

Falk v Gallo
2012 NY Slip Op 31012(U)
April 3, 2012
Sup Ct, Nassau County
Docket Number: 019472-06
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**JEFFREY FALK, M.D. and ANESTHISYSTEMS,
INC.,**

Plaintiff,

-against-

**VICTOR A. GALLO, M.D., VICTOR A.
GALLO, M.D., P.C., and GARDEN CITY
MEDICAL PLAZA CORP.,**

Defendants.

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**TRIAL/IAS PART: 16
NASSAU COUNTY**

**Index No: 019472-06
Motion Seq. Nos: 6 & 7
Submission Date: 2/14/12**

Papers Read on these Motions:

**Notice of Motion, Affirmation in Support,
Affidavit in Support and Exhibits.....X
Defendants' Memorandum of Law in Support.....X
Notice of Motion, Affidavit in Support and Exhibits.....X
Plaintiffs' Memorandum of Law in Support.....X
Deposition of V. Gallo.....X
Affirmation in Opposition to Plaintiffs' Motion and Exhibits.....X
Affidavit in Opposition and Exhibit.....X
Memorandum of Law in Opposition to Defendants' Motion.....X
Affidavit of Reply and Exhibits.....X
Reply Affirmation in Further Support.....X**

This matter is before the court on 1) the motion by Defendants Victor A. Gallo, M.D. ("Dr. Gallo"), Victor A. Gallo, M.D., P.C. ("Gallo PC") and Garden City Medical Plaza Corp. ("GC Medical") ("Defendants") filed November 9, 2011, and 2) the motion by Plaintiffs Jeffrey Falk, M.D. ("Dr. Falk") and Anesthisystems, Inc. ("AI") ("Plaintiffs") filed December 20, 2011, both of which were submitted February 14, 2012. For the reasons set forth below, the Court 1) grants Defendants' motion and dismisses the Amended Complaint; and 2) denies Plaintiffs'

motion. The Court notes that Defendants' counterclaims remain viable, and reminds counsel for the parties of their required appearance before the Court for a pre-trial conference on May 17, 2012 at 9:30 a.m.

BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR § 3212, granting Plaintiff summary judgment dismissing the Amended Complaint ("Complaint").

Plaintiffs move for an Order, pursuant to CPLR § 3212, granting Plaintiffs' motion for summary judgment and setting the matter down for a hearing as to the amount of damages.

B. The Parties' History

The parties' history is set forth in detail in prior decisions of the Court (Austin, J.) dated June 11, 2007 ("2007 Decision") and February 25, 2008 ("2008 Decision") (Exs. E and F to Falk Aff. in Supp.). In addition, this Court outlined the background of this action in its decision dated June 30, 2009 ("2009 Decision") in which the Court granted Defendants' motion to disqualify Plaintiffs' counsel. The Court incorporates the 2007, 2008 and 2009 Decisions by reference as if set forth in full herein.

As noted in the prior Decisions, Plaintiffs commenced this action to recover money damages, including lost profits, resulting from the Defendants' alleged breach of an oral agreement entered into in or about April 2006, pursuant to which 1) Plaintiffs would pay \$15,500 monthly rent for continued use of the Premises; and 2) Plaintiffs would employ and compensate specified employees that Dr. Gallo designated, including his son's fiancée, at a salary of \$85,000 annually. The Complaint (Ex. 1 to Vogel Aff. in Supp.) alleges, further, that in or about August 2006, Defendants insisted on changing the terms of the parties' Oral Agreement by 1) requiring Dr. Falk to enter into an employment agreement with Defendants whereby he would receive a salary; and 2) providing that checks from patients or medical plans, payable to Dr. Falk, would be assigned to Defendants and become the property of Gallo PC, and Dr. Falk would assign to Gallo PC the right to bill patients for his reimbursable medical services. The Complaint alleges, further, that Dr. Falk advised Defendants that this proposed agreement, which Plaintiffs characterize in the Complaint as "improper fee splitting," was illegal. Plaintiffs allege that Dr. Gallo then informed Dr. Falk that he would be denied further access to the Premises, and that Defendants have barred him from the Medical Plaza since September 12, 2006, thereby preventing him from performing medical services for patients. Plaintiffs seek damages for

Defendants' alleged breach of the parties' Oral Agreement.

The Complaint contains five (5) causes of action: 1) breach of the parties' agreement, causing Falk to sustain losses of income from September 2006, for the balance of the contract year, in the sum of \$1,500,000, 2) failure of Gallo to pay Plaintiff that part of the fees allocated by Vytra Health Plan ("Vytra") for his medical services, 3) Defendant's failure, since September of 2006, to deliver to Plaintiff payments from patients and insurance companies, or third party payers, for services rendered by Plaintiff to the respective patients, 4) the notice ("Notice") that Gallo provided to his patients beginning in 2005, regarding his anesthesiologist's willingness to provide services for a "nominal fee," was a reference to Dr. Falk, and was improper and interfered in Plaintiff's business and economic relationship with his patients, and 5) Defendants' actions constituted a *prima facie* tort.

Defendants have interposed three counterclaims based on their allegations that Plaintiffs breached the parties' Oral Agreement. They seek damages resulting from Plaintiffs' alleged failure to pay back rent and a portion of the salary owing to a medical assistant.

The Notice (Ex. 12 to Vogel Aff. in Supp.) provided, in pertinent part, as follows:

This office utilizes the services of a board certified anesthesiologist who does not participate with any insurance companies. However, most Insurance companies DO consider this a reimbursable service and will pay for it. The anesthesiologist will bill the insurance company separately and will accept their reimbursement as payment in full in most cases. For those patients whose carriers do not pay, a nominal fee will be charged by the anesthesiologist. If any further bills are received or there are any questions please contact our office immediately. This office does not anticipate any out-of-pocket expenses with most carriers. Don't hesitate to call this office and speak to Joann.

In the 2007 and 2008 Decisions, Justice Austin concluded, *inter alia*, that 1) the first cause of action, "when read broadly," stated a cause of action for wrongful eviction (2008 Decision at p. 4); 2) the second cause of action alleged a cause of action for breach of contract; and 3) the third cause of action alleged a cause of action for conversion.

C. The Parties' Positions

Defendants submit that Justice Austin's determinations that 1) Plaintiffs' first cause of action is effectively a wrongful eviction claim; and 2) Dr. Gallo's alleged promise that Dr. Falk would provide anesthesia to Gallo PC's patients "for the rest of Dr. Falk's life" is unnecessary and irrelevant to the wrongful eviction claim, constitute the law of the case binding all parties and this Court.

Defendants contend, further, that 1) in light of Justice Austin's binding determinations, and the fact that Plaintiffs have no lost profits or actual damages arising from the alleged wrongful eviction, the Court should dismiss the first cause of action; 2) the second cause of action, based on Plaintiffs' claim for fees involving Vytra members, cannot be sustained in light of evidence that Vytra changed its policy to allow anesthesiologists to bill Vytra patients directly, rendering the letter agreement between Dr. Falk and Gallo PC null and void, and because Plaintiffs have submitted no evidence to support their claim that Defendants failed to pay Dr. Falk Vytra fees for services rendered to "at least 100 patients" (Ds' Memo. of Law in Supp. at p. 25), a failure in proof that Defendants describe as "not surprising since Plaintiffs were clearly not entitled to such payments from the Gallo P.C. once Vytra allowed direct anesthesia billing..." (*id.*); 3) the Court should dismiss the third cause of action in light of Plaintiffs' failure to produce evidence supporting their claim that Defendants failed to turn over checks that were delivered to Medical Plaza after the oral lease terminated, and in consideration of Dr. Falk's sworn testimony that he does not know whether any such checks remain outstanding; 4) the Court should dismiss the fourth cause of action, alleging tortious interference with contractual relations, in light of Plaintiffs' failure to prove the necessary elements, including a) the existence of a valid contract between Dr. Falk and the Gallo PC patients, b) Defendants' intentional inducement of Gallo PC's patients to breach any alleged contract with Dr. Falk, and c) damages resulting from the alleged interference with contract relations; and 5) the Court should dismiss the fifth cause of action, alleging *prima facie* tort, in light of Plaintiffs' failure to allege or prove the required elements, including that a) Defendants' motivation was solely malicious; and b) Plaintiffs suffered special damages.

Plaintiffs oppose Defendants' motion, and submit that the Court should grant their motion for summary judgment, on the grounds that 1) applying the law of the case doctrine, the 2008 Decision established that there was a wrongful eviction of Plaintiffs by Defendants; 2) there is a basis for determining Plaintiffs' damages, based on the prior history of the parties as well as the number of colonoscopies performed from the time of the alleged eviction through the end of the lease agreement on March 31, 2007, as well as evidence of malice warranting punitive and treble damages; 3) the cause of action for breach of contract is not barred by the Statute of Frauds because the payment of monies by Plaintiffs to Defendants was unequivocally referable to the oral agreement; 4) Plaintiffs have established the elements of tortious interference with contract, in part by alleging and demonstrating that the Notice was "done deliberately and

maliciously in order to cause economic harm to the Plaintiff' (Ps' Memo. of Law in Supp. at p. 15); and 5) Plaintiffs have established their cause of action for *prima facie* tort by demonstrating that Dr. Falk suffered severe financial damages as a result of being deprived of his ability to practice his profession as agreed upon with the Defendants, without excuse or justification.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincheran*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986). Mere conclusions or unsubstantiated allegations will not defeat the moving party's right to summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

B. Law of the Case

In *Wells Fargo Bank Minnesota, National Association v. Perez*, 70 A.D.3d 817 (2d Dept. 2010), the Appellate Division, Second Department held that, [a]s a general rule, the law of the case doctrine precludes this Court from re-examining an issue that has been raised and decided against a party on a prior appeal where that party had a full and fair opportunity to address the issue." *Id.*, quoting *Frankson v. Brown & Williamson Tobacco Corp.*, 67 A.D.3d 213, 217 (2d Dept. 2009). The doctrine forecloses re-examination of an issue absent a showing of subsequent evidence or change of law. *Id.*, citing *J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809 (2d Dept. 2007), quoting *Matter of Yeampierre v. Gutman*, 57 A.D.2d 898, 899 (2d Dept. 1977).

C. Relevant Causes of Action

The measure of compensatory damages for wrongful eviction is the value of the unexpired term of the lease over and above the rent the lessee must pay under its terms, together

with any actual damages flowing directly from the wrongful eviction, including lost profits ascertainable with a reasonable degree of certainty and loss of personal property. *North Main St. Bagel Corp v. Duncan*, 37 A.D.3d 785, 786 (2d Dept. 2007), quoting *Long Is. Airports Limousine Serv. Corp. v. Northwest Airlines*, 124 A.D.2d 711, 712 (2d Dept. 1986).

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).

A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession. *Colavito v. New York Organ Donor Network Inc.*, 8 N.Y.3d 43, 49-50 (2006), citing *State of New York v. Seventh Regiment Fund Inc.*, 98 N.Y.2d 249 (2002). Two key elements of conversion are 1) plaintiff's possessory right or interest in the property, *Colavito*, 8 N.Y.3d at 50, citing *Pierpoint v. Hoyt*, 260 N.Y. 26 (1932) and *Seventh Regiment Fund Inc.*, *supra*, at 259, and 2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights, *Colavito*, 8 N.Y.3d at 50, citing *Employers' Fire Ins. Co. v. Cotten*, 245 N.Y. 102 (1927).

A party claiming tortious interference with contractual relations must establish the following elements: 1) the existence of a valid contract with a third party, 2) defendants' knowledge of the contract, 3) defendants' intentional procurement of the third party's breach of the contract without justification, 4) actual breach of the contract, and 5) damages resulting therefrom. *Lama Holding Co. v. Smith Barney*, 88 N.Y.2d 413, 424 (1996).

The elements of a claim for *prima facie* tort that must be alleged and proven are 1) the intentional infliction of harm, 2) which results in special damages, 3) without any excuse or justification, 4) by an act or series of acts which would otherwise be lawful. *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142-143 (1985). There is no recovery in *prima facie* tort unless disinterested malevolence is the sole motive for defendant's otherwise lawful act, *Burns Jackson Miller Summit & Spitzer v Lindner*, 59 N.Y.2d 314, 333 (1983), or unless defendant acts from disinterested malevolence, *id.*, quoting *American Bank & Trust Co. v. Federal Bank*, 256 U.S. 350, 358 (1921). A claim of *prima facie* tort does not lie where a defendant's action has any motive other than a desire to injure the plaintiff. *Smith v. Meridian Technologies, Inc.*, 86 A.D.3d 557, 559 (2d Dept. 2011), citing *Weaver v. Putnam Hosp. Ctr.*, 142 A.D.2d 641, 641-642

(2d Dept. 1988), quoting *Global Casting v. Daley-Hodkin Corp.*, 105 Misc. 2d 517 (1980).

D. Application of these Principles to the Instant Action

Preliminarily, the Court notes that the Complaint contains no request for treble damages, and Plaintiffs have made no request to further amend their pleading. Under these circumstances, there is no basis for Plaintiffs' request for treble damages (Ps' Memo. of Law in Supp. at p. 6).

With respect to the first cause of action for wrongful eviction, Plaintiffs rely entirely on the availability of lost profits as the basis for their claim for lost income resulting from the wrongful eviction. As Defendants note, however, Justice Austin concluded that the allegations that Dr. Falk was to be the anesthesiologist at the Med Plaza premises as long as Dr. Gallo practiced medicine at that location and for the rest of his life are "irrelevant and unnecessary to this cause of action." As this finding is a legal determination that was necessarily resolved on the merits in Judge Austin's decision denying dismissal of the first cause of action, it is the law of the case and the Court concludes that Defendants have made out a *prima facie* case that Plaintiffs have no damages resulting solely from the wrongful eviction.

Given the nature of the parties' relationship, the lease had no value, in and of itself. The value lay in the payments received by Dr. Falk for anesthesia treatment he provided for the patients of Dr. Gallo. Dr. Falk admits that he provided "ancillary services" to other physicians, and, therefore, that his work could "only be done in conjunction with a physician who was performing medical procedures" that required anesthesia (Falk Reply Aff. at ¶ 21). Dr. Falk argues that the lease agreement was intertwined with the services agreement and, therefore, the breach of the former entitles him to his lost income for services that he would have provided for the rest of the lease year.

The clear implication of Judge Austin's determination set forth above, however, is that any agreement as to services is irrelevant and unnecessary with respect to the claim of wrongful eviction. Under these unusual circumstances, Plaintiffs cannot bootstrap their claim for lost income to the wrongful eviction claim. Consequently, they have failed to raise a triable issue of fact as to damages sustained by reason of the Defendants' breach of the oral lease and, therefore, the Court grants Defendants' motion for summary judgment dismissing the first cause of action.

In the second cause of action, Plaintiffs allege that Defendants failed to pay Dr. Falk that part of his fees allocated by Vytra for services he performed between May 2005 and September 12, 2006 (Compl. at ¶¶ 25-26). Vytra and Gallo PC had an agreement that Gallo PC would accept a flat fee for each colonoscopy procedure performed, and that the flat fee of \$500

paid by Vytra would include payment for anesthesia services. As a result of this arrangement, Gallo PC and Dr. Falk entered into a separate letter agreement which provided that Dr. Falk would accept the fees paid by Gallo PC as full payment for the anesthesia services rendered by Dr. Falk to patients insured by Vytra. Plaintiffs assert that, in the aforementioned time period, Dr. Falk was not paid for services rendered to at least 100 patients insured by Vytra.

Defendants, however, have demonstrated that once Vytra changed its policy to allow direct anesthesia billing, their letter agreement with Dr. Falk no longer had any purpose because Dr. Falk could now bill Vytra himself. This change occurred around the end of 2005 (Falk Deposition transcript, Ex. 4 to Vogel Aff. in Supp., at p. 145). Furthermore, Defendants have submitted evidence that they made all payments for Vytra patients through September 25, 2005, and that Dr. Falk conceded his date of May, 2005, could be “a typographical error” (*id.* at p.146). On this record, Defendants have made out a *prima facie* case that there was no breach of the agreement for payment of proceeds received from Vytra while that agreement was viable. In opposition, Plaintiffs simply argue that there are factual disputes that preclude summary judgment (Falk Aff. in Opp. at ¶ 24). Without more, this conclusory statement does not suffice to raise a triable issue of fact. Accordingly, Defendants are entitled to summary judgment dismissing the second cause of action.

The third cause of action for conversion concerns checks for services rendered by Dr. Falk in the sum of at least \$25,000, from patients and insurance companies. Plaintiffs allege that these checks were withheld from them from September 2006, to date (Compl. at ¶¶ 27-28). Defendants contend that they are entitled to summary judgment dismissing this cause of action in light of the fact that Dr. Falk admitted receiving some checks after September 2006, and Dr. Falk is unable to state whether there are any outstanding checks. Dr. Gallo avers that “each and every check for anesthesia services” was forwarded after the parties’ relationship ended (Gallo Aff. in Supp. at ¶ 9(iii)). On this record, Plaintiffs have presented a *prima facie* case that they have not withheld any checks for anesthesia services from Dr. Falk. Again, in opposition, Dr. Falk simply states in conclusory fashion that there are clearly factual disputes regarding this cause of action. Under these circumstances, Plaintiffs have failed to raise a triable issue of fact to defeat Defendants’ entitlement to summary judgment, and the Court grants Defendants summary judgment dismissing the third cause of action.

With respect to the cause of action for tortious interference with contract, Plaintiffs allege that the Notice that Dr. Falk would charge a “nominal fee” for his services in the event that his

patients' insurance companies refused payment, constituted interference by Defendants in the contractual relationship that Dr. Falk had with his patients (Compl. at ¶¶ 35-37). Plaintiffs further allege that as a consequence of the Notice, Dr. Falk's invoices to various patients were largely ignored and not paid or, when paid, yielded less than the reasonable value of his services (*id.* at ¶ 36).

Defendants submit, *inter alia*, that there is no evidence that specific patients "ignored" invoices or paid less than the amount of the invoices as alleged in the Complaint. Plaintiffs have failed to produce such evidence and, accordingly, have failed to establish the damages element of this cause of action. Thus, Defendants have demonstrated their entitlement to summary judgment dismissing the fourth cause of action.

The factual basis for Plaintiffs' claim of *prima facie* tort in the fifth cause of action is the same as that for the fourth cause of action discussed above, specifically the alleged impropriety of the Notice. Dr. Gallo has provided sworn affirmations regarding his concern "that the Gallo P.C. would lose patients if they received exorbitant anesthesia bills in addition to the cost of the procedure" (Gallo Aff. in Supp. at ¶ 72; *see also* ¶ 16). Under these circumstances, where losing patients was, at least in part, the reason Dr. Gallo discussed anesthesia fees in the Notice, Dr. Falk cannot establish that a disinterested malevolence was the sole motive behind the Notice. Therefore, Defendants are entitled to summary judgment dismissing the fifth cause of action.

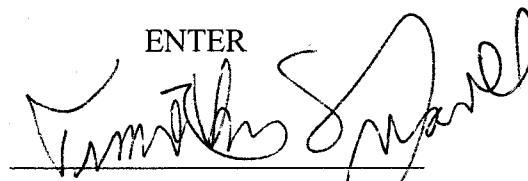
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court notes that Defendants' counterclaims remain viable, and reminds counsel for the parties of their required appearance before the Court on May 17, 2012 at 9:30 a.m. for a pre-trial conference regarding the counterclaims.

DATED: Mineola, NY

April 3, 2012

ENTER

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

ENTERED
 APR 11 2012
 NASSAU COUNTY
 COUNTY CLERK'S OFFICE