Malik v New York Presbyt. Brooklyn Methodist Hosp.
2020 NY Slip Op 32675(U)
August 17, 2020
Supreme Court, Kings County
Docket Number: 508226/18
Judge: Lawrence S. Knipel

At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of August, 2020.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

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ABDUL Q. MALIK, M.D. AND ABDUL MALIK, PHYSICIAN, P.C.,

Plaintiff,

- against -

Index No.508226/18

NEW YORK PRESBYTERIAN BROOKLYN METHODIST HOSPITAL F/K/A NEW YORK METHODIST HOSPITAL,

Defendant.

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The following e-filed papers read herein:	NYSCEF Doc No
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	36-44
Opposing Affidavits (Affirmations)	45-46
Reply Affidavits (Affirmations)	47
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers defendant New York Presbyterian Brooklyn Methodist Hospital f/k/a New York Methodist Hospital (defendant) moves for an order, pursuant to CPLR 2221, granting it leave to reargue this Court's October 23, 2019 decision and order denying its motion to dismiss the complaint, and upon granting leave to reargue, granting the motion to dismiss in its entirety.

Background and Procedural History

The facts underlying the instant matter are as follows. On or about July 1, 2010, defendant and plaintiff Abdul Malik Physician, P.C. (the PC) entered into a Services Agreement (the agreement),pursuant to which the PC was "to provide certain administrative, supervisory and teaching services in the Hospital's Department of Medicine" and "to employ or retain, at its expense, two (2) "P.C." Cardiologists to discharge its duties under this Agreement." The PC was to ensure "that all duties performed and services provided shall be in accordance with the NYMH Policies and Applicable Law." Defendant agreed to compensate the PC $150,000 annually, in monthly increments of $12,500. The agreement was in effect for one year terms, commencing on September 1, 2010, and automatically renewing for one year terms unless otherwise modified or terminated.

On March 25, 2015, plaintiff Dr. Malik was indicted on twelve counts related to alleged Medicaid fraud connected to his work performing remote reading services to Ultraline Medical Testing P.C. On or about April 1, 2015, defendant sent Dr. Malik a letter stating "in accordance with Article VII, Section 2 of the bylaws of the medical staff of New York Methodist Hospital, that effective immediately all of your clinical privileges are summarily suspended." Defendant contends that it also sent a letter to the PC on that date, notifying it that it was terminating the agreement effective immediately "[i]n light of [Malik's] suspension from the Medical Staff of the New York Methodist Hospital." By letter dated April 25, 2015, defendant informed Dr. Malik that it would lift the suspension of his staff membership and clinical privileges and grant his request to be placed on a leave of absence. On November 30, 2016, the Kings County District Attorney dismissed the indictment against Dr. Malik and exonerated him, noting that his credentials had been stolen and that he was an innocent victim in a fraud scheme.

Plaintiffs commenced the instant action by filing a summons and complaint on or about April 23, 2018. The complaint alleged three cause of action sounding in breach of contract/breach of covenant of goof faith and fair dealing, tortious interference and unjust enrichment. On or about August 21, 2019, defendant filed a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (1) and (a) (7), arguing that plaintiffs failed to state a cause of action on any of the alleged claims.[1] This court, in an October 23, 2019 decision and order, denied defendant's pre-answer motion to dismiss finding that there was outstanding apparent contractual issues and disputed documentary evidence which precluded the requested relief.

Defendant's Motion

Defendant contends that reargument is warranted as the court overlooked and/or misapprehended the facts and/or law when rendering the October 23, 2019 decision and order and, that upon reargument, its' motion to dismiss should be granted.

Legal Standards

Motion to Reargue

Pursuant to CPLR 2221 (d) (2), a motion to reargue is "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." "While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided" (*Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2011] [internal citations and quotations marks omitted]; *Williams v Abiomed, Inc.*, 173 AD3d 1115, 1116 [2019]).

[1]The court notes that the parties entered into several stipulations extending defendant's time to answer the complaint.

Motion to Dismiss

"In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the court must 'accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" (*Patel v Gardens at Forest Hills Owners Corp.*, 181 AD3d 611 [2020], quoting *Nonnon v City of New York*, 9 NY3d 825, 827 [2007], quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The pertinent issue is whether the plaintiff has a cause of action, not whether one has been stated in the complaint (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]; *Doe v Ascend Charter Schs.*, 181 AD3d 648, [2020]; *Tilford v Greenburgh Hous. Auth.*, 170 AD3d 1233, 1234-1235 [2019]). Further, "the factual allegations in the pleading must be deemed true, and the petitioner must be afforded the benefit of every favorable inference" (*Matter of Palmore v Board of Educ. of Hempstead Union Free Sch. Dist.*, 145 AD3d 1072, 1073 [2016]). "Therefore, a complaint is legally sufficient if the court determines that a plaintiff would be entitled to relief on any reasonable view of the facts stated" (*Dee v Rakower*, 112 AD3d 204, 208 [2013][citations omitted]). "Whether 'the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss'" (*Victory State Bank v EMBA Hylan, LLC*, 169 AD3d 963, 965 [2019], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2006]; *see Mirro v City of New York*, 159 AD3d 964, 966 [2018]). The court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see Sokol v Leader*, 74 AD3d 1180, 1181 [2010]; CPLR 3211[c]; *Phillips v Taco Bell Corp.*, 152 AD3d 806, 807-808 [2017]).

A motion to dismiss under CPLR 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. of New York*, 98 NY2d 314, 326 [2002]). The documentary evidence must "resolv[e] all factual issues as a matter of law and conclusively dispose[] of the plaintiff's claim" (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 806 [2011], quoting *Paramount Transp. Sys., Inc. v Lasertone Corp.*, 76 AD3d 519, 520 [2010]; *see Goshen*, 98 NY2d at 326; *Leon*, 84 NY2d at 88). To qualify as documentary evidence, the evidence "must be unambiguous and of undisputed authenticity" (*Nero v Fiore*, 165 AD3d 823, 826 [2018], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2010]; *see Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 808[2012]; *Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996-997 [2010]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta*, 73 AD3d at 84-85 [internal citation omitted]; *see L&S Motors, Inc., v Broadview Networks, Inc.*, 25 AD3d 767, 767 [2006]). "Conversely, letters, emails, and affidavits fail to meet the requirements for documentary evidence" *(25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2015]).

The court exercises its discretion to allow reargument (*see* CPLR 2221 [d] [2]; *Anthony J. Carter, DDS., P.C.*, 81 AD3d at 820). Upon reargument, the court decides as follows.

Breach of Contract/Breach of Covenant of Good Faith and Fair Dealing

With regard to plaintiff's breach of contract claim, defendant argues that the court overlooked that plaintiff failed to plead performance of the contract by one party and breach

by the other party. In this regard, defendant argues that plaintiff merely stated that it remained ready, willing and able to perform under the agreement and that this does not equate to its actual performance under the contract. With regard to the allegation that defendant breached its duty by failing to make payments to the PC from April 2015 on, defendant asserts that the agreement specifically provided for monthly payment of $12,500 to the extent that the services under the agreement were provided by the PC, and inasmuch as plaintiffs were unable to provide the services, defendant terminated the agreement and was under no obligation to tender such payment.

In opposition to this branch of defendant's motion, plaintiffs argue that defendant's wrongful repudiation alleviated the requirement for plaintiffs to tender performance or prove ability to perform. Plaintiffs argue that the doctrine of anticipatory breach excuses completion of performance in the face of repudiation. Plaintiffs contend that the agreement was never properly terminated pursuant to its explicit terms. In this regard, plaintiffs dispute that they ever received notice that defendant had terminated the agreement and that the PC was in violation of any terms of the agreement that would permit a termination.

In reply, defendant maintains that it was under no obligation to pay until the PC rendered services. Defendant maintains that it is irrelevant whether plaintiffs could have performed in the future and that it was the actual failure to perform pursuant to the terms of the agreement that absolved defendant of its payment obligation.

"The essential elements of a breach of contract cause of action are "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages" (*Liberty Equity Restoration Corp. v Pil Soung Park*, 160 AD3d 628, 630 [2018]; *see Hausen v North Fork Radiology, P.C.*, 171 AD3d 888, 892 [2019]; *De Guaman v American Hope Group*, 163 AD3d 915, 917 [2018]; *Elisa Dreier*

Reporting Corp. v Global NAPs Networks, Inc., 84 AD3d 122, 127 [2011]). Importantly, a cause of action to recover damages for breach of the implied covenant of good faith and fair dealing cannot be maintained where the alleged breach is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Deer Park Enters., LLC v. Ail Sys., Inc.*, 57 AD3d 711, 712 [2008], quoting *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 [1995]; *see Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323 [2004]).

Based upon the foregoing principles, the court finds that, within its four corners, the complaint sufficiently alleges the elements of a breach of contract cause of action against defendant necessary to survive a motion to dismiss pursuant to CPLR 3211 (a) (7) (*see Magee-Boyle v Reliastar Life Ins. Co. of N.Y.*, 173 AD3d 1157, 1159 [2019]; *Guido v Orange Regional Med. Ctr.*, 102 AD3d 828, 832 [2013]; *Dee*, 112 AD3d at 208). Moreover, the court finds that defendant has failed to submit documentary evidence which utterly refutes plaintiffs' factual allegations, conclusively establishing a defense as a matter of law within the intendment of CPLR 3211(a)(1) (*see Bonavita v Government Employees Ins. Co.*, __ AD3d __, 2020 N.Y. App. Div. LEXIS 4256, *4, 2020 NY Slip Op 04144; *County of Westchester v Unity Mech. Corp.*, 165 AD3d 883, 885 [2018]; *Attias v Costiera*, 120 AD3d 1281, 1282-1283 [2014]).

Accordingly, upon reargument the court adheres to its original decision in regard to plaintiffs' breach of contract claim.

Tortious Interference with Contract

Defendant asserts that this court's October 23, 2019 order failed to address "plaintiffs' tortious interference cause of action, a claim that is entirely distinct from the "contractual issues and documentary issues" identified in the order." Defendant asserts that plaintiff never plead the existence of a contractual relationship between plaintiff and a third-party

and/or defendant's intentional inducement of the third-party to breach. Specifically, defendant argues that, to the extent that plaintiffs' claim that defendant interfered with its on-going relationship with patients of the PC, doctor-patient relationships are not contractual but rather are at-will and can not form the predicate for a tortious interference with contract claim. Additionally, defendant points out that a showing of wrongful conduct is required and that here, plaintiffs merely assert that one of defendant's staff members stated, in the presence of plaintiffs' patient, that "Dr. Malik was a criminal." Defendant notes that plaintiffs fail to: identify the staff member, whether the comment was made in the course of or in furtherance of their employment for defendant and any basis for imputing said statement to defendant. Moreover, defendant argues that in any event the comment would not rise to the level of wrongful conduct inasmuch as it was not a misrepresentation as Dr. Malik had indeed been indicted on multiple criminal counts.

In opposition, plaintiffs argue that the court did not overlook any of defendant's arguments in this regard, but rather just found them to be unpersuasive. Plaintiffs argue that it properly plead that they had on-going relationships with their patients which is separate and apart from the defendant. In addition, plaintiffs maintain that referring to Dr. Malik as a criminal is wrongful and actionable conduct.

In reply, defendant reiterates that at-will doctor-patient agreements cannot form the predicate for the existence of a contract needed for a tortious interference claim. Moreover, defendant contends that plaintiffs have failed to allege wrongful conduct on the part of defendant solely for the purpose of injuring the plaintiffs.

"The elements of tortious interference with a contract are: "(1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render

performance impossible; and (4) damages to plaintiff' (*Kimso Apts., LLC v Rivera*, 180 AD3d 1033, 1035 [2020], quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]; *see Nero v Fiore*, 165 AD3d 823, 825 [2018]; *Pacific Carlton Dev. Corp. v 752 Pac., LLC*, 62 AD3d 677, 679 [2009]). The plaintiff must also establish that the defendant's actions were intentional and "without justification" (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *see Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 1036 [2011]). "Although on a motion to dismiss the allegations in a complaint should be construed liberally, to avoid dismissal of a tortious interference with contract [cause of action], a plaintiff must support his [or her cause of action] with more than mere speculation" (*Kimso Apts., LLC*, 180 AD3d at 1035, quoting *Burrowes v Combs*, 25 AD3d 370, 373 [2006]; see *Ferrandino & Son, Inc., LLC*, 82 AD3d at 1036]; *R.I. Is. House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890, 895-896 [2008]).

Accordingly, upon reargument the court reverses its original decision in regard to plaintiffs' tortious interference claim and that branch of defendant's motion seeking to dismiss this claim is granted (*see M.J. & K. Co. v Matthew Bender & Co.*, 220 AD2d 488, 490 [1995] [holding that "plaintiffs' mere contentions that third parties cancelled contracts with them because of the alleged defamatory remarks made by . . . [defendant's] representatives, offered with no factual basis to support the allegations, was insufficient to state a cause of action for tortious interference with contractual relations"]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2009]; *Newport Serv. & Leasing, Inc. v Meadowbrook Distrib. Corp.*, 18 AD3d 454, 455 [2005]; *Simaee v Levi*, 22 AD3d 559,563 [2005][holding that a "cause of action, alleging tortious interference with physician/patient relationships, was . . . correctly dismissed . . . as there was no allegation that plaintiff had "an independent contractual relationship with the patients of these entities which would give rise

to a pecuniary interest in these relationships"]; *Bronx-Lebanon Hosp. Ctr. v Wiznia*, 284 AD2d 265, 266 [2001]).

Unjust Enrichment

Finally, defendant claims that this court overlooked the applicable law warranting dismissal of plaintiffs' unjust enrichment claim, In this regard, defendant argues that its response to Dr. Malik's indictment was appropriate and justified in order to protect patients. Moreover, defendant asserts and that it would have been against good conscience to allow a criminally indicted physician to continue treating patients.

In opposition, plaintiffs argue that they have alleged that after defendant breached its agreement with the PC, defendant continued to provide services to plaintiffs' patients after it restricted plaintiffs from providing these services. Plaintiffs contend that defendant was unjustly enriched by retaining money for these services that plaintiffs should have been given an opportunity to provide.

In reply, defendant argues that plaintiffs' pleading of this claim lacks any showing that the alleged benefit conferred on defendant was under mistake or based on fraudulent conduct. Moreover, defendant notes that plaintiffs were not prevented by defendant from employing another PC cardiologist to discharge its duties under the agreement.

"To adequately plead such a cause of action [for unjust enrichment], a plaintiff must allege that '(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" (*Mannino v Passalacqua*, 172 AD3d 1190, 1193 [2019], quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [internal quotation marks and brackets omitted]; *see Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). However, the Court of Appeals in *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, (70 NY2d 382 [1987]),

held that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter... [a] quasi contract only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment. . . ." (*see D. Gangi Contr. Corp. v City of New York*, __ AD3d __ [2020], 2020 NY Slip Op 04378, 1-2]; *Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [2004] ["A claim for unjust enrichment, or quasi contract, may not be maintained where a contract exists between the parties covering the same subject matter"]; *Scavenger, Inc. v GT Interactive Software Corp.*, 289 AD2d 58, 59 [2001). Here it is undisputed that a contract exists between the parties covering the subject matter of this claim.

Accordingly, upon reargument the court reverses its original decision in regard to plaintiffs' unjust enrichment claim and that branch of defendant's motion seeking to dismiss this claim is granted (*see Clark-Fitzpatrick, Inc.*, 70 NY2d at 388).

The foregoing constitutes the decision and order of the court.

Justice Lawrence Knipel