STATE OF MAINE **BUSINESS AND CONSUMER COURT**

Cumberland, ss.

DL PROPERTIES, LLC

Plaintiff

v. **Docket No. BCD-CV-14-45**

DR. RICHARD S. STOCKWELL d/b/a Atlantic Laser Clinic

Defendant

DECISION AND JUDGMENT

Plaintiff DL Properties, LLC [DL] and Defendant Dr. Richard Stockwell [Stockwell] both have moved for summary judgment on DL's Amended Complaint and on Stockwell's counterclaim for conversion. The court elects to decide the motions without oral argument. *See* M.R. Civ. P. 7(b)(7).

The two issues in this case are: whether Defendant Stockwell is liable to Plaintiff DL under a commercial lease between DL and a third party, and which of the two parties to this case has the superior right of possession of a laser device which was left behind on DL's commercial property after the tenant vacated the property. DL claims that Stockwell is liable to it under the lease on theories of partnership and agency, and claims it is entitled to retain possession of the laser because it was abandoned at DL's property. Stockwell claims ownership and superior right of possession of the laser, and denies any liability to DL under the lease.

Factual Background

The following summary is based primarily on uncontroverted facts. Where factual disputes exist, they are noted.

Plaintiff DL is a Maine limited liability company. Defendant Stockwell is an osteopathic physician licensed and doing business in Maine.

In 2006, DL acquired the property at Unit 209, Cottage Place Condominiums, on Route 1 in York, Maine, subject to a commercial lease with David Bouthot. David Bouthot used the Unit 209 premises to operate a for-profit medical clinic called Atlantic Laser Clinic.

In August 2007, Peter de Puy purchased the assets of Atlantic Laser Clinic. In August 2009, Peter de Puy and DL entered into a further lease of Unit 209 and de Puy continued to operate a medical clinic called Atlantic Laser Clinic on the premises. The 2009 lease was for a two-year term, but Atlantic Laser Clinic continued to operate at Unit 209 until early 2014 under what DL in its amended complaint describes as "a month-to-month tenancy consistent with the terms of the [2009] Lease."

In January 2014, Atlantic Laser Clinic vacated the Unit 209 premises, leaving behind a laser device.

As far as the record discloses, Atlantic Laser Clinic was never incorporated.

Stockwell's relationship with Atlantic Laser Clinic dates to at least 2007, if not before. According to Stockwell and de Puy, beginning in 2007, Stockwell leased a Candela laser owned by him to de Puy for use in Atlantic Laser Clinic's treatment of its patients. Stockwell's claim of ownership of the laser is supported by a bill of sale issued to him by Laser Concepts LLC, describing the laser sold to Stockwell as a Candela GentleLase Plus 755 nm Alexandrite laser system. Although DL challenges Stockwell's claim to own the laser, it has not controverted his evidence of having purchased the laser for $31,000 from Laser Concepts LLC in 2006.

DL also challenges Stockwell's and de Puy's characterization of the lease arrangement, noting that the arrangement was apparently not memorialized in any written lease. DL's position is that, based on Stockwell's involvement in the operations of Atlantic

Laser Clinic, his arrangement with de Puy was not that of lessor and lessee, but rather that of partners in a business enterprise, meaning, according to DL, Stockwell is liable to it for amounts due in rent and other charges associated with Atlantic Laser Clinic's occupancy of Unit 209.

There is no evidence that DL ever dealt with Stockwell regarding the lease. In fact, as Stockwell's motion asserts, DL's principal, David Ferland, had never met or spoken to Stockwell. Thus, there is no indication that DL relied on Stockwell in entering into the 2009 lease with de Puy.

In affidavits, Stockwell and de Puy deny that Stockwell was ever a partner with de Puy in Atlantic Laser Clinic. According to Stockwell, his involvement in the operations of Atlantic Laser Clinic never went beyond providing "limited medical oversight related to Atlantic's use of the laser, [being] available to answer questions or address issues, and perform[ing] BOTOX cosmetic treatments for some of Atlantic's clients." Again, although DL does not necessarily accept this characterization of Stockwell's limited involvement, it has not presented any evidence of greater involvement.

The evidence does show that Atlantic Laser Clinic's promotional material represented that the Clinic's laser treatment was performed by Clinic "specialists under the medical oversight of a board-certified physician," i.e. Stockwell, but this description is essentially consistent with Stockwell's own characterization of his role.

DL asserts that, based on Maine law requiring laser treatment to be administered under the supervision of a physician, Dr. Stockwell should by operation of law be deemed a partner or joint venture with Mr. de Puy in operating Atlantic Laser Clinic.

Procedural Background

DL's Amended Complaint contends as follows:

- Count I is a breach of contract claim premised on Stockwell being liable on the holdover tenancy by virtue of being jointly and severally liable aa partner with de Puy in the operation of Atlantic Laser Clinic

- Count II is an account annexed claim for $30,857.91, also premised on Stockwell being a partner with de Puy

- Count III seeks a declaratory judgment that Stockwell and de Puy are or were partners in the for-profit joint venture operating as Atlantic Laser Clinic

- Count IV asserts that, even if de Puy and Stockwell were not partners, de Puy should be deemed to have been acting as Stockwell's agent in entering into the lease with DL, thereby rendering Stockwell liable as principal on the lease.

Stockwell's Amended Counterclaim asserts a claim for conversion based on DL's refusal to return his laser.

Standard of Review

Pursuant to M.R. Civ. P. 56(c), a moving party is entitled to summary judgment "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 [the] party is entitled to a judgment as a matter of law." *See also Beal v. Allstate Ins. Co.*, 2010 ME 20, ¶11, 989 A.2d 733. At this stage, the facts in the summary judgment record are reviewed "in the light most favorable to the nonmoving party." *Lightfoot v. Sch. Admin. Dist. No. 35*, 2003 ME 24, ¶6, 816 A.2d 63. However, a party wishing to avoid summary judgment must present a *prima facie* case for each element of the claim or defense that is asserted against it. *See Reliance Nat'l Indem. v. Knowles Indus. Svcs.*, 2005 ME 29, ¶9, 868 A.2d 220.

"If material facts are disputed, the dispute must be resolved through fact-finding." *Curtis v. Porter*, 2001 ME 158, ¶7, 784 A.2d 18. A factual issue is genuine when there is sufficient supporting evidence for the claimed fact that would require a fact-finder to choose between competing versions of the facts at trial. *See Inkel v. Livingston*, 2005 ME 42, ¶4, 869 A.2d 745. "Neither party may rely on conclusory allegations or unsubstantiated denials, but

must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions and affidavits to demonstrate either the existence or absence of an issue of fact." *Kenny v. Dep't of Human Svcs.*, 1999 ME 158, ¶3, 740 A.2d 560 (quoting *Vinick v. Comm'r*, 110 F.3d 168, 171 (1st Cir. 1997)).

Analysis

1. *DL's Claims Against Stockwell*

Both parties seek summary judgment on the fundamental issue raised in DL's Amended Complaint, which is whether Stockwell is liable to DL on a partnership, joint venture or agency theory.

In this case, given that Stockwell has submitted evidence in the form of his and de Puy's affidavits to the effect that de Puy was neither a partner with Stockwell nor an agent of Stockwell with respect to Atlantic Laser Clinic, the burden is on DL to make a *prima facie* showing of Stockwell's liability under either partnership or agency theory—meaning evidence that a factfinder could credit as sufficient to establish liability.

The underlying material facts are not in dispute. DL has not shown that Stockwell had any involvement in the lease. Stockwell was involved in the business of Atlantic Laser Clinic to the extent of leasing his laser to the Clinic and providing medical oversight of the Clinic's use of the laser in treating patients. The Clinic's advertising and publicity held out Dr. Stockwell as providing medical oversight of Atlantic's laser treatment. However, there is no evidence that Stockwell's involvement went beyond those things.

Where the parties differ, primarily, is in what inferences and conclusions should be drawn from the essentially undisputed facts. That point renders the case appropriate for resolution on summary judgment. *See Tondreau v. Sherwin-Williams Co.*, 638 A.2d 728, 730 (Me. 1994) ("A court may properly enter a summary judgment in a case when the parties are

not in dispute over the facts, but differ only as to the legal conclusions to be drawn from those facts").

DL's claim that Stockwell and de Puy were partners is not supported in the record. Under Maine law, a partnership is "an association of 2 or more persons to carry on as co-owners a business for profit . . . ." 31 M.R.S. § 1001(6). "Evidence relevant to the existence of a partnership includes evidence of a voluntary contract between two persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business with the understanding that a community of profits will be shared." *Dalton v. Austin*, 432 A.2d 774, 777 (Me. 1981).

The undisputed facts that Stockwell made his laser available to Atlantic Laser Clinic and that he provided medical oversight for Atlantic Laser Clinic's use of the laser in treating its patients does not render Stockwell and de Puy partners.

Likewise, the Maine statute DL cites in support of its partnership and agency arguments does not support the conclusion DL asks to be drawn. Section 3270-A, title 32, Maine Revised Statutes Annotated, provides in pertinent part:

> This chapter may not be construed to prohibit an individual from rendering medical services if these services are rendered under the supervision and control of a physician or surgeon and if that individual has satisfactorily completed a training program approved by the Board of Licensure in Medicine and a competency examination determined by this board. Supervision and control may not be construed as requiring the personal presence of the supervising and controlling physician at the place where these services are rendered, unless a physical presence is necessary to provide patient care of the same quality as provided by the physician. This chapter may not be construed as prohibiting a physician or surgeon from delegating to the physician's or surgeon's employees or support staff certain activities relating to medical care and treatment carried out by custom and usage when the activities are under the control of the physician or surgeon. The physician delegating these activities to employees or support staff, to program graduates or to participants in an approved training program is legally liable for the activities of those individuals, and any individual in this relationship is considered the physician's agent.

The reference in the last sentence of the statute to non-physicians to whom the supervising physician has delegated authority to render a medical service is plainly meant to impose liability on the physician for any negligence in the rendition of the medical service.

The statute does not create an agent relationship beyond the rendition of medical services. De Puy's lease agreement with DL plainly is well outside the scope of section 3270-A, so that statute affords no support for DL's claim that de Puy was Stockwell's agent for purposes of the lease. Stockwell's involvement with Atlantic Laser Clinic may or may not be a violation of his license, as DL has suggested, but any such violation is an issue for the Board of Licensure in Medicine and does not make Stockwell liable on the de Puy lease.

DL has failed to make a *prima facie* showing that Stockwell is liable under any of DL's theories of liability for any of DL's damages claims under the lease and the holdover tenancy. DL has not made a showing that Stockwell and de Puy were partners, or that de Puy was Stockwell's agent in de Puy's dealings with DL regarding the Unit 209 premises. It follows that Stockwell has no liability for breach of contract as alleged in count I of DL's amended complaint. DL's account annexed claim in count II of the Amended Complaint is premised on DL having an account with Stockwell, and thus depends on Stockwell being liable on some other basis. Likewise, regarding count III of the Amended Complaint, DL has not made a *prima facie* showing that it is entitled to the declaratory judgment adjudicating Stockwell liable as a partner. Regarding count IV of the Amended Complaint, DL has not made a prima facie showing of de Puy being Stockwell's agent for purposes of the lease and holdover tenancy.

2. Stockwell's Conversion Counterclaim Against DL

Stockwell's counterclaim against DL seeks an order adjudicating Stockwell to be entitled to possession of the laser left behind when de Puy vacated DL's premises. Stockwell has presented his own and de Puy's assertion that the laser belongs to Stockwell,

and has presented a receipt confirming his purchase of the laser.[1] DL's response does not seriously contravene Stockwell's claim to own the laser, and is more in the nature of putting Stockwell to his proof.

The issue in a conversion claim is which party has the superior right of possession of the property in dispute. The elements of a conversion claim consist of "(1) a property interest in the goods; (2) the right to their possession at the time of the alleged conversion; and (3) when the holder has acquired possession rightfully, a demand by the person entitled to possession and a refusal by the holder to surrender." *Chiappetta v. LeBlond*, 505 A.2d 783, 785 (Me. 1986).

Stockwell has made a *prima facie* showing of all three elements, meaning that, to avoid summary judgment, DL had to show that there is a genuine issue of fact material to any one or more of the elements. DL has not done so, with the consequence that Stockwell is entitled to summary judgment on his counterclaim for conversion on the issue of who owns the laser. However, Stockwell has failed to show that he has suffered any damages—nominal, actual or punitive—as a result of DL's retention of possession, so the grant of summary judgment is only as to possession. Summary judgment as to Stockwell's claim for damages is granted to DL.

Conclusion

IT IS HEREBY ORDERED AS FOLLOWS:

1. Defendant Dr. Richard Stockwell's Motion for Summary Judgment is granted as to all counts of Plaintiff DL Properties, LLC's Amended Complaint, and is granted on the Amended Counterclaim to the extent of an order requiring Plaintiff to return the laser to Defendant. Defendant's Motion is denied as to any damages on the Amended Counterclaim.

[1] The receipt likely is not admissible in evidence for lack of foundation, because no affidavit of Stockwell was filed and there is no indication de Puy has personal knowledge of Stockwell's alleged purchase. However, all Stockwell needs to show is that his right to possess the laser system is superior to DL's right, and he has done so,

2. Plaintiff DL Properties, LLC's Motion for Summary Judgment is denied as to the Amended Complaint, and denied as to the Amended Counterclaim except with regard to any actual or punitive damages.

3. Judgment on the Amended Complaint shall be entered for Defendant Dr. Richard Stockwell. Judgment on the Amended Counterclaim shall be entered for Defendant Dr. Richard Stockwell, for injunctive relief.

4. Plaintiff DL Properties, LLC, its members and employees and all persons acting in concert with it are hereby enjoined to permit Defendant Dr. Richard Stockwell, through his designees and at Defendant's sole expense, to take possession of the Candela GentleLase Plus 755 nm Alexandrite laser system (including any and all manuals, accessories and other items associated with the laser system) within 10 days of this Decision and Judgment becoming final.

5. Defendant is awarded recoverable court costs as the prevailing party.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Decision and Judgment by reference in the docket.

Dated January 25, 2016

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A. M. Horton, Justice
Maine Business and Consumer Court