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INDEX
NO. 13769-04

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 18 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 8-4-05
Submission Date: 10-3-05
Motion Sequence No.: 003,004,005/
MOT D

LONG ISLAND WOMEN'S HEALTH CARE ASSOCIATES, M.D., P.C.

Plaintiff,

- against -

JOAN HASELKORN-LOMASKY, M.D., POLINA KAGAN, M.D. and SOUTH SHORE WOMEN'S MEDICAL ASSOCIATES, L.L.C.,

Defendants,

JOAN HASELKORN-LOMASKY, M.D., POLINA KAGAN, M.D. and SOUTH SHORE WOMEN'S MEDICAL ASSOCIATES, L.L.C.

Third-Party Plaintiffs,

- against -

STEVEN MILIM, M.D., DOUGLAS PHILLIPS, M.D., and HOWARD NATHANSON, M.D.,

Third-Party Defendants.

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(for Third-Party Defendant)
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ORDER

The following papers were read on Defendants' motion to dismiss the complaint,

LONG ISLAND WOMEN'S HEALTH CARE ASSOCIATES, M.D., P.C., *et al.* v. HASELKORN-LOMASKY, M.D., *et al.*
Index No. 13769-04

Third-party Plaintiffs' motion to dismiss the counterclaims of the Third-party Defendants and Third-party Plaintiffs' motion to grant summary judgment dismissing the third-party complaint:

Motion Sequence No. 3

Notice of Motion dated July 15, 2005;
Affirmation of Myra G. Sencer, Esq. dated July 15, 2005;

Motion Sequence No. 4

Notice of Motion dated July 12, 2005;
Affirmation of Myra G. Sencer, Esq. dated August 12, 2005;

Motion Sequence No. 5

Notice of Cross-motion dated September 22, 2005;
Affidavit of Steven Milim sworn to on September 22, 2005;
Affirmation of Alan T. Rothbard, Esq. dated September 22, 2005;

Other Papers

Affidavit of Steven Milim sworn to on August 15, 2005;
Affirmation of Steven J. Eisman, Esq. dated August 17, 2005;
Affirmation of Myra G. Senser, Esq. dated August 15, 2005;
Affidavit of Joan Haselkorn-Lomansky sworn to on August 25, 2005;
Affirmation of Myra G. Senser, Esq. dated October 14, 2005;
Affidavit of Polina Kagan sworn to on October 12, 2005;
Affirmation of Alan T. Rothbard, Esq. dated October 26, 2005.

Defendants Joan Haselkorn-Lomasky, M.D., Polina Kagan, M.D., and South Shore Woman's Medical Associates, LLC move puruant to CPLR 3211 (a)(7) for an order dismissing the Plaintiff's complaint.

Defendants, third-party Plaintiffs cross-move pursuant to CPLR 3211 (a)(7) for an

order dismissing the third-party counterclaims interposed by Third-party Defendants Steven Milim, M.D., Douglas Phillips, M.D., and Howard Nathanson, M.D.

Third-party Defendants Steven Milim, M.D., Douglas Phillips, M.D., and Howard Nathanson, M.D. cross-move pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint.

BACKGROUND

This action arises from a contentious dispute among several physicians who formerly practiced together as shareholders in, and as members of, Plaintiff Long Island Women's Health Care Associates, M.D., P.C. ("Health Care"), a single-specialty, professional corporation which was originally established in 1990.

The five original shareholders of Health Care, which maintains offices in both Cedarhurst and Bellmore, include Third-party Defendants Steven Milim ("Milim"), Douglas Phillips ("Phillips") and Howard Nathanson ("Nathanson") as well as Steven Meltzer ("Meltzer") and Defendant/Third-party Plaintiff Joan Haselkorn-Lomasky ("Haselkorn") each of whom owned 20% Health Care's outstanding shares.

In August 1998, after Meltzer died, Defendant/Third-party Plaintiff Polina Kagan ("Kagan") became a shareholder in Health Care and entered into a new shareholders agreement ("1998 Agreement") with Milim and Haselkorn, pursuant to which all three became equal shareholders in Health Care.

Shortly before the 1998 Agreement was executed, Nathanson and Phillips

terminated their status as shareholders, although they continued their association with Health Care as independent contractors.

Notably, paragraph 26 (a) of the 1998 Agreement provides, in substance, that at any time during their respective lifetimes, Nathanson and Phillips could exercise an option to again become equal shareholders in Health Care – with Milim, Haselkorn and Kagan – provided that they executed a "Joinder Agreement" and paid a nominal consideration for their shares within 30 days after exercising their contractual option.

Thereafter, the parties' relationship deteriorated. In July 2004, Haselkorn and Kagan verbally apprised Milim that they intended to voluntarily terminate their employment with Health Care (Milim Aff. in Opp., ¶¶ 10-11).

By letter dated August 30, 2004, Haselkorn and Kagan informed Milim that they expected to finally terminate their employment with Health Care by the end of September, 2004 (Milim Aff., ¶ 11).

In August 2004, Phillips and Nathanson elected to exercise their option to become shareholders in Health Care pursuant to paragraph 26 of the 1998 Agreement.

Toward the end of August 2004, Haselkorn and Kagan formed South Shore Women's Medical Associates, LLC ("South Shore"), and entered into a leasehold for premises located in Oceanside, New York which was to commence in October 2004.

According to Milim, after Haselkorn and Kagan announced that they intended to leave Health Care, and while still in Health Care's employ, they embarked upon a course of conduct "clearly designed to destroy" Health Care (Milim Aff. in Opp.,¶ 16).

More particularly, Milim contends that – even as their new facility was accepting appointments – the Defendants: (1) approached Health Care's employees and solicited them to join their new practice; (2) surreptitiously entered Health Care's offices after business hours, downloaded confidential patient information and removed medical equipment; (3) mass-mailed misleading announcement letters to Health Care's patients which allegedly suggested that Health Care was closing; and (4) encouraged patients to cancel appointments at Health Care and to reschedule them at Defendants' new facility after October 1, 2004 (Milim Aff., in Opp., ¶¶ 19-23; Cmplt.,¶ 15).

In October 2004, and based on the foregoing allegations, Health Care commenced this action against Haselkorn, Kagan and South Shore.

The verified complaint alleges six causes of action sounding in breach of Defendants' fiduciary duties; wrongful conversion of corporate assets/trade secrets; fraudulent misrepresentation; breach of the covenant of good faith and fair dealing; unfair competition; and a claim for permanent injunctive relief. Defendants have answered and interposed nineteen separate counterclaims.

In November 2004, Haselkorn, Kagan and South Shore commenced a third-party action against Milim, Phillips, and Nathanson alleging twenty-one separately pleaded causes of action, which are essentially identical to the nineteen counterclaims already set forth in their answer.

Milim, Nathanson and Phillips have answered and interposed six counterclaims,

which are virtually identical to the six causes of action advanced by Health Care in the main action.

By so-ordered stipulation dated November 12, 2004, the parties agreed, among other things, that South Shore would not solicit Health Care's patients and that the parties would not instruct the patients of either practice to cancel existing appointments; nor would they advise patients that appointments had been cancelled.

While this action was pending, Haselkorn and Kagan, as shareholders of Health Care, commenced a related proceeding for dissolution of Health Care pursuant to Business Corporation Law § 1104.

By order dated April 5, 2005, this Court dismissed the petition, concluding among other things, that: (1) since Phillips and Nathanson rejoined the practice, the petitioners (Defendants herein) did not hold the requisite, 50% interest in Health Care (BCL § 1104[a]); (2) the petitioners did not state a claim under BCL § 1104-a (2); and (3) there was insufficient proof of internal dissension and/or managerial deadlock supporting a dissolution within the meaning of BCL § 1104(a)(1), (2), (3).

Although this Court did conclude that the petitioners' claims could potentially state a claim for oppressive conduct pursuant to BCL § 1104-a(1), the Court observed that dissolution on that ground was unwarranted where the shareholder agreement contained a buyout provision.

The Court's dismissal of the dissolution proceeding was, however, without prejudice to the petitioners' "seeking damages, if any, arising from the withholding of * *

*[medical] records and/or the misdirecting of patient inquiries" and "also without prejudice to Petitioners' claims for adjustment in the distribution/buyout of their respective shares based upon claims of alleged mismanagement, breach of fiduciary duty, breach of the Health Shareholder Agreement or any other theory which negatively affects the value of their shares."

Defendants now move, pursuant to CPLR 3211 (a)(7), for an order dismissing all six causes of action interposed by the Health Care in the main action.

Additionally, Third-party Defendants Milim, Philips and Nathanson cross-move, pursuant to CPLR 3212, for an order dismissing the third-party action, while Third-party Plaintiffs cross-move, pursuant to CPLR 3211, for dismissal of the six counterclaims interposed by the Third-party Defendants.

DISCUSSION

A. Defendants' Motion

1. *First Cause of Action*

With respect to Defendants' motion, accepting the facts alleged by the Plaintiff as true, and according the pleading and affidavits submitted "the benefit of every possible inference" (Sokoloff v. Harriman Estates Development Corp., 96 N.Y. 2d 409, 414 [2001]; Leon v. Martinez, 84 N.Y. 2d 83, 87-88 [1994]; Rovello v. Orofino Realty Co. Inc., 40 N.Y. 2d 633, 638 [1976]; and Operative Cake Corp. v. Nassour, 21 A.D. 3d 1020 [2nd Dept. 2005]), the Court agrees that the first cause of action is sustainable at this juncture, since Health Care has alleged, *inter alia,* that Defendants Hasselkorn and

Kagan, while in its employ, utilized trade secrets, confidential information and otherwise engaged in disloyal and fraudulent conduct through, the improper using its "time, facilities, and/or proprietary secrets." Don Buchwald & Assocs., Inc. v. Marber-Rich, 11 A.D. 3d 277, 278 (1st Dept. 2004); Wallack Freight Lines, Inc. v. Next Day Express, Inc., 273 A.D. 2d 462, 463 (2nd Dept. 2000); Schneider Leasing Plus, Inc. v. Stallone, 172 A.D. 2d 739, 741 (2nd Dept. 1991). *See,* Hair Say, Ltd. v. Salon Opus, Inc., 6 Misc.3d 1041(A) (Sup. Ct. Nassau Co. 2005); and Prohealth Care Associates, LLP. v. April, 4 Misc.3d 1017(A) (Sup. Ct., Nassau Co. 2004). See also, CBS Corp. v. Dumsday, 268 A.D. 2d 350, 353 (1st Dept. 2000); and Laro Maintenance Corp. v. Culkin, 267 A.D. 2d 431, 433 (2nd Dept. 1999).

While it is true that absent a nonsolicitation agreement or restrictive covenant, "a former employee may freely compete with a former employer", and even incorporate a competing business (Pearlgreen Corp. v. Yau Chi Chu, 8 A.D. 3d 460 [2nd Dept. 2004]; Falco v. Parry, 6 A.D. 3d 1138 [4th Dept. 2004]; Wallack Freight Lines, Inc. v. Next Day Express, Inc., *supra;* and Starlight Limousine Serv. v. Cucinella, 275 A.D. 2d 704 [2nd Dept. 2000]), he or she may not do so by misappropriating trade secrets or employing fraudulent methods. Don Buchwald & Associates, Inc. v. Marber-Rich, *supra*.

This Court's decision in ***Prohealth***, is not determinative under the circumstances presented. In ***Prohealth***, this Court held that the departing physicians therein were entitled to the names and record of their own patients. See, Lewis v. Clement, 1

Misc.3d 464, 465 (Supreme Ct., Monroe Co. 2003) *Cf.*, Gerson v. New York Women's Medical, P.C., 249 A.D. 2d 265 (2nd Dept. 1998). Here, Plaintiff contends that its practice was conducted in such a way that no single physician had his or her own individual patients. That is, a patient would be "seen by whichever doctor was available/on call at the time of their office visit." (Milim Aff. in Opp., ¶¶ 5-7).

Defendants' contentions to the contrary, as well as their claims that they did not, in fact, utilize Health Care's "time, facilities, and/or proprietary trade secrets" – or commit any wrongdoing at all – generate issues of fact and credibility which cannot be summarily resolved on a motion. See, Don Buchwald & Associates, Inc. v. Marber-Rich, *supra;* Priovolos v. St. Barnabas Hosp., 1 A.D. 3d 126, 128 (1st Dept. 2003); Howard Berger Co., Inc. v. Ye, 272 A.D. 2d 445, 446 (2nd Dept. 2000); and Hair Say, Ltd. v. Salon Opus, Inc., *supra* at *8. See also, Stuart Realty Co. v. Rye Country Store, Inc., 296 AD2d 455, 456 (2nd Dept. 2002). Ippolito v. Lennon, 150 A.D. 2d 300, 304 (1st Dept. 1999) (on a motion to dismiss, the credibility of the parties is not under consideration).

Further, Defendants' claim that the patient materials at issue were not actually trade secrets and/or never maintained with the requisite degree of confidentiality, has been articulated in what is effectively an attorney's reply affirmation. In any event, such contention merely creates an additional question of fact.

Notably, "[t]he question of whether or not a customer list is a trade secret is generally a question of fact." A.F.A. Tours, Inc. v. Whitchurch, 937 F.2d 82, 89 (2nd Cir.

1991); Golden Eagle/Satellite Archery, Inc. v. Eplin, 291 A.D. 2d 838 (4th Dept. 2002); and Spectron Glass & Electronics, Inc. v. Marianovsky, 273 A.D. 2d 374 (2nd Dept. 2000).

Thus, the motion to dismiss the forst cause of action must be denied. See gen'lly, Ashland Mgt. Inc. v. Janien, 82 N.Y. 2d 395, 407 (1993).

2. *Second Cause of Action*

The second cause of action, interposed as against Haselkorn and Kagan, alleges that these Defendants conspired with one another to convert property, including patient lists, unspecified equipment and supplies. As a result of this wrongful conversion of corporate assets, the Plaintiff has sustained damage (Cmplt.,¶¶ 18-22).

"The rule is clear that, to establish a cause of action in conversion, the Plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the Defendant exercised an unauthorized dominion over the thing in question * * * to the exclusion of the Plaintiff's rights * * * Tangible personal property or *specific money* must be involved." Independence Discount Corp. v. Bressner, 47 A.D. 2d 756, 757 (2nd Dept. 1975); [emphasis in original]. See, Estate of Giustino v. Estate of DelPizzo, 21 A.D. 3d 523 (2nd Dept. 2005); Batsidis v. Batsidis, 9 A.D. 3d 342 (2nd Dept. 2004); and Fiorenti v. Central Emergency Physicians, PLLC, 305 A.D. 2d 453 (2nd Dept. 2003). See also, State v. Seventh Regiment Fund, Inc., 98 N.Y. 2d 249, 259-60 (2002); and Matzan v. Eastman Kodak Co., 134 A.D.2d 863 (4th Dept. 1987).

Initially, that branch of the second cause of action which is predicated on the alleged removal of Health Care's patient list does not state a claim sounding in conversion, since it is not alleged that the Defendants deprived Health Care of the list itself. Hair Say, Ltd. v. Salon Opus, Inc., *supra* at *14-15. *Cf.*, State v. Seventh Regiment Fund, Inc., *supra* at 259-60; Waldron v. Ball Corp., 210 A.D. 2d 611 (3rd Dept. 1994).

However, insofar as the second cause of action alleges that the individual Defendants, acting jointly and in concert, tortiously and wrongfully "exercised an unauthorized dominion over" Health Care's property and equipment, it adequately states a claim sounding conversion. Defendants' contentions, in effect, that they did not – or could not – have converted the property because Health Care changed office alarm codes and passwords raise factual issues not amenable to resolution upon the parties' conflicting submissions. To this extent, the second cause of action must be sustained.

3. *Third Cause of Action*

The third cause of action, sounding in fraudulent misrepresentation, alleges that Haselkorn and Kagan falsely advised Health Care's patients that Health Care's Cedarhurst office was closing; that these statements were part of a fraudulent scheme to unfairly compete with Health Care; and that the alleged falsities were uttered to induce patients treated at the Cedarhurst office to terminate their relationship with Health Care and to seek treatment at the Defendants' offices (Cmplt.,¶¶ 23-27). Essentially, the same

allegation has been made in support of the Plaintiff's first cause of action sounding in breach of fiduciary duty (Cmplt., ¶ 15[i]).

To recover damages for fraud, a Plaintiff must plead with particularity and prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant; (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it; (3) justifiable reliance of the plaintiff on the misrepresentation or material omission; and (4) injury. Lama Holding Co. v. Smith Barney Inc., 88 N.Y. 2d 413, 421 (1996); Jablonski v. Rapalje, 14 A.D. 3d 484, 487 (2nd Dept. 2005); Tanzman v. La Pietra, 8 A.D. 3d 706, 707 (3rd Dept. 2004). See, CPLR 3016(b).

The Court agrees that the third cause of action is miscast as one purportedly sounding in fraudulent misrepresentation, since the gravamen of the asserted theory of recovery is not that Health Care was mislead to its detriment by reliance upon materially false statements, but rather, that falsehoods were allegedly uttered by Defendants to certain third parties; to wit: patients of Health Care. L.W.C. Agency, Inc v. St Paul Fire & Marine Ins. Co., 125 A.D. 2d 371, 373 (2nd Dept. 1986). Indeed, the cause of action does not contain an allegation of reliance upon the claimed fraudulent statements. Chasanoff v. Perlberg, 19 A.D. 3d 635 (2nd Dept. 2005); and Anderson v. Hill, 6 A.D. 3d 361, 362 1st Dept. 2004).

Although Plaintiff's right, if any, to maintain a given tort claim "does not hinge upon * * [the] label" assigned to it (Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co., 7 A.D.2d

441, 443 [1st Dept. 1959]), to the extent that the third cause of action can be viewed as implicating the tort of injurious falsehood (L.W.C. Agency, Inc v. St Paul Fire & Marine Ins. Co. *supra*; Duane Jones Co. Inc. v. Burke, 306 NY 172, 190 [1954]), it is nevertheless defective since the complaint does not contain the requisite allegations of special damage. Gilliam v. Richard M. Greenspan, P.C., 17 A.D. 3d 634, 635 (2nd Dept. 2005); Leslesne v. Leslesne, 292 A.D. 2d 507 (2nd Dept. 2002); Wasserman v. Maimonides Medical Center, 268 A.D. 2d 425, 426 (2nd Dept. 2000); DiSanto v. Forsyth, 258 A.D. 2d 497, 498 (2nd Dept. 1998); L.W.C. Agency, Inc. v. St. Paul Fire & Marine Ins., *supra* at 373. See also, Drug Research Corp. v. Curtis Publishing Co., 7 N.Y. 2d 435, 441 (1960).

Accordingly, this cause of action must be dismissed.

4. *Fourth Cause of Action*

The bare-boned fourth cause of action, alleging breach of the 1998 Agreement, incorporates by reference, the preceding allegations and then asserts – without explanatory and/or particularized supporting averments – that the Defendants have violated unstated provisions of the agreement and the "covenants of good faith and fair dealing inherent therein" (Cmplt.,¶¶ 28-30). The Court notes the same allegations have already been made in support of the first cause of action (breach of fiduciary duty). See, Fesseha v. TD Waterhouse Investor Services, Inc., 305 A.D. 2d 268, 269 (1st Dept. 2003).

Notably, "[i]n order to plead a breach of contract cause of action, a complaint must allege the provisions of the contract upon which the claim is based * * *." Atkinson v. Mobil Oil Corp., 205 A.D. 2d 719, 720 (2nd Dept. 1994). See also, Maldonado v. Olympia Mechanical Piping & Heating, 8 A.D. 3d 348, 350 (2nd Dept. 2004). "[V]ague and conclusory allegations" will not suffice. Gordon v. Dino De Laurentiis Corp., 141 A.D. 2d 435, 436 (2nd Dept. 1988). See, Fowler v. American Lawyer Media, Inc., 306 A.D. 2d 113 (1st Dept. 2003); and Rattenni v. Cerreta, 285 A.D. 2d 636, 637 (2nd Dept. 2001).

Here, neither the complaint nor Plaintiff's opposing submissions, adequately indicates precisely what provision of the 1998 Shareholders Agreement was breached by Defendants (e.g., Cmplt.,¶¶ 28-30).

Nor can this claim be alternatively sustained as a breach of the duty of fair dealing (Murphy v. American Home Products Corp., 58 N.Y. 2d 293, 304-305 [1983]), since that duty does "not create any obligations beyond those stated in the contract" (DHB Industries, Inc. v. West-Post Management Co., 9 Misc.3d 1130(A) [Sup. Ct. Nassau Co. 2005]), and therefore cannot salvage a defective breach of contract claim. Jacobs Private Equity, LLC v. 450 Park LLC, 22 A.D. 3d 347 (1st Dept. 2005); Fesseha v. TD Waterhouse Investor Services, Inc., *supra*; Triton Partners LLC v. Prudential Securities Inc., 301 A.D. 2d 411 (1st Dept. 2003). See also, Sutton Associates v. Lexis-Nexis, 196 Misc.2d 30, 33-34 (Sup. Ct. Nassau Co. 2003).

The fourth cause of action must, therefore, be dismissed.

5. *Fifth Cause of Action*

Plaintiff's fifth cause of action sounds in unfair competition, which is generally predicated "upon the alleged bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information or trade secrets.'" Beverage Marketing USA, Inc. v. South Beach Beverage Co., Inc., 20 A.D. 3d 439 (2nd Dept. 2005), *quoting,* Eagle Comtronics v. Pico Products, Inc., 256 A.D. 2d 1202, 1203 (4th Dept. 1998). See also, Ruder & Finn Inc. v. Seaboard Sur. Co., 52 N.Y. 2d 663, 671 (1981); Bender Ins. Agency v. Treiber Ins. Agency, 283 A.D. 2d 448, 450 (2nd Dept. 2001); Laro Maintenance Corp. v. Culkin, *supra*; CBS Corp. v. Dumsday, *supra* at 353; Capitaland Heating and Cooling, Inc. v. Capitol Refrigeration Co., Inc., 134 A.D. 2d 721, 722 (3rd Dept. 1987). Significantly, the "[r]esolution of * * * [an unfair competition] issue requires a complex factual analysis of a variety of factors including the character and circumstances of the business." *Id.* at 722.

Since this Court has already upheld, as potentially viable, the factual allegations made with respect to the Defendants' purported misappropriation of the Health Care's patient materials, the Court concludes that upon liberally reviewing the complaint, the unfair competition claim is sufficient to withstand the Defendants' motion at this juncture. CBS Corp. v. Dumsday, *supra*; and Rao v. Verde, 222 A.D. 2d 569 (2nd Dept. 1995).

6. *Sixth Cause of Action*

Lastly, and notwithstanding the execution of the November 2004 stipulation, since the Court has sustained several of Plaintiff's claims, that branch of Defendants' motion to dismiss Plaintiffs' cause of action for a permanent junction should be denied at this juncture.

B. The Cross-Motions

Third-party Plaintiffs and Third-party Defendants have also cross moved, respectively, for: (1) dismissal of the third-party counterclaims pursuant to CPLR 3211; and (2) summary judgment dismissing the third-party complaint.

Preliminarily, Third-party Defendants contend that the third-party action is defective and procedurally improper, since the counterclaims asserted do not arise from – nor are they conditioned upon – Health Care's potential recovery as against the Defendants in the main action. Lucci v. Lucci, 150 A.D. 2d 649 (2nd Dept. 1989). See also, Sklar v. Garrett, 195 A.D. 2d 454 (2nd Dept. 1993). This argument is persuasive.

CPLR 1007, entitled "When third-party practice allowed," provides, in part, that "[a]fter the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant, * * *"

Third-party Defendants assert that not one of the twenty-one third-party causes of

action contains the requisite "claim over connection." That is, there is no claim for indemnity advanced and "no cause of action * * * is conditioned upon * * * [Health Care's] recovery" against them in the main action. See, Alexander, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C1007, pp. 39-45. The Court agrees.

Although the impleader language of CPLR 1007 has been liberally construed (See, George Cohen Agency, Inc. v. Donald S. Perlman Agency, Inc., 51 N.Y. 2d 358, 364 [1980]), and does "not limit the amount which may be recovered or the legal theories which may be asserted as the basis for a third-party claim" (Ainspan v. City of Albany, 132 A.D. 2d 911, 913 [3rd Dept. 1987]), "the third-party claim must be sufficiently related to the main action to at least raise the question of 'whether the third-party defendant may be liable to defendant-third-party plaintiff, for whatever reason, for the damages for which the latter may be liable to plaintiff.'" Rausch v. Garland, 88 A.D. 2d 1021, 1022 *quoting*, Norman Co. Inc. v. County of Nassau, 63 Misc. 2d 965, 969 (Sup. Ct. Nassau Co. 1970). Accord, Zurich Ins. Co. v. White, 129 A.D. 2d 388, 390-391 (3rd Dept. 1987). See *also*, Sklar v. Garrett, *supra*; Lucci v. Lucci, *supra*; Ainspan v. City of Albany, *supra* at 913. See gen'lly, Alexander, *Practice Commentaries*, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C1007, pp. 39-45.

It is clear that none of the third-party causes of action interposed contains the "claim over" component expressly required by the language of CPLR 1007 and controlling case law. See, Sklar v. Garrett, *supra;* Lucci v. Lucci, *supra*; Ainspan v. City

of Albany, *supra*; BBIG Realty Corp. v. Ginsberg, 111 A.D. 2d 91, 92 (1st Dept. 1987). See also, Warner v. Levinson, 188 A.D. 2d 268 (1st Dept. 1992); DeLuca v. Lett, 173 A.D.2d 760, 763 (2nd Dept. 1991). See also, Alexander, *Practice Commentaries*, *supra*; McKinney's Cons. Laws of N.Y., Book 7B, CPLR C1007, at 44-45. That is, the third-party claims do not arise from nor are they conditioned upon the liability asserted against the Defendants/third-party Plaintiff in the main action. Rather, they are predicated upon entirely independent theories of recovery arising from factual claims bearing no "claim over" relation to the Plaintiff's main theories of recovery.

Moreover, the institution of the subject, third-party action under the circumstances presented does not further the objectives underlying CPLR 1007; namely, to "promote judicial economy and to avoid multiplicity of actions." Rausch v. Garland, *supra* at 1022. See, Krause v. American Guarantee & Liability Ins. Co., 22 N.Y. 2d 147, 152-153 (1968). Indeed, the institution of the subject third-party action has effectively generated a thicket of redundant claims interposed simultaneously in both the main and third-party actions, creating needless procedural complexity and unnecessarily complicating the resolution of the parties' motions.

Lastly, and contrary to claims of the Third-party Plaintiffs, none of the cases cited in their papers stands for the proposition that the requirements of CPLR 1007 have been waived upon the facts presented here.

In short, the Court agrees that Third-party Defendants' motion for summary judgment dismissing the third-party action should be granted.

The Court's dismissal, however, is without prejudice to the making of an appropriately supported request for leave to add new parties and/or legal claims to the main action which is already pending before this Court.

In light of the Court's determination, it is unnecessary to reach the Third-party Plaintiffs' cross-motion for an order dismissing the third-party counterclaims interposed by Milim, Nathanson and Phillips.

Accordingly, it is,

ORDERED that the motion by Defendants Joan Haselkorn-Lomasky. M.D., Polina Kagan, M.D., and South Shore Woman's Medical Associates, LLC, dismissing the Plaintiff's complaint is **granted** to the extent that the third and fourth causes of action are dismissed; and the motion is otherwise **denied**; and it is further,

ORDERED that the cross-motion by Third-party Defendants Steven Milim, M.D., Douglas Phillips, M.D. and Howard Nathanson, M.D., for summary judgment dismissing the third-party complaint, is **granted**; and it is further,

LONG ISLAND WOMEN'S HEALTH CARE ASSOCIATES, M.D., *et al.* v.
HASELKORN-LOMANSKY, *et al.*
Index No. 13769-04

ORDERED that the cross-motion pursuant to CPLR 3211 by the Defendants/Third-party Plaintiffs, for an order dismissing the third-party counterclaims, is **denied** as moot.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 27, 2005

Hon. LEONARD B. AUSTIN, J.S.C.