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SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x	**TRIAL/IAS PART: 22**
GRACE GATES,	**NASSAU COUNTY**
Plaintiff,	**Index No: 008617-10**
-against-	**Motion Seq. No. 1**
	Submission Date: 8/16/10
LONG ISLAND WOMEN'S HEALTH CARE ASSOCIATES, P.C., HOWARD NATHANSON and DOUGLAS PHILLIPS,	
Defendants.	
----------x	

The following papers having been read on this motion:

Notice of Motion with Summons and Verified Complaint.....x
Defendants' Memorandum of Law in Support.....x [1]
Affirmation in Opposition, Affidavit in Opposition and Exhibits...x
Memorandum of Law in Opposition.....x
Reply Affidavit and Exhibits.....x
Defendants' Reply Memorandum of Law in Support.....x

This matter is before the Court for decision on the motion filed by Defendants Long Island Women's Health Care Associates, P.C. ("LIWH"), Howard Nathanson ("Nathanson") and Douglas Phillips ("Phillips") (collectively "Defendants") on June 29, 2010 and submitted on August 16, 2010. For the reasons set forth below, the Court 1) denies Defendants' motion; and 2) directs Plaintiff to file and serve the Amended Complaint within thirty (30) days of the date of this Order, and directs Defendants to serve their Answer within thirty (30) days thereafter.

[1] Mistakenly titled "Plaintiff's Memorandum of Law in Support of Motion to Dismiss"

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3211(a)(7), dismissing the Verified Complaint ("Complaint").

Plaintiff Grace Gates ("Gates" or "Plaintiff") opposes the motion and has provided the Court with a copy of an Amended Complaint that she intends to file.

B. The Parties' History

In the Complaint, Plaintiff alleges as follows:

Gates is a physician who is licensed to practice medicine in the State of New York ("New York") and specializes in the areas of obstetrics, gynecology and obstetrical and gynecological surgery. LIWH is a New York professional corporation with its principal place of business at 2428 Merrick Road, Bellmore, New York 11710. Nathanson and Phillips are medical doctors, and principals and shareholders of LIWH, which they operate together. Plaintiff alleges that Defendants were an "employer" within the meaning of New York Labor Law ("Labor Law") § 190(3) and that Plaintiff was an "employee" of Defendant within the meaning of Labor Law § 190(6).

Gates accepted Defendants' offer of employment at LIWH and entered into a written agreement of employment with Defendants dated October 4, 2004 ("Contract") (Ex. A to Compl.). During her period of employment, Gates performed medical services at LIWH's offices in Cedarhurst and Bellmore, New York, and provided surgical and other medical services to Defendants' patients at South Nassau Communities Hospital in Oceanside, New York.

Paragraph 4 of the Contract, titled "Insurance," provides as follows:

> (a) Throughout the term of this Agreement, you agree to maintain professional liability insurance coverage on an "occurrence" basis in an amount not less than One Million Dollars per occurrence and Three Million dollars in the annual aggregate ($1 million/ $3 million). Subject to the foregoing, such insurance shall be issued on terms and conditions and with such carrier as is mutually agreed upon. LIWH will pay the premiums associated with such policy during the term of your engagement hereunder. You agree to instruct the malpractice carrier issuing such policy to notify LIWH if your insurance policy is to be terminated for any reason. You also agree to provide LIWH with evidence that such insurance remains in full force and effect whenever requested by LIWH.
>
> (B) In the event your employment hereunder [is] terminated for any reason, you agree to reimburse LIWH for any prepaid professional liability insurance premiums which extend beyond such termination date.

Paragraph 13 of the Contract, titled "Entire Agreement," provides as follows at subparagraph (a):

> This agreement is the entire agreement among the parties concerning the subject matter hereof and supersedes all prior agreements, whether written or oral. It shall not be changed, except by a writing signed by both of the parties hereto.

The Complaint alleges that professional liability insurance policies for physicians in New York are issued in two forms: 1) "occurrence," and 2) "claims-made" (Compl. at ¶ 15). Occurrence policies cover the policy-holder for alleged malpractice while the policy is in force, regardless of when the claim is reported. A claims-made form of insurance covers the policy-holder for alleged malpractice occurring and reported during the period that the policy is in continuous effect, or within 60 days following the policy's cancellation or non-renewal. The Contract provided that LIWH would pay for occurrence liability insurance for Plaintiff during her period of employment. Plaintiff alleges that she fulfilled her obligations pursuant to the Contract. On July 23, 2009, Plaintiff provided notice to Defendants of her intention to resign her position effective August 28, 2009.

In the First Cause of Action, Plaintiff alleges that Defendants breached the Contract by failing to provide and pay for occurrence professional liability insurance for Gates. In the Second Cause of Action, Plaintiff alleges that, pursuant to Section 630(a) of the New York Business Corporations law ("BCL"), Phillips and Nathanson, as the largest shareholders of LIWH, are jointly and severally liable to Plaintiff for damages suffered as a result of the alleged breach of contract. With respect to the Second Cause of Action, Plaintiff alleges, *inter alia*, that "[f]rom and after October 1, 2004, [LIWH] provided Gates with "claims-made" form of professional liability insurance in breach of her Contract" (Compl. at § 31).

Counsel for Plaintiff affirms that Plaintiff "is in the process of serving an amended complaint" (Larkin Aff. in Opp. at ¶ 6) and provides a copy of the Amended Complaint (Ex. B to P's Opp.). That Amended Complaint, *inter alia*, contains Third and Fourth Causes of Action not present in the initial Complaint. In the Third Cause of Action, Plaintiff alleges that Defendants breached the Covenant of Good Faith and Fair Dealing by failing to advise Plaintiff that LIWH had obtained claims-made professional liability insurance for Plaintiff, in violation of the Contract. In the Fourth Cause of Action, Plaintiff alleges that she reasonably relied on LIWH to obtain insurance on her behalf that was consistent with the Contract and that LIWH should now be equitably estopped from denying that it was obligated to pay for an occurrence type of

insurance.

In her Affidavit in Opposition, Gates affirms as follows:

Gates affirms the truth of the allegations in the original and Amended Complaints regarding her execution of the Contract. Gates avers that while she was employed by LIWH, its administrative staff handled all paperwork regarding professional liability insurance ("Insurance"). Gates believes, based on LIWH records she has reviewed, that LIWH arranged for Insurance for all physicians that it employed. No representative of LIWH ever asked Gates to obtain her own Insurance, or consulted her regarding the procuring of Insurance. Gates affirms that she "was given no reason to believe that [Insurance] coverage had not been obtained on an 'occurrence' basis" (Gates Aff. at ¶ 9).

Gates submits that the Court should construe the language of the Contract requiring her to "maintain" Insurance as meaning that Gates was required to keep her licenses and professional standing in place so that she could be insured. She argues, further, that irrespective of any ambiguity in the language of the Contract, because Defendants never required her to obtain Insurance on her own behalf and provided Insurance to her as part of her compensation, Defendants thereby modified the Contract, or waived any existing requirement that Plaintiff obtain separate professional liability insurance. Thus, Defendants breached the Contract by not providing Plaintiff with Insurance on an occurrence basis.

On December 24, 2009, counsel for Plaintiff sent to Defendants a notice advising them that Nathanson and Phillips, as shareholders of LIWH, may be personally liable to Plaintiff for damages constituting lost or unpaid wages as defined in the BCL. Gates provides a copy of this notice as an attachment to her Affidavit.

In his Reply Affidavit, Nathanson provides copies of 1) an application ("Application") dated August 10, 2004 that Plaintiff submitted to South Nassau Communities Hospital to obtain privileges there (Ex. A to Nathanson Aff.), 2) the declarations page ("Declarations Page") from the liability policy ("Policy") that Plaintiff had in effect when she joined LIWH (Ex. B to Nathanson Aff.) which is dated February 8, 2005, and 3) the most recent certificate of insurance ("Certificate of Insurance") for Plaintiff's insurance while she was employed by LIWH (Ex. C to Nathanson Aff.).

In his Reply Memorandum of Law, counsel for Defendants notes that 1) in her Application, Plaintiff described her malpractice coverage as "ml-mic, claims made $1,000,000 per occurrence $3,000,000 aggregate;" 2) the Declarations Page reflects that Plaintiff's Policy

had a retroactive date of August 3, 2003 and that the Policy term ran from July 1, 2004 through July 1, 2005; thus, Plaintiff's claims-made Policy remained in effect until nine (9) months after she began working for LIWH; and 3) the Certificate of Insurance reflects that Plaintiff's Policy was written by Medical Liability Mutual Insurance Company ("MLMIC"), the same insurance carrier she remained with while employed by LIWH. Counsel for Defendants submits that this documentary evidence "clashes with Gates's new allegations" (Reply Memorandum of Law at p.1) because it demonstrates that Plaintiff knew that she had a claims-made policy.

C. The Parties' Positions

Defendants submit that, in light of the fact that Plaintiff failed to maintain occurrence insurance as required by the Contract, LIWH was not obligated to pay the premiums for that insurance and there is no breach of contract. Defendants contend, further, that to the extent that paragraph 31 of the Complaint suggests that there was a modification of the Contract with respect to the insurance issue, no such modification could occur in light of the no-oral modification provision in the Contract.

Defendants contend, further, that Plaintiff's BCL § 630(a) claim must be dismissed because 1) Plaintiff failed to allege that she complied with the provisions of the statute requiring notice to the shareholder; and 2) an action may be commenced under the statute only after a judgment against the corporation has been entered and returned unsatisfied and, therefore, Plaintiff's action is premature.

In opposition, Plaintiff submits that the Amended Complaint states viable causes of action because 1) Defendants have improperly ignored the fact that LIWH procured claims-made Insurance for Gates, in violation of the Contract which provided that the Insurance was to be an occurrence policy; 2) Defendants took care of obtaining Insurance for Plaintiff and Plaintiff relied on Defendants in that regard, resulting in a modification of the Contract; 3) by dealing directly with the Insurance provider, Defendants induced Plaintiff to reasonably rely on Defendants and are estopped from relying on the no-oral modification provision of the Contract; 4) alternatively, by their conduct, Defendants waived their right to require Plaintiff to obtain her own Insurance; 5) ambiguity regarding the meaning of the word "maintain" in the Contract should be resolved against Defendants as the drafter of the Contract and should be interpreted as requiring Plaintiff to keep in force and effect all licenses and other requirements to permit her insurability; 6) Defendants breached their implied covenant of good faith by purchasing Insurance on behalf of Gates and never notifying her that she was required to procure her own

Insurance; 7) Plaintiff has a viable cause of action for promissory estoppel because she relied, to her detriment, on Defendants' implied promise that Plaintiff would receive the type of Insurance provided for in the Contract; 8) Plaintiff has provided proof of notice to shareholders and, therefore, may maintain an action pursuant to BCL § 630; and 9) BCL § 630 does not forbid this action against Nathanson and Phillips, even though Plaintiff has not obtained a judgment against the LIWH which was unsatisfied, but rather precludes enforcement of any judgment against Nathanson and Phillips until that judgment is returned unsatisfied as to the corporation.

In Reply, Defendants submit that 1) the Court should construe the meaning of the word "maintain" in its everyday sense so as to require Plaintiff to keep her Insurance policy in effect, and reject Plaintiff's argument as calling for a strained interpretation of that term; 2) Plaintiff has not demonstrated that there was a modification to the Contract because the conduct allegedly effecting a modification was not unequivocally referable to the modification and does not demonstrate a meeting of the minds to form a contract requiring LIWH to convert Plaintiff's policy from claims-made to occurrence; 3) LIWH's action in paying for renewals of the existing claims-made insurance did not effect a waiver of Plaintiff's obligation to maintain occurrence liability insurance as a condition precedent to LIWH paying for such a policy; 4) Gates' cause of action for breach of the covenant of good faith is duplicative of her breach of contract action; and 5) Plaintiff has not asserted a viable cause of action for promissory estoppel because she failed to allege the essential elements of that cause of action, including a) a clear and unambiguous promise, and b) performance of acts that are unequivocally referable to the alleged promise.

RULING OF THE COURT

A. Standards for Dismissal

A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion,

however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

B. Relevant Causes of Action

To establish a cause of action for breach of contract, one must demonstrate: 1) the existence of a contract between the plaintiff and defendant, 2) consideration, 3) performance by the plaintiff, 4) breach by the defendant, and 5) damages resulting from the breach. *Furia v. Furia*, 116 A.D.2d 694 (2d Dept. 1986).

The implied covenant of good faith and fair dealing embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract. *Moran v. Erik*, 11 N.Y.3d 452, 456 (2008), citing *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002), quoting *Dalton v. Educational Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (additional citations omitted).

The elements of estoppel are, with respect to the party estopped: 1) conduct that amounts to a false representation or concealment of material facts; 2) intention that such conduct will be acted upon by the other party; and 3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: 1) lack of knowledge of the true facts, 2) reliance upon the conduct of the party, and 3) a prejudicial change in his position. *First Union v. Tecklenburg*, 2 A.D.3d 575, 577 (2d Dept. 2003), citing *Airco Alloys Div. V. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Department 1980).

NY CLS Bus Corp § 630(a) provides, in pertinent part, as follows:

> (a) The ten largest shareholders, as determined by the fair value of their beneficial interest as of the beginning of the period during which the unpaid services referred to in this section are performed, of every corporation... shall jointly and severally be personally liable for all debts, wages or salaries due and owing to any of its laborers, servants or employees other than contractors, for services performed by them for such corporation. Before such laborer, servant or employee shall charge such shareholder for such services, he shall give notice in writing to such shareholder that he intends to hold him liable under this section. Such notice shall be given within one hundred and eighty days after termination of such services...An action to enforce such liability shall be commenced within ninety days after the return of an execution unsatisfied against the corporation upon a judgment recovered against it for such services.

C. Contract Interpretation

When the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms. *Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864 (2d Dept. 2006). A contract will be interpreted in accordance with the intent of the parties as expressed in the language of the agreement. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d 562, 569 (2002). The best evidence of what parties to a written agreement intend is what they say in their writing. *Id.* at 569, *quoting Slamow v. Del Col*, 79 N.Y.2d 1016, 1018 (1992). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *South Road Assoc., LLC v. International Business Machines Corp.*, 4 N.Y.3d 272, 277 (2005); *WWW Assoc., Inc. v. Giacontieri*, 77 N.Y.2d 157, 162 (1990). The interpretation of an unambiguous contract provision is a matter for the court. *Greenfield v. Philles Records, Inc.*, 98 N.Y.2d at 569; *WWW Assoc., Inc. v. Giacontieri*, 77 N.Y.2d at 162.

A court should not, under the guise of contract interpretation, imply a term which the parties themselves failed to insert or otherwise rewrite the contract. *Aivaliotis v. Continental Broker-Dealer Corp.*, 30 A.D.3d 446, 447 (2d Dept. 2006), citing *Lui v. Park Ridge at Terryville Ass'n, Inc.*, 196 AD2d 579 (2d Dept. 1993), quoting *Mitchell v. Mitchell*, 82 A.D.2d 849 (2d Dept. 1981). In addition, as a general rule, it must clearly appear from the contract itself that the parties intended a provision to operate as a condition precedent,.and where there is ambiguity in a contractual term, the law does not favor a construction which creates a condition precedent. *Gallo v. Rea Motors, Inc.*, 34 A.D.3d 635, 635-636 (2d Dept. 2006), quoting *Lui v. Park Ridge at Terryville Ass'n, Inc., supra,* at 582; *Willis v. Ronan*, 218 A.D.2d 794 (2d Dept. 1995).

D. Effect of No-Oral Modification Provision

General Obligations Law ("GOL") § 15-301(1) provides as follows:

> A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent.

The text of the General Obligations Law is not, however, the end of the inquiry. Rather, in *Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338 (1977), the Court of Appeals outlined the analysis a court should conduct in determining whether a no-oral modification clause precludes relief by a

defendant alleging an oral modification to the parties' agreement. The Court in *Rose* held as follows:

> Parties to a written agreement who include a proscription against oral modifications are protected by [GOL § 15-301(1)]. Any contract containing such a clause "cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement * * * is sought". Put otherwise, if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls. Thus, the authenticity of any amendment is ensured (*DFI Communications v. Greenberg*, 41 NY2d 602, 606-607).
>
> On the other hand, where the oral agreement to modify has in fact been acted upon to completion, the same need to protect the integrity of the written agreement from false claims of modification does not arise. In such case, not only may past oral discussions be relied upon to test the alleged modification, but the actions taken may demonstrate, objectively, the nature and extent of the modification. Moreover, apart from statute, a contract once made can be unmade, and a contractual prohibition against oral modification may itself be waived [citation omitted]. Thus, secion 15-301 nullifies only "executory" oral modification. Once executed, the oral modification may be proved. [Citations omitted.]
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> *Id.* at 343.

The Second Department reaffirmed these principles in *B. Reitman Blacktop, Inc. v. Missirlian*, 52 A.D.3d 752, 753 (2d Dept. 2008). In *B. Reitman*, the Second Department held that the statute of frauds bars oral modifications to a contract that expressly provides that modifications must be in writing, citing, *inter alia*, GOL" § 15-301(1), but also noted that an oral modification is enforceable if there is part performance that is "unequivocally referable to the oral modification" and a showing of equitable estoppel. *Id.*, quoting *Rose*, *supra*, at 343 and 345.

E. Application of these Principles to the Instant Action

The Court's analysis will focus on the sufficiency of the Amended Complaint.

Preliminarily, the Court declines to adopt Plaintiff's argument as to the meaning of the word "maintain" in the Contract as it seems to call for a strained interpretation of the language of the Contract and bely common sense. The plain meaning of the Contract is that Plaintiff was to obtain occurrence-type insurance and Defendant would pay for that insurance.

With respect to Plaintiff's BCL claim, the Court concludes that 1) Plaintiff provided Defendants with the requisite notice; and 2) BCL § 603(a) does not prohibit the cause of action against the individual Defendants, but rather prevents Plaintiff from seeking to enforce any future judgment against those Defendants unless and until a judgment against LIWH is returned

unsatisfied.

The Court is mindful of the issues raised by the motion papers. The parties' conduct, specifically Defendants' handling the ministerial aspects of obtaining and paying for Plaintiff's insurance and Plaintiff's apparent knowledge that she practiced medicine under a claims-based insurance policy while employed with LIWH despite the terms of the Contract, suggests that 1) there was a modification of the Contract by virtue of the parties' conduct; 2) the parties waived the requirements of the Contract by their conduct; 3) the parties are estopped from asserting their rights under the Contract by their conduct; and/or 4) the parties breached their respective duties of good faith and fair dealing to each other. The Court concludes, however, that accepting the facts alleged as true and according to the Plaintiff every favorable inference which may be drawn therefrom, the factual allegations contained in the Amended Complaint constitute a cause of action cognizable at law. In light of the foregoing, the Court denies Defendants' motion to dismiss.

The Court directs Plaintiff to file and serve the Amended Complaint within thirty (30) days of the date of this Order, and directs Defendants to serve their Answer within thirty (30) days thereafter.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel for the parties to appear before the Court for a Preliminary Conference on January 27, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY
October 8, 2010

HON. TIMOTHY S. DRISCOLL
J.S.C.