

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>FRANK FUMAI,</b>	:	<b>CIVIL ACTION</b>
	:	
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>HARVEY LEVY, SUBURBAN</b>	:	
<b>THERAPY, INC., and</b>	:	
<b>SUBURBAN MEDICAL ASSOCIATES,</b>	:	
	:	
<b>Defendants.</b>	:	<b>NO. 95-1674</b>

**MEMORANDUM - ORDER**

**AND NOW**, this 18th day of December, 1997, upon consideration of the motion of defendants Harvey Levy (“Levy”), Suburban Therapy, Inc. (“ST”), and Suburban Medical Associates (“SM”) for summary judgment pursuant to Federal Rule of Civil Procedure 56(c) (Document No. 21), the response by plaintiff Frank Fumai (“Fumai”) (Document No. 25), the reply by the defendants (Document No. 27), and the surreply by Fumai (Document No. 28), including the memoranda and exhibits submitted by the parties, and having found and concluded in determining that the motion will be denied that:

1. Rule 56(c) of the Federal Rules of Civil Procedure provides that "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 and that the moving party is entitled to a judgment as a matter of law" then a motion for summary judgment may be granted. The moving party has the initial burden of illustrating for the court the absence of a genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-161 (1970). Once the moving party has made a proper motion for summary judgment, the burden switches to the nonmoving party. Under Rule 56(e),  
[w]hen a motion for summary judgment is made and supported as

provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

The court is to take all of the evidence of the nonmoving party as true and to draw all reasonable inferences in his favor in determining if there is a genuine issue of material fact. See Adickes, 398 U.S. at 158-59. In order to establish that an issue is genuine, the nonmoving party must proffer evidence such that a reasonable jury could return a verdict in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986);

2. Fumai filed a complaint in this Court seeking unpaid fees owed to him under a contract with the defendants. The Court has jurisdiction over this case under 28 U.S.C. § 1332, as the parties are diverse and the amount in controversy exceeds the required jurisdictional amount. Defendants moved for summary judgment, claiming that because Fumai breached his fiduciary duties to his employer and to the defendants in his performance of the contract, not only do they do not owe him any more of his fees under the contract, but they also are entitled to restitution of the fees they already paid to Fumai under the contract;

3. On November 1, 1990, Fumai entered into an agreement with defendants whereby Fumai would receive a commission from the sale of stock or assets of SM or ST if he procured a purchaser or introduced a party to the defendants who later procured a purchaser. Under the agreement, Fumai would receive 10% of the purchase price of ST and 5% of the purchase price of SM. There were multiple connections between Fumai and the defendants. At the time of the contract, Levy was the chairman of the board of ST and chairman of the board and president of SM. Fumai was then the executive director of Warminster General Hospital (“Warminster”). In addition, Levy was on the board of directors of Warminster. Warminster was part of United Hospital Systems, Inc. (“United Hospitals”). In a joint venture, Warminster, ST, and SM owned an establishment known as the Achievement Center. (Levy dep. at 39). ST and SM also made referrals to Warminster. (Levy dep. at 39);

4. After the contract was signed between Fumai and the defendants, Fumai contacted Continental Medical Systems (“Continental”) to set up a meeting with the defendants to discuss the possibility of Continental purchasing ST and SM. (Fumai dep. at 46-50; Levy dep. at 43). Continental

signed a letter of intent to purchase ST and SM; however, the deal subsequently fell through and Continental did not purchase ST or SM;

5. In January of 1991, Allegheny United Hospitals (“Allegheny”) took over the management of United Hospitals so that it could perform due diligence to determine whether it wanted to acquire United Hospitals. At Levy’s request, Fumai approached the president and CEO of Allegheny, Sherif Abdelhak (“Abdelhak”) about the potential for Allegheny to acquire SM and ST, providing him with information about the companies including a copy of the letter of intent between Continental and the defendants. (Fumai dep. at 65). Although Fumai set up a meeting between the defendants and Allegheny, he did not attend the meeting nor did he participate in the negotiations that ensued between the defendants and Allegheny. (Fumai dep. at 91-92; Abdelhak dep. at 24-25). Fumai sent a memo to Abdelhak on February 18, 1991 stating that negotiations with Continental had been halted because of the position of Warminster that “we would not allow any transfer of ST investments in the Achievement Center to Continental Medical Systems.” (Def.’s Mem. Ex. B);<sup>1</sup>

6. Allegheny acquired United Hospitals in July of 1991. At that time, Fumai was transferred to Centennial Health Services (“CHS”), a part of Allegheny. On July 24, 1991, Fumai resigned from CHS. The effective date of his resignation was August 31, 1991; however, Fumai contends he was relieved of his duties immediately. (Fumai dep. at 120-121). On September 16, Allegheny entered into an agreement to purchase ST and SM; the deal closed on October 11, 1991. The defendants received approximately \$17 million from the sale. Fumai claims that he is entitled to a total fee of \$996,236 from the sales of ST and SM to Allegheny. To date, defendants have paid Fumai \$454,000 in fees under the contract in the following increments: \$324,000 in October 1991 after the closing, \$60,000 in October 1992, \$50,000 in October 1993, and \$20,000 in October 1994. (Levy dep. at 29-34). No payments have been made to Fumai since October of 1994;

7. Taking the evidence of Fumai as true and affording him all reasonable inferences from that evidence, this Court finds that there are genuine issues of material fact, including but not limited to the following, each of which precludes summary judgment:

a. The defendants claim that Fumai was an employee of

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<sup>1</sup> Fumai argues that defendants’ argument that Fumai breached his fiduciary duty to them in his handling of the Continental deal should not be a basis for summary judgment because defendants did not raise this as an affirmative defense or counterclaim nor did they include it in their responses to Fumai’s interrogatories. Because the resolution of this issue is not material to my decision in this motion and because it is the subject of Fumai’s motion in limine pending before this Court (Document No. 29), it will not be discussed here.

Allegheny during the formation of the deal between ST, SM, and Allegheny which presents Fumai with conflicting fiduciary duties to both Allegheny and the defendants. Fumai maintains that he was not an employee of Allegheny during the time that he facilitated the deal between Allegheny and the defendants. (Fumai dep. at 76-77);

b. The defendants claim that Fumai breached his fiduciary duties first to United Hospitals, then to Allegheny when he did not disclose his conflict of interest in finding a buyer for ST and SM. As for United Hospitals, the defendants claim that Warminster would lose referrals from ST and SM if it was sold to a competitor. As for Allegheny, it required written approval for an employee who wanted to undertake a role as a broker in a separate business transaction. (Abdelhak dep. at 49, Fumai dep. at 70). Fumai maintains that he disclosed to Abdelhak in person that he would receive a commission if Allegheny purchased ST and SM. (Fumai dep. at 65). Abdelhak denies this. (Abdelhak dep. at 25-26, 49-50). Fumai claims that he wrote a memo in February of 1991 to memorialize the conversation in which he disclosed his interest in the sale to Abdelhak; the defendants claim that the memo did not disclose his interest in the transaction. (Fumai dep. at 70, 72, 73);

c. The defendants contend that as a broker Fumai owed them a fiduciary duty. Fumai argues that he was a “finder” not a “broker” under the agreement because he was merely required to introduce a buyer to the defendants to collect a fee and he did not participate in any of the negotiations between Allegheny and Levy;

d. The defendants contend that Fumai interfered with the formation of a deal between Continental and them. Fumai claims that the deal fell through because there was a disagreement between the parties as to the terms of the deal because Continental wanted to tie the purchase price to ST and SM’s accounts receivable and performance in future years, (Fumai dep. at 51), and ultimately the defendants got a financially better deal with Allegheny than they would have with Continental;

8. Fumai has proffered evidence such that a reasonable jury could return a verdict in his favor;

it is hereby **ORDERED** that, based on the foregoing analysis and consideration of the

pleadings, depositions, and other evidence of record, the motion is **DENIED**.

**IT IS FURTHER ORDERED** that the parties shall submit a joint report to the Court no later than January 5, 1998 as to the status of settlement. If the parties need the assistance of the Court in facilitating settlement negotiations, the report should so indicate. Otherwise, the parties should be prepared to proceed to trial, which is scheduled for January 12, 1998.

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**LOWELL A. REED, JR., J.**