STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

JANERIO ALDRIDGE, M.D.,
HASHMAT ASHRAF, M.B.B.S., F.R.C.S.,
LUJEAN JENNINGS, Ph.D., M.D. and
BUFFALO THORACIC SURGICAL
ASSOCIATES, P.C.

Plaintiffs

MEMORANDUM DECISION

vs.

Index No. 2003-10120

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

Defendants

and

KALEIDA HEALTH,

Intervenor.

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

APPEARANCES: **Phillips Lytle, LLP**
Attorneys for Plaintiffs
Lisa McDougall, Esq., of Counsel
Robert L. Lash, Esq., of Counsel

Jaeckle Fleischmann & Mugel, LLP
Attorneys for Defendants
Charles C. Swanekamp, Esq., of Counsel

CURRAN, J.

The individual plaintiffs are cardiothoracic surgeons and are members of the medical staff of Kaleida Health ("Kaleida"). They also are the sole shareholders of their

practice group, plaintiff Buffalo Thoracic Surgical Associates, P.C. ("BTSA"). In or about February 2003, Kaleida hired defendant Richard F. Brodman, M.D. ("Brodman") to be its Chief of the Cardiothoracic Staff and entered into an agreement with defendant Buffalo Cardiothoracic Surgical, PLLC ("BCS"), Brodman's new practice group, to be the exclusive provider of cardiothoracic surgical services at Kaleida. Shortly thereafter, Brodman, who had no obligation to do so, approached the individual plaintiffs about joining BCS, which plaintiffs would be required to do in order to maintain their privileges at Kaleida. For various reasons, including that plaintiffs believed that the BCS contract being offered was illegal and/or unethical, plaintiffs refused to join BCS. As a result, Kaleida informed plaintiffs that it intended to terminate their staff privileges.

Following an Article 78 proceeding and a lengthy hearing pursuant to Kaleida's bylaws (the "Article 12 Hearing"), on September 12, 2004, Kaleida terminated plaintiffs' privileges to perform cardiac surgery because plaintiffs refused to join BCS. On January 21, 2005, the Kaleida/BCS contract was terminated and plaintiffs' full privileges at Kaleida were restored on January 25, 2005.

In November 2004, on motion of plaintiffs, this matter was converted into a plenary action by the Honorable Joseph G. Makowski, J.S.C. A Converted and Amended Complaint was served on January 24, 2005 and a Second Converted and Amended Complaint was served on July 8, 2005. On October 4, 2007, plaintiffs obtained leave to serve a Third Converted and Amended Complaint. Before the Court is defendants' motion for summary judgment on all causes of action against them.

Plaintiffs' Third Converted and Amended Complaint contains three (3) causes of action:

> (1) Declaratory Judgment that the BCS contract offered to plaintiffs is "unlawful and unethical and void as against public policy;"
>
> (2) Unfair Trade Practices; and
>
> (3) Tortious Interference with Business Relationships/Prospective Business Relationships.

Despite the significant passage of time since this action was commenced, very little discovery has taken place.[1] Indeed, as of the filing of this motion, no documents have been exchanged, no depositions have taken place and no third-party discovery has occurred. According to plaintiffs, the lack of discovery renders the motion premature, as many of the facts and documents required by plaintiffs to oppose the motion are in the possession of defendants and/or third-parties outside of plaintiffs' control.

First Cause of Action - Declaratory Judgment

In the first cause of action, plaintiffs allege that the proposed BCS contract is an illegal and unethical part of a scheme to ration health care and unlawfully split fees. Consequently, plaintiffs seek to have the proposed BCS contract declared unlawful, unethical and void as against public policy.

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[1] Various appeals taken from a discovery order granted by the Hon. Eugene M. Fahey on October 10, 2006, and adhered to by Justice Fahey following reargument on December 19, 2006, were recently decided by the Appellate Division, Fourth Department on March 14, 2008. Additionally, a Stipulated Protective Order governing document discovery was granted in connection with plaintiffs' cross-motion to this summary judgment motion.

CPLR § 3001 provides that "the supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a *justiciable controversy* whether or not further relief is or could be claimed" (emphasis added). In order to maintain an action for a declaratory judgment, a party must present a concrete, actual controversy for adjudication, and not an "abstract, hypothetical issue, the determination of which would not have an immediate practical effect and would not necessarily resolve the matter" (*Fragoso v Romano*, 268 AD2d 457 [2d Dept 2000]).

It is undisputed that plaintiffs never signed the proposed "illegal" contract. It also is undisputed that Kaleida had the right to contract with a single provider for cardiac services and that the single provider, BCS, had no obligation whatsoever to employ plaintiffs. Finally, it is undisputed that plaintiffs have since been restored to full privileges with Kaleida. Further discovery will not alter these settled material facts.

Since the contract was never binding between the parties, any determination as to its legality would be merely an advisory opinion having no impact on the relationship between the parties (*Fragoso*, 268 AD2d at 457). Further, defendants' failure to present a "lawful" contract does not present a justiciable controversy since it is clear that plaintiffs had no right to any contract at all. It is within the Court's discretion to decline to entertain an application for declaratory relief where there is no genuine controversy requiring judicial determination *(J.G. v Zachman*, 34 AD3d 1277, 1279 [4th Dept 2006]). Where, as here, the event complained of (the offering of an "illegal" contract) has expired on its own prior to resolution of the declaratory judgment action (plaintiffs have now been reinstated without the offending contract), the Court should dismiss, as academic, the cause of action seeking a

declaration that the event was improper (*see Gorman v Town Bd. of East Hampton*, 273 AD2d 235 [2d Dept 2000]; *W.J.F. Realty Corp. v Town of Southampton*, 240 AD2d 657, 658 [2d Dept 1997]). Accordingly, defendants' motion for summary judgment as to the first cause of action seeking a declaratory judgment is granted.

Second Cause of Action - Unfair Trade Practices

"An injury to a person's business by procuring others not to deal with him, or by getting away his customers, if unlawful means are employed, such as fraud or intimidation, or if done without justifiable cause, is an actionable wrong" (*Louis Capital Mkts., L.P. v REFCO Group Ltd., LLC*, 9 Misc 3d 283 [Sup Ct, New York County 2005], citing *Duane Jones Co v Burke*, 306 NY 172 [1954]). Likewise, actionable unfair competition "may result from representations or conduct which deceive the public into believing that the business name, reputation or goodwill or one person is that of another" (*Ball v United Artists Corp.*, 13 AD2d 133, 139 [1st Dept 1961]).

Plaintiffs' verified complaint alleges that defendants have caused confusion among patients and referring physicians concerning whether there is an affiliation between BTSA and BCS. Specifically, plaintiffs allege that BCS has purposefully encouraged confusion in the minds of the public concerning its apparent identity or affiliation with BTSA by manipulating Kaleida's information system, InfoClique, instructing nurses that referring patients to plaintiffs was grounds for termination, and rerouting plaintiffs' telephone calls to BCS and then failing to advise the referred/referring party that BCS and BTSA were not the same entity.

Plaintiffs also have submitted the affidavit of Karen Nizialek ("Nizialek"), the Office Manager for BTSA. Nizialek states that plaintiffs' medical malpractice carrier confused BTSA with BCS, that patients trying to reach Brodman were calling BTSA because they thought BTSA and BCS were the same entity, and that BTSA frequently received mail addressed to BCS. Nizialek also states that InfoClique was manipulated and improperly altered to remove a BTSA doctor and place two of BCS's physicians under BTSA's subdirectory. Finally, according to Nizialek, one of BTSA's telephone lines was disconnected and upon investigation she learned that BCS took over the phone number, thereby causing confusion to callers trying to reach BTSA.

On a motion for summary judgment, defendants must affirmatively demonstrate the merits of their defense and cannot meet this burden by noting gaps in the plaintiffs' proof (*Edwards v Arlington Mall Assocs.*, 6 AD3d 1136, 1137 [4th Dept 2004]). Until the movant establishes its entitlement to judgment as a matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied (*Loveless v Am. Ref-Fuel Co. of Niagara, LP*, 299 AD2d 819, 820 [4th Dept 2002]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*Gern v Basta*, 26 AD3d 807, 808 [4th Dept 2006], *lv denied* 6 NY3d 715 [2006]).

None of the affidavits submitted by defendants on this motion refute or even address any of plaintiffs' factual allegations concerning defendants' wrongdoing, including but not limited to plaintiffs' allegations regarding defendants' manipulation of the InfoClique system, redirection/misdirection of referrals intended for plaintiffs, threats of termination made

to persons referring patients to plaintiffs and the alleged disparagement of plaintiffs. Likewise, none of the affidavits submitted by defendants establish that defendants' actions and/or misrepresentations did not result in confusion among patients and others between BTSA and BCS or that defendants' conduct was not intended to cause such confusion or deception (*see O'Hara v Gardner Adv., Inc*., 32 AD2d 632 [1st Dept 1969]). Defendants do not deny that the facts alleged by plaintiffs occurred and do not deny any causal relationship between such alleged occurrences and defendants' actions. Accordingly, defendants have failed to meet their burden of establishing their entitlement to judgment as a matter of law and the motion for summary judgment as to the second cause of action is denied.

Third Cause of Action - Tortious Interference with Business Relationships/Prospective Business Relationships

"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]). "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 normal 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]).

As discussed above, plaintiffs allege that defendants tortiously interfered with their prospective business relations through fraud, misrepresentation and intimidation. Plaintiffs also have alleged violations of the Public Health Law, federal and state anti-kickback and anti-

referral laws, and unlawful and unethical fee splitting, which are additional alleged "wrongful means" used by defendants to tortiously interfere with their prospective business relations.

Defendants have failed to meet their burden of establishing as a matter of law that their alleged conduct was not "wrongful" or "culpable." As noted above, none of the affidavits submitted by defendants refute or even address any of plaintiffs' factual allegations concerning defendants' alleged wrongdoing. Similarly, defendants argue, without any factual support, that plaintiffs cannot prove that they lost any patients or business as a result of defendants' conduct (*See* Defendants' Memorandum of Law, p. 28-29).

Alternatively, defendants argue that the defense of "economic justification" requires the Court to grant them summary judgment on the third cause of action. However, it is well settled that, even if defendants' actions were motivated by economic self interest, such a defense does not excuse actions which are improper or unlawful (*see Nassau Diagnostic Imaging & Radiation Oncology Assocs., P.C. v Winthrop Univ. Hosp.*, 197 AD2d 563 [2d Dept 1993]; *E.F. Hutton Intl. Assocs. Ltd. v Shearson Lehman Bros. Holdings, Inc.*, 281 AD2d 362 [1st Dept 2001]). Since defendants did not address plaintiffs' allegations of wrongdoing, and have not affirmatively proved that plaintiffs did not lose any patients as a result of defendants' conduct, defendants have failed to build a record demonstrating their entitlement to summary judgment.

Moreover, even if defendants had carried their initial burden on this summary judgment motion, plaintiffs assert that due to the unique situation of being doctors on staff in a hospital, which is the source of many of their referral patients, they are unable to identify which specific patients they lost as a result of defendants' misconduct without the aid of discovery.

CPLR 3212 (f) provides "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Accordingly, the motion for summary judgment as to the third cause of action is denied, without prejudice, subject to renewal after the close of discovery.

Defense counsel should settle the Order with plaintiffs' counsel, and a pretrial conference shall take place on April 11, 2008 at 10:00 a.m.

DATED: March 28, 2008

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