SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 13
NASSAU COUNTY

LEONARD J. MONDSCHEIN, M.D.,

Decision and Order

Plaintiff,

MOTION SEQUENCE: 01
-against- **INDEX NO.:600307-14**

FELIX L. BADILLO, M.D., GARY D. GOLDBERG, M.D., UROLOGY ASSOCIATES, P.C. and WBF ASSOCIATES, LLC,

Defendants.

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
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Background

The plaintiff moves for an order pursuant to: CPLR 3212 granting him summary judgment on seven causes of action in his complaint; and pursuant to CPLR 6401 for the appointment of a temporary receiver.

The defendant Urology Associates, P.C. ("UA") is a medical professional corporation whose principal place of business is 535 Plandome Road in Manhasset. The plaintiff is a licensed physician who began working for UA in 1988; he became a shareholder of UA on August 15, 1991 by virtue of a shareholders agreement that was amended numerous times. Insofar as is relevant to the instant action, which concerns purported breaches of four agreements related to UA, the plaintiff, and defendants Felix L. Badillo, M.D. and Gary D. Goldberg, M.D., and non-party, Keith Bloom, M.D, were the shareholders of UA, with each of them owning ten shares.

Shareholders' Agreement

The shareholders' agreement contained the following relevant provisions with respect to the termination of employment with UA by a shareholder, and the obligation of UA and the remaining shareholders to the terminating shareholders (Exs. "A" and "K" to Affidavit in Support):

> 8. Purchase of Shares and Partnership Interest on Termination of Employment. Upon the termination of the employment of any Shareholder with the Corporation, for any reason whatsoever or no reason, all his shares of Common Stock shall be sold to the Corporation by the Shareholder and shall be purchased and redeemed by the Corporation in the manner and at the price set forth in Section 6 of this Agreement, and his interest in the Partnership shall be sold to and redeemed by the Partnership in accordance with Section 14 of the Partnership Agreement and as provided in Section 6 of this Agreement.
>
> 11. Guaranty. Each Shareholder who is not a Selling Shareholder jointly and

severally guaranties to each Selling Shareholder the full and prompt payment by this Corporation to such Selling Shareholder of any and all sums due hereunder and under the Partnership Agreement in connection with the purchase by the Corporation of the Shares of Common Stock owned by such selling Shareholder and the purchase by the Partnership of such Selling Shareholder's interest in the Partnership.

15. Indemnification of Selling Shareholder. Each Shareholder who is not a Selling Shareholder hereby agrees to indemnify and hold harmless a Selling Shareholder, pro rata based upon each non-Selling Shareholder's proportional ownership interest in the Corporation and the Partnership, as the case may be, (without regard to the Selling Shareholder), from any losses, claims or expenses relating to acts or omissions occurring subsequent to the effective date of the sale of such Selling Shareholder's interests, including, without limitation, claims on any indebtedness of the Corporation or the Partnership personally guaranteed by the Shareholder.

Retirement Agreement

On April 1, 1993, UA's shareholders executed a retirement plan, amended October 25, 2005, which delineated their benefits upon retirement or death of a shareholder. The relevant provisions of the retirement agreement include (Exs. "G" and "H" to Affidavit in Support):

1. Retirement Compensation.

(a) As Compensation for past services, upon the retirement or death, of a Shareholder who is a signatory to this Agreement (a "Participant"), a Participant or his estate or personal representative shall be paid the Retirement Compensation (as defined herein). "Retirement" means the termination of a Shareholder's employment by the Corporation for any reason other than termination for cause.

(b) For purposes of this Agreement, with regard to each Participant, the term "Retirement Compensation" shall mean the sum of (i) $250,000 ("Fixed Portion") plus (ii) the amount ("Accounts Receivable Portion"); determined by multiplying the Corporation's accounts receivable earned from medical services performed . . . as at the Valuation Date . . . by the percentage which such Participant's shares of

stock in the Corporation issued and outstanding on the Valuation Date. . . .[1]

2. Payment and Vesting.

(d) The Corporation's obligation to pay any Installment that would otherwise be due hereunder shall be suspended if, and for so long as, any Participant continues or resumes the practice of urology in Nassau County, New York after the date of his retirement from the Corporation. . . .
* * *

3. Guaranty. Each Shareholder jointly and severally guaranties to each other Shareholder the full and prompt payment by the Corporation to such other Shareholder of any and all sums due hereunder to such other Shareholder from the Corporation.

WBF Operating Agreement

On March 31, 1998, WBF Associates, LLC ("WBF") was formed for the purposes of holding title and managing the real property upon which UA conducted its practice (and which was previously owned by WBF Associates, a general partnership). The terms and conditions of the partnership agreement for WBF Associates were incorporated into the operating agreement of WBF ("operating agreement") and govern the relationship among the members (Affidavit in Support at ¶ 21; Ex. "E" to Affidavit in Support).

Relevant provisions of the WBF partnership agreement, which were incorporated into the WBF operating agreement, include (Ex. "C" to Affidavit in Support):

14. Death or Termination of a Partner.

(a) In the event of a Partner's death or the termination of his employment with the Corporation for any reason or no reason, the terminated Partner or the executor,

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[1] Pursuant to section 2(b)(i) of the Retirement Agreement, if a shareholder was employed by UA for at least 15 years, he was entitled to 100% of the fixed portion of his retirement compensation (which is $250,000).

administrator or other legal representative of his estate shall be required and obligated to sell to the Partnership, and the Partnership shall be obligated to purchase and redeem, such Partner's interest in the Partnership at a purchase price determined pursuant to clause (i) or (ii) below, as the case may be, and paid by the Partnership in accordance with . . . Section 6 of the Amended and Restated Shareholders' Agreement ("Shareholders Agreement") of even date among each Partner and the Corporation (in the case of a Partner's termination as an employee of the Corporation), upon which such interest shall be cancelled. . . .

* * *

17. Guaranty. Each Partner jointly and severally guaranties to each terminated Partner and the estate of any deceased Partner the full and prompt payment by the Partnership to such terminated Partner or estate of any and all sums due hereunder in connection with the purchase by the Partnership of such terminated Partner's or estate's interest in the Partnership.

Employment Agreement

In October 2008, the plaintiff executed the Physician Employment Agreement ("employment agreement") which detailed the benefits and responsibilities attendant to his position as a UA physician (Ex. "I" to Affidavit in Support).

The Plaintiff Resigns

In 2011, UA was reportedly in "financial distress" and its continued solvency was allegedly in doubt. Consequently, it retained a consultant "to identify potential practices that might be interested in acquiring UA and/or having its physicians join their practice". A proposal was received from Integrated Medical Professionals, PLLC ("IMP") with whom it began negotiating a transaction where IMP would acquire UA and UA would become a newly formed urology division of IMP with the shareholders of UA becoming members of the division of IMP (Affidavit in Support at ¶ 56; Affidavit in Opposition at ¶¶ 7, 8, 11, 13-15).

On February 23, 2012, at approximately 10:30 a.m. – shortly after its newest member, non-party Dr. Bloom, announced his decision to resign and return to Dallas, Texas – the plaintiff declared that he too was resigning (Affidavit in Support at ¶ 41). Dr. Bloom's departure reportedly "exacerbated [UA's] already precarious financial condition" such that, at the time of plaintiff's announcement, UA allegedly "did not have a surplus, and did not have any funds available to pay retirement compensation" (Affidavit in Opposition at ¶¶ 20, 26).

"Disagreeing with the legitimacy of [plaintiff's] purported notice of retirement, and alarmed by [plaintiff's] attempt to gain an unfair advantage over his fellow shareholders at a time of financial distress, [Badillo and Goldberg] immediately contested [plaintiff's] actions and submitted [their] own notices of intended resignation on the same day as [plaintiff's] purported notice of retirement" (Affidavit in Opposition at ¶ 33).[2]

At the time of the shareholders' notices to retire in February 2012, the shareholders of UA were the plaintiff, individual defendants Felix L. Badillo, M.D. and Gary D. Goldberg, M.D., and non-party, Keith Bloom, M.D.

Approximately three weeks later, on March 13, 2012, the three remaining physicians[3] (plaintiff and defendants Badillo and Goldberg) entered into a "standstill agreement" which, *inter alia*, stayed their respective resignations and maintained the status quo for a period of 90 days. During this 90-day time period, the parties continued to actively negotiate with IMP.[4] The

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[2] According to Badillo, the plaintiff knew that UA did not have the funds or future revenues to finance a buy-out of plaintiff's shares or retirement compensation and plaintiff "used his knowledge of UA's precarious financial situation and Dr. Bloom's resignation, knowledge gained by reason of his status as a UA shareholder, in attempting to impose personal liability upon his fellow shareholders for the buy-out of his shares and retirement compensation" (Affidavit in Opposition at ¶¶ 27, 28).

[3] Dr. Bloom's resignation did not trigger any buyout or compensation due him given his short tenure with UA (Affidavit in Support at ¶ 43).

[4] A tentative acquisition of UA by IMP was allegedly agreed to, however, the plaintiff allegedly rejected the proposal and sought to become IMP's employee instead of a member (Affidavit in Opposition at ¶¶ 37, 38).

standstill agreement was subsequently extended until September 1, 2013 (Ex. "J" to Affidavit in Support; Affidavit in Opposition at ¶¶ 35, 36). Notwithstanding the expiration of the standstill agreement on September 1, 2013 (which provided that the resignations became effective 90 days after the expiration of the standstill agreement, to wit, on December 1, 2013), the parties nevertheless continued to voluntarily provide services for UA (Affidavit in Opposition at ¶ 47). Moreover, in September 2013, IMP's website was updated to include the photographs, CVs and other marketing material for the physician employees of UA, including the plaintiff, Badillo, and Goldberg (Affidavit in Support at ¶ 65).

On December 30, 2013, Badillo, in his capacity as president and a shareholder of UA, scheduled a shareholders' meeting for January 9, 2014 "for the purpose of discussing the preservation of assets, the winding up of the business and the possible dissolution of the PC" (Exs. "M" and "N" to Affidavit in Support). When no resolution was achieved at the January 9, 2014 meeting, Badillo scheduled a January 20, 2014 meeting "for the purpose of additional motions aimed at preserving the assets of each of the PC and the LLC and dissolving and winding up of the business or the PC" (Ex. "O" to Affidavit in Support). On that date, in the plaintiff's absence, defendants Badillo and Goldberg approved motions to refinance the debt of UA and WBF for the purposes of: "selling the assets of UA to [IMP] or another suitable purchaser"; and "entering into a lease with [IMP] or another suitable lessee as [Badillo] deems appropriate, and the entering into of such lease by WBF" (Ex. "P" to Affidavit in Support).[5]

The plaintiff resigned on December 31, 2013 and defendants Badillo and Goldberg "continued to provide medical services to UA's patients in order to fulfill [their] professional obligations to [their] patients, and to preserve the assets of UA and WBF" (Affidavit in Support at ¶ 47; Affidavit in Opposition at ¶¶ 49, 50).

In March 2014, Badillo and Goldberg became members and employees of IMP and UA

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[5] Plaintiff attended the January 9, 2014 shareholders' meeting, but "declined to attend the January 20, 2014 meeting" (Affidavit in Opposition at ¶ 54).

allegedly "ceased all operations, and since that time has had no revenues" and "remains insolvent" (Affidavit in Opposition at ¶¶ 57, 58). Notwithstanding, and according to the plaintiff, UA has not been dissolved or wound up and continues to be listed as an active entity (Ex. "8" to Affirmation in Reply).

Moreover, on March 10, 2014, WBF leased the premises upon which UA conducted its practice to IMP for $17,000 per month (Ex. "11" to Affirmation in Reply).[6]

Procedural History

On January 22, 2014, the plaintiff filed the instant action against the defendants and IMP. On January 30, 2014, the complaint was amended withdrawing the claims against IMP.

In the amended complaint, the plaintiff asserts causes of action against defendants for, *inter alia*, breach of contract and/or declaratory relief with respect to the shareholders' agreement, retirement agreement, WBF agreement, and the employment agreement (Ex. "1" to Motion).

Defendants Badillo and Goldberg answered the complaint on March 13, 2014 and defendants UA and WBF separately answered on March 14, 2014. Both answers interposed counterclaims for, *inter alia*, judgment declaring that plaintiff's notice of resignation and retirement are "invalid and of no effect", breach of fiduciary duty, and breach of contract (Exs.

[6] On November 1, 2013, the property was appraised at $2,300,000 (Ex. "10" to Affirmation in Reply). According to the defendants, two months after the appraisal, as of December 31, 2013 (the date in which plaintiff retired), the fair market value of the property was $947,064.00 (Ex. "9" to Affirmation in Reply at p 9).

"2", "3" to Motion).[7]

The following month, plaintiff served his reply to the counterclaims (Exs. "4", "5" to Motion).

The plaintiff moves for the appointment of a temporary receiver and for summary judgment on the first seven causes of action in his complaint.[8]

For the reasons that follow, the motion is granted in part and denied in part.

The Court's Determination

Temporary Receiver

The branch of the plaintiff's motion, pursuant to CPLR 6401, for the appointment of a temporary receiver for UA and WBF, is denied.

The appointment of a temporary receiver is an extreme remedy that should be granted only where the movant (a person having an apparent interest in the property which is the subject of the action) has made a clear evidentiary showing of the need to conserve the property at issue and protect the moving party's interests (*see Lee v 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d 379 [2d Dept 2003]). Here, notwithstanding the fact that defendants Badillo and Goldberg approved a motion at a board meeting held on January 20, 2014 (which plaintiff was invited to,

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[7] In the counterclaim for breach of fiduciary duty, defendants allege, amongst other things, that plaintiff used information obtained in his capacity as a director of UA to further his own personal financial interests at the expense of UA and its shareholders by using such information in his attempt to extract buy-out and retirement payments from a financially distressed UA, and to gain an unfair advantage over his fellow shareholders Drs. Goldberg and Badillo" and in doing so, "placed his personal interests above those of UA and its other shareholders" (Ex. "2" to Motion at ¶¶ 216-17).

[8] Plaintiff does not seek summary judgment on his eighth cause of action, a claim for breach of fiduciary duty asserted against defendants Badillo and Goldberg.

but did not, attend) to sell assets of UA, the plaintiff has nevertheless failed to make a clear evidentiary showing that the assets and real property are in danger of being "removed from the state, or lost, materially injured or destroyed" (CPLR 6401[a]; *see also Vardaris Tech v Paleros Inc.*, 49 AD3d 631, 632 [2d Dept 2008]; *Lee v 183 Port Richmond Ave. Realty, Inc.*, 303 AD2d at 379, *supra*).[9]

Summary Judgment

Declaratory Judgment and Breach of Contract with Respect to the Shareholders' Agreement (the First and Fourth Causes of Action)

In the first cause of action, the plaintiff seeks a declaration that:

a. Dr. Mondschein, Badillo and Goldberg have resigned, there are no officers, directors or shareholders of UA, and a receiver must be appointed to administer the affairs of UA;

b. All votes and actions taken by Badillo and Goldberg as of January 9, 2014, January 20, 2014, and forward are hereby null and void;

c. UA is obligated to remit payment of the UA buy out and Retirement Compensation to Dr. Mondschein;

d. UA has breached its obligation to pay the UA buy out and Retirement Compensation to Dr. Mondschein;

e. Badillo and Goldberg are obligated to remit payment of the UA buy out and Retirement Compensation to Dr. Mondschein;

f. Badillo and Goldberg have breached their personal guaranty of payment of the UA buy out and Retirement Compensation to Dr. Mondschein; and

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[9] In this regard, Badillo states in his affidavit that IMP paid $9,638 for the assets of UA, "IMP assumed some of UA's contractual obligations", and IMP is currently leasing the property held by WBF, all in an effort to "preserve the assets of UA and WBF" (Affidavit in Opposition at ¶¶ 55, 56).

g. Badillo and Goldberg, having resigned after Dr. Mondschein, must personally pay the buy out under the UA Agreement (Amended Complaint at ¶ 102).

With respect to branches "c" through "g" above, the plaintiff has failed to establish its entitlement to declaratory relief as "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*BGW Development Corp. v Mount Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America, Inc.*, 247 AD2d 565 [2d Dept 1998]; citing *Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]). The plaintiff has sought the appropriate relief in the fourth cause of action asserting a claim for breach of the shareholders' agreement against UA (the breach relating to UA's failure to remit to plaintiff the buyout amount) and the individual defendants (for their breach of guaranty of the buyout payments owing to plaintiff) (*see Ithilien Realty Corp. v 180 Ludlow Development LLC*, 140 AD3d 621 [1st Dept 2016]; *First Sterling Corp. v Union Square Retail Trust*, 102 AD3d 490 [1st Dept 2013]; *Watson v Sony Music Entertainment, Inc.*, 282 AD2d 222 [1st Dept 2001]).

With respect to branches "a" and "b" of the first cause of action, plaintiff seeks a declaration that plaintiff and the individual defendants "have resigned, there are no officers, directors or shareholders of UA" and, thus, the actions taken by Badillo and Goldberg at the January 2014 board meetings are "null and void" (Amended Complaint at ¶ 102). Plaintiff's argument that defendants have resigned and are no longer shareholders or directors of UA is inconsistent with plaintiff's memorandum of law wherein plaintiff states that he has "clearly established as a matter of law that: . . . [t]he resignations of Drs. Badillo and Goldberg were ineffectual" and, as such, defendants are remaining shareholders "obligated to personally remit payment of the UA buyout to [plaintiff]" (Memorandum of Law in Support at p 15); that neither Badillo nor Goldberg "ever actually resigned from UA and are still working as UA, or, at the very least, did not resign from the UA entirely until March 2014, three months afer they accepted resignation of [plaintiff]"; and that "[plaintiff] is the only shareholder who actually resigned and retired" (Reply Memorandum of Law at pp 6, 13). In this regard, the plaintiff states that since

January 2014, "Drs. Badillo and Goldberg have performed and continue to perform professional services for UA as a division of IMP" (Affidavit in Support at ¶ 69).

Accordingly, plaintiff has failed to make a prima facie showing with respect to his first cause of action seeking declaratory relief.

In the fourth cause of action, a claim that the defendants breached the shareholders' agreement, plaintiff alleges that: UA has breached the shareholders' agreement by failing to remit payment to the plaintiff his buyout of UA; and Badillo and Goldberg have breached the shareholders' agreement by "refusing to honor their personal guaranty of payment of the UA buyout to [plaintiff]" (Amended Complaint at ¶¶ 124, 125).

With respect to the claim that UA and the individual defendants breached the shareholders' agreement, the court notes that section 8 of the agreement obligates UA to buy plaintiff's shares in UA upon plaintiff's termination. Specifically, "[u]pon the termination of the employment of any Shareholder with the Corporation, for any reason whatsoever . . . all his shares of Common Stock shall be sold to the Corporation by the Shareholder and shall be purchased and redeemed by the Corporation . . . . "

Here, Plaintiff has prima facie established that Plaintiff gave notice of his intention to retire on February 23, 2012, the Plaintiff did actually retire on December 31, 2013, and that after Plaintiff retired, defendants Badillo and Goldberg, who also gave notices of intent to retire on February 23, 2012, continued to practice as physicians with UA until, at least, March 2014. Accordingly, pursuant to section 8 of the agreement, UA was required to purchase plaintiff's shares at a price set forth in the agreement and defendants Badillo and Goldberg, as remaining shareholders, each guaranteed UA's "full and prompt payment" under section 11 of the shareholders' agreement.

In opposition, defendants argue, *inter alia*, that plaintiff's "purported notice of retirement

was only an attempt to use corporate information [that UA was in a purportedly precarious financial situation] to serve his own interests at the expense of his fellow shareholders" and that "such notice lacked the integrity and fairness required in a transaction between shareholders in a closely held corporation, and is invalid and of no effect" (Memorandum of Law in Opposition at pp 12, 13).[10]

In reply to defendants' contention that plaintiff acted in bad faith when resigning, the plaintiff argues that his:

> [M]otivation and intent with respect to his decision to resign from UA is irrelevant. Where the parties have entered into written agreements, it is the terms of those agreements that controls. . . . Clearly, none of the agreements make [plaintiff's] intent when he filed his notice of resignation a factor as to whether he should receive the payments owed to him. . . . Likewise, Defendants produce no evidence to raise a question of fact that [plaintiff] tendered his notice of resignation without anything other than a true intent to resign from UA. Defendants do not submit a single document in their opposition establishing that UA's financial condition was, in fact, deteriorating or that any shareholder was seeking to dissolve UA at the time of [plaintiff's] notice of resignation. Moreover, they do not submit any evidence that [plaintiff's] resignation was related to his knowledge of the deteriorating financial condition facing UA or that the UA shareholders were seeking to leave and dissolve UA (Memorandum of Law in Reply at pp 4, 5).

Contrary to the plaintiff's contention, his motivation and intent in resigning from UA is not irrelevant and, thus, the defendants have raised an issue of fact warranting the denial of plaintiff's motion with respect to defendants' alleged breach of the shareholders' agreement.

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[10] Defendants also argue that 90 days after the expiration of the standstill agreement, the resignation of plaintiff, Badillo and Goldberg "all simultaneously became effective, and UA was faced with three 'Selling shareholders' - i.e., shareholders potentially entitled to a buyout of their shares - and three shareholders potentially entitled to retirement compensation" and further, as "each is a Selling shareholder under the agreement", none "qualifies as a 'Shareholder who is not a Selling shareholder' who would be required to provide a guarantee under the agreement" (Memorandum of Law in Opposition at pp 16 and 20).

"As a general rule, courts must enforce shareholder agreements according to their terms. Such agreements avoid costly, lengthy litigation and promote 'reliance, predictability and definitiveness' in relationships among shareholders in close corporations" (*Matter of Penepent Corp.*, 96 NY2d 186, 192 [2001] [internal citations omitted]). Here, the shareholders' agreement expressly provides for a buyout of a shareholder's shares by the company and that such buyout is guaranteed by those shareholders who remain.

Nevertheless, a shareholder could be in breach of its fiduciary duty to other shareholders, even when exercising an express contractual right, if it acted malevolently and in bad faith, solely for its own gain (*Richbell Info. Servs. v Jupiter Partners* (309 AD2d 288 [1st Dept 2003] [Even in cases where a defendant has acted within its express contractual rights, an apparently unlimited contractual right "may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract"]; *see also O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281 [1st Dept 2007] citing *Richbell Info. Servs. v Jupiter Partners*, 309 AD2d at 288, *supra* [shareholder could be in breach of its fiduciary duty to other shareholders, "even when exercising an express contractual right, if it acted malevolently and in bad faith, solely for its own gain, and in a manner not contemplated by the parties' agreement"]; *Wilf v Halpern*, 194 AD2d 508 [1st Dept 1993] ["The provision in the partnership agreement requiring unanimity does not, as defendant asserts, give him an absolute right, at his sole whim and discretion, to impede significant functions of the partnership solely for personal gain, but must be construed in light of defendant's fiduciary obligation of undivided loyalty to his fellow partners, as well as those provisions of the partnership agreement requiring each partner to execute any documents necessary or expedient to the achievement of the partnership's purposes and to cooperate with each other to effectuate and advance its goals"]; *Drucker v Mige Assoc. II*, 225 AD2d 427 [1st Dept 1996] [internal citations omitted] ["[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty". The fiduciary is, therefore, mandated to "single-mindedly

pursue the interests of those to whom a duty of loyalty is owed."])[11]

Here, while defendants have not submitted documentation demonstrating the precarious financial status of UA, they have submitted the affidavit of defendant Badillo, who averred to the following:

> 7. In 2011, UA owed approximately a million dollars in guaranteed loans, owed additional amounts to various vendors and suppliers, and the amounts owed far exceeded the total amount of its assets.
>
> 8. In 2011, it became apparent to UA and its shareholders that UA was in financial distress, and that the continued solvency of UA was in doubt.
>
> 9. In 2011, all of the shareholders, including Dr. Mondschein, knew and agreed that UA was failing.
>
> 10. In 2011, it became clear to UA and its shareholders that, given UA's finances, among other factors, it made economic sense for the shareholders of UA to seek a transaction for UA to be acquired by either a larger urology practice or a multispecialty practice, or to otherwise join such a practice.
>
> 14. With the approval of its shareholders, including Dr. Monschein, UA entered negotiations with IMP regarding a transaction under which IMP would potentially acquire certain assets of UA, UA's shareholders would join IMP, and UA would cease to exist.
>
> 15. All of the UA shareholders, including Dr. Mondschein, were actively involved in the negotiations between UA and IMP.
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> 26. At the time of Dr. Mondschein's purported notice of retirement, UA was in

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[11] Defendants argue in their opposition that: "When [plaintiff] delivered his purported notice of intent to resign, he had been made aware, in his capacity as a shareholder and director of UA: (1) that UA owed approximately one million dollars in loans and additional amounts to vendors and suppliers, and was in severe financial distress; (2) that UA was negotiating a transaction by which all of UA's shareholders would resign from UA and become members of IMP; and (3) that Dr. Bloom intended to resign and that such resignation would accelerate UA's already deteriorating financial condition" (Memorandum of Law in Opposition at p 12).

financial distress, did not have a surplus, and did not have any funds available to pay retirement compensation to Dr. Mondschein, or to me [Badillo] or Dr. Goldberg.

27. Dr. Mondschein, as a shareholder of UA, knew at the time of his purported notice of retirement that UA did not have the funds or future revenues to finance a buy-out of his shares or retirement compensation.

40. From the fall of 2013 through early 2014, UA's financial condition worsened, and UA was unable to pay any compensation to me, Goldberg, or Mondschein.

45. On November 30, 2013, UA was in financial distress, did not have a surplus, and did not have any funds available to pay for a buy-out of the shares of Dr. Mondschein, or for the buy-out of the shares held by me or Dr. Goldberg.

46. On November 30, 2013, UA was in financial distress, did not have a surplus, and did not have any funds available to pay retirement compensation to Dr. Mondschein, or to me or Dr. Goldberg.

58. UA has ceased to operate or to collect any revenues and remains insolvent.

Badillo's affidavit has raised an issue of fact as to plaintiff's motive in retiring which warrants denial of summary judgment on the breach of contract claim.

Declaratory Judgment and Breach of Contract with Respect to the Retirement Agreement (Second and Fifth Cause of Action)

The plaintiff also seeks summary judgment on his second cause of action for declaratory relief and his fifth cause of action for breach of contract based on the terms of the retirement agreement. Specifically, plaintiff seeks the following declaratory relief with respect to the retirement agreement:

a. Dr. Mondschein retired before Badillo and Goldberg and Badillo and Goldberg are personally liable for the Retirement Compensation owed to Dr. Mondschein under the personal guaranties they signed as part of the Retirement Agreement;

b. UA is obligated to remit payment of the Retirement Compensation to Dr. Mondschein;

c. UA has breached its obligation to pay the Retirement Compensation to Dr. Mondschein;

d. Badillo and Goldberg are obligated to remit payment of the Retirement Compensation to Dr. Mondschein;

e. Badillo and Goldberg have breached their personal guaranty of payment of the Retirement Compensation to Dr. Mondschein;

f. Badillo and Goldberg, having resigned after Dr. Mondschein, must personally pay the buyout under the UA Agreement; and

g. Badillo and Goldberg are not entitled to Retirement Compensation as they are presently continuing to render professional medical services in Nassau County (Amended Complaint at ¶ 109).

Although it is undisputed that the plaintiff retired on December 31, 2013, prior to the resignations of Badillo and Goldberg, the court declines to grant declaratory relief with respect to branch "g" of the amended complaint, wherein plaintiff seeks a declaration that Badillo and Goldberg are not entitled to retirement compensation inasmuch as the issue of their entitlement to retirement compensation does not present an actual controversy (*see Fragoso v Romano*, 268 AD2d 457 [2d Dept 2000] [in order to maintain an action for a declaratory judgment, a party must present a concrete, actual controversy for adjudication]).

Summary judgment is also denied with respect to the remaining branches of the second cause of action inasmuch as declaratory relief is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in the fifth cause of action for breach of the retirement agreement (*see BGW Development Corp. v Mount Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America, Inc.*, 247 AD2d at 565, *supra*).

In the fifth cause of action, plaintiff alleges that UA has breached the retirement

agreement by "failing to remit payment" of retirement compensation to Plaintiff and that Badillo and Goldberg have breached the retirement agreement by "failing and refusing to honor their personal guaranty" of paying retirement compensation to plaintiff (Amended Complaint at ¶¶ 132, 133).

As noted earlier with respect to the shareholder agreement (*see* discussion *supra* at pp 10-13), the plaintiff's motivation and intent in resigning from UA is relevant to defendants' purported breach of the retirement agreement and, thus, the branch of the plaintiff's motion seeking summary judgment with respect to the fifth cause of action is denied (*Richbell Info. Servs. v Jupiter Partners,* 309 AD2d at 288, *supra*).

Declaratory Judgment and Breach of Contract with Respect to the WBF Operating Agreement (Third and Seventh Causes of Action)

In the third cause of action, the plaintiff seeks the following declaratory relief with respect to the WBF Operating Agreement:

> a. Dr. Mondschein retired before Badillo and Goldberg and Badillo and Goldberg are personally liable for the buyout of Dr. Mondschein's interest in WBF pursuant to the personal guaranties they signed as part of the Retirement Agreement;
>
> b. Badillo and Goldberg are not authorized to conduct business on behalf of WBF and the actions taken at the January 9 and January 20, 2014 meetings are null and void.
>
> c. WBF is obligated to remit payments of the buyout of Dr. Mondschein's interest in WBF;
>
> d. WBF has breached its obligation to pay the buyout of Dr. Mondschein's interest in WBF.
>
> e. Badillo and Goldberg are obligated to remit payment of buy out of Dr. Mondschein's interest in WBF to Dr. Mondschein;

f. Badillo and Goldberg have breached their personal guaranty of payment of the buyout of Dr. Mondschein's interest in WBF to Dr. Mondschein; and

g. Badillo and Goldberg, having resigned after Dr. Mondschein, must personally pay the buyout of Dr. Mondschein's interest in WBF (Amended Complaint at ¶ 118).

With respect to branch "b" of the third cause of action, plaintiff seeks a declaration that "Badillo and Goldberg are not authorized to conduct business on behalf of WBF and the actions taken at the January 9 and January 20, 2014 meetings are null and void". The plaintiff has failed to prima facie establish that Badillo and Goldberg were not authorized to conduct business and take action at the shareholders' meetings held in January 2014, a time at which plaintiff avers that Badillo and Goldberg were still shareholders of UA (and as such required them to remit a buyout to the plaintiff) and practicing urology as Urology Associates (see Affidavit in Support at ¶ 69 wherein plaintiff states that since January 2014, "Drs. Badillo and Goldberg have performed and continue to perform professional services for UA as a division of IMP").

Summary judgment with respect to the remaining branches of the third cause of action for declaratory relief is denied as "unnecessary and inappropriate" given the claim of breach of the WBF operating agreement asserted in the seventh cause of action (see *BGW Development Corp. v Mount Kisco Lodge No. 1552 of the Benevolent and Protective Order of Elks of the United States of America, Inc.*, 247 AD2d at 565, *supra*).

The plaintiff asserts in the seventh cause of action that pursuant to the WBF operating agreement, WBF is obligated to buy out plaintiff's interest in WBF, that Badillo and Goldberg have "personally guaranteed payment of the buyout of [plaintiff's] interest in WBF", and that WBF, Badillo and Goldberg have breached the WBF operating agreement.

Notwithstanding the contractual right to a buyout, there are factual issues as to plaintiff's resignation given his knowledge that, in 2011, IMP and UA were exploring a transaction where IMP would acquire UA and UA would become a newly formed urology division of IMP with the

shareholders of UA becoming members of the division of IMP (Affidavit in Support at 56); (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d at 288, *supra*).

Breach of the Employment Agreement
(Sixth Cause of Action)

In the sixth cause of action, the plaintiff alleges that UA breached the UA employment agreement by failing to remit to plaintiff his salary, benefits, and other additional compensation.

The employment agreement provided for plaintiff's compensation, expense reimbursement, automobile, telephone and computer allowances, etc.

With respect to plaintiff's claim that UA failed to compensate plaintiff for 14 weeks of base and productivity compensation in the year 2013, the plaintiff has made a prima facie showing of his entitlement to relief. The defendants' opposition, to wit, that they also did not receive any compensation from UA during that same time period because "[a]fter UA became insolvent, none of the shareholders received compensation, and UA remains insolvent to this day" (Affidavit in Opposition at ¶ 40; Memorandum of Law in Opposition at p 24) is insufficient to rebut plaintiff's prima facie showing inasmuch as defendants have not set forth the date on which UA purportedly became "insolvent". Moreover, the fact that UA did not pay compensation to other employees (Badillo and Goldberg) does not mean that UA did not breach the employment agreement by failing to pay his compensation.

The plaintiff also claims that he is entitled to $7,520.74 as reimbursement for his automobile insurance. The plaintiff has failed to make a prima facie showing that he is entitled to such relief. In this regard, the employment agreement provides: "With respect to each *automobile leased by Urology Associates* and *used by the Physician in connection with the business of Urology Associates*, Urology Associates agrees to maintain automobile insurance" (Ex. "I" to Motion at 8.3[b] [emphasis added]). In his affidavit in support of the motion, plaintiff does not aver that the car for which he seeks insurance reimbursement was leased by UA or used

by him in connection with his business, two conditions justifying UA's payment of automobile insurance. To the contrary, plaintiff maintains in his affidavit that he has "not been reimbursed for automobile insurance . . . for *my automobile*" (Affidavit in Support at ¶ 53 [emphasis added]).[12]

Similarly, plaintiff has also failed to make a prima facie showing that UA breached the employment agreement based upon plaintiff's 'belief' that Badillo converted plaintiff's American Express Reward points that plaintiff had accrued on his UA corporate card.

Last, the plaintiff's assertion that he should be indemnified under the UA shareholder agreement by Drs. Badillo and Goldberg for the Capital One lawsuit is denied.[13] Initially, the court notes that the allegations of breach of the shareholders' agreement in the complaint are addressed to the defendants' failure to purchase plaintiff's interest and do not concern the indemnification provision set forth in paragraph 15 of the shareholders' agreement (Amended

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[12] Although not argued by the plaintiff, to the extent plaintiff could plausibly argue, under section 9.1 of the employment agreement, that he is entitled to reimbursement for automobile insurance because Badillo and Goldberg's automobile insurance was "fully paid for by UA over the same period of time", summary judgment is nevertheless denied given Badillo's affidavit wherein plaintiff "failed to respond to UA's repeated requests that he provide the relevant insurance bills to UA for payment" (Affidavit in Opposition at ¶ 59).

[13] The plaintiff argues that, pursuant to the indemnification and hold harmless provision of the shareholders' agreement, he is entitled to protection against any portion of Capital One's May 7, 2014 claim asserted in *Capital One, N.A. v Urology Associates, P.C., WBF Associates LLC, Felix L. Badillo, Gary Goldberg, Leonard J. Mondschein* (Index No. 004242/14) which arose after plaintiff's retirement on December 31, 2013. On January 29, 2015, Capital One's motion for summary judgment against each of the defendants for breach of an October 2, 2012 promissory note, and their personal guarantees thereunder, in the amount of $750,000.00, was granted (Brown, J.).