

**El-Sharif v Freeman**

2009 NY Slip Op 31068(U)

May 11, 2009

Supreme Court, New York County

Docket Number: 600907/07

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB *vice*

PART 15

Nabil El-Ashraf, M.D.  
- v -  
Richard W. Freeman, M.D.

INDEX NO. 600907/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 03  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAY 15 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 5/15/09 \_\_\_\_\_ WALTER B. TOLUB 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: IAS PART 15

-----x  
NABIL EL-SHARIF, M.D.

Plaintiff,

**Index No.** 600907/07  
**Mtn Seq.**

-against-

RICHARD W. FREEMAN, M.D., EDMUND BOURKE,  
M.D., JOHN KASSOTIS, M.D., MICHAEL  
BRENNAN, ALAN SHALITA, M.D., EUGENE,  
FEIGELSON, M.D., JOHN LAROSA, M.D.,  
STEPHEN GOLDFINGER, M.D., STANLEY FISHER,  
M.D., EUGENE DINKEVICH, M.D., LISA  
DRESNER, M.D., MARGARET GOLDEN, M.D., and  
EDWARD CARBONELL, M.D.,

Defendants.

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**WALTER B. TOLUB, J.:**

This action arises out plaintiff's claim that defendants  
conspired and acted in concert to wrongfully effect the  
suspension of his clinical privileges at State University of New  
York Downstate Medical Center (SUNY Downstate). By this motion,  
the remaining defendants<sup>1</sup> in this action move for summary  
judgment and dismissal of plaintiff's complaint with prejudice.

Background

Plaintiff is a physician and a former member of the medical  
staff of University Hospital of Brooklyn (UHB), the teaching  
hospital of SUNY Downstate and its major affiliates. Plaintiff  
was also a former part-time faculty member at the College of

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<sup>1</sup>This action was discontinued as against defendant John  
Kassotis, M.D., Alan Shalita, M.D., and Michael Brennan on  
November 4, 2008.

Medicine of SUNY Downstate ("the Medical School"), where he held an appointment in the Electrophysiology Section of the Division of Cardiology.<sup>2</sup> Plaintiff's privileges were summarily suspended in April of 2005 following investigations into allegations of misconduct concerning patient care, and more particularly, claims made by staff members that plaintiff had subjected patients to unnecessary risks.<sup>3</sup>

The initial investigation into the claims against plaintiff was conducted by defendant Edmund Bourke, M.D., the Chairman of the Department of Medicine. Dr. Bourke learned of the complaints against plaintiff from Dr. George Frangos, the Associate Dean for Graduate Medical Education. During the course of the preliminary investigation, Dr. Bourke questioned three physicians with experience in electrophysiology: Dr. Pozzetti, then a fellow in the Electrophysiology Section; Dr. Pedalino, a faculty member and medical attending; and Dr. Sudhanva Hedge, a board certified internist and former Chief Resident who at the time was being

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<sup>2</sup> Electrophysiology is the study of the electrical properties of the heart (Bourke Affidavit, ¶4).

<sup>3</sup> The allegations against plaintiff were made by UHB faculty member Dr. Daniella Pozzetti (Affidavit of Edmund Bourke ¶7). Dr. Pozzetti claimed that plaintiff had pressured her to perform procedures which were not clinically indicated and to falsely report the results of the procedures. Dr. Pozzetti additionally charged that plaintiff lacked the technical ability to remedy a patient emergency in the event that she made a mistake, further endangering the health of the patients (*id.*).

trained in electrophysiology (id., ¶19).

Following his interviews of Drs. Pozzetti, Pedalino, and Hedge, Dr. Bourke met with defendant Richard Freeman, M.D., then the Chief Medical Officer and Vice President for Clinical Affairs at UHB to discuss what actions needed to be taken to protect the safety of UHB patients in accordance with the UHB Bylaws (the Bylaws) (id. ¶ 12; Affidavit of Richard Freeman, ¶7). Out of concern for the health of the hospital's patients, and pursuant to Section 3.9.2 of the Bylaws,<sup>4</sup> Drs. Bourke and Freeman decided to summarily suspend plaintiff's privileges (Bourke Affidavit, ¶13; Freeman Affidavit, ¶8). Plaintiff was notified that his privileges had been suspended by letter dated April 15, 2005 (Freeman Affidavit, Exhibit B). By letter dated May 2, 2005, defendant John LaRosa, the President of SUNY Downstate, notified plaintiff that his part-time faculty appointment at the Medical School would terminate on June 15, 2005 (Affirmation of Karen Dahlberg, Exhibit G).

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<sup>4</sup>Section 3.9.2 of the UHB Bylaws reads as follows:  
Subsection 3.9.2. Summary Suspension.

The Chief Medical Officer/Vice President for Clinical Affairs and the Chairman of the relevant Department, acting in concert, shall have the authority, whenever action must be taken immediately in the best interest of patient care in the Hospital, to suspend all or any portion of the clinical privileges of a practitioner, and such suspension shall become effective immediately. This action shall be reported, immediately, in writing, to the practitioner and to the Executive Committee.  
(Affirmation of Karen Dahlberg, Exhibit C).

Plaintiff, pursuant to the bylaws, formally requested a hearing and appellate review of the summary suspension of his clinical privileges on April 19, 2005. By letter dated April 21, 2005, Dr. Freeman acknowledged plaintiff's request and indicated that a hearing would be conducted "within 30 days" of April 19, 2005 (Freeman Affidavit, Exhibit C). Dr. Freeman has since claimed that this representation was made in error, and maintains that under Section 3.11.1(b) of the Bylaws,<sup>5</sup> a hearing is not mandated within 30 days of the receipt of plaintiff's letter (Freeman Affidavit ¶ 9).

Shortly after plaintiff requested review of his suspension, an *ad hoc* committee (the Committee) was convened to review the record and make a recommendation to the UHB Medical Executive Committee with respect to the appropriateness of plaintiff's suspension. The six-member committee included Dr. Margaret Golden, Dr. Edward Carbonell, Dr. Lisa Dresner, Dr. Eugene

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<sup>5</sup>Section 3.11.1(b) of the bylaws reads as follows:  
The Chairman of the ad-hoc committee shall convene a hearing on the matter, notifying the practitioner, the President of S.U.N.Y. Health Science Center at Brooklyn, the CEO/Senior Vice President for Clinical Affairs, the Chief Medical Officer/vice President for Clinical Affairs and the Chairman of the Practitioner's Department of the time, date, and place of the hearing by registered mail (return receipt). The date of the hearing **shall be no less than thirty (30) days from receipt of this registered letter sent to the practitioner, but may be scheduled at an earlier time if agreed to by the practitioner.** In addition, the notice of hearing should contain a list of any witnesses who will be called against the practitioner.  
(Dahlberg Affirmation, Exhibit C (emphasis added)).

Dinkevich, and Dr. Stanley Fisher. Each of these individuals are named as defendants in this action. None of the members of the Committee were trained in Electrophysiology.

Plaintiff's initial hearing was commenced on August 4, 2005. The Committee continued the hearing on August 16, 2005, and held a third hearing on September 15, 2005. During the presentation of plaintiff's version of the facts and the introduction of evidence, it became apparent that the Committee required an expert witness to evaluate relevant medical records, and in particular, the optical disks of several of plaintiff's patients.<sup>6</sup>

After a delay which appears to be caused by vacations as well as a change in command within SUNY Downstate, the Committee reconvened on November 29, 2005. Of particular note, is that Dr. Freeman had severed his association with SUNY Downstate in September of 2005 and was succeeded by Dr. Michael Lucchesi, the interim Chief Medical Officer. Upon completion of the November 29 hearing, The Committee, citing incomplete medical records and the need for an unbiased expert in electrophysiology to review the relevant records, declined to vote on whether plaintiff's suspension should be sustained, and submitted no recommendations on the issue to the UHB Medical Executive Committee (Affidavit of

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<sup>6</sup>Optical disks require the use of specialized equipment in order to view them. The data on an optical disk requires interpretation by an electrophysiologist.

Stephen Goldfinger, ¶¶ 38-42).

By February of 2006, while the Committee had succeeded in obtaining the optical disks for five patients from UHB, they still had not retained the necessary expert to interpret the disks. The February 2, 2006 hearing thus focused on developing a fair protocol for the selection of the needed expert. A short list of mutually acceptable experts was identified by March of 2006, and Dr. Lucchesi set out to retain one of them.

In May of 2006, plaintiff filed an Article 78 application in Kings County seeking an order compelling the Committee to make a recommendation to the UHB Executive Committee. The application, pursuant to the order of Justice Herbert Kramer, was granted only to the extent that the committee was directed to meet at "frequent and regular intervals" until a recommendation was made to the UHB Executive committee (Matter of El-Sherif v. Ad Hoc Committee, 824 NYS2d 768, 2006 Slip Op. 51512(U) [Kings Co. 2006]).

The Committee, still without an expert, reconvened on September 11, 2006. On November 3, 2006, seeking to enforce Justice Kramer's order, plaintiff moved for contempt. In response, and citing insufficient evidence to either credit or discredit the allegations of misconduct due to an inability to retain an expert to review the relevant medical records (Goldfinger Affidavit 57-58), the Committee recommended to the

UHB Medical Executive Committee that it was unable to sustain the summary suspension of plaintiff's privileges.

On November 22, 2006, in accordance with the Bylaws, Dr. Fisher, in his capacity of Alternate Chair of the Committee, communicated the Committee's recommendation to the UHB Medical Executive Committee (Fisher Affidavit ¶ 54, Fisher Affidavit, Exhibit D; Dalhberg Affidavit, Exhibit C; UHB Bylaws Subsection 3.11.1(j)). The recommendation was addressed by the UHB Medical Executive Committee at its December, 2006 meeting, and the UHB Medical Executive Committee voted to retroactively restore plaintiff's privileges from the date of the summary suspension to the date of the non-renewal of his faculty appointment at the Medical School (Goldfinger Affidavit ¶ 60; Bourke Affidavit ¶ 18; Dahlberg Affidavit, Exhibit C, UHB Bylaws Subsections 3.2.2).

By memorandum dated December 19, 2006 and pursuant to Subsection 3.11.1(1) of the Bylaws, Dr. Lucchesi, as Chairman of the UHB Medical Executive Committee, informed Dr. LaRosa, as president of SUNY Downstate of the retroactive restoration of plaintiff's privileges.

#### The Instant Complaint

The instant action was commenced on March 21, 2007 setting forth six causes of action, all of which plaintiff claims were derived from a conspiracy to wrongfully suspend his medical privileges. The initial claims against defendants included

tortious interference with contract rights (first); tortious interference with economic advantage (second); violations of 42 USCA §§ 1983, 1985, and 1981 (third, fourth, and fifth, respectively); and prima facie tort (sixth).

By decision dated November 16, 2007, this court dismissed all but the portion of plaintiff's claim asserting tortious interference of contract based upon the claim that defendants breached the UHB Bylaws in connection with plaintiff's hearing (first cause of action), and plaintiff's claim of prima facie tort (sixth cause of action). Discovery having been completed, defendants now move for summary judgment and dismissal of the balance of the complaint.

#### Discussion

As with any motion for summary judgment, success is dictated by whether the moving party is able to provide the court with admissible evidence sufficient to demonstrate an absence of any triable issues of fact, thereby demonstrating entitlement to judgment as a matter of law (Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]. See generally, Barr, Altman, Lipshie, and Gerstman; New York Civil Practice Before Trial, [James Publishing 2007] §37:91-92). The opponent to the motion bears the burden of producing evidentiary proof establishing the existence of material issues of fact requiring trial. Mere

conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v. City of New York, 49 NY2d 557 [1980]), and, if there is any doubt that triable issues of fact exist, summary judgment will not be granted.

Medical staff bylaws, such as those involved in the instant case, may form the basis of a claim for intentional interference with contractual relations (see, Gianelli v. St. Vincent's Hospital and Medical Center of New York, 160 AD2d 227 [1<sup>st</sup> Dept 1990]). A successful claim however, requires proof of the existence of a valid contract between plaintiff and a third party, defendants' knowledge of that contract, and the defendants' intentional procurement of that breach, resulting in actual breach, and damages (id., 233-234; Kronos v. AVX Corporation, 81 NY2d 90 [1993]).

Although plaintiff claims multiple various breaches of the UHB Bylaws at the hands of the defendants during the protracted course of the hearings, none of the claims are supported by the record. For example, plaintiff claims that UHB Bylaws were breached when defendants failed to hold his initial hearing date within the promised 30-day window as set forth in Dr. Freeman's April 21, 2005 letter. However, although Dr. Freeman's letter 'promised' plaintiff a hearing within 30 days of his demand for a hearing, there is no such requirement contained within the UHB Bylaws (see Footnote 5), and as such, Dr. Freeman's letter and

breach of a promise contained therein does not give rise to a breach of the UHB Bylaws.

Plaintiff additionally claims that the UHB Bylaws were breached when the Committee failed to provide him with relevant documents and witness lists, and claims an additional breach when the Committee failed to notify him of the decision to reinstate his privileges. Again, however, there is also no requirement in the UHB Bylaws mandating the Committee to provide relevant documents at the hearing or a witness list<sup>7</sup> prior to its commencement (See Dahlberg Affirmation, Exhibit C). Furthermore, even if the Committee were required to provide plaintiff with a witness list, no witnesses were ever called during the course of the hearing, thereby minimizing plaintiff's claims of prejudice (Goldfinger Affidavit ¶16), as well as his claims that he was deprived of a right of confrontation (see, Plaintiff's Affirmation in Opposition).

As for the claim that the UHB Bylaws were breached because defendants failed to notify plaintiff of the reinstatement of petitioner's clinical privileges, the only party responsible for such notification under the UHB Bylaws was the Chair of the UHB Medical Executive Committee, which was Dr. Lucchesi (Dahlberg

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<sup>7</sup> The UHB Bylaws only suggest that "the notice of hearing *should* contain a list of any witnesses who will be called against the practitioner" (*id.*, 3.11.1(b) (emphasis added)).

Affidavit, Exhibit C, UHB Bylaws 3.11.1(a),(1)). The remaining defendants in this action had no such obligation to notify plaintiff under the UHB Bylaws, and as such, violated no provisions of the Bylaws with respect to this claim.

Plaintiff's claims that the Committee breached the UHB Bylaws by failing to hold hearings at the earliest possible time are simply unsupported by the record, as are the claims that the Committee failed to report that they voted to reinstate plaintiff's clinical privileges in November of 2005 (see, Affidavit in Opposition Exhibit 5, Deposition Transcript of Dr. Margaret Golden p.19-20; Exhibit 6, Deposition Transcript of Dr. Lisa Dresner p. 28-39).

Also unsupported by the record, is plaintiff's claim that he was damaged by defendant's claimed interference with his contract. The only issue under investigation by the Committee concerned the suspension of plaintiff's medical privileges. Whether or not plaintiff may see and treat patients at SUNY downstate is determined by whether he holds a faculty position. The non-renewal of plaintiff's part-time faculty position was not under consideration by the Committee, and is not an issue before this court. Plaintiff is thus precluded from using the "non-renewal" of his faculty provision to buttress his claims of damages.

Stated differently, review of the record before this court

does not support plaintiff's claim that this matter should proceed to trial. To the contrary, it only emphasizes a lack of triable issues of fact. As such, defendants' motion for summary judgment on plaintiff's remaining portion of the first asserted cause of action is granted, and the first cause of action is dismissed.

The only remaining question therefore, is whether defendants are also entitled to summary judgment on plaintiff's sixth cause of action for prima facie tort.

A cause of action for prima facie tort requires a showing of intentional infliction of harm, resulting in special damages, without any excuse or justification, by an act or series of acts that would otherwise be lawful (Burns Jackson Miller Summit & Spitzer v. Lindner, 59 NY2d 314 [1983]). The tort is malice-driven, and in the absence of a demonstration that the conduct was solely justified by defendants' actions, the cause of action cannot lie (id.).

Plaintiff is a doctor. Complaints were filed after his colleagues questioned his decisions concerning patient care, and whether he was subjecting patients to unnecessary risks. Interviews were conducted with various physicians before plaintiff's privileges were suspended, and when the decision was made to suspend plaintiff's privileges, it was done for the health and safety of the UHB patients. Despite all of the

allegations to the contrary, plaintiff has simply not established that the defendants were solely motivated by malice. As such, plaintiff's cause of action for prima facie tort must be, and is, dismissed.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted; and it is further

ORDERED that the balance of plaintiff's causes of action are dismissed

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/11/09

  
HON. WALTER B. TOLUB, J.S.C.

**FILED**  
MAY 15 2009  
COUNTY CLERK'S OFFICE  
NEW YORK