STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

RICHARD F. BRODMAN, M.D. and BUFFALO CARDIOTHORACIC SURGICAL PLLC,

Plaintiffs

vs.

KALEIDA HEALTH

Defendant

MEMORANDUM DECISION

Index No. 868/08

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **Jaeckle Fleischmann & Mugel, LLP**
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CURRAN, J.

This action was commenced on June 25, 2008 by plaintiffs Richard F. Brodman, M.D. ("Brodman") and Buffalo Cardiothoracic Surgical PLLC ("BCS") (collectively hereinafter referred to as "Plaintiffs") against Kaleida Health ("Kaleida"). The Verified Amended Complaint ("Amended Complaint"), comprised of 115 allegation paragraphs, contains five causes of action: (1) breach of contract for the Brodman Employment Agreement; (2) breach of contract for the BCS Independent Contractor Agreement; (3) breach of the implied covenant of good faith and fair dealing; (4) tortious interference with prospective

economic advantage; and (5) prima facie tort. Before the Court is Kaleida's motion to dismiss the third, fourth and fifth causes of action pursuant to CPLR § 3211 (a) (7).

Plaintiffs allege that in 2001, in response to a crisis in its cardiothoracic surgery service, Kaleida decided to contract with a single group to be the exclusive provider of cardiothoracic surgery services at Kaleida and to consolidate Kaleida's cardiothoracic surgery program at Buffalo General Hospital in order to improve the quality of services. Plaintiffs allege that Kaleida recruited Brodman to be the head of the exclusive group and offered him the position of Chief of Service of Cardiothoracic Surgery in the Fall of 2002 (Amended Complaint ¶¶ 11-13).

On January 13, 2003, Brodman entered into an Employment Agreement with Kaleida governing his role as Chief of Service of Cardiothoracic Surgery, effective February 1, 2003 ("Employment Agreement"). Also in January of 2003, Brodman formed BCS to be the exclusive cardiothoracic surgery group (Amended Complaint ¶ 14).

On February 1, 2003, BCS entered into an Independent Contractor Agreement with Kaleida to exclusively provide cardiothoracic surgical services to Kaleida's patients effective June 1, 2003 ("Independent Contractor Agreement"). The rationale for the exclusivity of the Independent Contractor Agreement was to improve the quality of care to cardiothoracic surgery patients which had been in decline prior to Brodman's engagement as Chief of Service of Cardiothoracic Surgery. As a result of the exclusivity provision, if any cardiothoracic surgeon wanted to perform cardiothoracic surgeries at a Kaleida hospital, that surgeon would need to be a member of BCS (Amended Complaint ¶ 15).

Pursuant to the Independent Contractor Agreement, BCS was required to implement a contractual relationship with each cardiothoracic surgeon to provide services at Kaleida. By late June of 2003, all of the existing cardiothoracic surgeons at Buffalo General Hospital had either joined BCS or left Kaleida voluntarily. However, the three cardiothoracic surgeons based at Millard Fillmore Gates Hospital ("Gates"), Janerio Aldridge, M.D. ("Aldridge"), Hashmat Ashraf, M.B.B.S., F.R.C.S. ("Ashraf") and LuJean Jennings, PhD, M.D. ("Jennings"), refused to join BCS and continued to practice cardiothoracic surgery at Gates "in defiance of" the BCS Independent Contractor Agreement (Amended Complaint ¶ 17).

From February of 2003 through January of 2005, Brodman alleges that he worked to improve cardiothoracic surgery services at Kaleida and that they did improve (Amended Complaint ¶¶ 20-21). Plaintiffs contend that Kaleida failed to adequately support the cardiothoracic surgery service in violation of the Independent Contractor Agreement by closing the Buffalo General Hospital cardiovascular intensive care unit without Brodman's input and by failing to provide adequate staffing by nurse practitioners or physician assistants for evenings, overnights and weekends (Amended Complaint ¶ 34-35). As a result, Brodman and a nurse practitioner (Ms. Urschel) were required to be constantly available for emergent situations (Amended Complaint ¶¶ 19-21; 34-53). Kaleida did not provide Brodman or BCS with any extra compensation for providing such extraordinary care to the cardiothoracic patients nor were Plaintiffs able to bill for taking such calls and providing such care (Amended Complaint ¶¶ 38-39).

Plaintiffs further allege that the cardiothoracic surgeons based at Gates (Drs. Aldridge, Ashraf and Jennings), mounted a campaign of resistence to the exclusive practice

model group (Amended Complaint ¶¶ 24-29). Plaintiffs allege that Kaleida initially upheld the Independent Contractor Agreement by terminating those surgeons' privileges based on their refusal to join BCS, but that in late 2004, following increasing pressure exerted on it by those surgeons, Kaleida's commitment to the exclusive practice model waned and it failed to uphold the exclusivity provision (Amended Complaint ¶¶ 31-32; 54-56). Specifically, in October 2004, Kaleida expressed concern regarding the decreased volume of surgical procedures at Gates since Drs. Aldridge, Ashraf and Jennings lost their privileges and thereafter allegedly decided to cease its efforts to consolidate cardiothoracic services at Buffalo General Hospital with an exclusive group (Amended Complaint ¶ 58).

According to plaintiffs, in November or December of 2004, two BCS surgeons (Drs. Karamanoukian and Lewin) and BCS's former officer manager (Ms. Karamanoukian) falsely charged that Brodman had engaged in fraudulent billing practices (Amended Complaint ¶¶ 59-60). Plaintiffs allege that Kaleida forced Brodman to resign on the basis of those accusations without fully investigating them and that the accusations were unfounded (Amended Complaint ¶¶ 61-69). Brodman ultimately resigned as Chief of Service of Cardiothoracic Surgery "under duress" on January 21, 2005 (Amended Complaint ¶ 70).

Procedural Standards

On this motion, Kaleida asserts that the third, fourth and fifth causes of action in the Amended Complaint fail to state a claim and therefore must be dismissed pursuant to CPLR § 3211 (a) (7). The Court of Appeals has held: "Under modern pleading theory, a complaint should not be dismissed on a pleading motion so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists . . . Modern pleading rules are

designed to focus attention on whether the pleader has a cause of action rather than on whether he has properly stated one (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 634-636 [1976], citing 6 Carmody-Wait 2d § 38.19; *Kelly v Bank of Buffalo*, 32 AD2d 875 [4th Dept 1969]). Initially, the sole criterion is whether the pleading states a cause of action, and if from the four corners of the complaint "factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977], citing *Foley v D'Agostino*, 21 AD2d 60, 64-65 [1st Dept 1964]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:24; Weinstein-Korn-Miller, NY Civ Prac ¶ 3211.36). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We 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" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted]). Nonetheless, "allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration" (*Caniglia v Chicago Tribune-New York News Syndicate Inc.*, 204 AD2d 233, 233-234 [1st Dept 1994]).

Third Cause of Action: Breach of the Implied Covenant of Good Faith and Fair Dealing

According to Kaleida, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing should be dismissed because it is duplicative of Plaintiffs' breach of contract claims in the first cause of action for breach of the Employment Agreement and in the second cause of action for breach of the Independent Contractor Agreement.

"Implicit in every contract is a covenant of good faith and fair dealing" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). "This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Aventine Inv. Mgt., Inc. v Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2d Dept 1999]). Nevertheless, if the implied covenant claim is duplicative or intrinsically tied to the damages allegedly resulting from a breach of the contract, it cannot be maintained and should be dismissed (*see New York Univ.*, 87 NY2d at 320; *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452 [1st Dept 1995]; *Deer Park Enters., LLC v Ail Sys., Inc.*, 57 AD3d 711, 711-712 [2d Dept 2008]; *Hassett v New York Cent. Mut. Fire Ins. Co.*, 302 AD2d 886, 887 [4th Dept 2003]).

Plaintiffs assert that Kaleida's closure of the Buffalo General Hospital cardiac surgery intensive care unit without Brodman's input, its dealings with Drs. Aldridge, Ashraf and Jennings, its refusal to allow Plaintiffs to deal with the doctor who started the rumors after his departure from BCS, and its perpetuation or condoning of a rumor campaign against Brodman allege sufficient facts to establish a claim for breach of the implied covenant of good faith and fair dealing. However, these very same allegations also underlie Plaintiffs' claims for breach of contract in the first and second cause of actions. Under the subheading for the third cause of action, no new or additional factual allegations are made. Rather, the third cause of action merely incorporates all prior allegations by reference and then reiterates or "highlights" a few specific allegations made earlier in the Amended Complaint, thereby rendering the claim duplicative of the breach of contract claims.

Accordingly, Kaleida's motion to dismiss the third cause of action for breach of the implied covenant of good faith and fair dealing is granted.

Fourth Cause of Action: Tortious Interference with Prospective Economic Advantage

"In order to prevail on a cause of action for tortious interference with contractual relations, a plaintiff must establish the existence of a valid contract between plaintiff and a third party, the defendant's intentional and unjustified procurement of the third party's breach of the contract, the actual breach of the contract and the resulting damages" (*Jim Ball Chrysler LLC v Marong Chrysler-Plymouth, Inc.*, 19 AD3d 1094, 1095 [4th Dept 2005], *lv denied* 5 NY3d 709 [2005]). "It is well settled that, where there has been no breach of an existing contract, but only interference with prospective contract rights, a plaintiff must show more culpable conduct on the part of the defendant" (*Jim Ball Chrysler*, 19 AD3d at 1095, citing *NBT Bancorp Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621 [1996]). "Indeed, as a general rule, the interfering party's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently culpable to create liability for interference with prospective contracts or other nonbinding economic relations" (*John Hancock Life Ins. Co. v 42 Delaware Ave. Assocs., LLC*, 15 AD3d 939, 940-941 [4th Dept 2005]).

Where a defendant's conduct is not criminal or independently tortious, plaintiffs cannot recover unless an exception to the general rule is applicable. Such an exception has been recognized where a defendant engages in conduct for the sole purpose of inflicting intentional harm on plaintiffs, but that exception does not apply where defendant's motive in

interfering with plaintiffs' relationships was economic self-interest (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

In *Carvel*, the Court of Appeals expressly declined to define what other exceptions there may be to the general rule, i.e., whether there can ever be other instances of conduct which, though not a crime or tort in itself, was so "culpable" that it could be the basis for a claim of tortious interference with economic relations (3 NY3d at 190-191).
Thus, the question becomes whether the means employed by defendant were "wrongful" or "culpable" as defined by the Court of Appeals in *NBT* and *Guard-Life* (*Carvel*, 3 NY3d at 191-192, citing *NBT Bancorp*, 87 NY2d at 623 and *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193 [1980]). Wrongful means has been held to include "physical violence, fraud or misrepresentation, civil suits or criminal prosecutions" (*see A.D. Bedell Wholesale Co., Inc. v Philip Morris, Inc.*, 272 AD2d 854, 854 [4th Dept 2000]). Further, "conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship" (*Carvel*, 3 NY3d at 192 [citation omitted]).

Plaintiffs allege that Kaleida "perpetuated and condoned" rumors about Brodman's alleged billing fraud (Amended Complaint ¶¶ 63, 76, 107), did not make any effort to curtail the rumors (Amended Complaint ¶¶ 63, 78), and did not take action against a doctor (Levinsky) who established a cardiothoracic medical practice at Kaleida independent of BCS's Independent Contractor Agreement (Amended Complaint ¶¶ 54-55, 108). None of these alleged actions constitute a crime or an independent tort, nor does the Amended Complaint allege that Kaleida was solely motivated by the desire to inflict intentional harm on Brodman

(*see Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct, New York County 2007], *affd in part* 44 AD3d 317 [1st Dept 2007]). Rather, as acknowledged in the Amended Complaint, Kaleida was motivated by its own financial interests (see Amended Complaint ¶ 38, 58, 62, 88-90). Moreover, none of the actions allegedly engaged in by Kaleida were directed at "the party with which the plaintiff has or seeks to have a relationship," i.e., the cardiologists.

The cases cited by Plaintiffs in opposition to Kaleida's motion are inapposite and unavailing. As Plaintiffs correctly note, "unless the real and predominant purpose is to advance the defendants' lawful interests in a matter where the defendants honestly believe that those interests would directly suffer if the action taken against the plaintiffs was not taken, a combination willfully to damage a man in his trade is unlawful" (*Rampell v Hyster Co.*, 3 NY2d 369 [1957]). However, that language in *Rampell* upheld a cause of action for a conspiracy to injure plaintiff and destroy its business, not a cause of action for tortious interference with prospective business relations.

Likewise, although a cause of action for tortious interference with prospective business advantage may be sustainable on a motion to dismiss where the underlying acts complained of lie in defamation (*Stapleton Studios, LLC v City of New York*, 26 AD3d 236 [1st Dept 2006]), here, there are insufficient facts alleged to sustain such a cause of action. In *Stapleton Studios*, plaintiffs alleged specific statements made by defendants' representatives to the press which were reasonably susceptible of defamatory connotation (26 AD3d at 236). In the present action, Plaintiffs have not alleged any actual statements made by any representative

of Kaleida to any person or individual, nor have they identified to whom any such alleged statements were made.

Similarly, while it is true that a valid cause of action exists where a defendant engaged in "intentionally fallacious communication" with a third party with whom the plaintiff had a prospective relationship (*Freedman v Pearlman*, 271 AD2d 301 [1st Dept 2000]), Plaintiffs have failed to allege any specific communication made by any representative of Kaleida, nor have they identified the recipient of any such communication or how it is that Plaintiffs intended to do business with that third party.

Based on the foregoing, Kaleida's motion to dismiss the fourth cause of action for tortious interference with prospective economic advantage is granted.

Fifth Cause of Action: Prima Facie Tort

The specific cause of action for prima facie tort consists of four elements: (1) intentional infliction of harm; (2) causing special damages; (3) without excuse or justification; (4) by an act or series of acts that would otherwise be lawful (*Curiano v Suozzi*, 63 NY2d 113, 117 [1984]; *Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). However, "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]). A complaint does not state a cause of action for prima facie tort when it fails to allege that defendants were motivated solely by malevolence (*Niagara Mohawk Power Corp. v Testone*, 272 AD2d 910 [4th Dept 2000]). Further, as Justice Holmes noted many years ago, "disinterested malevolence . . . is supposed to mean that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury

and damage of another" (*Beardsley v Kilmer*, 236 NY 80, 90 [1923], citing *American Bank & Trust Co. v Federal Reserve Bank of Atlanta*, 256 US 350 [1921]).

Unlike the plaintiff in *Kevin Spence & Sons, Inc. v Boar's Head Provisions Co., Inc.* (5 AD3d 352, 354 [2d Dept 2004]), Plaintiffs here have failed to identify the specific representations allegedly made by Kaleida, nor have they alleged facts from which it can be inferred, at the pleading stage of this action, that Kaleida acted with the "disinterested malevolence necessary to give rise to a cause of action alleging prima facie tort" (*Kevin Spence & Sons*, 5 AD3d at 354). Indeed, to the contrary, the Amended Complaint acknowledges that Kaleida was motivated at least in part by its own financial interests (see Amended Complaint ¶ 38, 58, 62, 88-90) as well as by its effort to avoid continuing pressure from the cardiothoracic surgeons based at Gates (Amended Complaint ¶¶ 32, 49).

Accordingly, Kaleida's motion to dismiss the fifth cause of action for prima facie tort is granted.

Defense counsel shall settle the Order with Plaintiffs' counsel.

DATED: April 21, 2009

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HON. JOHN M. CURRAN, J.S.C.