

NYC Med. Practice PC v Kalsow
2020 NY Slip Op 34194(U)
December 17, 2020
Supreme Court, Kings County
Docket Number: 512047/20
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8
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NYC MEDICAL PRACTICE PC d/b/a GOALS
AESTHETICS AND PLASTIC SURGERY,

Plaintiffs, Decision and order

- against -

Index No. 512047/20

SERGEI KALSOW; SERGEI KALSOW MD,
P.C. d/b/a SERGEI KALSOW MD, PLASTIC
SURGEON and d/b/a KALSOW PLASTIC
SURGERY,

December 17, 2020

Defendants,

-----x
SERGEI KALSOW; SERGEI KALSOW MD,
P.C. d/b/a SERGEI KALSOW MD, PLASTIC
SURGEON and d/b/a KALSOW PLASTIC
SURGERY,

Third Party Plaintiff,

- against -

SERGEY VOSKIN and ELLA VOSKIN,

Third-Party Defendants,

-----x
PRESENT: HON. LEON RUCHELSMAN

The third party defendants have moved seeking to dismiss the causes of action of unjust enrichment, tortious interference and attorney's fees contained in a third party complaint as well as counterclaims filed. The third party plaintiff opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

As recorded in a prior order, on August 28, 2018 the plaintiff and defendant entered into an agreement whereby the

defendant would perform as a surgeon at the plaintiff's facility. The agreement provides that for two years after the termination of the agreement the defendant may not solicit or attempt to solicit any business from any of the plaintiff's customers or potential customers. The plaintiff alleges that defendant created a website which when accessed or searched for creates the appearance that he still works for the plaintiff thus violating the non-solicitation agreement. The defendant filed counterclaims and a third party complaint against Sergey and Ella Voskin alleging they have interfered with his business. The Voskins have moved seeking to dismiss the third party complaint on the grounds it fails to state any cause of action. The third party plaintiff has opposed the motion.

Conclusions of Law

It is well settled that a "motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]). Whether the third party complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no

part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005])).

The third party complaint alleges four specific facts which the Dr. Kalsow claims constitutes tortious conduct. First, that the Voskin's improperly utilized Dr. Kalsow's image in violation of rules promulgated by the Board of Plastic Surgeons. Second, that the Voskin's engaged in other activities prohibited by the Board of Plastic Surgeons such as conducting a sweepstakes for free procedures. Third, the Voskins "engaged in a pattern of conduct of purposefully stalking and harassing Dr. Kalsow by sending fake clients into his private practice, having fake clients call his private practice, and stating false information to prospective patients that called Goals seeking Dr. Kalsow's services" (Third Party Complaint, ¶27). Lastly, that the Voskins continue to use Dr. Kalsow's name and image on their website. The third party complaint contains five causes of action, unjust enrichment, tortious interference, harassment, violations of New York Civil Rights Law §§50, 51 and attorney's fees.

Conclusions of Law

"[A] motion to dismiss made pursuant to CPLR §3211[a][7] will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the

complaint states in some recognizable form any cause of action known to our law" (see, AG Capital Funding Partners, LP v. State St. Bank and Trust Co., 5 NY3d 582, 808 NYS2d 573 [2005]).

Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR §3211 motion to dismiss (see, EBC I, Inc. v. Goldman Sachs & Co., 5 NY3d 11, 799 NYS2d 170 [2005]).

It is well settled that a claim of unjust enrichment is not available when it duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). As the court noted "unjust enrichment is not a catchall cause of action to be used when others fail" (id). The court explained that "plaintiffs allege that Verizon committed actionable wrongs, by trespassing on or taking their property, and by deceiving them into thinking they were not entitled to compensation. To the extent that these claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects. The unjust enrichment claim should be dismissed" (id). Dr. Kalsow argues that the Voskin's were unjustly enriched personally and unrelated to any contract signed on behalf of the plaintiff. Specifically, he notes that "the Third-Party Complaint alleges that the Voskins, independent

of the contract between Dr. Kalsow and Goals, were unjustly enriched by *their* conduct, not through the mechanism of the corporate entity" (see, Affirmation in Opposition, page 7). However, the third party complaint does not allege that at all. The third party complaints states that "Goals' unlawful termination of the Agreement and denial of Kalsow's right to patients and reassignment of surgeries allows the Voskins to take advantage of Dr. Kalsow's significant contributions to the Goals practice while cutting Kalsow out of any further returns. It would be inequitable to allow the Voskins to move forward with the business relationships and channels that Dr. Kalsow has established, while cutting Dr. Kalsow out of the Agreement and denying him the right to income from surgeries he would have performed" (Third Party Complaint, ¶¶34,35). These contentions do not allege any enrichment that accrued to the Voskins other than in their role as officers or owners of the corporation. Therefore, the motion seeking to dismiss the cause of action and the counterclaim for unjust enrichment is granted.

Turning to the claim for tortious interference, to plead a claim of tortious interference with contractual relations the complaint must assert (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and

(4) damages to plaintiff (Anethsia Associates of Mount Kisco, LLP v. Northern Westchester Hospital Center, 59 AD3d 473, 873 NYS2d 679 [2d Dept., 2009])). Further, the plaintiff must specifically allege that 'but for' the defendant's conduct there would have been no breach of the contract (White Knight of Flatbush, LLC v. Deacons of Dutch Congregations of Flatbush, 159 AD3d 939, 72 NYS3d 551 [2d Dept., 2018])). Thus, to succeed upon these allegations the complaint must allege sufficient facts, vague or conclusory assertions are insufficient (Washington Ave. Associates Inc., v. Euclid Equipment Inc., 229 AD2d 486, 645 NYS2d 511 [2d Dept., 1996])).

Dr. Kalsow argues that the Voskins caused a breach of the contract he entered into with Goals. However, even if true "a director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation's promise being broken" (Murtha v. Yonkers Child Care Association Inc., 45 NY2d 913, 411 NYS2d 219 [1978])). Thus, to succeed on such a claim the "complaint must allege that the officers' or directors' 'acts were taken outside the scope of their employment or that they personally profited from their acts'" (Courageous Syndicate Inc., v. People-to-People Sports Committee Inc., 141 AD2d 599, 529 NYS2d 520 [2d Dept.,

1988])). The third party complaint does not allege the Voskins acted outside the scope of their authority and as already demonstrated the third party complaint fails to allege the Voskins benefitted independent of the corporation.

Moreover, to establish a claim for tortious interference with business relations, the plaintiff must demonstrate that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff or by means that were unlawful or improper (Tri-Star Lighting Corp., v. Goldstein, 151 AD3d 1102, 58 NYS3d 448 [2d Dept., 2017])). The third party complaint does not allege the Voskins interfered with Dr. Kalsow's business at all. The third party complaint alleges the Voskins sent fake clients to Dr. Kalsow stating false information. Even if true those facts do not establish the Voskins interfered with business relationships of Dr. Kalsow. If the Voskins purposely sent fake clients to Dr. Kalsow, that bizarre behavior did not interfere with any business relations of Dr. Kalsow since those clients were never his at all.

Paragraph 28 of the third party complaint alleges that the Goals website continues to use the image and credentials of Dr. Kalsow for purposes of advertising, obviously without Dr. Kalsow's consent. While if true that is surely improper and might involve other torts, the third party complaint fails to sufficiently explain how that wrong, if true, adversely affected

Dr. Kalsow's business. This is notable since this allegation does not appear in the actual tortious interference claim of the third party complaint (see, Paragraphs 36-46 of the Third Party Complaint).

Therefore, based on the foregoing the motion seeking to dismiss the tortious interference claim as well as that counterclaim is dismissed without prejudice to permit refileing the claim only regarding the website.

The third party plaintiff has withdrawn the harassment claims and the Civil Rights claims.

The motion seeking to dismiss the claim and counterclaim for attorney's fees is granted.

Thus, all claims contained in the third party complaint as well as the counterclaims connected to the claims of the third party complaint are all dismissed.

The third party plaintiff may refile the third party complaint specifically with regard to the claims concerning allegations the Goals website is improperly using the image and credentials of Dr. Kalsow.

So ordered.

ENTER:

DATED: December 17, 2020
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC