

Bavaro v Northeast Orthopedics & Sports Medicine, PLLC
2020 NY Slip Op 32448(U)
July 24, 2020
Supreme Court, New York County
Docket Number: 652030/2018
Judge: Kathryn E. Freed
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**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.,

MOTION SEQ. NO. 002

Plaintiff,

- v -

NORTHEAST ORTHOPEDICS AND SPORTS MEDICINE,
PLLC,**DECISION AND ORDER**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for

DISCOVERY

In this action sounding in breach of implied contract, defendant Northeast Orthopedics and Sports Medicine, PLLC ("NEOSM") moves, pursuant to CPLR 3124, to compel plaintiff Nicholas Bavaro, M.D. ("Dr. Bavaro") to produce his personal tax returns for the years 2014 through 2019 (Doc. 39-50, 64-66). Dr. Bavaro opposes the motion (Docs. 55-63). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order of this Court filed April 18, 2019 ("the 4/18/19 order"), which denied NEOSM's pre-answer motion to dismiss the complaint, pursuant to CPLR 3211(a) (5), (2), (5) and (7), reasoning that Dr. Bavaro had sufficiently pleaded a claim sounding in breach of an implied contract and that NEOSM had failed to utterly refute the claim (Doc. 23). Briefly summarized, NEOSM and its owner-members,

including Dr. Bavaro, sold certain assets of NEOSM, pursuant to an asset purchasing agreement ("APA"), with the understanding that the total sale proceeds would be distributed among NEOSM's owner-members (Doc. 1). This action stems from allegations that NEOSM failed to pay Dr. Bavaro \$110,847 of said payments (Doc. 1).

On May 8, 2019, following this Court's denial of its pre-answer motion, NEOSM interposed an answer denying the existence of an implied contract and raised several counterclaims (Doc. 25). In relevant part, NEOSM asserted that Dr. Bavaro breached his fiduciary duty as an owner-member when he failed to repay \$110,847 that was loaned to him (Docs. 25 ¶ 33-50; 40 ¶ 26). Specifically, NEOSM alleged that all owner-members, including Dr. Bavaro, obtained a loan from NEOSM to fund an advance of their share of partnership income distribution ("distributive share"), with the condition that said loan was to be repaid once NEOSM became profitable (Doc. 25 ¶ 33-50). At the time that he withdrew from membership in April 2017, Dr. Bavaro allegedly owed NEOSM \$110,847 (Doc. 25 ¶ 48). NEOSM further claimed that the loan advance was not to be treated as taxable income to such owner-members and that, when NEOSM became profitable, the repayment of the advance would be treated as a charge against each owner-member's distributive share and that the amount so charged would be treated as taxable income to such owner-member (Doc. 25 ¶ 46-47).

NEOSM now moves, pursuant to CPLR 3124, for disclosure of Dr. Bavaro's tax returns from 2014 through 2019, on the ground that Dr. Bavaro has placed his tax returns at issue by claiming that money was owed to him as an owner-member of NEOSM (Doc. 40 ¶ 39-40). NEOSM also claims that it is necessary for Dr. Bavaro to produce these documents to show his taxable income, especially since he was unable to testify as to the amounts he received from NEOSM in 2014 (Doc. 41 at 3-4). Further, NEOSM maintains that "[w]hether Dr. Bavaro treated

the advance of his [d]istributive [s]hare as a loan, or, impermissibly, as income is a critical question that can only be answered through disclosure of his personal tax returns" (Doc. 40 ¶ 42).

In opposition to the motion, Dr. Bavaro argues, *inter alia*, that NEOSM has failed to establish that the disclosure of his personal tax returns is indispensable to defending this action or that the information sought is unavailable from other sources (Doc. 63 at 7-10).

LEGAL CONCLUSIONS:

"While New York has a broad policy of discovery, favoring disclosure, disclosure of tax returns is disfavored because of their confidential and private nature, requiring the party seeking to compel production to make a strong showing of necessity and demonstrate that the information contained in the returns is unavailable from other sources" (*Weingarten v Braun*, 158 AD3d 519, 519-520 [1st Dept 2018] [internal quotation marks and citations omitted]; see *Lee v Chun Ka Luk*, 132 AD3d 515, 516 [1st Dept 2015]).

NEOSM's motion is denied. Not only are Dr. Bavaro's tax returns extraneous to his claim that NEOSM breached an implied contract, but NEOSM has also failed to establish an "overriding necessity" for the tax returns as it relates to its counterclaims (*CDR Creances S.A.S. v Cohen*, 77 AD3d 489, 491 [1st Dept 2010]). Specifically, this Court is unpersuaded by NEOSM's argument that Dr. Bavaro's taxable income is material to whether, pursuant to a verbal agreement, Dr. Bavaro was required to repay the money allegedly loaned to him (Doc. 41 at 3) (see *Manzella v Provident Life & Cas. Co.*, 273 AD2d 923, 924 [4th Dept 2000]; compare *Kerman v Friedman*, 21 AD3d 997, 998-999 [2d Dept 2005]).

Assuming, *arguendo*, that the tax returns are necessary to defend in this action, NEOSM nevertheless fails to establish that the information is unavailable from other sources. William

Carbonari ("Carbonari"), Dr. Bavaro's certified public accountant ("CPA"), affirms that, since NEOSM provided Dr. Bavaro with the schedule K-1 tax documents that were used to prepare his tax returns, NEOSM should already have within its possession documents reflecting Dr. Bavaro's income for 2014 through 2019 (Doc. 56 ¶ 3). In reply, NEOSM submits the affidavit of Jeffrey Teplitzky ("Teplitzky"), the CPA who prepared Dr. Bavaro's K-1s, who opines, *inter alia*, that it cannot be determined from the K-1s whether Dr. Bavaro actually reported as income the amount listed on the documents (Doc. 64 ¶ 6-8; 65 ¶ 13). However, insofar as NEOSM relies on speculation and conjecture to satisfy its entitlement to said discovery, the motion must be denied (*see Xamaka, Inc. v 166 E. 61st St. Assoc.*, 277 AD2d 35, 35 [1st Dept 2000]; *Slate v State*, 267 AD2d 839, 841 [3d Dept 1999]).

The Court has considered all other arguments and finds them unavailing.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendant Northeast Orthopedics and Sports Medicine, PLLC's motion to compel, pursuant to CPLR 3124, is denied in its entirety; and it is further

ORDERED that, within 20 days after this order is uploaded to the New York State Courts Electronic Filing System ("NYSCEF"), plaintiff Nicholas Bavaro, M.D., is to serve a copy of this

order, with notice of entry, on defendant Northeast Orthopedics and Sports Medicine, PLLC; and it is further

ORDERED that, in lieu of an in-person discovery conference, the parties are directed to confer and enter into a discovery stipulation and then email it to the Court to be so-ordered by Justice Freed on or before August 31, 2020, which will be deemed the newly scheduled date for the discovery conference; and it is further

ORDERED that the stipulation must set the next discovery conference date to November 4, 2020 for a telephonic conference with the Court at 10:00 am; and it is further

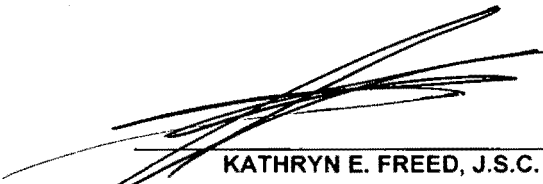
ORDERED that the stipulation shall include a note of issue deadline of November 18, 2020; and it is further

ORDERED that the discovery stipulation shall be emailed to ipeguero@nycourts.gov on or before August 31, 2020; and it is further

ORDERED that if the parties are unable to execute a stipulation by August 31, 2020, then they are to email Part 2 at srwalker@nycourts.gov prior to that date to schedule a telephonic discovery conference with the Court; and it is further

ORDERED that failure to follow these directives will be deemed a failure to appear for the August 31, 2020 conference; and it is further

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

<u>7/24/2020</u>					
DATE				KATHRYN E. FREED, J.S.C.	
CHECK ONE:	☐	CASE DISPOSED	☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	☐ REFERENCE