

**Lobel v Maimonides Medical Center**

2005 NY Slip Op 30358(U)

December 29, 2005

Supreme Court, New York County

Docket Number: 602970/04

Judge: Bernard J. Fried

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

EE  
1-5-06  
EB

PRESENT: BERNARD J. FRIED  
J.S.C.

PART  
**FBEM**

Index Number : 602970/2004

LOBEL, SUSAN M., M.D.

vs  
MAIMONIDES MEDICAL CENTER

Sequence Number : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

OTION DATE \_\_\_\_\_

OTION SEQ. NO. \_\_\_\_\_

OTION CAL. NO. \_\_\_\_\_

The \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

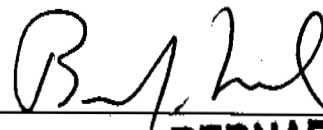
JAN 03 2006

NEW YORK  
COUNTY CLERK'S OFFICE

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 12/29/05



**BERNARD J. FRIED**  
**J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

----- X

SUSAN M. LOBEL, M.D.,

Index No. 602970/04

Plaintiff,

- against -

MAIMONIDES MEDICAL CENTER, THE  
MAIMONIDES MEDICAL CENTER DIVISION OF  
REPRODUCTIVE ENDOCRINOLOGY, THE  
MAIMONIDES MEDICAL CENTER DIVISION OF  
REPRODUCTIVE ENDOCRINOLOGY FACULTY  
PRACTICE PLAN, BROOKLYN I.V.F., INC.,  
GENESIS FERTILITY REPRODUCTIVE  
MEDICINE, P.C., and RICHARD V. GRAZI, M.D.,

Defendants.

----- X

**FILED**  
JAN 03 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

**APPEARANCES:**

For Plaintiff:

Arent Fox PLLC  
1675 Broadway  
New York, New York 10019  
(Janine E. Gargiulo, Eric Lent)

For Defendants:

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Weiss Zarett & Hirshfeld, P.C.  
3333 New York Hyde Park Road (#11042)  
New Hyde Park, New York 11042  
(David Zarett)

**FRIED, J.:**

Defendants Maimonides Medical Center (MMC), The Maimonides Medical Center Division

of Reproductive Endocrinology, The Maimonides Medical Center Division of Reproductive Endocrinology Faculty Practice Plan, Brooklyn I.V.F., Inc., Genesis Fertility Reproductive Medicine, P.C. (collectively, Division), and Richard Grazi, M.D. move, pursuant to CPLR 3211 (a) (1), (5), and (7), for dismissal of the amended complaint on the grounds of (1) a defense founded upon documentary evidence; (2) a release executed by plaintiff Susan M. Lobel, M.D. on April 16, 2002 (Release); (3) failure to state a cause of action; and (4) the court lacks subject matter jurisdiction over plaintiff's medical staff privileging claims.

The following allegations are taken from the verified amended complaint. Plaintiff is a medical doctor practicing in the field of reproductive endocrinology. MMC is a New York State certified hospital facility corporation. Plaintiff's employment with MMC began in 1996 when the parties entered into two agreements: (1) an employment agreement between plaintiff and MMC (1996 Agreement), and (2) a restrictive covenant agreement as an amendment to the 1996 Agreement. The 1996 Agreement had a three-year renewable term beginning on January 1, 1997, and it provided that plaintiff would be an employee of MMC and serve as the associate director of the Division and director of the IVF program.

Under plaintiff's guidance, the Division's number of in vitro fertilization (IVF) cycles multiplied more than tenfold from 1996 to 1999, thereby entitling her to substantial incentive pay under the 1996 Agreement. It is alleged that Grazi manipulated the Division's overhead and other expenses, however, to minimize plaintiff's incentive pay, and he committed other acts of financial misconduct, including, among many other things, the diversion of Division funds for his personal benefit.

Beginning in 1999, after the initial three-year term of the 1996 Agreement, plaintiff and Grazi

agreed to be equal partners in the Division, and they were to receive equal compensation and jointly make all major decisions affecting the Division. In April 2002, MMC, Grazi, and plaintiff executed multiple documents that memorialized certain of their understandings, including salary and other compensation to be paid to plaintiff and Grazi, as well as joint decision making for the Division. After an "Income Sharing And Related Matters Agreement Of The Division Of Reproductive Endocrinology Faculty Practice Plan Of Maimonides Medical Center" (Income Sharing Agreement) was executed in April 2002, retroactive to January 1, 2001, the parties continued to be employed by MMC, and they continued to operate the Division as partners.

Despite the success of the Division, however, Grazi allegedly did not comply with the terms of the Income Sharing Agreement. Rather, it is claimed that Grazi denied plaintiff full access to the Division's financial information, that he refused to share all of the Division's decision making with plaintiff, and that MMC condoned Grazi's operating of the Division as if it were his personal enterprise. The complaint also alleges that defendants engaged in numerous business improprieties and irregularities to plaintiff's detriment.

In September 2002, Grazi confirmed in writing that MMC had agreed to extend plaintiff's employment contract with MMC through December 2007. In November 2003, MMC reconfirmed that it had agreed to extend plaintiff's employment contract with it through December 2007. On December 16, 2003, plaintiff received a letter from MMC that informed plaintiff that the board of trustees had unanimously approved the executive medical council's recommendation that plaintiff be reappointed to the medical staff of MMC in the Department of Obstetrics and Gynecology for the two-year period from January 1, 2004 to January 1, 2006.

From December 16, 2003 (the date of plaintiff's reappointment) to March 31, 2004, plaintiff

continued to perform her contractual obligations and employment duties proficiently. Yet, allegedly she was wrongfully excluded from partnership business, and denied access to the Division's books and records despite her repeated requests for access to the books and records and an accounting of the Division's revenues.

Plaintiff scheduled a meeting with Abel Pena, the hospital's accountant overseeing the Division, to review the Division's finances. Grazi allegedly orchestrated her termination of employment by MMC, on March 31, 2004, one-half hour before the scheduled meeting with the hospital's accountant in a transparent attempt to prevent plaintiff from gaining access to the Division's books and records. MMC advised plaintiff that her employment and privileges at MMC would be terminated as of April 30, 2004, but that she could resign as a matter of record. In its termination letter, MMC's stated reason was plaintiff's inability to have a functional working relationship with Grazi, the Division's director. In a meeting held on April 23, 2004, MMC's vice president for legal affairs told plaintiff that the termination was effectively a "divorce between the doctors," and that there had been "no finding of wrongdoing" by her. Plaintiff contends that the termination was an "ousting of her by Grazi because she attempted to obtain access to the Division's accounting records to which she was rightfully and legally entitled."

The amended complaint contains seven causes of action. The first is for an accounting against all defendants. It alleges that under the Income Sharing Agreement, Grazi, MMC, and plaintiff operated as a partnership or joint venture which gave rise to a fiduciary and confidential relationship with one another, thereby obligating them to account to plaintiff. Grazi, MMC, and plaintiff continued to have a shared interest in the success of the Division, and they agreed to share in its profits. An accounting of the debt that the Division generated prior to the execution of the

Income Sharing Agreement is necessary, because significant debt payments were paid after the execution of the Income Sharing Agreement, thereby decreasing profit distributions.

The second cause of action seeks a declaration of plaintiff's employment rights under the Income Sharing Agreement, and other documents relating to her employment by MMC, including: (1) the terms of her 2004 employment; (2) salary, benefits, and other compensation that plaintiff earned from 2001 to 2004 and beyond, together with statutory penalties, and attorney's fees for violating New York's labor and wage payment laws; (3) the date through which MMC is required to pay her compensation; (4) whether MMC breached the terms of plaintiff's employment, and, if so, the damages arising from such breach; and (5) the amount of severance payment obligations due plaintiff. It also seeks a declaration (1) nullifying the March 31, 2004 termination letter; (2) stating that the purported grounds for termination violate New York law; and (3) as to the amount of damages for reinstatement, back pay, and benefits. Plaintiff claims that MMC improperly terminated her hospital privileges because the termination was not related to standards of patient care or welfare, the hospital's objective, or the character or competency of the practitioner.

The third cause of action seeks a declaration (1) as to whether plaintiff is subject to the restrictive covenant, and whether it is enforceable by virtue of defendants' breaches of that covenant, and of other terms of her employment, and (2) the enforceability of the Release.

The fourth cause of action alleges that defendants breached employment agreements and implied covenants of good faith and fair dealing by (1) paying Grazi salary and benefits in excess of the amount to which he was entitled; (2) denying plaintiff access to the Division's books and records; (3) Grazi's systematic exclusion of plaintiff from equal participation in the Division's management; (4) Grazi's interfering with plaintiff's employment relationship with MMC despite his

express agreement not to do so; (5) MMC's wrongful termination of plaintiff's employment without cause or without conducting a good faith investigation of any alleged cause; and (6) failing to provide plaintiff with any severance payment on January 14, 2005, after termination of her employment.

The fifth cause of action is against Grazi for tortious interference with existing contract or prospective contract relations or business relations. Allegedly, Grazi interfered with plaintiff's employment with MMC by making false, defamatory, and derogatory statements about plaintiff, resulting in MMC's breach of its employment agreements with plaintiff. Grazi was motivated by malice and by a desire to prevent plaintiff's meeting with MMC because he was in the process of renegotiating his position with MMC, and he feared that his position would be in jeopardy if MMC learned of his misconduct.

The sixth cause of action alleges that MMC and Grazi breached fiduciary duties owed to plaintiff by failing to provide an accounting, and by refusing to distribute profits and other compensation to which she was entitled, and by Grazi's false and disparaging statements about her.

The seventh cause of action is for prima facie tort against Grazi. It alleges that Grazi acted with disinterested malevolence and a sole intent to harm plaintiff by (1) creating an environment whereby plaintiff was subjected to abuse, humiliation, intimidation, and harassment; (2) opening and reading plaintiff's personal mail; (3) failing to pay bona fide Division expenses incurred in plaintiff's name so as to injure her name and creditworthiness; (4) concealing from plaintiff the foregoing to exacerbate the injury; (5) intentionally interfering with plaintiff's employment opportunities by making false and disparaging comments about her; (6) interfering with plaintiff's employment opportunities by failing to forward her mail; and (7) directing the Division staff to refuse to provide

patients and other callers with the agreed-to telephone number to contact plaintiff. As a result, plaintiff suffered special damages, including (1) injury to her name and reputation; (2) loss of Division profits; and (3) loss of income, profits, and other benefits that plaintiff expected to receive during her employment.

Defendants now move to dismiss the entire amended complaint, except for a portion of the fourth cause of action directed toward compensation issues under the Income Sharing Agreement.

Defendants first argue that the first and sixth causes of action, for an accounting and breach of fiduciary duty, respectively, must be dismissed because plaintiff does not have a right to an accounting, and she was not in a fiduciary relationship with them. This argument is unpersuasive. The amended complaint, supplemented by other evidence contained in the record, adequately alleges the existence of a fiduciary relation which could entitle plaintiff to an accounting (*Blaustein v Lazar Borck & Mensch*, 161 AD2d 507 [1<sup>st</sup> Dept 1990]).

For example, in the second paragraph of the amended complaint, plaintiff alleges that, during more than seven years of employment, she contributed more than one million dollars to the servicing of the debt of the Division with the expectation that her employment and affiliation with Grazi and others would continue after the debt was repaid, and that her income would increase once the debt was repaid. In a letter dated October 24, 2002, to Martin Crammer, Vice President, Financial Operations and Faculty Practice at MMC, Grazi stated: "Inasmuch as Dr. Lobel and I now share equally in the expenses and revenues of our division, we both agree that she, too, should be allowed a leased car."

Moreover, the Income Sharing Agreement provides that "Grazi and Lobel shall jointly make all significant decisions affecting the Division. Grazi and Lobel acknowledge that they will take no

action nor engage in any conduct adverse to the interests or continued employment of the other, except as may be required by law.” Hence, there is evidence that the parties entered into a joint venture, which might create a duty of trust if, in fact, it is shown that the parties agreed to share in profits and losses (*Wiener v Lazard Freres & Co.*, 241 AD2d 114 [1<sup>st</sup> Dept 1998]; *Michnick v Parkell Prod.*, 215 AD2d 462 [1<sup>st</sup> Dept 1995]). Joint venturers owe one another a fiduciary duty (*Blue Chip Emerald LLC v Allied Partners*, 299 AD2d 278 [1<sup>st</sup> Dept 2002]).

As for the second cause of action seeking a declaration of plaintiff’s employment rights under the Income Sharing Agreement, and other documents relating to her employment by MMC, defendants argue that declaratory relief is improper where monetary legal relief is available. A court may in its discretion render a declaratory judgment to stabilize the rights and legal relations of the parties to a justiciable controversy that involves substantial legal interests when the judgment will have some practical effect (*Goodman v Reisch*, 220 AD2d 383 [2d Dept 1995]). This is especially applicable here where there are issues pertaining to the enforceability of a release and of a restrictive covenant (*see e.g. Gazzola-Kraenzlin v Westchester Med. Group, P.C.*, 10 AD3d 700 [2d Dept 2004]; *Thur v IPCO Corp.*, 173 AD2d 344 [1<sup>st</sup> Dept], *appeal dismissed* 78 NY2d 1007 [1991]).

The claim that defendants improperly terminated plaintiff’s medical staff privileges is not properly before me, because the appropriate recourse for that claim is the grievance process set forth in Public Health Law § 2801-b (*Solomon v Beth Israel Med. Ctr.*, 248 AD2d 118 [1<sup>st</sup> Dept], *lv dismissed in part, denied in part* 92 NY2d 874 [1998]). Plaintiff argues that the Public Health Law requirement is not applicable, because MMC’s proffered reason for the termination does not pertain to medical care, citing *Tassy v Brunswick Hosp. Ctr.* (296 F3d 65 [2d Cir 2002]). In the March 31, 2004 termination letter, MMC stated that the “primary reason for the decision to end your

employment at this time is your inability to have a functional working relationship with the Director of the Division of Reproductive Endocrinology and other members of the staff.” Contrary to plaintiff’s assertion, the proffered reason relates to medical care, in that a suitable and cooperative working relationship between physicians would likely impact on, or at least relate to, the care rendered to the hospital’s patients.

The motion is denied as to the third cause of action, to the extent that it seeks declarations that plaintiff is not subject to the restrictive covenant, and that defendants procured her execution of the Release by duress and misrepresentation, thereby rendering the Release unenforceable.

Defendants argue that the Release bars all of plaintiff’s pre-January 1, 2001 compensation claims. Plaintiff contends that the Release does not bar any of her claims because (1) the Release was executed without disclosures required by parties owing a fiduciary relationship to each other; (2) Grazi threatened to wrongfully withhold her then past due distribution of \$400,00 unless she signed the Release; and (3) prior to the execution of the Release, Grazi intentionally misrepresented the amount of plaintiff’s 1999 profits, and denied her access to the Division’s books and records so as to procure her execution of the Release. Allegedly, on February 11, 2004, Grazi showed plaintiff an accounting report that showed that she had a profit of \$270,000 in 1999.

Although CPLR 3211 (a) (5) permits a court to dismiss a claim on the basis of a release (*see e.g. Litchmore v Sidney Martin Inc.*, 209 AD2d 675 [2d Dept 1994]), defendants have not demonstrated on this pre-answer record that the Release is enforceable. Although the amended complaint fails to adequately allege a theory of duress to void the Release (*see e.g. Fruchthandler v Green*, 233 AD2d 214 [1<sup>st</sup> Dept 1996] [plaintiff must show that it was compelled to agree to the terms of the release by means of a wrongful threat that precluded the exercise of its free will]), the

amended complaint adequately alleges that plaintiff executed the Release based upon Grazi's misrepresentations about the Division's finances (*McLaughlin & Stern, LLP v Lipkin*, 288 AD2d 65 [1<sup>st</sup> Dept 2001]).

Defendants contend that all of the issues that plaintiff claims that she was unaware of at the time she executed the Release were part of the negotiations leading up to her execution of the Release and the Income Sharing Agreement. I am not persuaded, however, that the correspondence pertaining to pre-contractual negotiations conclusively establishes a defense to the asserted claim as a matter of law (*IMO Indus. v Anderson Kill & Olick, P.C.*, 267 AD2d 10 [1<sup>st</sup> Dept 1999]). Misrepresentations upon which plaintiff may have reasonably relied in entering into the Release suffice to show fraud so as to permit plaintiff to avoid the Release (*McLaughlin & Stern, LLP v Lipkin*, 288 AD2d 65, *supra*; *see also Blue Chip Emerald LLC v Allied Partners*, 299 AD2d 278, *supra*; *H.W. Collections v Kolber*, 256 AD2d 240 [1<sup>st</sup> Dept 1998]).

Plaintiff also claims that she is not bound by the restrictive covenant contained in the 1996 Agreement because defendants breached that agreement by, among other things, refusing to allow plaintiff to send notification of her departure from the Division to patients under her primary care, and her present contact information, as provided for in the restrictive covenant agreement. In their original moving papers, defendants argued that the restrictive covenant agreement is enforceable, but in their reply papers, however, they assert that the issue of enforcement of the covenant is now moot (Memorandum in Further Support of Defendants Motion to Dismiss, at 6, n 3).

Documentary evidence conclusively supports defendants' argument that plaintiff's status as an at-will employee precludes plaintiff from asserting that she was an employee of MMC under a term of employment with an end date no earlier than 2007, and thus, that her employment could not

be terminated without cause. It establishes that plaintiff was an at-will employee when MMC terminated her employment in 2004, thereby warranting dismissal of the claim (*Elite Investigations, Ltd. v St. Regis Hotel Joint Venture*, 197 AD2d 456 [1<sup>st</sup> Dept 1993]).

Plaintiff contends that her employment contract, with a term ending no earlier than in 2007, consists of various documents, including the 1996 Agreement, the Income Sharing Agreement, plaintiff's reappointment letters, and various other writings and communications executed contemporaneously and subsequent to those agreements. None of that evidence establishes the creation of an unexpired fixed term at the time of plaintiff's termination, nor does it demonstrate the existence of an issue of fact as to plaintiff's employment status. The 1996 Agreement had a three-year term, and it was not renewed. The Income Sharing Agreement, dated as of January 1, 2001, between Grazi and plaintiff does not contain a term of employment, and it provides that it sets forth the entire agreement between the parties relating to the matters addressed therein, namely the sharing by plaintiff and Grazi of compensation for their work at the Division. The December 16, 2003 "privileging letter" that reappointed plaintiff for a two-year period from January 1, 2004 to January 1, 2006, did not create a term of employment with MMC (*Palmieri v Long Is. Jewish-Hillside Med. Ctr.*, 104 AD2d 405 [2d Dept 1984]).

Moreover, plaintiff's reference to other writings and communications is unavailing, because, contrary to plaintiff's conclusory assertion, that evidence does not establish that the parties entered into an employment agreement. Plaintiff also alleges that in November 2003, MMC reconfirmed that it had agreed to extend plaintiff's employment contract with it through December 2007 (Amended Complaint, ¶ 80). Apparently, this was an oral communication, and, as such, it is barred by the statute of frauds because plaintiff alleges that it was an agreement for a fixed term beyond a

one-year period (*Stucklen v Kabro Assoc.*, 18 AD3d 461 [2d Dept 2005]). In a September 3, 2002 letter from Grazi to David Lester, Grazi states: “On a very-related note, Susan still has no contract and mine is expiring in December 2003. The hospital has already agreed to extend our contracts through the loan-payback period, which ends in December 2007.” This statement does not constitute a writing signed by the party to be charged (*Cunnison v Richardson Greenshields Sec.*, 107 AD2d 50 [1<sup>st</sup> Dept 1985]).

The claim for breach of the implied covenant of good faith in the fourth cause of action is dismissed because it is redundant of the breach of contract claim (*Engelhard Corp. v Research Corp.*, 268 AD2d 358 [1<sup>st</sup> Dept 2000]; *Business Networks of New York v Complete Network Solutions*, 265 AD2d 194 [1<sup>st</sup> Dept 1999]).

The fifth cause of action for tortious interference with existing contract or prospective contract relations or business relations against Grazi is dismissed. Plaintiff alleges that Grazi tortiously interfered by “making false, defamatory, and derogatory statements” about her for the sole purpose of harming her, and used dishonest and unfair means to injure her relationship with MMC (Amended Complaint, ¶¶ 221, 226).

Tortious interference with contract requires the existence of a valid contract between plaintiff and a third party, defendant’s knowledge of that contract, defendant’s intentional procurement of the third party’s breach of contract without justification, actual breach and damages (*Vigoda v DCA Productions Plus*, 293 AD2d 265 [1<sup>st</sup> Dept 2002]). Plaintiff’s at-will position was only a prospective contractual relation, and thus, it cannot support a claim for tortious interference with existing contract (*Bainton v Baran*, 287 AD2d 317 [1<sup>st</sup> Dept 2001]).

To the extent that the fifth cause of action also alleges tortious interference with prospective

contract relations or business relations, it is not validly stated. This claim is actionable if effected by wrongful means (*NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996]), which generally include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degree of economic pressure (*id.* at 624). Plaintiff fails to identify the alleged defamatory statements, thereby rendering the claim conclusory and not validly stated (*see Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 [1<sup>st</sup> Dept 1995]). Moreover, although the allegation that Grazi used dishonest means to cause plaintiff's execution of the Release is relevant to the claims discussed above, plaintiff has failed to articulate its relevance to her tortious interference claim.

The seventh cause of action for prima facie tort is dismissed. Prima facie tort consists of four elements: (1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful (*Curiano v Suozzi*, 63 NY2d 113 [1984]). To state a valid claim, the complaint must allege that defendant acted with disinterested malevolence, i.e., the intent must have been solely to injure plaintiff (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]; *Havell v Islam*, 292 AD2d 210 [1<sup>st</sup> Dept 2002]), and not within defendant's own self-interest (*Bainton v Baran*, 287 AD2d 317, *supra*). Here, the allegation that Grazi was motivated, in part, by a desire to prevent plaintiff from meeting with MMC, because Grazi was in the process of renegotiating his own position with MMC, and he feared that his position would be in jeopardy if MMC learned of his alleged misconduct (Amended Complaint, ¶ 232) is fatal to the claim (*id.*).

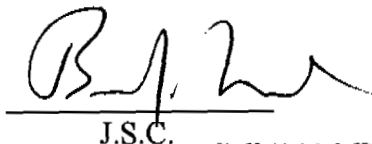
Accordingly, it is

ORDERED that the motion to dismiss the amended complaint is granted to the extent of dismissing the fifth and seventh causes of action; and it is further

ORDERED that defendants are directed to serve their answers to the amended complaint's surviving claims within twenty (20) days after service of a copy of this order with notice of entry.

Dated:

12/29/05



J.S.C.

**BERNARD J. FRIED**  
J.S.C.

**FILED**  
JAN 03 2006  
NEW YORK  
COUNTY CLERK'S OFFICE