

101 Imaging LLC v D.R. Rossi, M.D., P.C.

2016 NY Slip Op 32803(U)

April 25, 2016

Supreme Court, Nassau County

Docket Number: 601008-14

Judge: Timothy S. Driscoll

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

ORIGINAL

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

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----x **TRIAL/IAS PART: 12**
101 IMAGING LLC d/b/a ACU SCAN,

Plaintiff,

Index No: 601008-14
Motion Seq. Nos. 2, 3 and 4
Submission Date: 4/12/16

-against-

**D.R. ROSSI, M.D., P.C. d/b/a CENTRAL DIAGNOSTIC
IMAGING, LONG ISLAND RADIOLOGY
ASSOCIATES, P.C. d/b/a ELMONT OPEN MRI,
EMPIRE IMAGING, P.C., DENNIS ROSSI, M.D. a/k/a
DENNIS ROSSI and DANIEL BEYDA, M.D. a/k/a
DANIEL BEYDA,,**

Defendants.

-----x

The following papers have been read on these motions:

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Notice of Motion, Affirmation in Support and Exhibit.....x**
- Memorandum of Law in Support.....x**
- Notice of Motion.....x**
- Memorandum of Law in Support and Exhibits.....x**
- Affirmation in Opposition, Affidavit in Opposition and Exhibit.....x**
- Memorandum of Law in Opposition.....x**
- Rossi Reply Memorandum of Law.....x**
- Rossi Entities' Reply Memorandum of Law.....x**
- Beyda Reply Memorandum of Law.....x**

This matter is before the court on 1) the motion filed by Defendant Dennis Rossi, M.D. a/k/a Dennis Rossi ("Dr. Rossi") on February 8, 2016, 2) the motion filed by Defendants D.R. Rossi, M.D., P.C. d/b/a Central Diagnostic Imaging ("DRD"), Long Island Radiology Associates, P.C. d/b/a Elmont Open MRI ("LIRAD"), and Empire Imaging, P.C. ("Empire") ("Rossi Entities") on February 8, 2016, and 3) the motion filed by Daniel Beyda, M.D. a/k/a Daniel Beyda ("Dr. Beyda") on February 9, 2016, all of which were submitted on April 12,

2016. For the reasons set forth below, the Court 1) grants the motion by Defendant Dr. Rossi and dismisses the Amended Verified Complaint as asserted against Dr. Rossi; 2) grants the motion by the Rossi Entities and dismisses the Third Cause of Action in the Amended Verified Complaint as asserted against the Rossi Entities; and 3) grants the motion by Defendant Dr. Beyda and dismisses the Amended Verified Complaint as asserted against Dr. Beyda. The Court directs the Rossi Entities to answer the remaining allegations in the Amended Verified Complaint on or before June 3, 2016. The Court reminds counsel for Plaintiff and counsel for the Rossi Entities of their required appearance before the Court for a Certification Conference on July 14, 2016 at 10:00 a.m.

BACKGROUND

A. Relief Sought

Defendant Dr. Rossi moves for an Order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the Amended Verified Complaint (“Amended Complaint”) of Plaintiff 101 Imaging LLC d/b/a Acu Scan (“Acu Scan” or “Plaintiff”).

The Rossi Entities move for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Third Cause of Action in the Amended Complaint.

Dr. Beyda moves for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Amended Complaint.

Plaintiff opposes the motions.

B. The Parties’ Background

The Amended Complaint (Ex. C to Brickman Aff. in Supp.) alleges as follows:

Plaintiff is a limited liability company in the business of performing medical imaging and other related activities. The Rossi Entities operate out of the same offices, use the same employees, conduct the same business, and use the same equipment and network for imaging related services. Dr. Rossi and Dr. Beyda are physicians, licensed to practice medicine in New York. Dr. Rossi and Dr. Beyda were corporate officers and shareholders of the Rossi Entities. Plaintiff alleges that Dr. Rossi and Dr. Beyda exercised “complete dominion and control” of the Rossi Entities, and “misused” the Rossi Entities “to do business interchangeably, without distinction and to defraud” Plaintiff (Am. Comp. at ¶ 13).

The Amended Complaint contains three (3) causes of action:

First Cause of Action

The First Cause of Action is asserted against the Rossi Entities and Dr. Rossi for breach of contract. Plaintiff alleges that in 2009, Plaintiff negotiated an agreement at LIRAD's offices with Dr. Rossi, either individually or on behalf of the Rossi Entities, pursuant to which Plaintiff would perform certain services for the Rossi Entities in exchange for a fixed fee, depending on the type of service rendered. Dr. Rossi, through his office, presented Acu Scan with a written agreement, sent by LIRAD, which provided that Plaintiff would be entitled to fixed fees from DRD for imaging and leasing services set forth in the agreement, commencing on February 1, 2010. In turn, DAD agreed to perform billing and reading services on behalf of Plaintiff. When Plaintiff requested an executed copy of the written agreement, LIRAD's director advised Plaintiff that "Dr. Rossi's typed name was equivalent to his signature and the written agreement was binding" (Am. Comp. at ¶ 18). As agreed during Plaintiff's initial meeting with Dr. Rossi and LIRAD's Director of Marketing/Managed Care, the Rossi Entities began to obtain their credentials at Plaintiff's location.

As early as January 2010, Acu Scan began performing its obligations for the Rossi Entities relating to medical imaging equipment owned by Acu Scan at its facility ("Facility") located in Ozone Park, New York, including but not limited to MRIs, x-rays, bone density tests, ultrasounds and sonograms for a fee to be paid on a periodic basis by Defendants. Plaintiff also agreed to perform services for Defendants relating to the medical imaging procedures including patient intake, patient scheduling, submitting scans and images, proofreading reports, and transmitting reports to the referring doctors. Pursuant to the agreements between the parties, Acu Scan received a fee from Dr. Rossi and/or the Rossi Entities based on the medical imaging procedures performed at Plaintiff's Facility and Dr. Rossi and/or the Rossi Entities' use of the Facility.

Although Dr. Rossi had informed Plaintiff that it would be performing services for DRD, it became apparent that DRD was transmitting Acu Scan's images to LIRAD and Empire and the names used by those entities. Between December 2009 through February 2013, Acu Scan provided all services required by the parties' agreement, and the Rossi Entities accepted the services performed by Acu Scan. As a result of the services that Acu Scan provided to the Rossi Entities, Plaintiff was entitled to compensation pursuant to the parties' agreements.

Several payments were made to Acu Scan but, instead of paying Acu Scan a fee for each procedure performed, as contemplated by the agreements, the Rossi Entities began to issue checks to Acu Scan for lump sum payments for services rendered, but failed to delineate the procedures to which the payments correlated. Acu Scan corresponded directly with Dr. Rossi concerning the payments due to Acu Scan throughout the parties' business relationship. Acu Scan also subsequently communicated with Dr. Beyda who represented that he was an officer and/or shareholder of the Rossi Entities with authority to approve or disapprove payment to Acu Scan. When Acu Scan advised the Rossi Entities, Dr. Rossi and/or Dr. Beyda that Acu Scan was owed a substantial amount of money for services rendered, Acu Scan received assurances that those payments would be forthcoming, but no payments were made.

Plaintiff repeatedly requested that Dr. Rossi, Dr. Beyda and/or the Rossi Entities provide an accounting demonstrating which procedures performed by Acu Scan correlated to the payments issued by the Rossi Entities, as well as an explanation of why Acu Scan had not been paid for all services provided, but no accounting was ever provided. Plaintiff also demanded payment from the Rossi Entities of the sums due and owing to Acu Scan but the Rossi Entities, Dr. Rossi and/or Dr. Beyda have refused to provide those payments. As a result of Defendants' breach, Plaintiff has been damaged in an amount to be proved at trial but believed to exceed \$2,000,000.

Second Cause of Action

The Second Cause of Action is asserted against the Rossi Entities and Dr. Rossi for quantum meruit/unjust enrichment. Plaintiff alleges that, from January 2010 through February 2013, Acu Scan performed medical imaging services for and at the request of the Rossi Entities and/or Dr. Rossi. The Rossi Entities accepted these services from Plaintiff, retained the scans and images, and received the benefit of those services for which Plaintiff has not been compensated. Plaintiff alleges that it is entitled to recover from Defendants, jointly and severally, the reasonable value of those services which is believed to be no less than \$2,000,000.

Third Cause of Action

The Third Cause of Action is asserted against the Rossi Entities, Dr. Rossi and Dr. Beyda for fraud. Plaintiff alleges that, during the parties' negotiations and throughout the term of the business relationship between the parties, the Rossi Entities, Dr. Rossi and Dr. Beyda assured Acu Scan that it would have the proper credentials necessary for billing its services to various insurance carriers and Plaintiff relied on those assurances in rendering services to Defendants.

Plaintiff alleges that Defendants made that representation without the intention to perform and/or honor that obligation. Thereafter, Acu Scan rendered its services and scans for patients of a variety of insurance carriers and forwarded them for billing and reading services to be performed by DRD and its radiologist professionals. DRD, however, by and through Dr. Rossi and/or Dr. Beyda, forwarded the scans to LIRAD and Empire. Defendants subsequently denied payment to Acu Scan for the scans based in part on their contention that Acu Scan did not have the proper credentials. At the time that Acu Scan provided its services, it did not know that the representations were false, and believed them to be true. Plaintiff alleges that Defendants, as a result of their fraudulent misrepresentations, are liable to Plaintiff for damages believed to exceed \$500,000, as well as punitive damages and attorney's fees.

In support of Dr. Rossi's motion, counsel for Dr. Rossi ("Rossi Counsel") provides a copy of 1) the initial Verified Complaint filed in this action ("Initial Complaint") (Ex. A to Brickman Aff. in Supp.), and 2) the unsigned agreement ("Agreement") attached to the Initial Complaint (Ex. B to Brickman Aff. in Supp.). The first paragraph of the Agreement states that it is "by and between 101 Imaging, LLC...and D.R. Rossi, MD, PC" and the signature lines read as follows:

101 IMAGING, LLC

BY: _____

ANITA SOOKRAJ, PRESIDENT

D.R. ROSSI, MD, PC

BY: _____

DENNIS R. ROSSI, PRESIDENT

In opposition to the motions, Anita Sookraj ("Sookraj"), the President of Acu Scan, affirms that in the fall of 2009, she negotiated, on behalf of Acu Scan, an agreement to provide the services described in the Amended Complaint. From January 2010 through February 2013, Acu Scan performed services on behalf of Defendants, obtaining patient information and regularly submitting scans and reports to Defendants who accepted these scans and reports. Sookraj "thought Dr. Rossi may be a principal of [DRD]" (Sookraj Aff. in Opp. at ¶ 6) but, at her initial meeting, Sookraj met with Dr. Rossi and the Director of Marketing/Managed Care of a company that Sookraj later learned was LIRAD, at LIRAD's offices. Sookraj was not provided

with information regarding the corporate structure of the Defendant entities and was not aware of the entities' relationship to each other.

Sookraj affirms that, following her meeting with Dr. Rossi, Acu Scan was provided with a written agreement that contained lines for the signature of Dr. Rossi and Sookraj on behalf of Acu Scan. The Agreement, however, was not executed by Dr. Rossi or any other individual. The Agreement was sent to Sookraj via email from LIRAD. Sookraj requested that Acu Scan be provided with a signed copy of the Agreement but LIRAD's director advised Sookraj that "the typed name in the signature block was the equivalent to the signature" (Sookraj Aff. in Opp. at ¶ 9). Sookraj affirms that although she discussed a fee schedule with Dr. Rossi, the Agreement did not include a provision regarding that fee schedule.

Sookraj affirms that Acu Scan began performing medical imaging services but "it became clear" (Sookraj Aff. in Opp. at ¶ 11) that the images that were being provided to DRD were being redirected to other entities through a network connection set up by Defendants. From the initial meeting throughout the time that Acu Scan was providing services, Sookraj communicated directly with Dr. Rossi concerning payments due for services rendered by Acu Scan, regardless of the entity to which the images were ultimately transmitted. Dr. Rossi assured Sookraj that payments would be forthcoming to Acu Scan. Thereafter, Dr. Beyda began communicating with Acu Scan regarding payments and "also made no distinction between the entities when payments were requested by Acu Scan" (Sookraj Aff. in Opp. at ¶ 13). Sookraj affirms that Dr. Rossi never denied having an agreement with Acu Scan but, when he learned of the extent of the balance due to Acu Scan, he asked Sookraj to deal with Dr. Beyda, who is believed to be Dr. Rossi's son-in-law.

Sookraj affirms that Dr. Rossi also advised Sookraj that Defendants would ensure that Acu Scan obtained the credentialing required by the individual health insurance carriers so that Acu Scan would be able to submit invoices to those carriers. This promise to obtain credentialing was discussed at the initial meeting with Dr. Rossi in 2009 and Acu Scan relied on the representations of Dr. Rossi, either as an individual or on behalf of a corporate entity, that Acu Scan would receive proper credentials so that it could be paid for its services. This promise was not contained in the Agreement but, Sookjra affirms, Acu Scan would not have provided its patient intake, imaging and document preparation services to Dr. Rossi, Dr. Beyda or the Rossi Entities if Acu Scan was not going to be compensated due to a lack of proper credentials. When Sookraj inquired about the credentials, representatives of the Rossi Entities assured Sookraj that

this issue was being addressed. Sookraj affirms that Acu Scan did not have access to Defendants' files and records and, therefore, could not independently verify this. Acu Scan became aware that the credentialing had not been addressed when Defendants, whom Acu Scan believes received payments from carriers, refused to pay Acu Scan based on its lack of proper credentials.

In further opposition to the motion, counsel for Plaintiff ("Plaintiff's Counsel") provides a copy of Defendants' Verified Answer, submitted in response to the Initial Complaint (Ex. 1 to Sweeney Aff. in Opp.). In that Answer, Defendants asserted a counterclaim based on their contention that Plaintiffs¹ owe Defendants the amount of \$70,000.00, representing an overpayment of fees that were paid to Plaintiff for services rendered.

C. The Parties' Positions

Dr. Rossi submits that 1) dismissal of the first cause of action is appropriate because Dr. Rossi is not a party to the Agreement which is between Plaintiff and DRD; 2) Plaintiff's allegation in paragraph 18 of the Amended Complaint that "LIRAD's director advised Plaintiff that Dr. Rossi's typed name was equivalent to his signature" does not obligate Dr. Rossi under the Agreement; 3) the allegations in the Amended Complaint (*see, e.g.*, Am. Comp. at ¶¶ 16 and 17) confirm that Plaintiff was providing services for DRD or the other Defendant Entities; 4) the second cause of action fails to state a cause of action against Dr. Rossi because Plaintiff does not allege that Dr. Rossi accepted services from Plaintiff, or was enriched, and paragraph 37 of the Amended Complaint alleges that the Defendant entities accepted Plaintiff's services and received the benefit thereof; and 4) dismissal of the third cause of action, alleging fraud, is appropriate because the Amended Complaint contains inadequate particularity regarding the alleged fraud as evidenced by the lack of detail regarding a) who made the representations and to whom they were made, or b) when and where the representations were made, other than the general allegation that they were made "[d]uring the parties' negotiations and throughout the term of the business relationship between the parties" (Am. Comp. at ¶ 41).

The Rossi Entities seek dismissal of the third cause of action, alleging fraud, on the grounds that this cause of action is "based upon nothing more than a routine alleged breach of contract" (Eisenberg Aff. in Supp. at ¶ 4). The Rossi Entities submit that the third cause of

¹ The Initial Complaint contained three plaintiffs in the caption, Sookraj, 101 Imaging LLC and 101 Imaging LLC d/b/a Acuscan.

action is duplicative of Plaintiff's breach of contract claim because the fraud claim merely alleges that the Rossi Entities misrepresented their intention to comply with the Agreement and does not allege any representations that are collateral to the Agreement.

The Rossi Entities also contend that Plaintiff has failed to plead its fraud with adequate particularity. The Rossi Entities note that the Amended Complaint does not state, *inter alia*, where and when the allegedly fraudulent statements were made, or specify who made the statements. Moreover, the Amended Complaint refers generally to the Defendants without connecting particular misrepresentations to the particular Defendants.

Dr. Beyda submits that the Court should dismiss the third cause of action, the only cause of action asserted against Dr. Beyda, on the grounds that Plaintiff has not alleged facts that would warrant piercing the corporate veil and holding Dr. Beyda personally liable for fraud. Dr. Beyda contends, further, that the third cause of action does not plead a misrepresentation with the required specificity. Plaintiff alleges that "Defendants assured that Acu Scan would have the proper credentials necessary for billing its services to various insurance carriers" (Am. Comp. at ¶ 42) but does not identify the speaker or specify the language used in making the alleged misrepresentation. Moreover, the Amended Complaint does not contain any allegation, and certainly not a sufficiently particular allegation, that Dr. Beyda had knowledge of the falsity of any representation. In addition, Plaintiff's conclusory assertion that Plaintiff "acted in justifiable reliance" on the truth of Defendants' representations (Am. Comp. at ¶ 49) does not adequately plead the reliance element. Finally, Dr. Beyda contends that the fraud claim, which relies on allegations of misconduct that are encompassed in Plaintiff's breach of contract claim, is duplicative of Plaintiff's claim for breach of contract.

Plaintiff opposes the motions submitting that 1) its fraud claim arises out of Defendants' promise that they would ensure that Acu Scan was properly credentialed as a medical image provider, which Defendants did not intend to do, and which Defendants did not do; 2) Plaintiff refers to the Defendants collectively because Defendants, during negotiations and the parties' business relationship, "created this confusion as to relationship between the entities and the doctors who presented themselves as principals" (P's Memo. of Law in Opp. at p. 4); 3) Defendants' failure to perform this collateral promise is sufficient to plead a cause of action for fraud; 4) Plaintiff has provided adequate particularity by alleging that a) there was a material misrepresentation of fact by Dr. Rossi, either on behalf of himself or the Rossi Entities, specifically the additional promise that Defendants would provide proper accreditation for Acu

Scan; b) Defendants had knowledge this statement was false and intended that Plaintiff rely on it; c) Plaintiff relied on this material misrepresentation; and d) Plaintiff suffered damages as a result of that reliance. Plaintiff submits that it needs discovery to better address which Defendants had knowledge of and participated in the alleged fraud. Plaintiff contends, further, that it may proceed with a cause of action based on holding the corporate officers or directors personally liable where they had knowledge of or participated in the alleged fraud.

Plaintiff also contends that the unsigned Agreement is not conclusive documentary evidence defeating Plaintiff's right to proceed against Dr. Rossi personally for breach of contract. Plaintiff submits that, because the Agreement is not executed and certain negotiated terms are not included, it does not conclusively refute Plaintiff's claim that it was performing services for several corporate entities and/or Dr. Rossi individually. Plaintiff submits that Dr. Rossi should not be permitted to evade liability by relying on the signature block in the unsigned Agreement where Plaintiff has adequately alleged that Plaintiff, either individually or on behalf of the Rossi Entities, entered into an agreement pursuant to which Plaintiff would perform medical imaging services. Plaintiff also argues that Dr. Rossi improperly relies on the Initial Complaint in its motion in light of the fact that the Amended Complaint superseded the Initial Complaint.

Plaintiff also submits that it may proceed, alternatively, on its quantum meruit/unjust enrichment claim because it may be determined that Plaintiff did not have an agreement with any of the Defendants. Plaintiff contends that it has adequately pleaded a cause of action for unjust enrichment by alleging that 1) Defendants received the scans, reports and other services provided by Plaintiff; 2) Defendants were compensated for those services; and 3) it would be against equity for Defendants to benefit from the services provided by Plaintiff without compensating Plaintiff.

In reply, Dr. Rossi submits that he has properly referred to the Initial Complaint, which alleged that DRD "entered into a written agreement with 101 Imaging" and cited the unsigned Agreement as an exhibit (Initial Comp. at ¶ 12), because Plaintiff's allegations in the Initial Complaint constitute judicial admissions binding on Plaintiff. Dr. Rossi contends that, because the Initial Complaint alleged that Plaintiff and DRD entered into a written agreement, *i.e.* the Agreement, and Dr. Rossi is not a party to the Agreement, the Court should dismiss Plaintiff's breach of contract cause of action as to Dr. Rossi.

Dr. Rossi contends that Plaintiff, in an attempt to rectify its deficient breach of contract claim against Dr. Rossi, now argues that it is “not clear without discovery” whether it rendered its services under the Agreement to the Rossi Entities or Dr. Rossi (Dr. Rossi Reply Memo. at p. 7, quoting P’s Memo. of Law in Opp. at p. 9). Dr. Rossi submits that this claim is inconsistent with the allegations in the Amended Complaint, which in turn is consistent with the terms of the Agreement, that Plaintiff performed its services for DRD and the other Rossi Entities, not for Dr. Rossi individually (*see* Am. Comp. at ¶¶ 20, 22 and 25).

Dr. Rossi also argues that 1) the Court should dismiss the second cause of action, alleging unjust enrichment, because Plaintiff alleges that the Rossi Entities, not Dr. Rossi, were enriched by Plaintiff’s services; 2) while Plaintiff argues that Dr. Rossi exercised dominion and control over the Rossi Entities (P’s Memo. of Law in Opp. at p. 11 n. 2) Plaintiff has not asserted a cause of action to pierce the corporate veil and has not alleged facts to support such a claim; and 3) even if the Court were to accept the Sookraj affidavit in considering the adequacy of the fraud claim, that affidavit provides insufficient particularity regarding the alleged fraudulent misrepresentations.

In reply, the Rossi Entities submit that Plaintiff does not dispute that its fraud claim is based on Defendants’ alleged lack of intent to perform under the Agreement. The Rossi Entities contend that Plaintiff, in opposing the motion, “ignores the well-settled law that a fraud claim may not be maintained where, as here, Plaintiff merely alleges that defendant entered into a contract while lacking the intent to perform it” (Rossi Entities’ Reply Memo. of Law at p. 2). The Rossi Entities contend, further, that the Sookraj affidavit does not remedy the pleading defect that the Amended Complaint contains inadequate specificity regarding the alleged fraud.

In reply, Dr. Beyda submits that Plaintiff’s opposition does not refute Dr. Beyda’s arguments and, instead, reflects Plaintiff’s concession that it has no factual support for its fraud claim against Dr. Beyda and has not pleaded its fraud claim with adequate particularity. Dr. Beyda contend, further, that “there is not a single fact from which it can be inferred that veil piercing is appropriate” (Beyda Reply Memo. of Law at p. 3). Under these circumstances, Dr. Beyda submits, dismissal of the Amended Complaint against Dr. Beyda is appropriate.

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. Breach of Contract

The essential elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach. *El-Nahal v. FA Management, Inc.*, 126 A.D.3d 667, 668 (2d Dept. 2015) citing, *inter alia*, *Dee v. Rakower*, 112 A.D.3d 204, 208-209 (2d Dept. 2013). To state a cause of action to recover damages for a breach of contract, the plaintiff's allegations must identify the provisions of the contract that were breached. *Barker v. Time Warner Cable, Inc.*, 83 A.D.3d 750, 751 (2d Dept. 2011) citing, *inter alia*, *Peters v. Accurate Bldg. Inspectors Div. of Ubell Enters., Inc.*, 29 A.D.3d 972 (2d Dept. 2006).

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.*

C. Unjust Enrichment

The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in good conscience should be paid to the plaintiff. *Corsello v. Verizon New York, Inc.*, 18

N.Y.3d 777, 790 (2012), *rearg. den.*, 19 N.Y.3d 937 (2012), citing *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011), quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972), *reh. den.*, 31 N.Y.2d 709 (1972), *cert. den.*, 414 U.S. 829 (1973). Plaintiff may not maintain an action for unjust enrichment where the matter in dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

D. Fraud

To establish a *prima facie* case for fraud, plaintiff must allege that 1) defendant made a representation as to a material fact; 2) such representation was false; 3) defendant intended to deceive plaintiff; 4) plaintiff believed and justifiably relied upon the statement and was induced by it to engage in a certain course of conduct; and 5) as a result of such reliance plaintiff sustained pecuniary loss. *Ross v. Louise Wise Services, Inc.*, 8 N.Y.3d 478, 488 (2007).

CPLR § 3016(b) provides that where a cause of action is based upon misrepresentation, fraud, breach of trust, and certain other claims the circumstances constituting the wrong shall be stated in detail. The purpose of this pleading requirement is to inform a defendant of the incidents which form the basis of the action. *Pludeman v. Northern Leasing Systems*, 10 N.Y.3d 486, 491 (2008).

A cause of action to recover damages for fraud will not lie where the only fraud claimed arises from the breach of a contract. *Gorman v. Fowkes*, 97 A.D.3d 726, 727 (2d Dept. 2012), citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d 766, 768 (2d Dept. 2008); *Tiffany at Westbury Condominium v. Marelli Dev. Corp.*, 40 A.D.3d 1073, 1076-1077 (2d Dept. 2007). A mere misrepresentation of an intent to perform under the contract is insufficient to sustain a cause of action to recover damages for fraud. *Gorman v. Fowkes*, 97 A.D.3d at 727, citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d at 768; *WIT Holding Corp. v. Klein*, 282 A.D.2d 527, 528 (2d Dept. 2001). Conversely, a misrepresentation of material fact that is collateral to the contract and serves as an inducement for the contract is sufficient to sustain a cause of action alleging fraud. *Gorman v. Fowkes*, 97 A.D.3d at 727, citing *Selinger Enters., Inc. v. Cassuto*, 50 A.D.3d at 768, quoting *WIT Holding Corp. v. Klein*, 282 A.D.2d at 528.

E. Judicial Admissions

Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made. *GMS Batching, Inc. v. TADCO Construction Corp.*, 120 A.D.3d 549, 551 (2d Dept. 2014) citing, *inter alia*, *Zegarowicz*

v. Ripatti, 77 A.D.3d 650, 653 (2d Dept. 2010). An admission of fact in an original pleading does not lose its effect as an admission of fact because the pleading has been superceded as such by an amended pleading. *Kwiecinski v. Hwang*, 65 A.D.3d 1443, 1443-44 (3d Dept. 2009), quoting *Ranken v. Probey*, 136 App. Div. 134, 135 (1909) and citing, *inter alia*, *Ogilvie v. City of New York*, 44 A.D.2d 586 (2d Dept. 1974).

F. Piercing the Corporate Veil

Generally, a corporation exists independently of its owners, who are not personally liable for the corporation's obligations. Moreover, individuals may incorporate for the express purpose of limiting their liability. *East Hampton v. Sandpebble*, 66 A.D.3d 122, 126 (2d Dept. 2009), *aff'd* 16 N.Y.3d 775 (2011), citing *Bartle v. Home Owners Coop.*, 309 N.Y. 103, 106 (1955) and *Seuter v. Lieberman*, 229 A.D.2d 386, 387 (2d Dept. 1996). The concept of piercing the corporate veil is an exception to this general rule, permitting, under certain circumstances, the imposition of personal liability on owners for the obligations of their corporations. *East Hampton v. Sandpebble*, 66 A.D.3d at 126, citing *Matter of Morris v. N.Y.S. Dept. Of Taxation*, 82 N.Y.2d 135, 140-41 (1993).

A plaintiff seeking to pierce the corporate veil must demonstrate that a court should intervene because the owners of the corporation exercised complete domination over it in the transaction at issue. Plaintiff must further demonstrate that, in exercising this complete domination, the owners of the corporation abused the privilege of doing business in the corporate form, thereby perpetrating a wrong that caused injury to plaintiff. *East Hampton v. Sandpebble*, 66 A.D.3d at 126, citing, *inter alia*, *Love v. Rebecca Dev., Inc.* 56 A.D.3d 733 (2d Dept. 2008). In determining whether the owner has "abused the privilege of doing business in the corporate form," the Court should consider factors including 1) a failure to adhere to corporate formalities, 2) inadequate capitalization, 3) commingling of assets and 4) use of corporate funds for personal use. *East Hampton v. Sandpebble*, 66 A.D.3d at 127, quoting *Millennium Constr., LLC v. Loupolover*, 44 A.D.3d 1016, 1016-1017 (2d Dept. 2007).

G. Application of these Principles to the Instant Action

The Court 1) grants the motion by Defendant Dr. Rossi and dismisses the Amended Verified Complaint as asserted against Dr. Rossi; 2) grants the motion by the Rossi Entities and dismisses the Third Cause of Action in the Amended Verified Complaint as asserted against the Rossi Entities; and 3) grants the motion by Defendant Dr. Beyda and dismisses the Amended Verified Complaint as asserted against Dr. Beyda. The Court so rules based on its conclusion

that 1) dismissal of the first cause of action as asserted against Dr. Rossi is appropriate because Dr. Rossi is not a party to the Agreement, on which Plaintiff is relying in pursuing this action, which is between Plaintiff and DRD; 2) the second cause of action fails to state a cause of action against Dr. Rossi because Plaintiff alleges that the Rossi Entities, not Dr. Rossi, accepted services from Plaintiff and received the benefit thereof; and 3) dismissal of the third cause of action is appropriate, both because the Amended Complaint, even coupled with the Sookraj affidavit, contains inadequate particularity regarding the alleged fraud and because the fraud claim is duplicative of the breach of contract claim; and 4) Plaintiff has failed to allege sufficient facts to hold any individual Defendant liable under the theory of piercing the corporate veil.

The Court directs the Rossi Entities to answer the the remaining allegations in the Amended Verified Complaint on or before June 3, 2016.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for Plaintiff and counsel for the Rossi Entities of their required appearance before the Court for a Certification Conference on July 14, 2016 at 10:00 a.m.

DATED: Mineola, NY
April 25, 2016

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

MAY 06 2016

NASSAU COUNTY
COUNTY CLERK'S OFFICE