SHORT FORM ORDER

INDEX No. 98-4752
CAL. No. 06-02789-CO

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-18-07
ADJ. DATE 5-30-07
Mot. Seq. # 003 - MotD

GREENPORT HEALTHCARE NURSE PRACTITIONERS, P.C. d/b/a GREENPORT HEALTHCARE CENTER and MILDRED SCHARF-EHRENFELD a/k/a MILDRED SCHARF d/b/a GREENPORT WOMEN'S HEALTHCARE CENTER, Plaintiffs, - against - THE SOUTHAMPTON HOSPITAL and PAT ALCUS, Defendants.	WICKHAM, BRESSLER, GORDON et al. Attorneys for Plaintiffs 13015 Main Road, P.O. Box 1424 Mattituck, New York 11952 NIXON PEABODY, LLP Attorneys for Defendants 50 Jericho Quadrangle, Suite 300 Jericho, New York 11753-2728

Upon the following papers numbered 1 to 55 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 42 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 43 - 46 ; Replying Affidavits and supporting papers 47 - 55 ; Other defendant memorandum of law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants' motion for summary judgment dismissing the causes of action enumerated within plaintiffs' complaint is determined as follows.

Plaintiffs Greenport Healthcare Nurse Practitioners, P.C. d/b/a Greenport Healthcare Center ("GHC") and its principal Mildred Scharf-Ehrenfeld, a/k/a Mildred Scharf d/b/a Greenport Women's Healthcare Center ("Ms. Scharf") instituted the instant action against defendants Southampton Hospital and Pat Alcus ("the Hospital") on February 27, 1998 for, *inter alia,* breach of contract, conversion, intentional interference with contract , violation of New York Civil Rights Law §50 & §51, and interference and obstruction of mail pursuant to18 USC §1701. The facts of this case, as gleaned from the respective affidavits submitted by the parties, arise out of the Hospital's termination of plaintiffs' contract to provide maternity services two days each week at the hospital's extension clinic located in Greenport, New York.

Following the development of administrative and budgetary differences, the Hospital terminated its maternity services agreement ("MSA") with the plaintiff in accordance with paragraph 7(b)(ii) of the contract which provided that either party may unilaterally terminate the agreement after 30 days prior written notice. The Hospital then informed Ms. Scharf of its intention to relocate the maternity services program, retained the services of Ms. Scharf's former employee, Pat Alcus, and removed patient records and equipment from GHC's office. Pat Alcus also retained a beeper she obtained while working at GHC and continued to use communication services provided by Relay Communications to communicate with patients whose maternity care originated at GHC's offices.

Defendants now move for summary judgment dismissing the causes of action mentioned in plaintiffs' complaint. Firstly, defendants contend that plaintiffs' breach of contract claim should be dismissed because the claim is barred by the prior release set forth in paragraph 7(b)(ii) of their maternity services agreement. Defendants also aver that plaintiffs conversion claim is without merit because plaintiffs failed to demonstrate that they had a "superior right of possession" to the property and business records in question, or suffered damages as a result of the alleged conversion. Defendants further asserts that plaintiffs' tortious interference claim must be dismissed since plaintiffs will be unable to establish the elements necessary for such a claim. Additionally, defendants assert that plaintiffs have not proven the elements of intent or entitlement to damages to establish its action for violation of New York Civil Rights law § 50 and §51. Moreover, defendants argue that there are no cognizable claims for wrongful solicitation, wrongful advertisement and "receiving mail in error".

In opposition plaintiffs argue that defendants' motion to dismiss the claims set forth in its complaint should be denied because there are numerous unresolved issues of fact relating to these claims. In particular plaintiff Scharf asserts that defendants neither provided prior notice of its termination, nor sought termination on any of the grounds enumerated under paragraph 7(a) or 7(b) of the MSA. Rather, Scharf avers that the Hospital terminated the agreement in order to appropriate the goodwill and business built by GHC. Scharf also contends that defendants failed to respect patient confidentiality or distinguish between records belonging to their patients, or records belonging to GHC's patients with whom the Hospital had no association. Moreover asserts Scharf, the amount of damages related to each of its claims are questions of fact which preclude summary judgment.

It is well established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Porpspect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Since the movant bears the initial burden (*see*, ***General Elec. Capital v Broadway Crescent Assocs.***, 200 AD2d 607, 608 NYS2d 852 [1994]), where the submissions of the moving party are insufficient to demonstrate entitlement as a matter of law, the motion for summary judgment will be denied without regard to the sufficiency of the opposing papers (*see*, ***Scurlock v Boston***, 7 AD3d 778, 776 NYS2d 871 [2004]; ***St. Luke's –Roosevelt Hosp. v American Tr. Ins. Co.***, 274 Ad2d 511, 712 NYS2d 372 [2000]).

Contrary to plaintiffs' assertion, rather than seeking to terminate the MSA on the grounds set forth in paragraph 7(a) of the agreement, defendants have submitted documentary evidence that its termination was based on a "convenience termination clause" found in paragraph 7(b) of the MSA which provides *inter alia*

> Notwithstanding any other provisions of the agreement, the agreement may be immediately terminated upon
> (i)The mutual written agreement of the Parties;
> (ii)Thirty Days prior written notice by either Party

Indeed, plaintiffs' March 21, 1997 letter stated that it intended to terminate the agreement pursuant to paragraph 7(b) (ii) of the MSA and that such termination would be effective within thirty days of defendants' receipt of its letter. Plaintiff's mere assertion that she did not receive the letter because it was intercepted by Pat Alcus is also insufficient to raise a triable issue of fact (*see*, ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Furthermore, where a contract gives either party thereto the absolute unqualified right to terminate upon notice, the Court is precluded from inquiring whether such termination was actuated by an ulterior motive (*see*, ***A.J. Temple Marble & Tile v Long Island R.R.***, 256 AD2d 526, 682 NYS2d 422 [1998]; ***Big Apple Car v City of New York***, 204 AD2d 109, 611 NYS2d 533[1994]).

With regard to plaintiffs' claim for conversion of its business and patients records, although paragraph 4 (g) of the MSA provides that "*...all medical, financial, and/or other records of services rendered to the Hospital patients are and shall remain the property of the hospital*", paragraph 4(h) of the MSA indicates that both parties recognized that despite their business arrangement they would still maintain exclusive patient relationships within a common office. Nevertheless, without attempting to separate them, defendants collected all of the business and patient records and failed to return them to the plaintiffs until several months had passed. Therefore, issues of fact exist as to which party had the superior right to possess the records since neither party sought to separate the medical records belonging to the Hospital's patients or the records belonging exclusively to GHC's patients before they were removed from plaintiffs' office (*see*, ***Prohealth Care Assocs., LLP v April***, 4 Misc 3d 1071A, 798 NYS2d 347 [2004]; ***Roth v Barreto***, *supra*; ***O'Neill v Fishkill***, *supra*; *see also* ***Emergency Vision, Inc. v Main Place Opts.***, 10 Misc 3d 1071A, 814 NYS2d 560 [2006]). Accordingly, defendants' motion for summary judgment dismissing plaintiffs' first cause of action for conversion of its business and patient records is denied.

On the other hand, plaintiffs' cause of action for conversion of the beeper by defendant Pat Alcus must be dismissed because the beeper–utilized for defendants' and plaintiffs' patients alike–was timely returned to the plaintiffs and the gravamen of plaintiffs' complaint is conversion of intangible property insofar as plaintiffs contend that Pat Alcus retained the phone in order to acquire their patient list and solicit their patients (*see*, ***Sporn v MCA Records, Inc.,*** 58 NY2d 482, 462 NYS2d 413 [1983]; ***Rao v Verde***, 22 AD2d 569, 635 NYS2d 660 [1995]; ***MBF Clearing Corp. v Shine***, 212 AD2d 478, 623 NYS2d 204 [1995]; ***Mauro v Andrews***, 200 AD2d 392, 606 NYS2d 611 [1994]). Furthermore, no cause of action for tortious interference with contract lies for plaintiffs' assertion that Pat Alcus wrongfully attempted to induce Relay to breach its contract with GHC because Relay neither re-assigned the beeper numbers to the Hospital, nor terminated its service contract with the plaintiffs (*see*, ***Lama Holding Co., v Smith Barney Inc.***, 88 NY2d 413, 646 NYS2d 76 [1996]; ***Krinos Foods Inc., v Vintage Food Corp.***, 30 AD3d 332, 818 NYS2d 67 [2006]). Similarly, plaintiffs' cause of action for tortious interference with

existing and/or prospective patient contracts is also without merit as plaintiffs failed to specify that there were breaches (*see*, ***Pacheco v United Med Assocs., P.C.***, 305 AD711, 759 NYS2d 556 [2003]; ***Wheeler Broome County, Inc. v County of Broome***, 275 AD2d 592, 713 NYS2d 92 [2000]; ***Industron Assocs. v United Innovations, Inc.***, 259 AD2d 592, 687 NYS2d 642 [1997]), or that they had been damaged thereby (***Industron Assocs. v United Innovations, Inc.***, *supra*; 3-15 NY Practice Guide: *Business and Commercial § 15.03* [Matthew Bender & Co. Inc., 2005]). The Court also notes that plaintiffs can neither maintain its seventh cause of action alleging the interruption, or wrongful opening, of its mail since no such private cause of action is recognized under 18 USC § 1701 or 18 USC § 1703 (*see*, ***Sedima v Imrex Co.***, 473 US 479 [1985]; ***Whitney v United States Postal Serv.***, 1996 US App Lexis 13585).

With regard to plaintiffs' claim for breach of New York Civil Rights Law Sections 50 and 51, plaintiff Scharf contends that following the opening of the Hospital's new facility at 300 Atlantic Ave in Greenport in April 1997, the Hospital utilized her name in its advertising for three successive weeks in the Suffolk Times on May 8, 15, and 22. Defendants have now moved to dismiss plaintiffs' claim on the grounds that the advertisement was isolated and did not "draw trade" to its business since it erroneously displayed plaintiffs' GHC Front Street address and telephone number (***Flores v Mosler Safe Co.***, 7 NY2d 276, 196 NYS2d 975 [1959]). In support of their motion defendants have submitted a poor copy of one such advertisement which lists plaintiff Scharf as one of its employees and appears to be dated May 22, 1997. However, even assuming *arguendo* that the advertisement did not draw trade to defendants' business, Section 50 and 51 of the New York Civil Law also prohibits the unpermitted use of an individual's name where such name is used in, or as a part of, an advertisement or solicitation for patronage of a particular product or service (***Beverly v Choices Women's Medical Center, Inc.***, 78 NY2d 745, 579 NYS2d 637 [1991]). Accordingly, plaintiffs have stated a valid cause of action for violation of New York's Civil Law and defendants' motion to dismiss plaintiffs' claim is denied.

With regard to plaintiffs' eight cause of action alleging infringement of its exclusive right to continue using the trade names Greenport Healthcare Prenatal Center and/or Greenport Health Care Center, defendants have established their entitlement to summary judgment as a matter of law by demonstrating that there was no intent to confuse the public in their use of the name "Center for Prenatal Care at Greenport" and that they have a proprietary interest in the name (***Edward F. Hallahan Inc., v Hallahan, Mc Guinness & Lory's, Ltd.***, 275 Ad2d 691, 713 NYS2d 536 [2000]; *see also* ***Fast Track Structures, Inc. v R-J Taylor General Contractors, Inc.***, 129 AD2d 943, 502 NYS2d 853 [1986]). The record indicates that although plaintiffs practiced prenatal care prior to entering into the MSA agreement with the Hospital in 1995, it never used the name "Greenport Healthcare Prenatal Center". Rather, plaintiffs offered prenatal care under the name "Greenport Health Care". Indeed, the use of the name "Greenport Healthcare Prenatal Center" followed the signing of the MSA when the Hospital announced the clinic as its own prenatal satellite facility in Greenport. Moreover, plaintiffs failed to submit any evidence that defendants sought to intentionally deceive or mislead the public by using the name "Center for Prenatal Care at Greenport". The record indicates that the MSA contemplated an ongoing effort to distinguish between prenatal patients belonging to the Hospital and those patients maintaining an exclusive relationship with the plaintiffs. The testimony of defendant Pat Alcus also indicates that Pat Alcus specifically retained the beeper to advise hospital patients that Southampton Hospital was

ending its relationship with the plaintiffs and to advise them of the Hospital's new prenatal facility at Gladysbrook Medical Village, located at 300 Atlantic Avenue in Greenport. In any event the Court notes that the name "Center for Prenatal Care at Greenport" is generic and descriptive so that no entity could properly claim exclusive rights to its use (*see*, ***Allied Maintenance Corp. v Allied Mechanical Trades Inc.***, 42 NY2d 538, 399 NYS2d 628 [1977]; ***Fast Track Structures, Inc. v R-J Taylor General Contractors, Inc.***, *supra*). In opposition, plaintiffs have also failed to raise any triable issue of fact warranting denial of defendant's motion (*see*, ***Zuckerman v New York***, *supra*).

Accordingly, defendants' motion for summary judgment dismissing plaintiffs' second, third, fifth, sixth, seventh and eight causes of action is granted. However, the portion of defendants' motion seeking to dismiss plaintiffs' first and fourth causes of action is denied.

Dated: SEP 13 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION