

Kaminski v Sirera

2019 NY Slip Op 31435(U)

January 4, 2019

Supreme Court, Orange County

Docket Number: 0103/2016

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X

JILL KAMINSKI,
Plaintiff,

-against-

**CHRISTINA SIRERA, ALLYSON AVILA, ESQ.,
WILSON ELSEER MOSKOWITZ EDELMAN &
DICKER, LLP, CHAR & HERZBERG, LLP and
ED CHAR, ESQ.,**
Defendants.

-----X

SCIORTINO, J.

DECISION AND ORDER

**INDEX NO.: 0103/2016
Motion Date: 10/24/18
Sequence Nos. 6 - 8**

ORIGINAL

The following papers numbered 1 to 124 were read on motions for summary judgment brought by defendant Christina Sirera (Seq. #6); plaintiff (Seq. #7) and defendants Allyson Avila, Esq. (Avila) and Wilson Elser Moskowitz Edelman & Dicker (Wilson Elser) (Seq. #8)¹:

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¹All claims against Ed Char, Esq. and his former firm, Char & Hertzberg, LLP, have been previously dismissed.

Background

This action arises out of the dissolution of Melange Med Spa, LLC (Melange), a medical spa providing both medical (Botox injections, laser resurfacing, etc.) and non-medical (massage and facial, etc) services. Melange was formed in 2007 by defendant Sirera and non-party Margaret Scully, both registered nurses. Sirera and Scully signed an Operating Agreement (Agreement) for Melange which included provisions for the transferability of their respective interests in the company (Exhibit 5 to Seq. #6). Melange began operating in 2008 and never separated professional from non-professional fees at any time throughout its operation. At some point after Melange began, plaintiff Kaminski began to work for Melange as an aesthetician², being paid an hourly wage. Plaintiff and Sirera became personally involved in a relationship.

In 2009, Scully left Melange entering a Purchase and Sales Agreement with Sirera, signed on July 27, 2009. (Exhibit 4 to Seq. #6) Under that agreement, Sirera purchased Scully's shares of Melange in exchange for a fifty thousand (\$50,000) dollars Promissory Note; the amount was to be paid in 98 monthly installments of \$505 and a final installment of \$510. Sirera gave Scully a security interest in the purchased shares corresponding to the declining balance of payments under the Note. Scully resigned her membership in Melange upon execution of the Agreement.

The Agreement contained a restrictive covenant. Significantly, Article VI contained a provision making the rights purchased by Sirera "freely assignable at any time [to any person] upon notice" to Scully. Scully's consent was required for any assignment except to Plaintiff Kaminski.

²It is acknowledged that Kaminski was not and has never been a registered nurse.

Scully agreed that, upon notice of intended assignment to Kaminski, she would accept Kaminski as a substitute for and replacement of Sirera, who would then be relieved of all her duties and obligations under the Agreement. The Agreement also provided that all notices between the parties must be in writing, and that no change or waiver to the Agreement would go into effect unless set forth in a signed writing. (Exhibit 4 to Seq. #6, Article VII)

It is not disputed that, subsequent to Scully's departure, Sirera began to compensate plaintiff in a manner characterized by plaintiff as a "draw." Additionally, plaintiff was paid for her health insurance and car and car expense and received other benefits. Kaminski was listed on Melange's tax returns as a "limited partner" and was issued a K-1.

At some point, a document entitled "Delegation of Duties and Obligations, Scully's Acceptance of Such Delegation and Novation" (Novation) was drafted. (Exhibit 12 to Seq. #6) That document purported to evidence Scully's acknowledgment of receipt of notice and acceptance of the delegation of duties from Sirera to plaintiff, including all of Sirera's duties under the Note. However, the only copies of the Novation presented to the Court are unsigned.

The LLC continued to make all payments due to Scully. It is undisputed that plaintiff never made any payments to Scully. Plaintiff claimed that she and Sirera agreed to orally modify the Novation to permit the LLC to make payments on her behalf.

In 2014, Sirera and plaintiff were advised by defendant Avila, a Melange customer, that, as plaintiff was not an registered nurse, Melange's practice of paying plaintiff a draw instead of a salary was improper. Sirera was advised to form a PLLC to perform and receive fees for the medical services. Plaintiff could not be a member of the PLLC as she was not a medical professional. However, plaintiff continued to assert that she was an owner of Melange, LLC.

At the same time, the personal relationship between plaintiff and Sirera began to deteriorate. In 2015, with the relationship worsening and their problems being brought into the workplace, Sirera removed plaintiff's access to bank accounts; plaintiff's employment was eventually terminated. Upon creation of a PLLC, Sirera dissolved Melange. Eventually she formed a new LLC with the intent that the PLLC would collect fees for professional services rendered and the LLC would collect the fees for non-professional services. The new companies used the same location as Melange.

Procedural History

On January 7, 2016, plaintiff commenced an action by Order to Show Cause (Exhibit 1 to Seq. #8) seeking, *inter alia*, a declaration that she was a 50% owner of Melange; a temporary restraining order, and a full accounting of Melange's finances. Sirera filed an Order Show Cause (Exhibit 2 to Seq. #8) on February 22, 2016, asking that plaintiff be restrained from entering Melange or conducting any business on Melange's behalf.

Plaintiff's Amended Complaint³, filed February 24, 2016, alleged that, at the end of 2010, she became an owner of Melange, as such, was bringing a derivative action on Melange's behalf. (Exhibit 3 to Seq. #6, par. 10) She claimed numerous violations of Sirera's fiduciary duties to Melange. Plaintiff also named as defendants attorney Avila and her firm, Wilson Elser, claiming legal malpractice; breach of contract, and aiding and abetting Sirera's breach of her fiduciary obligations. Finally, plaintiff sought to enjoin the dissolution of Melange.

By Decision and Order of the Supreme Court (Bartlett, A.J.) dated March 28, 2016,

³The initial Complaint included as an exhibit, Avila's medical records from Melange. Justice Bartlett ordered those records excised, and an Amended Complaint, without reference to the records, to be filed.

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plaintiff's Order to Show Cause was in all respects denied and Sirera's Order to Show Cause was granted. Plaintiff was "permanently restrained" from entering Melange's premises or conducting any business on Melange's behalf. (Exhibit 3 to Seq. #8) In her Decision, Justice Bartlett specifically found that, while plaintiff "may thereby have acquired Scully's Membership Units," she was *not* a member of Melange or was *not* entitled to exercise the rights of a Member. Judge Bartlett noted that plaintiff had not asserted, much less proven, that any action was taken under the Melange Operating Agreement to make her a member or that there was any other provision of the law which could deem her admitted to membership. The Court concluded that "Sirera is the sole Member of [Melange]" and thus properly exercised her authority in dissolving Melange. The Court went on to note that plaintiff's "rights as a non-member purchaser ... may be vindicated in [Melange's] dissolution proceedings." (Exhibit 3 to Seq. #8 at page 6)

Judge Bartlett's decision resulted in dismissal of the first and second causes of action against Sirera, the action to enjoin the dissolution and the action to declare the parties equal managing members. Five causes of action remained against Sirera: the fourth (seeking an accounting); the ninth and sixteenth (conversion and breach of contract); and the tenth and eleventh (breach of fiduciary relationship).

Defendants Wilson Elser and Avila filed a pre-answer motion to dismiss. By Decision and Order dated May 25, 2016, Justice Bartlett found that as a non-member owner of Melange membership units, plaintiff would have a common law right to sue on behalf of Melange. (Exhibit 5 to Seq. #8, page 5) Thus, the motion to dismiss for lack of standing to sue derivatively was denied. However, the twelfth and thirteenth causes of action for legal malpractice were dismissed, as the damages claimed were not incurred by Melange, but by plaintiff herself. The fourteenth and

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fifteenth causes of action, for breach of contract, were dismissed on the same grounds. (Exhibit 5 to Seq. #8 at pp. 6-7) The Court declined to dismiss the fifth and sixth causes of action, for breach of fiduciary duty on behalf of Melange. (Exhibit 5 to Seq. #8 at page 7)

A seventeenth cause of action for attorneys fees continues against all defendants.

The parties each filed Answers Avila also filed a Counterclaim for violation of New York's Public Health Law, when plaintiff removed her medical records from Melange and gave them to her attorney, who then attached them to the original Complaint.

The parties engaged in discovery, with depositions of plaintiff, Sirera and Avila taking place in June 2016. Various discovery disputes (none of which resulted in any motion practice) delayed the completion of discovery until April 2018. Plaintiff filed a Note of Issue on June 14, 2018. (Exhibit 46 to Seq. #6)

Motions for Summary Judgment

By Notice of Motion (Sequence #6) filed July 20, 2018, defendant Sirera seeks summary judgment dismissing the Complaint as against her on the grounds that plaintiff is barred from proceeding with the action by reason of New York's public policy; the Statute of Frauds; lack of standing to sue derivatively, and plaintiff's failure to establish the elements of her causes of action.

Since her case revolves around her claim of ownership of Melange, and she is not a registered nurse or medical professional, New York's public precludes her from sharing in the funds earned by Melange for professional services. Moreover, the rights she claims are based on unsigned and alleged oral agreements, which are barred by the Operating Agreement, the Sales Agreement and the Statute of Frauds. She is thus a non-member of Melange, and as such, has no standing to sue derivatively. Even if she could, she cannot prove her remaining causes of action.

By Notice of Motion (Sequence #7) filed August 23, 2018, plaintiff seeks summary judgment asserting that her status as an owner; Sirera's fiduciary duties to her, and her right to derivatively sue are the law of the case. Sirera's conduct evidenced her intention that plaintiff should be a 50/50 partner in Melange. She argues that nothing in the Education Law prohibits such fee sharing. Nor did Sirera have any right to dissolve a "perfectly profitable LLC." Thus, Sirera's motion for summary judgment is frivolous, and sanctions should be ordered..

By Notice of Motion (Sequence #8) filed August 24, 2018, defendants Wilson Elser and Avila seek summary judgment dismissing the Complaint and awarding summary judgment to Avila on her counterclaim. Like Sirera, Wilson Elser and Avila assert that plaintiff lacks standing to assert derivative claims against them for breach of fiduciary duty or aiding and abetting such conduct. Primarily, these defendants assert that there was no wrongdoing, and even if there had been, no damages were incurred. As such, plaintiff has no claim for legal fees. For her part, Avila is entitled to summary judgment as plaintiff admitted during her deposition that she took Avila's records out of Melange and turned them over to her attorney for use in the litigation.

Discussion

While the history of this matter is long and tortured, the issues are not complicated, and there are few factual disputes. For the reasons which follow, the motion of defendant Sirera is granted; the motion of defendants Wilson Elser and Avila is granted in part and denied in part, and plaintiff's motion for summary judgment is granted in part and denied in part. The Complaint is dismissed as to all defendants, and the Counterclaim is dismissed as well.

Summary Judgment Standards

Summary judgment is a drastic remedy and should only be granted where there are no triable

issues of fact. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY 2d 395, 404 [1957]) In order to prevail on a motion for summary judgment, the movant must present a *prima facie* case showing entitlement to judgment as a matter of law. (*Prince v. DiBenedetto*, 189 AD2d 757 [2d Dept 1993]) Once the movant has done so, the party opposing summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v. City of New York*, 49 NY 2d 557, 562 [1980])

Summary judgment is appropriate where the movant satisfies her initial burden of proof and the non-movant’s opposition is entirely conjectural and there is no genuine issue of fact to be resolved. (*Cassidy v. Valenti*, 211 AD2d 876 [3d Dept 1995]; *Fabbricatore v. Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]; *Rivera v. Fenix Car Serv. Corp.*, 28 Misc. 3d 797, 800 [Kings Co. 2011])

Such is the case at bar. Defendants have proven that there are no triable issues of fact, and plaintiff’s opposition, commingled, in the first instance, with her cross-motion, fails to raise such triable issues.

Plaintiff’s Status as an Owner/Member of Melange

Contrary to plaintiff’s claim, defendants have shown, *prima facie*, that there was never an assignment of Sirera’s rights to Scully’s membership shares. Sirera has produced the Purchase and Sale Agreement signed in 2009 between Scully and her. That Agreement provides the right to freely assign the rights she obtained from Scully, together with the obligations, upon notice to Scully. If the rights were assigned to Kaminski, notice was required, but consent was not. Sirera’s sworn testimony in her deposition and in her moving affidavit is that no such assignment ever took place.

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While she acknowledges that it may have been her intent to transfer such rights to plaintiff, the act never happened.

Plaintiff's case hinges upon the Novation which she has claimed from the outset transferred the rights which were Scully's to her. However, whether in response to Sirera's discovery demands or in response to her moving papers, plaintiff has never produced a signed copy of the Novation. Though given the opportunity to do so, plaintiff declined to depose Scully, there is thus no corroboration to her claim that a signed Novation exists. Plaintiff's contention that the Novation occurred when Sirera changed her compensation formula and began to list her as a limited partner is incorrect. Without a signed Novation, there is no such agreement. (*PC Chiapouras and Associates, Inc. v. 212 Realty Corp.*, 156 AD2d 549 [2d Dept 1989])

Illegal Contract

Even if there had been a signed Novation, the rights which might have been transferred would be unenforceable. Section 6509-a of the Education Law provides that participation of licensed medical provider in, *inter alia*, the "division, assignment, splitting or refunding of a fee...in connection with the furnishing of professional care, or service....physiotherapy or other therapeutic service...drugs, medication or medical supplies", with any non-professional constitutes professional misconduct. The section provides that professionals may only practice as partners, groups or as professional corporations, with other professional members. It is long established that it is unprofessional conduct to permit any person to share in the fees for professional services other than a partner, employee, associate, subcontractor or consultant, authorized to practice the same profession. 8 NYCRR §29.1; (*Matter of Bell v. Board of Regents*, 295 NY 101 [1945])

The Second Department has held that a dentist's tendering a percentage of patient fees to a

landlord violates the Education Law provision against fee-splitting. (*Sachs v. Saloshin*, 138 AD2d 586 [2d Dept 1988])

Plaintiff has attempted to argue the inapplicability of this rule to nurses pointing out that the cases cited by defendants deal with dentists and architects. Such an argument is not persuasive, however. The Second Department held that “it is well settled that not being licensed to practice in a given field which requires licensure precludes recovery for the services performed, either pursuant to contract or in quantum meruit.” (*Gordon v. Adenbaum*, 171 AD2d 841 [2d Dept 1991])

The Second Department has long held that a party to an illegal contract (in this case, the plaintiff) cannot ask a court of law to help her carry out her illegal object. (*United Calendar Mfg. Corp. v. Huang*, 94 AD2d 176 [2d Dept 1983]) “The denial of relief to the plaintiff in such a case is not based on any desire of the courts to benefit the particular defendant. That the defendant may profit from the court’s refusal to intervene is irrelevant. What is important is that the policy of the law be upheld. Where the parties’ arrangement is illegal, ‘the law will not extend its aid to either of the parties...or listen to their complaints against each other, but will leave them where their own acts have placed them.’” (*United Calendar*, 94 AD2d at 180, quoting, *Braunstein v. Jason Tarantella, Inc.*, 87 AD2d 203, 207 [2d Dept 1982])

Law of the Case

Plaintiff attempts, in her motion and in opposition to defendants’ motions, to avoid the consequences of what would otherwise be an unenforceable contract by claiming that Justice Bartlett’s finding that she was a non-member owner of Scully’s shares is the law of the case. Plaintiff is incorrect.

It is well-established that the denial of a prior motion to dismiss a complaint for failure to

state a cause of action does not bar a subsequent motion for summary judgment. (*Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry, Inc.*, 128 AD2d 467 [1st Dept 1987]; *Kidd v. Delta Funding Corp.*, 299 AD2d 457 [2d Dept 2002]) A motion to dismiss merely addresses the sufficiency of the pleadings and is distinct from a motion for summary judgment, which searches the record and looks to the sufficiency of the underlying evidence. (*Id.*; *Del Castillo v. Bayley Seton Hosp.*, 232 AD2d 602 [2d Dept 1996]) The Court’s use of the phrases “is entitled to profits” and “is a non-member owner” are based on the Court’s function, on such a motion, to give plaintiff the benefit of every inference. Two years later, after discovery, it is evident that plaintiff has no such status.

Standing

It is thus evident that plaintiff lacks standing to bring the derivative action asserted in the Amended Complaint. The Court of Appeals has made it clear that members of a limited liability company, including minority members, may bring derivative suits. (*Tzolis v. Wolff*, 10 NY 3d 100 [2008]) However, a non-member has no such authority. (*See, Jacobs v. Westchester Industrial Complex, LLC*, 156 AD3d 608 [2d Dept 2017]) It has already been established, and is conceded by that plaintiff, that she is not a member of Melange. On the motion to dismiss, Justice Bartlett found that at best, she was an assignee, which assumption has been disproven in summary judgment.

However, even if plaintiff could establish such status, section 603 of the NY Limited Liability Company provides that a membership assignee is not entitled to participate in management and affairs of the LLC, or to become or exercise any rights or powers of a member. There is an exception to this law which allows for participation by an assignee. In the matter at bar, the Operating Agreement (Exhibit 5 to Seq. #6) mirrors the language, “unless, by unanimous vote, the

non-selling Members consent to him becoming a Member.” No evidence of such consent has been proffered by plaintiff.

Violations of Fiduciary Duty

Having found that plaintiff lacks standing to bring the derivative action before the Court, it is unnecessary to go further. However, even if the claims plaintiff asserts were deemed direct, defendants have made a *prima facie* showing that there was no violation of fiduciary duty either by Sirera, who, as the sole Member of Melange, had the authority to act as she saw fit; or by Wilson Elser/Avila. Plaintiff specifically acknowledged that Avila’s advice that she could not participate in the LLC, and that funds must be segregated, was accurate. Moreover, in her deposition, and in her attorneys’ affirmation, she repeatedly characterizes Melange as a “perfectly profitable” concern. An action for breach of fiduciary duty requires that plaintiff identify a conflict of interest that was a substantial factor in her loss. (*Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008]) In the matter at bar, plaintiff has identified neither element.

Conversion

Plaintiff’s claim for conversion, even if deemed an individual claim, must fail for the same reason her derivative claims fail. Plaintiff has failed to establish that she had any ownership interest in Melange, or was, at any time, anything more than a well-compensated employee. It is fundamental that conversion requires a showing of legal ownership or right of possession of a specifically identifiable thing and defendant’s unauthorized dominion over that thing, to the exclusion of plaintiff’s right. (*Nero v. Fiore*, 165 AD3d 823 [2d Dept 2018]) Plaintiff cannot show an ownership right. Therefore, she cannot show unauthorized dominion to the exclusion of her right. Without such a showing, her claim must fail.

Attorneys' Fees

For the foregoing reasons, plaintiff's claim for attorneys' fees is denied.

Avila's Counterclaim

It is undisputed that Allyson Avila signed a consent form describing medical services to be provided to her by Melange. Plaintiff admits having taken the form from Melange's office, and having given it to her attorney. (Exhibit 26 to Seq. #6 at page 76)

New York State Public Health Law section 18(6) applies to health care providers, including nurses who perform medical services requiring prescriptions. The elements of a cause of action for breach of physician-patient confidentiality include: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such information to a person not connected with the patient's treatment in a manner that allows the patient to be identified; (4) lack of consent for the disclosure, and (5) damages. (*Chanko v. Am. Broad. Companies, Inc.*, 27 NY 3d 46, 53 [2016])

Avila's claim, however, is against Melange, which is responsible for the actions of its employee. This Court having determined that plaintiff is neither an owner, a Member or a non-Member assignee, there is no physician-patient privilege extending between plaintiff and Avila. While plaintiff did not acquire the rights of an owner, neither did she acquire the duties. (*See*, N.Y. Lim. Liab. Co. Law §603)

Should Avila wish to pursue her claim, it must be against Melange.

Conclusion

For the reasons outlined herein, the motion of defendant Sirera (Seq. #6) is granted, and the Complaint is dismissed as against her. The motion of defendants Wilson Elser and Avila (Seq. #8)

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is granted in part and denied in part. The Complaint is dismissed, as against those defendants. The motion for summary judgment on the counterclaim is denied. Plaintiff's motion for summary judgment (Seq. #7) is granted in part and denied in part. The motion for summary judgment for plaintiff is denied, except insofar as concerns the counterclaim of Avila, upon which summary judgment is granted, and the Counterclaim is dismissed.

The foregoing constitutes the decision and order of the court.

Dated: January 4, 2019
Goshen, New York

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