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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present: HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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AMERICAN MEDICAL AND LIFE INSURANCE COMPANY,

Plaintiff,

-against-

CROSSSUMMIT ENTERPRISES, INC., CROSSWALK HOLDINGS, INC., RICHARD J. DUNN, AND KEVIN DUNN,

Defendants.

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CROSSSUMMIT ENTERPRISES, INC., d/b/a CROSS AMERICA HEALTH PLANS,

Third-Party Plaintiff,

-against-

JOHN OLLIS, ANDREW ALBERTI, JOHN GREEN, SCOTT MCGREGOR, EDWARD MCKERNAN, ROBERT OSTRANDER, RONALD PACK, MICHAEL C. SZWAJKOWSKI, TUCKER TAYLOR, DOUGLAS THOMAS and DONALD TRUDEAU,

Third-Party Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No. 018059-08
Motion Seq. Nos. 3 & 4
Submission Date: 2/1/10

The following papers have been read on these motions:

Notice of Motion, Affirmation in Support and Exhibits.....x
Third-Party Defendants' Memorandum of Law in Support.....x
Notice of Cross Motion.....x
Affirmation in Support/Opposition and Exhibit.....x
Affidavit in Support/Opposition and Exhibit.....x
Memorandum of Law in Support/Opposition.....x
Affirmation in Opposition to Cross Motion and Exhibits.....x
Plaintiff's Memorandum of Law in Opposition.....x

(Papers Cont.)

Reply Affidavit in Support/Opposition.....x
Reply Affidavit and Exhibit.....x
Third-Party Defendants' Reply Memorandum of Law.....x

This matter is before the Court for decision on 1) the motion filed by Third-Party Defendants John Ollis ("Ollis"), Andrew Alberti ("Alberti"), John Green ("Green"), Scott McGregor ("McGregor"), Edward McKernan ("McKernan"), Robert Ostrander ("Ostrander"), Ronald Pack ("Pack"), Michael C. Szwajkowski ("Szwajkowski"), Tucker Taylor ("Taylor"), Douglas Thomas ("Thomas") and Donald Trudeau ("Trudeau") (collectively "Third-Party Defendants") on June 30, 2009, and 2) the motion filed by Defendants Richard J. Dunn ("R. Dunn") and Kevin Dunn ("K. Dunn") (collectively "Dunns") on August 21, 2009, both of which were submitted on February 1, 2010. For the reasons set forth below, the Court 1) grants the motion by the Third-Party Defendants to dismiss the Third-Party Complaint against them; 2) grants the motion by the Dunns to dismiss the verified complaint as against them; and 3) denies the application of Defendants/Third Party Plaintiffs for leave to replead.

BACKGROUND

A. Relief Sought

Third-Party Defendants move for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Third-Party Complaint.

The Dunns cross move for an Order, 1) pursuant to CPLR § 3211(a)(7), dismissing the Verified Complaint ("Complaint") in its entirety against the Dunns; and 2) denying the Third-Party Defendants' motion to dismiss; or, alternatively, 3) denying the Third-Party Defendants' motion to dismiss until after discovery; or, alternatively, 4) granting leave to amend the General Denial and Third-Party Complaint.

B. The Parties' History

1. Prior Decision Dated May 18, 2009

By decision dated May 18, 2009 ("Prior Decision"), this Court denied Plaintiff's application for injunctive relief. In the Prior Decision, the Court provided the following background of this litigation:

This action involves group limited medical policies underwritten by AMLI. On June 22, 2006, AMLI entered into a managing general underwriting and administrative services agreement ("MGU") with Crosswalk Holdings Corporation ("Crosswalk"), wherein AMLI appointed Crosswalk as its principal agent and representative for the marketing of the policy under a separate agency agreement ("MGA"). Thereafter, Crosswalk was replaced by an affiliated entity, CrossSummit Enterprises, Inc. ("CrossSummit"). Defendants Richard J. Dunn and Kevin Dunn are the Chairman and President, respectively of CrossSummit.

The agreements between the parties required defendants to identify associations who would be interested in becoming policyholders for the benefit of their members. Upon identifying an interested association, CrossSummit was to submit all relevant documentation to AMLI so that AMLI could design a coverage plan for the association, issue appropriate rates, and bind coverage. After coverage was bound, CrossSummit was responsible for the collection of premiums, which would be placed in one of two interest bearing accounts in AMLI's name. Except for certain administrative fees for which CrossSummit was responsible and CrossSummit's own fee, the entirety of the premiums was to be placed in one of these two accounts.

On August 20, 2008, AMLI sent two notices to Crosswalk/CrossSummit terminating defendants as the exclusive underwriter and agent. In addition, Crosswalk and CrossSummit were required to "cease and desist any and all marketing, selling and/or binding of, under and pursuant to any policy insured and/or underwritten by AMLI" and to "make available to AMLI any and all records pertaining to the Agreement and the Policies."

On September 30, 2008, AMLI filed a summons and complaint asserting causes of action for fraud, breach of contract, unjust enrichment, breach of fiduciary duty, and conversion. Thereafter, AMLI moved by Order to Show Cause for a preliminary injunction preventing defendants from engaging in any activity related to AMLI, compelling defendants to submit to an audit, and compelling defendants to place premiums into escrow pending the resolution of this matter.

On October 2, 2008, the Court (Austin, J.) heard AMLI's motion and ultimately issued an order ("'08 Order") permanently enjoining defendants from, among other things, marketing, selling or binding any policy underwritten by AMLI, and destroying any records relating to. The

'08 Order also stated that defendants would consent to an audit on or before October 6, 2008, and provide all relevant documents to AMLI by that date. On October 27, 2008, the parties entered into a Stipulation stating that AMLI would provide a copy of the audit report performed by its independent auditor SMART by November 25, 2008, and the hearing on the issue regarding the placement of funds into escrow was rescheduled for December 4, 2008.

SMART then conducted a review of Cross America's Premium, Collections, Cash Management processes and reporting to AMLI for the period August 1, 2006 through July 31, 2008. The audit objectives were (1) to ensure that Cross America had adequate procedures and internal controls, (2) to ensure that Cross America had acted in compliance with the terms of the Agency Administration Agreements executed in June and July 2006, and (3) to determine the amount of premiums due. Plaintiff subsequently moved for an order requiring Defendants to place $2.7 million dollars into escrow to enforce compliance with Insurance Law § 2120(a). In the Prior Decision, the Court denied Plaintiff's motion, concluding that Plaintiff had not met its burden to warrant injunctive relief.

2. Third-Party Complaint

On September 30, 2008, Cross-Summit Enterprises, Inc. filed a summons and complaint in the Superior Court of New Jersey, Morris County, Law Division (Ex B to Katz Affirmation) against AMLI, Ollis, Alberti, Green, McGregor, McKernan, Ostrander, Szwajkowski, Taylor, Thomas and Trudeau. On October 2, 2008, AMLI, Cross-Summit and the Dunns executed a Stipulation and Order pursuant to which Cross-Summit was directed to withdraw the New Jersey complaint, and that complaint was deemed a general denial and counterclaim in the main action.

On May 29, 2009, Cross-Summit's counsel agreed to purchase a third-party index number in the New York State Supreme Court. The third-party complaint asserts causes of action against the Third-Party Defendants [1] for: 1) breach of contract, 2) violation of the New Jersey Unfair Competition Act, 3) breach of fiduciary duties and covenants of good faith and fair dealing, 4) tortious interference with contract, 5) business tort, 6) tortious interference with prospective economic damage, 7) unjust enrichment, and 8) slander. Generally, CrossSummit contends that the Third-Party Defendants terminated the MGUs and MGAs without justification

[1] The caption of the third-party action in the motion papers before the Court does not list AMLI as a TPD.

in an attempt to steal CrossSummit's customers and avoid having to pay fees to CrossSummit.

The slander claim is based on the allegations that 1) on or about July 9, 2008, Ollis and various officers of AMLI including Michael Murphy ("Murphy") and Joanne Billie ("Billie") spoke by telephone with Scott Stripani ("Stripani") and Christopher Sabatella, principal owners of the National Conference of Employers, a licensed Association and direct client of Cross-Summit, and with Daniel Touzier ("Touzier"), principal owner of Cinergy, also a direct client of Cross-Summit; 2) on or about August 25, 2008, Ollis, Murphy, Billie and AMLI General Counsel Craig Greenfield met with Stripani; 3) at the first of these meetings, "Defendant Ollis and Defendant's officers and/or General Counsel inferred to [Messrs.] Stripani and Touzier that Plaintiff was about to be terminated and, in the latter meeting, that Plaintiff had in fact been terminated, because of Plaintiff's dishonest and perhaps criminal dealings with Defendants, that Plaintiff had withheld money from Defendants and that Plaintiff was guilty of various other forms of criminal malfeasance" (Third-Party Complaint at ¶ 57);" and 4) "these false and malicious statements were then followed by a statement to said clients that they would no longer be permitted to market the Limited Medical Program developed by Plaintiff and insured by Defendant, and thus lose their ability to earn future commissions through the sale of these AMLI-insured products, if they did not circumvent Plaintiff and work directly for AMLI" (Third-Party Complaint at ¶ 58).

On January 12, 2009, the Third-Party Defendants served and filed an answer to the CrossSummit complaint.

C. The Parties' Positions

The Dunns seek dismissal on the ground that, with respect to the allegations in the Complaint, they acted in their corporate capacities and are therefore not personally liable. AMLI opposes the motion, submitting that the Dunns can be held individually liable because they participated in or had knowledge of a fraud.

The Third-Party Defendants move to dismiss the Third-Party Complaint against them on the grounds that they cannot be held personally liable to CrossSummit on any of its claims because the alleged conduct relates to these individuals' respective corporate roles at AMLI.

Defendants/Third Party Plaintiffs affirm that, during the proceedings regarding the prior Order to Show Cause, they learned additional facts regarding communications between certain

Third-Party Defendants and CrossSummit's client network. They ask the Court to permit Defendants to amend their pleadings to reflect these additional facts which, they submit, would provide a basis for the individual liability of some of the Third-Party Defendants. Defendants submit that their initial pleading in New Jersey met that state's pleading requirements and request permission to supplement their pleadings in this matter. They have provided a Proposed Amended Third-Party Complaint (Ex. A to Goodgold Aff.).

Initially, the Court notes that CrossSummit has not set forth any grounds to sustain the claims against Third-Party Defendants Alberti, Green, McGregor, McKernan, Ostrander, Szwajkowski, Taylor, Thomas or Trudeau. Accordingly, the Court dismisses all claims against these individual Third-Party Defendants. With respect to Third-Party Defendants Ollis and Peck, CrossSummit submits that the causes of action are viable because these Third-Party Defendants were motivated by personal gain. CrossSummit also alleges that they uttered slanderous words.

RULING OF THE COURT

A. Standards for Dismissal

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims that are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Liability of Corporate Officers and Directors

Generally, when officers and directors are acting in their corporate capacities, they cannot be held personally liable. *Joan Hansen & Co. Inc., v. Everlast World's Boxing Headquarters*, 296 A.D.2d 103 (1st Dept. 2002). For a court to hold otherwise, a pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were

performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant. *Id. at 110; A.S. Rampell, Inc. v. Hyster Co.*, 3 N.Y.2d 369, 379 (1957). *See also Robbins v. Panitz*, 61 N.Y.2d 967 (1984), reh'g denied, 62 N.Y.2d 803 (1984) (corporate officer not personally liable for causing corporation to terminate employment contract unless his activity involves individual separate tortious acts).

C. Applicable Causes of Action in Complaint

The essential elements of a cause of action sounding in fraud are 1) a misrepresentation or a material omission of fact which was false and known to be false by defendant, 2) made for the purpose of inducing the other party to reply upon it, 3) justifiable reliance of the other party on the misrepresentation or material omission, and 4) injury. *Colasacco v. Robert E. Lawrence Real Estate,* 68 A.D.3d 706 (2d Dept. 2009), quoting *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept., 2007).

CPLR 3016(b) provides, in relevant part, that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake....the circumstances constituting the wrong shall be stated in detail." The complaint must sufficiently detail the allegedly fraudulent conduct. *See Polonetsky v. Better Homes Depot, Inc.* 97 N.Y.2d 46, 55 (2007). Corporate officers and directors may be held individually liable if they participated in or had knowledge of the fraud, even if they did not stand to gain personally. *Pludeman v Northern Leasing Sys., Inc.,* 10 N.Y.3d 486 (2008), quoting *Polonetsky, supra.*

The elements of a cause of action for breach of contract are: 1) formation of a contract between the parties, 2) performance by plaintiff, 3) defendant's failure to perform, and 4) resulting damage. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

To prevail on a claim of unjust enrichment, a plaintiff must show that 1) defendant was enriched; 2) at plaintiff's expense; and 3) it is against equity and good conscience to permit defendant to retain what is sought to be recovered. *Clark v. Daby*, 300 A.D.2d 732 (3d Dept. 2002), *lv. app. den.* 100 N.Y.2d 503 (2003), citing *Lake Minnewaska Mtn. Houses v. Rekis*, 259 A.D.2d 797, 798 (3d Dept. 1999), quoting *Paramount Film Distrib. Corp. v State of New York*, 30 N.Y.2d 415, 521 (1972), *cert. den.*, 414 U.S. 829 (1973)).

To establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct. *Fitzpatrick House III LLC v. Neighborhood Youth & Family Services*,

55 A.D.3d 664 (2d Dept. 2008), quoting *Kurtzman v. Bergstol*, 40 A.D.3d 588, 590 (2d Dept. 2007). A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. *WIT Holding Corp. v. Klein*, 282 A.D.2d 527 (2d Dept. 2001).

To establish a claim for conversion, a plaintiff must show that he had an immediate superior right of possession to the property and the exercise by defendants of unauthorized dominion over the property in question to the exclusion of plaintiff's rights. *Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro,* 187 A.D.2d 384, 385 (1st Dept. 1992).

A simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. *Clark-Fitzpatrick v. Long Island Rail Road Company*, 70 N.Y.2d 382, 389 (1987).

D. The Court's Conclusion as to the Causes of Action in the Complaint

The first cause of action alleges that Defendants breached the MGU and MGA. In light of the fact that the Complaint does not allege that the Dunns performed any of the alleged conduct outside the scope of their employment as Chairman and President of Cross-Summit, or were motivated by personal gain as opposed to the gain of Cross-Summit, they may not be held personally liable with respect to these agreements.

For similar reasons, the second cause of action alleging breach of fiduciary duty is not viable. The allegations in this cause of action are based in great part on the allegations in the first cause of action, along with allegations, *inter alia*, that 1) Defendants breached their fiduciary duty to AMLI by collecting premiums on behalf of AMLI and failing to remit the premiums to AMLI; and 2) Defendants breached their fiduciary duty to AMLI by failing to render a full account of all premiums collected on behalf of AMLI. Even assuming, *arguendo*, that the Dunns induced Cross-Summit to breach its fiduciary duties to AMLI, there is no evidence that they did so in any capacity other than their corporate capacities.

The causes of action for fraud, conversion, constructive trust/unjust enrichment also fail because 1) Plaintiffs have failed to allege that Defendants violated a common law duty independent of their alleged breach of the agreements; 2) the allegations that Defendants failed to remit certain monies are insufficient to constitute a viable cause of action for fraud; and 3) Plaintiffs have failed to allege that the Dunns acted other than in their corporate capacities.

E. Causes of Action in the Third-Party Complaint

With respect to the cause of action for breach of contract, the Court notes that none of the Third-Party Defendants, except for Pack, signed the MGU and MGA. Pack signed the MGU in his capacity as the President and Chairman of the Board of Health Group, Ltd. and Preferred Care, Inc., two entities which are not named as parties in this action.

The second cause of action in the Third-Party Complaint is for violation of the New Jersey Unfair Competition Act. *See* N.J.S.A. 56:4-1. The subject agreements contain choice of law provisions which provide that any dispute will be governed by New York law.

The tort of intentional interference with contractual relations consists of four elements: 1) the existence of a contract that is enforceable by the plaintiff, 2) the defendant's knowledge of the existence of that contract, 3) the intentional procurement by the defendant of the breach of contract, and 4) resultant damages to the plaintiff. *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116, 120 (1956); Lama Holding Co. v. Smith Barney, Inc., 88 N.Y.2d 413, 424 (1996).

New York Courts have routinely dismissed tortious interference claims against corporate officers or directors where, as here, the allegations pertain to actions taken by officers and directors in their corporate capacities. *See, e.g., S.F.P. Realty Corp. v G.S. Rockaway Development*, 206 A.D.2d 417 (2d Dept. 1994), *Petkanas v. Kooyman*, 303 A.D.2d 303 (1st Dept. 2003). In *Petkanas,* the Court stated that the enhanced pleading standard requires a particularized pleading of allegations that acts of the corporate officers either were beyond the scope of their employment or, if not, were motivated by their personal gain, as distinguished from gain for the corporation. *Id.* at 305.

A fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge. *WIT Holding Corp. v Klein, supra at 527.*

Defamation is injury to one's reputation via a written (libel) or oral (slander) expression. *See Morrison v. National Broadcasting Co.*, 19 N.Y.2d 453 (1967). The elements of a cause of action to recover damages for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. *Epifani v. Johnson*, 65 A.D.3d 224, 233 (2d Dept. 2009), citing *Salvatore v. Kumar*, 45 A.D.3d 560, 563 (2d Dept. 2007), quoting *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept. 1999).

CPLR §3 016(a) states in relevant part: "in an action for libel or slander, the particular words complained of shall be set forth in the complaint....."

The factors to be considered in distinguishing between assertions of fact and nonactionable expressions of opinion are 1) whether the specific language in issue has a precise meaning that is readily understood; 2) whether the statements are capable of being proven true or false; and 3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact. *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995), citing *Gross v. New York Times*, 82 N.Y.2d 146, 153 91998), quoting *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 292 (1986).

F. The Court's Conclusion as to the Causes of Action in the Third-Party Complaint

As Pack is the only third-party defendant who signed either of the agreements, the Court dismisses the cause of action for breach of contract against all the other Third-Party Defendants because CrossSummit was not in privity of contract with them. The Court dismisses the cause of action for breach of contract against Pack because he executed the MGU in his capacity as the President and Chairman of the Board of Health Group, Ltd. and Preferred Care, Inc., two entities that are not named as parties in this action.

In light of the New York law provision, the parties may only assert claims cognizable under New York law. Therefore, CrossSummit may not assert New Jersey statutory claims against the Third-Party Defendants and the Court dismisses the second cause of action based on a violation of the New Jersey Unfair Competition Act.

The Court also dismisses the cause of action based on tortious interference with contract. As there is no contract between CrossSummit and the Third-Party Defendants with which the individual defendants could interfere, this cause of action is not viable. The Court also concludes that the Third-Party Complaint does not establish causes of action for business tort and tortious interference with prospective economic advantage and dismissal of those causes of action is also warranted

The Court also concludes that CrossSummit has not established that Ollis and Park owed a fiduciary relationship to it, or breached such a relationship, and accordingly dismisses the cause of action for breach of fiduciary duty.

Finally, the Court concludes that the eighth cause of action, predicated on slander, may

not survive because 1) as Ollis is the only named third party defendant to whom the allegations pertain, the cause of action may not survive as to the remaining Third-Party Defendants; 2) the allegations in the slander claim fail to meet the particularized pleading requirements of CPLR § 3016(a); and 3) the alleged statements are not actionable as they are, at best, opinions.

G. Leave to Replead

While it is true that an application to replead should be freely granted absent prejudice or surprise to the opposing party, it is equally true that the Court should examine the merits of the proposed amendment when considering the motion. *See Ingrami v. Rovner*, 45 A.D.3d 806, 808 (2d Dept. 2007). The movant must make some evidentiary showing that the proposed amendment has some merit and a proposed amendment that plainly lacks merit will not be permitted. *Monteiro v. R.D. Werner*, 301 A.D.2d 636 (2d Dept. 2003); *Janssen v. Incorporated Village of Rockville Centre,* 59 A.D.3d 15 (2d Dept. 2008).

AMLI urges that in the event this Court finds deficiences in AMLI's complaint, the Court should permit AMLI to replead to correct those deficiencies. The Court concludes that the allegations do not meet the heightened standard of demonstrating that the corporate officers acted outside their corporate capacity, maliciously and for their own personal profit of AMLI's expense, *see Appell v. LAG Corp.*, 41 A.D.3d 27 (1st Dept. 2007); *Zappin, Endlich & Lomaordo, Inc. v. CBS Coverage Group, Inc.*, 26 A.D.3d 231 (1st Dept. 2006)], and that AMLI has not demonstrated that the proposed amendment will not suffer from the same deficiency. Accordingly, the Court denies AMLI's request for leave to replead.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the remaining parties of their required appearance before Referee Frank N. Schellace on April 28, 2010.

ENTER

DATED: Mineola, NY
April 1, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.