minutes" regarding her work.

Additionally, the Third-Party Complaint alleges that on September 17, 2007, based on New Technology Disclosures, the Research Foundation filed U.S. provisional application, Serial No. 60/973,066, entitled "Breath Testing Diagnostics," naming Anastasia, Basil and Gouma as inventors. On September 20, 2007, the Research Foundation filed another patent application, Serial No. 11/903,135, entitled "Selective Point of Care Nanoprobe Breath Analyzer," naming Anastasia and Gouma as inventors. Gouma claims that Anastasia and Basil were improperly identified as inventors on these and subsequent filings.

Gouma further alleges that much of her most promising intellectual property arguably became subject to the OEPLA entered into between the Research Foundation and Medicon on November 15, 2007. She contends that the scope and subject matter of the OEPLA is over broad. Gouma acknowledges that she is not a signatory to the OEPLA.

In the first counterclaim/third-party claim, Gouma alleges that Basil and/or Anastasia were improperly named as inventors and/or co-inventors and/or developers on various New Technology Disclosures filed with the Research Foundation and/or patent applications filed by the Research Foundation in connection with Gouma's work. She further alleges that Nanomedicon, Medicon, Anastasia and Basil "have placed a cloud over [her] title and inventive contribution" as well as her reputation. Gouma seeks (1) a declaration of ownership with regard to New Technology Disclosure R-8033, based upon her allegation that the Research Foundation released all of its rights, without limitation, to the R-8033 invention, and (2) a judgment declaring her ownership in certain inventions and declaring that Anastasia and Basil made no inventive contribution toward her inventions.

The second counterclaim/third-party claim alleges that Nanomedicon, Medicon, Anastasia and Basil, based upon their actions described above, misappropriated, converted, copied, plagiarized and/or derived Gouma's intellectual property causing monetary damages.

The third counterclaim/third-party claim seeks damages for tortious interference with prospective economic advantage. Gouma alleges, among other things, that Nanomedicon, Medicon, Anastasia and Basil acted wrongfully, willfully, and maliciously by entering into an over broad and exclusive contract with regard to Gouma's work, wrongfully naming Anastasia and Basil on Gouma's technology disclosures and patent filings, attempting to restrict Gouma's presentation and publication of her work, thereby tying up her inventions and interfering "with her economic opportunities and professional advancement," preventing her from "enter[ing] into contractual arrangements with other commercial entities to sponsor and/or license her inventions," and restricting her "ability to obtain government funding and sponsorship for her research."

The fourth counterclaim/third-party claim seeks damages for fraudulent inducement/fraud. Gouma alleges, among other things, that Nanomedicon, Medicon, Anastasia, and Basil made numerous false statements and/or representations of fact, with knowledge of their falsity, upon which she justifiably relied, in order to induce Gouma to (1) share her work and expertise, (2) participate as Project Director in connection with Medicon's Research Agreement with the Research Foundation, (3) participate in the preparation of grant applications, and (4) to induce the Research Foundation to enter into the OEPLA and to prosecute ceratin patent filings.

The fifth counterclaim/third-party claim seeks restitution for unjust enrichment. Gouma alleges that, based upon their actions, Medicon, Nanomedicon, Anastasia and Basil have unjustifiably benefitted at Gouma's expense.

The sixth counterclaim/third-party claim seek damages for breach of contract. Gouma alleges that Nanomedicon violated the Confidentiality Agreement by disclosing, in this action, two New Technology Disclosure forms submitted to the Research Foundation by Gouma.

The seventh counterclaim/third-party claim seeks a declaration that the OEPLA is null, void, and unenforceable. Gouma alleges that the OEPLA is unreasonable, unconscionable, against public policy because (1) it is overly broad in scope and subject matter, and vague and open-ended as to its term, (2) it operates to “indenture” Gouma and her work and rights to future work, (3) it lacks consideration, (4) it violates SUNY and Research Foundation policies, (5) it violates Gouma’s constitutional rights and academic entitlements, (6) it was entered into under fraudulent circumstances, and (7) Medicon lacked corporate capacity at the time the OEPLA was entered into.

In their motions, Medicon, Nanomedicon and Anastasia contend, among other things, that (1) Gouma’s first and seventh causes of action as asserted against Medicon should be dismissed because Medicon has no interest in, or obligation under, the OEPLA having assigned all of its rights and obligations under the OEPLA to Nanomedicon in February 2009, (2) Gouma does not own the inventions at issue and therefore has no right to seek remedies that only an owner can seek, (3) this Court does not have jurisdiction to declare Gouma to be the inventor on two pending patent applications subject to the OEPLA as the United States Patent and Trademark Office has exclusive jurisdiction over such claims, (4) the claim for misappropriation, conversion, derivation and other wrongful acts against intellectual property (second counterclaim/third-party claim) is barred by the statute of limitations, and is premised upon property and contractual rights that belong to the Research Foundation and Nanomedicon, (5) the claim for tortious interference with prospective economic advantage (third counterclaim/third-party claim) fails to state a cause of action, (6) the claim for fraudulent inducement/fraud (fourth counterclaim/third-party claim) is premised upon contractual rights belonging to the Research Foundation under the OEPLA and is not pled with sufficient particularity, (7) the claim for unjust enrichment (fifth counterclaim/third-party claim) seeks compensation for patent rights that Gouma does not own and there is no factual allegation that Medicon, Nanomedicon and Anastasia received any benefit at Gouma’s expense, (8) Gouma has failed to join a necessary party, i.e. the Research Foundation, and (9) that Gouma lacks standing to assert a claim for breach of the Confidentiality Agreement (sixth counterclaim/third-party claim) and to seek a judgment declaring that the OEPLA is null, void, and unenforceable (seventh counterclaim/third-party claim) because she is not a party to these agreements which are between the Research Foundation and Nanomedicon.

In opposition to the motion, Gouma’s counsel states that “Gouma is not just challenging

the OEPLA, but rather the entirety of the conduct engaged in by Medicon and Nanomedicon and their principals which led to the OEPLA, as well as new technology disclosures, patent filings and grant proposals by which Basil Rigas and/or Anastasia Rigas or either of their companies lay claim to her work.” Gouma claims that the validity of the Assignment between Medicon and Nanomedicon is at issue in this action and she challenges it on the basis of Medicon’s lack of corporate capacity and status. Even if the Assignment is valid, Gouma asserts that her claims against Medicon are not contract claims based on the OEPLA, but are state law claims for tort, fraud, and unjust enrichment, liability for which was not assigned to Nanomedicon by the Assignment.

With regard to the first counterclaim/third-party claim, Gouma states that she does not seek a declaration of the proper inventorship of patent applications pending before the Patent and Trademark Office. Rather, she seeks a declaration that any alleged contribution to her intellectual property by Basil and Anastasia is not their own and a declaration concerning her ownership of certain intellectual property claimed by Basil and Anastasia as theirs. Gouma argues that the patent laws do not preclude this Court from making such a declaration and that “there appears to be no reason a state court would lack jurisdiction to resolve this controversy concerning inventive contribution to a SUNY faculty member’s work, whether it appears in a new technology disclosure or a provisional application for patent or other patent-related documents.” She also contends that this Court has jurisdiction to decide controversies concerning ownership of intellectual property.

With regard to her claim for her misappropriation/conversion claim (second counterclaim/third-party claim), Gouma argues that it is not time barred as it was commenced on December 4, 2010, by filing of an Answer and Counterclaims and Third-Party Complaint while this case was pending in Federal court, and seeks recovery for wrongful conduct that allegedly occurred before and after November 2007. In response to Medicon’s argument that Gouma does not own the property allegedly misappropriated/converted, Gouma argues that she and a Dr. Kalyanasundaram own the invention in New Technology Disclosure R-8033, which was wrongfully incorporated into a patent application improperly naming Anastasia and Basil as inventors. As to intellectual property assigned to the Research Foundation, Gouma contends that her reputational and economic interest in the development of her intellectual property provides her with standing to challenge conduct affecting it.

With regard to her claim for tortious interference with prospective economic advantage (third counterclaim/third-party claim), Gouma contends that the Research Foundation is a third party with whom she would have had economic relations for the purpose of developing her work. Further, Gouma requests leave to re-plead and/or amend if the Court determines that it is necessary for her to identify specific third parties with whom she would have had contractual relations but for Medicon's conduct.

Gouma contends that her fourth counterclaim/third-party claim for fraudulent inducement satisfies the pleading requirements of CPLR 3016(b), which requires the circumstances constituting the wrong in an action for fraud to be stated in detail. Gouma claims that she has set forth specific misrepresentations of fact made by Medicon and/or its principals in order to induce her and the Research Foundation to take certain acts in furtherance of their efforts to obtain and capture the commercial benefits of her work. Alternatively, Gouma requests leave to re-plead and/or amend the third-party complaint to add additional unspecified factual allegations.

Gouma also contends that her fifth counterclaim/third-party claim for unjust enrichment is adequately pled in that she alleges that Medicon and its principals have been wrongfully identified as inventors of her inventions and have obtained for themselves the benefits of her work, including having received funding from the National Institute of Health.

Finally, Gouma argues that the Research Foundation, a joint tortfeasor, is not a necessary party to her counterclaims/third-party claims.

DISCUSSION

In considering a motion to dismiss a complaint pursuant to CPLR 3211(a)(7):

[t]he complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (citations omitted). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (citations omitted). If the court can determine that the

plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (citations omitted). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (citations omitted).

(*Symbol Tech., Inc. v. Deloitte & Touche, LLP*, 69 AD3d 191, 193-195 [2d Dept 2009]).

Declaratory Judgment

In the first counterclaim/third-party claim, Gouma seeks (1) a declaration of ownership with regard to New Technology Disclosure R-8033, based upon her allegation that the Research Foundation released all of its rights, without limitation, to the R-8033 invention, and (2) a judgment declaring her ownership in certain inventions and declaring that Anastasia and Basil made no inventive contribution toward her inventions. The seventh counterclaim/third-party claim seeks a declaration that the OEPLA is null, void, and unenforceable.

Contrary to Gouma's contention, it is clear that the gravamen of the first and seventh third-party claims concerns ownership of intellectual property subject to the provisions of the OEPLA. Inasmuch as Medicon assigned all of its rights and obligations under the OEPLA and related agreements to Nanomedicon in 2009, and Medicon claims no interest in the intellectual property at issue in the third-party action, it is not a proper or necessary party to Gouma's first and seventh third-party claims (*see Jean v. Joseph*, 41 AD3d 657, 658 [2d Dept. 2007]; *McGahey v. Topping*, 255 AD2d 562, 563 [2d Dept. 1998]). Contrary to Gouma's contention, the validity of the Assignment, to which the Research Foundation consented, is not at issue in this action.

With regard to the first, sixth and seventh counterclaims/third-party claims as asserted against Nanomedicon and Anastasia, it is undisputed that SUNY's Patents and Inventions Policy provides that all inventions made by faculty members utilizing university facilities are the property of SUNY. The Research Foundation, as SUNY's agent entered into the OEPLA with Medicon to have its patent rights developed and commercialized. Gouma admits that "it is her

inventions that are the subject of the OEPLA, including her future technology disclosures.” It is undisputed that Gouma is not a party to the OEPLA or the Confidentiality Agreement, and she has neither alleged nor demonstrated that she is a third-party beneficiary of those contracts. Therefore, Gouma lacks standing to sue for breach of those contracts or for a declaration as to their meaning (*see Arrow Louver and Damper Div. of Arrow United Indus., Inc. v. New York City Transit Auth.*, 106 AD2d 533, 534-535 [2d Dept. 1984]).

Inasmuch as Gouma concedes that she does not seek a declaration of the proper designation of inventor on patent applications, the issue of whether this Court has jurisdiction to resolve such a dispute need not be addressed. Accordingly, the first, sixth and seventh counterclaims/third-party claims are dismissed.

Conversion

With regard to the second counterclaim/third-party claim for conversion, it is not time-barred, as Gouma’s allegations encompass conduct that allegedly occurred within three years prior to December 4, 2010, when the third-party claims were interposed by the filing of Counterclaims and Third-Party Complaint in Federal District Court. However, the third-party complaint fails to state a cause of action for conversion. In order to state a cause of action for conversion, plaintiff must establish legal ownership of a specific identifiable piece of property and the defendant’s exercise over or interference with the property in defiance of plaintiff’s rights (*see Hamlet at Willow Creek Dev. Co., LLC v. Northeast Land Dev. Corp.*, 64 AD3d 85, 113 [2d Dept. 2009]). Conversion is concerned with possession, not title and a defendant who does not exclude the owner from the exercise of her rights is not liable for conversion (*see State v. Seventh Regiment Fund, Inc.*, 98 NY2d 249, 259-260 [2002]). Here, Gouma admits in the Third-Party Complaint that Medicon was entitled to confidential information relating to certain technology disclosures prepared by Gouma submitted to the Research Foundation pursuant to the Confidentiality Agreement between Medicon and the Research Foundation. Additionally, the OEPLA entered into on November 15, 2007, gave Medicon the right to copies of all new technology disclosures filed by Gouma in the Field. Moreover, Gouma concedes that all rights in the invention in New Technology Disclosure R-8033 have been returned to her and her co-inventor. The Third-Party Complaint does not allege that Gouma has a superior right to Medicon, Nanomedicon and/or Anastasia to the intellectual property subject to the provisions

of the OEPLA and related agreements, or that Medicon, Nanomedicon and/or Anastasia excluded Gouma from the exercise of her rights to the intellectual property at issue. To the contrary, the documentary evidence establishes that Medicon, Nanomedicon and Anastasia had a right to the information they received pursuant to their agreements with the Research Foundation. Thus, as Gouma has failed to sufficiently allege that Medicon, Nanomedicon and/or Anastasia exercised unauthorized dominion over property to which she had a superior claim of legal ownership, the second counterclaim/third-party claim is dismissed (*see C.B. Western Financial Corp. v. Computer Consoles, Inc.*, 122 AD2d 10, 12 [2d Dept. 1986]).

Tortious Interference with Prospective Advantage

As recently stated by the Appellate Division, Second Department:

“To establish a defendant’s liability for damages for tortious interference with prospective contractual relations, the plaintiff must show that the defendant engaged in wrongful conduct which interfered with a prospective contractual relationship between the plaintiff and a third party. As a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of ‘physical violence, fraud or misrepresentation, civil suits and criminal prosecutions’ *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191, 428 NYS2d 628, 406 NE2d 445). Such wrongful conduct may include ‘some degrees of economic pressure;’ however, ‘persuasion alone’ is not sufficient (*id.* at 191, 428 NYS2d 628, 406 NE2d 445; *see Lyons v. Menoudakos & Menoudakos, P.C.*, 63 AD3d 801, 802, 880 NYS2d 509).

(*Smith v. Meridian Tech., Inc.*, 86 AD3d 557, 559-560 [2d Dept. 2011]).

Here, the Third-Party Complaint contains only conclusory allegations without factual support that Medicon, Nanomedicon and/or Anastasia acted maliciously in interfering with Gouma’s ability to enter into contractual relationships with unidentified third parties. Conclusory allegations without factual support are insufficient to state a cause of action for

tortious interference with prospective advantage (*M.J. & K. Co., Inc. v. Matthew Bender and Co., Inc.* 220 AD2d 488, 490 [2d Dept. 1995]). At most, the allegations in the Third-Party Complaint demonstrate that the third-party defendants' actions were financially motivated for their own economic interest, not for the sole purpose of harming Gouma (*see Newsday, Inc. v. The Fantastic Mind, Inc.*, 237 AD2d 497, 498 [2d Dept. 1997]; *Lobel v. Maimonides Med. Ctr.*, 39 AD3d 275, 277 [1st Dept. 2007]). Accordingly, the third third-party claim for tortious interference with prospective economic advantage is dismissed.

Fraud

“[A] misrepresentation of material fact, which is collateral to the contract and serves as an inducement for the contract, is sufficient to sustain a cause of action alleging fraud” (*Yenrab, Inc. v. 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2d Dept. 2009] quoting *WIT Holding Corp. v. Klein*, 282 AD2d 527, 528 [2d Dept. 2001]). Here, Gouma's Counterclaims/Third-Party Complaint sets forth numerous alleged misrepresentations made by Medicon, Nanomedicon and Anastasia which allegedly induced Gouma to take certain actions, including sharing her work and expertise, participating as Project Director, and participating in the preparation of grant applications. Gouma's allegations in this regard are not merely conclusory. Rather, Gouma has set forth numerous specific alleged misrepresentations made by Medicon, Nanomedicon and/or Anastasia. Although some of the alleged misrepresentations also may have served as an inducement for the Research Foundation to enter into the OEPLA, Gouma's fraud claim is not based solely on the OEPLA. Additionally, contrary to Medicon's contention, Gouma's allegations that the statements were false, that they were made with knowledge of their falsity and with intent to deceive, and that the statements caused damages are sufficient to satisfy CPLR 3016(b) (*see Black v. Chittenden*, 69 NY2d 665, 668 [1986]). Accordingly, those branches of the motions seeking to dismiss the fourth counterclaim/third-party claim for fraud are denied.

Unjust Enrichment

Gouma's fifth counterclaim/third-party claim for unjust enrichment is dismissed.

An action to recover for unjust enrichment rests

sounds in restitution or quasi-contract (*Waldman v. Englishtown Sportswear*, 92 AD2d 833, 836, 460 NYS2d 552 [1983]). The claim “rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly or *at the expense of another*’ (*Miller v. Schloss*, 218 NY 400, 407, 113 NE 337 [1916] [emphasis added]; *Flag Wharf, Inc. v. Merrill Lynch Capital Corp.*, 40 AD3d 506, 836 NYS2d 406 [2007]). Moreover, “[t]he general rule is that ‘the plaintiff *must have suffered a loss* and an action not based upon loss is not restitutionary” (*State of New York v. Barclays Bank of N.Y.*, 76 NY2d 533, 540, 561 NYS2d 697, 563 NE2d 11 [1990] [quoting Restatement of Restitution § 128, comment f, at 531 (emphasis added)]).

(*Edelman v. Starwood Capital Group, LLC*, 70 AD3d 246, 250 [1st Dept. 2009]). “A plaintiff must show ‘that (1) the other party was enriched, (2) at that party’s expense, and (3) that “it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered”’” (*Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 [2011]).

Here, the central allegations forming the basis of Gouma’s unjust enrichment claim are that Anastasia and Basil have been wrongfully identified as inventors of Gouma’s inventions and that Medicon has wrongfully obtained the benefits of her work. Additionally, Gouma contends that Medicon/Nanomedicon has received funding from the National Institute of Health. First, any benefit to Anastasia and Basil in being named as co-inventors did not come at Gouma’s expense as there is no allegation that she suffered loss as a result of not being identified as the sole inventor. In any event, Gouma does not allege that Medicon/Nanomedicon were improperly named as co-inventors. Such allegations are directed at Anastasia and Basil. Moreover, the receipt of a benefit alone is insufficient to establish a cause of action for unjust enrichment (*see Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept. 1998]; *Outrigger Constr. Co. v. Bank Leumi Trust Co. of New York*, 240 AD2d 382, 384 [2nd Dept. 1997])). Any intellectual property rights obtained by Medicon, Nanomedicon, and/or Anastasia with regard to Gouma’s work, and any benefits derived therefrom, were received pursuant to the terms of the OEPLA with the Research Foundation, and cannot be said to benefits to which Gouma was entitled having assigned intellectual property rights to the Research Foundation. Gouma does not deny that she stood to benefit financially from the development and commercialization of the technology subject to the OEPLA. Thus, a cause of action for unjust enrichment has not been

stated and the fifth counterclaim/third-party claim is dismissed.

Finally, Medicon has failed to demonstrate that Gouma's claims should be dismissed pursuant to CPLR 1003 because Gouma has chosen not to assert any claim against the Research Foundation, which is a defendant in the main action.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: March 15, 2012
Riverhead, New York

Emily Pines

EMILY PINES
J. S. C.

FINAL
 NON FINAL

To:

Thompson Hine, LLP
Barry M. Kazan, Esq.
335 Madison Avenue, 12 th Fl.
New York, New York 10017

Beldock Levine & Hoffman, LLP
Cynthia Rollings, Esq.
99 Park Avenue
New York, New York 10016-1503

Scully, Scott, Murphy & Presser, PC
Steven I. Wallach, Esq.
400 Garden City Plaza, Suite 300
Garden City, New York 11530

Schnader Harrison Segal & Lewis, LLP
Theodore L. Hecht, Esq.
140 Broadway, Suite 3100
New York, New York 10005