Brooklyn SC, LLC v Moskowitz
2022 NY Slip Op 31255(U)
April 8, 2022
Supreme Court, Kings County
Docket Number: IIndex No. 504492/2019
Judge: Larry D. Martin
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

BROOKLYN SC, LLC,

Plaintiff,

-against-

SAMUEL MOSKOWITZ, M.D., VANDALAY MANAGEMENT SERVICES, INC., BROOK PLAZA AMBULATORY SURGICAL CENTER, INC., STEVEN ACKERMAN, and BRIAN MARMOR

Defendants.

INDEX # 504492/2019

Motion Seq. 2

Hon. Larry D. Martin

Procedural History

Plaintiff Brooklyn SC, LLC (the "Surgery Center") brings this action against one of its physician members/owners, Dr. Samuel Moskowitz, charging fraud and breach of contractual and/or fiduciary duties by performing surgical procedures and other activities at and for its competitor, Brooklyn Plaza Ambulatory Surgery Center located at 5000 Avenue K, Brooklyn, NY ("Brook Plaza"). The Amended Complaint further charges that defendants Brook Plaza, Vandalay Management Services, Inc. ("Vandalay"), Steven Ackerman ("SAckerman"), and Brian Marmor (collectively, the "Brook Plaza Defendants") tortiously interfered with their contract, by aiding and abetting Moskowitz in breaching his contractual and fiduciary duties.

The Brooks Plaza Defendants filed this pre-answer motion to dismiss the Complaint pursuant to CPLR § 3211(a)(7) (Mot Seq 2). Plaintiff consented to dismissal of its Ninth Cause of Action (breach of contract), without prejudice, as to Brook Plaza only.

BACKGROUND FACTS

For purposes of this motion, SAckerman and Marmor are among the owners of Brook Plaza, a gastroenterological surgery center, and are its chief executive officer and chief operating

officer, respectively.[1] Vandalay manages Brook Plaza, and Marmor and SAckerman also own Vandalay, with Marmor serving as Vandalay's President.

In or about 2009, SAckerman worked on business development for Brook Plaza Realty and an anesthesia services company, 5000 Avenue K ("5000 Avenue"), both of which are owned by SAckerman and Dr. Dennis Metz. Plaintiff implicitly argues that Brook Plaza, Brook Plaza Realty, and 5000 Avenue should be deemed "united in interest," and/or collaterally estopped from disputing that fact in view of a ruling in a separate action.

In or about May 2011, certain physician members of the Surgery Center, including Dr. Moskowitz, signed an Amended and Restated Operating Agreement (the "Agreement") obligating each of them to perform a minimum of one-third of their procedures at the Surgery Center annually, and prohibiting them from performing similar procedures at other facilities within Kings County. The physician members were permitted to continue performing procedures at other facilities after executing the Agreement up until Surgery Center's new facility was operational. Marmor purportedly negotiated with the Surgery Center and Dr. Moskowitz and executed a Confidentiality and Nondisclosure Agreement (the "NDA").

Defendants' Alleged Scheme

In essence, Plaintiff asserts that Dr. Moskowitz entered into an agreement with Vandalay, SAckerman, and Marmor to, among other things, perform procedures at Brook Plaza in 2015 (the "Engagement"), during which discussions, Marmor allegedly assured a member of the Surgery Center that they were pursuing the NDA to obtain information to assist the Surgery Center's operations, not to further a business relationship (the "Verbal Assurances").

1 Brook Plaza's owners also include non-parties Jacob Ackerman, M.D. ("JAckerman"), Dennis Metz, M.D., Raymond Reich, M.D., 5000 Avenue K, and Brook Plaza Realty.

Plaintiff maintains that Dr. Moskowitz entered into the NDA on behalf of the Surgery Center, as well as himself, based upon said Verbal Assurances.[2] Pursuant to the NDA's terms, any party receiving Confidential Information could only use such information "to assist recipient in analyzing the possible [Engagement]" and any such information could not be used for "any other purpose."

The Amended Complaint alleges that Dr. Moskowitz violated the NDA by sharing with defendants Vandalay, SAckerman, and Marmor highly confidential billing and collection information concerning the Surgery Center's operations, including information regarding Dr. Moskowitz's individual production and revenue figures.

LEGAL STANDARDS OF REVIEW

On a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7), a complaint must be construed liberally, with its factual allegations deemed true, and the nonmovant must be given the benefit of all favorable inferences (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "The test for sufficiency of a pleading is whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proven and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (*V. Groppa Pools, Inc. v Massello*, 106 AD3d 722, 723 [2d Dept 2013]). The pleading generally need only contain "sufficient detail to inform defendants of the substance of the claims" (*Kaufman v Cohen,* 307 AD2d 113, 120 [1st Dept 2003]).

A cause of action sounding in breach of fiduciary duty falls within the scope of CPLR 3016(b) and must be pleaded with particularity (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]). However, CPLR § 3016(b) is satisfied when

[2] Specifically, Moskowitz signed in his capacity as Surgery Center's Board Member and his individual capacity, and Marmor signed in his capacity as its President and in his individual capacity.

the facts suffice to permit a reasonable inference of the alleged misconduct (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

In response to a motion to dismiss, the opposant may submit affidavits or other evidence to supplement her allegations (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). A motion to dismiss for failure to state a cause of action will be denied in its entirety where the complaint asserts several causes of action, at least one of which is legally sufficient and where the motion is aimed at the pleading as a whole without particularizing the specific causes of action sought to be dismissed (*Long Island Diagnostic Imaging, P.C. v Stony Brook Diagnostic Assocs.*, 215 AD2d 450, 452 [2d Dept 1995]).

ANALYSIS

Plaintiff essentially argues that the Brook Plaza Defendants: (i) should be deemed "united in interest," either by admission or by virtue of their overlapping owners, managers, employees, and physical locations; (ii) knew or had reason to know of Dr. Moskowitz's contractual and fiduciary obligations to plaintiff; and iii) despite this knowledge, entered into a contract with Moskowitz to perform surgical procedures.

The Amended Complaint, however, does not allege that the remaining Brook Plaza Defendants are signatories to any contract and does not allege false representations made to plaintiff or sufficient facts to reasonably infer that the Brook Plaza Defendants knew or had reason to know of Dr. Moskowitz's contractual or fiduciary obligations and that contracting with him could be deemed improper. Essentially, the sole alleged false representation appears to be paragraph 68 of the Complaint, which states:

> "In 2015, prior to the execution of the [NDA], Marmor acknowledged Dr. Moskowitz's obligations to the Surgery Center in discussions with Dr. Moskowitz and Dr. Kodsi. During those conversations, Marmor assured Dr. Kodsi that the [Brook Plaza] Defendants were pursuing the [NDA] in order to assist the Surgery

> Center with its operations, and not to further a business relationship with Dr. Moskowitz."

The foregoing is insufficient to suggest SAckerman's and Marmor's potential individual liability, absent assertions that, for example, they are signatories to an agreement or that they owed a duty to plaintiff rather than their own business, or suggestions that the remedies of alter ego or corporate veil doctrines might be applicable. Plaintiff need not prove these doctrines prior to discovery but claims *tacitly* based solely on the assumption that such remedies may be appropriate are too nebulous to survive this motion to dismiss.

Moreover, while allegations as to Verbal Assurances prior to the NDA and Engagement are seemingly inadmissible hearsay prohibited by the parol evidence rule, none of the parties have expressly broached the issues of actual or apparent authority to bind their respective corporate entities. While each entities' respective by-laws may elucidate which parties had actual authority to bind them, the parties have not focused their arguments on what facts, if any, may have created apparent authority in the absence of actual authority. In this respect, apparent authority's existence depends on a factual showing that a third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal rather than the agent (*Ford v Unity Hosp.*, 32 NY2d 464, 473; *see also* Restatement, Agency 2d, § 27).

This Court has been asked to take judicial notice of Dr. Moskowitz's assertion in a different case that Brook Plaza, 5000 Avenue, and Brook Plaza Realty are "united in interest" and should therefore be estopped from denying the same here. While defendants oppose the Court doing so, neither party has discussed the import of such a factual and/or legal finding that they are indeed united in interest.

Considering the foregoing ambiguities, the Brook Plaza Defendants' pre-answer motion to dismiss the Complaint pursuant to CPLR § 3211(a)(7) is **granted** solely to the extent of dismissing,

without prejudice, Plaintiff's Ninth Cause of Action (breach of contract) as to Brook Plaza only, and further dismissing, without prejudice, all breach of contract claims as to any non-signatories, and Plaintiff's right to assert any claims or remedies that post-discovery facts support.

Settle Order.

Dated: April 08, 2022
Brooklyn, New York

Hon. Larry D. Martin
Supreme Court of the State of New York

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT