

**Nahar v Gulati**

2011 NY Slip Op 33142(U)

December 6, 2011

Supreme Court, New York County

Docket Number: 105848/2010

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
Justice

PART 55

Index Number : 105848/2010  
NAHAR, TAMANNA, M.D.  
vs.  
GULATI, RASHMI, M.D.  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 9/20/11  
MOTION SEQ. NO. \_\_\_\_\_

Motion to/for \_\_\_\_\_  
\_\_\_\_\_ No(s) 1-3  
\_\_\_\_\_ No(s) 4-6  
\_\_\_\_\_ No(s) 7-10

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

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

NB NOI Due date extended to 2-29-2012 see end of decision

**FILED**

DEC 07 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12/6/11

JANE S. SOLOMON, J.S.C.

- 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: IAS PART 55

-----X  
TAMANNA NAHAR, M.D.,

Plaintiff,

INDEX NO. 105848/10

-against-

DECISION and ORDER

RASHMI GULATI, M.D., DEE GULATI  
a/k/a DEEPAK GULATI, VERA MYERS,  
PATIENTS MEDICAL P.C., JOHN AND JANE  
DOE 1-10 (FICTITIOUS NAMES),  
ABC CORPORATIONS 1-10 (FICTITIOUS  
NAMES),

**FILED**

Defendants.

DEC 07 2011

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**JANE S. SOLOMON, J.:**

In this action for fraud, defendants Rashmi Gulati, M.D. (Rashmi), Dee Gulati a/k/a Deepak Gulati (Dee) (together, the Gulatis), Vera Myers (Myers), and Patients Medical P.C. (the Clinic) (all together, Defendants) move, pursuant to 3212 and 22 NYCRR 130.1-1, for summary judgment and sanctions/costs for bringing a frivolous action. The motion is denied as follows.

**BACKGROUND**

Familiarity with the court's prior decision and order in motion sequence 001, dated February 25, 2011, and entered February 28, 2011 (02/28/11 Order), is presumed.

From January 2006 to January 2010, plaintiff Tamanna Nahar, M.D. (plaintiff), a New York licensed physician, was employed by non-party Bronx Lebanon Hospital Center (the Hospital) in the Bronx, New York, as Director of Echocardiography.

From approximately May 2009 to November 2009, plaintiff allegedly also worked at the Clinic<sup>1</sup> on a part-time basis, performing and interpreting echocardiograms.

At the Clinic, the Gulatis allegedly asked for plaintiff's permission to submit insurance bills for the Clinic under her name for patients whom she did not see or patients' studies that she did not interpret. She claims that she denied the Gulati's request, but the Clinic submitted such insurance bills anyway.

Plaintiff alleges that, in January 2010, she plaintiff was notified by her Hospital supervisors of their discovery that the Clinic had submitted insurance bills indicating that she had worked at the Clinic on days when she was supposed to be working at the Hospital (Complaint, ¶ 18). As a result, plaintiff was forced to leave the Hospital's employ (*id.*).

Pursuant to the 02/28/11 Order, eight out of ten purported causes of action were dismissed. The two that survived are fraud and intentional interference with prospective economic advantage. In March 2011, a deposition of the Hospital witness, Dr. Sridhar S. Chilimuri, M.D. (Dr. Chilimuri), took place. Dr. Chilimuri, the Chairman of Medicine at the Hospital, was plaintiff's superior. In May 2011, defendants served a notice to

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<sup>1</sup> Rashmi is the owner and director of the Clinic; Myers is a billing supervisor. Dee appears to also have a role in the Clinic's management.

admit on plaintiff, to which plaintiff has not responded.  
Plaintiff has not been deposed.

#### DISCUSSION

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'" (*id.*, quoting CPLR 3212 [b]).

"On a motion for summary judgment, ... self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (*Sacher v Long Is. Jewish-Hillside Med. Ctr.*, 142 AD2d 567, 568 [2d Dept 1988]).

"The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

"Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's

wrongful conduct" (*Vigoda v DCA Prods. Plus*, 293 AD2d 265, 266 [1st Dept 2002]). Wrongful conduct or "wrongful means" includes fraud and misrepresentation on part of the defendant (see *Snyder v Sony Music Entertainment*, 252 AD2d 294, 300 [1st Dept 1999]).

Defendants claim that plaintiff suffered no damages. In particular, they claim that plaintiff was not forced to resign from the Hospital, rather she left her employ voluntarily. In support, they offer a Notice to Admit, dated May 23, 2011 (the Notice to Admit), which was served on plaintiff, and a deposition transcript of Dr. Chilimuri.

Notice to Admit

The Notice to Admit asked plaintiff to admit that she resigned from the Hospital voluntarily and was not terminated, and that she was not requested or forced to resign (see 07/28/11 Bowles Aff., exhibit J). Defendants claim, and plaintiff does not deny, that she did not respond to the Notice to Admit.

The purpose of a notice to admit "is to eliminate from contention factual matters which are easily provable and about which there can be no controversy" (*Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986] [internal quotation marks and citation omitted]). It "may not be utilized to request admission of material issues or ultimate or conclusory facts, which can only be resolved after a full trial" (*id.* [internal citation omitted]; see also *Lewis v Hertz Corp.*, 193 AD2d 470, 470 [1st Dept 1993]).

"[I]t may not be employed as a substitute for other disclosure devices, such as examinations before trial, depositions upon written questions or interrogatories" (*Taylor*, 116 AD2d at 206).

Defendants' requests to admit that plaintiff was not terminated but rather left Hospital's employ voluntarily pertain to the crucial, ultimate issue of damages. Accordingly, the requests at issue are improper on a notice to admit (*Taylor*, 116 AD2d at 206; *Lewis*, 193 AD2d at 470). Hence, plaintiff's failure to respond to the Notice to Admit is of no consequence, and cannot be used by Defendants in support of their motion.

#### Dr. Chilimuri's Deposition

Dr. Chilimuri testified that, in December 2009, he received a phone call from a patient who wanted to clarify a bill regarding medical services provided by plaintiff sent by a clinic in Manhattan (*Chilimuri Dep. Tr.*, at 12, 47-48). Dr. Chilimuri then discovered that plaintiff was seeing patients at an office in Manhattan (*id.* at 13-14, 49-50). He testified that he had not authorized plaintiff to practice medicine outside of the Hospital, and did not know that plaintiff was working elsewhere (*id.* at 14-15; 44).

At a meeting with plaintiff in January 2010, Dr. Chilimuri purportedly discussed the following issues with plaintiff: (1) to clarify the nature of the bill from the patient and to determine whether plaintiff submitted bills without seeing

patients; (2) to find out about plaintiff's practice in Manhattan; (3) to find out if plaintiff was diverting the Hospital's patients to the Clinic; (4) to find out if plaintiff worked at the Clinic when she was supposed to be working at the Hospital or used her Hospital sick leave hours to work at the Clinic (*id.* at 15-16).

According to Dr. Chilimuri's testimony, he told plaintiff that the Hospital was going to investigate these issues (*id.* at 19). He told her that if the Hospital determined that she committed Medicare fraud or diverted the Hospital patients to the Clinic, then she would be terminated (*id.* at 22, 24-25). At the end of the meeting, plaintiff said that she would resign from her job at the Hospital (*id.* at 20). Plaintiff explained that it was already difficult for her to take care of her child and to work full time at the Hospital, and that the anticipated investigation would add more stress (*id.* at 37, 39). Once plaintiff announced her decision to resign, the Hospital did not pursue the investigation, aside from verifying that she was still billing under the Hospital's name and address for work performed at the Hospital (*id.* at 20-21, 25-26). Shortly after the meeting, plaintiff submitted a resignation letter (*id.* at 35). Dr. Chilimuri also testified that he agreed to provide a reference letter to plaintiff (*id.* at 68-69).

In opposition to the motion, plaintiff submitted an



affidavit stating that at the meeting with Dr. Chilimuri she "was overtly pressured to resign from [her] position or face serious inquiries that could jeopardize [her] medical career" (08/29/11 Nahar Aff., ¶ 6). Plaintiff claims that prior to the meeting, she had an "excellent" relationship with the Hospital, and had no intention of resigning from her position at the Hospital (*id.* at 7). Plaintiff further explains that she chose to resign in order to avoid the possibility of losing her license to practice medicine (*id.*, ¶¶ 9-10). "The wrongful acts of the Defendants created a stain on my employment record and disrupted my beneficial relationship with [the Hospital]" (*id.*, ¶ 10). "This forced resignation set my career back several years and impeded my advancement" (*id.*).

She further contends that Dr. Chilimuri's testimony incorrectly states that she could not practice medicine outside the Hospital without his authorization. His testimony could be read to imply that she resigned because she had engaged in an unauthorized medical practice. Instead, she claims that she was permitted to do outside work as long as it did not interfere with her work at the Hospital (Nahar Aff., ¶ 4). The significance of this distinction is that she claims that she felt compelled to resign by the appearance, created by the insurance bill wrongfully submitted by the Clinic, that she was engaged in a fraudulent billing practice, and *not* because she was engaged in

the practice of medicine in violation of her obligation to the Hospital.

Accordingly, issues of fact exist as to whether plaintiff was forced to resign or left her Hospital job voluntarily (see *Sacher v Long Is. Jewish-Hillside Med. Ctr.*, 142 AD2d at 568), whether her departure from the Hospital was caused by Defendants' conduct, and whether she sustained damages other than loss of employment with the Hospital. Hence, Defendants' motion for summary judgment is denied (see *id.*; see also *Zuckerman v City of New York*, 49 NY2d at 562).

In light of this determination, and in the absence of any facts showing that plaintiff engaged in "frivolous" conduct within the meaning of 22 NYCRR 130-1.1 (c) (1-3), Defendants' request for sanctions and costs is denied as well, and, itself is an an inappropriate request.

Finally, plaintiff was required to file and serve a note of issue by July 30, 2011, which she did not do. She has not yet been deposed. Since it appears that discovery is not complete, the note of issue deadline is extended to February 29, 2012. This action will be assigned to a different justice of this court by reason of my retirement, so an attorney wishing to schedule a compliance conference may learn who the assigned Justice is by consulting E-Courts at the court's website (<http://www.nycourts.gov>), or by contacting the Trial Support

Office at (646) 386-3155.

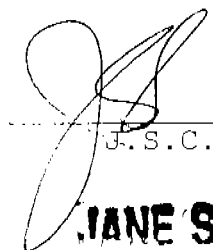
CONCLUSION

For the foregoing reasons, it hereby is

**ORDERED** that the defendants' motion for summary judgment and sanctions is denied with \$100 costs, and the note of issue deadline is extended to February 29, 2012.

Dated: December 6, 2011

ENTER:

  
\_\_\_\_\_  
J.S.C.

**JANE S. SOLOMON**

**FILED**

**DEC 07 2011**

NEW YORK  
COUNTY CLERK'S OFFICE