Brook v Peconic Bay Med. Ctr.
2018 NY Slip Op 31001(U)
May 23, 2018
Supreme Court, New York County
Docket Number: 650921/2012
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 39

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ADAM BROOK, ADAM BROOK M.D., PH.D., P.L.L.C.,

Plaintiff,

INDEX NO. 650921/2012

MOTION SEQ. NO. 015

DECISION AND ORDER

- v -

PECONIC BAY MEDICAL CENTER, RICHARD KUBIAK, DANIEL MASSIAH, AGOSTINO CERVONE, JAY ZUCKERMAN, JOAN HOIL, ANDREW MITCHELL,

Defendant.

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The following e-filed documents, listed by NYSCEF document number 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 570, 588, 589, 590, 591, 592, 593, 594, 659

were read on this application to/for Amend Caption/Pleadings

HON. SALIANN SCARPULLA:

This action arises from an Adverse Action Report ("AAR") that defendant Peconic Bay Medical Center (together with individual defendants, "PBMC") filed with the National Practitioner Databank after plaintiff Adam Brook, M.D. (together with plaintiff Adam Brook, P.L.L.C., "Brook") resigned following a surgery he performed on October 2, 2009.

On March 23, 2012, Brook filed his initial complaint in this court, which contained ten causes of action. In a decision dated October 18, 2016, I dismissed certain of Brook's claims. Brook subsequently appealed, my decision was modified, and the

following causes of action now remain: (1) breach of contract; (2) fraud; (3) negligent misrepresentation; (4) promissory estoppel; and (5) tortious interference with economic advantage. *See Brook v. Peconic Bay Medical Center*, 2016 N.Y. Slip Op. 31977(U) (N.Y. County Oct. 18, 2016), *affirmed as modified*, 152 A.D.3d 436 (1st Dep't 2017).

Brook moves for (1) leave to amend the complaint by adding claims for negligence, gross negligence, and "wrongful interference with business" and by increasing his punitive damages demand to $100 million, pursuant to CPLR 3025 (b); (2) leave to amend the complaint to conform to the evidence, pursuant to CPLR 3025 (c); and (3) leave to renew the previously dismissed defamation and breach of fiduciary duty causes of action, pursuant to CPLR 2221.

Discussion

Leave to amend a complaint is freely granted "upon such terms as may be just[.]" CPLR § 3025 (b). "In determining whether to grant a motion to amend [the complaint], the court should consider the merit of the proposed [cause of action] and whether the plaintiff will be prejudiced by the delay in raising it" *Lanpont v Savvas Cab Corp., Inc.*, 244 A.D.2d 208, 209–10 (1st Dep't 1997); *see also See also MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010) ("On a motion for leave to amend, plaintiff . . . [must] show that the proffered amendment is not palpably insufficient or clearly devoid of merit") (citation omitted).

Regarding the proposed negligence and gross negligence claims, Brook argues that, as a hospital accredited by the Joint Commission on the Accreditation of Hospital Organizations ("JCAHO"), PMBC violated JCAHO standards during the peer review

process, which violations constitute negligence per se. However, JCAHO standards do not impose a statutory duty upon PMBC toward Brook in the context of an employment relationship, and Brook has not cited, and I have not found, any New York precedent creating a new cause of action based upon such a duty.[1] Absent legislative action or a common law basis, I decline to impose a duty of care on a hospital toward its' employee physicians based on the JCAHO standards, the alleged violation of which would afford the employee physician a newly created negligence claim.

Absent a statutory or common law duty, Brook's causes of action for negligence and gross negligence are devoid of merit irrespective of whether PMBC deviated from JCAHO standards. *See Pasternack v Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016) ("In the absence of a duty, as a matter of law, there can be no liability"); *Elliott v City of New York*, 95 N.Y.2d 730, 736 (2001) ("In the absence of a violation of a statutorily imposed duty in this case, a negligence per se finding was unwarranted and defendants are entitled to a reversal and a new trial."). Accordingly, I deny Brook's motion to amend the complaint to add negligence and gross negligence causes of action.

Brook also seeks to add a claim for "wrongful interference with business," arguing that PMBC's "conduct in performing Quality Assurance Review and physician peer-

[1] Brook cites *Kelley v Apria Healthcare, LLC*, 232 F. Supp. 3d 983 (E.D. Tenn. 2017), which held that "[u]nder *Tennessee* law, Joint Commission standards may be used to fix the standard of care in negligence per se claims." *Id.* at 1002 (emphasis added). *Kelley* is distinguishable because it does not involve a hospital and a physician in the employment context but rather, a patient and a medical equipment provider. Additionally, *Kelley* incorporates JCAHO as the standard of care where a properly alleged duty already exists. Here, no duty exists to evaluate PMBC's conduct against JCAHO as the standard.

review here extended . . . into the realm of intentional interference with business." Upon review of the proposed amended complaint, this cause of action largely replicates the allegations of the negligence cause of action but instead inserts, "intentional and without justifiable excuse[.]" Brook's attempt to base an intentional tort claim on PMBC's alleged violation of JCAHO standards, by adding a claim for "wrongful interference with business," fares no better than the proposed negligence cause of action.

To the extent Brook seeks to add the "wrongful interference with business" cause of action based on post-complaint PMBC communications (or lack thereof) with hospitals concerning his employment history, Brook's claim for tortious interference with economic advantage is extant, and PMBC admits no surprise regarding such additional allegations *vis-à-vis* that claim. *See* Oral Argument Tr. 24:18 – 26, Jan. 3, 2018. Accordingly, I deny Brook's request to add a "wrongful interference of business" cause of action and instead permit Brook to amend the tortious interference with economic advantage cause of action to conform to the evidence, pursuant to CPLR 3025 (c), at the end of the trial in this action.

I treat Brook's request to amend the complaint, pursuant to CPLR 3025 (c), to add that PMBC held one "meeting conducted in an intentionally malicious or grossly negligent manner" in a similar way. There is nothing in this proposed amendment to which PMBC could claim prejudice, so Brook may also move to conform the pleadings to the proof as to this allegation, after trial.

I deny without prejudice Brook's request to increase the *ad damnum* clause from $25 million in punitive damages to $100 million. In the event the jury finds that Brook is

entitled to punitive damages in an amount greater than that pled in the complaint, he may seek a post-verdict amendment to raise the demand sum, pursuant to CPLR 3025 (c).

Finally, Brook seeks leave to renew, pursuant to CPLR 2221, the defamation and breach of fiduciary duty causes of action previously dismissed, which dismissal was affirmed by the Appellate Division, First Department. Although I already denied Brook's motion for leave to renew in a decision and order dated July 7, 2017, I reiterate that the alleged new evidence would not change the prior determination for the following reasons.

Regarding defamation, Brook seeks to renew based on allegations that PMBC made additional and subsequent defamatory statements by "publishing" the AAR to other hospitals and by responding to other hospitals' credentialing inquiries about Brook. These alleged subsequent publications do not change my prior determination, *i.e.*, that the allegations are insufficient to overcome PMBC's qualified privilege.

As for breach of fiduciary duty, Brook seeks to renew "not by virtue of an employer-employee relationship, but by virtue of PBMC's duty to act fairly in physician credentialing matters." As I have previously held, Brook and PMBC had an employer-employee relationship, which does not give rise to a fiduciary duty. The "duty to act fairly" does not give rise to a fiduciary relationship.

I have considered Brook's remaining arguments and find them unavailing.

In accordance with the foregoing, it is

ORDERED that motion to amend the complaint is denied except that Brook may move to conform the pleadings to the proof at the conclusion of trial, as set forth above.

This constitutes the decision and order of the Court.

5/23/18
DATE

Saliann Scarpulla
SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[X]	DENIED	[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED			[ ]	GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
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