SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KELLY O'NEILL LEVY **PART** 19

Justice

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I.M. OPERATING, LLC d/b/a SCORES, NY, ROBERTS RESTAURANT,

Plaintiff,

- v -

ZYAD KIVARKIS YOUNAN, M.D.,

Defendant.

INDEX NO. 153845/2014

MOTION DATE

MOTION SEQ. NO. 005 and 006

DECISION AND ORDER

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ZYAD KIVARKIS YOUNAN, M.D.,

Defendant/Third-Party Plaintiff,

- v -

KARINA PASCUCCI, MARSI ROSEN, SAMANTHA BARBASH, ROSELYN KEO, and JOHN and/or JANE DOES, 1-50 (names being fictitious and unknown),

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242

were read on this application to/for summary judgment

Defendant Zyad Kivarkis Younan, M.D. ("Dr. Younan") seeks an order, pursuant to CPLR 3212, granting him partial summary judgment dismissing all claims asserted by Plaintiff I.M. Operating, LLC d/b/a Scores NY and Robert's Restaurant ("Scores") (mot. seq. 005). Plaintiff opposes and seeks an order, pursuant to CPLR 3212, granting it summary judgment on its breach of contract claim and dismissing Defendant's counterclaims sounding in conversion, negligent supervision, defamation and violations of the Fair Debt Collections Practices Act (the "FDCPA") (mot. seq. 006). Defendant opposes. The motions are consolidated for disposition.

BACKGROUND

This action arises from a criminal conspiracy in which Karina Pascucci, Marsi Rosen, Samantha Barbash, and Roselyn Keo (collectively, "Third-Party Defendants") admitted to defrauding victims, including Dr. Younan. In November of 2013, Ms. Pascucci texted Dr. Younan telling him that they had met in 2012 at a New York City restaurant. She told him that her name was "Karina Nikokhosian" and that she was a nursing student who had recently moved to New York (Younan, tr. at 9, 30-31, 33). After a flirtatious exchange, Dr. Younan and Ms. Pascucci agreed to meet for dinner with another couple on November 16.

On their first date, Dr. Younan and Ms. Pascucci spent several hours together after the other couple left the restaurant. At Ms. Pascucci's suggestion, she and Dr. Younan met with Ms. Barbash and Ms. Rosen who were introduced to Dr. Younan as "Kimberly" and "Marsi" and as Ms. Pascucci's "sister" and "cousin," respectively (*Id.* at 40, 41-42, 43). Dr. Younan claims that shortly thereafter his memory became "very fuzzy" and he "didn't remember the events from dinner and getting back to the hotel" (*Id.* at 40). His next memory was waking up in the morning

at the hotel at which he was staying. After several texts over the next few days, Dr. Younan and Ms. Pascucci agreed to meet for a second date on November 22.

During their second date, Dr. Younan and Ms. Pascucci shared a bottle of wine. Dr. Younan went to the bathroom, and upon his return they finished the wine. He signed the bill and claims that he cannot remember anything after that. Again, his next memory was of waking up in his hotel the next morning.

Dr. Younan and Ms. Pascucci agreed to a third date at a Van Morrison concert at Madison Square Garden on November 25, 2013. Ms. Barbash and Ms. Rosen attended the concert as well. After the concert, Dr. Younan and Ms. Pascucci went to meet Dr. Younan's friends at the lounge of the Ace Hotel. Ms. Pascucci purchased a glass of wine and a shot for Dr. Younan. Dr. Younan remembered drinking the alcohol provided by Ms. Pascucci but did not remember anything after that. He woke up in his hotel room the next morning.

On November 26, the morning after the concert, Dr. Younan listened to a voicemail from an American Express representative alerting him to over $100,000.00 in charges by Scores[1] on his credit card bill. Scores had made twenty charges to his American Express card on November 17, 23, and 26, 2013, the same days as each of his dates with Ms. Pascucci. On November 16 and 17, Dr. Younan was charged $3,048.50 for private rooms and tips for the host, $2,257.61 for beverages and a tip for the waitress, and $44,600.00 for Diamond Dollars[2] and additional tips for the host. On November 22 and 23, Dr. Younan was charged $3,306.50 for private rooms and tips for the host, $4,396.00 for beverages and a tip for the waitress, and $44,660.00 for Diamond Dollars and tips for the host. Finally, on November 25 and 26, Dr. Younan was charged

[1] Scores is a gentlemen's club which provides food, beverages and entertainment.
[2] Diamond Dollars are Scores' in-house currency which customers may use to purchase services at the club, tip, cash out, or give to others at the club. Diamond Dollars function similarly to chips at a casino.

$2,442.00 for private rooms and tips to the host, $1,672.53 for beverages and a tip to the waitress, and $35,240.00 for Diamond Dollars and tips to the host. Dr. Younan confronted Ms. Pascucci that same morning stating that she had "defrauded" him and that he did not want her or her "cousin" or "sister" to contact him again (*Id.* at 134, 137, 138-139).

Dr. Younan reported the fraudulent charges to American Express on November 27, 2013. On the same day, American Express determined Scores' charges were fraudulent and reversed all twenty of the charges totaling $135,303.14. Scores submitted documentation to contest American Express' fraud determination, but American Express maintained its determination. Scores thereafter commenced this action by summons and complaint dated April 16, 2014. Dr. Younan asserted counterclaims and commenced a third-party action against Third-Party Defendants.

In June of 2014, Third-Party Defendants Ms. Pascucci, Ms. Rosen, Ms. Barbash, and Ms. Keo were indicted for conspiracy, forgery, and grand larceny. Dr. Younan was identified in the indictment as "Victim 3."[3] The indictment charged Third-Party Defendants with contacting and meeting potential victims, providing the victims with drugs, acquiring their credit cards, making unauthorized charges, and forging the victims' signatures on credit card receipts.

On September 9, 2014, the Office of the New York City Special Narcotics Prosecutor (the "SNP") moved to intervene, explaining that a criminal indictment had been filed against Third-Party Defendants that directly related to this civil action, and requested this action be stayed because "the factual disputes that give rise to the instant civil action are nearly identical to and would be proved or disproved by the same evidence as the facts at issue in the criminal prosecution" of the Third-Party Defendants (Cioppettini Aff., Exhibit F, Dodd Aff. at ¶ 8). Specifically, the SNP explained that the Third-Party Defendants had been charged with

[3] Assistant District Attorney Meggan K. Dodd affirmed that "Victim 3" in the indictment is Dr. Younan (Cioppettini Aff., Exhibit F, Dodd Aff. at ¶ 6, n. 3).

perpetrating a scheme in which they would "initiate, cause or arrange for fraudulent charges to be made by [gentlemen's clubs] to [a victim's credit card]; these charges, including the $135,303.14 charged by Scores to [Dr. Younan's credit card], were made without the victims' consent, for goods and services they had not agreed to purchase." (Cioppettini Aff., Exhibit F, Dodd Aff. at ¶ 5). This court, by order of Justice Anil C. Singh dated October 1, 2014, granted the SNP's motion.[4]

Third-Party Defendants ultimately pled guilty to conspiracy, assault, and grand larceny, including making unauthorized charges to Dr. Younan's credit card on November 17, 23, and 26, 2013. As a result, by letter dated February 16, 2016, the SNP expressed to this court that it was no longer the SNP's position that the stay of this civil action should be extended. Accordingly, by order dated March 1, 2016, this court lifted the stay and ordered discovery to recommence. On March 23, 2017, Scores filed a Note of Issue and certificate of readiness for trial.

Notwithstanding the Third-Party Defendants' guilty pleas, Scores asserts three causes of action against Dr. Younan claiming breach of contract, fraud, and unjust enrichment and seeks $135,303.00 for services rendered and goods provided on November 17, 23, and 26, 2013. Dr. Younan contends that these claims must be dismissed because Scores cannot seek enforcement of an illegally-performed contract.

DISCUSSION

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant

[4] At oral argument, Justice Singh explained that "I am going to grant the motion by Office of the Special Narcotics Prosecutor to intervene in this case and I am going to stay this action because I do find that the facts, as alleged in the civil case the defenses as raised in this action, are the same facts that have been raised in the criminal prosecution brought against the Third-party Defendants" (Cioppettini Aff., Exhibit G, Tr. of October 1, 2014, Proceedings at 13).

makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

Motion Sequence 005

Dr. Younan contends that Scores' cause of action for breach of contract should be dismissed as there is no enforceable contract between him and Scores under New York law. Dr. Younan argues that because the charges to his credit card resulted from a criminal scheme, Scores cannot hold him responsible for them. He similarly contends that Scores' cause of action for unjust enrichment should be dismissed because the charges to his credit card resulted from criminal activity.

In its opposition, Scores argues that Dr. Younan should be held responsible for the charges made to Scores on his credit card because (1) Scores is not liable for Third-Party Defendants' alleged crimes and (2) there is no admissible evidence of any wrongdoing by Third-Party Defendants; rather, any allegations of misconduct by Third-Party Defendants are unsupported. Further, Scores argues that Dr. Younan was unjustly enriched because he received and accepted goods and services for which Scores expected payment in return, and Dr. Younan has failed to show that Scores had "unclean hands" or any evidence that would relieve Dr. Younan of his obligation to reimburse Scores.[5]

[5] Scores abandoned its second cause of action sounding in fraud.

It is undisputed that Scores charged Dr. Younan for goods and services over three nights in November 2013 totaling $135,303.14 which he has not paid. While Dr. Younan contends he is not liable for those charges because they were only obtained through a fraudulent, criminal scheme orchestrated by Third Party Defendants, Scores argues that because it was not a party to the alleged criminal scheme, Dr. Younan must reimburse Scores for the charges made on his credit card which American Express reversed.

The elements of a cause of action for breach of contract are (1) the existence of a contract; (2) the plaintiff's performance thereunder; (3) the defendant's breach thereof; and (4) resulting damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010); *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 806 (2d Dep't 2011). "The requirements for the formation of a contract are (1) at least two parties with legal capacity to contract, (2) mutual assent to the terms of the contract, and (3) consideration." *N.Y. Pattern Jury Instr.--Civil 4:1* (citing *Restatement, Second, Contracts §§ 9, 12, 23*; *1 Williston, Contracts [4th Ed] 200-09, § 3:2*; *2 Williston, Contracts [4th Ed] 15-82, §§ 6:3- 6:10*; *UCC 1-201 [3], [11]*). Generally, the issue of whether a contract exists is a question of law which may be properly determined on a summary judgment motion. *Cent. Fed. Sav., F.S.B. v. Nat'l Westminster Bank, U.S.A.*, 176 A.D.2d 131, 132 (1st Dep't 1991); *Payner v. Natixis N. Am. LLC*, 43 Misc. 3d 1224(A), 992 N.Y.S.2d 159 (Sup. Ct., New York Cty 2014).

Regardless of whether Scores conspired to defraud Dr. Younan[6], Dr. Younan is not liable to Scores for the credit card charges made as a result of Third Party Defendants' criminal conduct. The first element necessary to show a breach of contract is the existence of a contract.

[6] Whether Scores was involved in Third-Party Defendants' criminal scheme is unsettled as the parties submit competing evidence as to whether Third-Party Defendants were working for Scores on the days of the subject charges.

A review of the evidence shows that in the instant case there is no valid contract upon which a breach of contract claim may stand due to the fraud and forgery perpetrated by Third-Party Defendants. *See Kwang Hee Lee v. ADJMI 936 Realty Assocs.*, 46 A.D.3d 629, 631 (2d Dep't 2007) (contract to sell property was void ab initio, where one co-owner forged the signature of the other co-owner); *Orlosky v. Empire Sec. Sys., Inc.*, 230 A.D.2d 401, 403 (3d Dep't 1997) (there was no contract between buyers of security system and finance company where buyers' names had been forged on retail installment contract assigned to finance company); *see also Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 372 (2d Cir. 2003) (parties did not have meeting of the minds with respect to an agreement to arbitrate where manufacturer did not sign addendum).

Dr. Younan testified at his deposition that he did not sign any of the receipts produced by Scores as allegedly supporting the charges made to his credit card (Younan, tr. at 177-182). As part of Third-Party Defendants' plea allocutions[7], they admitted to participating in a criminal conspiracy "to contact and meet with potential victims" and "to provide the victims with drugs and acquire their credit cards" and "make unauthorized charges to the victim's credit cards" and "forge[] the victim's signatures on credit card receipt[s] and other documents" (Cioppettini Aff., Exhibit V, Plea at 5-6, 11; Exhibit Y, Plea at 4-5). Each admitted that a member of the conspiracy caused charges to be made to Dr. Younan's credit card on November 17, 23, and 26, 2013 (Cioppettini Aff., Exhibit V, Plea at 10, 12; Exhibit Y, Plea at 5).[8] Ms. Pascucci and Ms. Barbarsh admitted that, acting in concert with each other and Ms. Rosen and Ms. Keo, they stole "property" from Dr. Younan (Cioppettini Aff., Exhibit V, Plea at 10; Exhibit Y, Plea at 6-7). In addition, American Express, after considering evidence submitted on behalf of both sides,

[7] The plea allocutions here in particular concern Ms. Pascucci, Ms. Rosen, and Ms. Barbash.
[8] Ms. Rosen plead to engaging in the criminal conspiracy only on November 17 and 26, 2013.

determined that the charges made to Dr. Younan's credit card were fraudulent. *See Costco Wholesale Corp. v. Rendina*, 38 Misc. 3d 469, 956 N.Y.S.2d 805 (Nassau Cty, Dist. Ct. 2012) (American Express' resolution of customer's dispute with retailer regarding charge on customer's card provided retailer full and fair opportunity to litigate issue, and therefore, retailer's fraud action against customer was precluded by collateral estoppel).

Notwithstanding the affidavits of Craig Yokemick and Brooke Hall (Yackow Aff., Exhibit H and Exhibit I), who stated as host and waitress at Scores, respectively, that it was their custom and practice to receive the customer's credit card, watch the customer sign the credit card receipt, and ensure that the customer was not inebriated before processing a transaction, Third-Party Defendants' guilty pleas are conclusive proof of the fraudulent conduct against Dr. Younan resulting in the unauthorized charges to his credit card and forged receipts, which negates the existence of a contract between Dr. Younan and Scores. *See Cumberland Pharmacy Inc. v. Blum*, 69 A.D.2d 903, 903 (2d Dep't 1979) ("A conviction is conclusive proof of the underlying facts upon which it rests," whether conviction by plea or jury verdict); *see also McMillan v. Williams*, 116 Misc.2d 171, 172 (New York Cty, Sup. Ct., Special Term, Part I 1982) (judgment upon a guilty plea "puts to rest any possible dispute of fact as to the [underlying activity]").

Scores contends that the Third-Party Defendants' guilty pleas are inadmissible under the hearsay exception for declarations against penal interest because Third-Party Defendants were not "unavailable" to testify in the instant case and because the guilty pleas are not sufficiently reliable.

Guilty pleas may be admitted against a third party non-declarant in a separate civil action under the "declarations against penal interest" exception only if four prerequisites are met: (1) the declarant is unavailable to testify; (2) the declarant must have been aware at the time of its making that the statement was contrary to his penal interest; (3) the declarant must have

competent knowledge of the underlying facts; and (4) there are sufficient indicia of reliability. *People v. Thomas*, 68 N.Y.2d 194, 197 (1986), *overruled on other grounds by People v. Hardy*, 4 N.Y.3d 192 (2005).

As Dr. Younan argues, Third-Party Defendants never responded to service of process in this case or Dr. Younan's discovery requests and eventually had default judgments entered against them. *See People v. Brown*, 26 N.Y.2d 88, 93 (1970) (A declarant is "unavailable" with respect to the hearsay exception for a declaration against penal interest when he or she is "beyond the jurisdiction of the court," whether by reason of insanity, death, or "some other acceptable reason" preventing testimony) (internal quotation marks and citations omitted). Therefore, Third-Party Defendants were unavailable for this proceeding. Scores' arguments concerning the reliability of the guilty pleas are also unavailing. *See People v. Soto*, 26 N.Y.3d 455, 462 (2015) (corroborating testimony of one witness as to the facts of the declaration existed to assure declaration's trustworthiness, as required to admit declaration as a statement against penal interest); *see also People v. Morgan*, 76 N.Y.2d 493, 498 (1990) (finding declarant's plea allocution statements admissible considering "allocutions take place in an open court; the declarant is queried by a Judge and is represented by counsel and advised of the forfeiture of the right to trial, to remain silent, and to present witnesses and confront an accuser; and the declarant is informed of the immediate and future consequences of the plea—conviction and sentence").

Accordingly, Dr. Younan has offered sufficient evidence to show prima facie that there was no contract between him and Scores as evidenced by Third Party Defendants' pleas that the subject charges were fraudulent and forged, his testimony that he never signed the relevant receipts, and American Express' determination that the charges were fraudulent. The burden thus shifts to Scores to show the existence of a triable material issue of fact. Scores fails here as the affidavits of Yokemick and Hall are insufficient to raise a question of fact, as discussed above.

Further, Scores' arguments that Dr. Younan was in a romantic relationship with Ms. Pascucci, that he failed to express any issue with his own health or memory at the time of the dates (which is consistent with the admissions in the Third Party Defendants' plea allocutions related to drugging their victims), and that he did not take it upon himself to check his credit card bills before being alerted by American Express are insufficient to raise a triable material issue of fact as to whether there was a contract. Likewise, the text messages highlighted by Scores do not raise a triable material issue of fact and, in addition, are immaterial to vitiate a criminal conspiracy.

As to the unjust enrichment and quantum meruit claims, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract [such as unjust enrichment or quantum meruit] as well as breach of contract." *Kramer v. Greene*, 142 A.D.3d 438, 441-442 (1st Dep't 2016) (quoting *Goldman v. Simon Prop. Group, Inc.*, 58 A.D.3d 208, 220 [2d Dep't 2008]). To establish a claim for unjust enrichment, a plaintiff must prove that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" *Kramer v. Greene*, 142 A.D.3d 438 at 142 (quoting *Mandarin Trading Ltd. v. Wildenstein,* 16 N.Y.3d 173, 182 [2011]). To establish quantum meruit, a plaintiff must show: "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." *Id.* (quoting *Caribbean Direct, Inc. v. Dubset LLC,* 100 A.D.3d 510, 511 [1st Dep't 2012]).

The unjust enrichment claim must be dismissed because "equity and good conscience" do not require that Dr. Younan reimburse Scores for charges fraudulently made to his credit card. *See 1133 Taconic, LLC v. Lartrym Servs., Inc.*, 85 A.D.3d 992, 993 (2d Dep't 2011) (quoting

McGrath v. Hilding, 41 N.Y.2d 625, 629 [1977]) ("Enrichment alone will not suffice to invoke the remedial powers of a court of equity. Critical is that under the circumstances and as between the two parties to the transaction the enrichment be unjust"). The quantum meruit claim must also be denied because there was no voluntary acceptance of services by Dr. Younan as evidenced by the Third-Party Defendants' guilty pleas, Dr. Younan's testimony, and American Express' determination. *See In re Clinton Cty.*, 56 Misc. 3d 1155, 1158 (Clinton Cty, N.Y. Sur. Ct. 2017) (County was not entitled to reimbursement from estate of farmer based upon a theory of quantum meruit because farmer did not voluntarily accept the actions taken either by county or by service providers whose actions were performed at county's request).

Accordingly, Dr. Younan's motion for partial summary judgment should be granted (mot. seq. 005). It follows that the branch of Scores' motion seeking summary judgement on its breach of contract claim should be denied (mot. seq. 006). Additionally, Dr. Younan abandons his counterclaims for conversion and negligent supervision insofar as the court grants his motion for partial summary judgment. Thus, Dr. Younan's claims for conversion and negligent supervision are dismissed. Therefore, the claims that remain against Scores are those concerning its alleged violations of the FDCPA and the alleged defamatory statements made about Dr. Younan.

Motion Sequence 006

Fair Debt Collections Practices Act

Under the Fair Debt Collections Practices Act (FDCPA), "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C.A. § 1692e (West). The FDCPA generally applies to debt collectors, although a creditor itself is subject to the FDCPA in certain circumstances, such as where a creditor "who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts." 15

U.S.C.A. § 1692a (West). As Dr. Younan argues, in determining whether a creditor violated this provision of the FDCPA, the court must examine whether the "least sophisticated consumer would have the false impression that a third party was collecting the debt." *Maguire v. Citicorp Retail Servs., Inc.*, 147 F.3d 232, 236 (2d Cir. 1998). Whether the least sophisticated consumer would have such a false impression is generally not a question of law at the summary judgment stage. To show that a consumer could have a false impression that a third party was collecting the debt, Dr. Younan claims that Scores representatives falsely stated in multiple voicemails left on his cell phone that they were acting on behalf of American Express, and this subjects Scores to the FDCPA. However, Scores argues that the voicemail messages are not admissible because the identity of the caller is not sufficiently known.

Initially, the court must determine whether the voicemail messages are admissible. In *People v. Lynes*, 49 N.Y.2d 286 (1980), the Court of Appeals held that for a caller's statements to be admissible, the identity of the caller must be known, which is a question for the Judge, not a question of fact for the fact-finder. As the High Court explained "while in each case the issue is one to be decided upon its own peculiar facts, in the first instance the Judge who presides over the trial must determine that the proffered proof permits the drawing of inferences which make it improbable that the caller's voice belongs to anyone other than the purported caller." *Lynes*, 49 N.Y.2d at 292; *but cf. Mankes v. Fishman*, 163 A.D. 789, 795-796 (3rd Dep't 1914) ("However, the identity of the person answering the telephone may be established by means other than the recognition of the voice of the person answering, and a conversation otherwise admissible is properly received in evidence when from all the circumstances the identity of the person answering the telephone has been established with reasonable certainty. The question as to the identity of the person may be one of fact for the jury."). Further, the caller's own self-identification is not enough to establish the identity of the caller, but the caller's identity may be

sufficiently established from surrounding facts and circumstances. *Id.* Indeed, surrounding facts and circumstances can be enough to establish a caller's identity where, for example, the caller makes reference to facts of which he alone is likely to have knowledge, or where the number called back was listed in a directory and the person answering the phone confirmed they are the person whose name is listed with the number in the directory. *Id.*

Dr. Younan presents several arguments to establish the caller's identity from surrounding facts and circumstances: (1) the caller on the voicemails identified herself as Lisa or Gina Zuckerman, who are individuals that other Scores employees and representatives identified as working in the office at Scores; (2) Dr. Younan called back the number left on his voicemail and someone answered as "Roberts Steakhouse;" and (3) the caller knew information that only someone connected to and having access to personal data from Scores would know.

Scores contends that it has no employees named Lisa or Gina Zuckerman, and Dr. Younan provides no details as to the other Scores employees and representatives who identified Lisa or Gina as working in the office at Scores. Rather, Scores submits that Tara Barnett is the Scores employee who contacted Dr. Younan to try to collect on the amount he owed. She properly identified herself, and she never referred to a Lisa or Gina. Additionally, the number Dr. Younan called back is not Scores' number, and he has not submitted any evidence that it was registered to Scores or an affiliate. To the contrary, Scores has submitted evidence that no Scores phone records show that number as belonging to it, and Mark Yackow, Scores' Chief Operating Officer, stated that Scores does not have such a phone number (Yackow Affirmation at ¶ 30). Finally, with respect to Dr. Younan's contention that the caller knew information that would only be known by someone from Scores, Scores argues that Dr. Younan includes conclusory statements only and does not provide any details regarding any conversations held with Scores

representatives or the financial calculations related to his credit card charges that the caller specifically referenced.

Here, after review of the record and in light of the counterarguments provided by Scores, the facts and circumstances surrounding the voicemails are insufficient for the court to find that it is likely that the calls were made by a representative of Scores, and dismissal of this claim is warranted.

Defamation

"Defamation is 'the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Stepanov v. Dow Jones & Co.*, 120 A.D.3d 28, 34 (1st Dep't 2014) (quoting *Foster v. Churchill,* 87 N.Y.2d 744, 751 [1996]). To recover for defamation, a claimant must prove "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999).

Dr. Younan alleges that representatives of Scores made ten defamatory statements about him to the media: five statements were allegedly made by Steven Sabbeth, a consultant for Scores; three statements were allegedly made by "Stephen Hyman," referred to in the New York Daily News as a Scores manager; and two statements were allegedly made by an unnamed senior source at Scores. The statements are delineated as follows.

Statements Allegedly Made by Steven Sabbeth

(1) "'He spent a lot of money,' club rep Steven Sabbeth told The Post, 'He was partaking and tipping and drinking.'"

(2) "When asked about the drugging allegations, Sabbeth joked, 'Within two weeks, he was here four times. So if he was drugged the first time, I guess he liked it." "On a more serious note, [Sabbeth] said, 'We're very law-abiding. We're very careful.'"

(3) "'Unbridled behavior is not out of the ordinary,' Sabbeth said. … 'This happens every once in a while, people get out of control with their credit cards, and then they wake up next morning and realize what they've done. They knew it the night before, but I guess it didn't bother them because they were enjoying themselves.'"

(4) "'If I had five dancers dancing for me, I'd be in the ICU,' quipped Scores spokesman Steven Sabbeth, head of licensing for the club. 'He's a heart doctor. I guess he's got a good heart,' Sabbeth said.

(5) "He was doing some heavy-duty stuff. To run up a substantial bill like that, you're probably doing top shelf liquor and champagne and sharing it with the girls."

Statements Allegedly Made by Stephen Hyman

(6) "'He was coherent until he saw the bill,' quipped Scores manager, Stephen Hyman."

(7) "'why did he come back three more times? . . . If he didn't have a good time the first time, he should have stayed home the next three times'"

(8) "'absurd . . . We are very careful and are a law-abiding facility. We don't serve anybody if they are intoxicated.'"

Statements Allegedly Made by an Unnamed Senior Source at Scores

(9) "'He had five girls at a time. This guy is insatiable. I can't even count to five,' the source said."

(10) "'He seemed to be very happy. He was a big tipper. He must have been happy. He came back three times,' the source continued."

Scores argues that Dr. Younan's defamation claim fails because he has not produced admissible evidence showing that any of the statements were made by the respective claimed speaker and that they are attributable to Scores. For instance, there is no evidence a Stephen Hyman exists, and Mr. Sabbeth testified that he did not recall what particular statements he made, that he is not a spokesman for Scores and unsure as to his authority to speak on behalf of Scores, and that he did not review or confirm his comments with Scores before making them. In addition, Scores argues that the articles quoting Mr. Sabbath lack a proper foundation and are

insufficient as inadmissible hearsay. Moreover, Scores argues that even if Dr. Younan could establish that the statements were made by Scores, the statements are insufficient to sustain a prima facie claim for defamation.

Dr. Younan contends that the statements are admissible because Mr. Sabbeth freely spoke with news outlets about Dr. Younan. Additionally, Dr. Younan argues that Mr. Sabbeth confirmed that he issued some of the quotations, that he did not disagree with some of the quotations attributed to him, that he characterized himself as part of Scores, and that he may have told the media he was a representative of Scores. Dr. Younan further contends that the statements are actionable because they were about him and were mixed false fact and opinion, and, in any event, the issue of whether a statement is opinion or mixed false fact and opinion is a decision for the fact finder.

A "libel action cannot be maintained unless it is premised on published assertions of fact." *Brian v. Richardson,* 87 N.Y.2d 46, 51 (1995). Statements of opinion are not actionable "no matter how offensive," *Mann v. Abel,* 10 N.Y.3d 271, 276 (2008), and "[l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable." *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999). "Whether an allegedly defamatory statement constitutes actionable fact or nonactionable opinion is a question of law to be resolved by the courts." *Crescendo Designs, Ltd. v. Reses*, 151 A.D.3d 1015, 1016 (2d Dep't 2017) (citing *Mann v. Abel,* 10 N.Y.3d at 276 [2008]). The dispositive question is "whether a reasonable [reader] could have concluded that [the statements were] conveying facts about the plaintiff." *Davis v. Boeheim*, 24 N.Y.3d 262, 269-270 (2014) (quoting *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152 [1993]) (internal quotation marks omitted). In resolving the question, courts are to consider the "content of the communication as a whole, as well as its tone and apparent purpose" and "the over-all context in which the assertions were made," rather than "sifting through a

communication" to isolate individual assertions of fact. *Brian,* 87 N.Y.2d at 51; *Immuno AG. v. Moor–Jankowski,* 77 N.Y.2d 235, 254 (1991); *see Mann v. Abel,* 10 N.Y.3d at 276.

In determining whether a statement constitutes an opinion or an assertion of fact, New York courts look at three factors:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact.

Mann, 10 N.Y.3d at 276 (quoting *Brian*, 87 NY2d at 51) (internal quotations omitted).

"Truth provides a complete defense to defamation claims," *Dillon v. City of New York*, 261 A.D.2d 34, 39 (1st Dep't 1999), and "[g]iven the importance of the First Amendment principles at stake, '[w]here the question of truth or falsity is a close one, a court should err on the side of non-actionability.'" *Adelson v. Harris*, 973 F. Supp. 2d 467, 487 (S.D.N.Y. 2013) (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 [D.C. Cir. 1988]); *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 188 (2d Cir. 2000).

Scores argues that the allegedly made statements as delineated above are non-actionable for the following reasons: statement one (1) is true; statement two (2) is loose, speculative, and opinion; statement three (3) is not of and concerning Dr. Younan; statement four (4) is opinion, hyperbole and not defamatory; statement five (5) is not defamatory; statements six (6), seven (7), and eight (8) are either hyperbole, opinion, or not defamatory; and statements nine (9) and ten (10) are either loose, opinion, or true. Moreover, as to statements six through ten, Scores argues they are not actionable as there is no evidence that a "Stephen Hyman" even exists and statements from an unnamed representative cannot support a defamation claim.

Scores also argues that even if the statements are admissible and defamatory, Dr. Younan still cannot establish that Scores acted with the requisite scienter to sustain his claim. Scores

argues that this matter is one within the sphere of legitimate public concern and consequently the claimant must show that the speaker acted in a grossly irresponsible manner. *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975) (holding that where the content of the article is arguably within the sphere of legitimate public concern, the defamed party may recover if it establishes, "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties"). Finally, Scores argues that Dr. Younan cannot prove special damages or slander per se.

Dr. Younan contends that the statements are actionable "mixed opinions," which contain false facts that Dr. Younan drank heavily, partied with numerous exotic dancers, and willingly paid exorbitant fees for various services at Scores. In *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-90 (1986), the Court of Appeals explained:

> When, however, the statement of opinion implies that it is based upon facts which justify the opinion but are unknown to those reading or hearing it, it is a 'mixed opinion' and is actionable. The actionable element of a 'mixed opinion' is not the false opinion itself—it is the implication that the speaker knows certain facts, unknown to his audience, which supports his opinion and are detrimental to the person about whom he is speaking."

Notably, in his opposition, Dr. Younan does not address the arguments made regarding the existence of Stephen Hyman nor the actionability of the statements made by an unknown source, but specifically focuses on those statements allegedly made by Mr. Sabbeth.

In the instant case, from the perspective of a reasonable reader, the statements made, taken as a whole and in full context, are not actionable for the reasons set forth by Scores as the statements were either true, loose, hyperbole, opinion, or not defamatory. Indeed, terms like "quipped" and "joked" were used to preface several of the statements. Based on this conclusion, the court need not reach the merits of Scores' other arguments.

Accordingly, Scores' motion for summary judgment is granted to the extent that Dr. Younan's counterclaims for conversion, negligent supervision, violation of the FDCPA, and defamation are dismissed. As discussed above, that branch of its motion which seeks summary judgment as to its breach of contract cause of action is denied and that claim is dismissed as against Dr. Younan.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Zyad Kivarkis Younan, M.D.'s motion, pursuant to CPLR 3212, for partial summary judgment dismissing all claims asserted by plaintiff I.M. Operating, LLC d/b/a Scores NY and Robert's Restaurant (mot. seq. 005) is granted; and it is further

ORDERED that plaintiff I.M. Operating, LLC d/b/a Scores NY and Robert's Restaurant's motion, pursuant to CPLR 3212, for summary judgment is granted to the extent that it seeks dismissal of defendant Zyad Kivarkis Younan, M.D.'s counterclaims sounding in conversion, negligent supervision, defamation and violations of the Fair Debt Collections Practices Act but is denied as to its breach of contract claim (mot. seq. 006).

The clerk of the court is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

1-2-18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE