

**Kadosh v Kadosh**

2013 NY Slip Op 31450(U)

July 2, 2013

Supreme Court, New York County

Docket Number: 651834/2010

Judge: Shirley Werner Kornreich

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUSTICE SHIRLEY WERNER KORNREICH PART 54  
*Justice*

Index Number : 651834/2010  
KADOSH, MICHEL  
vs.  
KADOSH, DAVID  
SEQUENCE NUMBER : 006  
AMEND SUPPLEMENT PLEADINGS

INDEX NO. \_\_\_\_\_  
MOTION DATE 5/20/13  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s) 123-144  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s) 146-148  
Replying Affidavits \_\_\_\_\_ | No(s) \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 5/20/13

**SHIRLEY WERNER KORNREICH**  
*[Signature]*  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X

MICHAEL KADOSH, on behalf of himself and as a  
Member and in the right of  
213 WEST 85th STREET, LLC,

**DECISION & ORDER**

Index No.: 651834/2010

Plaintiffs,

-against-

DAVID KADOSH, 114 WEST 71st STREET, LLC,  
30 LEXINGTON AVENUE, LLC and 3D IMAGING  
CENTER CORP.,

Defendants.

-----X

DAVID KADOSH, on behalf of himself and as a  
Member and in the right of  
213 WEST 85th STREET, LLC,

Third-Party Plaintiffs,

-against-

M.E.K. ENTERPRISES, LTD.,

Third-Party Defendant.

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Plaintiff Michel Kadosh (Michel) and third-party defendant M.E.K. Enterprises, Ltd.  
(MEK, collectively Movants) move (Motion Sequence 006) for leave to file a the proposed first  
amended complaint verified complaint & third-party counterclaims (Proposed Amendment)  
attached to the moving papers.<sup>1</sup> MEK is wholly-owned by Michel. Movants seek: 1) to add  
Cosmetic Dentistry of New York, PLLC (Cosmetic) as a defendant; 2) to add quantum meruit

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<sup>1</sup>The court granted the balance of the motion, which sought distribution of funds from 213  
West 85th Street, LLC (W85). Doc 148.

and unjust enrichment as alternative theories of relief; 3) to add claims for declaratory judgment, declaring that Michel is a 50% owner of Cosmetic and defendants 114 West 71st Street, LLC (W71), 30 Lexington Avenue, LLC (30 Lex), 3D Imaging Corp. (3D, collectively with W71 and 30 Lex, Defendant Entities); and 4) to amplify the original complaint with detail allegedly uncovered in discovery. In place of an affidavit of merit, Michel verified the Proposed Amendment. Michel agrees in advance to provide any additional discovery that will be needed if the motion is granted, but his attorney avers, and it is not contradicted, that the additional allegations were addressed in discovery already.

Defendant David Kadosh (David), the Defendant Entities (collectively with David, Defendants) and Cosmetic oppose, by attorneys' affirmation with exhibits, on the grounds that the Proposed Amendment: 1) is too late; 2) is prejudicial; 3) lacks merit 4) is contradicted by documentary evidence; 5) is barred by the statute of limitations with respect to the claims concerning Cosmetic; and 6) is illegal with respect to the claims concerning Cosmetic, which is a professional dental limited liability company. Defendants also ask the court to strike allegedly scandalous and prejudicial allegations in paragraphs 77 through 80 of the Proposed Amendment. CPLR 3024(b). The court will consider the request as opposition to the motion in chief. CPLR 104.

The original verified complaint contained the following causes of action, numbered here as they are in the complaint: 1) accounting by David with respect to W85; 2) David's breach of the W85 operating agreement; 3) David's breach of fiduciary duty with respect to W85; 4) accounting by David with respect to W 71; 5) accounting by David with respect to 30 Lex; and 6) accounting by David with respect to 3D.

The Proposed Amendment contains a combined declaratory judgment and accounting claim (5th cause of action). It alleges that pursuant to the Oral Agreement, Michel should be declared a 50% shareholder or member of W71, 30 Lex, 3D, and Cosmetic, and demands an accounting with respect to each. The Proposed Amendment also adds a claim for quantum meruit and unjust enrichment (6th cause of action), as an alternative to breach of contract, against the Defendant Entities and Cosmetic, for the reasonable value of services rendered to them by Michel. Finally, the Proposed Amendment contains MEK's counterclaim against David and W85 for breach of the Construction Contract (first counterclaim).

### *Background*

This is an action between two brothers. The gist of the original complaint was Michel's claim that in mid-June 2003, when MEK had a contract to buy a building now owned by W85 (Property), he agreed to give David a 50% interest in return for David's oral agreement to share profits and losses from his dental imaging and supply businesses, then owned or thereafter acquired, and two real estate investments (Oral Agreement). The Oral Agreement also allegedly required David to pay half the cost of acquiring and renovating W85, and to use the Defendant Entities' (and future entities') profits to fund construction at W85.

In October 2003, Michel and David created W85 to acquire the Property. The W85 operating agreement named the two brothers co-managing members, with equal decision-making authority. The closing on the Property occurred in December 2003. W71 and 30 Lex are entities that own real property and were wholly-owned by David in June 2003. 3D is a dental imaging business started by David in 2004.

Michel has claimed from the inception of the action that he had experience in

construction and that he and his company, MEK, renovated the Property, expecting David to honor his promise to pay 50% of the labor and material costs, but that David failed to pay his full share of the costs to buy, finance and renovate it. Michel also has asserted throughout that David did not honor his agreement to pay 50% of the expenses for W71, 30 Lex and 3D, and to divide their profits, although Michel incurred expenses, performed work, including renovations at W71 and 30 Lex, and managed the Defendant Entities from his office at W71.

The original complaint alleged that in September 2005, after David had requested and failed to perform as general contractor for the renovation the Property, W85 entered into a contract with MEK to perform the work (Construction Contract), which covered labor, but did not cover materials, “[w]ith few exceptions.” Complaint, ¶ 24.

David claims that the Proposed Amendment admits that he canceled the Oral Agreement in April 2005. Actually, the Proposed Amendment, ¶52, alleges that in April 2005, “David began to deny that he meant to make Michel a partner in the Defendant Entities.” Other documentary evidence, purportedly barring the Proposed Amendment, consists of checks to Michel and others from W71. David’s attorney claims the checks prove conclusively: 1) that Michel received a salary of \$1500 week for services, which was all that he was owed; and 2) that the Oral Agreement is a fiction. Michel’s explanation for the \$1500 per week is that David agreed that “for Michel to take a modest ‘draw’ of \$1500 per week...to be applied against future profits due Michel from the Defendant Entities per the agreement [Oral Agreement], always stating they would settle up at a later date after W71 was completed and they were profitable.” Proposed Amendment, ¶55.

*Discussion*

*Timeliness Proposed Amendment*

An amendment can be granted at any time, so long as there is no prejudice. *Murray v City of New York*, 43 NY2d 400 (1977) (motion to amend to conform pleading to proof may be granted at any time, even on appeal from final judgment, in absence of prejudice). Here, there is no prejudice or surprise because Defendants had notice that Michel claimed a 50% interest in the Defendant Entities and future ventures, and that he and MEK claimed not to have been compensated properly for the work they did for the Defendant Entities. Moreover, discovery has been done on these issues.

*Motion to Add Cosmetic*

The prong of the motion for leave to add claims declaring that Michel owns 50% of Cosmetic, and directing David to account for its receipts and expenses, is denied. Because Michel is not a dentist, a prospective agreement to share the profits of a dental practice violates public policy and is unenforceable. *Hartman v Bell*, 137 AD2d 585 (2d Dept 1988), citing *Psychoanalytic Center, Inc. v Burns*, 46 NY2d 1002 (1979); *Sachs v Saloshin*, 138 AD2d 586 (2d Dept 1988). The reasoning of these cases is that “[w]here the parties’ arrangement is illegal “the law will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them.” *Hartman, supra* at 586, citing *United Calendar Mfg. Corp. v Huang*, 94 AD2d 176, 180 (2d Dept 1983). A professional dental limited liability company may not admit a member who is not a licensed dentist, an agreement to do so is void, and a dentist who splits fees with a non-dentist is subject to license

suspension or revocation.<sup>2</sup>

The Proposed Amendment admits in paragraph 8 that Cosmetic was formed to “manage and profit from the business of providing dental products and services.” Michel admits that he is not a dentist. Oral Argument Transcript, 5/7/13, p 3. Thus, an agreement to admit Michel as a member of Cosmetic is void. LLCL 1207. His claim to declare him an owner of Cosmetic, and for an accounting by David of its profits cannot be maintained. Michel’s object in enforcing the Oral Agreement with respect to Cosmetic is to prospectively share its profits, which violates the Education Law. It is unnecessary to consider whether the claim against Cosmetic is barred by the statute of limitations or Michel delayed too long in asserting it.

*Motion to Add Claims for Declaratory Judgment, Quantum Meruit & Unjust Enrichment*

The court grants the motion to add alternative claims against the Defendant Entities for

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<sup>2</sup> Limited Liability Company Law (LLCL) 1207 provides:

(b) ...With respect to a professional service limited liability company formed to provide dental services as such services are defined in article 133 of the education law, each member of such limited liability company must be licensed pursuant to article 133 of the education law to practice dentistry in this state....

(c) No member of a professional service limited liability company shall enter into a voting trust agreement, proxy or any other type of agreement vesting in another person, other than another member of such limited liability company or professional who would be eligible to become a member of such limited liability company, the authority to exercise voting power of any or all of the membership interests of such limited liability company. All membership interests or proxies granted or agreements made in violation of this section shall be void.

A license to practice dentistry requires a dental education and completion of a residency. Art. 133, Educ. Law §6604. Practice of dentistry under Article 133 of the Education Law is defined as “diagnosing, treating, operating, or prescribing for any disease, pain, injury, deformity, or physical condition of the oral and maxillofacial area related to restoring and maintaining dental health.” Art. 133, Educ. Law §6601. A dentist’s license may be revoked or suspended for participating in the division or splitting of fees with a non-dentist. Educ. L. 6509-a.

declaratory judgment, quantum meruit and unjust enrichment. Under the CPLR, inconsistent claims for breach of contract and quantum meruit, or unjust enrichment, may be asserted.

*Farash v Sykes Datatronics, Inc.*, 59 NY2d 500, 503-504 (1983)(party may plead alternatively contradictory theories of enforcement of contract and recovery under implied contract); *Foster v Kovner*, 44 AD3d 23 (1st Dept 2007)(where there is bona fide dispute as to existence of oral contract, plaintiff may proceed on theories of quasi contract and contract).

With respect to the addition of claims for declaratory judgment, there is no prejudice or surprise and leave to amend is granted. The original pleading gave Defendants notice that Michel claimed a 50% interest in the Defendant Entities pursuant to the Oral Agreement. The accounting claims against the Defendant Entities in the original complaint alleged that in consideration of Michel's agreement to give 50% of W85 to David, he agreed to give Michel 50% of the Defendant Entities. Complaint, ¶¶ 71, 76 & 81. Hence, Michel can seek a declaration that he owns a 50% interest in the Defendant Entities.

#### *Alleged Lack of Merit & Documentary Evidence*

The documentary evidence that Defendants point to do not establish lack of merit. The checks paid to Michel do not conclusively establish that he was merely an employee performing services. They do not prove that he is not owed more pursuant to the Oral Agreement, or that they were not a draw against promised future profits that would be divided later. The allegation that David began to renege on the Oral Agreement in April 2005, is not conclusive proof that he canceled the "partnership." The Proposed Amendment states that while David told Michel "he can no longer compensate him as a partner," David continued to string Michel along with promises of a future pay out, cited the need to keep the "pot" intact for future ventures, agreed

that Michel could take a draw against future profits, and said they could settle up later. Proposed Amendment, ¶¶ 53-55. The court notes that Michel could not have been a partner in the Defendant Entities, which are not partnerships.

The court rejects the argument that the terms of the Oral Agreement are insufficiently pleaded. The elements of a cause of action for breach of contract are (1) formation of a contract between plaintiff and defendant; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. *Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 (3d Dept 2009). The complaint must give notice of the transactions or occurrences underlying the breach of contract, but particularity is not required. *Shilkoff, Inc. v 885 Third Ave. Corp.*, 299 AD2d 253, 254 (1st Dept 2002).

Here, Michel alleges that he and David agreed that, in consideration Michel's transferring a 50% interest in W85, David would give Michel 50% of the Defendant Entities and all future ventures, that the brothers would contribute equal amounts to cover expenses of W85, that they would share the profits of W85 and the Defendant Entities (and future ventures), and that the profits of the Defendant Entities would be used to renovate W85, but that David refused to make an equal contribution for W85's expenses, share the profits of the Defendant Entities, or use them for W85's renovation. In addition, Michel alleges that he performed his part of the bargain, contributing more than David in money, labor and materials. The claim is sufficiently alleged.

Although there are contradictory allegations, such as that David should pay what MEK allegedly is owed under the Construction Contract with W85; whether Michel draw was an employee's salary or a draw against future profits; that Eli Kadosh -- not Michel -- originally noticed W85 was for sale; the amount of the W85 down-payment; that Michel could not have

worked two years because David canceled the Oral Agreement in April 2005, etc., the inconsistencies simply raise factual and credibility issues. Richard T. Farrell, *Prince Richardson on Evidence*, © 2008, §8-219 (informal judicial admissions, such as deposition testimony and withdrawn verified pleadings, may be admitted as admissions at trial if they contradict current pleading). Defendants assert that the Proposed Amendment should be denied because Michel alleges, contradictorily, that the Defendant Entities' profits were to fund W85's renovations and that David was to contribute 50% of the expenses. However, the allegations are not necessarily inconsistent. Michel alleges that after the Oral Agreement was made, with his efforts the Defendant Entities began to generate profits. It can be inferred that at the time of the Oral Agreement, it was not certain that profits from the Defendant Entities would be profitable, and the brothers agreed to share expenses in the absence of profits.

However, the first counterclaim to the third-party complaint cannot be maintained against David Kadosh. It alleges that MEK entered into the Construction Contract with W85, and that David as 50% owner of W85 breached it. A non-party cannot be liable for breach of a contract. *Pacific Carlton Dev Corp. v 752 Pac., LLC*, 62 AD3d 677 (2d Dept 2009). Thus, MEK's first counterclaim against David Kadosh for breach of contract is dismissed, but the counterclaim survives against W85.

#### *Motion to Strike*

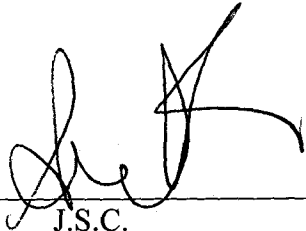
Defendants move to strike paragraphs 77 through 80 of the Proposed Amendment. CPLR §3024(b) authorizes a court, upon motion, to strike unnecessary and prejudicial allegations from a pleading. Allegations should remain when they are relevant to the plaintiff's cause of action. *Soumayah v Minnelli*, 41 AD3d 390 (1st Dept 2007).

Here, the paragraphs in question allege that David breached the Oral Agreement when Michel confronted him about tax, Medicaid and Medicare fraud committed by the Defendant Entities, and disability insurance fraud committed by David personally. Michel alleges that as part owner of the Defendant Entities, he refused to participate in such activities. This is relevant to refute Defendants' claim that the Oral Agreement never existed and to explain that David breached it in retaliation for Michel's insistence that such activities stop. However, David's personal disability insurance claim, as alleged in the second sentence of paragraph 77, is not relevant. Nor are the last three sentences of Paragraph 78, regarding David's contractual behavior with others. Thus, the motion to amend is granted to the extent of striking the allegation regarding the personal disability insurance claim in Paragraph 77 and the last three sentences of paragraph 78.. Accordingly, it is

ORDERED that the motion by Michel Kadosh and third-party defendant M.E.K. Enterprises, Ltd., to serve a first amended verified complaint and third-party counterclaim (Motion Sequence 006), is granted to the extent that they may serve the Proposed Amendment (as defined in this decision), within ten days of entry of this decision and order in the NYSCEF system, minus all references to 1) Cosmetic Dentistry of New York, PLLC, 2) David's private disability insurance as alleged in the second sentence of paragraph 77, and 3) the last three sentences of paragraph 78; and in all other respects the motion is denied.

Dated: July 2, 2013

ENTER:

  
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J.S.C.