

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

JAMES L. MELCHER,

INDEX No. 604047/03

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. NO. 033

APOLLO MEDICAL FUND MANAGEMENT L.L.C.,
& BRANDON FRADD

MOTION CAL No. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... _____

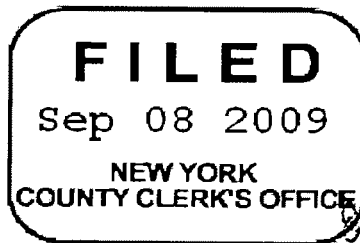
Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: _____ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.



Dated: 8/31/09

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION _____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

JAMES L. MELCHER,

Plaintiff,

APOLLO MEDICAL FUND MANAGEMENT L.L.C.
& BRANDON FRADD,

Defendants.

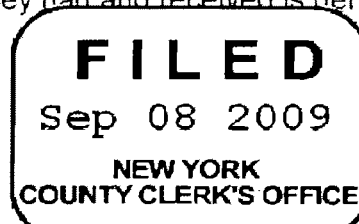
INDEX NO.
604047/03

DECISION/ORDER

DONNA M. MILLS, J:

The parties in this action engaged in an eleven day bifurcated jury trial before this court between May 11 and May 28, 2009. The jury returned a mixed verdict which will require a trial on damages. Plaintiff now, however, seeks judgment against defendants on the eighth and ninth causes of action which were reserved for decision by the Court. The Eighth cause of action against defendant Fradd individually, for money had and received, was expressly reserved to the Court for determination. Plaintiff contends that an entry of judgment against defendant Fradd individually is required in that: (a) the written contract was never amended, (b) Defendant Fradd breached Article VII of the Operating Agreement by failing to pay Mr. Melcher his contractual share of the profits, and (c) that Mr. Melcher never waived his rights.

An action for money had and received is an action in implied contract that the law creates in the absence of an agreement when one party possesses money that in equity and good conscience he ought not to retain and that belongs to another (Parsa v State of New York, 64 NY2d 143, 148 [1984]). Here, however, the Operating Agreement which the jury determined governed the relationship of the parties set forth the amounts payable to the managers and members. Accordingly, a claim for money had and received cannot be maintained where, as here, it is predicated upon a contract, namely the Operating Agreement. As such, plaintiff's claims for money had and received is denied.



The Ninth Cause of Action against Defendant Fradd for constructive trust was similarly determined a matter for the court, not the jury. The elements needed to impose a constructive trust are: (1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance therein, and (4) unjust enrichment (see Sharp v Kosmalski, 40 NY2d 119, 121 [1976]). Here, the plaintiff's submissions in support of his own motion demonstrate that these four elements are not present. Furthermore, the Jury specifically found that Plaintiff was estopped from asserting that Apollo Management underpaid him any performance fees. Accordingly, Plaintiff cannot now claim that he is entitled to any of the fees that were allocated to Fradd, and this Court cannot find, as required to impose a constructive trust, that Fradd has received an unjust benefit from the reallocation of any fees from Apollo Management.

Plaintiff also seeks judgment dismissing the affirmative defense of estoppel and entering judgment on the first cause of action. Plaintiff maintains that there was no evidence in the record of detrimental reliance by Apollo. The jury, however, in its verdict found equitable estoppel in favor of defendant Apollo Management.

It is settled law that a motion pursuant to CPLR 4404(a) should not be granted unless the preponderance of the evidence in plaintiff's favor is so great that the verdict could not have been reached upon any fair interpretation of the evidence (McDowell v Di Pronio, 52 AD2d 749 [4th Dept 1976]). The resolution of conflicting evidence and the credibility of the witnesses is for the jury to determine (Swensson v New York, Albany Despatch Co., 309 NY497, 505 [4th Dept. 1956]). This court finds there was sufficient credible evidence in the record to support a jury verdict finding in favor of Defendants on their affirmative defense of estoppel.

Plaintiff further contends that he is entitled to a new trial on the Fifth Cause of Action for improper removal as a Member. The jury verdict found that defendant Fradd had the

authority to remove Mr. Melcher as a Member. This Court finds there was sufficient credible evidence in the record to support a jury verdict finding in favor of Defendants on their authority to remove Mr. Melcher as a Member.

Plaintiff also seeks judgment as a matter of law or a new trial on the Sixth Cause of action on indemnification. The Sixth Cause of Action demanded denial of indemnification of defendant Fradd by defendant Apollo Management, under the clauses in the contract that forbid indemnification of Manager or Member for any fraud, bad faith, wilful misconduct or gross negligence. Fradd has been paying for the defense of this case with the funds of Apollo Management. The jury verdict found that Fradd had breached his fiduciary duty by diverting fees and investors to Apollo Offshore. It further found that Fradd's sworn assertion there was an "oral modification" was false, and that Fradd's sworn assertion that Mr. Melcher had waived his rights by not objecting was false. As such, this Court finds that the jury verdict, as noted above, requires that judgment be entered for plaintiff on the Sixth Cause of Action.

Plaintiff finally seeks judgment on the law, or a new trial on the issue of defendants' deceit, namely, defendant Fradd's presentation of fabricated physical evidence. This court did not permit any alleged fabrication of physical evidence before the jury, and as such, the motion for judgment on the law, or a new trial is denied.

Defendants' move for an order pursuant to CPLR § 4404(a) to set aside the jury's verdict on Plaintiff's Third Cause of Action for breach of fiduciary duty and direct that judgment be entered in favor of Defendant Fradd on Plaintiff's Third Cause of Action, or, in the alternative, granting a partial new trial only on Plaintiff's Third Cause of Action for breach of fiduciary duty.

The Third cause of action alleged, essentially, that Fradd had a fiduciary duty not to divert investors from Defendant Apollo Medical Fund Management, Inc. ("Apollo

Management”) into an investment company not managed by Apollo Management, and that Fradd breached his duty by diverting investors from non-party Apollo Medical Partners, Ltd. into Apollo Medical Offshore. Plaintiff alleged that he was damaged by loss of fees Apollo Management would have earned from those investors. Defendants also contend that the instruction and interrogatory on breach of fiduciary duty claim were inconsistent with plaintiff’s claim.

After hearing substantial evidence in this eleven day Jury trial, this Court finds that there was sufficient evidence to support the jury verdict for breach of fiduciary duty. Additionally, this Court’s finds that its trial rulings and jury instructions were in accord with the applicable law. As such, defendants’ motion is denied in its entirety.

Accordingly, it is

ORDERED that Plaintiff’s motion for judgment on the Eighth and Ninth causes of action are denied; and it is further

ORDERED that Plaintiff’s motion for a new trial on the Fifth cause of action is denied; and it is further

ORDERED that Plaintiff’s motion seeking judgment dismissing the affirmative defense of estoppel and entering judgment on the first cause of action is denied; and it is further

ORDERED that Plaintiff’s motion for a new trial on the Fifth Cause of Action for improper removal as a Member is denied; and it is further

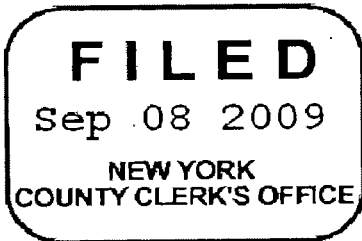
ORDERED that Plaintiff’s motion for judgment as a matter of law or a new trial on the Sixth Cause of action on indemnification is granted to the extent that a judgment is granted in favor of Plaintiff, and Defendant Fradd is not entitled to indemnification; and it is further

ORDERED that Plaintiff's motion for judgment on the law or a new trial on the issue of defendants' deceit is denied; and it is further

ORDERED that Defendants' motion for an order pursuant to CPLR § 4404(a) to set aside the jury's verdict on Plaintiff's Third Cause of Action for breach of fiduciary duty is denied.

This constitutes the decision and order of the court.

DATED: 8/31/09



ENTER:

Donna S. Mills

DONNA S. MILLS, J.S.C.