

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOT. SEQ: 001 MD; 002 Mot D;
003 Mot D

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

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MATTHEW J. VERDONE, D.O., individually and :	DEVITT, SPELLMAN,
as a minority shareholder of SUFFOLK :	BARRETT, LLP
ANESTHESIOLOGY ASSOCIATES, P.C., :	Attorneys for Plaintiff
OFFICE-BASED ANESTHESIA LLC and :	50 Route 111
UNITED ANESTHESIA, P.C., :	Smithtown, N.Y. 11787
Plaintiff(s), :	
- against - :	ROSENBERG, CALICA
	& BIRNEY, LLP
	Attorney for Defendants
SUFFOLK ANESTHESIOLOGY ASSOCIATES, :	100 Garden City Plaza, Suite 408
P.C., by its Board of Directors consisting of :	Garden City, N.Y. 11530
ELLIOT ROSSEIN, M.D., ANTHONY :	
BONANNO, M.D., BENJAMIN :	
KIRSCHENBAUM, M.D., and JAMES SUAZO, :	
M.D., et.al., :	
Defendant(s). :	
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Upon the papers read on this motion to dismiss and cross-motions, it is

ORDERED that the motion (seq 001) by defendants for an order dismissing the complaint filed herein and for the imposition of sanctions is denied; and it is further

ORDERED that the cross-motion (seq 002) by plaintiff for an order directing defendants to produce a copy of a forensic accounting report dated May 27, 2008 and for the imposition of sanctions, is decided herewith; and it is further

ORDERED that the motion (seq 003) by plaintiff, Matthew J. Verdone, D.O., for an order disqualifying counsel for the defendants; enjoining the corporate defendants from using any corporate funds in the defense of this action, or an order directing each defendant to post an undertaking is decided herewith; and it is further

ORDERED that the counsel for defendants shall serve a copy of this Order with Notice of Entry upon counsel for the named defendants, pursuant to CPLR 2103(b)(1), (2) or (3), thereafter

file the affidavit(s) of service with the Clerk of the Court.

Plaintiff commenced this shareholder derivative action for dissolution of the defendant corporation alleging a breach of contract, a breach of fiduciary duty, unjust enrichment and a waste of corporate assets. The defendants move to dismiss alleging that upon Dr. Verdone's termination from employment his status as a shareholder in the defendant corporation was also terminated. As a result, they assert that Dr. Verdone does not have standing to maintain the action (citing CPLR 3211(a)(1) and CPLR 3211(3)).

The defendants cite to an Order of this Court (Weber, J.) dated November 20, 2008, in a related matter (Index No. 37932-08). That Order granted partial summary judgment to the corporation holding that it had the legal right to terminate Dr. Verdone's employment, without cause, if supported by a vote of 75% of the shareholders pursuant to its Employment Agreement. Thereafter, on December 15, 2008, the shareholders and Directors of SAA, unanimously voted to terminate Dr. Verdone's services, without cause pursuant to Section 5(d) of the Employment Agreement and for cause pursuant to Section 5(e). Plaintiff contends that upon the unanimous vote terminating his employment for cause, Dr. Verdone was obligated to surrender his shares in the corporation.

The corporation asserts that §4.3 of the Shareholder's Agreement requires the corporation to purchase all of the shares held by a shareholder that is subject to a Call Event, here, the termination of employment for cause. Further, the corporation points to the Employment Agreement, which provides a formula for the payment of Deferred Compensation after the first quarter of the year following termination. However, the corporation, in a separate action have asserted that Dr. Verdone is a "faithless fiduciary". As such, they are entitled to a return of any and all compensation paid and a suspension of any further compensation due Dr. Verdone. Accordingly, the corporation concludes that Dr. Verdone does not have legal standing to maintain this action (CPLR 3211[3]).

In opposition, plaintiff argues that the corporation anticipatorily breached the Shareholder and Employment Agreements prior to terminating Dr. Verdone and can not now claim that Dr. Verdone is not a shareholder of the corporation. Further, the corporation's purported termination "for cause" demonstrates the lack of good faith and fair dealing by the defendants. Dr. Verdone accuses the corporation of financial improprieties, misconduct in its management of the corporation, waste of corporate assets and breach of fiduciary duty. Plaintiff notes that the prior Order of this Court did not resolve the issue of plaintiff's status as a shareholder. The Court simply noted that at will employment was not inconsistent with Dr. Verdone's status as a shareholder. It held that the corporation was within its rights to terminate Dr. Verdone without cause pursuant to the Employment Agreement. The Order made no findings on the issue of whether there was cause for the termination. Any termination "for cause" must be consistent with the corporate duty of good faith and fair dealing. Accordingly, until payment is made for the fair value of his shares, Dr. Verdone asserts that he retains standing to pursue a derivative action. Finally, he points to the

forensic accounting report as documenting the corporation's lack of a valid termination for cause.

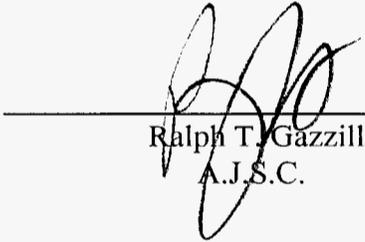
On a motion to dismiss the complaint is to be afforded a liberal construction and the facts alleged in the complaint are accepted as true. A complaint is afforded the benefit of every possible inference and construed in the light most favorable to the plaintiff (*Leon v Martinez*, 84 NY2d 83; *Peterec-Tolino v Harap*, 68 AD3d 10830. A motion to dismiss made pursuant to CPLR 3211(a)(1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*Daly v Kochanowicz*, 67 AD3d 78, 89). A question of fact exists as to whether there was a good faith basis to terminate Dr. Verdone for cause. Contrary to the claim by the defendant's, there was no judicial determination authorizing such action by the corporation. The Order authorized the termination without cause and did not fall within the definitions of a "Call Event" in the parties' Agreement.

The cross-motion (seq 002) by Dr. Verdone for an Order compelling the defendants to produce a complete copy of the forensic accounting report dated, May 27, 2008, is decided solely to the extent of noting that the report has been provided to the Court and was considered in the Court rendering of its determination herein. At this juncture, the Court adheres to the determination of this Court (Whelan, J.) dated August 14, 2008.

The motion (seq 003) by plaintiff disqualifying current counsel from representing both the corporate and individual defendants in this matter is denied as moot. By letter dated March 26, 2010, the firm of Weiss & Zarett, P.C., has been substituted as attorneys for the corporate defendants. That portion of the motion which seeks an Order enjoining the corporate defendants from expending corporate funds in the defense of the individually named defendants is denied. Plaintiff has not demonstrated entitlement to this relief.

Dated: 8/10

RIVERHEAD, NY



Ralph T. Gazzillo
A.J.S.C.

FINAL DISPOSITION _____ NON-FINAL DISPOSITION _____