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

PRESENT: Edmead **PART** 35

Justice

Index Number : 116136/2009
ROSENBERG, DDS, STEVEN N.
VS.
CHEN, DDS, HARRISON
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

INDEX NO. _____
MOTION DATE 8/2/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: ☑ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendant Harrison Chen, DDS for an order, pursuant to CPLR §§3211(a)(7), dismissing the Complaint of plaintiffs Steven N. Rosenberg, DDS, and Steven N. Rosenberg, DDS, PC, is granted only to the extent that plaintiffs' first cause of action for breach of contract is hereby severed and dismissed; and it is further

ORDERED that plaintiffs' cross-motion for an order, pursuant to CPLR §3211(a)(7), dismissing defendant's counterclaim is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 8.17.10

HON. CAROL EDMEAD J.S.C.

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

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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STEVEN N. ROSENBERG, DDS and
STEVEN N. ROSENBERG, DDS, PC,

Index No. 116136/09

Plaintiffs,

-against-

DECISION/ORDER

HARRISON CHEN, DDS,

Defendant.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this breach of contract action, defendant Harrison Chen, DDS ("defendant"), moves for an order, pursuant to CPLR §3211(a)(7), dismissing the Complaint of plaintiffs Steven N. Rosenberg, DDS ("Mr. Rosenberg"), and Steven N. Rosenberg, DDS, PC ("Rosenberg PC") (collectively, "plaintiffs").

In response, plaintiffs cross move for an order, pursuant to CPLR §3211(a)(7), dismissing defendant's motion and counterclaim in their entirety, and permitting discovery to proceed.

Background

Mr. Rosenberg and defendant are oral and maxillofacial surgeons licensed to practice in the State of New York. Rosenberg PC is a professional corporation operating and existing under and by virtue of the laws of the State of New York. Plaintiffs' Complaint comprises three causes of action against defendant: (1) breach of contract, (2) unjust enrichment, and (3) *quantum meruit*. In support of their first cause of action for breach of contract, plaintiffs allege that defendant requested the temporary use of Mr. Rosenberg's office, staff and supplies for the period of April 29, 2008 through September 15, 2008, because defendant's new office was under

construction. Plaintiffs allege that because defendant did not wish to be obligated to pay a fixed guaranteed amount on a periodic basis, defendant proposed payment of 50% of his patient collections, minus bone and implant supply fees.[1] Mr. Rosenberg orally agreed to defendant's payment proposal (the "Agreement").

Plaintiffs further allege that from April 29, 2008 though July 31, 2008, defendant paid Mr. Rosenberg 50% of his patient billing for each patient whom defendant saw and/or treated in Mr. Rosenberg's office. At the end of August and upon defendant's departure on September 12, 2008, defendant told Mr. Rosenberg that his new office's construction expenses far exceeded his ability to fund and pay for same. So, defendant requested that he pay Mr. Rosenberg the monies owed within 60 days. However, despite Mr. Rosenberg's repeated requests and defendant's repeated assurances, defendant failed to make said payment. Accordingly, defendant owes plaintiffs the unpaid sum of $38,626.

In their second cause of action for unjust enrichment, plaintiffs repeat the prior allegations and add that equity requires that defendant pay Mr. Rosenberg the agreed-upon funds, or else be unjustly enriched by his failure and refusal to do.

In their third cause of action for *quantum meruit*, plaintiffs repeat the prior allegations and add that Mr. Rosenberg expected to be compensated for providing defendant with the facilities, staff and supplies, and that defendant proposed and agreed to the aforementioned payment arrangement. Defendant accepted, used and enjoyed Mr. Rosenberg's facilities, staff and supplies, and agreed to, knew of and was aware of the Agreement and his obligation to

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[1]Plaintiffs further allege that defendant "urged insisted, importuned and pleaded for Mr. Rosenberg to accede to Defendant's proposed compensation arrangement" (Complaint, ¶ 10).

compensate Mr. Rosenberg for same. Therefore, equity demands that defendant compensate plaintiffs in the sum of $38,626.

In his Answer, defendant, *inter alia*, denies making the proposal or agreeing to pay Mr. Rosenberg 50% of his patient billing for each patient he saw and/or treated in Mr. Rosenberg's office. Instead, defendant alleges, he and Mr. Rosenberg "discussed various terms pursuant to which [defendant] might use some of [plaintiff's] office space, staff and materials; that [Mr. Rosenberg] at one point sought a percentage of [defendant's] fees as compensation for such use and that [defendant], after consultation and research, declined such a proposal and explained to [Mr. Rosenberg] that such an arrangement was prohibited by professional rules restricting the sharing of professional fees" (Answer, ¶ 8). Defendant further alleges that he told Mr. Rosenberg that "because his practice had been disrupted by the sudden termination of his prior professional relationship and further because he needed to devote as much of his collections to the build-out of his new office, he could not afford to pay [Mr. Rosenberg] above-market rates for the use of office space, staff and materials" (Answer, ¶ 9). Defendant alleges that Mr. Rosenberg "agreed to accept from [defendant] a market rental for the use of an office, limited staff, and materials during the period May 15, 2008 to September 15, 2008" (Answer, ¶ 13).

In support of his counterclaim for unjust enrichment, defendant alleges that he and Mr. Rosenberg "orally agreed that [defendant] could use a room (including dentist's chair) situated within the medical office suite as to which [Mr. Rosenberg] was the tenant, along with certain supplies and office support, on a month to month basis while [defendant's] own office suite was being prepared for occupancy." Defendant contends that he was a relatively new practitioner who had no prior experience or familiarity with the terms upon which dentists and surgeons

rented the use of examination or treatment rooms from established practitioners-tenants. In particular, defendant had no idea what the "market rates" were for such rentals. Defendant further alleges he was supposed to be charged a market rate. Defendant contends that Mr. Rosenberg had for a long time rented or licensed rooms, supplies, and office support to other physicians, and therefore was in a position to know the prevailing market rent. Mr. Rosenberg represented to defendant that the market rate was about "$18,000 per month"; so defendant paid that sum, defendant alleges. After defendant moved into his own medical suite, he learned that, during 2008, the prevailing market rate for the type of arrangement he had with Mr. Rosenberg was approximately $10,000 per month.

Defendant alleges that Mr. Rosenberg overcharged defendant by more than $32,000, and plaintiffs have been unjustly enriched by that sum. Defendant further alleges that plaintiff's demand for $32,000 over and above the prevailing market rate constitutes a breach of the Agreement. In the alternative, equity and good conscious requires that plaintiffs be compelled to repay defendant $32,000.

In his motion to dismiss the Complaint, defendant argues that plaintiffs' claims must be dismissed because the agreement plaintiff alleges as the basis for his claims constitutes a voluntary prospective arrangement for fee-splitting in contravention of Education Law ("Educ. Law") §6509-a, 8 NYCRR §29.1(b)(4), and New York public policy. The alleged agreement is illegal and unenforceable, and plaintiffs may not seek the aid of the Courts to enforce such an illegal contract or to secure its benefits by other artful pleadings, defendant argues.

In opposition to defendant's motion and support of their cross-motion, plaintiffs argue that defendant's counterclaim should be dismissed on the same grounds, caselaw and statute that

defendant cites. Plaintiffs argue that if they cannot seek redress for the unpaid rent, pursuant to a "percentage-of-collections" arrangement, on the theory such an arrangement is void by virtue of public policy, then defendant is similarly precluded from seeking this Court's assistance to obtain a refund for the monies he already paid. Plaintiffs contend that defendant was not only a party to the allegedly improper arrangement, but he also was the "originator, instigator and architect" of the very Agreement that he now claims is illegal and improper (*see* the e-mails between Mr. Rosenberg and defendant ["Exhibits 1-6"]). Plaintiffs argue that Mr. Rosenberg only agreed to the arrangement to accommodate defendant's needs.[2] The purpose was to protect defendant from the risk of additional costs, and this subjected plaintiffs to additional risks and was a greater benefit to defendant. As such, defendant has "unclean hands" and should not now be permitted to enlist the aid of the Court to escape the very business deal he proposed and voluntarily entered into when it suited his purpose. If the law will not extend to aid either of the parties in such an agreement, as defendant maintains, then defendant has no right to raise his own counterclaim for unjust enrichment for any alleged overpayment during May, June, and July 2008, plaintiffs argue.

However, plaintiffs' claim for unpaid services, pursuant to *quantum meruit*, survives, plaintiffs argue. Citing caselaw, plaintiffs contend the doctrine of *quantum meruit* was developed to ensure that a person who receives the benefit of services pays the reasonable value of such services to the person who performed them. Here, a material issue of fact exists as to the market rate for plaintiffs' rent and services. Such a rate will be determined at trial based upon industry norms *via* competent expert testimony, plaintiffs argue.

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[2]The Court notes that plaintiffs state: "Plaintiff only agreed to accommodate *the Plaintiff's needs*" (cross-motion, ¶ 20) (emphasis added). The Court infers from context of the paragraph that plaintiffs meant to write "the defendant's needs."

Plaintiffs contend that defendant admitted that he owes some value to plaintiffs for the services he received from plaintiffs. In an August 4, 2008 e-mail from defendant to Mr. Rosenberg, defendant wrote: "[H]indsight is 20/20 and I would have asked for a set rent from the beginning, but I really did not expect the cost to run over my original budget." Defendant also asked Mr. Rosenberg to accept "a fixed rent of [$13,000] plus materials" (*id.*). Therefore, under the theory of *quantum meruit*, defendant still owes plaintiffs for the period August 1, 2008 through September 12, 2008. If defendant's suggested rate were applied herein, the total owed would be approximately $28,000 ($20,000 for August 2008 and $8,000 for portion of September 2008), plaintiffs argue. At the very least, defendant owes plaintiffs no less than $13,000 per month, plus materials and personnel used during that time, or approximately $18,000 per month.

Further, equity rests with plaintiffs, plaintiffs argue. Having proposed his deal, made his deal and lived with his deal while it was convenient for him, defendant should be obligated to live up to the terms of that deal and pay plaintiffs such monies for the period August 1, 2008 through September 9, 2008, as either an audit of defendant's ledger reveals are duly owed, or based upon a determination at trial of the fair market rent and cost of materials and services utilized by defendant during the period, plaintiffs argue. Further, defendant must be precluded from seeking to renegotiate the terms and amount of payments he already made, pursuant to the Agreement.

In reply, defendant first argues that Mr. Rosenberg, having made an illegal contract for defendant's four-month subtenancy, cannot ask this Court to help him with regard to a six-week portion of the subtenancy. Second, plaintiffs' *quantum meruit* claim, as pleaded, seeks the exact same relief they seek pursuant to their claim based on the illegal contract, *i.e.*, 50% of

defendant's patient collections. Therefore, plaintiffs' *quantum meruit* claim is just as flawed as their contract claim. Third, the Court should reject the "attempt by [plaintiffs'] counsel to re-write his client's *quantum meruit* claim," defendant argues, since the affirmation of a lawyer who has no knowledge of the underlying facts is of no probative value. Further, such an affirmation should be disregarded where, as here, it is proffered in an attempt to modify a pleading that was verified by the lawyer's client, defendant argues, citing CPLR §3020(a).

Defendant further argues that its counterclaim states a cause of action for unjust enrichment, which must be assessed based solely on the allegations of his Answer. The Court may not consider any affidavits or other documents submitted by plaintiffs, unless the Court gives notice that it will treat the motion as one for summary judgment and gives defendant an opportunity to submit controverting proof, defendant contends. Unlike plaintiffs, he does not rely on an illegal contract in support of his claim. Defendant denies that there was ever such an agreement to split fees, and has adequately alleged that he told Mr. Rosenberg at the outset that a fee- splitting basis for rental was illegal and therefore unacceptable (*see* Answer, ¶ 8). Accordingly, defendant's unjust enrichment counterclaim may not be dismissed on the ground that plaintiffs' Complaint "relies on allegations of an illegal contract," defendant argues.

In reply, plaintiffs maintain that defendant's counterclaim must be dismissed, as a matter of law, because he cannot prevail on an unjust enrichment claim for the return of payments on a lease that he proposed and now asserts is illegal. Plaintiffs argue that defendant's conduct herein is duplicitous, in that defendant hopes to benefit from the very conduct in which he accused Mr. Rosenberg engaging. Further, while defendant himself raised the issue of an illegal contract in his motion papers (*see* motion, p. 3), he now insists that this issue cannot be raised against him in

plaintiffs' cross-motion.

Plaintiffs contend that defendant's motion asserts that the Agreement that he negotiated and entered into with Mr. Rosenberg is illegal and that he is no longer bound by it. However, now defendant seeks to disavow this Agreement for the purpose of recovering the amount of rent that he offered and negotiated to pay. Defendant's reply papers contradict his argument that the Agreement was an illegal fee-splitting arrangement, plaintiffs argue. Defendant "now attempts to mislead the Court into believing that the rent paid by [defendant] was for $18,000."[3] However, citing an affidavit by Mr. Rosenberg (the "Rosenberg Affd."), plaintiffs contend that the amounts defendant paid Mr. Rosenberg for rent varied from month to month. In his moving papers, defendant failed to explain the varying amounts he paid in rent, plaintiffs contend.

Citing caselaw, plaintiffs further contend that, contrary to defendant's argument, even when a moving party cites only one specific subpart as a basis for CPLR §3211(a) motion, where the movant includes extrinsic evidence in support of the motion, the Court may also consider CPLR §3211(a)(1)[4] as a grounds for relief. Further, defendant had sufficient opportunity to respond to the extrinsic evidence used in support of plaintiffs' cross-motion, but failed to do so. All of the facts that were supported by documents attached to plaintiffs' cross-motion are now also attested to by Mr. Rosenberg in the Rosenberg Affd., plaintiffs contends.

Finally, plaintiffs argue that defendant's position regarding the market rate of rent is also contradictory. Defendant argues that instead of a fee-splitting arrangement, he orally agreed with Mr. Rosenberg to pay a reasonable market rate of rent (reply, p. 4). Defendant argues that

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[3]Defendant's reply, p. 4.

[4]Dismissal based on documentary evidence.

plaintiffs are not entitled to any amount for the six weeks of unpaid tenancy on the theory of *quantum meruit* because the Agreement was fee-splitting agreement. "Certainly, [defendant] agrees that he must pay a market rate for rent – and raises an issue of fact as to what that amount may be, which is consistent with [plaintiffs'] claim for *quantum meruit* as to the unpaid six weeks," plaintiffs argue. Further, plaintiffs' *quantum meruit* and unjust enrichment claims are not for a specific amount but – consistent with defendant's admission – are for a reasonable market rate of rent and services. Defendant's unclean hands in formulating and insisting on a term of rent payment that he now claims is illegal cannot give him relief because this conduct was his doing.

Discussion

Failure to State a Cause of Action

When considering a motion to dismiss for failure to state a cause of action, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]).

Defendant's Motion

It is well settled that fee-splitting agreements between professionals violate public policy and are unenforceable (*Levy v Richstone*, 2008 WL 1923520 [Trial Order] [Sup Ct New York County 2008]). Educ. Law §6509-a provides for de-licensure or other penalty where it appears "[t]hat any [doctor] has directly or indirectly requested, received or participated in the division, transference, assignment, rebate, splitting or refunding of a fee for . . . the furnishing of

professional care, or service." Further, 8 NYCRR §29.1 (b)(4), the regulation promulgated pursuant to Education Law §6509-a, expressly prohibits fee-sharing:

> Unprofessional conduct in the practice of any profession licensed, certified or registered pursuant to title VIII of the Education Law . . . shall include . . . permitting any person to share in the fees for professional services, other than: a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice the same profession, or a legally authorized trainee practicing under the supervision of a licensed practitioner. *This prohibition shall include any arrangement or agreement whereby the amount received in payment for furnishing space, facilities, equipment or personnel services used by a professional licensee constitutes a percentage of, or is otherwise dependent upon, the income or receipts of the licensee from such practice.*
> (Emphasis added)

"New York courts uniformly hold fee-splitting arrangements to be illegal, even when the division is between medical providers'" (*Odrich v Trustees of Columbia Univ. in City of New York*, 193 Misc 2d 120, 126, 747 NYS2d 342, 347 [Sup Ct New York County 2002], citing *Hauptman v Grand Manor Health Related Facility*, 121 AD2d 151 [1st Dept 1986]; *see also United Calendar Mfg. Corp. v Huang*, 94 AD2d 176 [2d Dept 1983] [agreement to provide space, staff, equipment and supplies to doctors in exchange for 30% of doctors' collections held illegal and unenforceable]; *Hartman v Bell*, 137 AD2d 585 [2d Dept 1988] [doctor's agreement to sell medical practice in consideration of purchasing doctor's payment of 40% of next three years' gross patient collections held illegal and unenforceable]; *Cook v Hochberg*, NYLJ, September 2, 1999 at 26, col 5 [Sup Ct New York County 1999] [holding that a sublease agreement between dentists requiring the subtenant to pay 50% of patient collections as fee for use of facilities was illegal and unenforceable])). Quoting *In Re Sterene's Estate* (147 Misc 59, 61-62, 263 NYS 304 [Sur Ct New York County 1933]), the Court in *Odrich* explained: "'Inevitably such a method of division would lead to deterioration in the medical staffs of hospitals with attendant injury to the

public. It would likewise subject some physicians to the temptation of overcharging their patients'" (*Odrich, supra*, at 126).

In *Sachs v Saloshin* (138 AD2d 586, 587 [2d Dept1988]), the Second Department rejected the defendant dentist's attempt to recover damages from the plaintiffs for the breach of an oral contract relating to the rental of a dental facility. Over a four-year period, the defendant "remitted 20% of his gross revenues from the practice of dentistry to the plaintiffs, as partial consideration for his occupancy and use of a fully equipped dental facility." The Court noted that the defendant conceded "that by tendering a percentage of his patient fees to the plaintiffs, he violated the public policy of this State as reflected in Education Law §6509-a, the rules for professional conduct established by the Board of Regents (8 NYCRR 29.1 [b][4]), and the Code of Ethics of the Dental Society of the State of New York (Code of Ethics §I [1-I]).

Here, it is clear from the allegations of the Complaint that the Agreement upon which plaintiffs base their breach of contract claim constitutes an illegal fee-splitting agreement. Plaintiffs allege that Mr. Rosenberg and plaintiff agreed that defendant would pay plaintiff 50% "of his patient billing for each patient seen and/or treated by [defendant] in [Mr. Rosenberg's] office" for a license to use Mr. Rosenberg's "facility, staff and supplies, at and with which to see and treat [defendant's] patients" from April 29, 2008 through September 15, 2008 (Complaint, ¶¶ 7-13). Plaintiffs further allege that from April 29, 2008 through July 31, 2008, defendant paid plaintiff 50% of his patient billing, pursuant to the Agreement (*id.* at 14). Further, in their opposition and cross-motion, plaintiffs confirm the terms of the Agreement as alleged in their Complaint (cross-motion, ¶¶ 10-13).

Regarding whether the Court can consider the e-mails plaintiffs provided as evidence that

Mr. Rosenberg and defendant agreed to a fee-splitting arrangement, the First Department holds that on a CPLR §3211(a)(7) motion to dismiss, unless the Court gives notice that it will treat the motion as one for summary judgment, the Court can look outside the four corners of the Complaint to rectify deficiencies therein (*R.H. Sanbar Projects, Inc. v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989] ["Affidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims, and the court's attention should be focused on whether the plaintiff has a cause of action rather than on whether he has properly stated one"]). Further, extrinsic evidence can be considered in order to negate factual allegations of the complaint (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], quoting *Blackgold Realty Corp. v Milne*, 119 AD2d 512, 513 [1st Dept 1986] ["In cases where the court has considered extrinsic evidence on a CPLR 3211 motion, 'the allegations are not deemed true . . . . The motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted'"]).

Here, as discussed, *supra*, the four corners of the Complaint clearly indicate that the Agreement on which plaintiffs seek to recover constitutes a voluntary arrangement between two medical providers to split fees based on services defendant provided to patients. The e-mails submitted by plaintiff do not rectify, or "legalize" the otherwise illegal nature of the Agreement alleged by plaintiff.[5] Further, the e-mails were not offered to negate any facts alleged in the Complaint.

As the Agreement violates Educ. Law §6509-a and New York public policy, the

[5] The Court notes that the e-mails indeed support the conclusion that the Agreement on which plaintiffs seek to recover is illegal and unenforceable.

Agreement is unenforceable (*Gorman v Grodensky*, 130 Misc 2d 837, 840, 498 NYS2d 249 [Sup Ct New York County 1985]; *Levy v Richstone*, 2008 WL 1923520, *supra*). And, neither plaintiffs nor defendant can recover under said Agreement (*Gorman* at 840 ["That the defendants may benefit from the court's refusal to enforce a contract is irrelevant, if enforcement would further a purpose in violation of public policy. In such a case, the law will not aid either party but will leave them as their acts have placed them."] [citations omitted]). Accordingly, the branch of defendant's motion to dismiss plaintiff's claim for breach of contract is granted.

However, contrary to defendant's contention, plaintiffs' claims to recover for unjust enrichment and *quantum meruit* survive. New York Courts have held that where an express contract is unenforceable, an aggrieved party may be able to recover the benefits it conferred on the other party by suing on a quasi-contract theory for unjust enrichment or *quantum meruit* (28 NY Prac, Contract Law §7:12, citing *American Buying Ins. Services, Inc. v S. Kornreich & Sons, Inc.*, 944 F Supp 240, 245 [1996] ["[W]hile courts generally do not grant restitution under agreements that are unenforceable due to illegality, courts will award damages in *quantum meruit* if it is found that the two parties are not *in pari delicto*, as when the plaintiff is the victim of misrepresentation by the defendant"); *Katz v Zuckermann*, 119 AD2d 732, 501 NYS.2d 144 [2d Dept 1986] [holding that the Supreme Court "properly found that the plaintiffs, as nonprofessionals, were less culpable than the defendant, at whom the prohibitions of Education Law § 6509-a are directed, and accordingly they should not be precluded from recovering under a theory of unjust enrichment"]).

In *Gorman v Grodensky*, *supra*, the Court held that even though the contract action was dismissed since the subject contract was an illegal fee-splitting agreement, the plaintiff's action

for unjust enrichment "may be viable" (*id.* at 841). The Court explained that in two of the fee-splitting cases on which it relied – *Katz v Zuckermann* (126 Misc 2d 135, 138 -139 [Sup Ct Queens County 1984], *affd* 119 AD2d 732 [2d Dept 1986]), and *Baliotti v Walkes* (NYLJ, Apr. 27, 1984, p 15, col 3 [Sup Ct Kings County 1984], *affd* 115 AD2d 581, 581 [2d Dept 1985]) the plaintiffs were not left without a remedy. The Court stated that "Because equitable principles counsel that 'a person shall not be allowed to enrich himself unjustly at the expense of another,' the plaintiffs had potential causes of action for unjust enrichment, for the value of services rendered by plaintiffs and received by defendants" (*Gorman v Grodensky*, *supra*, at 841, quoting *Pink v Title Guarantee & Trust Co.*, 274 NY 167, 173 [1937]).

Katz v Zuckermann involved an illegal fee-splitting agreement between a medical doctor and nonprofessional medical technicians. In affirming the Supreme Court, the Second Department held: "While the courts will generally not enforce illegal contracts, an exception to the rule is recognized where, as here, the contract is merely prohibited by statute . . . and is not criminal in nature. . . . Therefore, under the circumstances of this case, Special Term properly found that the plaintiffs, as nonprofessionals, were less culpable than the defendant, at whom the prohibitions of Education Law § 6509-a are directed, and accordingly they should not be precluded from recovering under a theory of unjust enrichment" (*Katz v Zuckermann*, 119 AD2d 732, *supra*, at 733, citing *Baliotti v Walkes*, *supra*).

In *Baliotti v Walkes*, *supra*, the Second Department affirmed the Supreme Court's dismissal of the plaintiffs' claim under a management agreement, on the ground that it was an illegal fee-splitting arrangement. It also affirmed the Supreme Court's ruling permitting the plaintiffs to recover for unjust enrichment: the reasonable value of property, services and benefits

actually conferred upon the defendants (*Baliotti v Walkes*, 115 AD2d 581 at 581).

Contrary to defendant's contention, the illegality of the Agreement does not preclude plaintiffs from seeking to recover on quasi-contract theories. Second, the fact that plaintiffs seek to recover the same amount as they seek under their contract claim is not, in and of itself, fatal to plaintiffs' claim for *quantum meruit*. The caselaw on which defendant relies does not stand for such a proposition. In *Fallon v McKeon* (230 AD2d 629, 630 [1st Dept 1996]), the First Department rejected the plaintiff's *quantum meruit* claim on the ground that the Complaint failed to indicate a reasonable value for the plaintiff's services. Plaintiff claimed damages "identical to the other four causes of action," which rendered "this cause of action indistinguishable from the others, and therefore *insufficient*" (*id.*, citing *Bauman Assocs. v H & M Intl. Transp.*, 171 AD2d 479, 484 [1st Dept 1991]) (emphasis added). In *Bauman*, the First Department affirmed the dismissal of the plaintiff's *quantum meruit* claim noting that "it is evident that no benefit was conferred upon defendant, and if plaintiff expended any sums of money in reliance upon defendant's representations, plaintiff's complaint, as well as all its other submissions, *is entirely devoid of any indication of what it spent or, in fact, of the reasonable value of any services which it may have performed*" (*Bauman* at 484) (emphasis added). Here, in their Complaint, plaintiffs clearly allege the reasonable value of the services Mr. Rosenberg provided defendant: $38,626.

Regarding defendant's third argument that plaintiffs' counsel attempted to rewrite plaintiffs' *quantum meruit* claim in his affirmation, the Court notes the Complaint, in and of itself, sufficiently states a cause of action for *quantum meruit*. To state a cause of action for *quantum meruit*, plaintiffs "must allege (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of

compensation therefor, and (4) the reasonable value of the services" (*Soumayah v Minnelli*, 41 AD3d 390, 391-392 [1st Dept 2007]). Here plaintiffs allege that Mr. Rosenberg provided defendant with the facilities, staff and supplies; defendant "accepted, used and enjoyed" same; that Mr. Rosenberg expected to be compensated for providing defendant with same; and that equity demands that defendant compensate plaintiff in the sum of $38,626. Accordingly, the branch of defendant's motion to dismiss plaintiff's claims for *quantum meruit* and unjust enrichment is denied.

Defendants' Counterclaim

As the illegality of the Agreement does not preclude plaintiff's claims under a quasi-contract theory (see discussion, *supra*), plaintiff's motion to dismiss defendant's unjust enrichment counterclaim premised on the notion that all claims are barred when premised on an illegal contract, likewise fails. Therefore, dismissal of the counterclaim is denied.[6]

Accordingly, plaintiffs' cross-motion to dismiss defendant's counterclaim is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Harrison Chen, DDS for an order, pursuant to CPLR §§3211(a)(7), dismissing the Complaint of plaintiffs Steven N. Rosenberg, DDS, and Steven N. Rosenberg, DDS, PC, is granted only to the extent that plaintiffs' first cause of action for breach of contract is hereby severed and dismissed; and it is further

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[6] Contrary to defendant's contention, plaintiff's motion to dismiss the counterclaim is not based on any failure to state the elements of an unjust enrichment claim; instead, plaintiff avers that if his Agreement is deemed void by public policy, then defendant "is similarly precluded from seeking" a refund. In any event, the facts as alleged by defendant and supported by plaintiffs' evidence demonstrate that defendant has sufficiently stated a counterclaim for unjust enrichment, in that he may have overpaid Mr. Rosenberg., in that defendant may have paid Mr. Rosenberg *more than* the value of the license to use Mr. Rosenberg's facilities, supplies, and staff.

ORDERED that plaintiffs' cross-motion for an order, pursuant to CPLR §3211(a)(7), dismissing defendant's counterclaim is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: August 17, 2010

Hon. Carol R. Edmead, J.S.C.