

**Healy v Kruger**

2024 NY Slip Op 33529(U)

September 24, 2024

Supreme Court, New York County

Docket Number: Index No. 656130/2020

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC PART 36M

Justice

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INDEX NO. 656130/2020

DR. KIRSTEN O. HEALY,  
Plaintiff,

MOTION SEQ. NO. 006

- v -

DR. BERNARD KRUGER,  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157

were read on this motion to/for

**SUMMARY JUDGMENT**

Defendant Dr. Bernard Kruger moves, pursuant to CPLR 3212, for summary judgment dismissing the claim for fraud asserted by plaintiff Dr. Kristen O. Healy. For the reasons set forth below, the motion is granted.

The facts underlying this action were previously set forth in this court’s decision and order dated May 1, 2023 (NYSCEF Doc. No. 127, *Krakowsky affirmation, exhibit 5*), with which familiarity is presumed. Briefly, this action arises from defendant’s agreement to sell his medical practice to plaintiff. According to the complaint, the parties’ contract dated October 8, 2018, provided for a form of “revenue sharing” whereby defendant would make monthly commitment payments to plaintiff in exchange for plaintiff providing medical services to defendant’s patients (NYSCEF Doc. No. 126, *Krakowsky affirmation, exhibit 4, ¶¶ 15 and 17*). The contract based the sale of defendant’s medical practice to plaintiff on a percentage of gross revenues (*id.*, ¶ 17). After defendant allegedly breached the contract, plaintiff commenced this action asserting causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, account stated, and fraud. This court granted defendant’s earlier motion for summary judgment dismissing the breach of contract, covenant of good faith and fair dealing, and account stated claims on the ground that fee-splitting agreement between the parties was illegal and unenforceable under Education Law § 6509-a and 8 NYCRR 29.1(b)(4) and denied plaintiff’s cross-motion for summary judgment on the account stated cause of action (NYSCEF Doc. No. 127). The sole remaining cause of action pleads a claim for fraud.

Plaintiff alleges that defendant promised to make interim commitment payments and to sell his medical practice to plaintiff (NYSCEF Doc. No. 126, ¶¶ 21). In reliance on this promise, plaintiff purchased a professional condominium unit located at 170 East 78th Street, New York, New York (the “Office”), to house their medical practices (*id.*, ¶¶ 5 and 20). Plaintiff secured a mortgage loan for \$700,000.00 to help fund the \$1.1 million purchase price for the Office (*id.*, ¶ 14). Plaintiff alleges that she reasonably expected to pay for the property from the revenues generated from the interim commitment payments and from the purchase of defendant’s practice (*id.*, ¶ 21). Plaintiff maintains that defendant had no intention of transitioning his patients to her

practice, selling his practice to plaintiff, or paying plaintiff interim commitment fees to support her purchase of the Office (*id.*, ¶ 22).

Defendant now moves for summary judgment dismissing the fourth cause of action for fraud. Defendant relies on his affidavit; excerpts from the deposition transcripts for plaintiff and non-party Michael Healy (“Healy”); a brief history of plaintiff’s earnings; and the operating agreement for non-party Claerin Properties LLC (“Claerin Properties”); among other exhibits, in support. Plaintiff opposes the motion and submits the deposition transcripts for plaintiff and Healy; defendant’s schedule of income and expense; and other exhibits.

It is well established that a party moving for summary judgment under CPLR 3212 “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The “facts must be viewed ‘in the light most favorable to the non-moving party’” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [citation omitted]). If the moving party meets its prima facie burden, the opposing party must “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Bazdaric v Almah Partners LLC*, 41 NY3d 310, 316 [2024], quoting *Alvarez*, 68 NY2d at 324). If the movant fails to meet its prima facie burden, the motion must be denied without regard to the sufficiency of the opposing papers (*Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

At the outset, the present motion does not violate the rule barring successive summary judgment motions. Ordinarily, “successive summary judgment motions are improper ‘in the absence of newly discovered evidence or other sufficient cause’” (*Perretta v New York City Tr. Auth.*, — AD3d —, 2024 NY Slip Op 04184, \*4 [1st Dept 2024] [citation omitted]). In this case, this court has twice extended defendant’s time to make a dispositive motion on the fraud cause of action (NYSCEF Doc. No. 119; NYSCEF Doc. No. 137, *Krakowsky affirmation, exhibit 15*).

Defendant argues that plaintiff lacks standing to pursue a claim for fraud because Claerin Properties, the limited liability company in which she and her husband, Healy, are the sole members, owns the Office (NYSCEF Doc. No. 128, *Krakowsky affirmation, exhibit 6, plaintiff 12/14/2022 tr at 82-83*; NYSCEF Doc No. 130, *Krakowsky affirmation, exhibit 8, Healy tr at 12 and 74*). Standing is a threshold issue that must be resolved first to determine whether the plaintiff is the proper party to seek relief (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], appeal dismissed 8 NY3d 837 [2007]). The testimony establishes that Claerin Properties purchased the Office from the unit’s prior owner, Alcoma Corporation (NYSCEF Doc. No. 130 at 10). Defendant, though, waived the affirmative defense of standing by failing to plead it as an affirmative defense in his amended answer (*see US Bank N.A. v Nelson*, 36 NY3d 998, 999 [2020] [“Defendants failed to raise standing in their answers or in pre-answer motions as required by CPLR 3211(e) and accordingly, ... the defense was waived”]; *Alrose Steinway, LLC v Jaspán Schlesinger, LLP*, 205 AD3d 529, 531 [1st Dept 2022]; *Perine Intl. Inc. v Bedford Clothiers, Inc.*, 143 AD3d 491, 492 [1st Dept 2016]). Nor has defendant retracted the waiver by moving to amend his answer a second time (*see Beharrie v MRAG Dev., LLC*, 210 AD3d 945,

945 [2d Dept 2022]). Accordingly, the motion insofar as it seeks summary judgment predicated on plaintiff's lack of standing is denied.

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The plaintiff must furnish clear and convincing evidence to prevail on a cause of action for fraud (*see Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, 149 AD3d 146, 149 [1st Dept 2017], *lv denied* 30 NY3d 903 [2017]). A cause of action for fraud that arises out of an illegal contract must be dismissed “since relief cannot be granted on a tort cause of action that requires proof of the plaintiff's knowing entry into an illegal contract” (*Sabia v Mattituck Inlet Mar. & Shipyard, Inc.*, 24 AD3d 178, 179 [1st Dept 2005]).

Here, plaintiff testified that in 2018, she had been looking to purchase space for her own medical practice (NYSCEF Doc. No. 128, *Krakowsky affirmation, exhibit 6, plaintiff 12/14/2022 tr at 72*). Plaintiff testified that defendant pressed her to join his practice (*id.*) and purchase the Office (*id.* at 194). Plaintiff testified that she “wouldn't have purchased that space particularly....It wouldn't have been my choice space” (*id.* at 195). Nevertheless, based on defendant's representations, plaintiff and Healy formed Claerin Properties to purchase the Office.

As set forth above, this court previously determined that Education Law § 6509-a proscribes fee-splitting agreements between physicians, such as the underlying contract at issue (NYSCEF Doc. No. 127). The purpose of purchasing the Office was to further what was otherwise an illegal contract. Thus, defendant has demonstrated that “[t]he conduct at issue has a direct connection to the fraudulent inducement ... cause[ ] of action” (*Village Taxi v Beltre*, 91 AD3d 92, 101 [2d Dept 2011], citing *Sabia*, 24 AD3d at 179). Plaintiff's argument that defendant was unaware the contract was illegal is insufficient to raise a triable issue of fact since “a party to an illegal contract cannot ask a court of law to help him carry out his illegal object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose” (*Stone v Freeman*, 298 NY 268, 271 [1948]; see also *Bonilla v Rotter*, 36 AD3d 534, 535 [1st Dept 2007]). In view of the foregoing, the court need not address the other arguments advanced in support of or in opposition to the motion. Accordingly, it is

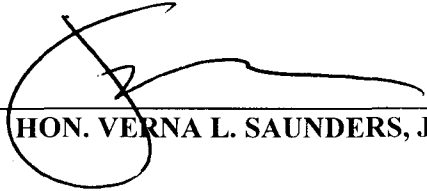
**ORDERED** that the motion brought by defendant Dr. Bernard Kruger for summary judgment dismissing the fourth cause of action for fraud is granted, and the fourth cause of action against said defendant is dismissed, and the complaint is dismissed in its entirety, with costs and disbursements as taxed by the Clerk of the Court; and it is further

**ORDERED** that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon plaintiff as well as the Clerk of the Court, who shall enter judgment accordingly; and it is further

**ORDERED** that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

September 24, 2024

  
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**HON. VERNA L. SAUNDERS, JSC**

<b>CHECK ONE:</b>	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<b>APPLICATION:</b>	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<b>CHECK IF APPROPRIATE:</b>	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE