SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **IAS MOTION 47EFM**

Justice

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INDEX NO. 157517/2017

GREAT WALL MEDICAL P.C.,JOON SONG

Plaintiff,

MOTION DATE 01/24/2019, 01/24/2019

- v -

MOTION SEQ. NO. 006 007

MICHELLE LEVINE,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 133, 134, 135, 138, 139, 140, 141, 143

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 126, 127, 128, 129, 130, 131, 132, 136, 137, 144, 145, 147

were read on this motion to/for DISMISS.

PAUL A. GOETZ, J.:

The crux of this case centers on defendant Michelle Levine's one visit to plaintiff Great Wall Medical P.C d/b/a New York Robotic Gynecology and Women's Health ("NY Robotic GYN") on July 7, 2017 where she was seen by defendant Dr. Joon Song. Plaintiffs allege that after this visit, starting in August 2017 and continuing through May 2018, defendant Levine engaged in a campaign to try to destroy plaintiffs' business and reputation by posting reviews and making public statements to the press accusing plaintiffs of unethical, fraudulent and illegal behavior. Based on these allegations, plaintiffs assert causes of action for (1) defamation per se and trade libel; (2) tortious interference with contractual relations and prospective contractual relations; (3) intentional infliction of emotional distress; (4) prima facie tort; and (5) harassment in violation of NY Penal Code § 240.26. Defendant Levine now moves for an order (1) dismissing the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of

action; (2) pursuant to CPLR 3024(b) striking certain paragraphs of the amended complaint; (3) pursuant to CPLR 2221 to renew and reargue the plaintiffs' motion to hold defendant Levine in contempt for violating the preliminary injunction dated February 13, 2018, which was granted by order dated August 2, 2018; (4) holding plaintiffs in contempt for violating the preliminary injunction; and (5) vacating the preliminary injunction (Motion Sequence #006).

In her answer to the amended complaint, defendant Levine asserts counterclaims against plaintiffs for medical malpractice, disclosure of confidential medical information in violation of CPLR 4504, and deceptive trade practices. Plaintiffs move pursuant to CPLR 3211 to dismiss the counterclaims (Motion Sequence #007). The motions are consolidated for disposition in this decision and order.

Motion to Dismiss Amended Complaint

In her motion to dismiss the amended complaint, defendant Levine first argues that the first cause of action for defamation per se must be dismissed because plaintiffs fail to allege that they incurred special damages as a result of defendant Levine's actions. In order to state a claim for defamation, plaintiffs must allege special harm or the statements must constitute defamation *per se*. *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dep't 1999). Generally, a written statement is considered defamatory *per se* "if it tends to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a substantial number of the community." *Geraci v. Probst*, 15 N.Y.3d 336, 344 (2010) (internal citations and quotations omitted). Damages are "presumed for statements that charge a person with committing a serious crime or that would tend to cause injury to a person's profession or business." *Id.; see also Pezhman v. City of New York,* 29 A.D.3d 164, 167 (1st Dep't 2006). Here, defendant Levine's statements accusing plaintiffs of engaging in unethical and fraudulent behavior not only charge

plaintiffs of a serious crime but are likely to cause harm to Dr. Song's business and to his professional reputation as a doctor. Accordingly, the first cause of action for defamation per se cannot be dismissed on this basis.

Defendant Levine also moves to dismiss the defamation claim based on documentary evidence pursuant to CPLR 3211(a)(1). However, defendant Levine has waived this defense by failing to raise it in her answer to the amended complaint. *See* NYSCEF Doc. No. 89; CPLR 3211(c). Moreover, this argument lacks merit as the document that defendant Levine submits in support of this claim, which is the notice of the hearing in small claims court (Affirmation of Daniel S. Szalkiewicz dated September 5, 2018, Exh. 6), does not conclusively establish that the allegedly defamatory statements were substantially true. *See Spoleta Construction LLC v. Aspen Ins. UK Ltd.*, 27 N.Y.3d 933, 936 (2016). To the extent defendant Levine's argument may be based on *res judicata* or collateral estoppel grounds under CPLR 3211(a)(5), defendant Levine has waived this defense by failing to include it in her answer to the amended complaint. *See* NYSCEF Doc. No. 89; CPLR 3211(c). Accordingly, the first cause of action for defamation per se will not be dismissed.

Plaintiffs' first cause of action also alleges that defendant Levine committed the tort of trade libel. Defendant Levine argues that the trade libel claim must be dismissed because plaintiffs have failed to allege special damages in connection with this claim. "The tort of trade libel or injurious falsehood requires the knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment. In addition, the facts so published must cause special damages, in the form of actual lost dealings." *Banco Popular N. Am. v. Lieberman*, 75 A.D.3d 460, 462 (1st Dep't 2010). Here, plaintiffs have not identified by name the patients they lost nor the specific

amount of lost profits they suffered as a result of defendant's actions. However, in paragraph 94 of the amended complaint, plaintiffs allege that as a result of defendant Levine's online reviews, several of their patients refused to pay for billed treatments and cancelled scheduled appointments with Dr. Song. Szalkiewicz Aff., Exh. 1, ¶ 94. Plaintiffs further aver in footnote one of the amended complaint that they omitted the names of these patients in their amended complaint to protect patient privacy but that these names can be provided upon request. Id., p. 25, fn. 1. Accordingly, this cause of action will not be dismissed subject to the plaintiffs providing this information to the court for in camera review within thirty days of entry of this order. Should plaintiffs fail to do so, defendant may renew her motion to dismiss the trade libel claim.

With respect to the second cause of action for tortious interference with contract and with prospective contractual relations, defendant Levine first argues that this claim must be dismissed because plaintiffs fail to identify the contracts which were breached and that defendant Levine had knowledge of these contracts. In order to state a claim for tortious interference with contract, a plaintiff must plead that (i) it had a valid and existing contract with a third party; (ii) the defendant's knowledge of that contract; (iii) the defendant's intentional and improper interference that causes a breach of that contract; and (iv) damages incurred by plaintiff as a result. *White Plains Coat & Apron Co. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). In order to state a claim for tortious interference with prospective business relations, a plaintiff must plead, in addition to the elements above, that defendant acted by the use of wrongful means or with malice and that "but for" defendant's actions, the plaintiff would have entered into a contract with the third party. *534 East 11th Street Hous. Dev. Fund v. Hendrick*, 90 A.D.3d 541, 542 (1st Dep't 2011); *Frank Crystal & Co. v. Dillmann*, 84 A.D.3d 704, 706 (1st Dep't 2011). Further,

the plaintiff must allege a specific business relationship with an identified third party with which defendants interfered. *Mehrhof v. Monroe-Woodbury Central School District*, 168 A.D.3d 713, 714 (2d Dep't 2019).

Here, plaintiffs allege that as a result of defendant Levine's online reviews, several of their patients refused to pay for billed treatments and cancelled scheduled appointments. Szalkiewicz Aff., Exh. 1, ¶ 94. Although plaintiffs omitted the names of these patients in their amended complaint to protect patient privacy, they state that these names can be provided upon request. Id., p. 25, fn. 1. In addition, plaintiffs allege that defendant Levine knew of these patients and that she represented that she would continue to reach out to them via email and other means. Id., ¶ 114. Accordingly, this cause of action will not be dismissed on this basis subject to the plaintiffs providing this information to the court for in camera review within thirty days of entry of this order. Should plaintiffs fail to do so, defendant may renew her motion to dismiss the tortious interference claims.

Defendant Levine also argues that the claim for tortious interference with prospective business relations must be dismissed because plaintiffs have failed to allege that defendant acted by the use of wrongful means. However, it is well-established that "defamation is a predicate wrongful act for a tortious interference claim." *Amaranth LLC v. JP Morgan Chase*, 71 A.D.3d 40 (1st Dep't 2009). Accordingly, the second cause of action will not be dismissed on this basis.

With respect to the third cause of action for intentional infliction of emotional distress, defendant Levine argues that this claim must be dismissed because it is duplicative of the defamation claim. It is well-settled that a cause of action for intentional infliction of emotional distress should be dismissed where it duplicates a plaintiff's defamation claim. *Matthaus v. Hadjedj*, 148 A.D.3d 425 (1st Dep't 2017). Here, the allegations underlying the defamation

claim, namely, defendant Levine's publication of allegedly false information about plaintiffs' business, are also the basis for plaintiffs' claim for intentional infliction of emotional distress. Thus, this cause of action must be dismissed as duplicative. Likewise, the cause of action for prima facie tort must also be dismissed as duplicative of the defamation claim. *Id.* at 426. Finally, plaintiffs' causes of action for harassment must be dismissed as this is not a valid cause of action under New York law. *Broadway Cent. Prop. v. 682 Tenant Corp.*, 298 A.D.2d 253, 254 (1st Dep't 2002).

Motion to Strike

Defendant Levine also moves pursuant to CPLR 3024(b) to strike paragraphs 11, 60-68, 71-73 and 75 of plaintiffs' amended complaint. As an initial matter, defendant's motion is untimely under CPLR 3024(c) as it was served more than twenty days after service of the amended complaint, which was served on June 29, 2018, and defendant has failed to show good cause for extending this time as required under CPLR 2004. Moreover, the motion lacks merit. Paragraphs 60-68, 71-73, and 75 of the amended complaint, which concern the parties' filing of defendant Levine's medical information and defendant's allegedly defamatory posts about such filings, are relevant both to plaintiffs' claims of defamation and to defendant Levine's counterclaim for violation of CPLR 4504, which prohibits disclosure of a patient's information. *New York City Health and Hospitals Corp. v. St. Barnabas Comm. Health Plan*, 22 A.D.3d 391 (1st Dep't 2005) (stating that "[a] motion to strike scandalous or prejudicial material from a pleading will be denied if the allegations are relevant to a cause of action"). Likewise, paragraph 11, in which plaintiffs allege that defendant Levine may have posted the allegedly defamatory remarks through her company, GABA App NY LLC, is relevant to plaintiffs' claims. Accordingly, the motion to strike must be denied.

Motion to Renew and Reargue the Contempt Motion

Defendant Levine also moves pursuant to CPLR 2221 to renew and reargue plaintiffs' motion to hold defendant Levine in contempt of the preliminary injunction, which was granted by order dated August 2, 2018. As an initial matter, the motion to reargue is untimely as the order with notice of entry was served on August 6, 2018. CPLR 2221(d)(3). Moreover, defendant Levine has failed to show any facts or law previously overlooked by the court and seeks merely to relitigate issues previously considered and decided by the court. Accordingly, the motion to reargue must be denied. *Setters v. AI Prop. and Dev. Corp.*, 139 A.D.3d 492 (1st Dep't 2016).

Likewise, the motion to renew lacks merit. Defendant Levine has failed to explain why the evidence on which it is based, which includes the amended complaint and documents showing positive reviews of plaintiffs' business (Exhibits 1, 8, 9, 10), was not introduced in the prior motion, particularly since most of this evidence pre-dates the court's decision on the motion. Moreover, defendant Levine fails to explain how this evidence is relevant to the contempt motion or why it should change the court's determination on that motion. Accordingly, the motion to renew is denied.

Motion for Contempt or to Vacate Preliminary Injunction

Defendant Levine also moves to hold plaintiffs in contempt for failing to comply with the terms of the preliminary injunction, or, alternatively, to vacate the preliminary injunction. Defendant's motion for contempt is based on three alleged statements which were published in articles on CBS News, ABC News and a Korean Language Newspaper on May 30, 2018, and which were the subject of plaintiffs' prior contempt motion. Szalkiewicz Aff., Exhs. 13-15. Defendant also alleges a violation of the preliminary injunction based on statements made in

comments on defendant's GoFundMe page, which were also the subject of plaintiffs' contempt motion. Szalkiewicz Aff., Exh. 17.

Under Judiciary Law § 753, defendant Levine must show by clear and convincing evidence that: (1) a lawful order clearly expressing an unequivocal mandate was in effect; (2) the order has been disobeyed; (3) the party to be held in contempt must have had knowledge of the order; and (4) prejudice to the right of a party to the litigation. *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 29 (2015). Here, defendant Levine cannot possibly show that she was prejudiced by plaintiffs' statements. Indeed, as discussed in the court's order holding defendant Levine in contempt, it was defendant Levine that engaged in contemptuous conduct by speaking to reporters at CBS News, ABC News and the New York Post and posting GoFundMe and Yelp pages. Accordingly, she cannot now credibly allege that she has been prejudiced by something plaintiffs may have said in response to her statements.

Further, defendant Levine has not shown by clear and convincing evidence that plaintiffs violated the preliminary injunction order. First, the statement made in the ABC News Article and on defendant's GoFundMe page were not made by plaintiffs, their employees or their attorneys, but were rather statements made by unrelated parties. Szalkiewicz Aff., Exhs. 14, 17; Affidavit of Hyejung Kim sworn to on September 27, 2018 (NYSCEF Doc. No. 134). Second, the translation of the statements in the Korean News article submitted by defendant are not in admissible form and cannot be considered under CPLR 2101. Szalkiewicz Aff., Exh. 15. Finally, the statement made by plaintiffs' attorney to CBS News, standing alone, is insufficient to hold plaintiffs in contempt, particularly since the statement was made in response to defendant Levine's comments and the statement itself, while not well-advised, speaks in general terms and

does not necessarily pertain to defendant or this lawsuit. Szalkiewicz Aff., Exh. 13. Accordingly, the motion to hold plaintiffs in contempt must be denied.

Moreover, defendant has failed to show that plaintiffs would not suffer irreparable harm absent the preliminary injunction or that the balancing of the equities are not in plaintiffs' favor. Accordingly, the motion to vacate the preliminary injunction must be denied.

Motion to Dismiss Counterclaims

Plaintiffs move pursuant to CPLR 3211 to dismiss defendant Levine's counterclaims for malpractice, violation of CPLR 4504 and deceptive trade practices. In these counterclaims, defendant Levine alleges that plaintiffs misdiagnosed her physical condition, violated her HIPAA rights through improper disclosure of medical information, and conducted deceptive, consumer-oriented practices in violation of state law.

Plaintiffs first argue that all three causes of action should be dismissed pursuant to CPLR 3211(a)(5). In particular, plaintiffs argue that all of these claims were or could have been litigated in the small claims action defendant Levine brought against Dr. Song and are thus barred on the ground of *res judicata*. The doctrine of *res judicata* precludes a party from re-litigating issues of fact or law necessarily decided in a prior action. *Gramatan Home Investors Corp. v. Lopez*, 46 N.Y.2d 481, 485 (1979). It also precludes litigation of claims for different relief which arise from the same facts or transaction which should or could have been resolved in the prior proceeding. *Luscher v. Arrua*, 21 A.D.2d 1005, 1006-07 (2d Dep't 2005).

Here, in the small claims action defendant Levine brought against Dr. Song, she sought to recover damages for "monies arising out of nonpayment for services rendered false psychologically damaging diagnosis by a misinformed uneducated staff. Loss time from work." (sic). Affirmation of Justin Mercer dated September 27, 2018, Exh. C. Likewise, in her first

counterclaim, defendant Levine seeks to recover for Dr. Song's alleged misdiagnosis of Levine. Mercer Aff., Exh. B, ¶¶ 141-150, 166-172. Thus, the first counterclaim, in which defendant Levine seeks to relitigate the same issues that were already adjudicated by the small claims court, is barred by res judicata.

Defendant Levine argues that under New York City Civil Court Act § 1808, a judgment obtained in small claims court does not bar a subsequent action based on the same facts. However, it is well-settled that, despite its language, New York City Civil Court Act § 1808 does does not divest a small claims judgment of its res judicata effect. *Chapman v. Faustin*, 150 A.D.3d 647 (1st Dep't 2017). Moreover, the fact that defendant Levine now seeks different damages than she sought in the small claims action does not alter the preclusive effect of the small claims judgment, as Levine could have pursued all relief in a single action in the Supreme Court, but opted instead to pursue her claim in small claims court. *Id.* at 648. Finally, the fact that the small claims action was only brought against Dr. Song, and not his practice, NY Robotic GYN, does not bar the application of the res judicata doctrine as to plaintiff NY Robotic GYN. *Id.* at 647. Accordingly, the first counterclaim must be dismissed.

With respect to the second counterclaim for violation of physician patient confidentiality, plaintiffs argue that this claim must be dismissed because defendant Levine has waived this privilege by filing her unredacted medical records in this proceeding. It is well-established that "the physician-patient privilege only applies to protect communications which have been made in confidence as well as in the context of the physician-patient relationship. It follows therefore that, even if the information was intended to remain confidential when it was communicated, once a patient puts the information into the hands of a third party who is completely unconnected to his or her treatment and who is not subject to privilege, it can no longer be considered a

confidence and the privilege must be deemed to have been waived as to that information. *Matter of Farrow v. Allen*, 194 A.D.2d 40, 44 (1st Dep't 1993). Here, defendant Levine first filed her un-redacted medical records in this action (NYSCEF Doc. No. 19) and thereby waived the privilege as to this information. *Id.*; *see also People v. Bercume*, 6 Misc.3d 420, 426 (Monroe Co. Sup. Ct. 2004 ("[i]f disclosure is made to an entity that is not a covered entity, the information will no longer be protected by HIPAA"). Accordingly, the second counterclaim must be dismissed.

Finally, turning to the third counterclaim, defendant Levine alleges that plaintiffs committed unfair and deceptive acts in violation of Gen. Bus. L. § 349 by (i) filing this lawsuit in retaliation for her negative reviews; (ii) performing unnecessary medical procedures and collecting excessive fees from insurance carriers; and (iii) posting false positive reviews of Dr. Song's business. Mercer Aff., Exh. B, ¶ 180. As an initial matter, this counterclaim must be dismissed to the extent it is based on the medical procedure performed by Dr. Song and his billing practices, as these allegations were adjudicated in the small claim action and are thus barred by res judicata. *See Chapman v. Faustin*, 150 A.D.3d 647 (1st Dep't 2017). Likewise, the counterclaim must be dismissed to the extent it is based on plaintiffs' filing of this lawsuit, as defendant Levine appears to concede in her memorandum of law in opposition to the motion. (NYSCEF Doc. No. 144, pp. 12-13).

However, to the extent the claim is based on defendant Levine's allegations of false advertising, this counterclaim cannot be dismissed. To establish a claim under Gen. Bus. L. § 349, a plaintiff must allege that "a defendant is engaging in consumer-oriented conduct which is deceptive or misleading in a material way, and that plaintiff has been injured because of it." *Weiss v. Polymer Plastics Corp.*, 21 A.D.3d 1095, 1097 (2d Dep't 2005). Deceptive acts are

defined as those that are "likely to mislead a reasonable consumer acting reasonably under the circumstances. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 25 (1995). Here, defendant Levine alleges that plaintiffs engaged in deceptive conduct by posting false positive reviews of their business, causing prospective patients, like herself, to seek treatment from plaintiffs. Mercer Aff., Exh. B, ¶¶ 164, 180. Although plaintiffs argue that these claims lack specificity, at this stage of the litigation, these allegations are sufficient to sustain the counterclaim. *See Pelman ex rel Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005) (an action under the deceptive trade practices provision of the New York Consumer Protection Act is not subject to the pleading with particularity requirements for fraud claims, but need only meet the bare bones notice pleading requirements).

Accordingly, it is

ORDERED that defendant Levine's motion is granted to the extent of dismissing the third and fourth causes of action in the amended complaint, and is otherwise denied subject to defendant's right to renew her motion to dismiss the first cause of action for trade libel and the second cause of action should plaintiffs fail to submit within 30 days of entry of this order for in camera review the identities of the patients they allegedly lost as a result of defendant's actions; and it is further

ORDERED that the motion to dismiss the counterclaims is granted to the extent of dismissing the first and second counterclaims and the third counterclaim insofar as it is premised on the filing of this lawsuit or plaintiffs' alleged malpractice and billing practices, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a conference on September 12, 2019.

5/9/19
DATE

PAUL A. GOETZ, J.S.C.

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