SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3

Index. 101154/05
Motion No.: 3 & 4

STATEN ISLAND UNIVERSITY HOSPITAL,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

GILBERT S. LEDERMAN, M.D. and
GILBERT S. LEDERMAN, M.D., P.C.,

Defendants

The following items were considered in the review of the following plaintiff's motion for partial summary judgment and defendants' cross-motion for dismissal of plaintiff's complaint and summary judgment on four counterclaims.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	
Answering Affidavits	
Replying Affidavits	
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff, Staten Island University Hospital, is moving for partial summary judgment dismissing the fourth and fifth counterclaims made by defendants, Gilbert S. Lederman, M.D. and Gilbert S. Lederman, M.D., PC. Defendant's fourth counterclaim is for breach of the December 31, 1996 agreement that existed between the two parties and defendants' fifth counterclaim is for tortious interference with business advantage. Simultaneously, defendants move for (1) the denial of plaintiff's motion to dismiss defendants' fourth and fifth counterclaims, (2) the dismissal of plaintiff's complaint in its entirety and (3) the granting of defendants' cross-motion for summary judgment on their counterclaims numbered One (1) through Four (4).

Facts

These causes of action arise out of the dissolution of the employment relationship between plaintiff, Staten Island University Hospital ("SIUH") and defendants Gilbert Lederman, M.D. and Gilbert Lederman, M.D., PC (collectively "Lederman"). On December 31, 1996, SIUH and Lederman entered into a Director of Radiation Oncology Agreement. Pursuant to this agreement, Dr. Lederman would be responsible for managing and operating SIUH's Department of Radiology and Oncology and would have his own radiation oncology practice on the hospital's premises. This agreement provided for an employment term of eight years beginning January 1, 1997 and ending December 31, 2004 with an automatic renewal for an additional eight years ending on December 31, 2012. The terms of this agreement also provided for its termination by the mutual written agreement of Dr. Lederman and SIUH.

On January 26, 2004, the parties executed an Agreement and General Release to supplant the agreement that had been entered into in 1996. In addition, this new agreement required SIUH to pay Dr. Lederman $300,000 over eight installments of $37,500 on a quarterly basis over the course of two years. At the same time as this new agreement was signed, the parties also entered into a letter agreement providing for a rental or license agreement between the parties that would allow Lederman to lease office space from SIUH at market rate, but the exact location of the rental space and the exact fee to be paid were not specified. SIUH contends that Lederman occupied SIUH's office space from February 10, 2004 through October 8, 2004, but has refused to pay rent for that time period. As a result, SIUH chose to withhold $150,000 that was to be paid to Lederman pursuant to the January 26, 2004 agreement.

On or about April 14, 2005, SIUH brought this action against Lederman for unpaid rent in the amount of $420,225. In response, Lederman asserted five counterclaims: (1) breach of the January 26, 2004 agreement, (2) default in "self-pay" payments provided for under paragraph 3(c) of the January 26, 2004 agreement, (3) default in "roster" payments provided for under paragraph 3(c) of the January 26, 2004 agreement, (4) breach of the December 31, 1996

agreement and (5) wrongful termination and tortious interference with business advantage.

In response to Lederman's counterclaims, SIUH asserted various affirmative defenses including the following: (1) the January 26, 2004 agreement was entered into by both parties and substituted and terminated all prior agreements, (2) the January 26, 2004 agreement released plaintiff from any obligation under the December 31, 1996 agreement and (3) the January 26, 2004 agreement should be considered a novation of the December 31, 1996 agreement. Additionally, SIUH seeks summary judgment dismissing Lederman's fourth and fifth counterclaims as barred by giving full effect to the January 26, 2004 agreement. At the same time, Lederman sought to dismiss SIUH's complaint in its entirety, moved for summary judgment on his first through forth counterclaims and requested that the court deny SIUH's motion to dismiss Lederman's fourth and fifth counterclaims.

Discussion

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."[1] Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. Moreover, "the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion."[2] The court's role on a summary judgment motion is one of issue finding rather than issue determination.[3] Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.[4] Once the moving party has made a showing of sufficient evidence, the burden shifts to the party

---

[1] CPLR §3212(b)

[2] *Marine Midland Bank, N.A., v. Dino, et al*., 168 AD2d 610 [2nd Dept. 1990].

[3] *McKinney v. Setteducatti*, 183 AD2d 879 [2d Dept 1992].

[4] *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

opposing summary judgment to put forth admissible evidence establishing a triable issue of fact.[5]

Defendant's Fourth Counterclaim: Breach of Contract

Defendant's fourth counterclaim is for breach of the employment contract dated December 31, 1996 that was entered into by plaintiff and defendant and which was labeled "Director of Radiation Oncology Agreement." As an affirmative defense, however, plaintiff asserts that defendant's counterclaim should be barred because plaintiff and defendant entered into a substituted agreement on January 26, 2004, which terminated all prior agreements between the parties, including the December 31, 1996 agreement. Essentially, plaintiff argues that defendant is barred from suing on the earlier agreement because there was a novation and thus plaintiff was released from any obligation under the December 31, 1996 agreement under the terms of the later agreement that the parties entered into on January 26, 2004.

For novation to exist there must be a previous valid obligation, agreement of all parties to a new contract, extinguishment of the old obligation and sufficient consideration.[6] A novation may occur when the parties clearly demonstrate their intention to create a new contract in substitution of another even if a new written agreement is never executed.[7] Novation also requires that valuable consideration be given for the new contract.[8] Discharge of the original contract, however, usually constitutes sufficient consideration for the substituted contract.[9]

Here, plaintiff has met its burden of providing sufficient evidence for the court to

---

[5] *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

[6] 42 NY Jur., Novation, s 7; *Town & Country Linoleum & Carpet Co. v. Welch*, 56 A.D.2d 708 [1977].

[7] *Bandman v. Finn*, 185 N.Y. 508 [1906].

[8] *Federal Deposit Ins. Corp. v. Hyer*, 66 A.D.2d 521, *appeal dismissed* 47 N.Y.2d 951.

[9] *Town & Country Linoleum & Carpet Co., Inc. v. Welch*, 56 A.D.2d 708 [N.Y. App. Div 1977].

conclude that a novation has occurred: Paragraph 1 of the January 26, 2004 agreement expressly terminates the December 31, 1996 agreement.[10] Not only did both parties willingly sign the later agreement, but the 2004 agreement contained clauses specifically stating that Dr. Lederman and the P.C. agreed to a general, broad release of any and all claims against SIUH[11] and that this new agreement was intended to constitute the complete agreement of rights and obligations between the two parties.[12]

The burden thus shifts to defendant to establish a triable issue of fact in order to avoid summary judgment on this claim. The defendant fails to meet this burden. In opposition to plaintiff's motion, the defendant merely alleges that a fraud was committed when it entered into the 2004 agreement, which is not plead with particularity, thus it is insufficient to fulfill defendant's burden of establishing a triable issue of fact. Aside from these allegations, the defendant fails to come forward with admissible evidence to support its position. Therefore, plaintiff's motion for summary judgment dismissing defendant's counterclaim for breach of the December 31, 1996 agreement is granted.

Defendant's Fifth Counterclaim: Tortious Interference with Business Advantage

Defendant's fifth counterclaim is for tortious interference with business advantage. A claim for tortious interference with prospective business advantage must allege that: (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship.[13] To resolve this counterclaim on summary judgment, plaintiff must show that defendant has failed to present a

---

[10] Horowitz Aff. Ex. E, ¶ 1.

[11] *Id* at ¶ 5.

[12] *Id* at ¶ 15.

[13] *Thome v. Alexander & Louisa Calder Foundation*, 890 N.Y.S.2d 16 [1 Dept. 2009].

prima facie case for tortious interference. If plaintiff is successful, the burden shifts to defendant to raise a triable issue of fact in order to avoid summary judgment.

With respect to the first element, defendant has not alleged that plaintiff knew about any potential business relationship between defendant and a third party, nor does it specify any other economic relationship that defendant was deprived of as a result of plaintiff's actions.[14] As for the third element, defendant must show that the plaintiff's interference with defendant's prospective business relations was accomplished by "wrongful means," or that the defendant acted with the sole purpose of harming the plaintiff.[15] Under the former category, "wrongful means" includes "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure," but more than mere persuasion.[16] A defendant's conduct must amount to a crime or an independent tort.[17] Regarding the latter category, plaintiff must establish that the interference was effected by lawful means but without justification.[18] More precisely, plaintiff must allege (1) infliction of intentional harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful.[19]

Because plaintiff was successful in meeting its burden of showing that defendant did not

---

[14] *Caprer v. Nussbaum,* 36 AD3d 176 [2d Dept 2006] ["knowledge of the prospective economic relationship is an implicit element of interference"]; *Vigoda v. DCA Prods. Plus*, 293 A.D.2d 265 [1st Dept 2002] ["Tortious interference with prospective economic relations requires an allegation that plaintiff would have entered into an economic relationship but for the defendant's wrongful conduct].

[15] *Snyder v. Sony Music Entertainment*, 252 A.D.2d 294 [1st Dept 1999].

[16] *Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 [1980].

[17] *Lawrence v. Union of Orthodox Jewish Congregations of Am.*, 32 AD3d 304 [1st Dept 2006].

[18] *Mandelblatt v. Devon Stores*, 132 A.D.2d 162 [1st Dept 1987].

[19] *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135 [1985].

successfully make out a *prima facie* case for tortious interference, the burden now shifts to defendant to submit evidence raising a triable issue of fact in order to avoid summary judgment on this counterclaim. Here, defendant alleges that plaintiff's tortious interference was accomplished through fraud and misrepresentation. The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.[20] Defendant states that plaintiff made false statements regarding the need to modify the December 31, 1996 agreement because it violated anti-kickback statutes and that promises were made to defendant by plaintiff leading up to and contained in the January 26, 2004 agreement. Defendant, however, fails to submit evidence proving that any of these statements misrepresented a material fact. Furthermore, defendant fails to show that if these promises did not turn out to be true that plaintiff knew of this falsehood at the time the statements were made.

As a result of defendant's failure to adequately show fraud and misrepresentation on the part of plaintiff, he has necessarily failed in his *prima facie* cause of action for tortious interference with business advantage because there is no evidence that plaintiff engaged in "wrongful conduct" in order to induce defendant to enter into the January 26, 2004 agreement. Consequently, plaintiff's motion for summary judgment dismissing defendant's claim for tortious interference is granted.

---

[20] *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 NY3d 553.

Defendant's Motion to Dismiss Plaintiff's Complaint in its Entirety

Defendant moved to dismiss plaintiff's complaint in its entirety for failure to state a cause of action upon which relief can be granted. In considering a motion to dismiss for failure to state a cause of action, the allegations contained in a plaintiff's complaint must be accepted as true.[21] The court must "accord plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory."[22] Moreover, "whether plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss."[23] The standard is whether the plaintiff has a cause of action, not whether the plaintiff has stated one.[24]

In the case at bar, plaintiff alleges three causes of action in its complaint: (1) breach of the January 26, 2004 Letter Agreement; (2) unjust enrichment by the defendants; and (3) *quantum meruit*. The required elements for a claim for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages.[25] Whether the January 26, 2004 Letter Agreement memorializing an office space rental arrangement between plaintiff and defendant is a valid and enforceable contract raises a triable issue of fact. Therefore, the court cannot summarily dismiss this cause of action.

A cause of action for unjust enrichment, however, does not arise from the breach of a written contract, but, rather, from a quasi-contract or a contract implied in law that prevents a

---

[21] *Leon v. Martinez*, 84 N.Y.2d 83; *Fischer v. Sadov Realty Corp.*, 34 A.D.3d 630; *Hartman v. Morganstern*, 28 A.D.3d 423; *McGuire v. Sterling Doubleday Enterps., L.P.*, 19 A.D.3d 660.

[22] *Leon v. Martinez*, 84 N.Y.2d 83.

[23] *EBC, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11 [2005].

[24] *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114 [1st Dept 1998].

[25] *Agway, Inc. v. Curtin*, 161 A.D.2d 1040; *Furia v. Furia*, 116 A.D.2d 694.

person from enriching himself or herself unjustly at the expense of another.[26] The elements of a restitution claim in quasi-contract are that the defendant has received a benefit at the plaintiff's expense under circumstances that would make it unjust and against equity and good conscience for the defendant to retain what the plaintiff seeks to recover.[27] Plaintiff argues that defendant's medical practice occupied premises owned by plaintiff and failed to pay rent on the premises thereby benefitting himself at plaintiff's expense. The court will not summarily dismiss this cause of action because plaintiff adequately alleges the requisite elements of unjust enrichment.

The elements of a claim based on the theory of *quantum meruit* are: (1) the performance of services in good faith; (2) the acceptance of the services by the party for whom they were rendered; (3) the expectation of compensation for those services; and (4) a statement of the reasonable value of the services.[28] Plaintiff must establish that the services were performed at the request or behest of the defendant.[29] Here, defendant's attorney sent a letter to plaintiff's attorney on January 26, 2004 memorializing a prior oral agreement for an office space rental agreement. If this letter is not an enforceable contract, plaintiff still has a cognizable claim based on the theory of *quantum meruit*. Plaintiff provided office space to defendant based on defendant's request for office space in the North Campus of the Hospital. The letter further states that defendant would pay market rate for the space. Plaintiff expected to be compensated for the space defendant occupied for eight months. Consequently, the plaintiff's motion for summary judgment with respect to defendant's counterclaim based on *quantum meruit* is denied.

---

[26] *Tower Intl., Inc. v. Caledonian Airways, Ltd.*, 969 F Supp 135 [ED N.Y.1997], *aff'd* 133 F3d 908 [2d Cir1998].

[27] *Anesthesia Assoc. of Mount Kisco, LLP v. Northern Westchester Hosp. Ctr.*, 59 AD3d 473 [2009]; *Old Republic Natl. Title Ins. Co. v. Luft*, 52 AD3d 481 [2008].

[28] Pulver Roofing Co., Inc. v. SBLM Architects, P.C., 65 A.D.3d 826 [4th Dept 2009].

[29] *Clark v. Daby*, 300 A.D.2d 732 [3rd Dept.2002]; *Prestige Caterers v. Kaufman*, 290 A.D.2d 295 [1st Dept 2002]; *Lakeville Pace Mechanical, Inc. v. Elmar Realty Corp.*, 276 A.D.2d 673 [2nd Dept 2000].

Defendant's Motion for Summary Judgment on Plaintiff's First, Second and Third Causes of Action

Defendant has moved for summary judgment on three inter-related counterclaims. The first is for breach of the January 26, 2004 agreement; the second is for default in "self-pay" payments under that agreement; and the third is for default in "roster" payments under that same agreement. In order for summary judgment to be granted in defendant's favor, defendant must submit sufficient evidence to show that there is no triable issue of fact that exists relating to the claim so the court can properly grant summary judgment. If the movant is successful in this showing, the burden shifts to the party opposing the summary judgment motion to submit evidence of a triable issue of fact that would make summary judgment on the issue inappropriate.

Here, defendant submitted evidence that plaintiff only made four out of the eight payments to defendant that were required under the January 26, 2004 agreement. Defendant claims that these missed payments constituted a material breach of contract and that he should be granted summary judgment on this claim. Defendant further contends that plaintiff has failed to make both "self-pay" and "roster" payments to defendant, as required by certain clauses within the January 26, 2004 agreement. Defendant has met his burden in showing these payments were not made, so the burden shifted to plaintiff to raise a triable issue of fact through admissible evidence in order to avoid summary judgment on the matters.

In opposition, the plaintiff contends that defendant's argument that plaintiff's alleged failure to make both self-pay and roster payments under the January 26, 2004 agreement constituted a breach of contract, that these claims must fail because the contract itself contains a clause stating that disputes over payments for professional services do not constitute a breach of contract. The relevant clause reads as follows: "In the event of a dispute as to any amounts due under this provision, such dispute shall not effect in any way the validity of this agreement or the releases contained herein, not shall is constitute a breach of the agreement."[30] Plaintiff further

[30] Paragraph 3(c) of the January 26, 2004 agreement.

contends that it is undisputed that it made four out of the eight payments of $37,500 to defendant and it is illogical for defendant to argue that he is entitled to keep the first $150,000 that plaintiff has already paid him and require plaintiff to pay the outstanding $150,000 all while maintaining that defendant owes plaintiff no money for office space rental.

There are clearly questions of fact that exist sufficient to deny defendant's motion for summary judgment on his counterclaims for (1) breach of the January 26, 2004 agreement, (2) default in "self-pay" payments under the January 26, 2004 agreement and (3) default in "roster" payments under the January 26, 2004 agreement. This court reserves judgment on the amounts owed by each party to the other until an accounting is done after a trial on the merits of these claims.

Defendant's Fourth Counterclaim: Breach of the December 31, 1996 Agreement

As discussed above in plaintiff's motion for summary judgment on defendant's fourth counterclaim for breach of the December 31, 1996 agreement, defendant's motion for summary judgment on this counterclaim is denied and summary judgment on this same counterclaim has been granted in favor of the plaintiff.

Conclusion

This court has reviewed both plaintiff's and defendant's motions for summary judgments on various claims and counterclaims and has determined that few of these motions should be granted because there are issues of fact that still exist that make summary judgment inappropriate at this point in time. This court does, however, grant plaintiff's motion for summary judgment on defendant's counterclaim for breach of the December 31, 1996 contract because the contract was canceled by a novation. This novation discharged the duties of both parties under the contract, so no cause of action can arise from it. In the matter of defendant's counterclaim for tortious interference, this court granted plaintiff's motion for summary judgment because defendant ultimately failed to make out a *prima facie* case for this cause of action.

Accordingly it is hereby:

ORDERED, that plaintiff's motion for summary judgment to dismiss the defendant's fourth counterclaim for breach of the December 31, 1996 agreement is granted; and it is further

ORDERED, that plaintiff's motion for summary judgment to dismiss the defendant's fifth counterclaim for tortious interference with prospective business advantage is granted ; and it is further

ORDERED, that defendant's motion to dismiss plaintiff's complaint in its entirety is denied; and it is further

ORDERED, that defendant's motion for summary judgment on the first counterclaim for breach of the January 26, 2004 agreement is denied; and it is further

ORDERED, that defendant's motion for summary judgment on the second counterclaim for default in "self-pay" payments provided for under the January 26, 2004 agreement is denied;

and it is further

ORDERED, that defendant's motion for summary judgment on the second counterclaim for default in "roster" payments provided for under the January 26, 2004 agreement is denied; and it is further

ORDERED, that defendant's motion for summary judgment on the fourth counterclaim for breach of the December 31, 1996 agreement is denied; and it is further

ORDERED, that all parties return to DCM Part 3 on **March 29, 2010 at 9:30 AM** for a pretrial conference.

ENTER,

DATED: March 3, 2010

Joseph J. Maltese
Justice of the Supreme Court