

Kalish v Fernandez
2012 NY Slip Op 33951(U)
November 9, 2012
Supreme Court, Nassau County
Docket Number: 006179-11
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:**

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
**SOLOMON KALISH and ADEX MANAGEMENT
CORP., individually and derivatively as members of
MRI ENTERPRISES, LLC,**

Plaintiffs,

-against-

**BENITO FERNANDEZ, HORIZONS INVESTMENT
CORP., WARMINSTER INVESTMENT CORP.,
ALLAN HAUSKNECHT, M.D., COMPREHENSIVE
IMAGING OF NEW YORK, PLLC, and MRI
ENTERPRISES, LLC,**

Defendants.
-----X

**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 006179-11
Motion Seq. No. 5
Submission Date: 9/5/12**

The following papers having been read on this motion:

**Notice of Motion, Affirmation in Support and Exhibits.....X
Memorandum of Law in Support.....X
Affidavit in Opposition and Exhibits.....X
Reply Affirmation in Further Support, Reply Affidavit in
Further Support and Exhibit.....X
Reply Memorandum of Law in Further Support.....X**

This matter is before the Court for decision on the motion filed by Defendant Warminster Investments Corp. s/h/a Warminster Investment Corp. ("Warminster") on October 24, 2011 and submitted on September 5, 2012. For the reasons set forth below, the Court grants the motion.

A. Relief Sought

Defendant Warminster moves, pursuant to CPLR §§ 3211(a)(1) and (7), for an Order dismissing the Verified Complaint ("Complaint") against Defendant Warminster.

Plaintiffs Solomon Kalish ("Kalish") and Adex Management Corp. ("Adex") oppose the motion.

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B. The Parties' History

The parties' history is set forth in detail in prior decisions of the Court regarding this matter and, accordingly, will not be set forth again herein. As noted in the prior decisions, the Complaint describes this lawsuit as an action for declaratory and injunctive relief, as well as money damages, arising from the alleged breach of certain agreements concerning MRI Enterprises, LLC ("MRI-LLC") and Comprehensive Imaging of New York, PLLC ("CINY"). Kalish is the owner of Adex, which is a member of MRI-LLC with a 20% ownership interest. Until his removal in March of 2011, Kalish was also the President of MRI-LLC and administrator of CINY. Horizons is a member of MRI-LLC with a 40% ownership interest. Fernandez owns and controls Horizons and Warminster. Hausknecht, a physician, is a member of MRI-LLC with a 20% ownership interest. Hausknecht owns CINY, a professional medical corporation. The Complaint contains thirteen (13) causes of action: 1) breach of the Agreement by the firing of Kalish, 2) breach of the Agreement by diverting HHC payments to CINY and thereby depriving Plaintiffs of monies due them, 3) breach of the Operating Agreement by the firing, which was effected without the required vote, 4) breach of the Operating Agreement by diverting HHC payments to CINY without the required notice and vote, 5) request for a constructive trust on revenues received by CINY from HHC pursuant to the 2010 Contracts, 6) unjust enrichment by Fernandez and Hausknecht, 7) conversion of MRI-LLC assets by Hausknecht, Fernandez and CINY, 8) breach of fiduciary duty by Hausknecht and Fernandez, 9) a derivative claim on behalf of MRI-LLC, for which any demand would be futile; 10) waste of MRI-LLC's assets by Hausknecht and Fernandez, 11) request for a declaratory judgment as to Kalish's continued employment, the firing, the address to which HHC payments should be sent, the diversion of funds to CINY, sums owed by CINY to MRI-LLC, and the amount of profit distributions due to Plaintiff, 12) a request for preliminary and permanent injunctive relief, and 13) a request for an accounting from Defendants.

In support of its motion, Warminster provides a copy of the Complaint (Ex. A to Zinn Aff. in Supp.) and counsel for Warminster affirms that the Complaint fails to assert any allegations against Warminster. The only reference to Warminster in the Complaint is a paragraph identifying it as a party. Specifically, paragraph 5 of the Complaint alleges that Warminster is a foreign corporation with its principal place of business in the County of Kings, State of New York.

In opposition, counsel for Plaintiffs notes that the Complaint alleges that Warminster is

owned and controlled by Fernandez, who is its Chief Executive Officer. He also provides Quick Book entries of CINY and MRI-LLC (Ex. B to Gabriele Aff. in Opp.) which reflect the transfer of hundreds of thousands of dollars from these companies to Warminster. As Warminster is not a member of CINY or MRI-LLC and, to Plaintiffs' knowledge, has no contract with and provides no services to these companies, "it appears that Warminster is simply an *alter ego* through which defendant Fernandez funnels profits out of CINY and MRI-LLC" (Gabriele Aff. in Opp. at ¶ 6).

Counsel for Plaintiffs further notes that paragraph 6 of the Complaint alleges that Fernandez owns and controls Warminster, and states that "the term 'Fernandez' shall also encompass...Warminster." Thus, Fernandez was acting on behalf of Warminster and the allegations in the Complaint against Fernandez are also being made against Warminster. Plaintiffs' counsel submits, therefore, that there are numerous allegations against Warminster in the Complaint, including but not limited to 1) paragraph 34 of the Complaint which alleges that Fernandez took certain actions to prevent Kalish from participating in MRI-LLC and from receiving profits and compensation due to him, and 2) paragraph 46 of the Complaint which alleges that Fernandez funneled HHC payments for MRI services to CINY in order to deprive Plaintiffs of monetary distributions due to them.

In reply, Fernandez submits that the Court should not consider the affirmation of Plaintiffs' counsel as he has no personal knowledge regarding Warminster. Fernandez also disputes the affirmations of Plaintiffs' counsel. Fernandez disputes the implication of Defendants' counsel that payments made to Warminster were improper, and affirms that the payments were proper in light of the fact that Warminster has an agreement for administrative services under which it is entitled to receive payments. Fernandez also contends that the assertion of Plaintiffs' counsel that Warminster has no contracts with and provides no services to either CINY or MRI-LLC is inaccurate, in light of Warminster's agreement for administrative services.

C. The Parties' Positions

Defendant Warminster submits that the Complaint fails to assert any allegations against Warminster and, therefore, fails to state a cause of action against it. The only reference to Warminster in the Complaint is a paragraph identifying it as a party.

Plaintiffs oppose Warminster's motion, noting that the Complaint alleges that Fernandez owns and controls Warminster, and states that "the term 'Fernandez' shall also

encompass...Warminster.” Thus, the allegations against Fernandez are also made against Warminster and the Complaint states a cause of action Warminster.

In reply, Warminster submits that 1) Plaintiffs’ attempt to cure the deficiencies in the Complaint by having their attorney assert allegations against Warminster must fail as counsel’s affirmation is not based on personal knowledge; 2) the Court should disregard the assertions of Plaintiffs’ counsel that Warminster has no contracts with and provides no services to CINY or MRI-LLC, and is an alter ego through which Fernandez funnels profits out of CINY and MRI-LLC as those assertions are not supported by an affidavit based on personal knowledge; and 3) the Court should reject Plaintiffs’ “absurd claim” (Zinn Reply Aff. at ¶ 10) that, because Plaintiffs have defined “Fernandez” in the Complaint also to encompass Warminster, that the specific allegations against Fernandez are somehow applicable to Warminster.

RULING OF THE COURT

A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

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. Sufficiency of Complaint

The rigid “theory of the pleadings” doctrine no longer survives in the CPLR. See *Jerry v. Borden Company*, 45 A.D.2d 344, 346 (2d Dept. 1974), citing CPLR § 3013. Rather, the test of whether a pleading is sufficient is whether it gives notice of the transactions relied on and the

material elements of the cause of action. *Id.* at 347.

C. Affirmations of Counsel

The affirmation of an attorney which is not based on personal knowledge of the facts is of no probative or evidentiary significance. *US Nat'l Bank Assoc. v. Melton*, 90 A.D.3d 742 (2d Dept. 2011).

D. Application of these Principles to the Instant Action

The Court grants the motion and dismisses the Complaint against Defendant Warminster Investment Corp. While the Court is mindful that pleadings must be construed liberally, the Complaint fails to state any allegations regarding Warminster's conduct or other involvement, and the allegations in the Complaint that Warminster is owned and controlled by Fernandez and that the term "Fernandez" shall also encompass Warminster are insufficient to sustain the Complaint against Warminster. Moreover, the Court cannot consider the affirmations of Plaintiffs' counsel given that they are not based on personal knowledge of the facts. Under these circumstances, the Court concludes that the Complaint is insufficient as to Defendant Warminster, and grants its motion to dismiss.

All matters not decided herein are hereby denied.

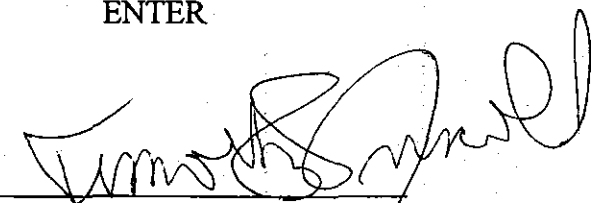
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Certification Conference on November 19, 2012 at 9:30 a.m.

DATED: Mineola, NY

November 9, 2012

ENTER


HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

NOV 15 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE