

**Belfar v New York Gracie Sq. Hosp., Inc.**

2011 NY Slip Op 31164(U)

April 13, 2011

Supreme Court, New York County

Docket Number: 109829/10

Judge: Jane S. Solomon

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

**JANE S. SOLOMON**

PRESENT: \_\_\_\_\_

PART 55

Index Number : 109829/2010

**BELFAR, WILLIAM**

VS.

**NY GRACIE SQUARE HOSPITAL, INC.**

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 1/19/11

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-3

4-9

10-11

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

Answering Affidavits — Exhibits filed under motion 02

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion *is* decided in accordance with the memorandum decision and order annexed hereto.

*MB — Preliminary Conf. scheduled for 5/27/11 at 11 AM.*

**FILED**

APR 14 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/13/11

  
**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  
COUNTY OF NEW YORK: IAS PART 55

-----X  
WILLIAM BELFAR, M.D., EAST SIDE PSYCHIATRIC  
SERVICES, P.C., and EASTSIDE MEDICAL AND  
DIAGNOSTIC SERVICES. P.C.,

DECISION AND ORDER

Plaintiffs,

Index No. 109829/10

-against-

**FILED**

THE NEW YORK GRACIE SQUARE HOSPITAL, INC. and  
FRANK BRUNO,

**APR 14 2011**

Defendants.

**NEW YORK  
COUNTY CLERK'S OFFICE**

-----X

**JANE S. SOLOMON, J.:**

Motion sequence numbers 001 and 002 are consolidated herein for disposition. Plaintiffs in this matter are Dr. William Belfar (Belfar), the East Side Psychiatric Services, P.C., and Eastside Medical and Diagnostic Services, P.C. The latter two plaintiffs and Belfar, who is their president and sole shareholder, will sometimes be collectively referred to herein as "Eastside." Defendants are The New York Gracie Square Hospital, Inc. (Gracie) and Frank Bruno (Bruno), who is the Chief Executive Officer of Gracie. This matter arises due to the deterioration of an ongoing relationship between plaintiffs and defendants, under which Eastside referred patients to Gracie for treatment, in some cases, by Belfar himself, and Eastside staff.

In motion sequence number 001, Bruno moves to dismiss the complaint, under CPLR 3016 (a), for failure to plead libel and slander causes of action with sufficient particularity, under CPLR 3211 (a) (7), for failure to plead a cause of action, and seeks costs and attorney's fees, under CPLR 8303-a and 22 NYCRR § 130-1.1. In motion sequence number 002, Gracie seeks, with the exception of the motion to dismiss under CPLR 3016, the same relief as Bruno seeks

under motion sequence number 001. Also under motion sequence number 002, Belfar and Eastside cross-move to amend their complaint as of right. CPLR 3025 (a).

As “[t]he clear purpose of [CPLR 3025] is to allow parties to recognize and correct pleading errors without burdening themselves, their opponents, or the courts with motion practice” (Carmody-Wait 2d, New York Practice with Forms, § 34.12), Eastside’s Amended Verified Complaint, submitted November 23, 2010, is accepted, and the motions to dismiss by defendants will be directed toward the Amended Complaint. Eastside has requested leave to submit additional opposition to the motions to dismiss. That request is denied.

#### **BACKGROUND**

Under the alleged agreement between Eastside and Gracie, Eastside would refer patients with private insurance to Gracie for a payment of \$50; for patients without private insurance, Gracie would remunerate Eastside from billings to Medicare Parts A & B. As of November 2009, the arrangement broke down, and according to the Amended Complaint, Gracie and Bruno terminated the agreement, and began a defamation campaign against plaintiffs.

Bruno and Gracie deny any such agreement, rather, they described the activities of Belfar and Eastside as a scheme to gain profits through improper billing practices and fraud. In this regard, as of February 2010, Gracie brought an action for injunctive relief to prevent Belfar and Eastside from identifying themselves as representatives of Gracie, and from seeking or soliciting patient referrals. This court granted a temporary restraining order (TRO) as of February 2, 2010, with a hearing date of February 8, 2010 (*see New York Gracie Square Hosp. v. Markbreiter*, Index No. 101402/10, hereinafter, the Prior Action).

The Prior Action, which is still pending, alleged five causes of action, one of which has

been dismissed by this court upon the motion of the defendants, pursuant to CPLR 3211 (a) (7).<sup>1</sup> Approximately one month later, as of July 19, 2010, Belfar and Eastside answered the complaint in the Prior Action. Two days after that, Belfar and Eastside initiated the instant action. The Complaint of July 19, 2010, and the Amended Complaint, submitted as of right on November 23, 2010, seek identical relief. To wit, Eastside brings an action for: (i) breach of contract; (ii) tortious interference in Eastside's relationships with administrators and physicians; with regard to publishing and bringing the Prior Action, (iii) slander per se; (iv) defamation; (v) intentional infliction of emotional distress; (vi) malicious prosecution; and (vii) abuse of process.

#### **MOTIONS TO DISMISS (CPLR 3211 [A] [7], AND 3016)**

The Amended Complaint is dismissed in its entirety. Bearing in mind that in the context of a motion to dismiss pursuant to CPLR 3211, the pleading is to be liberally construed, and that the plaintiff is to be accorded the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), the Amended Complaint reveals nothing but mundane, conclusory, and repetitive wails of non-actionable perceived wrongs. Moreover, the allegations are devoid of the factual support required by CPLR 3013 (“[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense”).

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<sup>1</sup>The causes of action were: (i) under GBL § 133 for use of Gracie's name for improper or deceptive purposes; (ii) under GBL § 397, for use of Gracie's name without written consent; (iii) for common-law misappropriation of Gracie's name, under a theory of improper use of trade secrets; (iv) for a permanent injunction against continued use of Gracie's name; and (v) for unjust enrichment due to the fees collected under the alleged scheme. As of June 21, 2010, this court dismissed the third cause of action for common-law misappropriation, and allowed the remaining causes of action to continue.

The first cause of action is for breach of the alleged agreement between Eastside and Gracie. Even under liberal pleading standards, it is incumbent on a plaintiff to allege facts sufficient to glean breach from the reasonably implied terms of the contract. *See e.g. Miglietta v Kennecott Copper Corp.*, 25 AD2d 57, 58 (1<sup>st</sup> Dept 1966); *see also Black Car and Livery Ins. v H & W Brokerage*, 28 AD3d 595, 595 (2<sup>nd</sup> Dept 2006) (breach of contract action properly dismissed where allegations are “devoid of a factual basis and are vague and conclusory”) (citations omitted). Here, Eastside simply states that Gracie “failed to comply with the material obligations of their agreement with [Eastside.]” Amended Complaint, ¶ 51. This is patently insufficient to give the court or the defendants notice of the transactions and occurrences to be proved. CPLR 3013; *see also Shapolsky v Shapolsky*, 22 AD2d 91, 92 (1<sup>st</sup> Dept 1964) (complaint should “give notice of ‘the material elements of each cause of action’”). Moreover, “[i]t is well settled that in an action to recover damages for the breach of a contract the facts constituting the breach must be pleaded, and that it is insufficient to plead generally that the defendant failed to fulfill his obligations under the contract, or that he has been guilty of a breach of the contract.” *Baby Show Exhibition Co. v Crowell Pub. Co.*, 174 App Div 368, 370 (1<sup>st</sup> Dept 1916).

The second cause of action for tortious interference by Gracie with Eastside’s business relationships with emergency rooms and hospitals in New York, is also patently deficient. To sustain this claim, Eastside must show that Gracie interfered with Eastside’s business relationships either *with the sole purpose of harming Eastside*, or by means that were unlawful or improper. *See Guard-Life Corp. v S. Parker Hardware Mfg. Corp.*, 50 NY2d 183, 190-191 (1980). First, the Amended Complaint itself states that the Prior Action “was orchestrated as part

of an ongoing attempt by Gracie [] to capture [Eastside's] business..." Amended Complaint ¶ 36. This admitted economic motivation negates the necessary element that the motivation for the interference be solely malicious. *See Advanced Global Tech., LLC v Sirius Satellite Radio*, 44 AD3d 317, 318 (1<sup>st</sup> Dept 2007); *see also Guard-Life Corp.*, 50 NY2d at 190-191. Second, the Amended Complaint is devoid of any allegations that the interference was unlawful. *See Id.* at 194.

The third and fourth causes of action, for slander per se and defamation, respectively, are without merit. The Amended Complaint fails to state "in *haec verba* the particular defamatory words claimed to have been uttered by [Gracie]. This requirement is strictly enforced and the exact words must be set forth." *Gardner v Alexander Rent-A-Car*, 28 AD2d 667, 667 (1st Dept 1967); *see also Laiken v American Bank & Trust Co.*, 34 AD2d 514 (1st Dept 1970); *Delaney v Hirt*, 18 AD2d 657 (1<sup>st</sup> Dept 1962). Moreover, the Amended Complaint does not specify any time or manner of communication of the alleged defamatory material. *See Seltzer v Fields*, 20 AD2d 60, 64 (1<sup>st</sup> Dept 1963), *affd* 14 NY2d 624 (1964) ("present practice requires that plaintiff allege the time, manner, and the persons to whom the publication was made"). Such imprecise pleading renders the Amended Complaint defective as a matter of law. *See Ramos v Madison Sq. Garden Corp.*, 257 AD2d 492, 493 (1<sup>st</sup> Dept 1999); *Murganti v Weber*, 248 AD2d 208, 208-209 (1<sup>st</sup> Dept 1998); *Gardner*, 28 AD2d at 667.

The court has carefully reviewed a letter of February 16, 2010 from defendant Bruno to Brookdale University Hospital and Medical Center (the Letter, attached to the Amended Complaint as Exhibit 2) that is offered as a partial basis for the third and fourth causes of action. Eastside maintains that Gracie intentionally used this letter to defame and slander Eastside, by

sending a copy of the TRO issued by this court on February 2, 2010, while knowing that a modification of the TRO had been granted.

As a preliminary matter, the Letter does not contain any defamatory or slanderous material. Any commentary regarding Eastside is clearly expressed as opinion. In any event, evidence has been submitted that the modified TRO (dated February 8, 2010) was submitted to Brookdale on March 3, 2010, a mere two weeks after the first letter. The actual provision of the modified TRO to Brookdale flatly negates the allegation that Gracie intended to conceal the modification in order to defame Eastside. The third and fourth causes of action are dismissed.

The fifth cause of action, for intentional infliction of emotional distress caused by defendants' alleged false and defamatory statements, is completely unsupported by the Amended Complaint and supporting documents. In order to recover for this tort, Belfar must show that the alleged defamatory and slanderous statements were "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Fischer v Maloney*, 43 NY2d 553, 557 (1978); *see also Kasachkoff v City of New York*, 68 NY2d 654, 657 (1986). Here, however, there were no defamatory or slanderous statements. As such, the bare request for recovery for intentional infliction of emotional distress based on such non-actionable alleged communications is denied.

The sixth and seventh causes of action, for malicious prosecution and abuse of process, respectively, are based on the allegation that Gracie instituted the Prior Action without any basis in law and solely to injure Eastside. "To establish a cause of action for malicious prosecution, a plaintiff must show the elements of commencement or continuation of a judicial proceeding, malice, want of probable cause, and *the successful termination of the precedent action in the*

plaintiff's favor.” *G & T Terminal Packaging Co., Inc. v Western Growers Assn*, 56 AD3d 266, 267 (1<sup>st</sup> Dept 2008) (emphasis added), *lv denied* 12 NY3d 729 (2009), citing *Martin v City of Albany*, 42 NY2d 13, 16 (1977). Here, the Prior Action is still pending; at this juncture, there can be no cause of action for malicious prosecution as a matter of law.

A cause of action for abuse of process requires a showing that there was a “(1) regularly issued process ..., (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective.” *Casa de Meadows (Cayman Islands) v Zaman*, 76 AD3d 917, 921 (1<sup>st</sup> Dept 2010) (internal quotation marks omitted), citing *Curiano v Suozzi*, 63 NY2d 113, 116 (1984). However, “[t]he institution of a civil action by summons and complaint is not legally considered process capable of being abused.” *Curiano*, 63 NY2d at 116. Hence, this cause of action is also defective as a matter of law. The sixth and seventh causes of action are dismissed. As all causes of action have been dismissed, Eastside’s request for punitive damages need not be addressed.

#### **COSTS AND ATTORNEY’S FEES UNDER CPLR 8303-A AND 22 NYCRR § 130-1.1**

Gracie and Bruno seek reimbursement for their actual expenses and attorney’s fees because this action was commenced in bad faith, and solely to retaliate against them for instituting the Prior Action. Where the complaint is patently devoid of merit, commenced without any reasonable basis in law or fact, and not supportable by a good faith argument for an extension, modification, or reversal of existing law (*see Grasso v Mathew*, 164 AD2d 476, 480 [3<sup>rd</sup> Dept], *lv denied* 78 NY2d 855 [1991]), especially with regard to frivolous defamation litigation (*Mitchell v Herald Co.*, 137 AD2d 213 [4<sup>th</sup> Dept 1988]), the sanction of costs and reasonable attorneys’ fees is mandatory. *See Nyitray v New York Athletic Club in City of New*

*York*, 274 AD2d 326, 327 (1<sup>st</sup> Dept 2000); accord *Rittenhouse v St. Regis Hotel Joint Venture*, 180 AD2d 523, 525 (1<sup>st</sup> Dept 1992) (“we think it appropriate at this time to indicate to the Bar that frivolous and baseless actions will not be tolerated and will result in a strict application of the provisions of CPLR § 8303-a”); see also 24C Carmody-Wait 2d § 148:31 (“[s]anctions under the CPLR are mandatory after a finding of frivolousness”).

Since this action is manifestly without merit and frivolous, Eastside’s conduct in commencing and continuing to litigate it is sanctionable under CPLR 8303-a. This application is denied with respect to 22 NYCRR 130-1.1, however, because sanctions under that section “shall not apply to requests for costs or attorneys’ fees subject to the provisions of CPLR 8303-a.” 22 NYCRR 130-1.5. Eastside hereby is sanctioned to pay Bruno’s and Gracie’s costs and reasonable attorneys’ fees, not to exceed \$10,000, for which a hearing is needed. See CPLR 8303-a (a) (limiting the amount of potential recovery).

While these motions were sub judice, Eastside’s lawyer wrote to the Court on January 26, 2011 advising that Belfar filed a Chapter 7 petition as a debtor in the United States Bankruptcy Court for the District of Massachusetts on January 10, 2011. His averment that this filing stayed decision in the fully submitted motions is without merit, because the automatic stay provision of United States Bankruptcy Code § 362 applies only to proceedings against the debtor. Whether an action or proceeding is “against” the debtor is determined by the posture of the parties at the commencement of the action or proceeding. *Koolik v Markowitz*, 40 F.3d 567 (2d Cir. 1994). The filing does suggest that Belfar has debt of a magnitude such that no reorganization is possible. It is not likely that his bankruptcy trustee would retain counsel for a sanction hearing. It also is not clear that the corporate plaintiffs remain viable. Accordingly, there will be a

conference, denominated a preliminary conference for administrative convenience, to discuss scheduling the sanctions hearing.

It hereby is

**ORDERED** that plaintiffs' cross-motion to amend the complaint is granted; and it further is

**ORDERED** that the motion of defendants The New York Gracie Square Hospital, Inc. and Frank Bruno to dismiss the Amended Complaint is granted and the Amended Complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk shall enter judgment accordingly at the conclusion of the sanctions hearing directed below; and it further is

**ORDERED** that the motion of defendants The New York Gracie Square Hospital, Inc. and Frank Bruno, pursuant to CPLR 8303-a, for costs and reasonable attorneys' fees is granted as against plaintiffs William Belfar, M.D., East Side Psychiatric Services, P.C., and Eastside Medical and Diagnostic Services, P.C., jointly and severally; and it further is

**ORDERED** that the parties shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY 10007, on May 23, 2011 at 11 AM.

DATED: April 13, 2011

ENTER:

**FILED**

APR 14 2011

NEW YORK  
COUNTY CLERK'S OFFICE

  
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JANE S. SOLOMON