

Bloom v Papadakis & Gonzalez D.D.S., PLLC

2022 NY Slip Op 30990(U)

March 24, 2022

Supreme Court, New York County

Docket Number: Index No. 650124/2021

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

-----X

DR. MICHAEL BLOOM,

Plaintiff,

- v -

PAPADAKIS & GONZALEZ D.D.S., PLLC, and DR.
ZACHARY PAPADAKIS,

Defendants.

-----X

INDEX NO. 650124/2021

MOTION DATE 03/09/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, and 37 were read on this motion for

DISMISSAL

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss the complaint pursuant to CPLR 3211 is granted based on the following memorandum decision.

Background

In this action for breach of contract, plaintiff Dr. Michael Bloom ("plaintiff") asserts three causes of action: breach of contract (first cause of action); conversion (second cause of action); and fraudulent inducement (third cause of action). Defendants Papadakis & Gonzalez D.D.S., PLLC ("P&G") and Dr. Zachary Papadakis ("Papadakis") now move to dismiss the complaint in its entirety based on documentary evidence, the statute of limitations, and for failure to state a cause of action.

Pursuant to a Sale of Assets and Professional Practice agreement (the "Sale Agreement") and an Independent Contractor Agreement (the "ICA"), the parties entered into an agreement whereby plaintiff sold his dental practice to P&G, and agreed to continue to provide dental

services to those patients who he brought over to P&G as an independent contractor for a period of two years, from September 11, 2018 through September 11, 2020 (NYSCEF Doc. Nos. 12, 14). Relevant to the instant motion, the Sale Agreement provides that plaintiff would sell his patient list and the established goodwill of his practice to P&G (NYSCEF Doc. No. 12, ¶¶ 1, 1.1). The Sale Agreement, the ICA, and a Non-Compete and Non-Solicitation Agreement which is not attached herein set “forth the entire understanding of the Parties with respect to the sale of the Practice” (*id.*, ¶ 20.4). Further, the Sale Agreement provides for a shortened limitations period for bringing claims related to the unified agreement of the parties. To wit:

All disputes, controversies, or claims arising out of, in connection with, or relating to this Agreement or any breach or alleged breach of this Agreement and any claim that a Party violated any state or federal statute or New York common-law doctrine (collectively, “Claim” or “Claims”) shall be made by the party asserting the Claim within a reasonable time after the Claim arose or when the Party asserting the Claim should reasonably have been aware of it (“Occurrence Date”), but in no event later than six (6) months from the Occurrence Date (the “Limitations Date”). A failure to commence an action . . . on or before the Limitation Date shall constitute an absolute bar to the making of such Claim in any court of law.

(*Id.*, § 20.8.)

The ICA provides that plaintiff will provide services under P&G’s name to those patients who were transitioning from his prior practice (NYSCEF Doc. No. 14, ¶ 1).

During plaintiff’s service as an independent contractor, a dispute arose regarding referral of work. Specifically, plaintiff alleges that it was his understanding that, pursuant to the terms of the ICA and the Sale Agreement, he would provide general dentistry services to his transitioning patients except where specialty dental work was necessary, in which case he would refer those patients to defendant Papadakis (NYSCEF Doc. No. 10, ¶¶ 5-9). After the required specialty work was completed, plaintiff alleges that those patients were to be referred back to him by Papadakis for any further dental services (*id.*). Plaintiff was paid a percentage of the billables for

his work; ergo, he asserts a breach of the parties' agreement because allegedly Papadakis refused to refer patients back to him (*id.*, ¶¶ 16-18). He also asserts that Papadakis should be liable for fraudulent inducement since he clearly never intended to abide by the provisions of the Sale Agreement and the ICA (*id.*, ¶ 19). Further, plaintiff asserts that P&G converted part of the money it owed him by taking funds necessary to satisfy a dispute under the Sale Agreement's work-in-progress provision (*id.*, ¶ 21).

Plaintiff commenced this action by filing a summons and complaint on January 7, 2021 (NYSCEF Doc. No. 1). Defendants appeared, and now make this pre-answer motion to dismiss pursuant to CPLR 3211.

Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Discussion

CPLR 3211(a)(5) provides, inter alia, that a complaint may be dismissed based upon the applicable statute of limitations. While the statutes of limitation for each of plaintiff's claims are defined by statute, the parties to a written agreement may prescribe a shorter period for claims arising thereunder (CPLR 201). "An agreement which modifies the Statute of Limitations by specifying a shorter, but reasonable, period within which to commence an action is enforceable" (*Executive Plaza, LLC v Peerless Ins. Co.*, 22 NY3d 511, 518 [2014] [internal quotation marks and citations omitted]). Absent proof that the contract is one of adhesion or the product of overreaching, or that [the] altered period is unreasonably short, the abbreviated period of limitation will be enforced" (*Hunt v Raymour & Flanigan*, 105 AD3d 1005, 1006 [2d Dept 2013]). "Where the party against whom an abbreviated Statute of Limitations is sought to be enforced has demonstrated no duress, fraud or misrepresentation in regard to his agreement to the shortened period, it must be assumed that the term was voluntarily agreed to" (*Wayne Drilling & Blasting, Inc. v Felix Indus., Inc.*, 129 AD2d 633, 634 [2d Dept 1987]).

Here, the Sale Agreement provides a six-month limitations period for all claims arising out of the parties' agreement (NYSCEF Doc. No. 12, § 20.8). As this action was commenced on January 7, 2021, plaintiff's claims would have had to occurred after July 7, 2020, six months prior to commencement of the action. Defendant asserts, and plaintiff does not dispute, that plaintiff's claims arose prior to that time. Moreover, plaintiff does not allege any duress, fraud, or misrepresentation with respect to the limitation period, and therefore he is bound by it (*Wayne Drilling & Blasting, Inc.*, 129 AD2d at 634). Plaintiff argues that the limitations period is contained only in the Sale Agreement and, accordingly, does not apply to his claims regarding the ICA. However, the Sale Agreement specifically provides that both it and the ICA are part of

the global agreement between the parties (NYSCEF Doc. No. 12, § 20.4). Further, it is settled law that agreements entered into contemporaneously by the same parties regarding the same subject matter are read together (*1471 Second Corp. v NAT of NY Corp.*, 162 AD3d 449, 450 [1st Dept 2018]).

With respect to the conversion claim, plaintiff argues that it implicates a duty outside of the contract and therefore may be plead separately. The complaint alleges, however, that the source of the conversion claim was a dispute over funds governed by the work-in-progress of the Sale Agreement (NYSCEF Doc. No. 10, ¶ 21). Thus, not only does the Sale Agreement's limitations period bar the claim, but the complaint does not adequately state a claim for conversion. A party claiming conversion must plead facts independent of a breach of contract to establish liability, and plaintiff has not done so (*Kopel v Bandwith Tech. Corp.*, 56 AD3d 320 [1st Dept 2008]).

Finally, and regarding the fraudulent inducement claim, "[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). In order to maintain a claim for fraud, plaintiff must assert "[a] misrepresentation of present fact [that] is collateral to the contract" (*American Media, Inc. v Bainbridge & Knight Labs., LLC*, 135 AD3d 477, 478 [1st Dept 2016]). Here, plaintiff alleges that Papadakis induced him to enter into the Sale Agreement and the ICA by falsely representing that patients that he referred to Papadakis for specialty work would be referred back to him after the agreement took effect, which is a representation regarding future conduct allegedly in breach of the contract rather than present fact (NYSCEF Doc. No. 10, ¶¶ 6, 19). Because plaintiff fails to allege a misrepresentation of present fact, the fraudulent inducement claim must be dismissed.

Accordingly, it is hereby

ORDERED that the motion of defendants Papadakis & Gonzalez D.D.S., PLLC and Dr. Zachary Papadakis to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

<u>3/24/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE