

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

MRI ENTERPRISES, INC.,

Plaintiff,

-against-

COMPREHENSIVE MEDICAL CARE OF
NEW YORK, P.C. and ALLAN HAUSKNECHT,

Defendants.

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 001636/08

MOTION DATE: June 3, 2008
Motion Sequence # 001

The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

This motion, by defendant Hausknecht, for an order and judgment pursuant to CPLR §3211(a) (7), dismissing the Amended Verified Complaint as to defendant Allan Hausknecht in its entirety, together with such other and further relief as this Court deems just and proper, is determined as hereinafter set forth.

FACTS

Allan Hausknecht is an officer of Comprehensive Medical Care of New York, P.C. ("CMCNY").

DEFENDANT'S CONTENTIONS

The defendant Hausknecht, the sole movant herein, asserts, by his attorney, that the cause of actions, numbered 5 through 9 against him, are without any basis in law or fact.

The defendant maintains that the fifth cause of action is not a legally cognizable claim based on either case law or the Debtor and Creditor Law, and even if it were, the requisite claims have not been pled properly; therefore, it should be dismissed. The defendant also argues that the sixth, seventh and eighth causes of action are unsupported by any factual and specific allegations -necessary in his view based on CPLR 3016 (b)- and therefore should be dismissed. Additionally, in the sixth, seventh and eighth causes of actions, the defendant argues that the threshold issue of whether MRI is a creditor of Hausknecht is neither alleged nor established. Regarding the ninth cause of action, the defendant argues that a breach of a fiduciary relationship must allege: 1) a fiduciary relationship; 2) misconduct ; 3) damages. However, the defendant claims the plaintiff has failed to allege any of these elements as to Hausknecht, and this action should therefore be dismissed.

PLAINTIFF'S CONTENTIONS

The plaintiff asserts that the parties agreed to an arrangement wherein the plaintiff provided all the machinery and accessory material and supplies for MRI scans at the defendants' offices, in exchange for a set sum of money for each MRI scan. It further asserts that the defendant ceased payment for scans performed for three years commencing March 15, 2001. It alleges causes of action sounding in money due and owing on a Breach of Contract, an account stated, quantum meruit and unjust enrichment. All of these foregoing causes of action (1 - 4) name only the corporate defendant.

In his fifth cause of action, the plaintiff argues that Hausknecht caused CMCNY to transfer to himself monies belonging to CMCNY, the total of which exceeds the amount owed by CMCNY to the plaintiff. The plaintiff asserts that Hausknecht

wrongfully and unlawfully preferred himself to the creditors of CMCNY, and thus owes the plaintiff \$535,439.00. In the sixth cause of action, the plaintiff contends that the aforementioned transfers should be adjudged fraudulent and void because they were not made for fair consideration and were made when CMCNY was insolvent or, as a result of the transfers, was rendered insolvent. In his seventh cause of action, the plaintiff alleges that the monetary transfers from CMCNY left it with unreasonably small capital, which also should be adjudged fraudulent and void. In the eighth cause of action, the plaintiff further asserts that CMCNY made fraudulent transfers with the actual intent to hinder, delay and defraud its creditors. Lastly, in the plaintiff's ninth cause of action, the plaintiff argues that Hausknecht breached a fiduciary duty he owed to the plaintiff by causing CMCNY to transfer assets to himself, thereby leaving CMCNY with insufficient assets to pay the plaintiff.

DECISION

This motion seeks dismissal of all causes of action against defendant Hausknecht under CPLR 3211 (a)(7). According to CPLR Rule 3211(a)(7), a motion to dismiss a cause of action may be granted if "the pleading fails to state a cause of action."

The plaintiff's fifth cause of action relies upon case law, but the cases it cites do not buttress its argument, nor creates the proper foundation for his stated cause of action. Those cases are factually, legally and procedurally inapplicable. "A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (Rovello v. Orofino Realty Co. Inc., 40 NY2d 633, 635, 1976), and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (Guggenheimer v. Ginzburg, 43 NY2d 268, 275, 1977). However, the plaintiff's affidavit does not alter the pleading's infirmity, and the pleading itself is deficient because it lacks factual specificity. The plaintiff's fifth cause of action is hereby **dismissed**. (CPLR 3211 (a)(7)).

Likewise, the plaintiff's sixth, seventh and eighth causes of action are devoid of factual and specific allegations. All of these allegations share the heightened pleading requirements of CPLR 3016 (b) for causes of action related to fraud: "Where a cause of action or defense is based upon fraud, the circumstances constituting the wrong shall be stated in detail."

The sixth cause of action hovers around the twin issues of fair consideration and insolvency (Debtor - Creditor Law, § 273), but makes no references to specific dates, transactions or documents. The seventh cause of action sends up a "trial balloon" related to conveyances resulting in unreasonably small capital (Debtor - Creditor Law §274), but declines to share any explanation for this allegation. The eighth cause of action asserts an intent by the plaintiff to defraud the defendant (§276), but proffers no letter, recalls no conversation and illuminates no action to support this claim. The plaintiff's sixth, seventh and eighth causes of action are hereby **dismissed** pursuant to CPLR 3211 (a)(7); no cause of action has properly been averred.

The plaintiff's ninth cause of action is unsupported by current New York law. The fiduciary duty of directors and officers extends to the corporation and shareholders, not to corporate creditors. (**Columbia Forest Prods. v. Firestone Plywood Corp.**, 799 N.Y.S.2d 159, 2004 WL 2672267, 2004 N.Y. Slip Op. 51442(U)). Hausknecht, as corporate officer, has no direct fiduciary duty to MRI Enterprises, Inc., as creditor, so he cannot breach that duty. Indeed, one purpose of the corporate form is to shield corporate officers from the kind of potential liability in dispute in the current case. Creditors protect themselves financially by obtaining personal guarantees from one or more officers, a precaution the plaintiff apparently did not take. The plaintiff's ninth cause of action is hereby **dismissed**, consistent with Rule 3211 (a)(7).

Accordingly, the action as against the defendant Hausknecht is **dismissed** and the action is **severed** and **continued** as against the corporate defendant.

A Preliminary Conference has been scheduled for August 26, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated JUL 21 2008

Stephen A. Benjamin
J.S.C.

ENTERED

JUL 24 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE