Lobel v Maimonides Medical Center
2006 NY Slip Op 30510(U)
December 22, 2006
Supreme Court, New York County
Docket Number: 602970/04
Judge: Bernard J. Fried
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[* 1] SCANNED ON 12/29/2006

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

PRESENT: BERNARD J. FRIED, *Justice* | **PART** 60

LoBEL, SUSAN M., MD
PLAINTIFF

- v -

MAIMONIDES MEDICAL CENTER.
DEFENDANT

INDEX NO. FBEM #[illegible]70-2004
MOTION DATE #003
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

The following papers, numbered 1 to ____ were read on this motion to/for ____________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum.

SO ORDERED

FILED
DEC 27 2006
NEW YORK
COUNTY CLERKS OFFICE

Dated: 12/22/06 [signature] J.S.C.
BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

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

FBEM

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SUSAN M. LOBEL, M.D.,

Plaintiff,

Index No. 602970/04
Mot. Seq. 003

- 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.

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APPEARANCES:

For Plaintiff:

Graubard Miller
The Chrysler Building
405 Lexington Avenue
New York, New York 10174
(C. Daniel Chill, Daniel J. Goldberg)

For Defendants:

Wilson, Elser, Moskowitz
Edelman & Dickler
150 East 42nd Street
New York, New York 10017-5639
(Ricki E. Roer, Celena R. Mayo)

FILED
DEC 27 2006
NEW YORK
COUNTY CLERK'S OFFICE

FRIED, J.:

Plaintiff Susan M. Lobel, M.D. moves, pursuant to CPLR 3025 (b), for leave to serve an amended complaint in the form of the proposed second amended complaint, a copy of which plaintiff submitted with the motion papers. In effect, the proposed second amended complaint seeks the reinstatement of the fifth cause of action which was dismissed on a prior motion.

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Defendants include 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., and Richard Grazi, M.D. (Grazi).

The amended complaint originally contained seven causes of action for (1) an accounting against all defendants; (2) a declaration of plaintiff's employment rights under the "Income Sharing Agreement," and other documents relating to her employment by MMC; (3) a declaration (a) as to whether plaintiff is subject to a restrictive covenant, and whether it is enforceable by virtue of defendants' alleged breaches of that covenant, and of other terms of her employment, and (b) the enforceability of the release; (4) breach of employment agreements and implied covenants of good faith and fair dealing; (5) tortious interference with existing contract or prospective contract relations or business relations; (6) breach of fiduciary duties; and (7) prima facie tort against Grazi.

In a prior decision dated December 29, 2005 (Prior Decision), I dismissed the fifth cause of action for tortious interference with existing contract, prospective contract relations, or business relations, as well as the seventh cause of action for prima facie tort. As for the fifth cause of action, plaintiff alleged that Grazi tortiously interfered with her employment with the hospital 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, and which resulted in MMC's breach of its employment agreements with plaintiff (amended complaint, ¶¶ 221, 226). Allegedly, 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.

In the Prior Decision, I held that plaintiff's at-will position was only a prospective contractual relation, and, thus, it cannot support a claim for tortious interference with existing contract (citing *Vigoda v DCA Productions Plus*, 293 AD2d 265 [1st Dept 2002]; *Bainton v Baran*, 287 AD2d 317 [1st Dept 2001]). To the extent that the fifth cause of action also alleged tortious interference with prospective contract relations or business relations, it was not validly stated, because plaintiff failed to identify the alleged defamatory statements, thereby rendering the claim conclusory (*see Bellino Schwartz Padob Adv. v Solaris Mktg. Group*, 222 AD2d 313 [1st Dept 1995]).

Plaintiff now asserts that the purpose of the proposed second amended complaint is to narrow the issues, and provide the requisite support for a claim of tortious interference with contract and prospective contractual relations. Plaintiff purports to remedy the pleading deficiency by identifying the alleged defamatory statements, citing a March 31, 2004 termination letter to plaintiff (Termination Letter) in which it is stated, in relevant part, 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. You should also be aware that there have been a number of serious allegations concerning you including but not limited to allegations of harassment of a staff member and falsification of records which Maimonides Medical Center is required to investigate. Your cooperation with these investigations is expected. Please be advised that any attempt at retaliation may result in immediate termination without prior notice"

(second amended complaint, ¶ 126). As evidence of the merits of the proposed amended pleading, plaintiff submits a copy of the Termination Letter.

Although leave to amend is to be freely granted in the absence of prejudice or surprise resulting from the delay (*Antwerpse Diamantbank N.V. v Nissel*, 27 AD3d 207 [1st Dept 2006]), leave to amend should be denied where the amended claim is palpably insufficient (*Manhattan Real Estate Equities Group LLC v Pine Equity NY, Inc.*, 27 AD3d 323 [1st Dept 2006]). Such is the case here. Although plaintiff's counsel asserts a belief that plaintiff needs the reinstatement of this claim to increase any damage award that she may eventually recover (oral argument transcript, at 30-34) that is not a factor to consider in evaluating the legal sufficiency of the proposed amended pleading.

As a preliminary matter, it should be noted that, in her original memorandum of law (at 4), plaintiff argues that defendants are unable to show prejudice, because "[p]laintiff seeks only (1) to add certain facts to supplement an already existing claim and (2) to plead with greater specificity certain allegations." Yet, in her reply memorandum, plaintiff contends that she seeks only to add a new meritorious theory of liability and not new facts (at 3-4). In any event, neither of these divergent paths lead to a finding that the granting of the motion is warranted.

The statement in the letter as to plaintiff's "inability to have a functional working relationship with the Director of the Division of Reproductive Endocrinology and other members of the staff" is nonactionable as opinion (*Epstein v Board of Trustees of Dowling Coll.*, 152 AD2d 534 [2d Dept 1989]). As for the statement in the letter that "there have been a number of serious allegations concerning you including but not limited to allegations of harassment of a staff member and falsification of records," plaintiff fails to provide any support for the assertion that these claims are false. On its face, the Termination Letter does

not contain any language to support her tortious interference claim, and thus, it, by itself, is insufficient to demonstrate that the proposed amended pleading has merit.

Moreover, plaintiff's affidavit lacks probative value, because it functions as a quasi memorandum of law, replete with legal assertions, and it is devoid of any allegations of fact to buttress her claim that the Termination Letter contains defamatory language. Hence, denial of the motion for leave to serve the proposed amended complaint is warranted because of the lack of an evidentiary showing of merit (*Davis & Davis, P.C. v Morson*, 286 AD2d 584 [1st Dept 2001]; *Leszczynski v Kelly & McGlynn*, 281 AD2d 519 [2d Dept 2001]).

To be sure, plaintiff verified the proposed second amended complaint, and, as such, the verified pleading could constitute an affidavit of merit (*see* CPLR 105; *see also Salch v Paratore*, 60 NY2d 851 [1983], *rearg denied* 61 NY2d 759 [1984]; *Mohan v Hollander*, 303 AD2d 473 [2d Dept 2003]; *Lebron v New York City Hous. Auth.*, 257 AD2d 541 [1st Dept 1999]). That proposed pleading lacks adequate detail, however, to demonstrate that the fifth cause of action contained in the second amended complaint has merit. The assertion therein that the Termination Letter contains false and defamatory content is conclusory and without a factual basis (*see e.g.* second amended complaint, at ¶ 128 ["The termination letter was false and defamatory. It was either written or caused to be written and disseminated by Grazi with full knowledge of its falsity and with spite and ill-will toward plaintiff and the letter harmed plaintiff per se in that it adversely affected her in her profession, trade or business and imputed to her a trait that to some would make her unfit to practice Medicine]; *see generally* proposed second amended complaint, ¶¶ 125-136).

Although the instant motion purports to be one for leave to serve an amended

complaint, it could be construed as one for reargument, in that plaintiff argues that I overlooked relevant law that permits her to bring a tortious interference claim even though she was an at-will employee (Memorandum at 5, citing *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980]). Construed as such, the reargument motion is untimely, in that it was not made within 30 days after service of the prior order with notice of entry, which occurred on January 27, 2006 (CPLR 2221; *see also Board of Mgrs. of Exec. Plaza Condominium v Jones*, 251 AD2d 89 [1st Dept] [court properly denied motion for leave to amend pleadings for lack of an evidentiary showing of merit and because the proposed amended pleading was not placed before the court until five months after the prior motion practice had been adjudicated], *lv dismissed* 92 NY2d 1002 [1998], *rearg denied* 92 NY2d 1046 [1999]).

Apparently, the delay in making the motion was based, in whole or in part, by a change in plaintiff's counsel (*see* oral argument transcript, at 29). Nevertheless, even if I were to entertain reargument (*see Garcia v The Jesuits of Fordham*, 6 AD3d 163 [1st Dept 2004] [although reargument was technically untimely pursuant to CPLR 2221, it was not an improvident exercise of discretion for the court to reconsider its prior ruling]), considering the foregoing, plaintiff has not demonstrated that I overlooked any relevant fact, misapprehended the law or, for any other reason, mistakenly arrived at its determination (*Spinale v 10 West 66th St. Corp.*, 193 AD2d 431 [1st Dept 1993]; *Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). That the Court in *Guard-Life Corp. v S. Parker Hardware Mfg. Corp.* (50 NY2d 183) recognized the validity of a complaint involving contracts terminable at will, where the one interfering employed wrongful means, does not

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alter the reasoning behind the Prior Decision that, on the allegations presented in this action, the tortious interference claim was not viable. According to plaintiff, the wrongful means is evidenced by the Termination Letter, and, as discussed above, plaintiff has not shown that the words contained in that letter are actionable so as to support this particular theory of liability.

Accordingly, it is

ORDERED that the motion by plaintiff for leave to serve an amended complaint is denied.

Dated: 12/22/06

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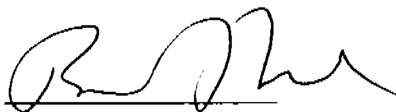

J.S.C.

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