

Nahar v Gulati

2011 NY Slip Op 30429(U)

February 25, 2011

Supreme Court, New York County

Docket Number: 105848/10

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 105848/2010
 NAHAR, TAMANNA, M.D.
 VS.
 GULATI, RASHMI, M.D.
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*is decided by
 accompanying decision & order.
 Judgment thereon to abide further
 proceedings*

FILED

FEB 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/28/11

[Signature]

 JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 55

TAMANNA NAHAR,

Plaintiff,

INDEX NO. 105848/10

-against-

MOTION SEQ. NO. 001

RASHMI GULATI, M.D., DEE GULATI
a/k/a DEEPAK GULATI, VERA MYERS,
PATIENTS MEDICAL P.C., JOHN AND JANE
DOE 1-10 (FICTITIOUS NAMES),
ABC CORPORATIONS 1-10 (FICTITIOUS
NAMES),

Defendants.

FILED

FEB 28 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

JANE S. SOLOMON, J.:

In this action for fraud, defendants Rashmi Gulati, M.D. (Rashmi), Dee Gulati a/k/a Deepak Gulati (Dee) (together, the Gulatis), Vera Myers (Myers), and Patients Medical P.C. (the Clinic) (together, Defendants) move, pursuant to CPLR 3211 © and 3212, for summary judgment dismissing the complaint.

BACKGROUND

Since January 2006, plaintiff Tamanna Nahar (Plaintiff), a New York licensed physician, was employed by non-party Bronx Lebanon Hospital Center (the Hospital) in the Bronx, New York, as Director of Echocardiography. In 2006, Plaintiff and the Hospital entered into an employment agreement governing the terms of Plaintiff's employment.

In May 2008, Plaintiff learned that the Clinic was looking for a physician to read echocardiograms on a part-time basis.

Plaintiff entered into negotiations with the Clinic, but the parties allegedly could not agree on compensation terms. In May 2008, one of the Defendants contacted Plaintiff in order to revisit the possibility of her working for the Clinic. This time, they allegedly reached an agreement that Plaintiff would work for the Clinic on weekends on a part-time basis. After Plaintiff commenced her employment at the Clinic, in August 2009, she allegedly received an e-mail from Dee complaining of low insurance reimbursement rates with respect to patients seen by Plaintiff. Dee allegedly suggested using Plaintiff's name for insurance billing purposes with respect to the Clinic's patients for whom Plaintiff provided no medical care. Plaintiff allegedly rejected this idea. In November 2009, after the Gulatis allegedly brought up this idea, Plaintiff rejected it again.

Later the same month, Plaintiff discovered that Dee had previously pled guilty to securities fraud brought by the Securities and Exchange Commission. Upon her discovery, Plaintiff quit working for the Clinic.

In January 2010, Plaintiff was notified by her Hospital supervisors of their discovery that the Clinic had submitted insurance claim forms indicating that Plaintiff had worked on weekdays when she was supposed to be working at the Hospital. As a result, Plaintiff was allegedly forced to leave the Hospital's employ.

Plaintiff confronted Dee and Myers via e-mail, and Myers admitted that she was instructed by the Gulatis to use Plaintiff's name for insurance billing purposes with respect to patients whom Plaintiff did not see or whose studies she did not read. Plaintiff alleges that the Clinic did not compensate her for her services.

On these alleged facts, Plaintiffs pleads the following causes of action: (1) fraud; (2) injurious falsehood; (3) intentional interference with contract; (4) negligent interference with contract; (5) intentional interference with prospective economic advantage; (6) negligent interference with prospective economic advantage; (7) defamation and defamation per se; (8) causing employee to lose employment; (9) negligence; and (10) punitive damages.

Defendants now move for summary judgment.

DISCUSSION

In their motion, Defendants contend that Plaintiff has failed to state a cause of action with respect to the causes of action asserted in the complaint, which is an argument available under CPLR 3211 (a) (7). Although issue has been joined, the CPLR provides that this defense is not waived and may be asserted on a motion for summary judgment (see CPLR 3211 [e]; CPLR 3212 [c]).

"In assessing a motion under CPLR 3211 (a) (7), ... the

criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [citations and internal quotation marks omitted]).

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'" (*id.*, quoting CPLR 3212 [b]).

Defendants argue that the following claims asserted by Plaintiff are not recognized under New York law: intentional interference with contract; negligent interference with contract; intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, causing employee to lose employment, and punitive damages.

Tortious Interference with Contract and Prospective Economic Advantage

New York law recognizes interference with an existing contract and interference with prospective economic advantage as valid causes of action and treats them as intentional torts (see e.g. *White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]; see also *Vigoda v DCA Prods. Plus, Inc.*, 293 AD2d 265, 266 [1st Dept 2002]). Accordingly, negligent interference with contract and negligent interference with

prospective economic advantage are not valid causes of action and are, therefore, severed and dismissed.

Additionally, "[a]greements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortious interference with existing contracts" (*American Preferred Prescription, Inc. v Health Mgmt., Inc.*, 252 AD2d 414, 417 [1st Dept 1998]). Here, Plaintiff's employment agreement with the Hospital provides that the Hospital may terminate the agreement without cause (see 09/22/10 Lutzer Aff., exhibit D, Employment Agreement, § 8 [d]). Since the Hospital employment agreement was terminable at will, plaintiff does not have a cause of action for tortious interference with existing contract (see *American Preferred Prescription, Inc.*, 252 AD2d at 417). Accordingly, the cause of action for intentional interference with contract is severed and dismissed.

Causing Employee to Lose Employment

The cause of action of causing employee to lose employment appears to be duplicative of tortious interference with an existing contract (see e.g. *S.C. Posner Co. v Jackson*, 223 NY 325, 332 (1918) [an employer may have a cause of action against a third party that interferes with a contract, that is not a contract at will, between the employer and an employee]; see also *NBT Bancorp v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 620 [1996]). As previously discussed, Plaintiff does not have a

cause of action for tortious interference with an existing contract. Accordingly, this cause of action is severed and dismissed as well.

Punitive Damages

A claim for punitive damages does not constitute a separate cause of action. "A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud" (*Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 616 [1994]).

Accordingly, this cause of action is dismissed. Plaintiff, however, is not precluded from seeking punitive damages in connection with the remaining substantive causes of action (see e.g. *Goldstein v Winard*, 173 AD2d 201, 203 [1st Dept 1991]).

Fraud

Defendants claim that Plaintiff lacks standing to pursue a fraud claim, because the alleged fraudulent statements were made to insurance companies, not Plaintiff, and that Plaintiff has failed to plead fraud with required particularity.

"The elements of a cause of action for fraud require [1] a material misrepresentation of a fact, [2] knowledge of its falsity, [3] an intent to induce reliance, [4] justifiable reliance by the plaintiff, and [5] damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]).

Here, Plaintiff alleges (1) that Defendants represented to

her that they would bill insurance companies only for the work that she performed, and not for patients that she did not see; (2) that at the time of their representation, Defendants had already falsified billing records; (3) that Defendants intended Plaintiff to rely on their representations; (4) that she in fact relied on them and continued working for the Clinic; and (5) as a result, suffered loss of employment at the Hospital (Complaint, ¶¶ 21-28). Accordingly, Plaintiff's allegation is that Defendants misrepresented to her that they would not improperly bill insurance companies for patients whom she did not see. Her claim is not based on statements made to insurance companies.

As to particularity, "in any action based upon fraud, 'the circumstances constituting the wrong shall be stated in detail'" (*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003], quoting CPLR 3016 [b]). The requirements of CPLR "section 3016 (b) may be met when the facts are sufficient to permit a reasonable inference of the alleged conduct" (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 492 [2008]). In this respect, Plaintiff describes in detail specific e-mails and conversations, and provides dates when she discussed the issues of billing with Defendants (see Complaint, ¶¶ 15-19), all of which satisfies CPLR 3016 (b) requirements (see e.g. *P.T. Bank Cent. Asia*, 301 AD2d at 376-377; see also *Kaufman*, 307 AD2d at 121).

Defendants further argue that Plaintiff voluntarily resigned from her job at the Hospital by giving a three-month notice and was not forced to resign. Plaintiff concedes that she wrote a resignation letter, but claims that depositions of relevant witnesses would show that the resignation letter and the three-month grace period was part of a compromise that she reached with the Hospital after she was informed of the termination of her employment.

Defendants also claim that Plaintiff worked on weekdays. They provide a copy of an e-mail from Plaintiff to Dee, dated June 2, 2009, saying that she would prefer to work on Thursdays and Saturdays (09/12/10 Rashmi Aff., exhibit H). They also provide a copy of handwritten notes, allegedly written by Plaintiff, dated June 2009, which purportedly show that she worked for the Clinic on weekdays (*id.*, exhibit I).

As to her e-mail to Dee, Plaintiff claims that after she had sent it, she called Dee and informed her that she could not work on Thursdays (10/27/10 Nahar Aff., ¶ 2). Plaintiff also claims that, in the summer of 2009, she might have worked on one weekday for the Clinic while on medical leave from the Hospital (*see id.*, ¶¶ 3-4).

Accordingly, an issue of fact exists as to whether Plaintiff worked for the Clinic on weekdays. This issue of fact is relevant to both causes of action for fraud and tortious

interference with prospective economic advantage. Additionally, given that the parties have not held depositions yet, and that Plaintiff has explained how discovery may support her allegations, or enable her to respond to Defendants' defenses, the grant of summary judgment on this issue at this juncture would be premature (see e.g. *Groves v Land's End Hous. Co.*, 80 NY2d 978, 978 [1992]). Accordingly, Defendants' motion with respect to the cause of action for fraud is denied.

Defamation

Defendants further argue that Plaintiff has not suffered actual damages and has failed to plead injurious falsehood and defamation with particularity.

"The elements [of defamation] are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999]). "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory" (*Brian v Richardson*, 87 NY2d 46, 50-51 [1995]; see also *Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2d Dept 2007]). "There cannot be a libel without publication" (*McGill v Parker*, 179 AD2d 98, 106 (1st Dept 1992).

"The tort of trade libel or injurious falsehood requires the

knowing publication of false and derogatory facts about the plaintiff's business of a kind calculated to prevent others from dealing with the plaintiff, to its demonstrable detriment" (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010]).

Here, Plaintiff has not alleged that Defendants communicated a false and defamatory statement about her to the Hospital or knowingly published those statements in some other way (*cf. id.* [a mortgagor properly pled a claim for injurious falsehood by alleging that a mortgagee, "with knowledge that the statement was false," informed potential lenders that the mortgagor was in arrears, which caused another lender to reject the mortgagee's loan application at a favorable interest rate]; *see also McGill*, 179 AD2d at 106). Therefore, the causes of action for defamation and injurious falsehood are severed and dismissed.

Negligence

"In order to set forth a prima facie case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury" (*Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept], *affd* 89 NY2d 824 [1996]).

Here, Plaintiff claims that Defendants knowingly submitted false claims to health insurance companies (Complaint, ¶ 19). Accordingly, Defendants' alleged conduct was not negligent, but

intentional, and, therefore, this cause of action is severed and dismissed.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Rashmi Gulati, M.D., Dee Gulati a/k/a Deepak Gulati, Vera Myers, and Patients Medical P.C. is granted to the extent that the following causes of action in the Complaint are severed and dismissed: intentional interference with contract; negligent interference with contract; negligent interference with prospective economic advantage; causing employee to lose employment; defamation and defamation per se; injurious falsehood; negligence; and punitive damages, and the motion is otherwise denied; and it is further

ORDERED that the action continues as to the causes of action for fraud and intentional interference with prospective economic advantage.

Dated: 2/25/11

ENTER:

J.S.C.
JANE S. SOLOMON

FILED
FEB 28 2011
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