Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

PREMIER HEALTH SERVICES, INC., Plaintiff, - against - RESORT NURSING HOME, et al., Defendants.	Index Number 17132 2007 Motion Date September 19, 2007 Motion Cal. Numbers 20 & 21 Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 31 read on this motion by plaintiff for a preliminary injunction and a separate motion by defendants to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (a)(7).

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits.....	1-4
Notice of Motion - Affidavits - Exhibits.....	5-8
Answering Affidavits - Exhibits.....	9-22
Reply Affidavits.....	23-31

Upon the foregoing papers it is ordered that the motions are consolidated for the purpose of disposition and are determined as follows:

This action arises out of an agreement between plaintiff, a dialysis service provider, and defendant Resort Nursing Home (Resort), for the provision of dialysis treatments to nursing home residents. Plaintiff seeks both money damages and equitable relief for alleged breach of contract and tortious conduct.

In its motion, plaintiff seeks a preliminary injunction enjoining defendants from interfering with its ability to obtain

healthcare insurance reimbursement by obstructing access to patient records and failing to provide full access to relevant patient names, payer information and insurance ID numbers as required under the agreement. The conclusory allegations made in support of plaintiff's application are insufficient to satisfy the burden imposed on an applicant for the drastic remedy of preliminary injunctive relief. (See, EdCia Corp. v McCormack, ___ AD3d ___, 2007 NY Slip Op 8179, *3 [2d Dept 2007]; Neos v Lacey, 291 AD2d 434 [2002].) Furthermore, the affidavits submitted by defendants contest plaintiff's contentions and demonstrate the existence of sharply disputed issues, thus precluding a finding of a likelihood of plaintiff's success on the merits. (See, Copart of Conn., Inc. v Long Is. Auto Realty, LLC, 42 AD3d 420 [2007]; Gagnon Bus Co., Inc. v Vallo Transp., Ltd., 13 AD3d 334 [2004]; Neos v Lacey, supra.) In addition, plaintiff's bare, unsubstantiated allegations are insufficient to demonstrate irreparable injury in the absence of preliminary injunctive relief. The assertion that plaintiff's existence as a dialysis provider is threatened is unsupported by any evidence in the record. (See, Copart of Conn., Inc. v Long Is. Auto Realty, LLC, supra.) Moreover, the economic loss complained of by plaintiff is compensable by money damages and does not constitute irreparable harm. (See, EdCia Corp. v McCormack, supra; Dhillon v HealthNow New York, Inc., 32 AD3d 1197 [2006]; Neos v Lacey, supra.) Accordingly, the motion for a preliminary injunction is denied.

While a preliminary injunction is not warranted, the court nonetheless notes that, although denying the wrongful conduct charged against them, defendants do not dispute that Resort is obligated under the terms of the contract to provide plaintiff with the subject insurance information and with access to patient records. The parties are reminded of their responsibilities to fulfill their contractual obligations.

With respect to defendants application, generally on a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]), the focus is on whether a plaintiff has a cause of action, the factual allegations must be deemed to be true, and the plaintiff must be accorded the benefit of every favorable inference from the facts alleged. (See, Cron v Hargro Fabrics, 91 NY2d 362, 366 [1998]; Leon v Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977].) Where evidentiary material is submitted in support of a motion to dismiss for failure to state a cause of action, dismissal is warranted only where the evidence conclusively establishes that a material fact alleged by plaintiff is not a fact at all and that plaintiff has no cause of action. (See, Guggenheimer v Ginzburg, supra; Rovello v Orofino Realty Co., 40 NY2d 633 [1976]; Allstate Ins. Co. v Raguzin, 12

AD3d 468 [2004].) Similarly, to succeed on a motion to dismiss, pursuant to CPLR 3211(a)(1), on the ground that a defense is founded upon documentary evidence, the documentary evidence upon which the motion is predicated must be such that it utterly refutes all factual allegations and definitively disposes of plaintiff's claim as a matter of law. (See, Goshen v Mutual Life Ins. Co. of New York, 98 NY2d 314, 326 [2002]; Montes Corp. v Charles Freihofer Baking Co., 17 AD3d 330 [2005]; see also, Allstate Ins. Co. v Raguzin, supra.)

Although the rest of their motion is addressed to the sufficiency of the complaint on its face, defendants' argument for dismissal of the first cause of action for breach of contract relies upon documentary evidence in the form of a provision of the contract between plaintiff and defendant Resort. Contrary to defendants' contention, the dispute resolution clause in issue does not definitively dispose of the breach of contract claim. The clause merely provides a curative process to be followed by a dissatisfied party prior to having the right to terminate the contract. It is not a clear, explicit and unequivocal alternate dispute resolution agreement whereby the parties to the contract surrendered their normal rights under the procedural and substantive law of this State. (See, Thomas Crimmins Contr. Co. v City of New York, 74 NY2d 166, 171 [1989].) Thus, dismissal of the first cause of action asserted against Resort is not warranted. The first cause of action does not seek relief against the individual defendants.

Although affidavits submitted by a plaintiff may be considered by the court to remedy any defect in the complaint (see, Cron v Hargro Fabrics, supra; Leon v Martinez, supra; Rovello v Orofino Realty Co., supra), the conclusory allegations in the affidavit of plaintiff's principal concerning the underlying purpose of the individual defendants' alleged conduct are insufficient to sustain the cause of action against them for tortious interference with the contractual relations between plaintiff and defendant Resort. (See, Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103 [2002]; Countrywide Publs., Inc. v Kable News Co., Inc., 74 AD2d 522, 523 [1980].) Plaintiff has failed to allege facts showing that the individual defendants' acts were for their own personal profit or outside the scope of their employment as necessary to state a claim for tortious interference by an employee of a party charged with breaching a contract. (See, Lutz v Caracappa, 35 AD3d 673 [2002]; Nu-Life Constr. Corp. v Board of Educ. of the City of New York, 204 AD2d 106 [1994]; Courageous Syndicate, Inc. v People-To-People Sports Comm., Inc., 141 AD2d 599, 600-601 [1988]; Citicorp Retail Servs., Inc. v Wellington Mercantile Servs., Inc., 90 AD2d 532 [1982].)

The equitable remedies sought in the third and seventh causes of action, a permanent injunction and specific performance of the subject contract, are not available due to the existence of an adequate remedy at law. (See, Van Wagner Adv. Corp. v S & M Enters., 67 NY2d 186 [1986]; Old Republic Natl. Title Ins. Co. v Cardinal Abstract Corp., 14 AD3d 678, 680 [2005].) Should plaintiff prove the claimed breaches of contract underlying these causes of action, it can be adequately compensated therefor by money damages which are capable of being calculated with reasonable certainty. (See, Van Wagner Adv. Corp. v S & M Enters., supra.)

The claim for unjust enrichment asserted in the fourth cause of action fails because it arises out of the same subject matter governed by the agreement between plaintiff and Resort. (See, Neos v Lacey, 2 AD3d 812 [2003]; see also, Julien J. Studley, Inc. v New York News, Inc., 70 NY2d 628 [1987].) To the extent this cause of action is also asserted against the individual defendants, it is insufficient since it is based upon allegations of payments and benefits received by Resort, not the individual defendants. (See generally, Chadirjian v Kanian, 123 AD2d 596, 598 [1986].)

The allegations of the fifth cause of action, labeled as one for trade libel and described by plaintiff as also sounding in trade defamation, are similarly insufficient to withstand dismissal. In any action for libel or slander, the particular words complained of and the particular person or persons to whom the allegedly defamatory statements were made must be set forth in the pleading. (CPLR 3016; see, Pipia v Nassau County, 34 AD3d 664, 667 [2006]; Simpson v Cook Pony Farm Real Estate, Inc., 12 AD3d 496, 497 [2004]; Hulse v Heckman, 298 AD2d 361 [2002].) Plaintiff's complaint does not plead the necessary allegations and the affidavits submitted in opposition to the motion do not disclose any evidentiary facts that could cure the deficiency. (Cf., Abe's Rooms, Inc. v Space Hunters, Inc., 38 AD3d 690, 693 [2007].)

As to the sixth cause of action for tortious interference with prospective economic advantage, plaintiff has not alleged or demonstrated the existence of a specific prospective business relationship that it would have entered into but for defendants' interference, thus precluding the claim. (See, Baker v Guardian Life Ins. Co. of America, 12 AD3d 285 [2004]; Long Is. Univ. v Grucci for Congress, Inc., 10 AD3d 412 [2004]; cf., Kevin Spence & Sons, Inc. v Boar's Head Provisions Co., Inc., 5 AD3d 352 [2004].)

Neither defendants' motion to dismiss nor plaintiff's opposition papers address the eighth cause of action, thus the

court makes no ruling as to its viability. Moreover, plaintiff's request for leave to replead in the event any causes of action are found to be insufficient is not supported by evidentiary facts or a proposed amended complaint, and is therefore denied. (Cf., Abe's Rooms, Inc. v Space Hunters, Inc., supra; Schenkman v New York Coll. of Health Professionals, 29 AD3d 671, 673 [2006].) Accordingly, the motion to dismiss is denied as to the first and eighth causes of action, and is granted in all other respects.

Dated: December 7, 2007

J.S.C.