TRAUB LIEBERMAN

NEWS & EVENTS

December 9, 2019

Partner Mario Castellitto and Associate Vito John Marzano Win Appeal Affirming Summary Judgment on Behalf of Their Client

Related Attorneys:

On December 3, 2019, partner Mario Castellitto and associate Vito John Marzano secured a decision from the New York Appellate Division, First Department affirming summary judgment dismissing all claims in favor of their client VCC, Inc. d/b/a Cicero Consulting Associates ("CCA").

Although plaintiff asserted numerous claims and allegations against other parties, as it relates to CCA, the crux of this matter arose out of the transfer of assets for a surgery center in 2010. CCA specializes in preparing certificate of need ("CON") applications for entities seeking to sell or acquire these type of health facilities. CCA does not vet the information provided by its clients because New York regulatory agencies review and vet the information prior to approval.

Concerning CCA, plaintiff advanced a mistaken interpretation that New York law proscribes nonphysicians from having an ownership interest in the type of medical facilities subject to this suit. CCA, according to plaintiff, knew this based on its prior work in preparing CON applications, and therefore aided and abetted fraud when it filed the instant CON application in 2009 on behalf of the defendant seeking to acquire the surgery center. Curiously, plaintiff conceded that he was not a shareholder of the corporate entity that owned the surgery center.

Before the lower court, Traub Lieberman joined codefendants' motions to dismiss for lack of standing as plaintiff cannot assert a derivative claim because he did not own, and indeed never owned, any shares in the corporate entity that sold the surgery center. Independently, Traub Lieberman moved for summary judgment arguing plaintiff's legal theory has no basis in New York law, and that CCA has provided all requested information to demonstrate that it did not aid and abet fraud. The lower court held that plaintiff lacked standing and that he failed to allege an underlying fraud. Thus, CCA was entitled to summary judgment as a matter of law.

On appeal, plaintiff abandoned his arguments regarding who can own health facilities in New York State, and argued for the first time the CCA owed plaintiff a duty to vet the veracity of the information in the CON application and to inform plaintiff of the transfer of assets.

While maintaining that all of plaintiff's arguments were unpreserved, Traub Lieberman contended that CCA did not owe any duty to plaintiff as he had no ownership or investment interest in the surgery center and was not a party to any contracts involving the same, and that CCA had no duty to vet the information in the CON application. Further, given that all of the information in the CON application is a matter of public record, there could be no underlying fraud.

The First Department rejected plaintiff's new arguments as unpreserved or without merit. It also concluded that plaintiff abandoned his prior claims and, as such, affirmed summary judgment dismissing the aiding and abetting fraud claim asserted against CCA because plaintiff could not establish an underlying fraud claim.

The decision is *Simon v. Francinvest, S.A.*, 2019 N.Y. Slip Op. 08629 (1st Dept. 2019).

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