

**Bavaro v Northeast Orthopedics & Sports  
Medicine, PLLC**

2019 NY Slip Op 31051(U)

April 10, 2019

Supreme Court, New York County

Docket Number: 652030/2018

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

*Justice*

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INDEX NO. 652030/2018

NICHOLAS BAVARO, M.D.,

Plaintiff,

MOTION SEQ. NO. 001

- v. -

NORTHEAST ORTHOPEDICS AND SPORTS MEDICINE, PLLC,

Defendant.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is denied.

In this action by plaintiff Nicholas Bavaro, M.D. sounding in breach of implied contract, defendant Northeast Orthopedics and Sports Medicine, PLLC moves, pre-answer, pursuant to CPLR 3211(a) (1), (2), (5) and (7) to dismiss the complaint. Plaintiff opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is **denied**.

**FACTUAL AND PROCEDURAL BACKGROUND:**

Defendant is a New York professional limited liability company which operates as a medical practice. Doc. 1 at par. 4. Plaintiff joined defendant as a member in 2013. Doc. 1 at par. 5. On or about June 16, 2016, plaintiff, defendant, and other, unnamed, parties entered into an asset purchase agreement (“APA”) pursuant to which defendant sold its physical therapy practice to Metro Athletic Medicine & Fitness, P.C. and Motion PT Management, Inc. (collectively “the

buyers”) for the sum of \$5 million (“the sale proceeds”). Doc. 1 at par. 6; Doc. 2. Defendant’s board agreed to distribute the sale proceeds among defendant’s members as set forth in a document entitled “Distribution of Proceeds from Sale of Physical Therapy Division of [defendant]” (“distribution summary”). Doc. 1 at par. 8.

Pursuant to the distribution summary, defendant was to distribute \$363,199.44 to plaintiff as follows: a) an initial installment of \$156,380.33 (which was made on or about April 12, 2017); b) a second installment, in the amount of \$180,503.32, which was to be made on April 10, 2017; and c) a third installment, in the amount of \$26,315.79, which was to be made on October 7, 2017. Doc. 1 at pars. 9, 10; Doc. 3.<sup>1</sup> In December of 2017, defendant paid plaintiff only \$69,656.32 of the \$180,503.32 second installment it was supposed to have paid him in April of that year, leaving a balance of \$110,847. Doc.1 at par. 11. By correspondence dated December 21, 2017, defendant explained to plaintiff that it had only paid plaintiff \$69,656.32 of the second installment because plaintiff owed defendant \$110,847 “representing indebtedness incurred in connection with overpayment of [plaintiff’s] share of net allocable income under the terms of the Operating Agreement and [plaintiff’s] Member Services Agreement.” (“MSA”). Doc. 1 at par. 12; Doc. 4. Defendant further stated that, although it owed plaintiff \$26,315.79 for the third installment, it “held back \$17,460 in reserve as an estimate to fund the 2017 contribution to [plaintiff’s] profit sharing plan.” Doc. 1 at par. 13.

Plaintiff commenced the captioned action on April 25, 2018. Doc. 1. In his complaint, plaintiff set forth one cause of action, for breach of an implied contract. Doc: 1 at pars. 20-22. Specifically, he claimed that defendant was obligated, pursuant to an implied contract, to pay him

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<sup>1</sup> Item 4 of the distribution summary reflects that 50% of \$938,282.00 (i.e. \$469,141.00) is due POWR (“Premier Orthopedics of Westchester and Rockland”), of which plaintiff was a “legacy owner.” Since the amount of \$469,141.00 was divided between the 3 legacy owners of POWR, plaintiff received \$156,380.33.

the amounts set forth in the distribution summary, as evidenced by partial performance, i.e., the fact that defendant paid him the first installment in full and paid the second and third installments in part. Doc. 1 at par. 15. Plaintiff claimed that defendant breached the implied contract by failing to pay him \$110,847, the amount remaining on the second installment, and by using \$17,460 of his share of the third installment to fund the employer contribution to his 401K, and was thus entitled to reimbursement of those amounts, plus interest, attorneys' fees, sanctions, costs and disbursements. Doc. 1 at par. 18 and "wherefore" clause.

On May 29, 2018, defendant filed the instant motion to dismiss the complaint pursuant to CPLR 3211(a) (1), (2), (5) and (7). In support of the motion, David L. Greenfield, Chief Executive Officer of defendant, represents, inter alia, that only the Operating Agreement and MSA are relevant to this action, and that the APA, which is predicated on the distribution summary, is irrelevant herein. Doc. 10 at par. 11. Greenfield maintains that the distribution summary, which addressed how funds received by defendant pursuant to the APA were to be distributed, was an "internally prepared document and was never part of the APA." Doc. 10 at par. 11. He further avers that plaintiff, "one of the founding owner-members" of defendant, was "credited with or paid all amounts he was entitled to, by allocation of \$110,847 to his capital account; allocation of \$17,460 to his profit-sharing plan contribution (per the terms of the Operating Agreement and [MSA]); and issuance of a check to plaintiff in the amount of \$78,512.11." Doc. 10 at par. 15. Greenfield also states that plaintiff withdrew as a member of defendant in April 2017. Doc. 10 at par. 9.

In a memorandum of law in support, defendant argues that plaintiff's claim that there was an implied contract between him and defendant based on the distribution summary is without merit. Defendant further asserts that the APA is irrelevant to any dispute regarding monies owed

by defendant to plaintiff and that plaintiff does not even allege a breach of that agreement. Additionally, defendant maintains that venue is improper insofar as it was based on a venue selection clause in the APA, which agreement is inapplicable herein. Defendant insists that the Operating Agreement and the MSA are the only contracts which govern the relationship between plaintiff and defendant.

In opposition, plaintiff argues that the motion must be denied since his complaint sets forth a valid cause of action based on the conduct of the parties, which gave rise to an implied contract. He further asserts that this Court has subject matter jurisdiction over this matter. Additionally, he maintains that he does not allege a breach of the APA, but rather a breach of the implied contract to pay him the amounts set forth in the distribution summary.

#### **LEGAL CONCLUSIONS:**

As noted above, defendant moves for summary judgment pursuant to CPLR 3211(a) (1) (defense based on documentary evidence), (2) lack of subject matter jurisdiction, (5) (arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability, payment, release, res judicata, statute of limitations or statute of frauds) and (7) (failure to state a cause of action).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party and "determine only whether the facts as alleged fit within any cognizable legal theory". *Leon v Martinez*, 84 NY2d 83, 87-88 (1994); see *DRMAK Realty LLC v Progressive Credit Union*, 133 AD3d 401, 406 (1st Dept 2015).

Plaintiff alleges that defendant breached an implied contract between the parties which required defendant to pay plaintiff installments in accordance with the distribution summary. The elements of an implied-in-fact contract are the same as those of an express contract: "consideration, mutual assent, legal capacity and legal subject matter." *Maas v Cornell Univ.*, 94 NY2d 87, 93-94 (1999). "A 'quasi contract' only applies in the absence of an express agreement; it is not really a contract at all, but rather a legal obligation imposed to prevent a party's unjust enrichment." *Universal Constr. Resources, Inc. v New York City Hous. Auth.*, 2018 NY Slip Op 32846 (U) (Sup Ct New York County 2018) citing *Parsa v State of New York*, 64 NY2d 143, 148 (1984). "A contract implied in fact may result as an inference from the facts and circumstances of the case, although not formally stated in words, and is derived from the 'presumed' intention of the parties as indicated by their conduct." *Jemzura v Jemzura*, 36 NY2d 496, 503-504 (1975) (internal citations omitted).

Here, this Court finds that plaintiff sufficiently pleaded a claim sounding in breach of an implied contract. A contract implied in fact can be implied from the conduct between the parties and the other circumstances of this matter. As noted previously, plaintiff alleges that defendant was to pay him in three installments of \$156,380.33, \$180,503.32, and \$26,315.79, respectively from the sale proceeds. Plaintiff claims that, although the first installment was paid in full, the next two were not, thereby giving rise to a claim that defendant breached an implied contract between plaintiff and defendant pursuant to which plaintiff was to be paid the amounts set forth in the distribution summary. Thus, the branch of defendant's motion seeking dismissal pursuant to CPLR 3211(a)(7) is denied.

Defendant further claims that the action must be dismissed pursuant to CPLR 3211(a)(5) on the ground that it has already paid plaintiff \$78,512.11, the amount it owed him. However, the

only proof proffered by defendant to show that it paid plaintiff consists of Greenfield's affidavit and Greenfield's letter to plaintiff, neither of which utterly refutes plaintiff's claim and thus does not constitute the type of documentary evidence which would entitle defendant to dismissal. *See William Doyle Galleries, Inc. v Stettner*, 167 AD3d 501, 506 (1<sup>st</sup> Dept 2018). Thus, the complaint is not subject to dismissal under CPLR 3211(a)(5) or under CPLR 3211 (a)(1).

The motion is also denied insofar as it is based upon CPLR 3211(a) (2), since defendant has not established that this Court lacks subject matter jurisdiction over this matter. As plaintiff asserts, the Supreme Court lacks jurisdiction only where its jurisdiction is pre-empted by a federal court, or where plaintiff seeks money damages against the state, in which case the action must be brought in the Court of Claims. *See Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 338 n 3.

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant's motion to dismiss the complaint is denied in all respects; and it is further

ORDERED that, within 20 days of the entry of this order, plaintiff's counsel shall serve this order, with notice of entry, on counsel for defendants; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after a service of a copy of this order, with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in this matter on July 16, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

4/10/2019

DATE

~~KATHRYN E. FREED, J.S.C.~~

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE