Zishan Asi v Lenox Hill Hosp.
2018 NY Slip Op 33366(U)
December 31, 2018
Supreme Court, New York County
Docket Number: 154083/2017
Judge: Anthony Cannataro

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 41EFM

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ZISHAN ASI,

Plaintiff,

- v -

LENOX HILL HOSPITAL, PARESH SHAH, AMIT JAIN, and PARSWA ANSARI,

Defendants.

INDEX NO. 154083/2017

MOTION DATE 10/17/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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HON. ANTHONY CANNATARO:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53 were read on this motion TO DISMISS.

Plaintiff, a former medical resident at Lenox Hill Hospital, asserts several causes of action against defendants, including breach of contract, tortious interference with contract, *prima facie* tort, promissory estoppel, and one denominated as a claimed breach of the implied covenant of good faith and fair dealing. Plaintiff also seeks declaratory judgment and injunctive relief. All the causes of action are asserted against defendant Lenox Hill Hospital, except for the tortious interference claim, which is asserted only against the individually-named defendants. Defendants now move, pursuant to CPLR R. 3211, to dismiss the complaint. Plaintiff opposes defendants' motion and cross-moves for leave to amend the complaint.

For his second year of medical residency, plaintiff participated in a one-year surgical residency program at Lenox Hill Hospital. He had a written agreement with the hospital running from July 2010 through June 2011. During that time, defendant Paresh Shah, M.D., was the director of the surgical residency program and defendant Parswa Ansari, M.D., was the associate program director.

Plaintiff alleges that defendants harmed his career by disparaging him through false statements made to the Federation of State Medical Boards in a letter written after plaintiff's residency has ended. The statements at issue pertain to an incident that occurred on or about February 11, 2011, during plaintiff's residency. At that time, a senior resident at Lenox Hill questioned the propriety of plaintiff's treatment of a patient. According to defendants, plaintiff was suspended from the residency program for approximately three days and placed on 30-days probation after his reinstatement, however, plaintiff alleges that he was assured that he was not the subject of disciplinary action and that no record of the incident would be made.

On July 2, 2013, about two years after plaintiff had completed his residency, defendant Dr. Ansari responded to an inquiry from the Medical Board by sending a letter reporting that plaintiff had been suspended and placed on probation during his residency. Plaintiff became aware of the letter and the allegations contained within it one year later, on July 3, 2014. Plaintiff commenced this action on May 3, 2017.

In his complaint, plaintiff alleges that defendants breached several duties by sending a disparaging letter to the Medical Board and that, as a result, he lost future earnings and employment opportunities. Notably, plaintiff claims in his first amended complaint and in an affidavit that he was assured that he had been cleared of all wrongdoing following the February 11, 2011 incident and that there would be nothing in his record regarding any suspension or probation.

Plaintiff's motion to amend the complaint is denied. Pursuant to CPLR § 3025 (b), motions to amend are freely granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (*Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166 [1989]). However, CPLR § 3025 (b) provides that, "[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Although plaintiff previously filed an amended complaint in this case, plaintiff's cross motion did not include a proposed second amended pleading, and so the cross motion is denied (*see Scialdone v Stepping Stones Assoc., L.P.*, 148 AD3d 950, 952 [2017]). Only the allegations and causes of action in the previously filed amended complaint are considered herein.

The Court next turns to defendants' motion to dismiss. On a motion to dismiss a complaint pursuant to CPLR R. 3211 "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 within any cognizable legal theory" (*Sokol v Leader,* 74 AD3d 1180, 1181 [2010] [internal quotation marks omitted]; *see Nonnon v City of New York,* 9 NY3d 825, 827 [2007]; *Leon v Martinez,* 84 NY2d 83, 87–88 [1994]).

Plaintiff's first two causes of action are for breach of contract and breach of the covenant of good faith and fair dealing. The statute of limitations for a breach of contract claim is six years (CPLR § 213 (2); *see Sanchez de Hernandez v Bank of Nova Scotia*, 76 AD3d 929, 930 [2010]). The statute of limitations commences to run on a cause of action for breach of contract when the contract is breached (*see* CPLR § 203 (a); *Kassner & Co. v New York*, 46 NY2d 544, 550 [1979]). This rule for determining when the statute of limitations begins to run applies, "even if no damage occurs until later" (*Collins v Unger*, 138 AD3d 421, 422 [2016]); *see Chelsea Piers L.P. v Hudson River Park Trust*, 106 AD3d 410, 412 [2013]). "[K]nowledge of the occurrence of the wrong on the part of the plaintiff is not necessary

to start the Statute of Limitations running in a contract action" (*Keles v Hultin*, 144 AD3d 988, 989 [2016]).

"In New York, all contracts imply a covenant of good faith and fair dealing in the course of performance" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). "This covenant embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*id.*) (internal citations omitted). The covenant of good faith and fair dealing cannot be construed so broadly as to create independent contractual rights (*see Peter R. Friedman, Ltd. v Tishman Speyer Hudson L.P.*, 107 AD3d 569, 570 [2013]); *Vanlex Stores, Inc. v BFP 300 Madison II LLC*, 66 AD3d 580, 581 [2009]); *Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [2003]).

In the case at bar, plaintiff had a one-year contract with the hospital. A review of the contract indicates that it was essentially a service contract, providing that plaintiff would work as a resident doctor at the hospital in exchange for pay and certain benefits. The amended complaint alleges that defendants breached the hospital's contract with plaintiff by sending a letter containing false statements to the Medical Board. However, sending a summary of plaintiff's record to the medical board, approximately two years after the expiration of the hospital's contract with plaintiff cannot be said to have been a breach any of the provisions of the contract. No provision remotely addresses such a scenario. Assuming the factual allegations of the complaint to be true, the breach occurred on or about February 11, 2011 when a record was made of the disciplinary action following allegations of plaintiff's mistreatment of a patient and notwithstanding the fact that plaintiff received assurances that no such record would be made. A claim for this breach, however, is barred by the six-year statute of limitations.

Moreover, the implied covenant of good faith and fair dealing, which is applicable to the parties' performance of all contracts, cannot be used here to create an

independent, and essentially never-ending, contractual duty on the part of defendants not to recount the information contained in the records of plaintiff's residency. There is nothing in the pleadings to suggest that plaintiff did not receive the education, compensation and other benefits of his residency agreement. The contract was long-expired when the letter was sent, and it is common practice for hospitals to send information regarding former residents to the Medical Board upon request (*see Douglas Elliman LLC v Corcoran Group Mktg.*, 93 AD3d 539, 540 [2012]) ("Nor did any duty arise under a theory of an implied covenant of good faith and fair dealing, as the contract between [the parties] had expired by the time of the [alleged breach]").

Assuming the facts alleged in the amended complaint to be true, and viewing them in the light most favorable to plaintiff, the only possible breach by defendants would have occurred when they allegedly suspended and placed plaintiff on probation without affording him proper due process, and then misrepresented to him how that discipline would be recorded on his record, which could then be sent to whatever subsequent programs or jobs plaintiff applied for. However, those alleged events would have taken place in February 2011, and so, the statute of limitations on any breach of contract or breach of the covenant of good faith and fair dealing expired before plaintiff commenced this action in May of 2017. As such, the causes of action for breach of the covenant of good faith and fair dealing, and for breach of contract must be dismissed.

The remaining causes of action asserted in the amended complaint must be dismissed as well. The causes of action for tortious interference with contract and *prima facie* tort are both subject to a three-year statute of limitations (*see Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [2012]). In this case, even calculating from the date the letter was sent to the medical board, the causes of action for tortious interference and *prima facie* tort are time-barred. Furthermore, the cause of action for *prima facie* tort

was intended to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy, not to provide a catchall alternative for every cause of action which is not independently viable (*see Epifani v Johnson*, 65 AD3d 224, 232 [2009]). Here, the traditional tort of defamation would have provided redress for defendants' allegedly false statements, if timely commenced. As such, plaintiff's cause of action for *prima facie* tort is meritless (*see Entertainment Partners Group v Davis*, 198 AD2d 63, 64 [1993]).

Similarly, the cause of action seeking a declaratory judgment must be dismissed. The statute of limitations period is dictated by the nature of relief sought in a declaratory judgment (*see DiRaimondo v Calhoun*, 131 AD3d 1194, 1198 [2015]). Furthermore, the relief sought by plaintiff, that this Court order defendants to revoke the letter to the medical board, is beyond the purview of CPLR § 3001 (*see Hyde Park Landing, Ltd. v Town of Hyde Park*, 130 AD3d 730, 731 [2015]). As such, the cause of action for a declaratory judgment must also be dismissed.

Plaintiff's request for injunctive relief is similarly time-barred and, additionally, plaintiff has not shown a likelihood of prevailing on the merits (*see Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]). Thus, plaintiff's cause of action for injunctive relief is dismissed.

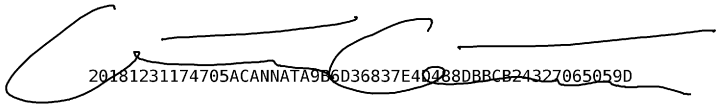
Lastly, the cause of action for promissory estoppel must also be dismissed because such actions are subject to the same six-year statute of limitations as breach of contract claims (*see* CPLR 213 [2]). Further, the written contract in effect between the parties precludes a claim for promissory estoppel (*see Hoeg Corp. v Peebles Corp.*, 153 AD3d 607, 610 [2017]); *Wald v Graev*, 137 AD3d 573, 574 [2016]).

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's amended

complaint is granted with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants; and it is further

ORDERED that plaintiff's cross-motion for leave to amend his complaint is denied as academic.



12/31/2018
DATE

ANTHONY CANNATARO, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE