SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

A. PHILIP FONTANETTA, M.D. and WESTERN NASSAU ORTHOPAEDIC ASSOCIATES, P.C.,

INDEX No. 004514/07

MOTION DATE: Feb. 25, 2008
Motion Sequence # 001

Plaintiffs,

-against-

JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, FRANK DIMAIO, M.D., GLENN TEPLITZ, M.D. and WINTHROP ORTHOPAEDIC ASSOCIATES, P.C.,

Defendants.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Memorandum of Law..... X
Memorandum of Law in Reply..... X

This motion, by defendants Frank DiMaio, M.D., Glenn Teplitz, M.D., and Winthrop Orthopaedic Associates, P.C., for an order pursuant to CPLR 3211(a)(1) dismissing the complaint and an order pursuant to 42 U.S.C. §11112(a) awarding them attorney's fees and costs is **denied**.

In this action, the plaintiff orthopaedic surgeon Dr. Fontanetta seeks, *inter alia*, to recover damages caused by his August 26, 2005 summary suspension and

recommendation that his privileges not be reviewed in October 2005 at Winthrop University Hospital ("Winthrop"). At all pertinent times, defendant Dr. DiMaio was the Chairman of the Department of Orthopaedic Surgery at Winthrop and defendant Dr. Teplitz, was also a member of that Department and served on that Department's Quality Improvement Committee which reviewed cases concerning patient care by orthopaedic surgeons at Winthrop. A recommendation by the Quality Improvement Committee can be accepted or rejected by the Department Chair. Defendants Drs. DiMaio and Teplitz were both shareholders of defendant Winthrop Orthopaedic Associates, P.C.

In their complaint, the plaintiffs allege that Dr. Fontanetta had unrestricted orthopaedic admitting privileges at Winthrop from 1980 through 2005. Plaintiffs allege that "[d]efendants [Drs.] DiMaio, Teplitz and Associate P.C. abused their power, authority and positions at [Winthrop] to gain an unfair competitive advantage over plaintiffs regarding distribution and allocation of [Winthrop's] resources; implemented a concerted effort and scheme to assume unfettered control over the business and economic prerequisites of the Department of Orthopaedic Surgery at Winthrop; [and that defendants] have installed in [Dr. Fontanetta's] former position a full-salaried orthopaedic staff made up entirely of the members of defendant Associate P.C., at the expense of [Dr.] Fontanetta and Western Nassau and their patients." More specifically, plaintiffs allege that the "[d]efendant [Drs.] DiMaio, Teplitz and the other physicians of Associate P.C. unfairly have hoarded precious hospital resources, including nurses, administrative staff support and surgical rooms and facilities, forcing [Dr.] Fontanetta and Western Nassau to suffer a severe competitive disadvantage." Plaintiffs allege that as a result of defendants' conduct, they have stopped receiving references and referrals from Winthrop's full-time physicians and staff who had historically provided them, thus causing economic damage to plaintiffs, including a material loss of revenue and concomitantly, a benefit to the defendants and Winthrop's financial relationship.

Plaintiffs additionally allege that Winthrop summarily suspended [Dr.] Fontanetta's admitting privileges and recommended that his privileges not be renewed after the defendants "published wrongful and untruthful allegations that [Dr.] Fontanetta supposedly had provided substandard and inadequate care in selected cases." Plaintiffs allege that the defendant doctors personally selected and reviewed the cases that were made the focus of the false and wrongful allegations, which ultimately led to Dr. Fontanetta' s summary suspension and termination at Winthrop. Plaintiffs allege that Winthrop's actions were "proximately caused by defendants' interference with [its] business, by defendants' unfair competitive tactics, and by defendants' false and

malicious misdescription of beneficial surgeries successfully performed by [Dr.] Fontanetta." Plaintiffs allege that "[t]he summary suspension was planned and orchestrated by defendants as a deliberate step in their plan and scheme to install a full-time salaried orthopaedic staff made up exclusively of Associate P.C. physicians." More specifically, Dr. Fontanetta alleges that defendants falsely accused him of performing a "wrongful site surgery," which was in fact properly performed and that defendants negligently relied upon unsubstantiated allegations that he "persistently failed to follow hospital protocols concerning site verification," which were in fact properly followed.

Plaintiffs further allege that in reliance on the Quality Improvement Committee's report and Dr. DiMaio's recommendation and determination, on July 14, 2005, Winthrop posted an Adverse Action Report in the National Practitioner Data Bank publicizing, **inter alia**, that "as a result of the Chairman's review of a medical record, a case which involved wrong site surgery, [Dr. Fontanetta] was informed on 6/10/05 that he was required to be proctored for a minimum of ten spinal surgery cases by a credentialed surgical spine practitioner deemed acceptable to the Chairman." Plaintiffs further allege that again relying on the report of the Quality Improvement Committee and Dr. DiMaio's recommendation and determination, on August 31, 2005, Winthrop posted an Adverse Action Report in the National Practitioner Data Bank publicizing that on August 26, 2005, [Dr.] Fontanetta's privileges were summarily suspended effective that day and that it had been recommended that his application for reappointment effective October 1, 2005 be denied based upon "substandard or inadequate care." Plaintiffs allege that the National Practitioner Data Bank notified Winthrop that the report was "legally insufficient and vague, and did not meet the statutory requirements" and that defendants nevertheless took no action to correct that report for nine months. Plaintiffs allege that ultimately, on March 15, 2006, Winthrop updated its report, and stated, **inter alia**, that Dr. Fontanetta's suspension and recommendation of non-reappointment was "based upon a review of several cases where the care of the patients did not meet the standards of care and on the basis of a failure of the physician to adhere to hospital policy and protocol regarding surgical site selection." Plaintiffs allege this report, once again, was based upon the minutes of the Committee's meeting, including comments by defendant Teplitz, as well as and the review and action upon the report and minutes by defendant DiMaio.

As and for their first cause of action sounding in unfair competition, the plaintiffs allege that in an effort to compete against plaintiffs unfairly, defendants, in breach of their fiduciary duties to Winthrop, hoarded Winthrop's resources for their patients' exclusive

benefit, leading to better general care of their patients at the expense of other doctor's patients and the public at large and that defendants, **inter alia**, deliberately and wantonly caused false reports to be filed with the State of New York in an effort to malign and defame Dr. Fontanetta, more specifically, falsely accusing him of wrong site surgery.

As and for their second cause of action sounding in tortious interference with contract, plaintiffs allege that Dr. Fontanetta' s admitting privileges at Winthrop amounted to a contract and that his "contractual privileges at Winthrop were wrongfully suspended due to defendants' illegal acts, false and defamatory reports, and wanton abuse of authority, position and power at Winthrop."

As and for their third cause of action sounding in tortious interference with business advantage, plaintiffs allege that "[d]efendants knowingly and intentionally interfered with the business relationship between Plaintiffs and Winthrop solely out of malice, or alternatively, defendants used dishonest, unfair or improper means to interfere with that business relationship."

As and for their fourth cause of action sounding in constructive trust and their fifth cause of action sounding in unjust enrichment, the plaintiffs allege that "[d]efendants have abused their fiduciary relationship [with Winthrop] and have been unjustly enriched due to the abuse of their power and position at Winthrop, at the expense of [Dr.] Fontanetta and Western Nassau;" that "[a]s a direct and proximate cause of Defendants' conduct, [Dr.] Fontanetta and Western Nassau have been deprived of the just and rightful proceeds of their admitting privileges at Winthrop, and the profits, benefits and revenues of surgical care available to be rendered to their patients at Winthrop," and, that "[d]efendants' revenues and profits should be held in constructive trust for plaintiffs' benefit, owing to defendants' wrongful conduct and unlawful competitive scheme."

As and for their sixth cause of action sounding in defamation, plaintiffs allege that "[d]efendants have falsely stated that [Dr.] Fontanetta provided substandard and inadequate care to his patients, and that [Dr.] Fontanetta performed a wrong site surgery." Plaintiffs further allege that relying on the Quality Improvement Committee's report and the recommendation and determination by Dr. DiMaio, on July 14, 2005, Winthrop posted an Adverse Action Report in the National Practitioner Data Bank stating "as a result of the Chairman's review of a medical record, a case which involved wrong site surgery, the physician was informed on 6/10/05 that he was required to be proctored for a minimum of ten spinal surgery cases by a credentialed surgical spine practitioner deemed

acceptable to the Chairman," and that on August 31, 2005, again relying on the Quality Improvement Committee's report and Dr. DiMaio's recommendation, Winthrop posted an Adverse Action Report in the National Data Bank stating that Dr. Fontanetta's privileges were summarily suspended effective August 26, 2005 and that his application for reappointment as of October 1, 2005 had been recommended for denial based upon "substandard and inadequate care." Plaintiffs allege that while the National Practitioner Data Bank informed Winthrop that the report was "legally insufficient and vague, and did not meet statutory requirements," defendants nevertheless took no action to correct that report for nine months. Plaintiffs allege that ultimately on March 15, 2006, Winthrop updated that report, based on the minutes of the Quality Improvement Committee's meeting, including comments by defendant Teplitz as well as the review and action upon the report and minutes by defendant DiMaio, and stated, *inter alia*, that Dr. Fontanetta's suspension "was taken based upon a review of several cases where the care of the patients did not meet the standards of care and on the basis of a failure of the physician to adhere to hospital policy and protocol regarding surgical site selection." Plaintiffs allege that the defendants knew that the false statements made by them to Winthrop would be published and republished in the medical community and that the defendants who were "motivated by actual malice, actual ill will, personal spite or culpable recklessness or negligence, maliciously and/or negligently participated in making the statements and permitting their publication without privilege or authorization to do so." Plaintiffs allege that "[Dr.] Fontanetta's reputation as a medical physician and orthopaedic surgeon has been irrevocably damaged due to defendants' defamatory statements" and that "[a]s a direct and proximate cause of defendants' conduct, [Dr.] Fontanetta has been damaged in an amount to be proven at trial and estimated to exceed $1,000,000 dollars."

The defendants Frank DiMaio, M.D., Glenn Teplitz, M.D. and Winthrop Orthopaedic Associates, P.C., seek dismissal of the complaint against them pursuant to CPLR 3211(a)(1) based upon statutory immunity, more specifically the Health Care Quality Improvement Act ("HCQIA") (42 USC § 11101, *et seq.*).

On a motion pursuant to CPLR 3211, the complaint must be afforded a liberal construction and given every favorable inference. (**Leon v Martinez**, 84 NY2d 83, 87, 1994). The facts alleged in the complaint must be accepted as true and the court is to determine only whether the allegations fit within any cognizable legal theory. (**Leon v Martinez, supra**, at p. 87). "The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." (**Guggenheimer v Ginzburg**, 43 NY2d 268, 275, 1997).

Dismissal pursuant to CPLR 3211(a)(1) lies when "a defense is founded upon documentary evidence." "In order to prevail on a CPLR 3211(a)(1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff's allegations." (**AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.**, 5 NY3d 582, 591, 2005; citing **Goshen v Mutual Life Ins. Co. of N.Y.**, 98 NY2d 314, 326, 2002; see also, **L&S Motors, Inc. v Broadview Networks, Inc.**, 25 AD3d 767, 2nd Dept., 2006). That is, " '[t]o succeed on a motion under CPLR 3211(a)(1), a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim.' " (**Ozdemir v Caithness Corp.**, 285 AD2d 961, 963, 3rd Dept., 2001, lv to app den., 97 NY2d 605 (2001), quoting **Unadilla Silo Co. v Ernst & Young**, 234 AD2d 751, 3rd Dept., 1996). In Siegel's Practice Commentaries, he notes that there is a paucity of case law which gives guidance on what qualifies as "documentary evidence." (Siegel, Practice commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, p. 22). In an "attempt to suggest a rule of thumb whereby to gauge whether an item qualifies as 'documentary,' " Siegel opines that "[t]he word apparently aims at a paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based." (**Supra**, p. 22).

Congress enacted the "HCQIA" (42 USC § 11101, *et seq.*), on which defendants rely, in 1986 to facilitate the effective review of the quality of medical care via a professional peer review process. "Congress passed the Act 'to improve the quality of medical care by encouraging physicians to identify and discipline physicians who are incompetent or who engage in unprofessional behavior.' " (**Mathews v Lancaster General Hospital**, 87 F.3d 624, 632, C.A. 3 [Pa] 1996; quoting H.R. Rep. No. 903, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. 6287, 6384, 6384). "Congress believed incompetent physicians could be identified through 'effective professional peer review,' which it chose to encourage by granting **limited** immunity from suits for money damages to participants in professional peer review actions (emphasis added)." (**Mathews v Lancaster General Hospital**, **supra**, at p. 632 quoting 42 U.S.C. § § 11101(5), 11111(a)). "HCQIA affords immunity from liability to the professional review body, any person acting as a member or staff to the body, any person under a contract or other formal agreement with the body and any person who participates with or assist the body with respect to the action for actions associated with the peer review process, provided that the action meets all of the standard set forth at 42 USC § 11112(a)." 42 USC § 11111(a)(1).

Under HCQIA, only actions that meet the definition of professional review are eligible for immunity. (**Wahi v Charleston Area Medical Center**, 453 F.Supp.2d 942, 949,S.D.W.Va. 2006, citing **Gordon v Lewiston Hospital**, 423 F.3d 184, 201, 3rd Cir. 2005). HCQIA defines professional review action as:

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. 42 USC § 11151(a).

Professional review activity "means an activity of a health care entity with respect to an individual physician–

> (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
>
> (B) to determine the scope or conditions of such privileges or membership, or
>
> (C) to change or modify such privileges or membership." 42 USC § 11151(10).

For immunity to attach, "a professional review action must be taken

> (1) [i]n the reasonable belief that the action was in furtherance of quality health care,
> (2) [a]fter a reasonable effort to obtain the facts of the matter,
> (3) [a]fter adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
> (4) [i]n the reasonable belief that the action was warranted by the facts known after such reasonable efforts to obtain facts and after meeting the requirements of paragraph (3)." 42 USC § 11112(a).

A professional review action is presumed to have met these standards unless the

presumption is rebutted by a preponderance of the evidence. (42 USC § 11112(a)).

The requirement of adequate notice and hearing procedures is met if the following conditions are met: The physician must be given notice of the proposed professional review action and the reasons therefore, as well as notice of his right to request a hearing; the time limits in which to do so; and, his rights at the hearing. 42 USC § 11112(b)(1). The physician must be given notice of the hearing if one is requested, including the place, time, and date of the hearing and a list of witnesses expected to testify on behalf of the professional review body. 42 USC § 11112(b)(2). The hearing must be held "before an arbitrator mutually acceptable to the physician and the health care entity; before a hearing officer who is appointed by the entity and who is not in direct economic competition with the physician involved; or, before a panel of individuals who are appointed by the entity and are not in direct economic competition with the physician involved." 42 USC § 11112(b)(3) (A). In the hearing, the physician has the right to be represented by an attorney; to have a record made; to call, examine and re-examine witnesses; to present evidence determined to be relevant by the hearing officer regardless of its admissibility in a court of law; and, to submit a written statement at the close of the hearing. 42 USC § 11112(b)(3)(C). Following the hearing, the physician has a right to receive the written recommendation including a statement for the basis thereof and to receive a written decision of the health care entity, including a statement of the basis thereof. 42 USC 11112(b)(3)(D).

"In a sense the presumption language in [the HCQIA] means that the plaintiff bears the burden of proving that the peer review process was not reasonable." (**Bryan v James & James E. Holmes Regional Medical Ctr**, 33 F3d 1318, 1333, 11th Cir. 1994, cert den., 514 U.S. 1019, 1995). Thus, "the court must consider whether plaintiff's privileges were terminated 'in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the [adequate notice and hearing] requirement[s].'" (**Gelbard v Genesee Hospital**, 255 AD2d 882, 884, 4th Dept., 1998, quoting 42 USCS 1112[a][4], citing **Bryan v James E. Holmes Regional Med. Ctr., supra**, at p. 1137). An objective standard is applied to evaluate a defendant's compliance with 42 USC § 11112.(**Mathews v Lancaster General Hosp., supra**, at p. 635, citing **Imperial Suburban Hosp. Ass'n., Inc.**, 37 F3d 1026, 1030, 4th Cir. 1994; **Smith v Ricks**, 31 F3d 1478, 1485, 9th Cir. 1994, cert den., 514 U.S. 1035,1995). Allegations of bad faith and anti-competitive motives are irrelevant. (**Mathews v Lancaster General Hosp., supra**, at p. 635, citing **Bryan v James E. Holmes Regional Medical Ctr., supra; Austin v McNamara**, 979 F.2d 728 734, 9th Cir. 1992). And,

where a defendant substantially prevails relying on 42 USC § 1111 *et seq.*, the Court must award him attorneys' fees "if the claim or the claimant's conduct was frivolous, unreasonable, without foundation or in bad faith." 42 USC § 11113.

The defendant movants seek a pre-answer, pre-discovery declaration based upon documentary evidence that all of the plaintiffs' claims hinge on the defendants' roles in reviewing medical care provided by Dr. Fontanetta; that defendants are accordingly entitled to statutory immunity; and, a dismissal of the complaint based on those findings.

This is not the scenario envisioned by CPLR 3211(a)(1), as the entire record of proceedings–which has not been submitted –does not constitute "documentary evidence" as contemplated by CPLR 3211(a)(1). In any event, the application of the statutory presumption of immunity found in HCQIA is dependent upon the establishment of a wide variety of facts. More importantly, the immunity provided by that statute is not mandatory; it can be defeated. (see, **Moorman v Huntington Hosp.**, 254 AD2d 465, 2nd Dept., 1998).

A determination pursuant to CPLR 3211(a)(1) does not lie at this juncture. (see, **Goshen v Mutual Life Ins. Co. of New York**, **supra**, at p. 326-327; **511 West 232nd Owners Corp. v Jennifer Realty Co.**, 98 NY2d 144, 2002; **Weil, Gotshal & Manges, LLP. v Fashion Boutique of Short Hills**, 10 AD3d 267, 271, 1st Dept., 2004). In addition, the court notes that the plaintiffs may have advanced claims which may not be defeated even if statutory immunity does apply: Dismissal of those claims pursuant to CPLR 3211(a)(1) would not lie in any event.

A Preliminary Conference has been scheduled for April 15, 2008 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated 31 March 2008

ENTERED
APR 02 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Stephen A. Bucaria
J.S.C.