SUPREME COURT-STATE OF NEW YORK
DECISION AND ORDER AFTER TRIAL
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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COMPLEX STRATEGIES, INC. and DIRECT EFFECT CONSULTS, INC.,

Plaintiffs,

-against-

AA ULTRASOUND, INC., CAROL HOPKINS, STEVENIE HOPKINS, JACKSON HEIGHTS CARDIOVASCULAR IMAGING AND ULTRASOUND, P.C., and IRENE SCHULMAN MEDICAL, P.C.,

Defendants.

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TRIAL/IAS PART: 12
NASSAU COUNTY

Index No. 605909-14

This action was tried before the Court on various days in October 2016. The parties submitted post-trial memoranda in January 2017. Upon consideration of all of the testimony and evidence in this case, the Court determines that plaintiff has proven each of the claims in its complaint, except the claim for unjust enrichment, by a preponderance of the evidence. The Court further determines that defendant has failed to prove any of its counterclaims. The Court further concludes that plaintiff's claim for piercing the corporate veil as to its breach of contract claims has not been established, but that the individual defendants are liable for damages flowing from proven allegations of misappropriation, unfair competition and tortious interference with contract.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Defendant AA Ultrasound, Inc. was formed in 2006 by defendant Carol Hopkins ("Carol") to provide ultrasound medical testing services. Carol and her daughter, defendant Stevenie Hopkins ("Stevenie"), are the shareholders of AA Ultrasound. Carol served as President of the company, whose offices were in the basement of Carol's residence during the relevant time frame in this case.

Carol and Stevenie are also shareholders of a medical billing company called Professional Medical Billing Associates ("PMBA"). That entity also operated out of the basement of Carol's residence.

Plaintiff Complex Strategies, Inc. ("Complex") is owed by James Guardino. Guardino had worked as a sales representative in the medical testing field, and developed relationships with physicians who prescribed and/or provided ultrasound testing. On behalf of their respective companies, Guardino and Carol entered into an agreement in October 2006 in which Complex would refer patients for medical testing to AA Ultrasound. See Exh. 2. Under the 2006 Agreement, AA Ultrasound would engage technicians to provide sonographs, and physicians to interpret those tests.

The 2006 Agreement was modified in 2007 and 2009. It is the 2009 Agreement (Exh. 7) that is at issue in this case. The 2009 Agreement added plaintiff Direct Effect Consults, Inc. ("Direct") as a party to that agreement, and also adjusted the financial terms of the parties' earlier agreements. The 2009 Agreement required AA Ultrasound to provide periodic and regular information to plaintiffs, including Explanation of Benefit ("EOB") forms for services provided to patients referred by plaintiffs. Furthermore, the 2009 Agreement obligated AA Ultrasound to

continue to pay amounts due plaintiffs even after that agreement's expiration date of September 24, 2012.

AA Ultrasound billed for the services through two other companies: defendant Irene Schulman Medical, P.C., which also has its headquarters in Carol's basement, and defendant Jackson Heights Cardiovascular Imaging and Ultrasound, P.C. Carol maintains the books and records for all four defendant companies, and all of the companies bank at the same location. Carol alone decides the fees for the services performed by these latter two companies.

Neither Carol nor any other defendant provided the required EOB forms to either plaintiff, as required by the 2009 Agreement. Indeed, Carol's testimony that she mailed EOB forms to plaintiff is entirely unworthy of belief, absent any documents confirming this testimony. Indeed, she had no independent proof of such mailing, as would be expected in a billing entity for which the regular mailing of the EOB forms was the *sine qua non* of any attempt to verify amounts due to plaintiffs.

Perhaps more directly causing plaintiffs financial harm, AA Ultrasound also provided significantly less revenue to plaintiffs after 2009. Indeed, plaintiffs' share of revenues collected by AA Ultrasound declined over 60% from 2009 to 2011. Then, beginning in March 2012, defendants ceased providing any revenue to plaintiffs.

Compounding AA Ultrasound's breach of the 2009 Agreement, in late 2012 defendants began to solicit physicians whom Guardino had introduced to defendants. Moreover, defendants assigned technicians formerly working for AA Ultrasound to provide services on behalf of PMBA. The tax returns for these two entities confirm this conclusion, as they demonstrate a dramatic diminution of AA Ultrasound's revenue, and a concomitant increase in PMBA's

revenue, beginning in 2010.

Curiously, Carol, who had the intelligence, drive and ambition to create the defendant companies and operate a successful business using those companies, claimed that she did not communicate by e-mail in her business. She attempted to use such an assertion as the basis for not providing, in response to plaintiffs' request, any e-mails relevant to the parties' claims and defenses. In and of itself, it is not believable that such a successful enterprise would exist without its principal ever using email. Moreover, Carol's testimony is further belied by the deposition testimony of her daughter/co-worker/co-defendant Stevenie, which was admitted in evidence at trial:

Q: So this is an example of a communication between you and your mother where she's using the aau515@aol.com address to communicate regarding AA Ultrasound matters; is that correct?

A: Yes.

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Q: Am I correct though that it's an email between you and your mother regarding business?

A: Yes.

Deposition of Stevenie Hopkins at 41, lines 18-23 and 42, lines 18-21.

Equally troubling was the failure of defendants to preserve the various EOB forms that were central to this case. There is no question that defendants knew these forms were relevant – plaintiffs' counsel sent a letter to defendants prior to the commencement of this action directing defendants to preserve all relevant information. Moreover, such a letter would hardly be

necessary given that the EOB forms were required to be exchanged pursuant to the 2009 Agreement and indeed were the essence of any attempt to ascertain the amounts due to plaintiffs under that agreement. The Court thus concludes that such documents would, at the very least, damage the defense theories in this case. The Court accordingly draws the inference that the absence of these documents must ultimately favor the plaintiffs' theories, both on liability and damages. The Court draws this inference based on its conclusion that plaintiffs have demonstrated that defendants, the party having control over the evidence, possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to Plaintiffs' claims. *See Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015), citing *Voom HD Holdings LLC v. Echostar Satellite LLC*, 93 A.D.3d 33, 45 (1st Dept. 2012), quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D 212, 220 (S.D.N.Y. 2003). In sum, the Court rejects Carol's testimony, and further draws all inferences in favor of plaintiffs based on defendants' failure to preserve and provide the relevant EOB forms.

The Court also does not credit the testimony of AA Ultrasound employee Edgar Maldonado who attempted to explain the paucity of the defendants' production of relevant EOB forms. Maldonado claimed, in sum and substance, that the defendants' "Gazelle" computer program contained the same information that was on the EOB forms, and thus any deficiency in the production of the EOB forms was immaterial. The Court disagrees. The EOB forms were central to the parties' relationship. Indeed, production of those forms — and not the underlying data — was called for by the parties' agreements. Such forms are an industry standard for verifying health care provider information, amount billed, and amount paid. By contrast, there

was no evidence that the "Gazelle" program maintained by defendants is afforded any reliability in the health care industry. Moreover, given that the Court will not credit any testimony of Carol Hopkins, any attempt by defendants to rely on a computer program that she maintained must similarly fail.

The Court concludes that plaintiffs have established their claims for breach of contract against AA Ultrasound. In violation of the 2009 Agreement, Defendant AA Ultrasound failed to pay plaintiffs monies due to them, failed to maintain the confidentiality of plaintiffs' proprietary information, and failed to produce required documentation to plaintiffs.

The Court declines to assess liability against Carol and Stevenie on the breach of contract claims on a corporate veil-piercing theory. In order to pierce the corporate veil, a plaintiff must demonstrate that "(1) the owners [of the corporation] exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Matter of Morris v. New York State Dept. Of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993). In essence, this requires plaintiff to demonstrate that the owners "abused the privilege of doing business in the corporate form." *Id.* Such proof is not present here. Plaintiffs attempt to base this claim on facts that demonstrate, at most, that Carol and Stevenie no longer wish to operate AA Ultrasound. Specifically, they claim that because AA Ultrasound is "inactive," "being dissolved," "no longer providing services," has "closed credit card accounts" and "has no assets" and during its period of activity had offices in Carol's residence somehow show both "complete domination" by Carol and Stevenie and the connection of such domination to AAU's breach of contract. The Court concludes that plaintiffs have not met their burden to warrant piercing the

corporate veil, as the winding down of a corporation's affairs under the circumstances here is not, in and of itself, a fraudulent or wrongful activity.

The Court concludes that plaintiffs have established their claims for misappropriation and conversion of plaintiffs' confidential information and trade secrets, unfair competition, and tortious interference with prospective economic advantage. The plaintiffs' customer information is a protectable trade secret, as acknowledged by AAU in the 2009 Agreement. Defendants – both the corporate defendants and Carol and Stevenie – improperly used that information to solicit various medical providers, as set forth above. And, unlike the corporate veil which shields Carol and Stevenie from liability on the breach of contract claims, there is no such shield for the plaintiffs' claims that sound in tort. *Queens Carwash, Inc. v. JDW & Assoc., Inc.* 144 A.D.3d 750, 752 (2d Dept. 2016). Moreover, the defendants wrongly used this information to interfere with plaintiffs' business relationship with those providers. The damages flowing from this improper conduct, for which the individual and corporate defendants are jointly and severally liable, are discussed in more detail below. Further unfair competition based on this wrongful conduct must cease, and thus plaintiffs are entitled to a permanent injunction prohibiting defendants from continuing to exploit the plaintiffs' confidential information.

The Court declines to award plaintiffs judgment on their claim for unjust enrichment. That claim appears duplicative of plaintiffs' breach of contract claim. And, in any event, any damages flowing from such unjust enrichment are duplicative of the damages resulting from the breach of contract.

The Court further concludes that defendants have not proven their counterclaims. There was no proof at trial to support defendants' claim that plaintiffs directed their clients to

defendants' competitors, or failed to bring new clients to defendants in violation of any agreement between the parties.

The damages flowing from defendants' conduct are significant, although not of the magnitude sought by plaintiffs. In calculating damages, the Court has relied on various exhibits introduced in evidence, including those prepared by plaintiffs' expert Kyle Brengel. The Court also relies on Brengel's testimony, and notes his experience in auditing and forensic accounting, particularly in the health care field.

Brengel used an appropriate methodology to determine damages. He collected and considered billing ledgers, commission checks, bank deposit slips, balance sheets and tax returns. He candidly explained that the failure of defendants to provide EOB statements could somewhat affect his conclusions, but adequately explained his attempt to substitute what was actually available to him in his determinations.

Brengel's choice of 2009 as a baseline year for any damages calculation was also proper, as that is the year before the parties' relationship soured. Using that data, Brengel determined a collection rate and expenses amount consistent with past years. He then made three separate assumptions regarding growth or attrition in revenues. The Court credits the third assumption, which actually supposes an attrition in revenues, as it accounts for actual attrition data. That attrition rate (2.7%), coupled with the assumptions regarding expenses and collection, results in a damages figure of $8,608,126.58. Accordingly, that is the Court's determination of the measure of damages. The damages measure is the same, regardless of the theory of liability. Moreover, as set forth above, individual defendants Carol and Stevenie are liable for those damages as to plaintiffs' claims for misappropriation, unfair competition and tortious interference with

economic advantage.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

Settle judgment on ten (10) days notice.

ENTER

DATED: Mineola, NY

March 22, 2017

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

ENTERED
MAR 27 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE