STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland
Docket No.: BCD-CV-14-34

DAVID L. SAVELL,

Plaintiff

v.

THOMAS D. HAYWARD, KEN G. SIMONE, MICHAEL B. BRUEHL, MICHAEL A. DUDDY, and KELLY, REMMEL & ZIMMERMAN,

Defendants

ORDER ON PENDING MOTIONS BETWEEN PLAINTIFF AND THE DOCTOR DEFENDANTS

This action is before the court on Plaintiff David Savell's Motion for Summary Judgment against Defendants Thomas Hayward, Ken Simone and Michael Bruehl [collectively "the Doctor Defendants"] on Counts I through V of his Third Amended Complaint. The Doctor Defendants oppose Plaintiff's Motion and ask that summary judgment be rendered against Plaintiff on those counts, and have filed a cross motion for summary judgment on the remaining counts pleaded against them—Counts VI-VIII.

Plaintiff's Motion contends that the Doctor Defendants owe him the sum of $190,454, which is equal to one-fourth of the net proceeds from the sale of certain commercial property located in Bangor, Maine.

In response, Defendants contend that the Plaintiff is not—or, at least, not yet—entitled to his one-fourth interest. Further, they contend that Plaintiff's claim, if any, runs only against the limited liability company that sold the commercial property in question, and that they have no personal liability to Plaintiff.

Factual Background

Sunbury Primary Care, P.A. ("SPC") is or was a professional services corporation engaging in the practice of medicine, with its principal place of business in Bangor, Maine. (Pl.'s Supp. S.M.F. ¶ 1; Defs.' Opp. S.M.F. ¶ 1.) At all times relevant to the case, SPC was in the business of furnishing medical services to members of the public. (Pl.'s Supp. S.M.F. ¶ 2; Defs.' Opp. S.M.F. ¶ 2.) At all relevant times, the Doctor Defendants—Hayward, Simone, and Bruehl—were the only shareholders of SPC. (Pl.'s Supp. S.M.F. ¶ 4; Defs.' Opp. S.M.F. ¶ 4.) At all relevant times, Plaintiff David Savell was employed as the Chief Executive Officer of SPC. Under his employment contract, Plaintiff was "directly and solely responsible" to SPC's board of directors. (Pl.'s Supp. S.M.F. ¶ 6; Defs.' Opp. S.M.F. ¶ 6.)

Sunbury Medical Properties, LLC ("SMP") is a limited liability company (LLC) that had its principal place of business in Bangor, Maine, and with the three Doctor Defendants as members. (Pl.'s Supp. S.M.F. ¶ 10; Defs.' Opp. S.M.F. ¶ 10.) SMP owned and managed the real property located at 133 Corporate Drive, Bangor, occupied by SPC's medical offices. Plaintiff also served as the manager of SMP, and in that role had responsibility and authority to manage the business and carry out all acts customary or incident to the management of the company. (Pl.'s Supp. S.M.F. ¶ 13; Defs.' Opp. S.M.F. ¶ 13.) [1]

In September 2008, Plaintiff purchased an equal ownership economic interest in SMP for $5,200,[1] thereby becoming a one-fourth economic interest holder in SMP and also a one-fourth guarantor on secured debt owed by SMP to KeyBank. (Pl.'s Supp. S.M.F. ¶ 19; Defs.' Opp. S.M.F. ¶ 19.)

In 2012, the SPC medical practice began to experience financial distress. SPC through the Plaintiff and the Doctor Defendants began negotiations with Eastern Maine Medical

[1] Plaintiff's rights and obligations as owner of an "economic interest" are specified in SMP's Operating Agreement.

Center ("EMMC") for the sale of SPC as a going concern and the sale of the real estate owned by SMP.[2] (Pl.'s Supp. S.M.F. ¶ 20; Defs.' Opp. S.M.F. ¶ 20.) In August of 2013, the parties reached a tentative agreement for the sale of both companies to EMMC for a combined price of $4.6 million.[3] SPC and SMP sent a letter of acceptance of the tentative agreement to EMMC dated August 14, 2013.[4] SPC and SMP were both represented by Michael Duddy of the Kelly, Remmel & Zimmerman law firm. EMMC was represented by counsel from the Eaton Peabody law firm.

On September 5, 2013, Eaton Peabody sent Attorney Duddy a draft of the Asset Purchase Agreement.[5] (Pl.'s Supp. S.M.F. ¶ 30; Defs.' Opp. S.M.F. ¶ 30.) The closing on the Asset Purchase Agreement was to be on or before September 30, 2013. However, prior to the closing, the parties executed an amendment to the Asset Purchase Agreement, which was signed on October 1, 2013.[6] (Pl.'s Supp. S.M.F. ¶ 34; Defs.' Opp. S.M.F. ¶ 34.) Said Amendment altered the terms of the Asset Purchase Agreement in the following ways. First, SPC, SMP, and the Physician Owners agreed to divide the closing into two parts, a closing on the sale of SMP's real estate to take place on September 30, 2013, and a sale of assets of SPC to take place on or before October 31, 2013. Second, the sale price of SPC's assets was subject to

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[2] The only significant asset owned by SMP was its real estate at 133 Corporate Drive in Bangor. Initially, both EMMC and St. Joseph's Hospital were interested in buying the property. (Defs.' Addt'l S.M.F. ¶ 8; Pl.s' Rep. S.M.F. ¶ 8.) However, by February 2013 EMMC was the only interested buyer. (Defs.' Addt'l S.M.F. ¶ 9.)

[3] The sale price was subject to audit verification by EMMC.

[4] The letter as signed by Defendant Bruehl as Chair of the SPC Board and by Plaintiff as the Manager of SMP. (Pl.'s Supp. S.M.F. ¶ 23; Defs.' Opp. S.M.F. ¶ 23.)

[5] The Asset Purchase Agreement was signed by Defendant Bruehl in his capacity as Chair of SPC. Plaintiff signed in his capacity as Manager of SMP. The doctors signed the Agreement in their individual capacities as "Physician Owners."

[6] Again Defendant Bruehl signed the Amendment on behalf of SPC in his capacity as Chair. Plaintiff signed in his capacity of Manager of SMP and the Defendant Doctors signed in their individual capacities as Physician Owners.

reduction at the request of EMMC.[7] Finally, the net proceeds of SMP's real estate sale were to be held in escrow by Eaton Peabody.[8] (Pl.'s Supp. S.M.F. ¶ 36; Defs.' Opp. S.M.F. ¶ 36.)

On October 1, 2013, SMP closed on its sale of real estate to EMMC.[9] The sale price was $3.95 million. The net amount received by SMP from the sale was $794,006.69. The amount was held in escrow pursuant to Section 7.i of the First Amendment to the Asset Purchase Agreement. (Pl.'s Supp. S.M.F. ¶ 43). The sale of SPC assets was deferred until on or before Oct 31, and the remaining amount held in escrow after making various payments was $593,044.41. (Pl.'s Supp. S.M.F. ¶ 45; Defs.' Opp. S.M.F. ¶ 45.)

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[7] Paragraph 6 of the Amended Agreement reads:

> Buyer and seller agree that the delays in the Asset Closing will result in additional costs to the parties that were not included in the Asset Purchase price. Buyer and Seller agree to negotiate in good faith regarding a reduction in the Asset Purchase Price prior to the Asset Closing. The reduction in the Asset Purchase Price must be satisfactory to Buyer, in its sole discretion, or Buyer shall not be obligated to proceed with the Asset Closing. This Section shall be treated as an additional condition precedent to Buyer's obligation to close the Asset Purchase under Section 8.02 of the Asset Purchase Agreement.

See Amended Agreement ¶ 6.

[8] Paragraph 7.1 of the Amended Agreement reads:

> After adjustments to the Real Estate purchase price at the Real Estate Closing, any proceeds due Sunbury Medical at the Real Estate Closing in excess of Fifty Thousand dollars ($50,000.00) shall be withheld and placed in an escrow account; Eaton Peabody shall be the Escrow Agent and shall hold the escrowed funds in accordance with the terms hereof and Exhibit A hereto. The escrowed funds shall be used to satisfy liabilities associated with the Asset Closing, including but not limited to adjustments contemplated under Section 2.05 of the Agreement, personal property taxes and liens in favor of Katahdin Trust Company. *Notwithstanding the foregoing limitation*, during the Interim Period, upon written request from Seller to Escrow Agent, Escrow Agent shall deliver to Seller up to Two Hundred Two Thousand dollars ($202,000.00), to be used to pay pension obligations of Seller. Acceptance of such funds by Seller shall be deemed and constitute Seller's agreement that such funds shall be used only for such purpose. In the event the Asset Closing does not occur, all funds remaining in escrow shall be immediately paid to Sunbury Medical, subject to any adjustments contemplated under Section 2.05 of the Agreement. [Italics in original.]

[9] By signing the Amendment both SPC and SMP understood and agreed: (1) that there would be two closings; one for the real estate and one for the practice; (2) that the approximately one month delay in the Practice closing would result in additional costs to the parties; (3) that at the sole discretion and satisfaction of EMMC as the buyer, the Practice would be subject to a reduction in the sale price as the result of those costs; and (4) that the net proceeds of the real estate sale were to be held in escrow by EMMC's attorney's and used to satisfy liabilities of the Practice.

The amount was reduced further after the payment of SPC pensions and payroll and a wire fee. The remaining amount as of October 24, 2013, was $387,530.20. (Pl.'s Supp. S.M.F. ¶ 48; Defs.' Opp. S.M.F. ¶ 148.) Plaintiff claims to be entitled to a one-fourth share of the proceeds of the sale of the real estate by SMP to EMMC upon the dissolution of the company.

While the parties agree that the Plaintiff never waived his interest in the proceeds, the Doctor Defendants contend that none of the prerequisites to a distribution of assets required under the Operating Agreement have been completed. Specifically, they contend that Plaintiff is not entitled to any distribution from the LLC unless and until the LLC is wound up and dissolved. They contend that it is unknown how much any member or economic interest holder is entitled to, if anything. (Defs.' Opp. S.M.F. ¶ 42.) They also assert that Plaintiff's recourse is against the LLC, and that they cannot be held individually liable for an obligation of the LLC without a determination that the corporate veil should be pierced.

Plaintiff contends that during a meeting of SPC shareholders held on September 10, 2013, prior to the signing of the initial Asset Purchase Agreement, Defendant Hayward told Plaintiff that the reallocation of the sale price of the SMP real estate would result in Plaintiff's one-fourth economic interest being valued at roughly $80,000 more than his original purchase price.[10] (Pl.'s Supp. S.M.F. ¶ 52; Defs.' Opp. S.M.F. ¶ 52.) Based on the overall transaction as it was understood to be as of that date, this was not an incorrect assessment. While Defendant Hayward requested that the Plaintiff reduce his share of the sale proceeds, Plaintiff did not agree to such reduction.

On October 13-14, Plaintiff made repeated attempts through attorney Michael Duddy, who was representing SPC and SMP in the transaction with EMMC, to clarify that he would receive a share of the SMP proceeds. Attorney Duddy relayed Plaintiff's concerns to the

[10] Defendants Simone and Bruehl were also present at the meeting. (Pl.'s Supp. S.M.F. ¶ 52; Defs.' Opp. S.M.F. ¶ 52.)

Doctor Defendants, who, through attorney Duddy, told Plaintiff that his concerns would be addressed later, thus neither rejecting his demand for assurances nor agreeing to it.

By emails dated October 21 and 22, 2013, EMMC acted on its right to reduce the sale price of the assets and declared that it would agree to purchase the SPC practice for only as much as would be necessary, along with the escrowed proceeds from the sale of SMP's real estate, to cover SPC's liabilities. (Pl.'s Supp. S.M.F. ¶ 56; Defs.' Opp. S.M.F. ¶ 56.) SPC through Plaintiff and the Doctor Defendants acquiesced to this modification. At the closing on the sale of the Practice on October 24, 2013, Plaintiff signed a Second Amendment to the Asset Purchase Agreement on behalf of the LLC, in which the LLC authorized the release of nearly all of the remaining escrow funds to satisfy the liabilities of SPC. The assets were sold at the closing for only $400,000. (Pl.'s Supp. S.M.F. ¶ 66.)

As a result of the sale of both entities, Plaintiff was released from his personal obligation as a one-fourth guarantor of SMP's debt to Key, while the Doctors were released from their personal obligations as guarantors on both the Key debt and on certain debts owed by SPC. (Pl.'s Supp. S.M.F. ¶ 74; Defs.' Opp. S.M.F. ¶ 74.) To date, Plaintiff has received no proceeds from SMP reflecting his one-fourth interest.

Plaintiff Savell's nine-count Third Amended Complaint asserts the following counts against the Doctor Defendants:

- Count I, Unjust Enrichment
- Count II, Breach of Duty of Good Faith and Fair Dealing, 31 M.R.S. §1522.F; Common Law
- Count III, Breach of Contract
- Count IV, Quantum Meruit
- Count V, 26 M.R.S. §§626-626-A

- Count VI, Tortious Interference with Contractual Relations
- Count VII, Intentional Misrepresentation
- Count VIII, Negligent Misrepresentation

As noted above, Plaintiff has moved for summary judgment on Counts I through V, whereas the Doctor Defendants seek summary judgment on all counts against them.

Standard Of Review

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any . . . show that there is no genuine issue as to any material fact set forth in those statements and that any party is entitled to a judgment as a matter of law." M.R. Civ. P. 56(c). To survive a motion for summary judgment, the opposing party must produce evidence that, if produced at trial, would be sufficient to resist a motion for a judgment as a matter of law. *Rodrigue v. Rodrigue*, 1997 ME 99, ¶ 8, 694 A.2d 924.

For purposes of summary judgment, "[a] material fact is one that can affect the outcome of the suit." *Burdzel v. Sobus*, 2000 ME 84, ¶ 6, 750 A.2d 573 (citing *Kenny v. Dep't of Human Services*, 1999 ME 158, ¶ 3, 740 A.2d 560); *see also McIlroy v. Gibson's Apple Orchard*, 2012 ME 59, ¶ 7, 43 A.3d 948. A genuine issue exists when sufficient evidence supports a factual contest to require a fact-finder to choose between competing versions of the truth at trial. *See Prescott v. Tax Assessor*, 1998 ME 250, ¶ 5, 721 A.2d 169 (citing *Garside v. Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990)).

A party wishing to avoid summary judgment must present a prima facie case for each element of a claim or defense that is asserted. *See Reliance Nat'l Indem. v. Knowles Indus. Services*, 2005 ME 29, ¶ 9, 816 A.2d 63. "If material facts are disputed, the dispute must be resolved

through fact-finding." *Curtis v. Porter*, 2001 ME 158, ¶ 7, 784 A.2d 18. When the court rules on a motion for summary judgment, "'[it] is to consider *only* the portions of the record referred to, and the material facts set forth, in the Rule 7(d) statements.'" *Handy Boat Serv., Inc. v. Prof'l Services, Inc.*, 1998 ME 134, ¶ 16, 711 A.2d 1306 (quoting *Gerrity Co. v. Lake Arrowhead Corp.*, 609 A.2d 293 (Me. 1992)). The court will view the evidence in light most favorable to the non-moving party. *See, e.g., Steeves v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 1998 ME 210, ¶ 11, 718 A.2d 186.

Discussion

1. Plaintiff's Claim To a Distribution Under the SMP Operating Agreement

A threshold contention of the Doctor Defendants is that no distribution from the SMP real estate sale is due to the Plaintiff. The Doctor Defendants contend that, because the escrowed sales proceeds were payable to the LLC, and because the LLC still exists and its affairs have not been wound up, Plaintiff's entitlement as a one-fourth economic interest holder has yet to be determined, and that this action was thus prematurely brought. The Plaintiff contends that the Doctor Defendants have refused to acknowledge his entitlement or to take any steps to wind down the LLC.

"[T]he paramount principle in the construction of contracts is to give effect to the intention of the parties as gathered from the language of the agreement viewed in light of all the circumstances under which it was made." *SC Testing Tech., Inc. v. Dep't of Envtl. Prot.*, 688 A.2d 421, 424 (Me. 1996) (*citing F.O. Bailey Co. v. Ledgewood, Inc.*, 603 A.2d 466, 468 (Me. 1992)). When the language of a contract is not ambiguous, the contract's interpretation is a question of law for the court. Id. "Contract language is ambiguous when it is reasonably susceptible of different interpretations." *American Policyholders Ins. Co. v. Kyes*, 483 A.2d 337, 340 (Me.1984).

In this case, the Operating Agreement governs the distribution of proceeds. Nothing in the Operating Agreement requires the distribution of SMP assets to members or holders of an economic interest, unless the LLC is dissolved. Under the terms of the Operating Agreement SMP shall be dissolved upon the occurrence of any of "the sale or other disposition of all or substantially all of the assets of the Company or the permanent cessation of the Company's business operations.

Section 12.1(c) states that a statement of intent to dissolve must be filed with the Secretary of State as a prerequisite to dissolution. Following the filing of a statement of intent, the Article XII Section 12.3(a) of the Operating Agreement requires that the Manager wind up, liquidate, and distribute assets. The Section describes the process as follows:

(i) sell or otherwise liquidate all of the Company's assets as promptly as practicable (except to the extent the Managers may determine to distribute any assets to the Member in kind);

(ii) discharge or make reasonable provision for all liabilities of the Company, including liabilities to Members and Economic Interest Owners who are also creditors (other than liabilities to Members and Economic Interest Owners for distributions and the return of capital) and establish such reserves as may be reasonably necessary to provide for contingent liabilities of the Company (for purposes of determining the Capital Accounts of the Members and Economic Interest Owners, the amounts of such Reserves shall be deemed to be an expense of the Company);

(iii) distribute the remaining assets of the Company in the following order of priority:

1. To each Member or Economic Interest Owner, with respect to the cumulative amount of all accrued but unpaid pre-dissolution distributions for which the Company is liable to such Member or Economic Interest Owner, the amount of such liability;

2. To each Member and Economic Interest Owner, with respect to his unreturned capital contribution, an amount equal to the positive balance (if any) in his Capital Account (as determined after taking into account all Capital Account adjustments for the Company's taxable year during which the liquidation occurs), or, if the assets available to be distributed hereunder are insufficient to cover the aggregate of the Members' and Economic Interest Owners' positive balances, a proportionate amount based upon the relative positive balances of the Members and Economic Interest Owners; and

3. To each Member and Economic Interest Owner, with respect to his Membership Interest, as the case may be, a proportionate share of the remaining assets equal to his proportionate share of all Economic Interests.

Article XII Section 12.3(a).

To date, no such statement of intent has been filed with the Secretary of State. (Defs.' Addt'l S.M.F. ¶ 19; Pl.'s Rep. S.M.F. ¶ 19.) Further, the LLC remains registered and in good standing with the State of Maine. (Defs.' Addt'l S.M.F. ¶ 20; Pl.'s Rep. S.M.F. ¶ 20.) The affairs have not been wound up, and no accounting has occurred. (Defs.' Addt'l S.M.F. ¶ 21; Pl.'s Rep. S.M.F. ¶ 21.)

As noted, nothing compels the LLC to make the distribution to Plaintiff Savell that he claims to be due. None of the claims in his Third Amended Complaint seeks to compel winding up of the LLC, and he has not named the LLC as a party defendant on any theory of liability.

Instead, his Third Amended Complaint essentially ignores the existence of the LLC, and seeks to impose personal liability on the Doctor Defendants directly. Individual officers and employees of a corporation can be held personally liable for their own tortious acts, *see Advanced Const. Corp. v. Pilecki*, 2006 ME 84, ¶ 13, 901 A.2d 189; s*ee also Mariello v. Giguere*, 667 A.2d 588, 590-91 (Me. 1995), and subsequent portions of this Order analyze the issue of the Doctor Defendants' personal liability based on their own acts and omissions. Another basis on which the Doctor Defendants could be held liable is on a theory of piercing the corporate veil, also analyzed below. However, both theories for holding the Doctor Defendants individually liable require the Plaintiff to prove that he has suffered an economic loss for which he can recover damages.

The fact that the LLC is still in existence and has not been wound up or dissolved means that it remains speculative as to whether or not he has sustained any actual loss of an

entitlement based on his economic interest in SMP. Plaintiff could have sued the LLC and the Doctor Defendants together—i.e., it may be that he is not required to exhaust his remedy against the LLC before proceeding against the Doctor Defendants—but the fact that he has not pursued any remedy against the LLC means that the Doctor Defendants can contend—as they do contend—that he has not demonstrated any actual loss.

On the other hand, the reason why Plaintiff cannot prove that he has a present enforceable entitlement to a distribution is that the Doctor Defendants as members of SMP have not taken any steps either to make a distribution or to dissolve the LLC. They also apparently have not taken any steps to reimburse SMP for using sales proceeds from its real estate to satisfy SPC's debt and, in so doing, to extinguish their obligation as guarantors of that debt.

For these reasons, the court concludes that, although the Plaintiff may not be presently entitled to obtain a distribution from SMP under the Operating Agreement, whether he may have recourse against the Doctor Defendants is a different question. The analysis turns to the individual counts pleaded against the Doctor Defendants.

2. Personal Liability of Defendant Doctors For Damages Under Counts I-VIII

The Doctor Defendants can be held personally liable to the Plaintiff either based on the doctrine of piercing the corporate veil, or based on their own independently actionable acts or omissions, or both. These alternate grounds for imposing personal liability on the Doctor Defendants are examined in turn.

i. *Piercing the Corporate Veil:*

Maine law recognizes corporations to be separate legal entities with limited liability. *Johnson v. Exclusive Properties Unlimited,* 1998 ME 244, ¶ 5, 720 A.2d 568. "As such, courts are generally reluctant to disregard the legal entity and will cautiously do so only when necessary

to promote justice." *Anderson v. Kennebec River Pulp & Paper Co.*, 433 A.2d 752, 756 n.5 (1981).[11] However, the Law Court has held that the corporate entity, which in this case is a limited liability company, can be disregarded (1) if the defendant dominated, abused or misused the corporate form, and (2) if the court's recognition of a separate corporate existence would cause an unjust or inequitable result. *See Johnson v. Exclusive Prop. Unlimited*, 1998 ME 244, ¶ 6, 720 A.2d 568, 571; *see also* 31 M. R. S. § 1544 (noting the limited liability of members and managers of LLCs).[12]

In determining whether a member, has abused the privilege of a separate corporate entity the courts will examine a series of factors. For example:

> (1) common ownership; (2) pervasive control; (3) confused intermingling of business activity[,] assets, or management; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporate assets by the dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; [and] (12) use of the corporation in promoting fraud.

Id. ¶ 7.

In this case, the Plaintiff contends that SMP is now a defunct corporation with no assets. Even if true, those circumstances do not, in and of themselves, justify imposing personal liability for obligations of the LLC on the members of the LLC. The same holds true for purposes of SPC. To assert a claim against the Doctor Defendants personally, based on their status as members of SMP or officers, directors and shareholders of SPC (rather than based on

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[11] *See also Bonnar-Vawter, Inc. v. Johnson*, 157 Me. 380, 387, 173 A.2d 141 (1961) noting: Maine courts will "disregard the legal entity of a corporation . . . with caution and only when necessary in the interest of justice."

[12] The statute states:

> A person who is a member of a limited liability company is not liable, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company, whether arising in contract, tort or otherwise or for the acts or omissions of any other member, agent, or employee of the limited liability company.

31 M. R. S. § 1544.

their own independently actionable conduct), Plaintiff must establish the elements necessary for the court to pierce the corporate veil.

The Plaintiff contends that the Doctor Defendants wrongfully caused SMP to direct the proceeds held in the Eaton Peabody law firm's escrow account to be applied to debts owed by SPC for a line of credit with Katahdin Trust Company. The Doctor Defendants had personally guaranteed the Katahdin Trust debt. It is the Plaintiff's contention that SMP should have distributed the proceeds of the real estate sale to him and the three Doctor Defendants, and the Doctor Defendants should have paid SPC's debt from their *pro rata* share of the proceeds instead of using what would have been his quarter-share to pay their debts.

There is some justification for that argument—one reasonable view of what happened is that the Doctor Defendants engaged in self-dealing, in taking care of themselves first and ignoring the Plaintiff's concerns. However, the facts also show that the Doctor Defendants conducted the transaction in a manner consistent with the corporate form, not in a manner that showed disregard. The facts also show that the Plaintiff acquiesced and cooperated in the transaction about which he now complains. On the other hand, he can credibly contend that he cooperated in the assignment of SMP's sale proceeds to pay the SPC debt only because the Doctor Defendants, through their attorney, led him to believe that his claim would be dealt with later.

The First Amendment to the Asset Purchase Agreement indicated that EMMC would be entitled to reduce the asset sale price and that any proceeds due Sunbury Medical at the time of the real estate closing would be held in escrow by Eaton Peabody. The escrowed funds were to be used to satisfy liabilities associated with the asset closing, including but not limited to property taxes, and liens in favor of Katahdin Trust Company. The First Amendment was

signed by the Plaintiff in his capacity as Manager of SMP and by Defendant Doctor Michael Bruehl, in his capacity as President of SPC and as a physician owner.

Further, at the time of the Asset closing on October 24, 2013, the Plaintiff was presented with an authorization and the Second Amendment to the Asset Purchase Agreement.[13] (Pl.'s Supp. S.M.F. ¶ 60.) Said Amendment clearly indicated that the balance remaining in the escrow account would be released:

> i. to Sunbury Primary Care P.A. upon a final resolution of the Claim, provided there is no liability, cost or expense to buyer that has not been fully satisfied by the undersigned Physician Owners; or
>
> ii. to Buyer in the event any cost or expense paid or incurred by Buyer arising from the claim has not been fully satisfied by the undersigned Physician Owners.

The Second Amendment authorized the release of nearly all of the remaining escrow funds and satisfied the remaining personal liabilities of the assets. *Id.* Plaintiff signed both the Authorization and the Second Amendment in his capacity as manager of SMP and Doctor Doctor Defendant Bruehl signed in his capacity as President of SPC and as a physician owner.

Plaintiff's contention that he is not bound by the documents is not persuasive. It was Plaintiff's duty to read and understand the documents he was signing. "The law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents, and was willing to assent to its terms without reading it." *Hix v. E. S.S. Co.*, 107 Me. 357, 78 A. 379, 381 (1910); *see also Francis v. Stinson*, 2000 ME 173, ¶ 42, 760 A.2d 209, 217-18

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[13] The Authorization was drafted by Eaton Peabody and signed by the Plaintiff at closing. It states:

> Sunbury Medical Properties, LLC authorizes you to apply $372,774.16 of its funds currently held by Eaton Peabody in escrow to satisfy amounts due from and/or owed by Sunbury Primary Care P.A. at the asset closing being conducted on or about today's date and reflected in the seller settlement statement of even date. The balance of funds remaining in the escrow account being $14,756.04 shall remain in escrow in accordance with the Second Amendment to Asset Purchase Agreement of even date.

("As a matter of general contract law, parties to a contract are deemed to have read the contract and are bound by its terms.").

The terms of the First and Second Amendments to the Asset Purchase Agreement signed by the Plaintiff clearly set forth the intentions of the Doctor Defendants to apply the proceeds in escrow to outstanding debts of the SPC. Whether an asset of SPC was properly used to extinguish the debt of SPC and the Doctor Defendant guarantors is a valid question, but there was no disregard or misuse of the corporate form of the sort essential to the first element of piercing the corporate veil. All corporate steps necessary to complete the EMMC transaction, including the assignment of SMP sales proceeds, were properly approved and documented. Because the Plaintiff has failed to meet the first part of the test for piercing the corporate veil—that the Doctor Defendants "dominated, abused or misused the corporate form"—the second part of the piercing test need not be analyzed.

ii. Doctor Defendants' Personal Liability for Their Own Acts and Omissions

The Plaintiffs' claims against the Doctor Defendants fall into two groups.

Counts I through V of Plaintiff's Third Amended Complaint allege the following claims against the Doctor Defendants: Count I—Unjust Enrichment; Count II—Breach of Duty of Good Faith and Fair Dealing--31 M.R.S. §1522.F; Common Law; Count III—Breach of Contract; Count IV—Quantum Meruit; Count V—26 M.R.S. §§626-626-A. Counts VI through VIII allege tort claims against the Doctor Defendants. Each group is analyzed separately.

Count I—Unjust Enrichment: If the Doctor Defendants were unjustly enriched, it was at the immediate expense of SMP, because it was an asset of SMP that was used to extinguish their liability as guarantors on the debt of SPC to Katahdin.

One reasonable view of the facts is that the Doctor Defendants caused SMP to transfer proceeds of the sale of its real estate to satisfy a debt of a different entity that the Doctor Defendants had guaranteed; that they caused Plaintiff to cooperate in the transaction on the understanding that his claim would be addressed after the EMMC transaction had closed, and that, through inaction, they are now holding his claim in a state of limbo by failing either to make any distribution, or to dissolve SMP and distribute its assets, or to reimburse SMP for the proceeds diverted to benefit themselves, or to get SPC to reimburse SMP.

That interpretation of the facts means that Plaintiff has made a *prima facie* showing that he has conferred a benefit on the Doctor Defendants in the form of an expectancy, and that they knowingly took the benefit and used it to pay their own debt, and are refusing to take steps that they have the ability to take that are necessary for the benefit to be returned to the Plaintiff--and therefore have been unjustly enriched at Plaintiff's expense. The Doctor Defendants' Motion for Summary Judgment is denied as to Count I. On the other hand, Plaintiff's showing is to a *prima facie* degree only, so his Motion is also denied.

Count II: Breach of Duty of Good Faith and Fair Dealing—31 M.R.S. § 1522.F: The cited statute, 31 M.R.S. § 1522.F. provides that an LLC may not "eliminate or limit a member's liability to the limited liability company and members for money damages for a bad faith violation of the implied contractual covenant of good faith and fair dealing." Nothing in the SMP agreement purports to do that.

However, the statute plainly is intend to establish a duty of good faith and fair dealing on the conduct of the business of SMP. The court is not prepared to say that the Doctor Defendants' duty of good faith and fair dealing does not run in favor of Plaintiff, even though he is an economic interest holder rather than a member. The same circumstances that Plaintiff proffers to support his unjust enrichment claim also suffice to make a *prima facie* showing of

breach of the duty of good faith and fair dealing. Summary judgment on Count II is denied to both the Doctor Defendants and the Plaintiff.

Count III—Breach of Contract: Plaintiff has not shown that the Doctor Defendants breached a contract between any of them and him. His Motion will be denied; theirs will be granted, as to Count III.

Count IV—Quantum Meruit: This count fails because the Plaintiff has not shown that he rendered services to the Doctor Defendants under circumstances in which the law implies a promise to pay. He was employed by SMP and SPC in various capacities, and his services were rendered to those entities, not to the individual Doctor Defendants. His Motion will be denied as to Count IV; theirs will be granted, as to Count IV.

Count V—26 M.R.S. §§626-626-A : This count is brought under the wage payment statute, which does not fit the circumstances of this case. Any entitlement Plaintiff might have to a distribution from the LLC is not within the scope of title 26. The employment agreement was executed between the Plaintiff and SPC, which is a registered professional services corporation. At no point did the Doctor Defendants personally employ the Plaintiff as an employee or as an independent contractor. His Motion will be denied as to Count V; theirs will be granted, as to Count V.

Counts VI through VIII allege tort claims against the Doctor Defendants. "Corporate officers who participate in wrongful acts can be held liable for their individual acts, and such liability is distinct from piercing the corporate veil." *Advanced Const. Corp. v. Pilecki*, 2006 ME 84, ¶ 13, 901 A.2d 189, 195 (citing *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602, 606 (3d Cir.1978)). "The individual liability stems from participation in a wrongful act, and not from facts that

must be found in order to pierce the corporate veil." *See Advanced Const. Corp. v. Pilecki*, 2006 ME 84 at ¶ 13, 901 A.2d at 195 (citing *Mariello v. Giguere*, 667 A.2d 588, 590-91 (Me. 1995).

Count VI—Tortious Interference: In Maine, to establish a claim for tortious interference with contractual relations, a plaintiff must prove the following: "(1) that a valid contract or prospective economic advantage existed; (2) that the defendant interfered with that contract or advantage through fraud or intimidation; and (3) that such interference proximately caused damages."[14] *Currie v. Indus. Sec., Inc.*, 2007 ME 12, ¶ 31, 915 A.2d 400 (*quoting Rutland v. Mullen*, 2002 ME 98, ¶ 13, 798 A.2d. 1104). The expectancy here is the Plaintiff's alleged entitlement to a distribution from SMP's proceeds of sale.

Even assuming there is an entitlement, Plaintiff has not made a *prima facie* showing that any of the Doctor Defendants used fraud or intimidation to interfere with it. In telling him through their attorney that his claim would be "dealt with" after the EMMC transaction had closed, they were not promising to honor his claim. Because the Plaintiff has failed to set forth a *prima facie* case, the Doctor Defendants' Cross Motion will be granted as to Count VI.

Count VII--Fraudulent/intentional misrepresentation: To prove fraud, the Plaintiff must show by clear and convincing evidence:

> (1) that [the Defendant] made a false representation (2) of a material fact[15] (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing plaintiff to act in reliance upon it, and (5) plaintiff[s] justifiably relied upon the representation as true and acted upon it to [their] damage.

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[14] "Intimidation is not restricted to frightening a person for coercive purposes, but rather exists wherever a defendant has procured a breach of contract by making it clear to the party with which the plaintiff had contracted that the only manner in which that party could avail itself of a particular benefit of working with defendant would be to breach its contract with plaintiff."
Currie, 2007 ME 12, ¶ 31, 915 A.2d 400 (quoting *Pombriant v. Blue Cross/Blue Shield of Maine*, 562 A.2d 656, 659 (Me. 1989)) (citations omitted).

[15] "To be material, the false or fraudulent representation must 'not only influence the buyer's judgment in making the purchase but also must relate to a fact which directly affects the value of the property sold.'" *Mariello*, 667 A.2d at 590 (citing *Bolduc v. Therrien*, 147 Me. 39, 43, 83 A.2d 126, 129 (1951)).

Mariello v. Giguere, 667 A.2d 588, 590 (Me. 1995) (*citing Guiggey v. Bombardier*, 615 A.2d 1169, 1173 (Me. 1992)).

In the Third Amended Complaint, the Plaintiff avers that the Defendant Doctors withheld information from the Plaintiff and were not willing to reimburse the Plaintiff for the loss of the benefit of his investment. (Compl. ¶¶ 116-118). Plaintiff has failed to make a *prima facie* showing that any of the Doctor Defendants misrepresented any material fact or fraudulently induced the Plaintiff into signing the documents authorizing SMP's proceeds of sale to be applied to satisfy debt of SPC. As noted above, they never promised to honor his claim if he cooperated in the EMMC transaction. Because the Plaintiff has failed to establish a *prima facie* case, the Doctor Defendants' Cross Motion is granted as to Count VII.

Count VIII—Negligent Misrepresentation: In Maine a party will be held liable for negligent misrepresentation "if in the course of his business he supplies false information for the guidance of others in their business transactions, and the other party justifiably relies upon it to his pecuniary detriment." *Guiggey v. Bombardier*, 615 A.2d at1173 (*citing Chapman v. Rideout*, 568 A.2d 829, 830 (Me.1990)); *see also* Restatement (Second) of Torts § 552.

Whether a party made a misrepresentation and whether the opposing party justifiably relied on a misrepresentation are questions of fact. *See McCarthy v. U.S.I. Corp.*, 678 A.2d 48, 53 (Me.1996); Devine v. Roche Biomedical Labs., Inc., 637 A.2d 441, 446 (Me. 1994). "Additionally, liability only attaches if, when communicating the information, the party making the alleged misrepresentation "fails to exercise the care or competence of a reasonable person under like circumstances," an inquiry that is likewise for the fact-finder." Rand v. Bath Iron Works, 2003 ME 122, ¶ 13, 832 A.2d 771.

Again, the Doctor Defendants through their attorney told Plaintiff only that his claim would be addressed after the EMMC transaction, not that it would be honored. This is not a

false statement, although it could enable Plaintiff to overcome the waiver defense that the Defendants assert based on his execution of the document assigning SMP's sales proceeds to satisfy SPC's debt, in that he did not knowingly intend to relinquish his right to a distribution. Defendants are entitled to summary judgment on Count VIII.

Conclusion

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED:

1. Plaintiff's Motion for Summary Judgment on Counts I through V of the Third Amended Complaint is denied.

2. The Cross-Motion for Summary Judgment of Defendants Thomas Hayward, Ken Simone and Michael Bruehl is granted as to on Counts III through VIII of the Third Amended Complaint and denied as to Counts I and II.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this Order into the docket by reference.

Dated February 27, 2015

A. M. Horton, Justice
Business & Consumer Court

Entered on the Docket: 3/2/15
Copies sent via Mail ___ Electronically ✓