

<b>Brill Physical Therapy, P.C. v Leaf</b>
2011 NY Slip Op 33903(U)
August 4, 2011
Supreme Court, New York County
Docket Number: 600629/2009
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT **HON. EILEEN BRANSTEN**

PART 3

Index Number : 600629/2009

**BRILL PHYSICAL THERAPY**

VS.

**LEAF, STEPHEN**

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. 600629/09

MOTION DATE 3/2/11

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

PAPERS NUMBERED	
_____	1
_____	2
_____	3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

Dated: 8-4-11



**HON. EILEEN BRANSTEN**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART THREE

-----X  
BRILL PHYSICAL THERAPY, P.C.,

Plaintiff,

-against-

Index No. 600629/2009  
Motion Date: 3/2/11  
Motion Seq. No.: 003

STEPHANIE LEAF, NEW LEAF WELLNESS  
and VERTICAL RESPONSE,

Defendants.

-----X  
PRESENT: BRANSTEN, J.

Defendants Stephanie Leaf and New Leaf Wellness (“New Leaf”, and, with Stephanie Leaf, “Defendants”) move pursuant to CPLR 3211 (a) (7) to dismiss Plaintiff Brill Physical Therapy, P.C.’s (“Brill Physical Therapy”) second cause of action for failure to state a cause of action for tortious interference with contract.

**Background**

Brill Physical Therapy is a New York corporation that provides physical therapy and rehabilitation services. It is owned by Margaret Brill, a renowned physical therapist. Brill opened Brill Physical Therapy in 1993, and the company now has 4,000 active patients.

Brill Physical Therapy is defined by the state of New York as a Health Care Provider. It is therefore governed by the Health Insurance Portability and Accountability Act of 1996 (“HIPPA”) and the New York State Education Law Title VIII, Article 136, Sections 6730-6743, in addition to other New York State laws. Pursuant to these laws,

patient information is privileged and confidential medical information. Brill or her employees are thus unable to disclose or use patient information without the patient's express consent.

Defendant Leaf is a licensed physical therapist. Leaf worked for Brill Physical Therapy from May 2003 to January 2009, first as a physical therapist and then as a clinical director. While working at Brill Physical Therapy, Leaf had access to password-protected client lists and patient information.

Leaf left Brill Physical Therapy in January of 2009 to form a new business, "New Leaf Wellness." Plaintiff alleges that in February of 2009, Brill became aware that Leaf had been soliciting Brill Physical Therapy's patients for treatment at New Leaf Wellness. According to the complaint, Leaf had not obtained permission from Brill or the patients to utilize patient information. Second Amended Complaint, ¶ 12.

Plaintiff served its initial complaint on May 4, 2009. Plaintiff alleged against Stephanie Leaf and New Leaf Wellness claims of misappropriation of trade secrets (Brill's patient information), tortious interference with contract and two claims of breach of contract. Plaintiff amended its complaint on July 14, 2009, to add causes of action against Leaf for falsely representing hours worked on Brill's behalf, fraud and trover and conversion of money.

On February 17, 2010, Plaintiff moved for partial summary judgment on liability for its first cause of action for misappropriation of trade secrets and its third cause of

action for breach of employment contract. Defendants cross-moved to dismiss the complaint for failure to state a cause of action. On September 24, 2010, this court denied Plaintiff's motion for partial summary judgment on the grounds that the motion was premature. The court granted Defendants' cross-motion to dismiss Plaintiff's second cause of action for tortious interference with contract but gave Plaintiff leave to replead (the "September 24, 2010 Order"). Plaintiff did so on October 25, 2010.

Defendants brought their instant motion to dismiss Plaintiff's amended cause of action for tortious interference with contract on November 5, 2010.

Oral argument was held on February 15, 2011, and the motion was fully submitted on March 2, 2011.

### Analysis

Defendants contend that Plaintiff has failed to assert a claim for tortious interference of contract and, therefore, the claim must be dismissed. Defendants argue that Plaintiff has failed to name specific contracts with which Defendants tortiously interfered. In opposition, Plaintiff argues that it has pled the elements of the claim with sufficient specificity in order to survive a motion to dismiss. Plaintiff is correct.

### Standard of Law

On a motion to dismiss a complaint pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (N.Y. 1994). The court accepts the facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference and determines only whether the facts as alleged fit within any cognizable legal theory. *Id.* at 87-88. “Whether a [party] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

On a motion to dismiss under CPLR 3211 (a) (7), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the pleading fails to state a cause of action. The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. *Leon v. Martinez*, 84 N.Y.2d at 87-88. The court may review the complaint and the affidavits supporting the opposition to the motion to dismiss to determine if a cause of action has been sufficiently pled. *See Mobile Training & Education v. Aviation Ground Schools of America*, 28 Misc.3d 1226(A), 2010 WL 3310257, \*8 (N.Y. Sup. Ct., N.Y. County, June 23, 2010) (Bransten, J.).

### Plaintiff's Claim

In order to plead a claim for tortious interference of contract, the claimant must allege: (1) the existence of a valid contract between the plaintiff and a third party;

(2) defendant's knowledge of that contract; (3) defendant's intentional procurement of the third-party's breach of the contract without justification; (4) actual breach of the contract; and (5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996) (citations omitted); *Burrowes v. Combs*, 25 A.D.3d 370, 373 (1st Dep't 2006).

In moving to dismiss Plaintiff's amended claim, Defendants first contend that Plaintiff has pleaded no new facts in their Second Amended Complaint and therefore, the claim must be dismissed for the same reasons the court dismissed the original claim. *See* Defendants' Memorandum of Law in Support of Motion to Dismiss, dated November 5, 2010, p. 2. Plaintiff has, however, plead new facts. In its Second Amended Complaint, Plaintiff identified which contractual relationships with which Defendants allegedly interfered. Second Amended Complaint, ¶¶ 24-27. Plaintiff's amended pleading therefore does state allegations of tortious interference with contract sufficient to survive a motion to dismiss.

Specifically, Plaintiff's second amended complaint alleges that Defendants tortiously interfered with contracts between Brill and the patients listed on the confidential Brill Patient List. Second Amended Complaint, ¶ 25. Treatment by a doctor may give rise to a contractual relationship subject to unlawful interference. *Comprehensive Community Development Corp. v. Lehach*, 223 A.D.2d 399, 400 (1st Dep't 1996). Defendants have not disputed that a doctor-patient contract is sufficient to

support a tortious interference claim. *See* Oral Argument of February 15, 2011 (Jack L. Morelli, CM, CSR), p. 5:2-6 (Defendants' Motion for Leave to Dismiss the Plaintiff's Second Amended Second Cause of Action). The oral doctor-patient contracts between Brill and the patients found on the confidential patient list are valid contracts with which interference may be found. *See Comprehensive Comty. Dev. Corp. v. Joan G. Le-Hach*, 223 A.D.2d at 399; *see also Allan Dampf, P.C. v. Bloom*, 127 A.D.2d 719 (2d Dep't 1987).

Plaintiff's Second Amended Complaint states that Leaf caused a "currently unknown number of the Brill patients to breach their contractual relationship with Brill and join the Leaf practice. Accordingly, Brill has lost an as yet unknown number of patients and incurred significant losses." Defendant Leaf has admitted to using the confidential Brill Patient List. Consequently, there are potentially 1500 contracts with which Defendant Leaf interfered. Although discovery may be necessary to determine the extent to which these claims may be developed further, enough has been shown at the outset to demonstrate that discovery "would not be an empty fishing expedition." *Daniel Goldreyer, Ltd. v. Van de Wetering*, 630 N.Y.S.2d 18, 24 (1st Dept. 1995).

Defendants, relying on *McGill v. Parker*, 179 A.D.2d 98 (1st Dep't 1992), further argue that Plaintiff did not plead its cause of action for tortious interference with contract with sufficient specificity. Defendants argue that Plaintiff did not specify which customer relationships were affected. In *McGill*, the court dismissed the plaintiff's claim of



interference with business relationships because plaintiffs did not make sufficiently particular allegations of interference with specific contracts or business relationships. The complaint in *McGill* only generally referred to plaintiff's customers, without providing any guidance or evidence that these customers could be identified. The issue in *McGill* was that there were no specific contracts with the clients, not that the customers had not been individually named. *McGill v. Parker*, 179 A.D.2d at 105. Defendants here provide no support for their contention that specific names of the third parties are required in order to properly plead a claim for tortious interference with contract. Rather, it is sufficient that Plaintiff plead that specific contracts between doctors and patients exist with which Defendant interfered. *See Constantin Assocs. v. Kapetas*, 17 Misc.3d 1137[A]. \*2, Index No. 601305/2006 (N.Y. Sup. Ct., N.Y. County, 2007) (Fried, J).

On a motion made pursuant to CPLR 3211 (a) (7), the court will accept each of the factual allegations of the complaint as true, sustain the pleading when a cause of action may be discerned, even if inartfully stated, and make no effort to evaluate the ultimate merits of the case. *See McGill v. Parker*, 179 A.D.2d at 105. Although it is possible that none of Brill Physical Therapy's client relationships were, in fact, affected, this issue is not appropriate for a motion to dismiss. Plaintiff has pleaded the existence of valid contracts with which Defendant may have interfered. Providing Plaintiff all favorable inferences, Plaintiff has adequately pleaded a cause of action for tortious interference with contract.

Accordingly,

Defendants Stephanie Leaf, New Leaf Wellness, and Vertical Response's motion to dismiss Plaintiff Brill Physical Therapy, P.C.'s cause of action for tortious interference with contract is denied.

This constitutes the Decision and Order of the Court.

Dated: New York, NY  
August 4, 2011

Enter:



Eileen Bransten, J.S.C.