

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

**ISAIAS IRGAU, M.D., GAIL WYNN,)
M.D., and CHRISTIANA INSTITUTE) CIVIL ACTION NUMBER
OF ADVANCED SURGERY, P.A.)
) 07C-11-180-JOH
)
Plaintiffs)
)
v.)
)
CHRISTIANA CARE HEALTH)
SERVICES)
)
Defendant)**

Submitted: February 1, 2008

Decided: April 9, 2008

MEMORANDUM OPINION

Appearances:

Richard R. Wier, Jr., Esquire, of Richard R. Wier, Jr., P.A., Wilmington, Delaware, attorney for plaintiffs

James Drnec, Esquire, of Balick & Balick, LLC, Wilmington, Delaware, attorney for defendant

HERLIHY, Judge

Plaintiffs, Dr Isaias Irgau, Dr. Gail Wynn, and Christiana Institute of Advanced Surgery, P.A., have sued Christiana Care Health Services alleging Christiana improperly abridged their admission privileges, tortiously interfered with their right to contact, violated the Deceptive Trade Practices Act, defamed them, and improperly retaliated against them. They seek damages.

Christiana has moved to dismiss. It argues plaintiffs have failed to adequately plead any cause of action. Alternatively, they seek a more definitive statement of each of plaintiffs' claims.

Factual Background

Doctors Irgau and Wynn are the partners in Christiana Institute of Advanced Surgery. On May 9, 2005, Christiana renewed their staff membership at Christiana Hospital. The renewal was for a term ending May 31, 2007. They were granted general surgical privileges, special privileges for advanced laparoscopic gastric bypass surgery for morbid obesity, and privileges for adjustable gastric band surgery.

Basically, they were granted privileges to perform bariatric surgery which is a multifaceted approach to obesity. They were the only surgeons in Delaware performing bariatric surgery.

At the time plaintiffs' privileges were renewed at Christiana, they were also performing this surgery at St. Francis Hospital in Wilmington. Prior to the renewal of their privileges, plaintiffs claim that the chairman of the Department of Surgery at

Christiana warned Dr. Irgau that plaintiffs' privileges could be jeopardized by continuing to treat patients at St. Francis. There were several conversations to this effect in January 2006. Plaintiffs allege Christiana did not want them treating patients at a competing hospital and this, not their clinical performance, jeopardized continued privileges at Christiana.

Plaintiffs assert Christiana pressured them to practice exclusively at that institution.

As a result, on January 13, 2006, Christiana's Chief Medical Officer, Dr. Keith Doram, wrote plaintiffs:

At last Thursday's meeting, January 5, 2006 with you and your attorney, we discussed the mutually exclusive component of the Bariatric Surgical Services Agreement. This quality-based requirement by the Board of Directors of Christiana Care for the provision of bariatric surgery was brought to your attention and has been discussed with you since July 2005. Since that time, you have repeatedly indicated that you understood this requirement and related that you were willing to move forward with this model. However, at Thursday's meeting you indicated your concern with the contractual requirement that, upon expiration of termination of the contract, your bariatric surgery privileges would also be terminated in order for Christiana Care to enter into a new exclusive agreement with a new group of bariatric surgeons. This is a standard provision of exclusive contracts, which is necessary to allow for a month and seamless transition in the event of a change in exclusive providers.

* * * * *

However, in your memo of January 9, 2006 you offered no such suggestions, and instead indicated that you are unwilling to participate in a mutually exclusive agreement at this time. We were very disappointed in your position. I also need to correct a mis-statement, and possible misunderstanding, as reflected in your memo. We did not suggest that because you refuse to sign the contract prohibiting you from practicing at St. Francis, CCHS would unilaterally remove your staff privileges to perform bariatric surgery without providing due process. We understood at the

meeting your primary concern was the contract provision that requires you to voluntarily relinquish your privileges at CCHS without following the due process provisions in the Medical-Dental Staff Bylaws in the event of expiration or termination of the agreement.

* * * * *

Effective today, and until we are able to contract with bariatric surgeons to support the Christiana Care Program, no new patients will be scheduled for bariatric surgery. However, in order to accommodate the needs of patients who are already enrolled in the Christiana Care Program, those patients may be scheduled for surgery when cleared by the pre-operative program and will be provided with the post-operative care provided by the Christiana Care Program.¹

On February 17th, Christiana sent a document addressed to “All Christiana Care Medical-Dental Staff Members.” In pertinent part, the memo stated:

- In March 2005, the Board of Directors, in order to assess the needs of the community and evaluate the current method for physician direction and staffing of the BSP, approved a moratorium on new bariatric surgery privileges and appointed a Bariatric Surgery *Ad Hoc* Committee to study and make recommendations to the Board regarding an appropriate and desirable methodology to achieve effective and efficient physician direction and staffing for the optimal provision of bariatric surgery services.
- In July 2005, after an extensive review of the literature, consultation with nationally recognized clinical and legal experts as well as the BS practice group and several medical-dental staff members (including the President of the Medical-Dental Staff and the Chair of Surgery), the *Ad Hoc* Committee recommended and the Board approved pursuing a mutually exclusive contract with one group for the physician staffing of the BSP. The Board’s decision was conveyed to and understood by the bariatric surgeons. The Medical-Dental Staff also was apprised of the decision.
- The bariatric surgeons notified administration in early January 2006 that they were not able to agree to the terms of the contract presented by Christiana Care. Further time was given for this group to reconsider, but

¹ Plaintiffs’ complaint, Exhibit C.

to no avail. Therefore, it was the decision of the Christiana Care Administration, with acknowledgment from the Christiana Care Board at the January 2006 Board meeting, that the current group would only be allowed to do bariatric surgery on those patients that were already enrolled in the program as of mid-January, 2006. It was also made clear that these same bariatric surgeons could continue to perform all other non-bariatric procedures that they were credentialed/privileged to do and their clinical presence at Christiana Care was very much appreciated.

* * * * *

- As soon as we have selected our lead bariatric surgeon, we will immediately restart the bariatric pre-surgery enrollment program. In the meantime, our Weight Management Program, under the leadership of James Lenhard, M.D., and Kim Tran, R.Ph., MBA, continues to thrive and expand.²

On February 19, 2006, Christiana distributed a newsletter to its employees, physicians, and others informing them about the Bariatric Surgery Program:

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* * * * *

The bariatric surgeons notified the administration in early January 2006 that they were not able to agree to the terms of the contract presented by Christiana Care. Further time was given for this group to reconsider, but to no avail. Therefore it was the decision of the CC administration, with acknowledgment from the CC Board at the January 2006 Board meeting, that the current group would only be allowed to do bariatric surgery on those patients that were already enrolled in the program as of mid-January, 2006. It was also made clear that these same bariatric surgeons could continue to perform all other non-bariatric procedures that they were

² Plaintiffs' complaint, Exhibit F.

credentialed/privileged to do and their clinical presence at CC was very much appreciated.³

Plaintiffs wrote to Dr. Doram on February 21, 2006, objecting to the “moratorium” on treating new patients. They complained about the pressure to enter into an exclusive contract with Christiana. They objected to the February 17th “Bariatric Surgery Update.” Plaintiffs also invoked (because of the effect on their privileges) the provisions in Christiana’s Medical Staff bylaws for a hearing and all concurrent procedural rights.⁴ Plaintiffs state their request was denied.

On March 27, 2006, Dr. Doram wrote plaintiffs acknowledging that the Hospital was aware that they wanted to provide bariatric surgery at the Hospital. The letter, however, stated that a condition of being able to perform such surgery was an exclusive contract with Christiana Care. Other conditions were mentioned.

Plaintiffs’ complaint states that the Staff Council (not otherwise identified) passed a motion requesting that the bylaws Fair Hearing procedure be set in motion. This request, plaintiffs allege, was ignored.

The plaintiffs assert they were defamed by the newsletters and communications. They claim their professional expertise was put into question and that the Hospital communications were sent, i.e., published, to persons who did not need and who had no

³ Plaintiffs’ complaint, Exhibit G.

⁴ Plaintiffs’ complaint, Exhibit E.

right to know. They also allege that Christiana's actions tortiously interfered with their relationships with patients and contractual relationships with St. Francis Hospital. Finally, plaintiffs allege certain retaliatory actions have been taken against them.

Plaintiffs contend Christiana acted willfully and maliciously, without justification or just cause. Its actions, they assert, caused them significant economic loss, damaged their reputations, caused emotional distress and caused them to incur costs and attorney's fees. They seek compensatory, punitive and treble damages, costs, and attorneys fees and other appropriate relief.

Christiana's Motion

Christiana moves to dismiss on several grounds. First, the claim for treble damages, it points out, arises under the Uniform Deceptive Trade Practices Act (UDTPA). But to obtain damage relief, it says plaintiffs must also show they have a basis for injunctive relief. Their complaint, Christiana asserts, contains no basis for such relief. It notes plaintiffs' privileges were restored in April 2006.⁵ Their complaint, therefore, does not make an adequate claim for a violation of the UDPTA and it wants all reference to it and treble damages stricken. Nor does plaintiffs' complaint make out a claim for tortious interference with their patients or with their relationship with St. Francis Hospital. Finally, Christiana questions whether there is a common law action for "retaliation" or even if plaintiffs have made out such a claim.

⁵ There is no record evidence of this, only an oral representation made at argument.

If all of plaintiffs' actions are not dismissed, Christiana moves for a more definitive statement and a complaint which breaks down the causes of action by count.

Applicable Standard

A motion to dismiss requires the Court to accept all well-pled allegations as true.⁶ The Court is not compelled, however, to blindly accept all allegations as they are nor to draw all inferences in plaintiffs favor unless reasonable.⁷

Discussion

Plaintiffs' UDTPA Claim

The plaintiffs make a passing reference to the UDPTA (Act) in Paragraph 20 of their complaint.⁸ Their complaint alleges a violation of 6 *Del. C.* § 2532(a)(8) and (12):

(a) A person engages in a deceptive trade practice when, in the course of a business, vocation, or occupation, that person:

(8) Disparages the goods, services, or business of another by false or misleading representation of fact;

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

⁶ *State ex rel. Secretary of Dept. of Transp. v. Regency Group, Inc.*, 598 A.2d 1123 (Del. Super. 1991).

⁷ *Dunlap v. State Farm Fire and Cas. Co.*, 878 A.2d 434, 439 (Del. 2005).

⁸ The act is found in 6 *Del. C.* § 2531-36.

If there is more, it is not clear from plaintiffs' complaint. The Act provides for two primary remedies, namely injunctive relief and treble damages.⁹ To sustain an action under the Act, the plaintiff must assert a basis for injunctive relief and without it, there is no standing for a cause of action under the UDTPA.¹⁰ As explained in *Dionisi v. DeCampli*:

A party seeking to recover [for Unfair Trade Practices] must have a basis for injunctive relief. The Act is designed to encourage immediate or at least timely enforcement of its provisions to halt unfair or deceptive trade practices between business with "horizontal relationships." . . . Injunctive relief coupled with the possibility of treble damages and counsel fees looms as a powerful deterrent against wrongdoers and an incentive to litigate for the wronged. *It is not a vehicle for damages long after the immediacy of the grievance dissipates.* When the press for instant action eases, so does the basis for possible concomitant damages. The [Unfair Trade Practices Act] is not a platform for an independent common law damage suite.¹¹

A party need not, however, actually have sought and been granted injunctive relief to have the standing to recover under the UDTPA.¹² Standing under the UDTPA is established by "the nature of the wrong and that it is, *or was*, amendable to injunctive relief."¹³ The requirement of standing to seek an injunction does not exclude the possibility

⁹ 6 *Del. C.* § 2533.

¹⁰ *Grand Ventures, Inc. v. Whaley*, 632 A.2d 63, 70 (Del. 1993).

¹¹ 1995 WL 398536 (Del. Ch.). (emphasis in original).

¹² *State ex rel. Brady v. Fallon*, 1998 WL 283438 (Del. Super.); *aff'd Fallon v. State ex rel. Brady*, 755 A.2d 388 (Del. 2000).

¹³ *Griffin Corporate Services, LLC v. Jacobs*, 2005 WL 2000775 (Del. Ch.) at *7.

that the deceptive trade practice may cease before an injunction is issued.¹⁴ Hypothetically, “an injunction could still issue to prevent future wrongs even though damages may be the only meaningful remedy.”¹⁵

The basis for possible injunctive relief cannot be as stale as here or *in nubibus*. Plaintiffs’ privileges to perform surgery and care for new patients were restored in April 2006.¹⁶ The wrong which may have formed the basis for injunctive action appears to have ended in April 2006. This action was filed in July 2007. In this case, “(t)he press for instant action ceased long ago.”¹⁷

In sum, plaintiffs’ basis for injunctive relief, whatever it may have been in 2006, ceased fifteen months prior to filing suit. There is no basis in their complaint from July 2007 until present. While they may have sought other “appropriate relief,” they did not explicitly seek injunctive relief and even now do not seek it. The thrust of the UDTPA is to attack alleged wrongs when fresh, not when so historical, as here. Plaintiffs’ ephemeral argument that the suspension/moratorium could be re-imposed at any time does not provide a basis for injunctive relief.

¹⁴ *Grand Ventures*, 632 A.2d at 70.

¹⁵ *Id.*

¹⁶ If this is wrong and full pre-“moratorium” privileges were not restored, plaintiffs must so inform this Court by an amended pleading.

¹⁷ *Lipson v. Anesthesia Services, A.A.*, 790 A.2d 1261, 1290 (Del. 2001).

Without a basis for injunctive relief, either when suit was filed or now, and even though not expressly sought, plaintiffs have failed to meet the threshold for a treble damages claim under the UDTPA. Any part of their action deriving from the UDTPA is dismissed.

Tortious Interference Claim

In the Court's view, when Christiana placed the moratorium on plaintiffs' admitting new bariatric surgery patients, the process for doing so violated its bylaws. The privileges granted to plaintiffs in 2005 to last two years, and which included admitting new patients, were "reduced."¹⁸ That should have triggered Christiana's Fair Hearing process. Apparently, it did not. The issue, however, is not that violation *per se* but whether the moratorium was an act tortiously interfering with plaintiffs' contracts. The role of Christiana's communications may come into play, too.

Under Delaware law, a plaintiff must establish the following elements to make a claim for tortious interference with contract: "(1) a contract, (2) about which defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."¹⁹ Christiana contends that, because the moratorium did not extend to those patients already enrolled in the bariatric surgery program, plaintiffs fail to establish the first element, "a contract." In the

¹⁸ Plaintiffs' complaint, Exhibit B, p. 24.

¹⁹ *Luscavage v. Dominion Dental USA, Inc.*, 2007 WL 901641 (Del. Super.) at *2.

complaint, plaintiffs state “[d]efendant tortiously interfered with Plaintiffs’ existing and prospective business relations and contracts with patients who were candidates for or desired to have Bariatric surgery...”²⁰ Plaintiffs do not, as Christiana points out, identify any specific contracts which may have been adversely affected by the moratorium. In order for a party to succeed on a theory of tortious interference with contract, “there must be an actual breach of a valid and enforceable contract.”²¹

From the allegations in the complaint regarding tortious interference, it is, at the very least, unclear to the Court with which of plaintiffs’ patient contracts, if any, Christiana tortiously interfered. In order for this claim to be sustained, plaintiffs should provide a more definite statement of what existing, and not prospective,²² contracts with which they are claiming Christiana tortiously interfered, such as with prospective patients in the period covered by the moratorium. Otherwise, this claim will be dismissed.

Christiana attacks plaintiffs’ claim for tortious interference regarding their contract with St. Francis Hospital. In the complaint, that claim is contained in the same paragraph

²⁰ Comp. ¶ 18.

²¹ *Ariba, Inc. v. Electronic Data Systems Corp.*, 2003 WL 943249 (Del. Super.) at *5.

²² It appears from the complaint that plaintiffs have also asserted a claim for interference with prospective contracts. Defendant, however, does not contest that cause of action in its motion and for that reason the Court has not discussed the sufficiency of that claim.

alleging violations of UDTPA.²³ However, for the purposes of this motion, it can be parsed out as a stand-alone common law claim for tortious interference and dealt with as such. Christiana contends that this claim should also fail “because the Complaint fails to allege any impairment of any contract with St. Francis Hospital.”²⁴

In this case, plaintiffs allege that the “moratorium” was based upon their refusal to sign an exclusive contract with Christiana. Their claim for tortious interference of their contract with St. Francis is based upon the assertion that if they were to have signed the exclusivity contract with Christiana, St. Francis would have sued them for violations of anti-trust laws. On this claim, plaintiffs’ complaint fails to satisfy element five because the injury is not actual, it is merely speculative. From the facts presented in the complaint, it cannot be determined whether plaintiffs would have been sued under their contract with St. Francis had they signed the exclusivity contract with defendants.

The record at this point on the St. Francis relationship is lacking. There is no mention if plaintiffs ceased their relationship with that hospital or because of Christiana’s actions, certain deleterious things transpired in that relationship. Plaintiffs will have time to fill in the gaps, if they can.

Retaliation Claim

Christiana argues that plaintiffs failed to plead a cognizable claim for retaliation. It

²³ Comp. ¶ 20.

²⁴ Def.’s Motion ¶ 7.

points to paragraph 28 of the complaint, wherein plaintiffs state: “[d]efendant has continued its retaliation against the Plaintiffs...”²⁵ Plaintiffs go on in that paragraph to restate its assertion that defendant engaged in “deceptive trade practices.”²⁶ It is unclear to the Court whether plaintiffs use of the word “retaliation” was simply used to describe a further basis for their UDTPA claim or if they are stating a separate and distinct claim for “retaliation.”²⁷ If the plaintiffs intended the latter, the Court agrees with Christiana that a more definite statement of that claim is required in order for defendants to reasonably frame a response to such a claim.²⁸

Christiana’s Motion for Definitive Statement

Finally, as to the entire complaint,²⁹ Christiana moves under 12(e) for a more definite statement of plaintiffs’ claims. It contends the complaint does not comply with Rule 10(b) as plaintiffs’ claims are not stated in a “separate count”³⁰ and have “failed to

²⁵ Comp. ¶ 28.

²⁶ This claim under UDTPA was discussed above. *Infra* pp. 3.

²⁷ Plaintiff’s response does not directly “clear up” this uncertainty. It does, however, appear that the term is indeed being used to support the UDTPA claim and not as a separate claim.

²⁸ Pursuant to Super. Ct. Civ. R. 12(e).

²⁹ In its introduction, defendant’s motion requests a more definite statement as to “any remaining claims.” However, in paragraph 9, defendant requests a more definite statement as to “the entire Complaint.” Def.’s Motion.

³⁰ Super. Ct. Civ. R. 10(b).

clearly identify each discrete cause of action that they are asserting.”³¹ The Court agrees that the complaint does not set out each claim in a separate count, which would certainly have been helpful to the Court. However, it does not agree that plaintiffs have not sufficiently identified at least some cognizable claims against Christiana. In addition, it is Christiana which has not properly complied with the dictates of Rule 12(e) by “point[ing] out the defects [in the complaint] complained of and the details desired.”³² Indeed, other than asserting generally that all of plaintiffs claims are lacking, Christiana has not indicated to the Court specifically how the claims are lacking and what information would be needed in order for them to prepare a responsive pleading. Despite these deficiencies in Christiana’s argument, the Court will order a more definite statement under 12(e) so that each cause of action is distinctly set out by count and paragraph.

Conclusion

In conclusion, for the reasons stated herein:

1. Defendant Christiana’s motion to dismiss plaintiffs’ UDTPA and to strike any such claims is **GRANTED**.

2. Defendant Christiana’s motion to dismiss plaintiffs’ retaliation claim is **DENIED**, and plaintiffs are ordered to provide a more specific basis for this claim within twenty (20) days.

³¹ Def.’s Motion ¶ 9.

³² Super. Ct. Civ. R. 12(e).

3. Defendant Christiana's motion to dismiss plaintiffs' tortious interference claims is **DENIED**, but plaintiff shall have twenty (20) days from the date of this opinion to amend their pleadings to meet the elements of such claim.

4. Plaintiffs shall amend within twenty (20) to separately plead the remaining causes of action.

IT IS SO ORDERED.

J.