

DeMarco v BIH, LLC

2012 NY Slip Op 32263(U)

August 2, 2012

Supreme Court, Nassau County

Docket Number: 15058/10

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

CHARLES DEMARCO, M.D.,
CHARLES COOPER, M.D., Individually and
on behalf of WILLIAMSBURG IMAGING
and JOHN KILLCOMMONS,

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 15058/10

MOTION DATE: June 19, 2012
Motion Sequence # 002

Plaintiffs,

ACTION #1

-against-

BIH, LLC and ALPHA IMAGING, LLC,

Defendants.

CDC RADIOLOGY PLLC,

Plaintiff,

INDEX No. 6233/11

ACTION #3

-against-

WILLIAMSBURG MEDICAL IMAGING, P.C.,

Defendant.

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... X

DEMARCO, et al v BIH, LLC, et al

Index no. 15058/10

Motion by defendants BIH, LLC and Alpha Imaging, LLC to consolidate the above action with action # 2, Index No. 15057/10, and action # 3, Index No. 6233/11, is **granted** only to the extent that actions # 1 and # 3 shall be tried jointly.

In action # 1 above, plaintiffs Dr. Charles DeMarco and Dr. Charles Cooper assert a claim for breach of the master agreement and seek the recovery of certain radiology equipment. On December 22, 2005, Dr. DeMarco and Dr. Cooper formed Williamsburg Imaging, LLC to construct a diagnostic imaging center at 762 Bedford Avenue in Brooklyn. Plaintiff John Kilcommons, a non-physician, was a former member of the limited liability company. On January 20, 2006, Dr. DeMarco and Dr. Cooper formed Williamsburg Medical Imaging, PC in order to conduct their radiology practice at the Bedford Avenue center in Brooklyn.

Williamsburg Imaging LLC entered into a series of equipment leases with banks or leasing companies in order to obtain the diagnostic equipment needed to operate the imaging center. However, due to financial difficulties, the LLC defaulted on its equipment leases with CIT Healthcare, M&T Credit Services, and Sterling National Bank.

Toward the end of 2009, plaintiffs began negotiating with two non-physicians, Motty Landau and Avigdor Freund, who were interested in acquiring the diagnostic equipment and leasing it to another radiologist, Dr. John Rigney. In order to implement such an arrangement, Landau and/or Freund formed two companies, defendants BIH, LLC and Alpha Imaging, LLC.

On December 17, 2009, BIH acquired CIT Healthcare's interest in its equipment lease. On April 19, 2010, BIH and Alpha Imaging entered into a "master agreement" with plaintiffs and certain other parties (Defendants' Exhib K). The other parties to the master agreement were Mark Antin, AMJB LLC, and JBAM Realty LLC. Antin, AMJB, and JBAM are also members of Williamsburg Imaging LLC.

The master agreement provided among other things that Williamsburg Imaging, LLC assigned its interest under the M&T Bank, Sovereign Bank, and Sterling Bank equipment leases to Alpha and surrendered the collateral. Williamsburg also assigned its accounts receivable to BIH and granted BIH "full access" to its bank accounts. Alpha agreed to make monthly payments on the equipment leases and to indemnify Williamsburg with respect to any arrears that might accrue. Alpha and BIH granted Williamsburg a security interest in the

DEMARCO, et al v BIH, LLC, et al

Index no. 15058/10

equipment to secure Alpha's payment obligations. On April 19, 2010, Dr. DeMarco and Dr. Cooper also entered into stock purchase agreements with Dr. Rigney who agreed to purchase their stock in the professional corporation.

Plaintiffs allege that Alpha failed to make any payments on the M&T equipment lease and the amount of rent owed is approximately \$357,000. Plaintiffs allege that Alpha failed to make any payments on the Sterling National Bank equipment lease and the amount owed is approximately \$83,796.

Plaintiff commenced action # 1 on August 6, 2010. Plaintiffs assert a claim for breach of the master agreement by failing to make the equipment lease payments. Plaintiffs also seek an order for the recovery of the radiology equipment. Plaintiffs assert additional claims for contractual indemnity, unjust enrichment, and attorney's fees.

By order dated December 17, 2010, the court denied plaintiffs' motion for an order of seizure of the radiology equipment. The court reasoned that because defendants' obligation to pay rent on the equipment may have been dependent upon plaintiffs' obligation to provide the lenders with requested financial documents, plaintiffs had not established the absence of a valid defense to their breach of contract claim (*Stoll America Knitting v Creative Knitware Corp.*, 5 AD3d 586 [2d Dept 2004]).

Action # 2, Pixel River Technology, LLC v BIH, LLC and Alpha Imaging, LLC, Index No. 15057/10, was also commenced on August 6, 2010. Pixel alleges that on April 15, 2010 it entered into a technology services agreement to provide BIH and Alpha with technology/hosting services. The technology agreement was signed on behalf of Pixel by John Kilcommons. Pixel alleges that these technology/hosting services were to assist BIH and Alpha in their role as the management company responsible for the "day-to-day affairs" of the diagnostic imaging center located at 762 Bedford Avenue in Brooklyn. Pixel seeks \$31,561 as compensation due for these services. Action # 2 has been assigned to Justice Feinman.

Action # 3 above, CDC Radiology, PLLC v Williamsburg Medical Imaging, PC, Index No. 6233/11, was commenced on April 26, 2011. CDC alleges that on April 19, 2010, it entered into a "physician service agreement" with Williamsburg Medical Imaging, PC. The physician service agreement provided that CDC (the physicians) would be paid \$30,000 per month, and the physicians assigned all their fees to Williamsburg Medical Imaging. The

physician services agreement was signed on behalf of CDC by Dr. DeMarco. CDC seeks \$120,000 which is alleged to be due under the physician service agreement. Action # 3 has been assigned to Justice Woodard.

Defendants BIH and Alpha move pursuant to CPLR §602 to consolidate all three actions on the ground that there is a common question of fact or law. Defendants argue that the common question is whether Dr. DeMarco and Killcommons themselves breached the master agreement by not delivering the contracted for medical equipment and locking defendants out of the software systems required to run the medical facility. Plaintiffs oppose consolidation on the ground that the parties are different and the cases are at different stages of discovery.

The physician service agreement may be an illegal fee splitting arrangement, if the assigned fees are shared with a non-physician. The master agreement granted BIH control over Williamsburg's financial affairs. Additionally, BIH and Alpha were responsible for managing the "day-to-day affairs" of the diagnostic imaging center. The court notes that the physician service agreement was executed the same date that Dr. DeMarco and Dr. Cooper, through the Williamsburg limited liability company, entered into the equipment lease and agreed to sell their stock in the professional corporation. The fact that unlicensed individuals were members of the Williamsburg PC suggests that they may hold an interest in the Williamsburg professional corporation. That Dr. Digney, the supposed real party in interest, has not appeared also suggests that he may be only the nominal owner of the Williamsburg professional corporation. Thus, action # 1 and action # 3 share a common issue, whether the master agreement and the physician service agreement constitute an illegal fee splitting arrangement or are otherwise unenforceable because Williamsburg Medical Imaging, PC granted control of its affairs to a non-physician (See *State Farm v Mallela*, 4 NY3d 313 [2005]).

The court notes that the same attorney who represents Dr. DeMarco, Dr. Cooper, and CDC Radiology also represents Pixel River. However, the issue of control by unlicensed individuals does not appear to be an issue in action # 2 brought by Pixel River Technology.

Accordingly, defendants' motion for consolidation is **granted** only to the extent that action # 1 and action # 3 above shall be tried jointly.

DEMARCO, et al v BIH, LLC, et al

Index no. 15058/10

Counsel in Action #1 and Action #3 are directed to appear for a status conference on September 27, 2012 at 9:30 a.m. in Chambers of the undersigned.

So ordered.

Dated AUG 02 2012


J.S.C.

ENTERED
AUG 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE