

**SUPREME COURT OF THE STATE OF NEW YORK**  
*Appellate Division, Fourth Judicial Department*

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**CA 04-01871**

PRESENT: PIGOTT, JR., P.J., KEHOE, MARTOCHE, SMITH, AND PINE, JJ.

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SYRACUSE ORTHOPEDIC SPECIALISTS,  
P.C., PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

DAVID R. HOOTNICK, M.D.,  
DEFENDANT-APPELLANT,  
ET AL., DEFENDANT.

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DAVID R. HOOTNICK, M.D.,  
COUNTERCLAIM PLAINTIFF-APPELLANT,

V

MICHAEL VELLA,  
COUNTERCLAIM DEFENDANT-RESPONDENT.

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MACKENZIE HUGHES LLP, SYRACUSE (NANCY L. PONTIUS OF COUNSEL), FOR  
DEFENDANT-APPELLANT AND COUNTERCLAIM PLAINTIFF-APPELLANT.

COSTELLO, COONEY & FEARON, PLLC, SYRACUSE (EDWARD G. MELVIN OF  
COUNSEL), FOR PLAINTIFF-RESPONDENT.

SONNEBORN, SPRING & O'SULLIVAN, P.C., SYRACUSE (LAURA L. SPRING OF  
COUNSEL), FOR COUNTERCLAIM DEFENDANT-RESPONDENT.

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Appeal from an order of the Supreme Court, Onondaga County  
(Anthony J. Paris, J.), entered December 22, 2003. The order granted  
the motion of counterclaim defendant to dismiss the counterclaim  
against him for breach of fiduciary duty and denied the cross motion  
of defendant David R. Hootnick, M.D. to compel discovery.

It is hereby ORDERED that the order so appealed from be and the  
same hereby is unanimously affirmed without costs.

Memorandum: David R. Hootnick, M.D. (defendant) appeals from an  
order that granted the motion of Michael Vella, the president of  
plaintiff Syracuse Orthopedic Specialists, P.C. (Syracuse  
Orthopedics), to dismiss defendant's counterclaim against him  
personally for breach of fiduciary duty. On May 14, 2002, Syracuse  
Orthopedics merged with University Orthopedics & Sports Medicine, P.C.  
(University), and Syracuse Orthopedics became the successor by merger.  
Defendant, who was an employee and shareholder of University, opposed  
the merger and refused to sign a Syracuse Orthopedics employment

agreement. Defendant continued to work at Syracuse Orthopedics' offices for approximately one year after the effective date of the merger, then terminated his employment. Thereafter, Syracuse Orthopedics commenced this action against defendant. Defendant counterclaimed against Syracuse Orthopedics, alleging that it breached its employment agreement with defendant. Defendant also counterclaimed against Syracuse Orthopedics and Vella, alleging that defendant is a shareholder of Syracuse Orthopedics and that Vella breached his fiduciary obligations to Syracuse Orthopedics.

Contrary to the contention of defendant, Supreme Court properly dismissed defendant's counterclaim against Vella prior to service of responses to outstanding discovery demands on the ground that defendant lacks standing. Although the factual allegations in a pleading are presumed to be true on a motion to dismiss, bare legal conclusions and factual claims that are flatly contradicted by the evidence are not presumed to be true (see *Tal v Malekan*, 305 AD2d 281, *lv denied* 100 NY2d 513; *Olszewski v Waters of Orchard Park*, 303 AD2d 995; see generally 6A Carmody-Wait 2d, NY Prac § 38:113). Here, the assertion by defendant that he is a shareholder of Syracuse Orthopedics "is such a bare legal conclusion" (*Tal*, 305 AD2d at 281). By his own admission, defendant did not vote for the merger, sign a Syracuse Orthopedics' employment agreement or sign confirmation and adherence agreements, nor did he sign a Syracuse Orthopedics' shareholder agreement. Because defendant failed to allege facts sufficient to establish that he was a shareholder of Syracuse Orthopedics, his counterclaim against Vella was properly dismissed for lack of standing.

Although the order appealed denied defendant's cross motion to compel discovery, we note that the cross motion is moot insofar as it relates to the counterclaim against Vella. We have considered defendant's remaining contentions and conclude that they are without merit.