SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

March 18, 2009

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RE: *Richard J. Sternberg, M.D. v. Nanticoke Memorial Hospital, et al.*
C.A. No. 07C-10-011(THG)

Dear Counsel:

This is the Court's decision as to Plaintiff's pending Rule 11 Motion concerning Defendant, Nanticoke Memorial Hospital, Inc. ("Hospital").

On November 21, 2008, the Plaintiff filed a Motion for Sanctions against Hospital as to Count 2 of Defendant Hospital's counterclaim. Hospital admitted that Plaintiff had served the Motion on Hospital on October 31, 2008. There was compliance with Rule 11(c)(1) requirement that the non-moving party be given twenty-one (21) days to withdraw the challenged pleadings before the Motion is filed with the Court. (Safe Harbor provision). The challenged counterclaim was not withdrawn until December 3, 2008.

Rule 11 allows the Court to impose sanctions against an attorney and/or the party he or she represents. Rule 11(c); Federal Practice and Procedure, Wright & Miller, Vol. 5A §1336.2.

The Motion is granted.

BACKGROUND

The parties are involved in a contentious lawsuit and unfortunately their mutual dislike of each other has caused some troublesome pleadings by both sides.

When Dr. Sternberg practiced medicine in Seaford, his relationship with Nanticoke Memorial Hospital, Inc. ("Hospital") and other doctors was difficult, at best. When he left, he sued the Hospital and over a dozen doctors. His pleadings are not directly the subject of this Motion, but his allegations set the tone of the relationship and triggered the counterclaim at issue.

The Hospital operated a Community Trauma Center. In order to be certified, there existed a requirement that there be a sufficient number of orthopedic physicians available to be "on call" to respond to and treat trauma patients at the Hospital. Friction developed between the Hospital and Dr. Sternberg about Dr. Sternberg's alleged negativity in regard to the Trauma Center.

Dr. Sternberg was perceived as a quarrelsome person, and eventually the Hospital took the step of forcing him to be evaluated and assisted by the Physicians's Health Program. In 2006, Dr. Sternberg's treating psychiatrist, Dr. Jeannette Zaimes, and Dr. Carol Tavani, the psychiatrist from the Physician's Health Program assigned to monitor Dr. Sternberg, both agreed that removing Dr. Sternberg from full "on call" responsibility would be helpful in treating him. Dr. Sternberg was permitted to treat his own patients on an emergency or "on call" basis.

The removal of Dr. Sternberg from being "on call" frustrated the Hospital because of the difficulty of complying with the Trauma Center credentialing requirements. The Hospital was also frustrated because the removal from "on call" was thought to be temporary, but months turned into years. But the "temporary" designation from a medical standpoint must be compared to a "permanent" medical impediment or problem.

The history of the escalating bad blood between the parties is unnecessary for this decision. The Trauma Center had to be reduced to a lower grade Trauma Center which impacted the finances of the Hospital because they were unable to recruit another orthopedic physician to the Seaford area.

In January 2008, Dr. Sternberg resigned and moved away. He then sued the Defendants. In April 2008, the Defendants filed a counterclaim, claiming economic interference by Dr. Sternberg. That counterclaim is the subject of this Motion.

The Hospital alleged that Dr. Sternberg's refusal to take emergency calls constituted "a tortuous interference with business expectations and opportunities of the Hospital". The Hospital further alleged Dr. Sternberg's conduct "was intentional, wanton, willful and fraudulent" because there was no documented medical reason for the ongoing "temporary" excuse for not taking calls.

Two very important letters which the Hospital had in its possession at the time the counterclaim was filed are critical to this Rule 11 decision.

The first is a December 2007 letter from Dr. Carol Tavani, the doctor monitoring Dr. Sternberg for the Physicians's Health Program, the program that Dr. Sternberg was forced to become involved in by the Hospital in 2006. It states as follows:

> I am in receipt of a letter to Dr. Richard Sternberg dated December 17, 2007 regarding unassigned on-call coverage. The letter states that he must let you know whether he is willing to take full call or no longer take call for his own patients.
>
> Dr. Sternberg's physician (Dr. Jeannette Zaimes) is of the opinion that while he is able to see his own patients, the full call schedule would risk destabilizing him. This was also the opinion rendered by the Physicians' health program when he was evaluated in the past.
>
> I had been contacted by Dr. Connell to reassess Dr. Sternberg's ability to resume the full call schedule; an appointment had been set up, and I have also spoken with his treating doctor, as Dr. Sternberg requested I do before evaluating him.
>
> This issue never involved any intent on his part to decline patients unable to pay or any other violation of EMTALA, but it does involve his right to reasonable accommodation under the ADA.
>
> I now understand that Dr. Sternberg will be leaving in the near future. If you still wish that he be evaluated for the purpose of determining his ability to resume full call (please note that your hospital has agreed to pay for this at a rate of $400/hour), I will be happy to do so, but given his medical issues it would appear unwise to have him to do so until cleared.
>
> Please call me if there are any questions and also please advise as to whether it is necessary to keep the appointment for reevaluation.

This letter made it clear that both the treating physician and the monitoring physician both agreed that a full "on call" schedule would put the patient (Dr. Sternberg) at risk. It is stated in the present sense, not in the past tense. If the Hospital wanted him evaluated to see if he could resume "on call", that could be done, "but given his medical issues it would appear unwise to have to do so until cleared" by his psychiatrist.

A second letter relevant to this Motion was also sent to the Defendant Hospital on January 4, 2008. It was from Dr. Sternberg's treating psychiatrist and explains the need for the "on call" accommodation under the American Disabilities Act.

So at the time the counterclaim was filed, the Hospital knew the following:

(a) Dr. Sternberg was believed to be a troublesome doctor to the point he was forced by the Hospital to be evaluated and monitored by the Physicians' Health Program.

(b) that his treating psychiatrist and Physicians' Health Program's psychiatrist had put him on a treatment plan that included removing him from "on call".

(c) that despite the Hospital's frustration with Dr. Sternberg, neither the treating psychiatrist nor the monitoring psychiatrist ever changed their medical opinion as to the "no call" recommendation.

(d) that the Hospital was aware that certain relationships between a doctor and his patient are confidential.

(e) that several weeks before Dr. Sternberg resigned and left the area, the Hospital had two letters confirming that the accommodation for "no call" was still necessary and appropriate.

So when the Hospital alleged Dr. Sternberg intentionally, wantonly, willfully and fraudulently interfered with the Hospital's business expectations by not taking call, it knew Dr. Sternberg was not taking call due to the directions of his physician. And they knew the monitoring physician agreed. Simply put, the Hospital knew or should have known this claim was unfounded.

The Hospital's attorney argued that he did not have the above information when the claim was filed, but he did get this information as the case developed. Prior to the Rule 11 Motion for Sanctions being filed, the Hospital's attorney concluded the counterclaim should be withdrawn. After the Rule 11 Motion was filed, the Hospital and counsel had twenty-one (21) days to withdraw the counterclaim Rule 11(c)(1). Counsel argues he advised the Hospital to withdraw the counterclaim to resolve the Rule 11 Motion. The Hospital refused to withdraw the counterclaim because there was still outstanding discovery. When I asked if his client was just stringing it out, Hospital's attorney did not dispute that conclusion. Later the Hospital did authorize the withdrawal of the counterclaim and a stipulation was filed accomplishing same.

I find that when the Hospital directed their attorney to file the counterclaim, the Hospital knew that Dr. Sternberg was under doctors' orders not to take call. Therefore, there was no basis to allege he intentionally, wantonly, willfully and fraudulently did not take call. The Hospital knew it had no right to have any documented medical reason for his doctors' recommendations because patient-doctor communications are confidential and privileged. Nevertheless, the Hospital directed that the counterclaim go forward. I also note the $3 million claim by the Hospital as damages is exactly the amount sought by Dr. Sternberg in his complaint (i.e., tit for tat).

After the Hospital's attorney became aware there was no evidentiary support for the counterclaim and that it would be impossible to prove the allegations, he had a continuing Rule 11 duty to withdraw the claim. He advises he tried to withdraw the claim but his client would not let him, thereby placing him in the dilemma of having to comply with his client's wishes versus his responsibility to the Court.

Rule 11(c)(2) notes that a sanction for a Rule 11 violation shall be limited to what is sufficient to deter similar conduct by others similarly situated. I note that if the withdrawal of the counterclaim had come within the twenty-one (21) day "safe harbor", that would have ended the matter.

Therefore, in exercising the Court's discretion as to an appropriate sanction, I took into consideration the aforementioned facts and the poisoned relationship between the parties. The counterclaim is but a small fraction of the entire case.

I also considered the Rules' guidance in imposing a sanction as contained in Rule 11(c)(2) wherein the sanction should be sufficient to deter comparable conduct by others. I am satisfied that this experience has humbled Hospital's counsel, and this decision itself is a sufficient sanction. Hospital knew much more when it authorized the counterclaim, and it has been represented the Hospital was reluctant to retreat in the face of the Rule 11 Motion. I have concluded a payment to the Court is not appropriate, but paying some of the reasonable attorneys' fees of Dr. Sternberg's attorneys in defending their client and having to file and prosecute the Rule 11 Motion including this reargument is appropriate.

Mr. Carucci shall provide an affidavit as to the time spent by one attorney in preparing and prosecuting the Motion for Sanctions. In determining a reasonable sanction, I also looked at the time the opposing party spent in defending the Motion. Both parties shall submit affidavits as to time spent on the Rule 11 Motion, as well as their hourly fee, by March 30, 2009.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

baj
cc: Prothonotary