

Mitsugu Shimmyo v Apple Ophthalmology PLLC

2021 NY Slip Op 30705(U)

February 27, 2021

Supreme Court, New York County

Docket Number: 656127/2019

Judge: Arthur F. Engoron

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

PRESENT: HON. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

Justice

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MITSUGU SHIMMYO, M.D., P.C.,

Plaintiff,

- v -

APPLE OPHTHALMOLOGY PLLC, KICHIEMON ASOMA,
NAOMI HAYASHI

Defendant.

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INDEX NO. 656127/2019

MOTION DATE 08/19/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 34, 35, 36, 37, 38, 39

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, it is Upon the foregoing documents and for the reasons set forth herein, plaintiff's instant motion to dismiss defendants' first Counterclaim is denied, and defendants' instant cross-motion to amend the subject Answer with Counterclaims is granted.

Background

The Court will assume the truth of the following allegations in the instant complaint (NYSCEF Doc. 1).

Dr. Shimmyo's Practice

For several decades, plaintiff, Mitsugu Shimmyo, M.D., P.C. ("Dr. Shimmyo") has practiced as an ophthalmologist and ophthalmic surgeon in midtown Manhattan; he also serves as an associate clinical professor at the Icahn School of Medicine at Mount Sinai. In 2006 and 2014, Dr. Shimmyo hired defendants Naomi Hayashi, M.D. ("Dr. Hayashi") and Kichiemon Asoma, M.D. ("Dr. Asoma") respectively and provided "tutelage," "facilities," and patients to these doctors, who "brought no meaningful business to Dr. Shimmyo." Dr. Shimmyo's practice used the website www.drshimmyo.com to advertise its services, profile its physicians, and facilitate appointment scheduling ("the Shimmyo Website"). Dr. Shimmyo paid for and owned the Shimmyo Website and asked Dr. Hayashi to operate it; Dr. Hayashi's friend "develop[ed] and maintain[ed]" the Shimmyo Website. (NYSCEF Doc. 1.)

Dr. Hayashi and Dr. Asoma's Alleged Exploitation of Dr. Shimmyo's Practice

Dr. Shimmyo alleges that Dr. Hayashi and Dr. Asoma "[inserted] secret, hidden code on [the Shimmyo Website] designed to confuse and deceive patients—all to open a competing practice just down the street," namely defendant Apple Ophthalmology ("Apple"). On or around January 24, 2017, Dr. Hayashi and/or Dr. Asoma registered the domain "appleophthalmology.com" ("the Apple Website") to promote Apple. On September 25, 2017, they registered Apple with the

New York Department of State. In or around 2017, Dr. Hayashi and Dr. Asoma falsely informed doctors and individuals in the Japanese community that Dr. Shimmyo's entire practice planned to move. Instead, Dr. Hayashi and Dr. Asoma arranged to move from Dr. Shimmyo's practice and to Apple. As Dr. Hayashi arranged for her subject move, her office hours with Dr. Shimmyo's practice significantly changed, often on short-notice, which frustrated patients. (NYSCEF Doc. 1.)

On October 15, 2018, Dr. Hayashi formally resigned to Dr. Shimmyo but continued to treat patients at Dr. Shimmyo's office for approximately one month, during which time she criticized Dr. Shimmyo to patients and handed patients her new business cards. Additionally, Dr. Hayashi allegedly "misrepresented to patients that the entire practice was moving" to Apple's new location. Dr. Asoma also "solicited" patients from Dr. Shimmyo's office. (NYSCEF Doc. 1.)

In October 2018, Apple hired an employee of Dr. Shimmyo and that employee's sister who had allegedly "misused their continuing employment with Dr. Shimmyo to convert Dr. Shimmyo's billing, financial and surgical information to aid Dr. Hayashi's new practice." (NYSCEF Doc. 1.)

Although November 10, 2018 marked Dr. Hayashi's final day working for Dr. Shimmyo's practice, Dr. Hayashi continued to log in to Dr. Shimmyo's practice's computer accounts/electronic platforms, which contained "confidential and proprietary information" such as patient records and financial information, among other details (NYSCEF Doc. 1, at 11).

On December 3, 2018, upon learning that Dr. Asoma participated in the aforementioned plans/activities, Dr. Shimmyo fired Dr. Asoma (NYSCEF Doc. 1.)

Dr. Shimmyo claims that Dr. Hayashi "covertly" inserted a computer code in the Shimmyo Website that not only "deceive[ed] patients but also locked out Dr. Shimmyo and his employees, "making it impossible for Dr. Shimmyo to control the use of his own name." Dr. Hayashi used secret/hidden text that "was not readily visible in a web user's browser" but "its placement in the browser code had a drastic effect on how Google and other search engines respond to online inquiries," and its phrasing misled patients "into thinking that Dr. Shimmyo endorsed Dr. Hayashi's competing practice." (NYSCEF Doc. 1.)

Between December 2017 and December 2018, the number of new patients at Dr. Shimmyo's practice decreased by approximately 62% and continues to drop (NYSCEF Doc. 1, at 10).

The Subject Insurance for Dr. Hayashi

Dr. Shimmyo acquired professional liability insurance from MLMIC for Dr. Hayashi and paid the premiums from 2006 to October 2015. In or around mid-2018, MLMIC converted ("demutualized") to a stock insurance company and paid cash "based upon the premiums paid on all policies in effect from July 15, 2013 through July 14, 2016." Dr. Hayashi "received and retained entirely for herself the entirety of the cash disbursement ["the Conversion Payment"] from MLMIC based on the payment of her premiums," even though Dr. Shimmyo paid for Dr. Hayashi's premiums for a minimum of two of the three subject years. (NYSCEF Doc. 1, at 13.)

The Instant Action

On October 18, 2019, Dr. Shimmyo commenced the instant action against Dr. Hayashi, Dr. Asoma, and Apple, asserting the following causes of action: (1) unfair competition; (2) tortious interference with prospective economic advantage; (3) pursuant to General Business Law §133, use of name or address with intent to deceive; (4) pursuant to Civil Rights Law §§ 50-51, invasion of right of privacy; (5) pursuant to General Business Law §§ 349-350, deceptive acts or practices; and (6) unjust enrichment. (NYSCEF Doc. 1.)

Dr. Shimmyo seeks, essentially, a judgment [1] permanently restraining and enjoining defendants from (1) acquiring, using, and disclosing any confidential information or trade secrets, among which are patient lists and medical records, that belong to Dr. Shimmyo; (2) accessing or using any electronic data or accounts associated with Dr. Shimmyo or his practice, except to the extent necessary to remove defendants' advertisements from the Shimmyo Website; (3) using Dr. Shimmyo's name or goodwill for defendants' own purposes, among which may be advertising, soliciting, or permitting patients to schedule appointments directly or indirectly through websites that use the name or address of Dr. Shimmyo or his practice; [2] awarding damages to Dr. Shimmyo in an amount to be determined at trial; [3] awarding Dr. Shimmyo interest from the date of judgment until the date on which the judgment is fully paid, plus costs; and [4] awarding attorney's fees, costs, and expenses to Dr. Shimmyo (NYSCEF Doc. 1, at 18).

Dr. Shimmyo also requests a trial by jury (NYSCEF Doc. 1, at 18).

Defendant's Answer and the Subject First Counterclaim

On November 26, 2019, defendants answered the instant complaint with various admissions, denials, sixteen Affirmative Defenses, and seven Counterclaims. As here relevant, defendants assert in their first counterclaim that the subject MLMIC policy listed Dr. Hayashi as the "Insured" and the policyholder while the subject policy listed Dr. Shimmyo as the "Policy Administrator." Pursuant to the subject MLMIC plan, "eligible policyholders [were] to receive payment in consideration of their extinguishment of their membership interests following the Plan Effective Date," and, thus, Dr. Hayashi is that "eligible policyholder." Both Dr. Shimmyo and Dr. Hayashi claim that he/she respectively has the right to receive approximately two-thirds of the subject Conversion Payment. Dr. Shimmyo apparently has failed to object, pursuant to the terms of the MLMIC plan, to MLMIC's issuing the Conversion Payment to Dr. Hayashi. Thus, in the first Counterclaim, Dr. Hayashi seeks, pursuant to CPLR 3001, a judgment declaring that (1) Dr. Hayashi is entitled to the Conversion Payment in its entirety; and (2) Dr. Shimmyo has no right(s) to any portion of the Conversion Payment. (NYSCEF Doc. 14.)

Dr. Shimmyo's Instant Motion

On January 15, 2020, Dr. Shimmyo moved, pursuant to CPLR 3211(a)(7), to dismiss defendants' first Counterclaim in its entirety (NYSCEF Doc. 16).

Dr. Shimmyo asserts that the First Department's decision in Matter of Schaffer, Schonholz & Drossman v Title, 171 AD3d 465 (1st Dept. 2019), (see also AdvantageCare Physicians, P.C. v Dr. Elise Alvarez MD, Index No. 152409/2019, decision of December 7, 2020 granting plaintiff summary judgment, NYSCEF Doc. 139, strongly adhering to Schaffer), "squarely foreclose[s]" Dr. Hayashi's subject Counterclaim. In that decision, the First Department held, in Dr.

Shimmyo's words, the following: "the party who paid the premiums to the insurer – here, Dr. Shimmyo – is entitled to the proceeds from the demutualization" (NYSCEF Doc. 17, at 5). Dr. Shimmyo quotes the following from Schaffer, at 465:

Although respondent was named as the insured on the relevant MLMIC professional liability insurance policy, petitioner purchased the policy and paid all the premiums on it. Respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy. Nor did she bargain for the benefit of the demutualization proceeds. Awarding respondent the cash proceeds of MLMIC's demutualization would result in her unjust enrichment.

Dr. Shimmyo further claims that Dr. Hayashi's assertion that the premium payments constituted a portion of Dr. Hayashi's compensation from Dr. Shimmyo "is of no moment." See Sullivan v Medical Liab. Mut. Ins. Co., 2019 NY Misc. LEXIS 6418, at *3-*5 (NY Sup. Ct., NY County 2019).

Defendants oppose the instant motion to dismiss, asserting, among various points, that (1) Dr. Shimmyo "ignores recent case law regarding MLMIC distributions, which endorses a fact-specific and common-sense 'analysis of payment'"; and (2) an issue of fact exists as to who paid the subject premiums from July 15, 2013 until September 30, 2015 (NYSCEF Doc. 30).

Defendants' Instant Cross-Motion

On February 28, 2020, defendants cross-moved, pursuant to CPLR 3025(b), to amend their Answer with Counterclaims (NYSCEF Doc. 23).

Pursuant to Dr. Hayashi's February 27, 2020 affidavit, "there is an issue of fact as to who paid the MLMIC premiums during the relevant timeframe," and, thus, this Court should deny plaintiff's motion to dismiss the first Counterclaim. According to Dr. Hayashi, Dr. Shimmyo agreed to pay MLMIC directly for the subject premiums in exchange for reducing Dr. Hayashi's monthly compensation rate until and including September 2015. Thus, Dr. Hayashi claims, essentially, that (1) between July 15, 2013 and September 2015, Dr. Hayashi paid for the premiums "by taking a reduction in compensation" from Dr. Shimmyo, who wrote the subject checks; and (2) between October 2015 and July 14, 2016, Dr. Hayashi directly paid the premiums. (NYSCEF Doc. 24.)

Dr. Hayashi seeks to add the following to the subject Answer with Counterclaims: (1) the facts that she outlines in her immediately-aforementioned affidavit; and (2) an email dated September 23, 2015 from Dr. Shimmyo that informed Dr. Hayashi that: "[Dr. Shimmyo] would like [Dr. Hayashi] to prepare to pay for certain personal/professional expenses out of your corporation, and [Dr. Shimmyo] will increase pay to Hayashi Medical Management ... Expenses to be paid by Hayashi Medical Management are: MLMIC premiums ..." On October 1, 2015, Dr. Hayashi apparently began paying the subject MLMIC premiums, and Dr. Shimmyo increased her compensation accordingly, "but fell short of paying [Dr. Hayashi] [her] full increase for that month." (NYSCEF Doc. 24-25.)

Dr. Hayashi cites to The Columbia Mem. Hosp. v Hinds, 65 Misc 3d 1205(a) (Sup. Ct. Columbia County 2019), in which the court granted defendant-employee's motion to dismiss the complaint of plaintiff-employer, who sought to recover MLMIC funds and seems to have written the subject checks, on the ground that the subject employment agreement stated that "premiums were deducted before defendant-employee received any incentive pay" (NYSCEF Doc. 30, at 11).

Plaintiff opposes the instant cross-motion, asserting, among various points, that (1) the proposed amended pleading is insufficient as a matter of law; and (2) defendants have not raised an issue of fact that would defeat plaintiff's motion to dismiss defendants' first Counterclaim (NYSCEF Doc. 35).

Discussion

Dr. Shimmyo's Motion to Dismiss

CPLR 3211(a)(7), states the following: "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the pleading fails to state a cause of action."

Defendants have stated a cause of action in the Schaffer/AdvantageCare mold. Whereas in Schaffer, "respondent does not deny that she did not pay any of the annual premiums or any of the other costs related to the policy," here, Dr. Hayashi claims that she did pay premiums. Indeed, defendants have in their opposition to plaintiff's motion submitted evidence that they paid the subject premiums.

The Court has considered Dr. Shimmyo's other arguments and finds them to be unavailing and/or non-dispositive.

Thus, this Court denies Dr. Shimmyo's motion to dismiss the first Counterclaim.

Defendants' Cross-Motion to Amend

CPLR 3025(b) states the following: "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court ... Leave shall be freely given upon such terms as may be just ... Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Defendants have complied with CPLR 3025(b) by submitting a copy of the proposed amended Answer with Counterclaims with the proposed amendments clearly indicated in redline (NYSCEF Doc. 28). As Dr. Hayashi notes, the amendments that defendants seek to add to the subject pleading are facts rather than legal conclusions (NYSCEF Doc. 39, at 8).

The Court has considered Dr. Shimmyo's other arguments and finds them to be unavailing and/or non-dispositive.


Thus, this Court grants defendants' cross-motion to amend the subject Answer with Counterclaims.

Conclusion

Thus, for the reasons stated herein, the instant motion, pursuant to CPLR 3211(a)(7), by plaintiff, Mitsugu Shimmyo, M.D., P.C., to dismiss the first Counterclaim that defendants, Apple Ophthalmology PLLC, Kichiemon Asoma, M.D., and Naomi Hayashi, M.D., submitted in their instant Answer with Counterclaims, is hereby denied. The instant cross-motion, pursuant to CPLR 3025(b), by defendants to amend their Answer with Counterclaims is hereby granted. The proposed amended Answer with Counterclaims that defendants e-filed as NYSCEF Doc. 29 is hereby deemed the current, operative Answer with Counterclaims.

This Court strongly encourages all parties to consider attempting to settle this case with or without this Court's assistance. In the former instance, an email to this Court (aengoron@nycourts.gov, copied to argreenf@nycourts.gov) with a copy to all parties can get the ball rolling.

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<u>2/27/2021</u>					
DATE			ARTHUR F. ENGORON, J.S.C.		
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