

**Enterprise Radiology, P.C. v CDP Holdings Group,
LLC**

2015 NY Slip Op 32842(U)

July 28, 2015

Supreme Court, Nassau County

Docket Number: 601786-15

Judge: Timothy S. Driscoll

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ORIGINAL

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x
**ENTERPRISE RADIOLOGY, P.C. d/b/a
WASHINGTON HEIGHTS IMAGING,**

**TRIAL/IAS PART: 14
NASSAU COUNTY**

Plaintiff,

**Index No: 601786-15
Motion Seq. Nos. 3 and 4
Submission Date: 7/2/15**

-against-

**CDP HOLDINGS GROUP, LLC and LONG
ISLAND RADIOLOGY ASSOCIATES, P.C.,**

Defendants.
-----x

Papers Read on these Motions:

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

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

This matter is before the court on 1) the motion filed by Defendant CDP Holdings Group, LLC (“CDP”) on May 22, 2015, and 2) the motion filed by Defendant Long Island Radiology Associates, P.C. (“LIRAD”) on May 29, 2015, both of which were submitted on July 2, 2015. For the reasons set forth below, the Court 1) with respect to the motion by CDP, grants CDP’s motion to dismiss the first, fifth and sixth causes of action, as well as Plaintiff’s request for punitive damages, and otherwise denies the motion; and 2) grants LIRAD’s motion and dismiss

the Complaint as asserted against LIRAD.

BACKGROUND

A. Relief Sought

Defendant CDP moves for an Order, pursuant to CPLR § 3211, dismissing the first, third, fifth, sixth and seventh causes of action in the Complaint.

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

Plaintiff Enterprise Radiology, P.C. d/b/a Washington Heights Imaging (“WHI” or “Plaintiff”) opposes the motions.

B. The Parties’ History

The parties’ history is outlined in detail in a prior decision (“Prior Decision”) of the Court dated May 11, 2015 and the Court incorporates the Prior Decision by reference as if set forth in full herein. In the Prior Decision, the Court granted, to a limited extent, Plaintiff’s prior motion for injunctive relief.

As noted in the Prior Decision, the Complaint (Ex. A to Michael Aff. in Supp.) describes the nature of this action as follows:

This is an action by WHI for conversion, declaratory judgment, specific performance, breach of contract, breach of good faith and fair dealing, tortious interference and injunctive relief against CDP and LIRAD...resulting from CDP’s actions in barring WHI from accessing critical medical records of WHI’s patients, specifically electronically stored mammograms for patients, many of whom have been diagnosed with breast cancer, as well as additional radiological images, and in preventing LIRAD from giving WHI access to these critical medical records and LIRAD’s actions in agreeing or acquiescing to CDP restricting WHI’s access to its medical records.

Comp. at ¶ 4.

As also noted in the Prior Decision, the Complaint contains seven (7) causes of action: 1) conversion, 2) a request for a declaratory judgment setting forth the rights and obligations of the parties, including that a) the mammography and other radiological records of WHI’s patients are the property of WHI and its patients; b) CDP is improperly retaining and refusing to permit access to said records; and c) WHI does not owe to CDP any sum of money for the restoration of

access to said records for the purpose of viewing said records or migrating them to WHI's PACS, 3) for specific performance requiring Defendants to provide WHI with cost-free access to PACS until the migration of WHI's patients' records to WHI's PACS is complete, 4) breach of the parties' implied and/or oral contract to provide ready access to patient records, 5) breach of the implied covenant of good faith and fair dealing, 6) tortious interference with business relations and economic advantage, and 7) a request for injunctive relief prohibiting Defendants from restricting WHI's ready access to its patient records and ordering CDP to immediately restore WHI's access to LIRAD's PACS. The sixth cause of action, alleging tortious interference, includes the allegation that "Defendants' interference with WHI's relationships with its patients is willful and intentional and was accomplished through illegal, improper and/or unethical actions, including, but not limited to, Defendants' refusal to permit WHI access to its patients' records" (Comp. at ¶ 123).

In support of CDP's motion, counsel for CDP ("CDP Counsel") provides copies of the following documentation: 1) a February 16, 2015 letter from CDP to Dr. Daniel E. Beyda ("Beyda") of WHI (Ex. B to Michael Aff. in Supp.), 2) a March 1, 2015 email from Eric Fader ("Fader") to CDP Counsel (Ex. C to Michael Aff. in Supp.), and 3) a March 2, 2015 letter from CDP Counsel to Fader. In his affidavit in support of Plaintiff's prior motion, Beyda affirmed that 1) he is the President and Medical Director of WHI, a radiology practice located in Manhattan, and has held those positions since WHI opened in 2012; 2) from 2004 to the present, he has been a shareholder of LIRAD, a radiology practice located in Elmont, New York, and is one of six shareholders of LIRAD; and 3) from September 5, 2014 to March 4, 2015, Beyda was the President and sole director of LIRAD. And, as noted in the July 6, 2015 decision of the Court in the related action ("Related Action") titled *Daniel Beyda v. Daniel DiPietro and CDP Holdings Group, LLC*, Index Number 600916-15, Fader is an attorney with the law firm of Day Pitney LLP who represented Beyda in negotiating the transaction that is central to this action and the Related Action. Day Pitney LLP initially represented Beyda in the Related Action but recently withdrew as counsel for Beyda in the Related Action.

In support of LIRAD's motion, Howard Gelber ("Gelber"), the President of LIRAD, provides copies of the following documentation: 1) the Asset Purchase Agreement ("APA"),

dated as of September 5, 2014, entered into by and among LIRAD, D.R. Rossi, M.D., P.C., Radiology Works, P.C., Empire Imaging, P.C., American Imaging Associates, P.C., Greater Northeast Radiology Associates, P.C., CDP, Dennis Rossi, M.D., Howard Gelber, M.D., Beyda, Victoria Beyda, M.D. (“Victoria”), James McCleavey, M.D., Glenn Schwartz, M.D., and Matthew Diament, M.D. (Ex. A to Gelber Aff. in Supp.), and 2) the Bill of Sale, dated October 6, 2014, concerning the APA (Ex. B to Gelber Aff. in Supp.).

In further support of LIRAD’s motion, counsel for LIRAD (“LIRAD Counsel”) provides copies of the following documentation: 1) the complaint in the Related Action (Ex. A to Collins Aff. in Further Supp.), 2) a Pledge and Security Agreement, dated as of September 5, 2014, by and between CDP, Daniel DiPietro (“DiPietro”), Beyda, LIRAD, D.R. Rossi, M.D., P.C., Radiology Works, P.C., Empire Imaging, P.C., American Imaging Associates, P.C., and Greater Northeast Radiology Associates, P.C. (Ex. B to Collins Aff. in Further Supp.), 3) a Pledge and Security Agreement, dated as of September 5, 2014, by and between CDP, Beyda, LIRAD, D.R. Rossi, M.D., Radiology Works, P.C., Empire Imaging, P.C., American Imaging Associates, P.C., and Greater Northeast Radiology Associates, P.C. (Ex. C to Collins Aff. in Further Supp.) and 4) an Assignment and Assumption Agreement, dated as of September 5, 2014, by and between LIRAD, D.R. Rossi, M.D., P.C., Radiology Works, P.C., Empire Imaging, P.C., American Imaging Associates, P.C., Greater Northeast Radiology Associates, P.C., Dennis R. Rossi, M.D., James McCleavey, M.D., Howard Gelber, M.D., Victoria, Glenn Schwartz, M.D., Matthew Diament, M.D., CDP, DiPietro and Beyda (Ex. D to Collins Aff. in Further Supp.).

C. The Parties’ Positions

CDP submits that this action is a contract dispute related to WHI’s contention that CDP agreed to provide WHI with access, at no charge, to medical records created and stored on CDP’s computer systems, but broke that promise by demanding payment as a condition of continued access. CDP contends that Plaintiff, in an attempt to depict this action as more than a simple breach of contract case, has included “duplicative and extraenous claims” (CDP Memo. of Law in Supp. at p. 1), which CDP now seeks to dismiss. CDP submits that 1) Plaintiff’s claims for conversion (first cause of action), breach of the implied covenant of good faith and fair dealing (fifth cause of action) and tortious interference (sixth cause of action) are duplicative of

Plaintiff's breach of contract claim; 2) Plaintiff's claim for tortious interference is also subject to dismissal because this cause of action concerns conduct directed not at a plaintiff, but at the party with which the plaintiff has or seeks to have a relationship, and there is no allegation that CDP spoke to or communicated with Plaintiff's patients; 3) the Court should dismiss Plaintiff's request for punitive damages because Plaintiff has failed to allege conduct sufficiently egregious to warrant an award of punitive damages; and 4) the Court should dismiss Plaintiff's causes of action for injunctive relief and specific performance because New York law does not recognize stand alone causes of action for that relief.

Plaintiff opposes CDP's motion submitting *inter alia* that 1) Plaintiff's conversion claim is not duplicative of the breach of contract claim because Defendants' actions, as detailed in the Complaint, give rise to both a breach of contract and tort claim, the latter being based on the allegation that Defendant deprived Plaintiff of access to radiological images and records; 2) Plaintiff's tortious interference claim is not duplicative of the breach of contract claim, and is viable because Plaintiff has alleged the required elements of a) the existence of a business relationship with a third party, b) Defendant's interference with the relationship by use of dishonest, unfair or improper means, and c) damages sustained by Plaintiff; and 3) Plaintiff may properly assert a cause of action for breach of the implied covenant of good faith and fair dealing as an alternative to its breach of contract claim.

In reply, CDP submits that 1) in light of Plaintiff's failure to justify its request for punitive damages, the Court should dismiss Plaintiff's claim for punitive damages; 2) dismissal of the tortious interference claim is appropriate in light of Plaintiff's failure to allege conduct directed at third parties, specifically Plaintiff's patients; and 3) dismissal of the conversion, tortious interference and breach of implied covenant of good faith and fair dealing claims is warranted because they are all based on the same facts as Plaintiff's breach of contract claim.

LIRAD submits that the documentary evidence demonstrates that none of the causes of action in the Complaint are viable as against LIRAD. LIRAD contends that, by virtue of the APA, and the closing of the subject transaction in the Fall of 2014, LIRAD no longer owns any equipment on which medical records are stored. LIRAD submits that the Complaint acknowledges this fact in light of its allegations, *e.g.*, that 1) pursuant to the APA, dated

September 5, 2014, CDP was to acquire substantially all of the non-professional assets of LIRAD (Comp. at ¶ 26); and 2) in September 2014, CDP began providing infrastructure and support services to LIRAD, and is currently providing those services (Comp. at ¶ 27). LIRAD submits that, as a result of the APA, LIRAD was not, and is not, in a position to grant or terminate Plaintiff's access to its medical records, or to permit or refuse to permit WHI to migrate those records and, therefore, dismissal of the Complaint is warranted.

LIRAD also submits that 1) dismissal of the first, fifth and sixth causes of action is appropriate because those causes of action are duplicative of Plaintiff's breach of contract claim; 2) the tortious interference claim is not viable because Plaintiff has failed to allege actions specifically directed at Plaintiff's patients; 3) the Court should dismiss Plaintiff's claim for punitive damages because Plaintiff has failed to allege conduct that is sufficiently egregious to warrant an award of punitive damages; and 4) dismissal of the third and seventh causes of action, for specific performance and injunctive relief, is appropriate because those claims cannot stand as independent causes of action.

Plaintiff opposes LIRAD's motion submitting that the documentary evidence on which LIRAD relies does not refute the allegations, as set forth in paragraphs 28-32 of the Complaint, that CDP defaulted on the APA and defaulted on the notes, and that default effectively eliminated or nullified CDP's ownership interest in the computer hardware and software. Plaintiff also reaffirms its position, as set forth in opposition to CDP's motion, that the causes of action for conversion, breach of the covenant of good faith and fair dealing, and tortious interference are not duplicative, and are meritorious.

In reply, LIRAD submits that the APA and Bill of Sale demonstrate that the computer hardware and software at issue were sold to, and acquired by, CDP. Thus, since the closing in the Fall of 2014, CDP has owned and has been in exclusive possession and control over substantially all of the equipment that once belonged to LIRAD, including the picture archiving and communications system used by LIRAD. LIRAD contends that Plaintiff's allegations of default by CDP are irrelevant, particularly because Plaintiff has cited no law, or provision of the APA or transaction documents, that would eliminate CDP's ownership interest upon its default. As a result of the APA, LIRAD does not own, possess or control any equipment on which

Plaintiff's records may be stored and, accordingly, LIRAD is not a proper party in this action.

RULING OF THE COURT

A. Dismissal Standards

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d 956, 957 (2d Dept. 2014), quoting *Alva v. Gaines, Gruner, Ponzini & Novick, LLP*, 121 A.D.3d 724 (2d Dept. 2014) (internal quotation marks omitted) and citing *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

A motion to dismiss a cause of action pursuant to CPLR § 3211(a)(1) may be granted only if documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law. *Bivona v. Danna & Associates, P.C.*, 123 A.D.3d at 957, citing *Indymac Venture, LLC v. Nagessar*, 121 A.D.3d 945 (2d Dept. 2014), quoting *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 63 (2012).

B. Punitive Damages

An award of punitive damages is warranted where a plaintiff establishes that the defendant's conduct evinced a high degree of moral turpitude and demonstrated behavior that equated to criminal indifference to civil obligations. *Stormes v. United Water New York, Inc.*, 84 A.D.3d 1351 (2d Dept. 2011), citing *Huang v. Sy*, 62 A.D.3d 660 (2d Dept. 2009). The misconduct must be exceptional, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness, or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety rights. *Stormes v. United Water New York, Inc.*, 84 A.D.3d at 1351, quoting *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007) (internal quotation marks omitted).

C. Conversion

A conversion takes place when defendant, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's

right of possession. *Colavito v. Organ Donor Network*, 8 N.Y.3d 43, 49-50 (2006). The two key elements of conversion are 1) plaintiff's possessory right or interest in the property, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights. *Id.* at 50.

A cause of action alleging conversion cannot be maintained where damages are being sought merely for breach of contract, and no wrong independent of the contract claim has been demonstrated. *Hassett-Belfer Senior Housing, L.L.C.*, 270 A.D.2d 306, 307 (2d Dept. 2000) citing, *inter alia*, *Priolo Communications v. MCI Telecommunications Corp.*, 248 A.D.2d 453 (2d Dept. 1998); *MBL Life Assur. Corp. v. 555 Realty Co.*, 240 A.D.2d 375, 376-377 (2d Dept. 1997).

D. Covenant of Good Faith and Fair Dealing

Implicit in all contracts is a covenant of good faith and fair dealing in the course of contract performance. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted). The implied covenant of good faith and fair dealing will not impose an obligation that would be inconsistent with the terms of the contract. *Adams v. Washington Group, LLC*, 42 A.D.3d 475, 476 (2d Dept. 2007), citing, *inter alia*, *Horn v. New York Times*, 100 N.Y.2d 85, 93 (2003).

E. Tortious Interference

To make out a claim for tortious interference with business relationships, a plaintiff must show that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper. *Nassau Diagnostic Imaging and Radiation Oncology Associates, P.C. v. Winthrop-University Hosp.*, 197 A.D.2d 563, 563-564 (2d Dept. 1993), *lv. app. den.*, 83 N.Y.2d 756 (1994).

A party claiming tortious interference with contractual relations must establish the following elements: 1) the existence of a valid contract with a third party, 2) defendants'

knowledge of the contract, 3) defendants' intentional procurement of the third party's breach of the contract without justification, 4) actual breach of the contract, and 5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996).

F. Application of these Principles to the Instant Action

The Court grants CDP's motion to dismiss the first, fifth and sixth causes of action, alleging conversion, breach of the implied covenant of good faith and fair dealing, and tortious interference, on the grounds that they are duplicative of the breach of contract cause of action. The tortious interference cause of action is also not viable, in part due to Plaintiff's failure to allege, other than in a conclusory fashion, that CDP interfered with Plaintiff's relationship with a third party, specifically Plaintiff's patients. The Court also grants CDP's motion to dismiss Plaintiff's request for punitive damages based on the Court's conclusion that the conduct alleged is not sufficiently egregious to warrant an award of punitive damages.

The Court denies CDP's motion to dismiss the causes of action seeking specific performance (third) and for injunctive relief (seventh). CDP cites *Cho v. 401-403 57th St. Realty Corp.*, 300 A.D.2d 174 (1st Dept. 2002) in support of its contention that specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action (*see* CDP Memo. of Law at p. 6). While the First Department did assert that general proposition in *Cho*, *id.* at 175, it also held that the trial court had not erred in refusing to dismiss plaintiffs' cause of action for declaratory judgment and specific performance, concurring with the trial court that whether plaintiff may be entitled to specific performance is a matter that should be determined by the trial court on a fuller record, not on a motion to dismiss. *Id.* at 175-176. Thus, *Cho* does not appear to stand for the broad proposition that a request for specific performance may never be asserted as a separate cause of action.

The Court grants LIRAD's motion and dismisses the Complaint as asserted against LIRAD. Pursuant to the transaction set forth in the APA, which closed in the Fall of 2014, substantially all of LIRAD's assets, including equipment and computer hardware and software used in the operation of LIRAD's business, were sold to and acquired by CDP. Thus, ownership, possession and control over those assets is vested with CDP, not LIRAD, and the Complaint is not properly asserted against LIRAD. CDP's potential default on its obligations does not change

that fact, both because there are no provisions in the relevant documents that would support that conclusion, but also because the transaction documents, including promissory notes and Pledge and Security Agreements, specifically provide remedies arising from a payment default by CDP, none of which involves the automatic divestment of CDP's title to the relevant assets.

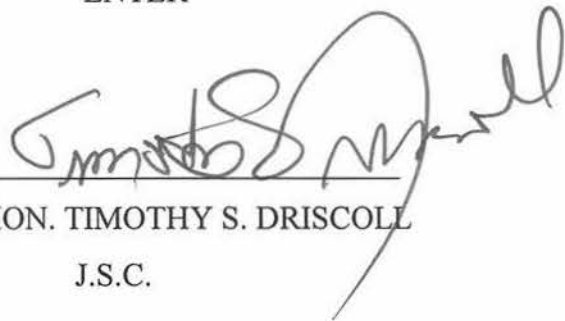
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the remaining parties of their required appearance before the Court for a Compliance Conference on August 11, 2015 at 9:30 a.m.

ENTER

DATED: Mineola, NY
July 28, 2015


HON. TIMOTHY S. DRISCOLL
J.S.C.

ENTERED

AUG 04 2015
NASSAU COUNTY
COUNTY CLERK'S OFFICE