

Mostovoy v Billing & Collection Inc.

2022 NY Slip Op 30828(U)

February 24, 2022

Supreme Court, Kings County

Docket Number: Index No. 510597/21

Judge: Leon Ruchelsman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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DR. ALEKSANDR MOSTOVOY, APAK CHIROPRACTIC
P.C. AND OCEANA CHIROPRACTIC P.C.,

Plaintiff,

Decision and order

- against -

Index No. 510597/21

BILLING AND COLLECTION INC., PRACTICE WIZ,
INC., EPIONE MEDICAL, P.C.,
INNOVATIVE BUSINESS STRATEGIES INC.,
MBCC SUPPORT LTD. d/b/a BILLING PROS,
MEDREX, INC., WEB PRO SERVICES, INC.,
NEW YORK CITY MEDICAL TREATMENTS P.C.
SIMON DAVYDOV, MICHAEL JACOBI,
ELENA MUMIN-AKHUNOV, STELLA RAYSIN
AND EMANUEL DAVID,

Defendants,

February 24, 2022

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved pursuant to CPLR §3025 seeking to amend the complaint. The defendants Emanuel David, Web Pro Services Inc., Innovative Business Strategies Inc., Epione Medical P.C., MedRex, Inc., NYC Medical Treatments P.C., Michael Jacobi, and Stella Raytsin and Billing & Collection Inc., Practice Wiz, Inc., MBCC Support Ltd., Simon Davydov and Elena Mumin-Akhunovpro Services Inc., have all moved opposing 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 the prior order, on January 1, 2021 the entity Oceana Chiropractic, P.C., entered into a Facilities Use License and Services Agreement with defendant NYC Medical Treatments P.C. whereby the plaintiff would lease certain space

from within an existing medical office located in Queens. The original complaint alleged the defendants essentially harmed the plaintiff by failing to work pursuant to all the contracts entered between the parties. The prior order required certain parties to proceed to arbitration and dismissed the entire complaint as to the remaining defendants on various grounds.

The plaintiff has now moved seeking to amend the complaint in efforts to maintain viable claims against the parties. The defendants have all moved opposing that request.

Conclusions of Law

Pursuant to CPLR §3025(a) a party has the right to amend any pleading, once, without leave of the court, as long as the amendment is filed within the time outlined in the statute. However, in Panagouloupoulos v. Carlos Ortiz Jr. MD P.C., 194 AD3d 728, 143 NYS3d 571 [2d Dept., 2021] the court held that when a complaint has been dismissed then a motion to amend the complaint cannot be granted since there is no viable complaint in which to amend.

Furthermore, even if such complaint could be amended the request is untimely. CPLR §3025(a) presents three time periods when a pleading, a complaint in this case, may be amended as of right. They are (1) within twenty days after the complaint is

served, (2) any time before the period to respond expires and (3) within 20 days after the defendant's answer is served (id). It is further true that when a defendant files a motion to dismiss the time in which to amend the complaint as of right is thereby extended (Poly Manufacturing Corp., v. Dragonides, 109 AD3d 532, 970 NYS2d 589 [2d Dept., 2013]). The length of that extension is "similarly" the same 10 days afforded by CPLR §3211(f) in which to file a complaint following a motion to dismiss. Thus, in Schwatka v. Super Millwork Inc., 33 Misc3d 1213(A), 939 NYS2d 744 [Supreme Court Suffolk County 2011] the court specifically noted that a motion to dismiss filed by a defendant "extended plaintiffs' time to serve a responsive pleading until 10 days after service of a notice of entry of the order deciding the motion" (id). Therefore, the filing of the Amended Complaint beyond ten days after the notice of entry of the court's decision was untimely pursuant to CPLR §3025(a).

Moreover, considering the merits of the proposed amended complaint, it alleges claims for breach of fiduciary duty against defendants Emanuel David, Samuel Davydov, Billing & Collection Inc., MBCC Support Ltd. d/b/a/ Billing Pros, Elena Mumin-Akhunov and Stella Raytsin, aiding and abetting breach of fiduciary duty against defendants Billing & Collection Inc., MBCC Support Ltd. d/b/a/ Billing Pros, Stella Raytsin and Elena Mumin-Akhunov and unjust enrichment against defendants Innovative Business

Strategies Inc., Web Pro Services, Inc. and Emanuel David and Samuel Davydov.

Concerning individual defendants Emanuel David, Samuel Davydov and Stella Raytsin the wife of Samuel Davydov as well as Elena Mumin-Akhunov, the proposed amended complaint does not assert any information sufficient to pierce the corporate veil. It is true that the proposed amended complaint alleges that Davydov and David dominated the activities of Practice Wiz and IBS Inc., (see, Proposed Amended Complaint, ¶¶ 41-44) and Billing Pros (see, Proposed Amended Complaint, ¶¶ 46-47) nevertheless, the information contained therein is insufficient to establish the piercing of any corporate veil. As noted, to succeed on a request to pierce the corporate veil the plaintiff must demonstrate that "(1) the owners exercised complete dominion of the corporation in respect to the transaction attacked; and (2) that such dominion was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury" (Conason v. Megan Holding LLC, 25 NY3d 1, 6 NYS3d 206 [2015]). Thus, the plaintiff must allege facts demonstrating such dominion over the corporation and that such dominion led to inequity, fraud or malfeasance (TMCC, Inc., v. Jennifer Convertibles Inc., 176 AD3d 1135, 111 NYS3d 102 [2d Dept., 2019]). "Factors to be considered in determining whether the owner has 'abused the privilege of doing business in the corporate form' include whether there was a

'failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use of corporate funds for personal use'" (Vivir of L I, Inc., v. Ehrenkranz, 145 AD3d 844, 43 NYS3d 435 [2d Dept., 2016]).

The proposed amended complaint does not allege any of the above noted criteria. The proposed amended complaint asserts in conclusory fashion that the defendants "completely dominated and controlled the activities of Practice Wiz, such that Practice Wiz was an alter ego of Defendants David and Davydov" (see, Proposed Amended Complaint, ¶40). The proposed amended complaint does allege that "Practice Wiz never appointed any officers, shareholders or employees to run or operate Practice Wiz. Practice Wiz neither maintained corporate formalities, like maintaining corporate books or records, nor held any shareholder meetings. Practice Wiz does not appear to have any corporate structure, and has made no corporate filings except the initial registrations of the company with the Departments of State in which it was incorporated." (id at ¶41). However, the proposed amended complaint merely contains conclusory language about domination and control. As the court stated in Sky-Track Technology Company Limited v. HSS Development Inc., 167 AD3d 964, 91 NYS3d 119 [2d Dept., 2018] "mere conclusory statements that a corporation is dominated or controlled by a shareholder are insufficient to sustain a cause of action against a shareholder

in its individual capacity" (id). Thus, without particularized facts warranting the piercing of any corporate veil no liability can attach to any individuals (Pine Street Homeowner's Association v. 20 Pine Street LLC, 109 AD3d 733, 971 NYS2d 289 [1st Dept., 2013]). Further, the proposed amended complaint fails to allege that the use of the corporate form was done with the intent to commit fraud or a wrong upon the plaintiff (Abelman v. Shoratlantic Development Co., Inc., 153 AD2d 821, 545 NYS2d 333 [2d Dept., 1989]). In addition, a simple breach of contract is not fraud or some other wrong sufficient to pierce the corporate veil (Bonacasa Realty Co., v. Salvatore, 109 AD3d 946, 972 NYS2d 84 [2d Dept., 2013]).

Therefore, the motion seeking to amend the complaint as to all the individual defendants including Stella Raytsin and Elena Mumin-Akhunov is denied.

Turning to the remaining defendants Billing & Collection Inc., MBCC Support Ltd. d/b/a/ Billing Pros, and Innovative Business Strategies Inc., and Web Pro Services, Inc., the proposed amended complaint does not really allege any breach of any fiduciary duty against Billing & Collection Inc., or Billing Pros but rather against David and Davydov who dominated those companies. However, the proposed amended complaint concedes that David and Davydov "were not officers, shareholders or employees of the Billing Company Defendants" (see, Proposed Amended

Complaint, ¶98) but nevertheless took all instructions from them. Consequently, there really are no allegations that the entities committed any breach of any fiduciary duty or aided and abetted such breaches. Rather, the inclusion of these entities is another attempt to try and impose liability upon David and Davydov. Therefore, the motion seeking to amend the complaint concerning these entities is denied.

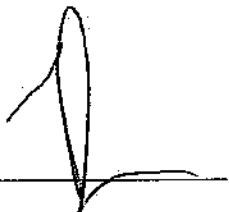
Lastly, the complaint seeks to add a cause of action for unjust enrichment against Innovative Business Strategies Inc., and Web Pro Services, Inc., on the grounds they contracted for services and that such services were never performed. However, it is well settled that unjust enrichment is not available where the claim duplicates or replaces a conventional contract or tort claim (see, Corsello v. Verizon New York Inc., 18 NY3d 777, 944 NYS2d 732 [2012]). Since the unjust enrichment claim is really a breach of contract claim the claim of unjust enrichment fails.

Therefore, the motion seeking to amend the complaint is denied in all respects.

So ordered.

ENTER:

DATED: February 24, 2022
Brooklyn N.Y.



Hon. Leon Ruchelsman
JSC