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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. ROBERT A. BRUNO, J.S.C.

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SCOTT SAVEL, and SCOTT SAVEL CONSULTING CORP.,

Plaintiffs,

-against-

MICHELE SAVEL, KIDDSMILES DDS, PLLC, KIDDSMILES DDS II, PLLC, KIDDSMILES DDS III, PLLC, KIDDSMILES DDS IV, PLLC,KIDDSMILES V PLLC d/b/a KIDDSMILES PEDIATRIC DENTISTRY, ROBERT BENCIVENGA, GABY MORGAN, and JOHN DOE DOS. "1" through "5", inclusive, the last five names being fictitious and unknown to Plaintiff, the persons or parties intended as being other participants and/or co-conspirators in the events, circumstances, or causes of action asserted herein,

Defendants.

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TRIAL/IAS PART 14
Index No.: 006375-14
Submission Date: 4-13-17
Motion Sequence: 003, 004

DECISION & ORDER

Papers Numbered

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Sequence #004

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Defendant, Michele Savel (referred to herein as "Dr. Savel"), and defendants, Kiddsmiles DDS, PLLC, Kiddsmiles DDS II, PLLC, Kiddsmiles DDS III, PLLC, Kiddsmiles DDS IV, PLLC, Kiddsmiles DDS V, PLLC d/b/a Kiddsmiles Pediatric Dentistry (herein referred to as "the Dental Practices"), collectively move [Mot. Seq. 003], pursuant to CPLR 3211(a)(7), for an Order, dismissing the plaintiffs' verified complaint. **The motion is granted in its entirety.**

By separate motion, the Dental Practices move [Mot. Seq. 004], pursuant to CPLR 3025(b), for an Order granting them leave to amend their Verified Answer to assert four counterclaims. **The motion is granted.**

Plaintiffs commenced this action sounding in constructive trust, unjust enrichment, money had and received, conspiracy, New York Public Health Law §238-a, tortious interference with a contract, and tortious interference with business relations. The plaintiff, Scott Savel and defendant, Michelle K. Savel were married in 2004. Thereafter, defendant Dr. Savel, a pediatric dentist and plaintiff Savel, an "entrepreneur and businessman" started several pediatric dental businesses, to wit: Kiddsmiles DDS PLLC located in North Babylon, NY; Kiddsmiles DDS II PLLC located in Manhasset, NY; Kiddsmiles DDS III PLLC located in Holbrook, NY; Kiddsmiles DDS IV PLLC located in Merrick, NY; and Kiddsmiles DDS V PLLC located in Syosset, NY. According to the plaintiff, sometime in 2014, the parties' marriage began to deteriorate and, as a result, the defendant Dr. Savel terminated plaintiff Savel's employment with the Dental Practices.

It is noted at the outset that by prior Short Form Order dated March 12, 2015, this Court granted the defendants', Robert Bencivenga (Certified Public Accountant for the Dental Practices) and Gaby Morgan's (Dr. Savel's mother and bookkeeper), motion [Mot. Seq. 001] to dismiss the plaintiffs' complaint for failure to state a cause of action.

Upon the instant motion, defendants, Dr. Savel and the Dental Practices, seek, pursuant to CPLR 3211(a)(7), to dismiss the plaintiff's complaint in its entirety.

The law is clear. On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), this court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Polonetsky v. Better Homes Depot*, 97 NY2d 46 [2001]; *Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307, 318 [1995]; *Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v. Martinez, supra* at 87-88). Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated (*Campaign for Fiscal Equity v. State of New York, supra* at 318). Importantly, "[w]hether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus" (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

It is noted at the outset that contrary to the plaintiffs' argument made in opposition to the defendants' motion herein, the movants are not required to attach a copy of the plaintiffs' Verified Bill of Particulars, and the Amended and Supplemental Verified Bill of Particulars. No such requirement exists. Indeed, the law provides as follows:

> Although a bill of particulars may be used to amplify the allegations in a complaint***and considered in determining the "sufficiency of a pleaded cause of action"***, a bill of particulars may not be used to supply allegations essential to a cause of action that was not pleaded in the complaint ***

(*Alami v. 215 E. 68th St., L.P.*, 88 AD3d 924, 925-926 [2nd Dept. 2011] *quoting* Siegel, N.Y. Prac. § 238, at 401 [4th ed.]; *Sullivan v. St. Francis Hosp.*, 45 AD3d 833 [2nd Dept. 2007]; *Castleton v. Broadway Mall Props., Inc.*, 41 AD3d 410, 411 [2nd Dept. 2007]).

For the sake of clarity, this Court will separately address the sufficiency of each of the plaintiffs' causes of actions as asserted against the moving defendants. In the end, this Court predicates its analysis by accepting as true the allegations of each claim as asserted in the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]).

Constructive Trust

The equitable remedy of a constructive trust may be imposed "[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest" (*Sharp v. Kosmalski*, 40 NY2d 119, 121 [1976]; *see Simonds v. Simonds*, 45 NY2d 233, 241 [1978]; *Rowe v. Kingston*, 94 AD3d 852, 853 [2nd Dept. 2012]). Thus, the elements of a cause of action to impose a constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, express or implied (3) a transfer in reliance thereon, and (4) unjust enrichment (*Sharp v. Kosmalski*, *supra* at 121; *Rowe v. Kingston*, *supra* at 853; *Quadrozzi v. Estate of Quadrozzi*, 99 AD3d 688, 691 [2nd Dept. 2012]).

Here, the plaintiff maintains that he and the defendant had a confidential and fiduciary relationship by virtue of their marriage and financial partnership (Complaint, ¶57). According to the plaintiff, from the time the first business was created, and at the creation of each subsequent business/office, the defendant, Dr. Savel, promised the plaintiff that despite the defendant being listed as the sole owner of the business, said fact was not representative of the reality of the ownership interests, but rather a formality in compliance with New York State law – which plaintiff admits does not permit a non-medical professional such as the plaintiff herein to be listed as a member or officer of a PLLC (Complaint, ¶¶58, 26). According to the plaintiff, the defendant, Dr. Savel, promised that the business was an equal partnership, that the plaintiff had vested rights and interests in the pediatric dentistry business and property, and that his rights would

continue, as would their marriage and the defendant's status as a faithful and loving wife (Complaint, ¶58).

Plaintiff submits that in reliance on the confidential and fiduciary relationship between himself and the defendant, and upon the defendant's promises, both express and implied, during the period of their marriage, the plaintiff transferred time, energy, effort, money, experience, and expertise with incalculable value, including funds of over $500,000, to the defendant, Dr. Savel, and the Dental Practices (Complaint, ¶59). The plaintiff contends that the defendant Dr. Savel breached her express and implied promises to him by terminating his employment and shutting him out of the operations of the businesses, thereby leaving her unjustly enriched (Complaint, ¶60). As such, the plaintiff claims that a constructive trust should be imposed upon the defendant's ownership interests in the Dental Practices, as well as upon the equity in and assets of the Dental Practices.

As noted above, a necessary component of a "constructive trust" claim is that a party transfers some asset in reliance upon the promise of the other.

Here, the plaintiff claims that he transferred his "time, energy, effort, money, experience and expertise" because of Dr. Savel's promise that the business "was an equal partnership" ("Complaint, ¶¶58-59). However this is a not the type of promise that can give rise to a constructive trust claim.

First, as admitted to by the plaintiff in the very complaint in which he advances the foregoing allegations, the alleged promise is illegal because the plaintiff could not be an equal partner in the Dental Practices under New York law. New York permits dentists to form professional corporations as long as the corporations are owned, operated, and controlled by licensed dentists (Limited Liability Company Law §§ 1203, 1207; Bus. Corp. Law §§ 1503(a), 1507, 1508).

New York Limited Liability Company Law provides, in pertinent part, as follows:

§ 1207. Membership of professional service limited liability companies

***

(b) *** With respect to a professional service limited liability company formed to provide dental services as such services are defined in article 133 of the education law, each member of such limited liability company must be licensed pursuant to article 133 of the education law to practice dentistry in this state. ***
***

(c) No member of a professional service limited liability company shall enter into a voting trust agreement, proxy or any other type of agreement vesting in another person, other than another member of such limited liability company or professional who would be eligible to become a member of such limited liability company, the authority to exercise voting power of any or all of the membership interests of such limited liability company. All membership interests or proxies granted or agreements made in violation of this section shall be void.

The law provides that "[a] professional dental limited liability company may not admit a member who is not a licensed dentist, an agreement to do so is void, and a dentist who splits fees with a non-dentist is subject to license suspension or revocation" (*Kadosh v. Kadosh*, 2013 NY Slip Op. 31450[U] [Sup. Ct. New York 2013]). Here, because the plaintiff is not a dentist, an agreement to be in an equal partnership in the Dental Practices with his dentist wife violates public policy and is unenforceable. Any such arrangement is illegal. Therefore, "the law will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them" ' " (*Kadosh v. Kadosh*, *supra* at *3; *Hartman v Bell*, 137 AD2d 585, 586 [2nd Dept. 1988] *citing*, 94 AD2d 176, 180 [2nd Dept. 1983]; *Psychoanalytic Ctr. v Burns*, 46 NY2d 1002 [1979]).

Therefore, given the illegality of the parties' agreements, the plaintiffs are precluded from seeking to enforce any such contract here (*United Calendar Mfg. Corp. v Huang*, *supra* at 180).

Next, given the plaintiff's admission that he was paid an annual salary of nearly $400,000 plus benefits for the alleged "time, energy and effort" he expended as an employee of the Dental Practices (Complaint, ¶28), it is clear that he cannot claim that any alleged promise was the *sole* cause for his transfer of "time, energy and effort."

Again, a critical element of a constructive trust claim is that the transfer of the beneficial interest be made in reliance upon the promise of one who is in a confidential or fiduciary relationship with the transferor at the time of the transfer (*Sharp v. Kosmalski, supra*). Having admittedly received a salary for the alleged time, energy and effort he expended as an employee of the Dental Practices, this Court simply cannot find that the plaintiff's transfer of the beneficial interest – the time, energy and effort he expended – was made in reliance upon the promise of defendant Dr. Savel that the businesses be "an equal partnership."

In any event, given that the plaintiff was compensated for his services makes it clear that the defendants were not unjustly enriched on his account. The law provides "[t]o prevail on an unjust enrichment claim, a plaintiff must prove that the defendant received a benefit at the plaintiff's expense and that retention of that benefit would be unjust.***However, the law is clear that a plaintiff may not allege that his former employer was 'unjustly' enriched at his expense when the employer compensated the plaintiff by paying him a salary" (*Levion v. Societe Generale*, 822 F. Supp.2d 390 [SDNY 2011]; *Karmilowicz v. Hartford Financial Services Group*, 2011 WL 2936013 [SDNY 2011]).

The plaintiff admits herein that the defendant compensated him for his performance by paying him a salary. Therefore, it is plain that the defendant did not benefit unfairly from the plaintiff's work and efforts.[1]

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[1] This Court is also bound by the doctrine of law of the case (*People v. Bilsky*, 95 NY2d 172 [2000]; *Martin v. City of Cohoes*, 37 NY2d 162 [1975]) . Indeed, as this Court noted in its prior Decision and Order dated March 12, 2015, plaintiffs' allegations concerning unjust enrichment are conclusory and cannot withstand a motion to dismiss for failure to state a claim.

In the end, inasmuch as the constructive trust doctrine serves as a "fraud-rectifying" remedy rather than an "intent-enforcing" one, without more, the circumstances offered by the plaintiff herein are insufficient to establish the elements of a "constructive trust" claim (*Bankers Sec. Life Ins. Soc. v. Shakerdge,* 49 NY2d 939 [1980]).

Accordingly, the defendants' motion to dismiss the plaintiffs' first cause of action for a constructive trust is granted.

Unjust Enrichment

As noted above, in order to satisfy the element of unjust enrichment, "a party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" (*Robertson v. Wells*, 95 AD3d 862 [2nd Dept. 2012]; *GFRE, Inc. v. U.S.Bank, N.A.*, 130 AD3d 569, 570 [2nd Dept. 2015] *quoting Mobarek v. Moward*, 117 AD3d 998, 1001 [2nd Dept. 2014]). "[A] plaintiffs allegation that the [defendant] received benefits, standing alone, is insufficient to establish a cause of action to recover damages for unjust enrichment" (*Goel v. Ramachandran*, 111 AD3d 783 [2nd Dept. 2013]).

Plaintiff claims herein that he conferred a benefit – namely "time, energy, efforts and resources" – upon the defendant, Dr. Savel, and the Dental Practices in good faith, the retention of which would be unjust (Complaint, ¶¶63, 64).

However, as stated above, not only is this Court bound by its prior Decision and Order ruling that the plaintiffs' allegations concerning unjust enrichment conclusory and therefore cannot survive a motion to dismiss for failure to state a cause of action, but the plaintiffs' unjust enrichment claim fails because the plaintiff admits that he was

compensated for his services as an employee of the Dental Practices (*Levion v. Societe Generale, supra; Karmilowicz v. The Hartford Fin. Servs. Group, supra*).

Moreover, the plaintiffs' claim is based upon an illegal contract and therefore they cannot seek to enforce it here (*United Calendar Mfg. Corp. v Huang, supra* at 180)

Accordingly, the defendants' motion to dismiss the plaintiffs' second cause of action for unjust enrichment is herewith granted.

Money Had and Received

A cause of action for money had and received is a contract implied in law (*Parsa v. State of New York*, 64 NY2d 143 [1984]). "[I]t is an obligation which the law creates in the absence of agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another" (*Id.* at 148). "Having money that rightfully belongs to another, creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise" (*Goel v. Ramachandran, supra* at 790 *quoting, Byxbie v. Wood*, 24 NY 607 [1862]). Therefore, "[t]he essential elements of a cause of action for money had and received are (1) the defendant received money belonging to the plaintiff, (2) the defendant benefitted from receipt of the money, and (3) under principles of equity and good conscience, the defendant should not be permitted to keep the money" (*Id*).

The plaintiff claims herein that the defendant, Dr. Savel, and the Dental Practices have received funds rightfully due and owed to the plaintiff that, the plaintiff claims, would be inequitable for the defendants to retain possession of (Complaint, ¶67). Plaintiffs claim that by reason of the foregoing, they are entitled to judgment against the defendants for a sum to be determined by the Court, but in an amount of no less than $2,500,000.00 (Complaint, ¶68).

It is noted at the outset that the plaintiff fails to allege what money is the subject of this cause of action. Nor does he allege that he gave the defendants $2,500,000.00. Plaintiff only generally alleges that he gave the defendants "$500,000 to the creation and growth of the business and to pay for daily necessary business expenses" (Complaint, ¶16). However, even under a liberal construction of the complaint, the fact is that the plaintiff fails to allege that this corpus of funds – the $500,000 – was to be paid back to him (*see generally, Lebovits v Bassman*, 120 AD3d 1198 [2nd Dept. 2014]). That is, there is no claim by the plaintiff that this $500,000 allegedly given by the plaintiff was a debt that the plaintiff expected the defendant to pay back to the plaintiff and for which the law will imply a promise (*Byxbie v Wood, supra*; *Goel v Ramachandran, supra*).

More importantly, this Court cannot overlook the fact that a cause of action for money had and received:

> ... allows [the] plaintiff to recover money which has come into the hands of the defendant 'impressed with a species of trust' " * * * because under the circumstances it is " 'against good conscience for the defendant to keep the money' " * * * *The remedy is available "if one man has obtained money from another, through the medium of oppression, imposition, extortion, or deceit, or by the commission of a trespass"****
> (*Parsa v. State, supra* at 148 [emphasis added]).

Critically important in this case is that the plaintiff has failed to allege or claim that any "oppression, imposition, extortion, or deceit or [] the commission of a trespass" caused the plaintiffs to contribute that money.

Accordingly, the defendants' motion to dismiss the plaintiffs' third cause of action for money had and received is also granted.

New York Public Health Law §238-a

Public Health Law section 238-a entitled "Prohibition of financial arrangements and referrals" provides at subsection (1) as follows:

> (a) A practitioner authorized to order clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services may not make a referral for such services to a health care provider authorized to provide such services where such practitioner or immediate family member of such practitioner has a financial relationship with such health care provider.
>
> (b) A health care provider or a referring practitioner may not present or cause to be presented to any individual or third party payor or other entity a claim, bill, or other demand for payment for clinical laboratory services, pharmacy services, radiation therapy services, physical therapy services or x-ray or imaging services furnished pursuant to a referral prohibited by this subdivision.
> ***
> (Public Health Law §238-a[1][a], [b]).

"The statute, in essence, prohibits a medical doctor from ordering specified medical services from an entity in which he or an immediate family member has a financial interest" (*Autoone Ins. Co. v. Manhattan Heights Medical, P.C.*, 24 Misc3d 1228(A) [Sup Ct Queens 2009]). "Public Health Law § 238-a has an obvious and salutary purpose: to prevent the provision of health care from being based on financial incentive rather than patient welfare and medical necessity" (*Stephen Matrangolo, D.C., P.C. v Allstate Ins. Co.*, 35 Misc.3d 582 [Civil Ct. New York 2012]).

Plaintiff claims herein that the defendant, Dr. Savel and the Dental Practices violated, *inter alia*, New York Public Health Law §238-a by virtue of repeatedly and continuously accepting, receiving, and/or soliciting payments, remuneration, and/or other consideration in return for patient referrals (Complaint, ¶77). Plaintiff also claims that John Does Nos. "1" through "5" violated, *inter alia*, this statute by repeatedly and continuously paying and/or providing payments, remuneration, and/or other consideration

in return for patient referrals (Complaint, ¶78). According to the plaintiff, the facts and circumstances regarding the defendants' unlawful conduct and professional violations will come to light during the matrimonial litigation between the plaintiff and the defendant, Dr. Savel, and that the violations of, *inter alia*, the Public Health Law §238-a will result in revocation of Dr. Savel's professional license and cause closure or forced sale of the Dental Practices (Complaint, ¶¶79,80). In addition, plaintiff claims that as a joint guarantor on the approximately $2.5 million dollars in loans to the Dental Practices, the plaintiff will be jointly and severally liable for the outstanding loans to the Dental Practices (Complaint, ¶81). According to the plaintiff, closure or forced sale of the Dental Practices will result in a monthly loss to the plaintiff Scott Savel Consulting Corp ("SCC") of thousands of dollars per month and that as a result of the foregoing, both plaintiffs have been damaged in the amount of $2,500,000.00, in addition to the annual revenue that the plaintiffs derived from the defendant Dental Practices (Complaint, ¶¶82-83).

Initially, it is clear to this Court that the plaintiffs' allegations for a claim for a violation of the Public Health Law ¶238-a (as well as tortious interference of contract and tortious interference with an existing business relationship), *infra*, all also stem from an illegal contract – one involving "kickbacks", *infra*. To that extent, and as stated above, " 'it is the settled law of this State ... that a party to an illegal contract ... cannot ask a court of law to help him carry out his illegal object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose.' " (*Prins v Itkowitz & Gottlieb*, 279 AD2d 274 [1st Dept. 2001] *quoting United Calendar Mfg. Corp. v Huang*, *supra* at 180; *Matter of New York State Correctional Officers & Police Benevolent Assn. v State of New York*, 94 NY2d 321, 327 [1999]). The law provides that "[a] contract entered into in violation of a statute is an unlawful undertaking and such an illegal contract cannot give rise to a viable cause of action" (*Lipco Elec. Corp. v ASG Consulting Corp.*, 117 A.D.3d 687 [2nd Dept. 2014] *quoting Scotto v Mei*, 219 AD2d 181, 183 [1st Dept. 1996]; *Parpal Rest. v Martin Co.*, 258 AD2d 572, 573 [2nd Dept. 1999]).

By the plaintiffs' own admission here, "...prior to May 2014, SCC was bringing in no less than $12,000 per month in consulting contracts with orthodontists and/or medical professionals" (Complaint, ¶37). However, according to the plaintiffs, these payments were really "kickbacks" that were being paid to SCC by orthodontists and/or medical professionals – described in the complaint as John Doe Nos. "1" through "5" – in exchange for patient referrals (Complaint, ¶39). Specifically, plaintiff alleges as follows:

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> 39. That in exchange for [defendant Dr. Savel] and the [Dental Practices'] substantial patient referrals, these orthodontists and/or medical professionals, named herein as defendants JOHN DOES NOS. "1" through "5", executed rental agreements with the [Dental Practices]. The rental payments were deposited exclusive with SCC. [Defendant Dr. Savel] was always fully aware of all such orthodontists, contracts and payments.
>
> 40. That these rental agreements were executed to *give an appearance of propriety for what were, in reality, kickbacks for patients referrals* which were received as a result of an active conspiracy between [defendant Dr. Savel], [Gaby] Morgan, and the JOHN DOE Defendants.
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> ***
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> (Complaint, ¶¶39-40 [Emphasis Added]).

Agreements to pay "kickbacks" are illegal and unenforceable (*see generally, Melius v. Breslin*, 46 AD3d 524 [2nd Dept. 2007]). Thus, there is no legal theory that permits the plaintiffs to recover damages for their alleged illegal contracts with John Doe Nos. "1" through "5."

In any event, this Court also finds that the plaintiffs lack the standing to pursue any cause of action under the Public Health Law §238-a, and, therefore the claim must be dismissed. The law is settled. Standing involves a determination of whether "the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution" (*Matter of Graziano v. County of Albany*, 3 NY3d 475, 479 [2004] *quoting Community Bd. 7 of Borough of Manhattan v. Schaffer*, 84 NY2d 148, 155 [1994]). "Injury-in-fact has become the touchstone" and requires "an actual legal stake in the matter being adjudicated" (*Society of Plastics Indus.*

v. County of Suffolk, 77 NY2d 761, 772 [1991]). "A threat of future harm is insufficient to impose liability against a defendant in a tort context***The requirement that a plaintiff sustain physical harm before being able to recover in tort is a fundamental principle of our state's tort system" (*Caronia v Philip Morris USA, Inc.*, 22 NY3d 439, 446 [2013]). "It is axiomatic that there is no standing to complain where an alleged defect in or violation of a statute does not injure the party seeking redress" (*Matter of Sarah K.*, 66 NY2d 223 [1985]).

Here, given that the plaintiffs are not medical doctors, they cannot successfully invoke this statute against the defendants, Dr. Savel and the Dental Practices (*see, Autoone Ins. Co. v. Manhattan Heights Medical, P.C., supra*; *Ozone Park Med. Diagnostic Assoc. v Allstate Ins. Co.*, 180 Misc. 2d 105 [App. Term 2nd Dept. 1999]; *Stand-Up MRI of the Bronx v General Assur. Ins.*, 10 Misc 3d 551 [Dist. Ct. Suffolk 2005]).

Moreover, the plaintiffs herein are also outside the class of beneficiaries intended by the statute whose purpose, as stated above, is "to prevent the provision of health care from being based on financial incentive rather than patient welfare and medical necessity".

In addition, this Court cannot overlook that even if the defendants had in fact violated the statute as plaintiffs allege, the plaintiffs' failure to assert any injury in fact renders their claim fatal at a threshold level. That is, even if there was a violation of the statute, it has not resulted in injury to the plaintiffs; on the contrary, according to their claims, the damage "will result" – in the future – if various circumstances come to pass including the "[c]losure or forced sale of the [Dental Practices]."

Accordingly, the defendants' motion to dismiss the plaintiffs' fifth cause of action for violation of the Public Health Law §238-a is also granted.

Tortious Interference with Contract

To sustain a viable cause of action for tortious interference with a contract, there must exist "a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]; *Bayside Carting, Inc. v. Chic Cleaners*, 240 AD2d 687, 688 [2nd Dept. 1997]). Notably, the plaintiff must specifically "allege that the contract would not have been breached but for the defendants conduct" (*Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036 [2nd Dept. 2011] [internal quotations omitted]; *Burrowes v. Combs*, 25 AD3d 370, 373 [1st Dept. 2006]). In addition, "to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation" (*Ferrandino & Son, Inc. v. Wheaton Bldrs., Inc., LLC*, *supra* at 1036 [internal quotations omitted]; *Burrowes v. Combs*, *supra* at 373).

Plaintiff claims herein that SCC had valid contractual agreements with John Does Nos. "1" through "5", that the defendant, Dr. Savel, knew about the existence of such contractual agreements and that defendant Dr. Savel, with spiteful malice and ill-will, expressly and/or impliedly procured John Does Nos. "1" through "5" breach of their contracts with SCC by intimidating, molesting, and/or threatening to withhold lucrative patient referrals to same unless they severed all ties to SCC (Complaint, ¶¶85-87). Plaintiff claims that as a result of the defendant, Dr. Savel's intentional procurement of John Does Nos. "1" through "5" breach of contracts with SCC, he has been deprived of thousands of dollars per month in income (Complaint, ¶88).

Initially, this Court cannot overlook the fact that the plaintiffs merely allege in conclusory form that the "SCC had valid contractual agreements with John Does Nos. "1" through "5".

Moreover, the plaintiffs' failure to identify with any particularity the contracts at issue is fatal to their claim to withstand the defendants' motion to dismiss.

Finally, according to the plaintiffs themselves these agreements were for the illicit purpose of receiving "kickbacks" in exchange for patient referrals. As noted above, such agreements are clearly invalid, *supra*.

Accordingly, the defendants' motion to dismiss the plaintiffs' sixth cause of action for tortious interference with contract is also granted.

Tortious Interference with Existing Business Relations

To establish a claim based on tortious interference with existing business relations, plaintiff must show: (1) the existence of a business relationship or its expectancy with a third-party; (2) defendant's interference with the relationship; (3) that defendant acted with the sole purpose of harming plaintiff or used dishonest, unfair or improper means; and (4) that plaintiff sustained damages (*Carvel Corp v. Noonan*, 3 NY3d 182, 190 [2004]; *NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614 [1996]; *Guard–Life Corp. v. Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1990]). Notably, the wrongful conduct described in the third element of their claim "must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be lawful' and thus insufficiently culpable' to create liability for interference with prospective contracts or other non-binding economic relations" (*Carvel Corp v. Noonan*, *supra* at 190). That is, "[t]he motive for the interference must be solely malicious, and the plaintiff has the burden of proving this fact" (*Newsday, Inc. v. Fantastic Mind*, 237 AD2d 497 [2nd Dept. 1997]).

Here, the plaintiffs' claim that they had a business relationship with the Dental Practices and John Doe Nos. "1" through "5" (Complaint, ¶91). According to the plaintiff, the defendant, Dr. Savel knew that the plaintiff was employed by the Dental Practices,

and knew of the existing business relationship and connections between the plaintiff and John Doe Nos. "1" through "5" (Complaint, ¶92). According to the plaintiff, the defendant, Dr. Savel intentionally interfered with the business relationship between the plaintiff and the Dental Practices wherein Dr. Savel, maliciously and unjustifiably terminated the plaintiff's employment without just cause (Complaint, ¶93). Plaintiff also claims that the defendant, Dr. Savel, intentionally interfered with the business relationship between Savel and John Doe Nos. "1" through "5" by directing John Does Nos. "1" through "5" to sever all ties with Savel, and to forego any future business relations with him (Complaint, ¶94). According to the plaintiff, the defendant, Dr. Savel's actions were carried out with the sole intention of harming Savel and SCC, and were based upon malice and illegitimate motivations, inasmuch as there is a highly contested matrimonial action currently pending between Savel and the defendant, Dr. Savel, in the Supreme Court, Nassau County (Complaint, ¶95). Plaintiff contends that as a result of the defendant's tortious interference with Savel's existing business relationships, the defendant, Dr. Savel, has destroyed Savel's livelihood (Complaint, ¶96).

Plaintiff also adds that due to the defendant Dr. Savel's malice-driven tortious interference, the Dental Practices, of which the defendant Dr. Savel is listed as the sole owner and thus receiving 100% of the profits and proceeds therefrom, the defendant Dr. Savel and the Dental Practices are presently saving an additional $381,420.00 gross per year as and for the salary the plaintiff Savel was paid as an employee of the Dental Practices (Complaint, ¶97). Plaintiff claims that as a result of the defendant, Dr. Savel's tortious interference with Savel's existing business relationships, John Doe Nos. "1" through "5" severed all ties with Savel, causing Savel to lose thousands of dollars per month in income as well as a loss of future business opportunities with John Doe Nos. "1" through "5" (Complaint, ¶98).

Once again, inasmuch as the plaintiffs' claim is based upon an illegal contract involving kickbacks, such cause of action fails as a matter of law.

In addition, the claim also fails because the plaintiffs do not identify the third parties with whom the alleged business relations existed (*Parekh v Cain*, 96 AD3d 812 [2nd Dept. 2012]; *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept. 2009]). Nor do the plaintiffs allege what "wrongful means" were utilized to interfere with these business relationships (*Habitat, Ltd. v Art of the Muse, Inc.*, 81 AD3d 594 [2nd Dept. 2011]).

Accordingly, the defendants' motion to dismiss the plaintiffs' seventh cause of action for tortious interference with business relations is herewith granted.

Conspiracy

It is noted at the outset that "New York does not recognize civil conspiracy to commit a tort ... as an independent cause of action" (*Blanco v. Polanco*, 116 AD3d 892, 895 [2nd Dept. 2014]). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of N.Y. v. Fritzen*, 68 NY2d 968 [1986]). "In order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, coupled with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement. A bare conclusory allegation of conspiracy is usually held insufficient" (*Blanco v. Polanco*, *supra* at 896).

Plaintiffs claim herein that the defendants aided, abetted and conspired to misappropriate the plaintiff's partnership opportunities (equity and profits) and financial interests in the Dental practices (Complaint, ¶70). In addition, the plaintiffs claim that the defendants aided, abetted and conspired to divert and/or unlawfully interfere with the plaintiff's employment with the Dental Practices without just cause for same and ultimately terminate the plaintiff SCC's business relations with John Doe Nos. "1" through "5" (Complaint, ¶¶71-72).

According to the plaintiffs, the acts in furtherance of the conspiracy include, but are not limited to: terminating Savel's employment without just cause, filing a fraudulent Petition in Family Court seeking an Order of Protection against Savel preventing him from visiting the Dental Practices, and halting deposits of funds in SCC's account, as was ordinarily done in the normal course of business, and ordering John Does "1" through "5" to terminate their business relationships with SCC (Complaint, ¶73). Plaintiffs claim that the defendant, Dr. Savel and the Dental Practices benefitted from said conspiracy by unlawfully retaining funds that rightfully belong to Savel and using same for the defendant, Dr. Savel's personal expenses and repayment of the debts of the Dental Practices (Complaint, ¶74).

As previously determined by this Court in its Short Form Order dated March 12, 2015 granting the defendants Bencivenga and Morgan's motion seeking to dismiss the plaintiffs' complaint, at best, the plaintiffs' civil conspiracy claim is derivative of the tort of tortious interference with a contract or tortious interference with business relations. Since its viability in this case is derivative of the aforementioned torts, and said claims were dismissed, *supra*, the civil conspiracy cause of action insofar as asserted against moving defendants must also be dismissed.

Moreover, this Court finds that the acts by which the alleged conspiracy took place essentially consists of the plaintiff's employment with the Dental Practices being terminated and his no longer receiving compensation for the terminated employment. Again, at best, the plaintiffs' claim appears to sound in wrongful termination rather than conspiracy.

In any event, the plaintiffs' allegations forming the basis of this cause of action are conclusory claims that the alleged conspirators interfered with his business.

Accordingly, the defendants' motion to dismiss the plaintiffs' fourth cause of action for (civil) conspiracy is also granted.

In the end, this Court notes that the plaintiffs argument in opposition to the defendants' instant motion that the defendants cannot rely on the illegality of the alleged agreement between the plaintiff Savel and the defendant Dr. Savel to be equal partners in the Dental Practices because it was not raised as an affirmative defense in their answer, is also meritless. Indeed, this argument misses the mark because the plaintiffs' own complaint alleges the illegality of such an agreement. That is, the plaintiff overlooks the fact that the defendants' motion to dismiss for failure to state a claim is based upon the plaintiffs' allegations in the Verified Complaint and not the defendants' answer. Indeed, in reaching its determination above, this Court addressed the sufficiency of the plaintiffs' complaint as mandated by the rules and law relating to CPLR 3211(a)(7).

Accordingly, the defendants Dr. Savel and the Dental Practices' motion [Mot. Seq. 003], pursuant to CPLR 3211(a)(7), for an Order, dismissing the plaintiffs' verified complaint in its entirety is herewith granted.

The complaint is dismissed.

Defendants, Dental Practices', also separately move, pursuant to CPLR 3025(b), for an Order granting them leave to amend their Verified Answer to add four counterclaims – to wit, conversion; employee breach of fiduciary duty; breach of duty of good faith and loyalty; and, misappropriation and unfair competition.

The defendants' claims concern the plaintiff's theft of monies from the Dental Practices and his unlawful use of confidential information and trade secrets that he obtained during his employment with the Dental Practices at a competing company he formed after his employment ended, *infra*.

The law is clear. A party should be granted leave to serve an amended pleading in the absence of prejudice or surprise resulting from delay (CPLR 3025[b]; *Fahey v.. County of Ontario*, 44 NY2d 934 [1978]; *Northbay Construction Co., Inc. v. Bauco*

Construction Corp., 275 AD2d 310 [2nd Dept. 2000]). The party opposing the amendment must demonstrate that there will be actual prejudice in permitting the pleading to be amended (*Edenwald Contr. Co. v. City of New York*, 60 NY2d 957 [1983]; *Holchendler v. We Transp.*, 292 AD2d 568 [2nd Dept. 2002]).

The Court will not consider the merits of the proposed amendment unless the proposed amendment is insufficient as a matter of law or totally devoid of merit (*Sunrise Plaza Assoc. v. International Summit Equities Corp.*, 288 AD2d 300 [2nd Dept. 2001]; *Norman v. Ferrara*, 107 AD2d 739 [2nd Dept. 1985]).

The determination of whether to deny or permit an amendment to the pleadings is one addressed to the discretion of the court (*Liendo v. Long Is. Jewish Med. Ctr.*, 273 AD2d 445 [2nd Dept. 2000]; *Henderson v. Gulati*, 270 AD2d 308 [2nd Dept. 2000]).

Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay (*Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 [2nd Dept. 1995]; *Heller v. Louis Provenzano*, 303 AD2d 20 [1st Dept. 2003]; *Oil Heat Inst. of Long Is. Ins. Trust v. RMTS Assoc.*, 4 AD3d 290 [1st Dept. 2004]).

In the end, denial of a motion to amend a pleading is appropriate when there is prejudice to the opposing party and no showing of a satisfactory excuse for the delay (*Bailey v. Village of Saranac Lake, Inc.*, 100 AD3d 1089 [3rd Dept. 2012] *leave to appeal dismissed*, 20 NY3d 1053 [2013]) although the failure to offer an excuse for the delay does not alone bar amending a pleading (*AFBT-II, LLC v. Country Vil.on Mooney Pond, Inc.*, 21 AD3d 972 [2nd Dept. 2005]).

"Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contr. Co. v. City of New York, supra* at 959 [internal quotation marks

omitted]; *Coleman v. Worster*, 140 AD3d 1002, 1003 [2nd Dept. 2016]; *HSBC Bank v. Picarelli*, 110 AD3d 1031, 1032 [2nd Dept. 2013]). "The burden of establishing prejudice is on the party opposing the amendment" (*Coleman v. Worster, supra* at 1003; *Kimso Apts., LLC v. Gandhi*, 24 NY3d 403, 411 [2014]; *Caceras v. Zorbas*, 74 NY2d 884, 885 [1989]).

Indeed, to defeat a motion for leave to serve an amended pleading, the party opposing the amendment must demonstrate, "... some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one now wants to add" (*Fulford v. Baker Perkins, Inc.*, 100 AD2d 861 [2nd Dept. 1984]; *Wyso v. City of New York*, 91 AD2d 661 [2nd Dept. 1982]).

Initially, it is noted that the Dental Practices' instant motion for leave to amend their answer must be permitted given that there has been no extended delay in seeking leave to amend to include these claims. This Court is mindful that discovery remains outstanding in this case and that the note of issue and certificate of readiness for trial have yet to be filed in this case. That is, this case is nowhere near the "eve of trial".

Furthermore, there is no showing of prejudice to the plaintiffs herein with the assertion of these counterclaims at this juncture. Permitting the Dental Practices to amend their Verified Answer will not hinder the plaintiffs' preparation of their case to prevent the plaintiffs from taking any measure in support of their position, as there remains opportunity for discovery and preparation for the case before the case is ready for trial.

In any event, the plaintiffs have failed to demonstrate that they do not have any factual basis for the Dental Practices' counterclaims.

That is, given that each of the defendants' counterclaims are not insufficient as a matter of law or totally devoid of merit, this Court, without examining the merits of the

proposed amendment, herewith grants the Dental Practices' motion for an Order awarding them leave to amend their Answer.

Conversion

Specifically, as to their first claim for conversion, this Court begins by noting that "[t]wo key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006] [citations omitted]).

Here, the Dental Practices' proposed counterclaim for conversion alleges at least four known instances where the plaintiff Savel diverted funds that belong to the Dental Practices. The Dental Practices further allege that none of the diverted funds have been repaid to the Dental Practices to date. Thus, this Court finds that the proposed counterclaim clearly alleges the required elements for conversion – namely that (1) the funds in question are corporate funds belonging to the Dental Practices and that (2) plaintiff Scott Savel, in derogation of the Dental Practices' right to funds in question and interfering with the Dental Practices' right to possess the funds, exercised dominion and control over said funds.

The plaintiff's argument in opposition that an action for conversion of money only exists when there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question, is meritless in this case. Indeed, in this proposed conversion counterclaim, the Dental Practices sufficiently allege that specific funds were taken from the bank accounts and other specific funds (*Singapore Recycle Centre Pte Ltd. v. Kad Int'l Marketing, Inc.*, 2009 WL 24243337 [EDNY 2009]; *Lenczycki v Shearson Lehman Hutton*, 238 AD2d 248 [1st Dept. 1997]; *Lemle v Lemle*, 92 AD3d 494 [1st Dept. 2012]; *Republic of Haiti v. Duvalier*, 211 AD2d 379 [1st Dept. 1995]). Here, given the Dental Practices' allegations in their proposed conversion

counterclaim that, *inter alia*, the plaintiff Savel diverted approximately $120,000 from the Dental Practices' bank accounts to his own personal TD Bank account, which funds were intended to be used to pay the Dental Practices' federal and state taxes, the plaintiffs' contention that the Dental Practices do not adequately allege a specific identifiable fund is entirely meritless and rejected by this Court.

Equally meritless is the plaintiffs' claim that the conversion counterclaim is deficient because it does not allege that the Dental Practices' demanded that the plaintiff return the funds he converted. Indeed, the law provides that the demand for return of the property is required only where "defendant's possession of it was *acquired lawfully*" (*cf. Matzan v. Eastman Kodak Co.*, 134 AD2d 863 [4th Dept. 1987]). Here, the Dental Practices do not allege that the plaintiff Savel's possession of their funds was acquired lawfully (*see generally, State of New York v. Seventh Regiment Fund*, 98 NY2d 249, 260 [2002]).

Breach of Fiduciary Duty

It is axiomatic that an employee is "prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties ..." (*Lamdin v. Broadway Surface Adv. Corp.*, 272 NY 133, 138 [1936]). Since the Defendant, Dental Practices', counterclaim in this case is that the plaintiff, while in their employ, planned, and later formed, a competing corporation and used confidential information to take customers away from the employer, this Court finds that it has sufficiently stated a cause of action (*CBS Corp. v. Dumsday*, 268 AD2d 350 [1st Dept. 2000]). Specifically, the Dental Practices allege that the plaintiff Savel was an employee and that prior to his termination he hatched a plan to open a competing dental practice called "Super Smiles," which he opened after his employment terminated. He then used the Dental Practices' confidential patient lists to solicit patients away from Dental Practices. Patient lists are precisely the type of confidential information that can give rise to such a claim (*CBS Corp. v. Dumsday, supra*

at 353; *Island Sports Physical Therapy v. Kane*, 84 AD3d 879 [2nd Dept. 2011]; *Schneider Leasing Plus v. Stallone*, 172 AD2d 739, 741 [2nd Dept. 1991]).

The plaintiffs' argument that there is no fiduciary duty between the parties where, as here, an at will low level employee is involved is misguided in this case. Rather, this Court is guided by the First Department's holding in *American Baptist Churches of Metro, N.Y. v. Galloway,* 271 AD2d 92, 99 [1st Dept. 2000] which asserts:

> An agent may not divert or exploit for his own benefit an opportunity that is an asset of his principal *** Nor may he make use of the principal's resources or proprietary information to organize a competing business ***It would be a breach of fiduciary duty if an agent of a corporation secretly established a competing entity so as to divert opportunities away from his principal ***
> (*American Baptist Churches of Metro, N.Y. v. Galloway, supra* at 99).

Thus, because the plaintiffs have failed to show that the proposed breach of fiduciary duty counterclaim is lacking in merit or palpably improper, this Court herewith grants the moving defendants' motion for an Order granting them leave to amend their complaint. Indeed, this Court is mindful that at this juncture, on a motion seeking leave to amend their pleadings to assert a counterclaim, the movant defendants are not required to make any evidentiary showing of merit (*cf. Katz v Beil*, 142 AD3d 957, 962 [2nd Dept. 2016]).

Breach of Duty of Good Faith and Loyalty

Next, the law provides that an employee owes one's employer a duty of good faith and loyalty in the performance of one's duties (*Wallack Frgt. Lines v. Next Day Express, Inc.*, 273 AD2d 462 [2nd Dept. 2000]; *Maritime Fish Prods. v. World–Wide Fish Prods.*, 100 AD2d 81 [1st Dept. 1984]). That is, an employee is prohibited from acting in any manner inconsistent with his or her agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his or her duties (*CBS Corp. v. Dumsday, supra*; *American Map Corp. v. Stone*, 264 AD2d 492 [2nd Dept. 1999]).

Again, the Dental Practices allege that the plaintiff was an employee and that during his employment, prior to his termination, he acted in a manner inconsistent with his agency or trust by, siphoning hundreds of thousands of dollars from the Dental Practices for himself and, further, by misappropriating confidential information from the Dental Practices in order to obtain a competitive advantage for his new company, "Super Smiles."

Misappropriation and unfair competition

Finally, the defendants, Dental Practices, have also asserted a counterclaim for misappropriation and unfair competition. Given that the defendant Dental Practices assert claims that are rooted in the improper use of trade secrets to gain an advantage over the defendants permitting an inference that said defendants improperly used trade secrets in an effort to supplant the plaintiff, this Court finds that the defendants have also stated a counterclaim for breach of duty of good faith and loyalty (*CBS Corp. v. Dumsday, supra*).

Specifically, the Dental Practices allege that the plaintiff Savel formed a competing company called "Super Smiles" after his employment was terminated. In addition, the defendants' claim that during his employment, he had access to confidential information, like patient lists, and learned the Dental Practices trade secrets. He used all of this information to form a competing company called "Super Smiles." The Dental Practices also claim that the plaintiff has used the confidential information, especially patient lists, to solicit patients away from the Dental Practices.

In the end, the Dental Practices' motion [Mot. Seq. 004], pursuant to CPLR 3025(b), for an Order granting them leave to amend their Verified Answer to add four counterclaims, is granted in its entirety.

As the base complaint has been dismissed, the Court severs the defendants' counterclaims pursuant to CPLR 3019.

Accordingly, this Court dismisses this matter in its entirety and hereby severs the defendants' counterclaims.

The parties' remaining contentions have been considered by this Court and do not warrant discussion.

It is hereby

ORDERED, that counsel for the parties, are directed to appear before this Court on **July 6, 2017 at 9:30 a.m.** for a **CONFERENCE** which date shall not be adjourned without consent of this Court. Failure to appear may result in a default and/or a dismissal of the action (NYCRR §202.27).

All applications not specifically addressed are herewith denied.

This shall constitute the decision and order of this Court.

Dated: May 19, 2017
Mineola, New York

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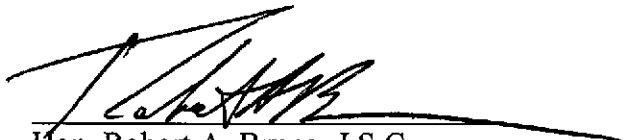

Hon. Robert A. Bruno, J.S.C.