Greenwood Med. Serv., PC v Physicians Practice Mgt. Assoc., Ltd.
2014 NY Slip Op 32331(U)
August 29, 2014
Supreme Court, Suffolk County
Docket Number: 29774/2013
Judge: Thomas F. Whelan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 29774/2013

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION

I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/11/14
SUBMIT DATE: 8/15/14
Mot. Seq. # 001 - MOTD
CDISP: No
PRELIM. CONF. 10/10/14

GREENWOOD MEDICAL SERVICES, PC, Plaintiff, -against- PHYSICIANS PRACTICE MANAGEMENT ASSOCIATES, LTD., GOTHAM CITY MEDICAL BILLING SERVICES, PLLC and HARRY BIBER, Defendants.	BIRZON, STRANG & ASSOC. Attys. For Plaintiff 222 E. Main St. - Ste. 212 Smithtown, NY 11787 LEE A. SCHWARTZ & ASSOC. Attys. For Defs. Physicians & Biber 445 Broad Hollow Rd. - Ste. 205 Melville, NY 11747

Upon the following papers numbered 1 to 7 read on this motion to dismiss and the imposition of sanctions; Notice of Motion/Order to Show Cause and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ; Answering papers 4-5; Replying papers 6-7; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that those portions of this motion (#001) by defendants, Physicians Practice Management Associates, Ltd. and Harry Biber, for an order dismissing the amended complaint or original complaint served pursuant to CPLR 3211(a)(4), (a)(5) and/or (a)(7) is considered thereunder and is granted only to the extent that the Third cause of action set forth in the amended complaint is dismissed; and it is further

ORDERED that the remaining portions of this motion wherein the moving defendants seek the imposition of sanctions against the plaintiff and or its counsel is considered under 22 NYCRR Part 130-1 and is denied; and it is further

ORDERED that a preliminary conference shall be held in this action on **October 10, 2014** at 9:30 a.m. in the courtroom of the undersigned located in the Supreme Court Annex Building of the Courthouse at One Court Street, Riverhead, NY 11901.

As originally constituted, the plaintiff commenced this action in November of 2013 to recover damages from defendant, Physicians Practice Management Associates, Ltd. [hereinafter "PPMA"], under contract and tort theories arising out of a Business Services Agreement executed by them on April 15, 2009, pursuant to which, PPMA agreed to provide medical billing services to the plaintiff. These claims were also the subject of counterclaims asserted by the plaintiff in a separate action for breach of the subject contract which defendant PPMA commenced against the plaintiff on October 28, 2013, just days prior to the commencement of the instant action.

In lieu of answering the complaint served in this action, defendant PPMA, obtained an extension of time to serve its answer and then moved in its prior commenced action [hereinafter Action #1] to dismiss the counterclaims asserted by the plaintiff against PPMA. By order dated March 14, 2014, this court dismissed the plaintiff's counterclaims in Action #1. Thereafter, the plaintiff served an amended complaint in this action which it reasserted its newly drafted contractual claim against PPMA. It also served a supplemental summons so as to join as new defendants, the second and third defendants named in the caption, namely Gotham City Medical Billing Services PLLC [hereinafter Gotham] and Harry Biber. The amended complaint added a damages claim against Gotham resting on its purported breach of a separate and subsequent contract for the same billing services that were the subject of PPMA's contract with the plaintiff, both of which contracts were negotiated by defendant Biber and executed by him purportedly on behalf of each corporate defendant. With respect to defendant Biber, the plaintiff seeks to hold him personally liable for the damages owing from PPMA and/or Gotham under alter ego/corporate veil theories and/or under direct theories of contract law by charging him with being the actual contracting party.

By the instant motion, the defendants, PPMA and Biber seek an order dismissing the amended complaint as jurisdictionally defective due to the absence of leave of court and the dismissal of the original complaint pursuant to CPLR 3211(a)(5) under principles of res judicata. Alternatively, the moving defendants seek dismissal of the amended complaint pursuant to CPLR 3211(a)(4) due to the existence of the moving defendants' prior commenced action or under CPLR 3211(a)(7) on grounds of legal insufficiency. The moving defendants also seek an award of sanctions and/or costs pursuant to 22 NYCRR Part 130-1. The plaintiff opposes the motion, in response to which, the defendants replied. For the reasons stated below, the motion is denied.

Rejected as unmeritorious are the moving defendants' claims that the amended complaint is subject to dismissal on jurisdictional grounds because it was served, together with the supplemental summons which added defendant Biber and Gotham as party defendants, without leave of court. While the failure to obtain leave of court or to otherwise comply with the provisions of CPLR 1003 has been held to render, void, the service of an amended complaint adding claims against newly parties that are added by a supplemental summons (*see* ***Public Adm'r of Kings County v McBride***, 15 AD3d 558, 791 NYS2d 570 [2d Dept 2005]), such leave is not required under the circumstances of this case. Both CPLR 1003 and 3025 allow for the amendment of a complaint without leave of court or by stipulation once, "as of right" anytime prior to the time within which a responsive pleading is required.

Here, the plaintiff's service of the supplemental summons adding the last two named defendants as new parties to this action and its amended complaint containing new claims against them and an amplified claim against defendant PPMA was properly made "as of right" and without leave of court since the time for service of the defendants' answer had not expired. Since service of the supplemental summons and amended was neither void nor a nullity and dismissal thereof on jurisdictional grounds is not warranted and the moving defendants' demands therefor are denied.

Also rejected as lacking in merit are the moving defendants' claims that dismissal of the breach of contract claim against PPMA that is advanced in the First cause of action of the amended complaint served herein is warranted under CPLR 3211(a)(5), because principles of res judicata bar the plaintiff's prosecution of this breach of contract claim due to the court's dismissal of the plaintiff's counterclaim for such relief in action #1 in the order issued therein on March 14, 2014. Contrary to the contentions of defense counsel, the dismissal of the plaintiff's counterclaim pursuant to CPLR 3211(a)(7) for failure to state a cause of action was not a determination of the merits of such claim and it left such determination without res judicata effect (*see* ***Rechais v McGivans***, 119 AD3d 666, 988 NYS2d 895 [2d Dept 2014]; ***Canzona v Atanasio***, 118 AD3d 841, 988 NYS2d 637 [2d Dept 2014]; ***Hae Sheng Wang v Pao–Mei Wang***, 96 AD3d 1005, 1008, 947 NYS2d 582 [2d Dept 2012]). A claimant, such as the plaintiff here, is thus not precluded from re-asserting the claim in a second commenced action (*see* ***Canzona v Atanasio***, 118 AD3d 837, 989 NYS2d 44 [2d Dept 2014]; *see also* ***Canzona v Atanasio***, 118 AD3d 841, *supra*) and one who does may not be found to be avoiding the consequences of an prior adverse ruling (*cf.*, ***Shah v RBC Capital Markets LLC***, 115 AD3d 444, 981 NYS2d 524 [1st Dept 2014]).

The moving defendants' claims that dismissal of this action is warranted under CPLR 3211(a)(4) are equally lacking in merit. This rule vests this court with broad discretion to dismiss an action where there is another action pending between the same parties for the same cause of action in a court of any state or the United States. The purpose of the statute is to avoid the duplication of effort and the risk of divergent rulings on issues raised in both actions and to prevent vexatious litigation (*see* ***Liebert v TIAA-CREF***, 34 AD3d 756, 826 NYS2d 339 [2d Dept 2006]; ***Certain Underwriters at Lloyd's, London v Hartford Acc. and Indem., Co.***, 16 AD3d 167, 791 NYS2d 90 [1st Dept 2005]).

In addition to dismissal, the court may make such order as justice requires. In cases wherein complete relief can be afforded in the first action to all parties named in the second action, a consolidation or joint trial of the actions may be directed (*see* ***Roberts v 112 Duane Assoc., LLC***, 32 AD3d 366, 821 NYS2d 33 [1st Dept 2006]; ***Graev v Graev***, 219 AD2d 535, 631 NYS2d 685 [1st Dept 1995]). The remedy of a joint trial is especially pertinent in cases wherein there is not a complete identity of issues and parties (*see* ***Security Mut. Life Ins. Co. of New York v DiPasquale***, 271 AD2d 268, 707 NYS2d 39 [1st Dept 2000]). Where, however, additional parties are involved in one of the actions, notice of the consolidation or of any possible issuance of a judicial direction to join them for purposes of a joint trial is required (*see* ***Kent Dev. Co. Inc. v Liccione***, 37 NY2d 899, 378 NYS2d 377 [1975]).

Here, the claims asserted in this action by the plaintiff are not the subject of any prior action pending, as the counterclaims asserted by the plaintiff in PPMA's action #1 against the PPMA were

dismissed pursuant to CPLR 3211(a)(7) for failure to state a claim in the order of this court dated March 14, 2014. Since that determination was not on the merits, the plaintiff was free to re-plead its breach of contract claim against PPMA in this second commenced action. Dismissal of this action is thus unwarranted under CPLR 3211(a)(4) as there is no prior action pending in which the claims asserted herein subsist. Under these circumstances, the plaintiff may not be found to be avoiding the consequences of an prior adverse ruling and thus denied the right to litigate its claims in this action (*cf.*, ***Shah v RBC Capital Markets LLC***, 115 AD3d 444, 981 NYS2d 524 [1st Dept 2014]).

The remaining grounds advanced in the moving papers rest upon the purported legal insufficiency of the Third cause of action advanced in the amended complaint in which defendant Biber is charged with individual liability for breach of the contracts at issue or for the damages recoverable from the corporate defendants by reason of their breach of their respective contracts with the plaintiff. Such liability is allegedly premised on grounds that Biber was the contracting party not PPMA (or Gotham) or that Biber is liable under a piercing of the corporate veil of the corporate defendants. For the reasons stated, the court grants this portion of the motion.

The legal standard to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) is whether "the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (***Marist College v Chazen Envtl. Serv.***, 84 AD3d 1181, 923 NYS2d 695 [2d Dept 2011], *quoting* ***Sokol v Leader***, 74 AD3d 1180, 1180–1181, 904 NYS2d 153 [2d Dept 2010]). On such a motion to dismiss, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory (*see* ***Goshen v Mutual Life Ins. Co. of N.Y.,*** 98 NY2d at 314, 326, 746 NYS2d 858 [2002]; ***Leon v Martinez***, 84 NY2d 83, 87, 614 NYS2d 972 [1994]). However, bare legal conclusions and factual averments flatly contradicted by the record are not presumed to be true (*see* ***Simkin v Blank***, 19 NY3d 46, 945 NYS2d 222 [2012]); ***Khan v MMCA Lease, Ltd.***, 100 AD3d 833, 954 NYS2d 595 [2d Dept 2012]; ***U.S. Fire Ins. Co. v Raia***, 94 AD3d 749, 942 NYS2d 543 [2d Dept 2012]).

The test to be applied is thus "whether the complaint gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments" (***Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC***, 107 AD3d 788, 967 NYS2d 119 [2d Dept 2013]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 803, 893 NYS2d 237 [2d Dept 2010]). In making such determination, the court must consider whether the complaint contains factual allegations as to each of the material elements of any cognizable claim and whether such allegations satisfy any express, specificity requirements imposed upon the pleading of that particular claim by applicable statutes or rules (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 66 AD3d 122, 884 NYS2d 94 [2d Dept 2009], *aff'd* 16 NY3D 775, 919 NYS2d 496 [2011]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus" (***EBC I, Inc. v Goldman, Sachs & Co.***, 5 NY3d 11, 19, 799 NYS2d 170 [2005]; ***Haberman v Zoning Bd. of Appeals of City of Long Beach***, 94 AD3d 997, 942 NYS2d 571 [2d Dept 2012]).

To state a viable cause of action under the doctrine of piercing the corporate veil, the "plaintiff must allege facts that, if proved, indicate that the defendant exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate [or LLC] form to perpetrate a wrong or injustice" (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 16 NY3d 775, 776, 919 NYS2d 496 [2011]; ***Matter of Morris v New York State Dept. of Taxation & Fin.***, 82 NY2d 135, 142, 603 NYS2d 807 [1993]). Factors to be considered in determining whether an individual has abused the privilege of doing business in a corporate or LLC form include the failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and the personal use of corporate funds (*see* ***East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.***, 16 NY3d 775, *supra;* ***Avila v Distinctive Dev. Co., LLC***, ___ AD3d ___, 2014 WL 3844033 [2d Dept 204]; ***Allstate ATM Corp. v E.S.A. Holding Corp.***, 98 AD3d 541, 949 NYS2d 483 [2d Dept 2012]; ***B. Merrick Rd., LLC v Chriso Food Serv., Inc.***, 95 AD3d 913, 944 NYS2d 597 [2d Dept 2012]). Here, the amended complaint, as amplified by the allegations advanced in the affidavit of the plaintiff's president, fails to sufficiently plead the elements of a claim for recovery for recovery of damages from defendant Biber under the doctrine of corporate veil piercing.

The court further finds that the amended complaint contains no legally sufficient direct claim against Biber for breach of contract due to his purported execution of the subject contracts in his individual capacity. "A corporate officer who executes a contract acting as an agent for a disclosed principal is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally" (***Stamina Prods., Inc. v Zintec USA, Inc.***, 90 AD3d 1021, 1022, 935 NYS2d 629 [2d Dept 2011]; *see* ***Salzman Sign Co. v Beck***, 10 NY2d 63, 65, 217 NYS2d 55 [1961]); ***Yellow Book Sales & Distrib. Co., Inc. v Mantini***, 85 AD3d 1019, 1021; 925 NYS2d 646 [2d Dept 2011]). "There must be clear and explicit evidence of the agent's intention to substitute or superadd his [or her] personal liability for, or to, that of his [or her] principal" (***GMS Batching, Inc. v TADCO Constr. Corp.***, ___ AD3d ___, 2014 WL 3929111 [2d Dept 2014]; *see* ***Savoy Record Co. v Cardinal Export Corp.***, 15 NY2d 1, 4; 254 NYS2d 521 [1964]; ***Star Video Entertainment v J & I Video Distrib.***, 268 AD2d 423, 423–424 702 NYS2d 91 [2d Dept 2000]). Here, the allegations of fact advanced in the Third cause of action of the plaintiff's amended complaint, as amplified by the affidavit of its president, do not state legally sufficient claims against defendant Biber to recover damages by reason of his breach of any contract he executed in his individual capacity (*see* ***Savoy Record Co. v Cardinal Export Corp.***, 15 NY2d 1, *supra*) or any enforceable promise to answer for the debt of another (*see* General Obligations Law § 5–701[a] [2]; ***T.D. Bank, N.A. v Halcyon Jets, Inc.***, 99 AD3d 431, 951 NYS2d 724 [1st Dept 2012]).

The moving defendants' demands for the imposition of sanctions and/or costs or attorneys fees against the plaintiff or its counsel is denied as none of the complained of conduct constitutes frivolous conduct within the purview of the rules at 22 NYCRR Part 130-1, *et. seq.*

DATED: 8/29/14

THOMAS F. WHELAN, J.S.C.