

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY

PRESENT: Hon. Elizabeth Hazlitt Emerson

MOTION DATE: 10-26-06
SUBMITTED: 11-8-06
MOTION NO.: 006-MG
007-XMD

x
LUCIANO BONANNI and MRI ENTERPRISES, INC.
individually and as a member of MRI ENTERPRISES,
LLC and MRI ENTERPRISES, LLC,

Plaintiffs,

DAVIDOFF MALITO & HUTCHER LLP
Attorneys for Plaintiffs
605 Third Avenue
New York, New York 10158

-against-

JASPAN SCHLESINGER HOFFMAN LLP
Attorneys for Defendants
300 Garden City Plaza
Garden City, New York 11530

HORIZONS INVESTORS CORP., BENITO
FERNANDEZ a/k/a B.R. FERNANDEZ, ADEX
MANAGEMENT CORP., SOLOMON KALISH, ALLAN
HAUSKNECHT, M.D. and COMPREHENSIVE
IMAGING OF NEW YORK, PLLC,

Defendants.

x

Upon the following papers numbered 1 to 25 read on this motion to dismiss and cross-motion to amend; Notice of Motion and supporting papers 1-14; Notice of Cross Motion and supporting papers 15-21; Answering Affidavits and supporting papers 22; Replying Affidavits and supporting papers 23-25; it is,

ORDERED that the motion by the defendants for an order dismissing the eleventh cause of action contained in the plaintiffs' second amended complaint is granted; and it is further

ORDERED that the cross motion by the plaintiffs Luciano Bonanni and MRI Enterprises, Inc., for leave to amend the complaint is denied without prejudice.

The eleventh cause of action contained in the plaintiffs' second amended complaint seeks dissolution of the plaintiff MRI Enterprises, LLC, pursuant to Business Corporation Law § 1104-a. Since MRI Enterprises, LLC, is a limited liability company, not a corporation, it is governed by the Limited Liability Company Law, not the Business Corporation Law (*see, Artigas v Renewal Arts Realty Corp.*, 22 AD3d 327). Accordingly, the motion to dismiss is granted.

The plaintiffs Luciano Bonanni and MRI Enterprises, Inc., cross move for leave to

amend the complaint to add a cause of action for dissolution of MRI Enterprises, LLC, pursuant to Limited Liability Company Law § 702, which provides, in pertinent part, as follows:

On application by or for a member, the supreme court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

The moving plaintiffs allege that the majority members of MRI Enterprises, LLC, have engaged in illegal, fraudulent, and oppressive conduct toward them. While such allegations are grounds for dissolution under Business Corporation Law § 1104-a, they are not grounds for dissolution of a limited liability company (*see, Widewaters Herkimer Co. v Aiello*, 28 AD3d 1107, 1108). Moreover, it cannot be determined from the present record whether the moving plaintiffs have grounds for dissolution under Limited Liability Company Law § 702. Accordingly, the cross motion is denied without prejudice to renew upon an appropriate record.

Finally, the court notes that a motion for leave to amend the complaint must be supported by an affidavit of merit and evidentiary proof that could be considered upon a motion for summary judgment (*see, Non-Linear Trading Co. v Braddis Assocs.*, 243 AD2d 107, 116). The cross motion is supported only by the affirmation of counsel, who has no personal knowledge of the facts. Such an affirmation by counsel is without evidentiary value (*see, Zuckerman v City of New York*, 29 NY2d 557, 563). Accordingly, any renewed motion to amend the complaint must be supported by a proper evidentiary showing.

HON. ELIZABETH HAZLITT EMERSON

DATED: February 9, 2007

J. S.C.