

STATE OF NEW YORK  
SUPREME COURT COUNTY OF MONROE

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PARKWAY PEDIATRIC AND  
ADOLESCENT MEDICINE LLC,

Plaintiff,

DECISION AND ORDER

v.

Index #2006/01585

BENEDETTO VITULLO, M.D.,

Defendant.

v.

GRETCHEN SMITH-BURKE,

Counterclaim Defendant.

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Defendant and Counterclaim Plaintiff Dr. Benedetto Vitullo, M.D. ("Dr. Vitullo"), moves for summary judgment pursuant to CPLR §3212 to dismiss each of the seven causes of action asserted by Plaintiff Parkway Pediatric and Adolescent Medicine, LLC ("Parkway" or the "Company"). By its Complaint dated February 7, 2006, Parkway asserts: 1) Breach of Contract; 2) Breach of the Implied Covenant of Good Faith and Fair Dealing; 3) Breach of Fiduciary Duty; 4) Replevin; 5) Conversion; 6) Unfair Competition; and 7) Prima Facie Tort. Parkway concedes the dismissal of its second, fourth, fifth, sixth and seventh causes of action and those causes of action are dismissed. In accordance with the below decision, Plaintiff's remaining causes of action consisting of breach of contract and breach of

fiduciary duty are also dismissed.

Parkway is a New York limited liability company formed in 1999 by Dr. Vitullo, and Counterclaim Defendant Dr. Gretchen Smith-Burke, M.D. ("Dr. Smith-Burke") for the purpose of practicing pediatric medicine. Dr. Vitullo and Dr. Smith-Burke are the sole members of the Company and each hold a 50% interest. Dr. Smith-Burke and Dr. Vitullo entered into an Operating Agreement attendant to the formation of the LLC. Dr. Smith-Burke was designated the managing member under the agreement. Pursuant to section 2.2, profits and losses of the Company were to be distributed in the same proportion as their respective annualized productivity. Section 4.4 of the Operating Agreement provides that any member may operate a competing business.

This action stems from events surrounding Dr. Vitullo's decision to leave the practice. In late November of 2004, Dr. Vitullo informed the Company's three staff physicians, Drs. Heil, Beshiem and Wedig that he was leaving the Company. He also told two Nurses Longo and Lauffer. On or about December 5, 2004, Dr. Smith-Burke learned of Dr. Vitullo's plan and sought and obtained confirmation that he intended to leave the Company. The next day on December 14, 2004, Dr. Smith-Burke announced to the entire staff the Dr. Vitullo planned to leave.

The parties eventually came to agreement that April 15, 2005 would be Dr. Vitullo's last day. Several physicians, nurses and

staff members moved with Dr. Vitullo to his new practice, English Road Pediatrics and Adolescent Medicine.

### **Summary Judgment**

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also, Potter v. Zimmer, 309 A.D.2d 1276 (4<sup>th</sup> Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003), *citing Alvarez*, 68 N.Y.2d at 324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also, Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4<sup>th</sup> Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4<sup>th</sup> Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v

Johnson, 147 A.D.2d 312, 317 (2<sup>nd</sup> Dept. 1989) (citations omitted).

### **Breach of Contract**

In order to prevail in a breach of contract claim, Plaintiff must show the existence of a valid contract, that Plaintiff has performed under the contract, defendant's breach of his obligation under the terms of the contract, and resulting damages. Morris v. 702 East Fifth Street HDFC, 46 A.D.3d 478 (1<sup>st</sup> Dept. 2007); Furia v. Furia, 116 A.D.2d 694 (4<sup>th</sup> Dept. 1986).

Parkway asserts two breaches of the Operating Agreement. First, Parkway asserts that Dr. Vitullo took a draw in the amount of \$85,975 (Pl. Mem. of Law, p. 8) from Parkway's operating account on April 14, 2005 in violation section 7.2 of the Operating Agreement. That section provides that "[t]he Company will from time to time distribute to the Members any or all cash in excess of reserves which is determined by the Manager to be available for distribution." Plaintiff asserts that Dr. Vitullo withdrew the money in the operating account without a determination from Dr. Smith-Burke that funds were available for distribution." Plaintiff's Memorandum of Law, p. 4.

Second, Plaintiff alleges that Dr. Vitullo, after he began working at English Road, failed to deposit a portion of the insurance payments he received for services he performed while at Parkway into a Parkway operating account in violation of section

5.4 of the Operating Agreement. Id. That section provides that "All funds of the Company will be deposited in such separate bank or account or accounts with any Member as authorized signatory."

It is not disputed that the Operating Agreement was a valid contract between the parties. Further, it is uncontroverted that Dr. Smith-Burke, as the Managing Member, did not designate that \$85,975 was available for distribution to the members.

Nevertheless, Dr. Vitullo asserts in sum and substance that he was entitled to the April 14, 2005 draw, and the \$42,495 of insurance payments as income/profit distributions under section 2.2 of the Operating Agreement. Parkway does not contend that Dr. Vitullo retained monies he was not otherwise entitled as his share of the income/profits under the operating agreement or his share of the company upon his withdrawal. The record shows that Dr. Vitullo's withdrawal was based on consideration of information in his K-1. Dr. Smith-Burke concedes that expert evaluators hired by the parties calculate that the money retained by Dr. Vitullo and withdrawn by him in April of 2005 represent between 40% and 60% of Dr. Vitullo's interest in the practice as of April 15, 2004 when he stopped working for Parkway. Affidavit of Dr. Smith-Burke, December 13, 2010 (Smith-Burke Aff.") ¶ 87. Further, uncontroverted evidence before the Court shows that, as of December 14, 2005, after the withdraw and withholding of the insurance payments, Parkway's expert believed Dr. Vitullo may be

owed \$125,000 for his share of the Company. (Defendant's Appendix of Exhibits, Tab 17).

New York Limited Liability Law provides in section 507 that "a member is entitled to receive distributions from a limited liability company before his or her withdrawal from the limited liability company and before the dissolution and winding up of the limited liability company." Limited Liability Company Law, § 507. By March 14, 2005, the relations between the parties were clearly acrimonious and adversarial. The mere technicality of Dr. Smith-Burke's designation of the funds as available for distribution cannot trump Dr. Vitullo's right to a distribution under the Limited Liability Law. There has been no showing, nor issue of fact raised, that the funds withdrawn constituted other than those "in excess of reserves."

It is clear that but for Dr. Smith-Burke's adversarial posture, such monies could have easily been designated for distribution. Dr. Smith-Burke asserts primarily, and in a conclusory fashion, that Dr. Vitullo's withdraw of funds "disrupted the cash flow of the business" or created "cash flow crises." Smith-Burke Aff., ¶ ¶ 72, 90. Plaintiff provides cash flow figures indicating a decreased cash flow for the months of April, May and June. Smith-Burke Aff. ¶ 74. Plaintiff, however, provides no explanation of how the decreased cash flow damaged the company. Moreover, Plaintiff fails to distinguish the effect

on cash flow attributable to the withdraw of funds distinct from the naturally occurring decrease in cash flow attendant to the uncontroverted fact that Drs. Vitullo, Beisheim, Heil no longer provided services on behalf of Parkway for those months.

Moreover, plaintiff fails to raise any issue of fact that the monies withdrawn were not in excess of reserves.

More fundamentally, this court does not find that the parties' Operating Agreement permitted Dr. Smith-Burke, regardless of her status as managing member, the unilateral and unfettered authority to prevent distributions to the other 50% member of the company that he would otherwise be entitled to receive under other provisions of the agreement and the Limited Liability Law, whether it be through a unilateral reduction in weekly draw or the self-serving failure to designate funds as available for distribution.

That these funds were indeed available for distribution i.e., not reserved or even needed to meet the foreseeable needs of the Company, is found in that there is no evidence at all of any disruption to the business caused by this withdrawal.

Plaintiff asserts that the withdrawal by Dr. Vitullo disrupted its ability to meet payroll obligations, but provides no evidence or even an assertion that payroll was not met. In fact, Dr. Smith-Burke testified at her deposition that Parkway was not required to access any credit facility, take any loans or

incur any debt related to any events at issue here. Simply, there is no evidence in the record that Parkway was unable to meet any of its financial obligations after Dr. Vitullo's actions.

To the contrary, there is evidence that Dr. Smith-Burke offered a retention bonus to staff physicians with little or no regard to their effect on the financial condition of Parkway. The evidence also shows that Parkway was able to proceed with the hiring of replacement physicians and staff, and to continue to pay Dr. Smith-Burke a draw and management salary (at least there was no evidence presented that Dr. Smith-Burke's compensation was reduced). Therefore, there was no legitimate financial reason preventing the designation of the funds as available for distribution.

Additionally, inasmuch as April 14 was designated as the official withdrawal date, Dr. Vitullo was "entitled to receive any distribution to which he [] is entitled under the operating agreement and, if not otherwise provided in the operating agreement, he [] is entitled to receive, within a reasonable time after withdrawal, the fair value of his or her membership interest . . . ." It is plain on this record that, as of December 14, 2005, Parkway believed Dr. Vitullo's share was equal to at least \$125,000, even considering that he had already received \$85,975 and \$42,295. Under these circumstances, Dr.

Vitullo's actions were not in breach of the Operating Agreement and Plaintiff's breach of contract claim is dismissed.

**Breach of Fiduciary Duty**

Parkway and Dr. Smith-Burke's breach of fiduciary duty claim also fails. On the prior motion by plaintiff for summary judgment on the breach of fiduciary duty claim, the court observed that Dr. Smith-Burke's allegations are limited to these: that she heard of the intended split the day after a December 4<sup>th</sup> holiday party from a then former employee, that when confronted with this news, Dr. Vitullo confirmed only that he was leaving and would not otherwise discuss the matter with her, that she could only obtain confirmation from one of the doctors, Wedig, of his plans (whether "staying or leaving"), that Dr. Vitullo hindered (but did not prevent) distribution of her written inquiry of each doctor concerning their intentions, that Drs. Heil and Beisheim (who with Dr. Vitullo treated about 60% of the LLC's patients) continued to be non-responsive on the subject (she does not say whether she talked to others, including Dr. Longo who ultimately left, with better success), that during a meeting with both sides and their attorneys on April 14<sup>th</sup> Dr. Vitullo announced that Drs. Heil, Beisheim, Longo, the office manager, several RNs, one LPN and two receptionists would be leaving for Dr. Vitullo's English Road practice the next day. Dr. Vitullo also took \$85,974.29 from Parkway's operating account

that day but informed Dr. Smith-Burke of it on his own initiative at the end of the April 14<sup>th</sup> meeting.

To succeed on a cause of action to recover damages for breach of fiduciary duty, a plaintiff must do more than make allegations of unscrupulous acts." Greenberg v. Joffee, 34 A.D.3d 426, 427 (2d Dept. 2006). The proponent of such a claim "must, at a minimum, establish that the offending parties' actions were 'a substantial factor' in causing an identifiable loss." Gibbs v. Breed, Abbott & Morgan, 271 A.D.2d at 189 (quoting Milbank, Tweed, Hadley & McCloy v. Chan Cher Boon, 13 F.3d 537, 543) (quoted in Greenberg v. Joffee, 34 A.D.3d at 427). See RNK Capital LLC v. Natsource LLC, 76 A.D.3d 840 (1<sup>st</sup> Dept. 2010); Laub v. Faessell, 297 A.D.2d 28, 31 (1<sup>st</sup> Dept. 2002) ("[l]oss causation is the fundamental core of the common-law concept of proximate cause").

Dr. Vitullo establishes prima facie that his actions attendant to establishing a competing practice were permitted under the parties Operating Agreement and were not otherwise unlawful. Indeed, Plaintiff concedes that the Operating Agreement provides, without restriction, for Dr. Vitullo's right to own and operate a competing practice. Further, his withdrawal of operating funds, as discussed above relative to Plaintiff's breach of contract claim, did not harm Parkway in any identifiable or material way.

In response, Parkway and Dr. Smith-Burke fail to raise an issue as a matter of law on this record with admissible evidence that Dr. Vitullo acted at the relevant times as part of a scheme designed solely to injure the LLC, i.e., with evidence negating an intention to act in his own behalf and for his own business or pecuniary interests. Nor did they raise an issue of fact on this record that Dr. Vitullo wrongfully used confidential LLC data in planning the move, or that he solicited patients or suppliers while still employed at the LLC, or that he otherwise employed "wrongful means" in his discussions with other LLC physicians and employees while he was still employed there, or that he made undue or unreasonable use of time and facilities at the LLC in preparation for his new endeavor. Importantly, there was no covenant not to compete, nor was there a non-recruit covenant prohibiting solicitation of fellow LLC employees, the latter of which in any event would have been of questionable validity. Lazer Inc. v. Kesselring, 13 Misc.3d 427, and esp. 433-34 (Sup. Ct. Monroe Co. 2005).

Indeed, there was a plenary provision in the operating agreement permitting member competition with the LLC, ¶4.4 (either "independently or with others"), as Dr. Smith-Burke acknowledges. More importantly, there was adequate lead time given to Dr. Smith-Burke, from the notice of intent to set up a competing practice with some of the LLC personnel in December to

the agreed upon April 15 formal split, to react to Dr. Vitullo's plans, whether with or without the cooperation of the other physicians is of no moment without a showing that Dr. Vitullo unfairly procured their non-cooperation.<sup>1</sup> There has been no such showing.

Although Parkway and Dr. Smith-Burke allege in conclusory fashion that Dr. Vitullo's conduct in making his April 14 withdrawal and withholding of insurance payments was designed to cause Parkway harm and disrupt its ability to meet payroll obligations, they do not raise an issue of fact by proffering admissible evidence that Parkway ultimately was harmed thereby.

For example, Dr. Smith-Burke protested at the April 14<sup>th</sup> meeting that the money Dr. Vitullo withdrew that day was earmarked for payroll, but she does not allege that Parkway failed to meet payroll. Dr. Smith-Burke also posits that the departure of staff would leave Parkway unable to provide services to patients, but she does not allege that Parkway ultimately was unable to meet its commitments. She even concedes that she hired her husband to look after the business end and that she began the search for new physicians, but she does not allege that these efforts failed, nor does she raise an issue of fact by proffering

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<sup>1</sup> Indeed, there is undisputed evidence that Dr. Smith-Burke and Parkway fully waived the 6 month notice period of former LLCL §606(b) by attempting to hasten Dr. Vitullo's exit in February, and then agreeing to his exit in April.

admissible evidence that she had insufficient time to keep Parkway alive and profitable. Dr. Smith-Burke does not address any concrete losses suffered by the LLC.

As the court observed in the prior decision and, in part, above, Dr. Vitullo's analysis of his right to withdraw on 6 months notice under former LLCL §606, and his right to a fair distribution under LLCL §509, is correct. So is his analysis of the Operating Agreement on his right to distribution upon withdrawal, and his right to form a competing practice.

Additionally, equitable relief in the form of an accounting, sought by Plaintiff in the ad damnum clause, is barred.<sup>2</sup> Dr. Vitullo establishes on this motion that Dr. Smith-Burke comes to the court with unclean hands in that she violated her fiduciary duty to Dr. Vitullo due to her unilateral decision to reduce his draw in February 2005 while simultaneously reducing hers, but at the same arranging to pay herself an unprecedented manager's

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<sup>2</sup> "The "right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest."" AHA Sales, Inc. v. Creative Bath Products, Inc., 58 A.D.3d 6 23 (2d Dept. 2008) (quoting LoGerfo v. Trustees of Columbia Univ. in City of N.Y., 35 A.D.3d 395, 397 (2d Dept. 2006) (quoting Palazzo v. Palazzo, 121 A.D.2d 261, 265 (2d Dept 1986)). Thus, although plaintiffs' request for an accounting was stated in the Wherefore clause to be associated with the unfair competition claim which plaintiffs agreed to dismiss on page 2 of their memorandum, there was no explicit statement in plaintiffs' responding papers agreeing to dismissal of the prayer for an accounting, which, as set forth above, is really part of the fiduciary duty claim.

salary, and thereby insulating only her from financial impact owing to these February changes. Cf., Lippman v. Shaffer, 15 Misc.3d 705, 712-13 (Sup. Ct. Monroe Co. 2006) (in the corporate context, director self-compensation decisions lie outside the business judgment rule's presumptive protection, and are examined under the entire fairness doctrine, especially when the distributions to one director/shareholder and not to the other are not justified by a contractual or other legitimate reason).

"The misconduct which will bar equitable relief need not be sufficient to constitute the basis of a legal action; any willful conduct "which would be condemned and pronounced wrongful by honest and fair-minded men, will be sufficient to make the hands of the applicant unclean (20 NY Jur, Equity, § 107) as long as the conduct pertains to the matter in litigation (Agati v Agati, 59 NY2d 830; Seagirt Realty Corp. v Chazanof, 13 NY2d 282, 285-286)." Pecorella v. Greater Buffalo Press, Inc., 107 A.D.2d 1064, 1065 (4<sup>th</sup> Dept. 1985).

That Dr. Smith-Burke reduced by nearly half Dr. Vitullo's weekly draw, at a time when his productivity on behalf of Parkway remained undiminished, is uncontroverted on this record. Further, it is uncontroverted that the manager's salary taken by Dr. Smith-Burke was unprecedented. Further, Dr. Smith-Burke conceded in deposition her motive for this was to "get my money before he left." Thus, Dr. Smith-Burke's actions preclude her

claim for relief on a claim of breach of fiduciary duty. Kallman v. Krupnick, 67 A.D.3d 1093(3d Dept. 2009) (client's conduct of first breaching joint venture agreement with attorney and pursuing purchase of real property on his own, and subsequently agreeing to enter into transaction with attorney while simultaneously commencing present action to rescind that agreement, constituted unclean hands barring equitable relief in his action for breach of fiduciary duty).

It is clear that, even after the parties' relationship became strained, Dr. Smith-Burke remained burdened with the fiduciary duty to conduct the LLC's affairs in a manner consistent with protection of Vittulo's withdrawal rights. In an analogous setting, it was held:

As a threshold issue, we note that Holme as a shareholder in Global, a closely held corporation, owed a fiduciary duty to the other Global shareholders. Fender v. Prescott, 101 A.D.2d 418, 476 N.Y.S.2d 128 (1st Dept. 1984), aff'd 64 N.Y.2d 1077, 489 N.Y.S.2d 880, 479 N.E.2d 225 (1985), 64 N.Y.2d 1079, 489 N.Y.S.2d 904, 479 N.E.2d 249 (1985). Additionally, Holme owed a fiduciary duty to Global arising out of his status as a corporate officer and director. See Alpert v. 28 Williams St. Corp., 63 N.Y.2d 557, 568, 483 N.Y.S.2d 667, 673, 473 N.E.2d 19, 25 (1984). 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. Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466, 541 N.Y.S.2d 746, 748, 539 N.E.2d 574, 576 (1989). Moreover, these fiduciary duties were not extinguished by Holme's acrimonious relationship with Global until he withdrew from the corporation. See Blue Chip Emerald LLC. v. Allied Partners, 299 A.D.2d 278, 279, 750 N.Y.S.2d 291, 294 (1st Dept. 2002).

Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93, 98 (1st Dept. 2006) (emphasis supplied). Ajettix Inc. v. Raub, 9 Misc.3d 908, 912-13 (Sup. Ct. Monroe Co. 2005).

These principles apply to managing or co-members of a Limited Liability Company. Willoughby Rehabilitation and Health Care Center, LLC v. Webster, 46 A.D.3d 801 (2d Dept. 2007), aff'ing, 13 Misc.3d 1230(A), 831 N.Y.S.2d 357, unreported disposition, 2006 WL 3068961, 2006 N.Y. Slip Op. 52067(U) (Sup. Ct. Nassau Co. October 26, 2006) ("partner, and by analogy, a member of a limited liability company, has a fiduciary obligation to others in the partnership or limited liability company which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty"); Salm v. Feldstein, 20 A.D.3d 469, 470 (2nd Dept. 2005); Nathanson v. Nathanson, 20 A.D.3d 403, 404 (2nd Dept. 2005). See also, Berman v. Sugo LLC, 580 F.Supp.2d 191, 204 (S.D.N.Y. 2008) ("Federal and state courts have recognized that members of a limited liability company, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members").

Here, Dr. Smith-Burke's affirmative act of reducing Dr. Vitullo's weekly draw for the express purpose of benefitting her violated her fiduciary duty to Dr. Vitullo and bars any equitable

relief.

In accordance with the above decision, Plaintiff's complaint is dismissed. The court further reserves on the motion for attorneys fees in the form of sanctions.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: January 8, 2011  
Rochester, New York