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

PRESENT: Ellen M. Coin Justice PART 63

Manhattan Allied Network Corp.

-v-

Dmitry Davydov

INDEX NO. 151984/14
MOTION DATE 8/5/15
MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion to vacate a default judgment is granted for the reasons set forth on the record in oral argument held on August 5, 2015.

It is further ORDERED that the proposed answer, attached to the moving papers, shall be deemed served nunc pro tunc upon service of this order with notice of entry.

This constitutes the decision and order of the Court.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 8/5/15

EMC, J.S.C.
HON. ELLEN M. COIN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

**PRESENT:** Ellen M. Coin **PART** 63
*Justice*

Index Number : 151984/2014
MANHATTAN ALLIED NETWORK
vs.
DAVYDOV, DMITRY
SEQUENCE NUMBER : 002
DISMISS

**INDEX NO.** _____
**MOTION DATE** 8/5/15
**MOTION SEQ. NO.** _____

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

**Notice of Motion/Order to Show Cause — Affidavits — Exhibits** _____ **No(s).** _____

**Answering Affidavits — Exhibits** _____ **No(s).** _____

**Replying Affidavits** _____ **No(s).** _____

**Upon the foregoing papers, it is ordered that this motion is** granted to the extent of dismissing the first and second causes of action as against Dmitry Davydov only and the fifth and sixth causes of action as against defendants Dmitry Davidov, Rosario Uy and Virginia Perez to the extent they seek repayment of cash advances only, and the motion is otherwise denied for the reasons set forth on the record in oral argument held on August 5, 2015.

This constitutes the decision and order of the Court.

**MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):**

**Dated:** 8/5/15

_____, J.S.C.
**HON. ELLEN M. COIN**

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

| | |
|---|---|
| **MANHATTAN ALLIED NETWORK CORPORATION,**<br><br>Plaintiff,<br><br>vs.<br><br>**DMITRY DAVYDOV, a.k.a. DAVID DAVYDOV, 2 FEEL GOOD PHYSICAL THERAPY P.C., ROSARIO UY and VIRGINIA PEREZ,**<br><br>Defendants. | Index No.: 151984/2014 |

**BRIEF OF DEFENDANTS ROSARIO UY, VIRGINIA PEREZ AND DMITRY DAVYDOV IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS I, II, V AND VI OF THE VERIFIED COMPLAINT**

*Of Counsel and on the Brief:*

John Fialcowitz, Esq.

Defendants Rosario Uy ("Rosario"), Virginia Perez ("Virginia") and Dmitry Davydov ("Dmitry") submit this brief in support of their motion for an Order, pursuant to C.P.L.R. 3211(a)(7), to dismiss Counts I, II, V and VI of the Verified Complaint of Plaintiff Manhattan Allied Networking Corporation ("Plaintiff" or "Manhattan Allied") for failure to state a claim upon which relief may be granted.

## PRELIMINARY STATEMENT

Plaintiff alleges that Rosario, Virginia and Dmitry agreed to make Plaintiff a part owner in Defendants 2 Feel Good Physical Therapy, P.C. ("2 Feel Good"), a professional corporation engaged in the practice of physical therapy, in exchange for Plaintiff advancing money to pay 2 Feel Good's operating expenses. Plaintiff also claims that the Defendants agreed to pay over to Plaintiff all of 2 Feel Good's revenues, less 17% of the Company's net income as part of this arrangement. Four of the six causes of action asserted in Plaintiff's Verified Complaint -- as well as the bulk of Plaintiff's alleged damages -- arise from this alleged agreement to share 2 Feel Good's ownership and revenues.

The Defendants deny that they ever entered the agreement alleged by Plaintiff. However, even if such an agreement had been struck, it would nevertheless violate Section 1507 of the Business Corporation Law and Section 6509-a of the Education Law because the Plaintiff is not licensed to practice physical therapy. As a result, the Court should not extend any aid to Plaintiff because the alleged agreement upon which Plaintiff bases its claims is illegal, void and unenforceable.

## SUMMARY OF ALLEGATIONS

Plaintiff's Verified Complaint sets forth the following factual allegations, which the Court should accept as true solely for purposes of this motion to dismiss.

**A. Allegations Relating to the Parties.**

Plaintiff is a New York corporation with a principal place of business located at 41 Madison Avenue, New York, New York. Verified Complaint ("VC"), at ¶5. Plaintiff describes itself as "a leading business management, consultancy and human resource agency." Plaintiff's Website, at www.manhattanallied.com. Jonathan Suarez is Plaintiff's President. VC, at ¶18.

2 Feel Good is a New York professional corporation engaged in the practice of physical therapy. Id., at ¶7. Co-Defendant Rosario Uy is a physical therapist licensed by the State of New York and 2 Feel Good's owner. Id., at ¶8.

**B. Allegations Relating to the Agreements.**

Plaintiff alleges that on or about September 19, 2012, it entered into a contract with the Defendants for the provision of physical therapists and physical therapy aides. Id., at ¶10. According to Plaintiff, this contract provided that Plaintiff would provide physical therapists and physical therapy aides to work at 2 Feel Good and that Plaintiff agreed to provide invoices on a weekly basis. Id., at ¶15. In exchange, the Defendants allegedly agreed to pay those invoices in full within three days after the invoices were received. Id.

Plaintiff alleges that the Defendants stopped paying Plaintiff's invoices on time or in full beginning in or about March 2013. Id., at ¶18. Then, according to Plaintiff, Dmitry allegedly represented to Mr. Suarez that the Defendants had more than sufficient receivables from insurance companies to pay all of Plaintiff's outstanding invoices and showed him documents purporting to evidence the Defendant's receivables from insurance companies. Id., at ¶19.

Plaintiff also alleges that "[i]n or about October 2013, [Dmitry] offered to make plaintiff a part owner of defendant 2 Feed Good in return for plaintiff advancing money to pay the Company's

operating expenses until the cash flow situation improved." Id., at ¶20. Plaintiff further alleges that:

> [i]n or about October 2013, plaintiff and the defendants entered into an agreement whereby plaintiff agreed to make cash advances to pay defendant 2 Feel Good's operating expenses in return for the right to share in the revenues of the Company. Defendant Davydov, acting on behalf of himself and defendant 2 Feel Good, agreed that the defendants would pay over to plaintiff all the revenues of the Company, less 17% of the Company's net income, in return for plaintiff paying the Company's operating expenses.

Id., at ¶21. Plaintiff claims that "[i]n reliance on these promises, plaintiff paid the Company's operating expenses, including office rent, suppliers, and salaries of the Company's office staff, acupuncturist, physical therapists, and physical therapy aides." Id., at ¶22.

Plaintiff alleges that "[b]etween October 2013 and (sic) January 2013, plaintiff paid more than $32,000.00 to cover the Company's operating expenses." Id., at ¶23. The Defendants subsequently refused to pay Plaintiff any share of 2 Feel Good's revenues or for its alleged advances. Id., at ¶¶26-27.

**C. Plaintiff's Causes of Action Against the Defendants.**

In its Verified Complaint, Plaintiff asserts the following causes of action against the Defendants:

- **Count I/Fraud Against Davydov and 2 Feel Good**. Plaintiff alleges that "Defendant Davydov made material misrepresentations to plaintiff and omitted material facts necessary to avoid making his representations false and misleading" and that Davydov "acted with actual and apparent authority to bind defendant 2 Feel Good when making those representations." Id., at ¶¶29-30.

- **Count II/Breach of Contract Against Davydov and 2 Feel Good**. Plaintiff alleges that "[p]laintiff and defendants entered into a valid and binding contract" and that in breach of the contract, defendants "failed and refused to pay plaintiff for its advances to fund the Company's operating expenses" and "failed and refused to pay plaintiff its share of the Company's revenues." Id., at ¶¶35-38.

- **Count III/Breach of Contract Against All Defendants**. Plaintiff alleges that "[p]laintiff and defendants entered into a valid and binding contract for the provision of physical therapists and physical therapy aides to work at defendant 2 Feel Good" and that in breach of the contract, defendants "failed and refused to pay plaintiff the balance due, despite plaintiff's demand for payment." Id., at ¶¶41-43.

- **Count IV/Account Stated Against All Defendants**. Plaintiff alleges that its invoices "were delivered to, accepted and retained by defendants without objection within a reasonable time" and that "Defendants owe Plaintiff $28,589.35 on their account." Id., at ¶¶46-47.

- **Count V/*Quantum Meruit* Against All Defendants**. Plaintiff alleges that "[t]he services and cash advances provided to defendants by plaintiff, which defendants accepted and agreed to compensate plaintiff for, but which defendants have yet to pay, have a reasonable value of not less than $60,728.79." Id., at ¶50.

- **Count VI/Unjust Enrichment Against All Defendants**. Plaintiff alleges that "[b]ecause of the services and cash advances provided by plaintiff to defendants, the defendants have been unjustly enriched to the detriment of plaintiff in an amount not less than $60,728.79." Id., at 53.

Rosario, Virginia and Dmitry filed a Verified Answer denying the allegations set forth in the Verified Complaint. Their motion to dismiss follows below.

## ARGUMENT

## POINT I

### THE COURT SHOULD DISMISS COUNTS I, II, V AND VI OF THE VERIFIED COMPLAINT BECAUSE THE ALLEGED AGREEMENT TO SPLIT 2 FEEL GOOD'S OWNERSHIP AND REVENUES VIOLATES PUBLIC POLICY AND IS ILLEGAL.

Plaintiff alleges that Dmitry and the other defendants agreed to make Plaintiff a part owner in 2 Feel Good and to share its revenue in exchange for Plaintiff advancing money to pay the Company's operating expenses. Id., at ¶¶20-21. However, this alleged agreement -- which Defendants deny -- violates public policy and the Business Corporation and Education Laws because the Plaintiff is not licensed to practice physical therapy. As a result, the agreement upon which Plaintiff bases the first, second, fifth and sixth causes of action is void and unenforceable.

### A. The Agreement Alleged by Plaintiff Violates the Business Corporation and Education Laws.

Section 1507 of the Business Corporation Law, entitled "Issuance of Shares," prohibits ownership agreements with non-licensees such as Plaintiff and provides, in relevant part, as follows:

> (a) A professional service corporation ***may issue shares only to individuals who are authorized by law to practice in this state a profession which such corporation is authorized to practice and who are or have been engaged in the practice of such profession in such corporation or a predecessor entity, or who will engage in the practice of such profession in such corporation within thirty days of the date such shares are issued.*** No shareholder of a professional service corporation shall enter into a voting trust agreement, proxy, or any other type agreement vesting in another person, other than another shareholder of the same corporation or a person who would be eligible to become a shareholder if employed by the corporation, the authority to exercise voting power of any or all of his shares. ***All shares issued, agreements made, or proxies granted in violation of this section shall be void.***

McKinney's B.C.L. §1507(a)(emphasis added).

Similarly, Section 6509-a of the Education Law -- made applicable to physical therapists pursuant to Education Law §§6700 and 6730 -- prohibits fee splitting with non-licensees and provides, in relevant part, as follows:

> Notwithstanding any inconsistent provision of this article or of any other provision of law to the contrary, ***the license or registration of a person subject to the provisions of articles *** one hundred thirty-six *** of this chapter may be revoked, suspended or annulled or such person may be subject to any other penalty provided in section sixty-five hundred eleven of this article in accordance with the provisions and procedure of this article for the following***:
>
> ***That any person subject to the above enumerated articles, has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for***, or has directly requested, received or profited by means of a credit or other valuable consideration as a commission, discount

> or gratuity in connection with ***the furnishing of professional care, or service, including *** physiotherapy or other therapeutic service*** or equipment *** or any other goods, services or supplies prescribed for medical diagnosis, care or treatment under this chapter, except payment, not to exceed thirty-three and one-third per centum of any fee received for x-ray examination, diagnosis or treatment, to any hospital furnishing facilities for such examination, diagnosis or treatment.

McKinney's Education Law, §6509-a (emphasis added).

Here, the agreement alleged by Plaintiff violates both the Business Corporation Law and the Education Law because under the alleged agreement, Plaintiff, a non-licensee, would become "a part owner of defendant 2 Feel Good," would have "the right to share in the revenues of the Company," and would be entitled to "all of the revenues of the Company, less 17% of the Company's net income, in return for plaintiff paying the Company's operating expenses." VC, at ¶¶20-21.

### B. The Court Should Refuse to Entertain Any Claims Arising Out of the Alleged Illegal Ownership and Revenue-Splitting Agreement.

It is well settled that "a contract to perform illegal acts is void and unenforceable." Hartman v. Harris, 810 F.Supp. 82, 84 (S.D.N.Y. 1992). As a result, "a party to an illegal contract [in this case the plaintiff corporation] cannot ask a court of law to help him carry out his illegal object, nor can such a person plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose." Carr v. Hoy, 158 N.Y.S.2d 572, 574 (1957)(internal quotation and citation omitted).

The Second Department's decision in United Calendar Manufacturing Corp. v. Huang, 463 N.Y.S.2d 497 (2d Dep.'t 1983) is factually analogous to our case and should guide the Court's analysis here. Similar to the agreement alleged by Manhattan Allied, the United Calendar plaintiff alleged that in exchange for employing the defendant physicians, the defendants agreed that "[the

United Calendar] plaintiff [would] receive 30% of the total fees received by them." Id., at 499. After finding that the alleged agreement to split fees with an unlicensed corporation violated Section 6509-a of the Education Law, the Appellate Division refused to award plaintiff any relief, reasoning as follows:

> The denial of relief to the plaintiff in such a case is not based on any desire of the courts to benefit the particular defendant. That the defendant may profit from the court's refusal to intervene is irrelevant. What is important is that the policy of the law be upheld. Where the parties' arrangement is illegal the law will not extend its aid to either of the parties * * * or listen to their complaints against each other, but will leave them where their own acts have placed them.

Id., at 500 (internal quotation and citation omitted). Accordingly, the Appellate Division reversed the trial court's order denying the defendants' motion for summary judgment and dismissed the United Calendar plaintiff's complaint. Id., at 501.

Here, as with the agreement alleged by the United Calendar plaintiff, the ownership and fee-splitting agreement alleged by Manhattan Allied is void and unenforceable under Section 1507 of the Business Corporation Law and Section 6509-a of the Education Law because Manhattan Allied is not licensed to practice physical therapy. *See e.g.,* LoMagno v. Koh, 667 N.Y.S.2d 280, 280-81 (2d Dep.'t 1998)(dismissing breach of contract allegations because even "[a]ssuming the allegations of the complaint to be true, the oral agreement under which plaintiff seeks to recover constitutes a voluntary, prospective arrangement for the splitting of fees with a medical provider in contravention of Education Law §6509-a and State public policy."). Accordingly, this Court should dismiss Plaintiff's claims for breach of contract arising out of the alleged illegal agreement as a matter of law.

Nor may Plaintiff assert claims for either fraud or unjust enrichment relating to the alleged illegal ownership and revenue-splitting agreement. *See e.g.,* Prins v. Itkowitz & Gottlieb, P.C., 719

N.Y.S.2d 228, 229 (1st Dep.'t 2001)(dismissing claim by purported insurance expediter for compensation under illegal fee-splitting arrangement because a person may not "plead or prove in any court a case in which he, as a basis for his claim, must show forth his illegal purpose.")(internal quotations and citations omitted); Hartman v. Bell, 524 N.Y.S.2d 477, 478 (2d Dep.'t 1988)(affirming dismissal of unjust enrichment claims and finding buy-sell agreement was a prospective fee-splitting agreement in violation of Education Law 6509-a and public policy because agreement provided that the defendants were to pay the plaintiff "40% of the gross income" from their practice of industrial medicine); Itskov v. New York Fertility Institute, Inc., 813 N.Y.S.2d 844, 845 (Sup. Ct., App. Term, 2006)(plaintiff's fraud claim properly dismissed because plaintiff cannot plead or prove illegal surrogate parenting agreement to establish a claim of fraud); Lothar's of California, Inc. v. Weintraub, 601 N.Y.S.2d 231, 232 (Sup. Ct., N.Y. Cty., 1993)(dismissing claims of corporation against certified public accountant for refund of illegal contingency fees because "[t]he courts of this state have consistently held that even in the event of illegality, equity does not require defendant to return amounts already paid, and that the parties to an illegal contract should be left as they are.")(internal quotation and citation omitted).

Indeed, as the purpose of Section 1507 of the Business Corporation Law and Section 6509-a of the Education Law is "to protect the public from unlicensed non-professionals who may be operating a professional practice or business," Sangiorgio v. Sangiorgio, 662 N.Y.S.2d 220, 222 (Sup. Ct., Rich. Cty., 1997), public policy bars the claims asserted by Plaintiff in the first, second, fifth and sixth causes of action of the Verified Complaint.

## CONCLUSION

For the reasons set forth above, Rosario, Virginia and Dmitry respectfully request that the Court grant their motion to dismiss in its entirety, together with such other and further relief as this Court deems just and proper.

Respectfully submitted,

**THE LAW OFFICE OF**
**JOHN A. FIALCOWITZ, LLC**

By: _____

John Fialcowitz, Esq.
89 Headquarters Plaza North
Suite 1216
Morristown, New Jersey 07960
973.532.7208
Attorney for Defendants
*Rosario Uy, Virginia Perez and*
*Dmitry Davydov*

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