

At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York, on the 23rd day of September 2022.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF TOMPKINS

**DANIEL SUDILOVSKY M.D., individually and as a
shareholder of Pathology Associates of Ithaca, P.C.;
PATHOLOGY ASSOCIATES OF ITHACA, P.C.,**

Plaintiffs,

v

ELIZABETH PLOCHARCZYK M.D.,

Defendant.

DECISION AND ORDER

Index No. EF2021-0348
RJI No. 2021-0199-M

APPEARANCES:

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Via NYSCEF

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MARK G. MASLER, J. S. C.

Plaintiff Daniel Sudilovsky, M.D., and defendant Elizabeth Plocharczyk, M.D., are the sole shareholders of plaintiff Pathology Associates of Ithaca, P.C. (PAI), each holding a 50% interest in the corporation. PAI provided medical pathology services to the community through affiliations with health care entities including Cayuga Medical Center at Ithaca, Inc. (CMC). PAI provided exclusive pathology services to CMC for more than a decade pursuant to a contract dated March 1, 2008, as amended in September 2010 and December 2014, (the pathology services agreement) and provided administrative services to CMC pursuant to a separate contract dated October 1, 2018 (the medical director services agreement). Plocharczyk became a shareholder of PAI in 2018, when she and Sudilovsky executed a shareholders agreement dated June 1, 2018 (the shareholders agreement), which provided, among other things, that no shareholder would compete with the corporation, or solicit or otherwise induce a third party to terminate or alter its business dealings with the corporation, and that these prohibitions would continue for six months after such person ceased to be a shareholder.

In March 2021, Plocharczyk commenced a proceeding seeking judicial dissolution of PAI pursuant to Business Corporation Law § 1104, alleging that dissolution was necessary due to division, differences of opinion, and dissension between the shareholders (Elizabeth Plocharczyk M.D. v. Pathology Associates of Ithaca, P.C. et al., Sup Ct, Tompkins County, index No. EF2021-0163, the dissolution proceeding). By notice dated March 29, 2021, CMC terminated the pathology services and medical director agreements based on the allegations made in the petition for dissolution, which it characterized as a repudiation of the agreements (see NY St Cts Elec Filing [NYSCEF] Doc No. 42). Plocharczyk formed a new entity, Cayuga Pathology PLLC, in April 2021.

In May 2021, Sudilovsky commenced this action, individually, derivatively as a shareholder of PAI, and on behalf of PAI, alleging that Plocharczyk had breached the non-competition and non-solicitation provisions of the shareholders agreement, violated her fiduciary duty to Sudilovsky, and tortiously interfered with the contractual relationship between PAI and CMC by attempting to enter into her own pathology services agreement with CMC after inducing it to terminate PAI's agreements with CMC. Plaintiffs sought a temporary restraining order and a preliminary injunction by order to show cause filed with the summons and complaint, which the court declined to sign. In June 2021, Cayuga Pathology PLLC entered into a pathology services agreement with Cayuga Health Services, Inc., (CHS) on behalf of its affiliates which included CMC; defendant resigned employment with PAI and resumed providing pathology services to CMC under the new contract with Cayuga Pathology PLLC (see NYSCEF Doc No. 40, Plocharczyk aff, ¶¶ 6-7). The court denied plaintiffs' motion for a preliminary injunction by decision and order dated August 9, 2021 (McBride, J.) (see NYSCEF Doc No. 64).

Following a three-day hearing in the dissolution proceeding, the court determined that dissolution would be beneficial to the shareholders of PAI due to internal dissension between the shareholders and, by decision and order dated December 7, 2021 (McBride, J.), granted the petition for dissolution. Sudilovsky has appealed the December 7, 2021 decision and order, and the matter is scheduled to be heard by the Appellate Division, Third Department, during its January 2023 term. Nevertheless, the parties have consented to the appointment of a permanent receiver to assist with the dissolution of PAI. Defendant now moves for summary judgment in this action. Plaintiffs oppose the motion asserting, among other things, that it is premature because defendant's responses to the discovery demands served by plaintiffs in June 2021 are

still pending. Plaintiffs cross-move for (1) an order pursuant to CPLR 3124 and 3126 compelling defendant to provide complete responses to their discovery demands, and (2) leave to amend the complaint.

Defendant contends that plaintiffs' first two causes of action, which are for breach of contract and breach of fiduciary duty, respectively, are moot in light of (1) the court's prior denial of plaintiffs' requests for temporary and preliminary injunctive relief, and (2) the dissolution of PAI, because plaintiffs seek only injunctive relief which would drive defendant out of business without any corresponding benefit to PAI. This contention is without merit because plaintiffs have demanded monetary damages in addition to injunctive relief and have alleged both economic loss and irreparable harm resulting from defendant's actions. Although the complaint does not specifically state that plaintiffs seek damages on the first two causes of action, the only fair construction of the complaint is that the claim for monetary damages of at least \$1,000,000 made in the "wherefore" clause applies to all three causes of action (see CPLR 3013, 3014, 3026; Archer-Vail v LHV Precast Inc., 168 AD3d 1257, 1258 [2019]).

With respect to plaintiffs' third cause of action, which alleges tortious interference with contract, defendant contends that she is entitled to summary judgment because plaintiffs cannot establish that she procured CMC's breach of the pathology services and medical director agreements.¹ In support of this argument, defendant relies upon the court's August 9, 2021 decision and order denying plaintiffs' request for a preliminary injunction, in which the court

¹ "The elements of tortious interference with contract are the existence of a valid contract with a third party, the defendant's knowledge of that contract, the defendant's intentional and improper procuring of a breach, and damages" (Abele Tractor & Equip. Co., Inc. v Schaeffer, 167 AD3d 1256, 1258 [2018] [internal quotation marks, brackets, and citation omitted]).

stated that “[h]ere, as alleged by Dr. Plocharczyk and confirmed by members of CMC, it was CMC that ultimately terminated the pathology agreement with Dr. Sudilovsky and PAI due to Dr. Sudilovsky’s dysfunctional behavior toward CMC’s administration” (NYSCEF Doc No. 64, August 9, 2021 decision and order at 5 [internal quotation marks and ellipsis omitted]).

Initially, “it is fundamental that the grant or denial of a temporary injunction does not constitute an adjudication on the merits and will not be given res judicata effect” (Matter of Steck v Jorling, 182 AD2d 937, 939 [1992], appeal dismissed 80 NY2d 893 [1992]). The court’s denial of plaintiffs’ request for a preliminary injunction was premised on its conclusion that plaintiffs had failed to adequately establish the elements necessary for injunctive relief: a likelihood of success on the merits, irreparable injury if preliminary injunctive relief is denied, and a balance of equities in plaintiffs’ favor. Although the court also observed that defendant’s allegation that Sudilovsky’s behavior had caused CMC to terminate the agreements was corroborated by CMC personnel, this determination was not necessary to resolve the question before the court. There was not a full and fair opportunity to litigate the issue of whether defendant procured a breach of the agreements and, therefore, the court’s observations as to the cause of such termination were dicta which, in any event, did not constitute a determination on the merits (see Matter of Doe v Rensselaer Polytechnic Inst., 172 AD3d 1691, 1692 [2019]; Zinter Handling, Inc. v Britton, 46 AD3d 998, 1000 [2007]; Pollicino v Roemer & Featherstonhaugh, 277 AD2d 666, 668 [2000]). Moreover, it bears noting that the court conducted an evidentiary hearing in the dissolution proceeding subsequent to entry of the order denying the preliminary injunction during which Sudilovsky testified that defendant had spoken to the President of CMC, Dr. Stallone, to plaintiffs’ detriment prior to CMC’s termination of the agreements (see NYSCEF Doc No. 79 at 6). Notably, the only factual determination made by

the court following this evidentiary hearing was that the shareholders were deadlocked; the court did not otherwise make any factual determinations resolving the parties' competing testimony.

Moreover, that part of defendant's motion seeking dismissal of plaintiffs' tortious interference with contract claim is premature because there is pending discovery which might reveal material facts in defendant's exclusive knowledge, which includes evidence related to defendant's communications with PAI's clients regarding the dissolution of PAI, the pathology services agreement, and the provision of pathology services by Plocharczyk to these clients upon termination of the pathology services agreement (see Abele Tractor & Equip. Co., Inc. v Schaeffer, 167 AD3d 1256, 1259-1260 [2018]). Plaintiffs initially sought discovery from defendant in July 2021, shortly after issue was joined. In September 2021, defendant acknowledged possession of materials responsive to plaintiffs' demands, but did not provide any materials to plaintiffs on the grounds that: (1) plaintiffs were already in possession of responsive documents through motion practice in this action and the dissolution proceeding; (2) the responsive documents were protected by privilege; or (3) the responsive documents would only be disclosed subject to a confidentiality order (see NYSCEF Doc No. 84). Plaintiffs have sufficiently explained their delay in seeking further discovery until after defendant made the pending motion. No scheduling order has been issued in this action, and, in light the pending appeal in the dissolution proceeding – where the receiver appointed in June 2022 has not yet determined whether he intends to pursue breach of contract claims against PAI's clients, including CMC – plaintiffs have sufficiently pursued discovery (see Arthur Brundage Inc. v Morris, 189 AD3d 2032, 2033 [2020] [internal quotation marks, brackets, and citations omitted]).

With respect to plaintiffs' motions, it must first be noted that they are not barred from moving to compel production of discovery because, as noted above, they have satisfactorily explained why they did not move to compel discovery until after defendant filed her summary judgment motion. Defendant's response to plaintiffs' first request for production of documents is insufficient, and plaintiffs' motion to compel responses is granted. For each separate demand, defendant shall provide responses which include (1) an itemized list of documents which she claims have been previously produced; and (2) all additional documents not previously provided which are responsive to the request. Based on plaintiffs having consented to enter into a confidentiality agreement, the parties shall execute a confidentiality agreement in substantially the same form as set forth in the Rules of the Commercial Division of the Supreme Court (22 NYCRR 202.70), appendix B (see Rules of the Commercial Division of the Supreme Court [22 NYCRR 202.70], rule 11-g [a]) within 30 days from the date of this decision and order. Defendant shall provide a complete response to plaintiffs' first demand for production of documents which complies with the terms provided herein, within 60 days from the date of this decision and order. Plaintiffs' motion for an order striking defendant's answer is denied, without prejudice to a motion seeking penalties pursuant to CPLR 3126 should defendant fail to timely comply with this decision and order.

Plaintiffs' motion to amend the complaint is granted. The requested amendments are premised upon the same legal theories and factual basis as the initial complaint, including the terms of the shareholders agreement, and there is no prejudice or surprise to defendant. Further, there is no longer a requirement that a party show that a proposed amendment has merit; rather, defendant may test the merits of the proposed amendments by moving for summary judgment

after discovery has been completed (see NYAHSAs Servs., Inc., Self-Ins. Trust v People Care Inc., 156 AD3d 99, 102 [2017]).

Based on the foregoing:

- (1) Defendant’s motion for summary judgment dismissing the first and second causes of action as moot is denied. Defendant may seek summary judgment on the first and second causes of action on other grounds following the conclusion of discovery.
- (2) Defendant’s motion for summary judgment dismissing the third cause of action is denied as premature. Defendant may renew her motion at the conclusion of discovery.
- (3) Plaintiffs’ motion for an order pursuant to CPLR 3124 is granted, on the terms set forth herein, and their motion for an order pursuant to CPLR 3126 is denied, without prejudice to a motion based on noncompliance with this decision and order.
- (4) Plaintiffs’ motion for leave to amend the complaint is granted; plaintiffs shall serve the amended complaint within 30 days from the date of this decision and order.

This decision constitutes the order of the court. The filing of this decision and order, or the transmittal of copies hereof, by the court shall not constitute notice of entry (see CPLR 5513).

Dated: December 19, 2022
Cortland, New York

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Digitally signed by Hon. Mark G. Masler
 DN: C=US, OU=Cortland County Supreme Court, O=Sixth Judicial District, CN=Hon. Mark G. Masler, E=crmasler_chambers@nycourts.gov
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HON. MARK G. MASLER
 Supreme Court Justice

The following documents filed with the Clerk of the County of Cortland via New York State Courts Electronic Filing System were considered on these motions (see CPLR 2219 [a]):

Document Numbers 66-67; 69-87; 90-100; 102-109.