Ashley MRI Mgt. Corp. v Perkes
2010 NY Slip Op 30248(U)
January 26, 2010
Supreme Court, Nassau County
Docket Number: 001915-05
Judge: Timothy S. Driscoll
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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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ASHLEY MRI MANAGEMENT CORP., individually and in its capacity as a Limited Partner of SCANNING OF SUFFOLK, L.P.,

Plaintiff,

-against-

EDWARD PERKES, M.C., JOEL REITER, M.D., MERICK DOLBER, JILL VINCENTE, REITER & PERKES, M.D., P.C. n/k/a MID-ISLAND MEDICAL IMAGING, P.C., ISLANDIA MRI ASSOCIATES, P.C., TECHMED LI CORPORATION, ISLANDIA MRI LIMITED PARTNERSHIP, ISLANDIA MRI MANAGEMENT CORP. and SCANNING OF SUFFOLK, L.P.,

Defendants.

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TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 001915-05
Motion Seq. Nos: 3, 4, 6 & 7
Submission Date: 12/14/09

The following papers have been read on these motions:

Notice of Motion, Rule 19-a Statement, Affirmation in Support and Exhibits....x
Affidavit in Support of Motion for Summary Judgment and Exhibits.....x
Exhibits 5, 6, 7 and 8 to Affirmation in Support..... x
Defendant Vincente's Memorandum of Law in Support.....x
Notice of Motion, Rule 19-a Statement, Affidavit in Support and Exhibits..... x
Memorandum in Support of Motion for Partial Summary Judgment.....x
Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....x
Memorandum of Law in Support of Plaintiff's Motion to Strike Answer.....x
Affidavit in Opposition to Defendants' Motion, Affirmation in Opposition,
Counter-Statement of Material Facts and Exhibits.....x
Affidavits in Opposition to Motion to Strike (2) and Exhibits.....x
Defendants' Memorandum in Opposition to Motion to Strike.....x
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion.....x

Papers Read on Motions (cont.)

Affidavit in Opposition to Motion for Summary Judgment,
Affirmation in Opposition, Counter-Statement of Material Facts and Exhibits.....x
Plaintiff's Memorandum of Law in Opposition to Motion.....x
Notice of Cross Motion, Affidavit in Opposition/Support,
Affirmation in Opposition/Support and Exhibits.....x
Memorandum of Law in Opposition/Support.....x
Affidavit in Further Support , Affirmation in Further Support,
Exhibits and Response to Plaintiff's Counter-Statement of Material Facts.....x
Reply Memorandum of Law in Further Support.....x
Reply Affidavit in Further Support and Exhibits.....x
Reply Memorandum in Further Support of Motion.....x
Reply Affidavit in Further Support,
Reply Affirmation in Further Support and Exhibits.....x
Plaintiff's Reply Memorandum of Law in Further Support.....x
Plaintiff's Memorandum of Law in Reply/Opposition.....x
Correspondence dated 11/24/09 and Enclosure.....x

This matter is before the Court for decision on 1) the motion filed by Defendant Jill Vincente on December 24, 2008, 2) the motion filed by Defendants Edward Perkes, M.D., Joel Reiter, M.D., Merik Dolber, Perkes & Reiter, P.C., Islandia MRI Associates, P.C., Techmed LI Corporation, Islandia MRI Limited Partnership, Islandia MRI Management Corp. and Scanning of Suffolk, L.P. on April 15, 2009, 3) the motion filed by Plaintiff Ashley MRI Management Corp. on August 11, 2009, and 4) the motion filed by Defendant Jill Vincente on September 10, 2009, all of which were submitted on December 14, 2009 after oral argument and supplemental briefing. The Court 1) denies the motion by Defendant Jill Vincente for summary judgment dismissing the complaint; 2) denies the motion by the defendants, other than Vincente, for summary judgment dismissing the fifth and seventh causes of action but grants the motion for summary judgment dismissing the second, third and fourth causes of action as to all defendants; 3) denies Plaintiff's motion to strike Defendants' answer; and 4) denies the motion by Defendant Jill Vincente for sanctions.

In addition, as discussed *infra*, the Court, *sua sponte*, notes that the parties' consulting

agreement, purporting to entitle Plaintiff to a percentage of the "net revenue" earned pursuant to the parties' "turnkey" lease agreement, may constitute an illegal fee splitting arrangement. Accordingly, the Court grants Defendants leave to renew their motion for summary judgment on the ground of illegality within thirty (30) days of service of a copy of this order. If Defendants fail to renew their motion for summary judgment, Plaintiff shall submit a supplemental memorandum on the issue of why the Court should not dismiss this action on its own motion.

BACKGROUND

A. Relief Sought

Defendant Jill Vincente ("Vincente") moves for an Order, pursuant to CPLR § 3212, granting summary judgment and dismissing the claims in the Complaint against her.

Defendants Edward Perkes, M.D. ("Perkes"), Joel Reiter, M.D. ("Reiter"), Merik Dolber ("Dolber"), Perkes & Reiter, P.C. ("Perkes & Reiter"), Islandia MRI Associates, P.C. ("P.C."), Techmed LI Corporation ("Techmed"), Islandia MRI Limited Partnership ("Partnership"), Islandia MRI Management Corp. ("Management") and Scanning of Suffolk, L.P. ("Scanning") (collectively "Defendants") move for an Order, pursuant to CPLR § 3212, granting Defendants summary judgment dismissing Plaintiff's 1) fifth cause of action for breach of contract, and 2) seventh cause of action for tortious interference with contract, on the ground that there are no material issues of fact and the causes of action have no merit as a matter of law.

Plaintiff Ashley MRI Management Corp. ("Ashley MRI") moves for an Order, pursuant to CPLR § 3126, granting its motion to strike Defendants' Answer based on Defendants' alleged violations of their discovery obligations, with respect to electronic data and hard-copy documentation.

Defendant Vincente also moves for an Order, pursuant to 22 N.Y.C.R.R. § 130-1.1, awarding her costs and counsel fees based on the allegedly frivolous conduct of Plaintiff and its counsel.

B. The Parties' History

In 1990, Lon Dolber, the brother of Defendant Merik Dolber ("M. Dolber"), approached Vincente to request her assistance in the proposed development of an magnetic resonance

imaging ("MRI") facility in Suffolk County.[1] Vincente located space for the MRI office in Islandia, New York and solicited two radiologists, Defendant Dr. Joel Reiter ("Reiter") and Defendant Dr. Edward Perkes ("Perkes"), to operate the facility.

Vincente affirms that she is familiar with the corporate structure of the pertinent parties, which she describes as follows. Vincente was the practice coordinator for Partnership, which was formed 1) to lease MRI equipment and office space to a professional corporation, and 2) to provide services to enable Islandia MRI Associates, P.C. ("P.C.") to provide professional services at the Islandia facility. The Partnership's partners, subsequent to certain amendments to the partnership agreement, consisted of Scanning as general partner, and 64 limited partnership interests owned by individuals.

Vincente affirms, further, that Scanning, as the general partner, managed the day-to-day operations of the Partnership. Scanning consisted of Management as general partner, and Techmed and Plaintiff Ashley MRI as limited partners. At all relevant times, Reiter and Perkes were the sole shareholders, directors and officers of Management. [2]

Ashley MRI's president, Sheldon Ashley ("Ashley"), is a Ph. D. who is knowledgeable about the leasing of MRI equipment, but is apparently not a medical doctor.[3] Merik Dolber is Techmed's controlling shareholder. The Partnership leased the MRI equipment from Marcap Corporation and the office space from Charles Baldassano.[4] Neither Marcap nor Baldassano is a party in this action.

Aside from locating the space, recruiting the doctors, and identifying possible investors, Vincente was also involved in forming certain of the business entities related to the start-up of the venture. Vincente affirms that in March 1991, she incorporated Management and served as

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[1] *See* affidavit of Jill Vincente in support of motion for summary judgment.

[2] *See* ¶ 30 of the Amended Verified Complaint, Ex. A to Defendants' motion for partial summary judgment, in which Plaintiff provides an "organizational chart of the structure of the relevant entities and individuals."

[3] Defendant Jill Vincent's motion for summary judgment, ex. 3, amended complaint at ¶ 47. *See* affidavit of Ashley in opposition to defendant Vicente's motion for summary judgment.

[4] *See* Defendants' motion for partial summary judgment, Ex. D.

its initial officer, director and sole shareholder,[5] but sold those shares and resigned from those positions less than a year later, in January 1992, at which time she sold all the shares in Management to Perkes and Reiter, after they became involved in the venture.[6] In January 1992, Vincente became the initial limited partner in the Partnership, and Scanning, now controlled by Perkes and Reiter through Management, became the general partner. In June 1992, with the doctors on board and the limited partnerships in place, Vincente withdrew as limited partner in the Partnership.[7] However, Vincente continued as an executive vice president of Management until 1993. Vincente is also a Techmed minority shareholder.

Perkes and Reiter practice together in the P.C. In June 1992, before the Lease agreement discussed *infra* was signed, Partnership entered into a consulting agreement ("Consulting Agreement") with Ashley MRI.[8] The Consulting Agreement required Ashley MRI to perform various financial services for the Partnership, including overseeing medical billing and collections. The Consulting Agreement also required Ashley MRI to perform various "marketing and strategic planning services," including "seek[ing] strategic alliances for sources of additional MRI referrals." As compensation for its services, Ashley MRI was to be paid a percentage of the "net revenues" of the Partnership, defined as "the sum of all fees actually received by [Partnership] from [P.C.] pursuant to the Turnkey Lease Agreement...less any refunds or overcharges..." Ashley was to receive a percentage of 7.5% for the first year of the Consulting Agreement and slightly reduced fees thereafter. The Consulting Agreement was signed by Ashley as president of Ashley MRI and by Defendants as follows: [9]

[The Partnership],

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[5] Affidavit of Jill Vincente, ex. B.

[6] Vincente affirms that she was "apparently elected" as a vice president of Management on January 17, 1992, but "does not specifically recall being elected to this position or performing any services under this title[,]" although she apparently concedes that a director's resolution contained that provision (Vincent Aff. at p.5).

[7] Affidavit of Jill Vincente, Ex. G, second document.

[8] Defendants' motion for partial summary judgment, Ex. E.

[9] Dr. Perkes' signatures on page 8 of the Consulting Agreement and page 20 of the Turnkey Lease Agreement appear similar.

a Delaware limited partnership

By: [Scanning], its general partner

By: [Management], a New York corporation,
its general partner

By: [signature of Perkes]

Title: President [handwritten, not typed]

In August 1992, the Partnership, as lessor, entered into a "turnkey lease agreement" ("Lease Agreement") with the P.C., as lessee, pursuant to which Partnership leased office space and MRI equipment to P.C. at the Premises.[10] Through the levels of corporate and limited partnership ownership described above, Perkes and Reiter controlled the lessor as well as the lessee under the Lease Agreement. Pursuant to Section 4(b)(iii) of the Lease Agreement, the P.C. had the exclusive right to provide MRI services at the Premises, located at 200 Corporate Plaza, Suite A104, Islandia, New York.

The Lease Agreement provided that, as compensation for providing the office space and MRI equipment, the lessee was to pay the lessor a set "use fee" for each MRI or diagnostic test performed by the lessee using the MRI system. The use fee consisted of an equipment fee, a "realty fee,"and an allowance for "sales tax," all of which gradually increased each year.[11] The Lease Agreement was executed by Perkes on behalf of the Partnership and by Dr. Reiter on behalf of P.C.

As a limited partner of Scanning, Ashley MRI received a share of the use fees generated pursuant to the Lease Agreement. Beginning in March 1996, the Partnership entered into a series of "excess capacity license agreements" with management companies in order to allow other radiologists to use the MRI equipment.[12] Pursuant to these agreements, the management companies, which were presumably not licensed to practice medicine, were granted a license to

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[10] Defendants' motion for partial summary judgment, Ex. D.

[11] For the initial year of the lease, the equipment fee was $362.83, the realty fee was $130.62, and the sales tax was $29.03.

[12] *See* Ex. I to Defendants' Motion for Partial Summary Judgment.

use the facilities. The management companies then "sublicensed" the facilities to the outside radiologists. Pursuant to the excess capacity agreements, the Partnership received a flat fee for each MRI scan performed. The agreement purports to allocate the fee as to office space, clerical personnel, and equipment.

Plaintiff commenced this action in 2005. By Decision dated January 3, 2006 ("Initial Decision"), the court (Austin, J.): 1) dismissed the Complaint against the individual Defendants; and 2) dismissed the second, third, fourth, seventh, eighth, tenth and twelfth causes of action sounding in conversion, tortious interference with contract, constructive trust, requests for preliminary and permanent injunctive relief and appointment of a receiver. On reconsideration, by Decision dated July 10, 2006 ("Revised Decision"), Judge Austin: 1) reinstated the seventh cause of action, alleging tortious interference, as to all Defendants; 2) granted Plaintiff leave to replead the eighth cause of action, alleging tortious interference with the Scanning Agreement; and 3) directed that the ninth cause of action, alleging breach of fiduciary duty, shall be read to include the individual Defendants. [13] As the doctrine of law of the case applies to legal determinations that were necessarily resolved on the merits in the prior decision, *D'Amato v. Access Manufacturing*, 305 A.D.2d 446, 448 (2d Dept. 2003), quoting *Baldasano v. Bank of New York*, 199 A.D.2d 184 (1st Dept. 1993), some discussion of Justice Austin's Decisions is appropriate.

In the Initial Decision, Justice Austin 1) denied the motion to dismiss the first cause of action for an accounting based on his conclusion that the Complaint sufficiently alleged Defendants' failure to provide complete information regarding the disposition of partnership funds; 2) granted the motion to dismiss the second cause of action for a constructive trust because Plaintiff failed to allege a specific transfer in reliance on a promise; 3) granted the motion to dismiss the third cause of action for an injunction because Plaintiff failed to allege irreparable harm and the absence of an adequate legal remedy, in this case money damages; 4) granted the motion to dismiss the fourth cause of action for appointment of a Receiver because Plaintiff did not allege the existence of an emergency warranting that extraordinary remedy;

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[13] These Decisions are Exhibit C to Defendants' motion for partial summary judgment.

5) denied the motion to dismiss the fifth and sixth causes of action, for breach of the Consulting and Scanning Agreements respectively, based on the court's determination that Plaintiff sufficiently alleged a breach of both Agreements; 6) granted the motion to dismiss the seventh and eighth causes of action for tortious interference with the Consulting and Scanning Agreements respectively, based on the court's conclusion that the Complaint did not allege that Defendants deliberately sought to procure breaches of either Agreement; and 7) denied the motion to dismiss the ninth cause of action, for breach of fiduciary duty, concluding that the Complaint was sufficient in light of the fiduciary duty that a managing or general partner of a limited partnership owes to the limited partners. Justice Austin also concluded that, although a six year statute of limitations was applicable to the breach of fiduciary duty claims, dismissal of the breach of contract and breach of fiduciary duty claims was inappropriate in light of Plaintiff's allegations that Defendants' conduct constituted a continuing wrong; 8) granted the motion to dismiss the tenth cause of action, based on the court's conclusion that, because Plaintiff was not a partner in Limited Partnership, it had no standing to assert a derivative cause of action on behalf of Limited Partnership; 9) denied the motion to dismiss the eleventh cause of action, a derivative cause of action for breach of fiduciary duty on behalf of Scanning, concluding that, because plaintiff was a limited partner of Scanning, it had standing to assert a derivative claim; and 10).granted the motion to dismiss the twelfth cause of action, a derivative cause of action for conversion, asserted on behalf of Scanning and Islandia MRI, reasoning that, as plaintiff did not seek recovery from a specifically identifiable fund, the failure to pay use or consulting fees did not give rise to a claim for conversion.

Upon Plaintiff's motion for leave to renew and reargue, Justice Austin, in the Revised Decision: 1) reinstated the seventh cause of action, for tortious interference with the consulting agreement, as against the individual defendants;[14] and 2) ruled that the ninth cause of action, for breach of fiduciary duty, stated a cause of action both against the entities and the individual Defendants. The court reasoned that a corporate officer who commits a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation. The

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[14] Defendants' motion for partial summary judgment, Ex. C.

Court also granted Plaintiff leave to replead the eighth cause of action, alleging tortious interference with the Scanning Agreement.

Plaintiff filed an Amended Verified Complaint ("Amended Complaint") dated August 10, 2006, in which it asserts twelve causes of action, both individually and in its capacity as a limited partner of Scanning. In the first cause of action, Plaintiff seeks an accounting with respect to both Scanning and Limited Partnership. In the second cause of action, Plaintiff seeks to impose a constructive trust over the assets of Scanning and Limited Partnership. In the third cause of action, Plaintiff seeks a permanent injunction, prohibiting Defendants from diverting the funds of Scanning and Limited Partnership, or transferring the assets of these limited partnerships. In the fourth cause of action, Plaintiff seeks the appointment of a receiver to manage the affairs of Scanning and Limited Partnership. In the fifth cause of action, Plaintiff asserts that Limited Partnership breached, and continues to breach, the Consulting Agreement by failing to pay Plaintiff a percentage of the fees received from outside radiologists. In the sixth cause of action, Plaintiff asserts a claim for breach of the Scanning limited partnership agreement by Management and Techmed's diversion of radiology fees from Limited Partnership. The seventh cause of action alleges that Defendants tortiously interfered with the Consulting Agreement. The eighth cause of action alleges that Defendants tortiously interfered with the Scanning partnership agreement. The ninth cause of action alleges that Defendants breached their fiduciary duty to Ashley MRI in its capacity as a limited partner of Scanning. In the tenth cause of action, Plaintiff, as a limited partner of Scanning, asserts a derivative cause of action for breach of fiduciary duty on behalf of the general and limited partners of Limited Partnership. In the eleventh cause of action, Plaintiff, as a limited partner of Scanning, asserts a derivative cause of action for breach of fiduciary duty on behalf of Scanning. Finally, in the twelfth cause of action, Plaintiff, as a limited partner of Scanning, asserts a derivative cause of action for conversion on behalf of Scanning and Limited Partnership. Plaintiff seeks both compensatory and punitive damages on its various causes of action.

C. The Parties' Positions

Plaintiff submits that the income that Limited Partnership received pursuant to the excess capacity agreements should have been included in "net revenue" for the purpose of determining

Plaintiff's fees pursuant to the Consulting Agreement. Plaintiff further claims that, as a limited partner in Scanning, it was entitled to a share of the "use fees" that should have been charged on scans performed by the outside radiologists pursuant to the Lease Agreement. Thus, Plaintiff seeks an accounting for monies that the Partnership received , or should have received, pursuant to the excess capacity agreements. Plaintiff further alleges that on or about July 29, 2004, Partnership agreed to sell its leasehold interest in the office and the MRI equipment at a "discounted price" to North Ocean Imaging Holdings, L.P., a limited partnership that Merik Dolber controlled. Plaintiff, as a limited partner in Scanning, seeks an accounting with respect to Limited Partnership's partnership assets.

Defendant Vicente moves for summary judgment dismissing the complaint. Vincente asserts that she resigned from her position as executive vice president of Management in 1993, and has served as the practice coordinator for Management since that time. As the practice coordinator, Vincente affirms that she was a salaried employee who was responsible for general office administration, hiring and firing of staff, and bookkeeping. Vincente denies being involved in the solicitation or negotiation of the excess capacity agreements or deriving any financial benefit from them. In moving for summary judgment, Vincente argues that, as a matter of law, she did not tortiously interfere with the Consulting Agreement. Vincente further argues that she did not owe a fiduciary duty to Plaintiff. Finally, Vincente argues that her conduct was not sufficiently egregious to warrant an award of punitive damages.

The remaining Defendants move for summary judgment dismissing the fifth cause of action for breach of the Consulting Agreement and the seventh cause of action for tortious interference with that Agreement. Defendant Partnership argues that it did not breach the Consulting Agreement because "net revenues" were defined as the fees that it received from P.C. pursuant to the Lease Agreement. Thus, Limited Partnership argues that it was not under an obligation to pay Plaintiff a share of the fees received from outside radiologists. The individual Defendants argue that they did not tortiously interfere with the Consulting Agreement because there was no breach of that agreement. Defendants further argue that they acted properly in attempting to maximize the revenue earned by the Partnership.

Plaintiff moves to strike Defendants' Answer to the Amended Complaint on the ground

that Defendants lost or destroyed a set of ring binders and composition notebooks containing itemized logs of MRI scans taken on Limited Partnership's system. Defendant Jill Vincente cross-moves for sanctions against Plaintiff for filing a frivolous discovery motion.

In connection with Plaintiff's motion to strike Defendants' Answer, and after the instant motion papers were initially marked "submitted," counsel for Plaintiff brought to the Court's attention a recent case that, Plaintiff submits, supports Plaintiff's motion to strike. That case is *Einstein v. 357, LLC ("Einstein")*, New York County Index No. 604199/07, which outlines the potential consequences of a party's failure to comply with its obligation to preserve and produce electronically stored information ("ESI"). [15] Plaintiff submits that, under the reasoning of *Einstein*, the Court should impose the requested sanction in light of Defendants' alleged failure to produce the hard drives from Defendants' computers. Alternatively, Plaintiff argues that the Court, at a minimum, should order all Defendants, including Vincente, to produce for inspection by an information technology ("IT") vendor, all of the hard drives or other ESI sources from which Ashley may extract discoverable ESI. After that inspection, if a significant destruction of ESI is apparent, Plaintiff submits that it should again be permitted to move before the Court for the appropriate sanction, as authorized by *Einstein*. In support thereof, Plaintiff provides documentation that, Plaintiff submits, establishes that 1) Defendants have repeatedly changed their position regarding ESI; and 2) Defendants still have not produced any documentation from the office computer, despite a prior promise to do so.

In their opposition, the Defendants, other than Vincente, describe Plaintiff's comparison of this case with *Einstein* as "strained," and object to Plaintiff's inclusion of documentation that were not contained in the initial motion. Defendants submit that the facts of the instant matter are fundamentally different from those in *Einstein* and, therefore, sanctions are inappropriate. Specifically, Defendants argue that the issue in *Einstein* was whether the defendants had engaged in spoliation by 1) selectively deleting certain electronic mailings ("e-mail"); 2) failing to implement an effective litigation hold regarding e-mail. Defendants submit that the facts of

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[15] The correspondence from counsel for the parties regarding the *Einstein* case consists of 1) a letter on behalf of Plaintiff, dated December 4, 2009 with exhibits, 2) a letter dated December 10, 2009, on behalf of all Defendants except Vincente, with exhibits, and 3) a letter dated December 11, 2009, on behalf of Defendant Vincente, with an exhibit.

Einstein, which included the court's prior admonition of the defendants regarding their failure to produce all relevant e-mails, are different than those in the matter *sub judice*. Defendants submit that, in the matter at bar, *inter alia*, 1) there is no history of discovery delay or evasion; 2) there are no prior orders or instructions from the Court regarding discovery; and 3) Plaintiff did not advise Defendants that it viewed Defendants' e-mail production as incomplete until seven (7) weeks after its motion to strike, dated August 6, 2009. Counsel for Defendants submits that 1) none of the entity Defendants maintained a dedicated e-mail system and, therefore, e-mail was never stored on the server that was recently restored; and 2) to the extent that any e-mail may have existed, a search has been conducted of each individual's personal e-mail account, and none of the information on these accounts is responsive to any of Plaintiff's document requests. Defendants also dispute Plaintiff's contention that Defendants have taken inconsistent positions regarding the existence of ESI.

Counsel for Defendant Vincente, similarly, submits that *Einstein* 1) is not binding on the Court; and 2) is of minimal guidance to the matter at issue. Counsel submits, preliminarily, that Plaintiff cites to communications between Plaintiff and counsel for Defendants other than Vincente in support of its application. Counsel contends, further, that Plaintiff never objected to Vincente's May 5, 2009 letter, a copy of which counsel provides, that notified Plaintiff that it was Vincente's position that 1) she had complied with her discovery obligations; and 2) Plaintiff's objections to the adequacy of ESI disclosure related to Defendants other than Vincente.

Vincente moves for sanctions, submitting that Plaintiff's motion was frivolous.

RULING OF THE COURT

A. Summary Judgment Standard

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of

fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

B. Certain Aspects of Justice Austin's Decisions are Law of the Case

In the Initial Decision, Justice Austin granted the motion to dismiss 1) the second cause of action for a constructive trust, 2) the third cause of action for an injunction, 3) the fourth cause of action for appointment of a Receiver, 4) the seventh and eighth causes of action for tortious interference with the Consulting and Scanning Agreements respectively, 5) the tenth cause of action, concluding that Plaintiff lacked standing to assert a derivative cause of action on behalf of Partnership, and 6) the twelfth cause of action, a derivative cause of action for conversion. In the Revised Decision, Justice Austin reinstated the seventh cause of action, for tortious interference with the consulting agreement, as against the individual defendants.

Justice Austin's dismissal of the actions for a constructive trust, injunction and appointment of a receiver is binding on this Court pursuant to the doctrine of law of the case with respect to the same causes of action on the present summary judgment motion. That doctrine applies to legal determinations that were necessarily resolved on the merits in a prior decision. *Lehman v North Greenwich Landscaping*, 65 A.D.3d 1292 (2d Dept. 2009). The Court concludes that Justice Austin's determinations that Plaintiff did not make the requisite showing to justify that relief (including, for example, that injunctive relief is inappropriate because Plaintiff's injuries are compensable by money damages, and that a receiver is not warranted) are binding on this Court. In any event, Plaintiff's arguments do not otherwise afford a basis for this Court to question Justice Austin's reasoning. Accordingly, the Court dismisses the second, third and fourth causes of action in the Amended Complaint related to constructive trust, injunctive relief and appointment of a receiver.

Justice Austin also granted Plaintiff leave to replead the eighth cause of action, alleging tortious interference with the Scanning Agreement. The Court concludes that the eighth cause of action in the Amended Complaint, alleging Defendants' tortious interference with the Scanning Partnership Agreement, states a cause of action.

The Court also concludes that the tenth, eleventh and twelfth causes of action in the Amended Complaint, which are derivative actions by Ashley MRI in its capacity as a limited

partner in Scanning, general partner of the Partnership, state causes of action.

C. The Court Must Read and Construe the Consulting and Lease Agreements Together

Agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and will be read and interpreted together. *Patton v. Ferrara*, 46 A.D.3d 1203 (3d Dept. 2007); *Grossman v. Laurence Handprints,* 90 A.D.2d 95, 100 (2d Dept 1982). The Court determines that the Consulting Agreement and the Lease Agreement were executed at substantially the same time and are related to the same subject matter, namely the operation and marketing of the MRI facility. Thus, the Court must read, and interpret, the Consulting Agreement and the Lease Agreement together.

The Court must construe a contract in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. *MHR Capital Partners v. Presstek*, 12 N.Y.3d 640, 645 (2009). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.* However, when a contract term is ambiguous, parol evidence may be considered to elucidate the disputed portions of the agreement. *Blue Jeans v. Basciano*, 286 A.D.2d 274 (1st Dept. 2001).

D. Factual Issues Preclude Summary Judgment for Breach of the Consulting Agreement

As the Consulting Agreement defined "net revenues" as fees received by Partnership from P.C. pursuant to the Lease Agreement, less refunds or overcharges, Defendants argue that Plaintiff was not entitled to a percentage of the receipts from the outside radiology practices. This argument is supported by the provision in the Lease Agreement that P.C. would have the exclusive right to provide MRI services at the facility.

The Consulting Agreement, however, also provided that Ashley MRI was to seek "strategic alliances" for sources of additional MRI referrals. Because this term is ambiguous, the Court cannot rule as a matter of law that the parties did not contemplate licensing the facilities to outside radiologists, either directly or through the services of a management company. Reading the Consulting Agreement and the Lease Agreement together, fees received by the Partnership pursuant to the excess capacity agreements might be received "pursuant to the turnkey lease agreement," even though the MRI scans were read by outside radiologists rather than Perkes or Reiter. Thus, the parties might reasonably have intended for Plaintiff to receive a percentage of

the income received from outside management companies, regardless of whether the business was derived from "strategic alliances" that Plaintiff developed. In light of these factual disputes the Court denies Defendant Partnership's motion for summary judgment dismissing the fifth cause of action for breach of the Consulting Agreement.

E. Factual Issues Preclude Summary Judgment on the Tortious Interference Claim

To establish a claim of tortious interference with contract, plaintiff must show the existence of a valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages. *White Plains Coat & Apron v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). In response to such a claim, a defendant may raise the economic interest defense, that it acted to protect its own legal or financial stake in the breaching party's business. *Id.* Where plaintiff seeks to hold corporate officials personally responsible for the corporation's breach of contract, the acts of the officers which resulted in the tortious interference must be beyond the scope of their employment or motivated by personal gain, as distinguished from gain for the corporation. *Petkanas v. Kooyman*, 303 A.D.2d 303, 305 (1st Dept 2003). Where the corporate official acts to further his own personal gain as opposed to that of the corporation, he is not acting simply to protect his stake in the corporation's business. This standard applicable to corporate officials applies as well to those in control of a limited partnership.

In the seventh cause of action, Plaintiff alleges that the individual Defendants interfered with its Consulting Agreement with the Partnership. In moving for summary judgment dismissing the tortious interference claim, Vincente asserts that she did not financially benefit from the excess capacity agreements. However, Vincente has not made a *prima facie* showing that she did not, through her role as the practice coordinator, improperly procure the Partnership's failure to pay Plaintiff monies due under the Consulting Agreement.

Defendant Dolber asserts that there was no breach of the Consulting Agreement because Plaintiff was not entitled to a percentage of the revenue earned pursuant to the excess capacity agreements. However, because Dolber does not allege that he was personally involved in the negotiation of the Consulting Agreement, his assertion as to what was intended by the parties is merely a conclusion that does not meet his burden of proof. Thus, Dolber has not made a *prima*

facie showing that there was no breach of the Consulting Agreement.

If Defendants were to take the position that the Consulting Agreement was economically a "bad deal" for the Partnership, they could argue that they acted to protect their stake in the Partnership's business. However, it appears that Defendants may have acted with malice, that is to secure for themselves a greater share of the Partnership's net revenue, rather than to protect the Partnership's economic interest. In reaching this conclusion, the Court notes that Defendants did not inform Plaintiff that they had opened the facility to outside radiologists until five months after the first excess capacity agreement.[16] Thus, Defendants have failed to make a *prima facie* showing that 1) there was no breach of the Consulting Agreement; 2) they did not wrongfully procure the breach, or 3) Defendants acted in their economic interest. Accordingly, the Court denies the individual Defendants' motion for summary judgment dismissing the seventh cause of action for tortious interference.

A partner may be liable to the other partners for breach of fiduciary duty, if the partner usurps a "partnership opportunity." *Samantha Enterprises v. Elizabeth Street, Inc.*, 5 A.D.3d 280 (1st Dept. 2004). A partnership has a "tangible expectancy" of profiting from a particular business opportunity, which is consistent with its appropriately defined purpose. *Id.* Where, however, the partnership agreement permits the partners to engage in "other business," the partners may lawfully pursue business opportunities that might otherwise have gone to the partnership. *Barrett v. Toroyan*, 28 A.D.3d 331 (1st Dept. 2006).

The absence of an "other radiology business" provision in the Consulting Agreement, the Lease Agreement, or the Partnership's limited partnership agreement suggests that Perkes and Reiter did not have the right to usurp for themselves opportunities to license the MRI facilities. Thus, the excess capacity agreements would be partnership opportunities of the Partnership, if such agreements were consistent with its appropriately defined purpose. Licensing a management company to use the facilities would not be consistent with the Partnership's appropriately defined purpose, if the management company were controlled by individuals not licensed to practice medicine who received a disproportionate share of the fees earned by the

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[16] Defendants' motion for partial summary judgment, ex. H at 392.

outside radiologists, as such an agreement might be impermissible. In light of the factual disputes, the Court denies Defendants' motion to dismiss the cause of action for breach of fiduciary duty.

Vincente resigned from her position as executive vice president of Management and relinquished her limited partnership interest in the Partnership before the diversion of radiology business which gives rise to Plaintiff's breach of fiduciary claim. As Vincente was no longer under a fiduciary duty to Plaintiff when the excess capacity agreements were executed, she cannot be liable on a breach of fiduciary duty theory. However, if licensing the management companies were within the Partnership's appropriately defined purpose, Vincente might be liable for aiding and abetting breaches of fiduciary duty by the other Defendants.

A cause of action for aiding and abetting breach of fiduciary duty requires a *prima facie* showing of 1) a fiduciary duty owed to plaintiff by another, 2) a breach of that duty, and 3) defendant's substantial assistance in effecting the breach, and 4) resulting damages. *Keystone Int'l v. Suzuki*, 57 A.D.3d 205, 208 (1st Dept 2008). On Defendant Vincente's motion for summary judgment dismissing the Complaint, it is her burden to make a *prima facie* showing that she did not render substantial assistance to Defendants in breaching their fiduciary obligation to Plaintiff. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005). In view of Vincente's administrative and financial responsibilities as the practice coordinator of the Partnership, it is clear that Defendant has not met her burden. Accordingly, the Court denies Defendant Vincente's motion for summary judgment dismissing the Complaint as to Plaintiff's claim for aiding and abetting a breach of fiduciary duty by the other Defendants.

F. The Discovery Disputes do not Warrant Striking Defendants' Answer

The Court agrees with Defendants that the *Einstein* case is distinguishable from the matter at bar, in part because the Court has not previously issued directions or admonitions to one or more of the parties. Accordingly, the Court denies Plaintiff's motion to strike Defendants' Answer, but will permit Plaintiff leave to argue at trial as to any adverse inferences to be drawn from Defendants' conduct, if the testimony establishes that Defendants have wilfully failed to comply with their discovery obligations.

G. The Court Denies Vincente's Motion for Sanctions

Conduct is frivolous if it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. 22 NYCRR § 130-1.1(c)(1); *Carniol v. Carniol*, 288 A.D.2d 421 (2d Dept. 2001); *Baghaloo-White v. Allstate Ins. Co.*, 270 A.D.2d 296 (2d Dept. 2000); or if it was undertaken primarily to harass another litigant. 22 NYCRR § 130-1.1(c)(2); *Carniol v. Carniol, supra.* In light of the factual disputes regarding the extent to which Defendants have complied with their discovery obligations, the Court cannot conclude, based on the record before it, that Plaintiff's motion to strike the Answer was frivolous. Accordingly, the Court denies Vincente's motion for sanctions.

H. The Consulting and Lease Agreements may be Void

Although not raised by the parties, there is another important issue that the Court must address. Education Law § 6530(19) defines professional misconduct by a physician as including "permitting any person to share in the fees for professional services, other than a partner, employee, associate in a professional firm or corporation...authorized to practice medicine..." The prohibition includes "any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice...." Because fee sharing with an unlicensed individual is professional misconduct, an agreement to share medical fees with a non-physician is void and unenforceable. *See, e.g., Odrich v. Columbia University*, 308 A.D.2d 405 (1st Dept. 2003) in which the First Department affirmed the trial court's holding that respondents-trustees and administrators could not require petitioner-physicians to pay a 10% "Dean's tax," as such an arrangement would constitute illegal fee splitting where petitioners were no longer employees of respondents' university faculty practice corporation and respondents were no longer providing petitioners with salary, employee benefits, facilities, supplies, staff or malpractice insurance. *Cf. Albany Med. College v. McSchane*, 66 N.Y.2d 982 (1985) (where plaintiff, state-chartered medical college, had corporate charter empowering it to promote medical science and instruction, plaintiff permitted to share in fees generated by physicians who were faculty members).

In light of the fact that Ashley is apparently not licensed to practice medicine, the

Consulting Agreement, purporting to entitle Plaintiff to a percentage of the "net revenue" earned pursuant to the Lease Agreement, may be an illegal fee splitting arrangement. The provision in the Lease Agreement entitling the Partnership to a flat use fee for each MRI or diagnostic scan performed by the P.C. is dependent upon the income or receipts of the P.C. Thus, to the extent that the Partnership's income was passed through to Scanning and its unlicensed limited partners, Plaintiff appears to have participated in a second illegal fee splitting arrangement.

Where the public policy offended by an illegal agreement is sufficiently compelling, the defense of illegality may be raised by the court *sua sponte* in order to protect the integrity of the proceedings. *Simmons v. Benn*, 96 A.D.2d 507 (2d Dept. 1983). Passing the profits of a medical service corporation to a non-physician through the intermediary of an unlicensed management company raises public policy concerns as to the quality of care and the "corporate practice of medicine." *State Farm Ins. v. Mallela*, 372 F.3d 500, 506 (2d Cir. 2004). The direct sharing of radiology fees with a non-physician raises similar public policy concerns that are equally compelling.

Accordingly, the Court grants Defendants leave to renew their motion for summary judgment on the ground of illegality within thirty (30) days of service of a copy of this order. If Defendants fail to renew their motion for summary judgment, Plaintiff shall submit a supplemental memorandum on the issue of why the Court should not dismiss this action on its own motion.

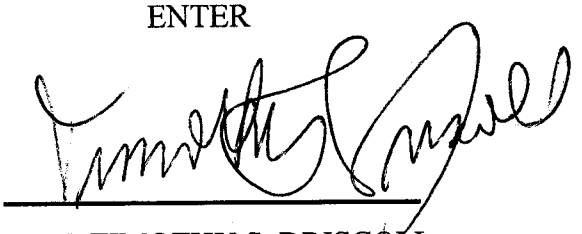
This shall constitute the decision and order of the court.

All matters not decided herein are hereby denied.

Counsel are reminded of their required appearance before the Court on February 8, 2010 at 9:30 a.m. for a Certification Conference.

ENTER

DATED: Mineola, NY
January 26, 2010



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

ENTERED

FEB 01 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE