SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. JEROME C. MURPHY,
Justice.

TRIAL/IAS PART 7

ALLEON CAPITAL PARTNERS, LLC AND ACP ALLFAMILY UNIVERSAL, LLC,

Plaintiffs,

- against -

SHERYAR CHOUDHRY, TANGENT EHR, LLC, AMSAC, INC a/k/a AMSAC HEALTHCARE CONSULTANTS, MANUEL A FARESCAL, ALL FAMILY MEDICAL, P.C., and UNIVERSAL MEDICAL, P.C.,

Defendants.

Index No.: 610648-18
Motion Date: 3/9/21
Sequence No.: 005

DECISION AND ORDER

The following papers have been read on this motion:

Notice of Motion, Affirmation in Support, and Exhibits.....1
Memorandum of Law in Opposition.....2
Reply Affirmation and Exhibits.....3

PRELIMINARY STATEMENT

Defendants, Sheryar Choudhry, Tangent EHR, LLC AMSAC, Inc a/k/a AMSAC Healthcare Consultants, bring this application for an Order; a) Pursuant to and in accordance with §3103(a) for a protective order denying the taking of the deposition upon oral questions pursuant to the notice, dated on or about 12/30/2020, to take the deposition upon oral questions of General Counsel Tinamarie Franzoni, as a witness, and vacating the notice to take the deposition upon oral questions of said General Counsel, upon the ground that the taking of the deposition is protected by the attorney-client privilege; and for such other further relief as this Court deems

just, proper and equitable. Opposition and reply have been submitted.

BACKGROUND

Plaintiffs commenced this action by filing a Summons and Complaint on August 9, 2018. The action is for a breach of contract with respect to the obligations of defendants under a loan agreement under which Alleon Capital Partners, LLC, as lender, entered into a Loan and Security Agreement with Universal Medical, P.C. and All Family Medical, P.C., with Alleon as Agent and Manuel A. Farescal, M.D. as individual guarantor. The Agreement was for $2,782,259.27, as evidenced by a Promissory Note. The Agreement and Note are set forth in Exh. "B" to the motion.

As alleged in the Complaint, defendant Sheryar Choudhry, the owner, operator and alter ego of AMSAC Health Care Consultants ("AMSAC"), orchestrated a transaction by which Alleon made the loan to two entities controlled by Manuel Farescal, M.D., Universal Medical, P.C. ("Universal") and All Family Medical, P.C. ("All Family"), which loan was secured by repayment of a group of medical receivables that Farescal was supposed to collect in the ordinary course of his business ("receivables").

The anticipated return on the loan by Alleon was $5,000,000, the approximate value of the receivables. The loan was allegedly never fully repaid, allegedly in large part because AMSAC, an entity wholly owned by Choudhry, contracted to collect the receivables, and arrange for them to be forwarded to plaintiff. At some point in time, Choudhry directed Farescal to stop making payments of all amounts collected in receivables to plaintiff.

To the extent that all Obligations are not fully paid by the Maturity Date, November 23, 2013, they became fully due and payable. The Agreement defines "Obligations" to "mean and include the Indebtedness, Closing Fees, and any other loans, debts, liabilities, obligations, principal, interest and fees, covenants, and duties owing by each Borrower to Lender under the Loan Document and any related agreement direct or indirect, absolute or contingent, due or to become due, now or in the future existing (Loan Agreement Schedule 1, Exh. "B"). The term "Indebtedness" is defined as "the Principal, the Loan Premium, and any applicable interest at the Default Rate" (*Id.*).

The Loan Premium is defined in Section 1.9 of the Agreement, and is "a premium to

Lender as consideration for entering into this [Loan] Agreement" is calculated based on $1.00 for each $1.00 of receivables, until the principle is paid. Thereafter it is calculated based on $0.868 for each $1.00 of receivables. The balance of $0.132 of each $1.00 of receivables is paid to Borrower. What are referred to as Clean Claim Receivables are referred to in Schedule 2.5(g) of the Loan Agreement.

The Complaint further alleges that AMSAC was a signatory of the Irrevocable Account Management Agreement ("IAMA"), under which AMSAC, as the Collection Agent for the proceeds of the receivables was to be deposited into an attorney escrow account, and paid into the Collection Account Bank. Defendants AMSAC and Tangent, through Choudhry, allegedly refused to provide information on the status of the receivables, and Choudhry allegedly diverted the receivables from the ability of plaintiffs to receive them by, among other actions, the following:

i. Reducing AMSAC to a shell of a company, and creating Tangent, which took over all of the duties of AMSAC, and moving the assets of AMSAC two Tangent;

ii. Having an employee of Tangent, a former AMSAC employee, Tina Marie Franzoni advise the Dr. Farescal to contact an attorney regarding continued payment;

iii. Utilizing the same office space, equipment and personnel to operate both AMSAC and Tangent so as to intermingle all assets and obligations, and have Tangent succeed to substantially all of AMSAC's assets;

iv. Holding out tangent as the successor to end a continuation of AMSAC;

v. Preparing a letter for Farescal directing AMSAC to pay any monies received after the Maturity Date to Farescal;

vi. Create an agreement between Farescal and AMSAC/Tangent for only a small portion of the receivables to be paid to Farescal, with the balance remaining with AMSAC/Tangent;

vii. Claiming that he was obligated to comply with the directive of Farescal, and was therefore not obligated to make payment of receivables to plaintiffs; and

viii. Making his own determination that plaintiffs were not entitled to any of the

receivables after the Maturity Date.

The Complaint refers to deposition testimony of Dr. Farescal that he and his financial entities received only some $13,500 per month from Tangent out of the receivables, but that the documents show that collections were regularly between $35,000 and $50,000 per month.

Plaintiff alleges Four Causes of Action in the Complaint as follows:

FIRST CAUSE OF ACTION, against all defendants, alleges Breach of Contract;

SECOND CAUSE OF ACTION, against all defendants, alleges Fraud;

THIRD CAUSE OF ACTION, against all defendants seeks an Accounting;

FOURTH CAUSE OF ACTION, against Choudhry, AMSAC, and Farescal, alleges Fraudulent Concealment.

DISCUSSION

Defendants Choudhry, Tangent EHR, LLC, and Amsac, Inc. move for a protective order, pursuant to CPLR § 3103(a), denying the taking of the deposition upon oral questions of Tinamarie Franzoni, Esq., General Counsel for Tangent. Ms. Franzoni submits an Affirmation in which she asserts that from November 2011 to August 2013, she worked as in-house General Counsel for defendant AMSAC. She claims that, having reviewed plaintiff's Notice of Deposition (Exh. "A" to Motion), she does not possess, maintain or control any writings, records, documents, notes or files of my former employer, defendant AMSAC.

Counsel for moving defendants, on the other hand, argues that they are entitled to a protective order to protect against harassment, and disclosure of information protected under the cover of attorney/client privilege. CPLR § 3103(a) provides as follows:

> (a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.

Plaintiff opposes the application.

While § 3103(a) authorizes the issuance of a protective order, the burden of showing entitlement to such an order is with the party seeking it. (*Viruet v. City of New York*, 97 A.D.2d

435 [2d Dept. 1983]; *see also Crazytown Furniture, Inc. v. Brooklyn Union Gas Co.*, 145 S/F/2d 402 [2d Dept. 1988]). Discovery generally is guided by the principle set forth in CPLR § 3101 of "full disclosure of all matter material and necessary in the prosecution or defense of an action."

The scope of disclosure under Civil Practice Law and Rules § 3101 has been interpreted to be generous, broad and is to be "interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" (*Matter of Kapon v. Koch,* 23 N.Y.3d 32, 38 [2014]). The statute was amended in 1993 to broaden the reach of disclosure devices. The general view is that the amendment did no more than codify what Courts had been doing in practice, effectively making the disclosure standards comparable to the standards of discovery contained in Rule 26(b) of Federal Rules of Civil Procedure. Rule 26(b)(1) is a general statement of the scope of discovery.

> **(1) In General.** Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

The limitations of Rule 26(b)(2)(i), (ii), and (iii)involve determinations by the Court that:

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome , or less expensive;
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> (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or
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> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under

Rule 26[c]).

The scope of disclosure in Civil Practice Law and Rules § 3101(a) is more abbreviated, but is generally regarded as having the same import as Rule 26. It provides as follows:

> **(a) Generally.** There shall be full disclosure of all matters material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by:
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> (1) a party, or the officer, director, member, agent or employee of a party;
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> (2) a person who possessed a cause of action of defense asserted in the action
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> (3) a person about to depart from the state, or without the state, or residing at a greater distance from the place of trial than one hundred miles, or so sick or infirm as to afford reasonable grounds of belief that he or she will not be able to attend the trial, or a person authorized to practice medicine, dentistry or podiatry who has provided medical, dental or podiatric care or diagnosis to the party demanding disclosure, or who has been retained by such party as an expert witness;, and
>
> (4) any other person, upon notice stating the circumstances or reasons such disclosure is sought or required.

Civil Practice Law and Rules § 3103 authorizes protective orders to prevent abuse in the discovery process.

> **§ 3103. Protective orders.**
>
> **(a) Prevention of abuse.** The court may at any time on its own initiative, or on motion of any party or of any person from whom the discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.
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> **(b) Suspension of disclosure pending application for protective order.** Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.

> **(c)Suppression of information improperly obtained.** If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including that the information be suppressed.

The words "material and necessary", have long been held to connote "needful and not indispensable" (*Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403 [1968]).

Ms. Franzoni is an employee of a defendant. While attorney/client communications may be protected, not all communications with an in-house counsel are privileged. Where an in-house counsel is not acting as counsel, or rendering legal services, but, rather, is performing business services, no privilege attaches. In *Bodega Investments, LLC ex rel. Kreisberg. v. U.S.*, 2009 WL 1456642 (2d Cir. 2009) the Court stated as follows: "[i]n contrast, the privilege does not protect communications designed to facilitate the performance by the attorney of services not of a legal nature, such as the provision of business advice or the performance of such functions as negotiating purely commercial aspects of a business relationship. Similarly, in *United States Postal Service v. Phelps Dodge Ref. Corp.*, 852 F.Supp. 156, 160 (EDNY 1994), the Court held that when in-house counsel is just participating in the day-to-day operations of the company, and not acting as legal counsel, the communications are not privileged.

Plaintiffs contend that the crux of the action is that AMSAC, as the billing company, improperly withheld, or otherwise improperly diverted payments from plaintiffs in violation of the Loan Documents to which AMSAC was a signatory. As detailed by Rubin & Licatesi in their Affidavit at ¶¶ 39 — 43, attached as Exh. "A" to Affirmation of Edward S. Stone and the Affidavit of Sallyann Mirabile, attached as Exh. "B", when a receivable was resolved. The check was sent to AMSAC, and AMSAC made the determination of what was to be done with the check. Once the majority date had passed, AMSAC stopped sending the checks to be deposited on behalf of plaintiffs in breach of their obligations to abide by the Loan Documents.

Efforts to obtain documents which reflect the disposition of the proceeds received after the maturity date have not been produced by defendants. Plaintiff contends that Ms. Franzoni, as an employee of defendants AMSAC, Tangent Systems Corp., and Tangent EHR, because intimately involved in the role of AMSAC and had non-privileged conversations with third

parties, including plaintiffs about the receivables. Further, she had nonprivileged communications through at least 2015, which included her employment at AMSAC, Tangent Systems, and Tangent EHR, with Dr. Farescal about the status of the receivables and payments to plaintiff. She had further conversations of a business (non-legal) nature with Anthony Licatesi, Esq. , served as counsel of record on some of the receivables, and has information about the process of collection and flow of money, which are not privileged communications, and has non-privileged knowledge about the process used to service the receivables under the applicable arrangements while she was employed at AMSAC, Tangent Systems and Tangent EHR.

Having worked at the foregoing three companies, she would have substantial non–privileged information as to the " successor in interest" claim of plaintiff. With respect to plaintiff's claim for an Accounting, Ms. Franzoni was directly involved in servicing the Receivables on behalf of defendants and would have non-privileged information regarding what happened to the proceeds of the Receivables. Plaintiff has deposed Mr. Choudhry, which provided no information respect to the disposition of the proceeds of collected Receivables after the maturity date. The testimony of Anthony Licatesi, Esq., the collections attorney, was that after the maturity date, his firm sent all checks from the resolution of Receivables to AMSAC and Tangent, but has no knowledge of what they did with the money.

Plaintiffs are not seeking privileged information. If, during a deposition of Ms. Franzoni, a question is asked which calls for privileged information, counsel is free to object, in accordance with the Uniform Rules for the Conduct of Depositions (22 NYCRR 221; *see Veloso v. Scaturro Brothers, Inc.*, 2020 WL 4331645 [Sup. Ct. New York Co. 2020]). "Pursuant to 22 NYCRR 221.2, a deponent shall answer all questions at a deposition except to preserve a privilege or right of confidentiality, to enforce a court ordered limitation, or when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a witness not to answer except under these limited circumstances or pursuant to an objection set forth in CPLR3115", citing *Parker v. Olivierre,* 60 A.D.3d 1023 [2d Dept. 2009]).

Plaintiff is entitled to ask questions designed to elicit information which is material and necessary to the prosecution of this action. Defendant's motion for a protective order preventing

the deposition of Ms. Franzoni is denied.

To the extent that relief has not been granted, it is expressly denied.

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
May 13, 2021

ENTER:

JEROME C. MURPHY, J.S.C.

ENTERED
May 17 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE