

Min Aung Wong v New York Downtown Hosp.

2012 NY Slip Op 33304(U)

January 4, 2012

Sup Ct, NY County

Docket Number: 105693/11

Judge: Carol R. Edmead

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[* 1]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 35

-----X
DR. MIN AUNG WONG, DR. LIH LIH WU and
ZHAO HUI WANG,

Plaintiffs,

Index No.
105693/11

-against-

NEW YORK DOWNTOWN HOSPITAL and Dr.
YONG KANG HE,

Defendants.

-----X

EDMEAD, J.:

Motion Sequence Nos. 001 and 002 are consolidated for disposition. In Motion Sequence No. 001, defendant New York Downtown Hospital (the Hospital) moves for an order, pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint. In Motion Sequence No. 002, defendant Yong Kang He (Dr. He) also moves for an order dismissing the complaint, pursuant to CPLR 3211.

On January 1, 2007, the New York State Berger Commission (the Commission), the entity that was formed to eliminate a number of problems in the health care industry in the State of New York, recommended the merging or restructuring of more than 50 hospitals and nursing homes. Among the Commission's recommendations was a directive that the Hospital close its Brooklyn Primary Care Clinic or divest itself of its ownership interest therein by June 30, 2008. In accordance with the directive, the Hospital subsequently put the Clinic up for sale.

Plaintiffs Dr. Min Aung Wong, Dr. Lih Lih Wu and Dr. Zhao

[* 2]

Hui Wang (jointly referred to as the Wong Group) are physicians that were employed by the Hospital and assigned to work at the Clinic. On or about May 8, 2008, the Hospital notified each of the plaintiffs who it had been directed by the Commission to close the Hospital's off-site clinics, and that their positions in the Clinic would be eliminated effective May 16, 2008 (the Termination Letters). The Wong Group continued to work at the Clinic until they were terminated. The Clinic was subsequently sold to defendant Dr. He.

The Wong Group previously commenced an action against Dr. He in the Supreme Court, Kings County, in an action entitled *Dr. Min Aung Wong, et. al. v Dr. Yong Kang He* (index No. 20302/08) (the Prior Action), wherein it asserted three causes of action: libel (first), and tortious interference (second and third). The court therein granted Dr. He's motion to dismiss the complaint for failure to state a cause of action with prejudice (the Prior Action, Order dated 11/19/08).

The Wong Group then commenced the instant action against the Hospital and Dr. He, asserting four causes of action: fraud (first); tortious interference with prospective business opportunities (second); tortious interference with doctor-patient relationship (third); and tortious interference with Healthfirst, an independent insurance provider (fourth).

This court shall first address Dr. He's motion to

dismiss, in Motion Sequence No. 002. Dr. He seeks this relief based on various grounds, including the doctrine of *res judicata*. In support of this ground, he alleges that, in the Prior Action, the Wong Group asserted identical claims for defamation and tortious interference as those asserted in this action, which were dismissed with prejudice for failure to state a cause of action. He maintains that the Wong Group did not appeal that decision, and its motion to restore the action to the calendar, following the dismissal of its complaint, was denied (see Dr. He's Exhibit 2, the Prior Action, Order dated 8/12/09). He, thus, argues that, pursuant to the doctrine of *res judicata*, the claims against him in this action should be dismissed.

The Wong Group acknowledges that the Prior Action against Dr. He was dismissed. It, however, argues that, since the prior dismissal was not on the merits, this action is not subject to dismissal based on *res judicata*.

Under the doctrine of *res judicata*, a final adjudication of a claim on the merits precludes relitigation of that claim and all claims arising out of the same transaction or series of transactions by a party or those in privity with a party (see *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481 [1979]; *Matter of LaSonde v Seabrook*, 89 AD3d 132 [1st Dept 2011]). Generally, "a dismissal for failure to state a cause of action is not on the merits and, thus, will not be given *res judicata* effect" (*Pereira v*

*** 4**

St. Joseph's Cemetery, 78 AD3d 1141, 1142 [2d Dept 2010]). However, a dismissal of claims "with prejudice" signifies that the court intended to dismiss the action "on the merits" (*Jespersen v Li Sheng Liang*, 68 AD3d 724, 725 [2d Dept 2009], quoting *Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 380 [1999]; see also *Matter of LaSonde v Seabrook*, 89 AD3d 132, *supra*). Here, the court in the Prior Action not only granted the motion to dismiss the Wong Group's complaint for failure to state a cause of action "with prejudice," but also denied the Wong Group's motion to restore the case to the calendar following its dismissal of the complaint, thus signifying that court's intention of bringing the Wong Group's claims to a final conclusion¹ (see *Aard-Vark Agency, Ltd. v Prager*, 8 AD3d 508 [2d Dept 2004]; see also *Yonkers Contr. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, *supra*; see also *Papa v Burrows*, 186 AD2d 375 [1st Dept 1992], *lv denied* 81 NY2d 707 [1993]). Since the instant complaint adds nothing new of substance to the Wong Group's previous complaint, and essentially asserts identical claims thereto, and the dismissal with prejudice granted in the Prior Action between the Wong Group and Dr. He constitutes a final adjudication on the merits of those claims, the claims asserted in the instant complaint against Dr. He are barred by the doctrine of

¹If the Wong Group believed that such dismissal was improperly granted by that court, the remedy for such purported error was a timely motion for reargument, pursuant to CPLR 2221, or a timely appeal, pursuant to CPLR 5513 (see *Benitez v City of New York*, 2 AD3d 285 [1st Dept 2003]), which was not done. Thus, the Prior Order is final (*id.*).

[* 5]

res judicata (see *Aard-Vark Agency, Ltd. v Prager*, 8 AD3d 508, *supra*; see also *Papa v Burrows*, 186 AD2d 375, *supra*). In view of the foregoing, this court need not address the other grounds raised by Dr. He for dismissing the complaint.

Therefore, Dr. He's motion to dismiss the complaint, in Motion Sequence No. 002, is granted.

In Motion Sequence No. 001, the Hospital also moves for an order dismissing the complaint, pursuant to CPLR 3211 (a) (1) and (7), on the grounds that the complaint fails to state a claim and that documentary evidence conclusively establishes a defense to the claims. "On a motion to dismiss, pursuant to CPLR 3211, the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory" (*Ladenburg Thalmann & Co. v Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]). Affidavits and other evidence submitted by plaintiffs may be considered for the limited purpose of remedying any defects in the complaint, thus preserving inartfully pleaded, but potentially meritorious, claims (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). Pursuant to CPLR 3211 (a) (1), "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The first cause of action purports to state a claim for

[*6]

fraud, alleging that the Hospital made false representations in the Termination Letters "which were meant to be intentionally misleading" and "caused the Wong Group to conclude that if they had any discussions with any patient or encouraged them to leave and join their private practice, that they had somehow breached a duty of loyalty" (Complaint, ¶ 46). The Complaint characterizes such purported representations as a non compete clause (*id.*, ¶50). The Wong Group also asserts that the Hospital "proclaimed that the Wong Group was "dismissed due to a medical accident" (*id.*, ¶ 49).

In support of its motion for dismissal, the Hospital argues, *inter alia*, that the documentary evidence consisting of the Termination Letters, themselves, demonstrate that the language therein does not include a non compete clause as alleged by the Wong Group. Instead, the Hospital contends that the Termination Letters advise the Wong Group that, during the remainder of their employment, it could not solicit the Clinic's patients, a restriction it claims entitlement to, under New York law. Additionally, the Hospital submits a translation of a notice (the Notice) posted in the Clinic, which it assumes is the basis of the purported proclamation complained of by the Wong Group. The Hospital maintains that it received the Notice from Dr. He's counsel, which translated from Chinese to English, states "Notice from Hong Ning Clinic" "Dr. Wong Man On, Dr. Ng Lei Lei and Dr. Wong Chiu Fai have been dismissed by this clinic. . This notwithstanding,

the clinic will continue to provide full quality service of internal medicine, surgery, gynecology and pediatrics" (Annese affirmation dated 7/12/11, Exhibit D, Translation by Jean-Marie Leger dated 10/31/08). The Hospital maintains that the Wong Group's allegation regarding the purported proclamation lacks the degree of specificity necessary to state a fraud claim, in that it fails to identify who allegedly made this statement or when the statement was made. Therefore, the Hospital alleges that the Wong Group fails to allege a cognizable fraud claim against it.

In opposition, plaintiff's counsel argues that, in the Termination Letters, the Hospital sought to "injure the economic and professional integrity of [the Wong Group]" through a "non-compete clause to preclude [it] from competing with [the Hospital]" (the Wong Group's counsel's affirmation at 7). With respect to the proclamation, counsel alleges that it refers to the Notice, a sheet of paper with writing in Chinese, which was affixed to the door of the Clinic, on or about May 25, 2008, which translated in English, states, upon information and belief, that the Wong Group "had been discharged/fired from the Clinic because of incompetence or misdeeds" (The Wong Group's counsel's affirmation at 5). Counsel maintains that this translation of this Notice supports a claim in "professional defamation" (*id.* at 7). Thus, counsel argues that the fraud claim is sufficiently pleaded.

In reply, the Hospital maintains that the affirmation of

the Wong Group's counsel is not based on personal knowledge of the facts, and is insufficient to demonstrate the legal merits of the Wong Group's claim. It further argues that the Wong Group is unable to identify any language constituting a non compete clause in the Termination Letters. Additionally, it contends that the Wong Group fails to state a claim for defamation arising from the Notice, in that, *inter alia*, there is no defamatory language in the Notice regarding the Wong Group.

To plead a viable cause of action for fraud, plaintiff must allege that defendant made a misrepresentation of a material existing fact or a material omission of fact, which was false and known to be false by the defendant when made, for the purpose of inducing plaintiff's reliance, justifiable reliance on the alleged misrepresentation or omission by the plaintiff, and injury (*Lama Holding Company v Smith Barney*, 88 NY2d 413 [1996]). Additionally, CPLR 3016 (b) requires that the complaint set forth the misconduct complained of in sufficient detail to clearly inform each defendant of what his or her respective role was in the incidents complained of (see *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373 [1st Dept 2003]).

Here, the purported misconduct complained of consists of the Hospital's purported representation, in the Termination Letters, that the Wong Group was subject to a non compete clause which restrained its solicitation of the Hospital's patients. ``Covenants

restricting a professional, and in particular a physician, from competing with a former employer or associate are common and generally acceptable'" (*North Shore Hematology/Oncology v Zervos*, 278 AD2d 210, 211 [2d Dept 2000], quoting *Gelder Med. Group v Webber*, 41 NY2d 680 [1977]). Non compete or restrictive covenants "are subject to specific enforcement to the extent that they are 'reasonable in time and area, necessary to protect the employer's legitimate interest, not harmful to the general public and not unreasonably burdensome to the employee'" (*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 102 [1st Dept 2008], *affd* 14 NY3d 774 [2010], quoting *BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999] [citations omitted]).

The Wong Group's claim rests on the language of the Termination Letters, which provide, in relevant part as follows:

We are sorry to inform you that your position in [the Clinic] will be eliminated effective May 16, 2008. ... Please be advised that any misconduct during the remainder of you (sic) employment with the Hospital which is in violation of your contract and/or Hospital policy, including but not limited to HIPPA (sic) violations and the solicitation of patients will lead to the forfeiture of your layoff benefits ...

(Menkes Affidavit, Exhibit B, Termination Letters dated 5/9/08).

The clear and unambiguous language of the Termination Letters relied on by the Wong Group provides for a restriction on the Wong Group's actions in soliciting the Hospital's patients during the duration of its employment with the Hospital, i.e., during the period of May 9,

2008, the date of the letter, through May 16, 2008, the last day before its termination of employment (*American Express Bank v Uniroyal, Inc.*, 164 AD2d 275 [1st Dept 1990], *lv denied* 77 NY2d 807 [1991]). It does not prohibit the Wong Group from solicitation post-termination, but rather reminds the Wong Group of its duty of good faith and loyalty, as employees, that it owes to the Hospital, as its employer, of not soliciting patients or creating a competing business during the Hospital's time or at its facility, prior to the Wong Group's termination. This non-solicitation restriction is permitted, as "[i]t is well settled that an employee owes a duty of good faith and loyalty to an employer in the performance of [his] duties" (*30 FPS Prods., Inc. v Livolsi*, 68 AD3d 1101, 1102 [2d Dept 2009]), and that, while the employee may create a competing business prior to leaving the employer, he may not use the employer's time or facilities to do so, since doing so would constitute a breach of those duties (*id.*; see also *Fredic M. Reed & Co. v Irvine Realty Group*, 281 AD2d 352 [1st Dept], *lv denied* 96 NY2d 720 [2001]). Further, "an employee may solicit an employer's customers only when the employment relationship has been terminated" (*Island Sports Physical Therapy v Burns*, 84 AD3d 878, 878 [2d Dept 2011]). Therefore, the language in the Termination Letter clearly disproves the existence of any fraudulent representations by the Hospital regarding the non-solicitation provision therein. Thus, the first cause of action fails to state a fraud claim as a matter of law,

pursuant to CPLR 3211 (a) (1) (*Leon v Martinez*, 84 NY2d 83, *supra*).

The Wong Group's counsel argues that the first cause of action also states a defamation claim based upon the purported statement in the Notice. The elements of a defamation claim "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]). "CPLR 3016 (a) requires that in a defamation action, 'the particular words complained of ... be set forth in the complaint.'" The complaint must also allege the time, place and manner of the false statement and specify to whom it was made (*id.*; see also *Simpson v Village Voice, Inc.*, 58 AD3d 421 [1st Dept], *lv denied* 12 NY3d 710 [2009]).

A review of the complaint discloses that the purported defamation claim rests upon the allegation that "the Hospital proclaimed that the Wong Group was 'dismissed due to a medical accident'" (the Complaint, ¶ 49). Here, the alleged defamatory statement is alleged to have been made by the Hospital, without identifying the person or persons who made it and the individuals to whom it was made, and without any specificity as to the date, time and location of the statement (*Simpson v Village Voice, Inc.*, 58 AD3d 421, *supra*; *Bell v Alden Owners*, 299 AD2d 207 [1st Dept 2002], *lv denied* 100 NY2d 506 [2003]). Thus, the pleading itself fails to

meet the particularity requirements of CPLR 3016 (a) (*Simpson v Village Voice, Inc.*, 58 AD3d 421, *supra*).

The record is devoid of any affidavits by the Wong Group. The Wong Group's counsel attempts to cure the defects of the complaint by alleging, upon information and belief, that, on May 25, 2009, the office staff of Dr. He was observed affixing the Notice that was visible to all patients, vendors and service providers entering the Clinic. It is well settled that only a plaintiff's affidavit can be used to remedy a defect in the complaint (*Thomas v Thomas*, 70 AD3d 588 [1st Dept 2010]). Therefore, the Wong Group cannot rely on the assertions by its counsel, which are made upon information and belief, and without personal knowledge of the facts set forth therein, to establish a viable cause of action (*see Dick v Doral Greens Ltd. Partnership*, 289 AD2d 74 [1st Dept 2001], *lv denied* 98 NY2d 607 [2002]).

The Wong Group also refers to an excerpt from an affirmation prepared by Dr. He's counsel that was submitted in the Prior Action, wherein he alleged that the Hospital published the Notice (*see the Wong Group's Exhibit B, affirmation by Oliver Zhou dated 8/18/08 at 4*). While "admissions in a defendant's affidavit may similarly be used to ascertain whether a plaintiff has a valid cause of action" (*Thomas v Thomas*, 70 AD3d at 591), this assertion was not made by defendant Dr. He, but rather his attorney, who did not express that such purported fact was stated from firsthand

knowledge (see *Dick v Doral Greens Ltd. Partnership*, 289 AD2d 74, *supra*). Thus, counsel's assertion may not be considered in determining the sufficiency of the Wong Group's claim. Even assuming, *arguendo*, that counsel's statement was considered, it does not cure the deficiencies of the purported defamation claim in that it does not state the date, time and location that the Notice was published, the identities of the individuals from the Hospital who published the Notice, or the recipients of such publication (*Simpson v Village Voice, Inc.*, 58 AD3d 421, *supra*). Thus, the Wong Group's failure to comply with the special pleading requirements of a defamation claim, pursuant to CPLR 3016 (a), mandates dismissal of the claim (*Simon v 160 W. End Ave. Corp.*, 7 AD3d 318 [1st Dept 2004]; *Gill v Pathmark Stores*, 237 AD2d 563 [2d Dept 1997]; *Vardi v Mutual Life Ins. Co. of N.Y.*, 136 AD2d 453 [1st Dept 1988]). Therefore, the Wong Group fails to state a defamation or fraud claim against the Hospital in its first cause of action, and it is dismissed.

The second cause of action purports to state a claim for tortious interference with prospective business opportunities. To state a claim for tortious interference with prospective economic relation, "a plaintiff must demonstrate that the defendant's interference with its prospective business relation was accomplished by "wrongful means" or that defendant acted for the sole purpose of harming the plaintiff" (*GS Plasticos Limitada v Bureau Veritas*, 88

AD3d 510, 510 [1st Dept], *lv denied* 17 NY3d 714 [2011]), quoting *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1st Dept 1999]). “‘Wrongful means’ includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required” (*Snyder v Sony Music Entertainment*, 252 AD2d at 300, quoting *Guard-Life Corp. v Parker Hardward Mfg. Corp.*, 50 NY2d 183, 191 [1980]). This claim also requires a showing that, through the intentional and wrongful acts of defendant, identified third parties were prevented from entering into a business relation with plaintiff (see *Joan Hansen & Co. v Everlast World’s Boxing Headquarters Corp.*, 296 AD2d 103 [1st Dept 2002]; see also *Vigoda v DCA Prod. Plus*, 293 AD2d 265 [1st Dept 2002]).

The alleged interference consists of the insertion of an alleged non competition clause in the Termination Letters (Complaint, ¶ 62), and “the publication of the libelous [Notice]” (*id.* at 64). As previously discussed, the Hospital did not engage in any wrongful conduct by including non-solicitation language in the Termination Letters, and the Wong Group did not state a viable defamation claim against the Hospital based on the Notice. Thus, the Wong Group fails to allege facts demonstrating that the means employed by the Hospital were wrongful (*Snyder v Sony Music Entertainment*, 252 AD2d 294, *supra*).

The Wong Group also does not sufficiently allege that the

Hospital acted for the sole purpose of harming the plaintiffs, since implicit in this element "is knowledge of the prospective economic relation" (*GS Plasticos Limitada v Bureau Veritas*, 88 AD3d at 510). Here, the Wong Group alleges that it provided health care to the patients of the Clinic (Complaint, ¶ 57), and the Hospital had notice and knowledge of the doctor-patient relations between the Wong Group and their patients (Complaint, ¶ 64). Such conclusory reference to the Clinic's patients is insufficient for this claim, since it fails to identify any patients by name or any specific business relation of which the Hospital was aware, and with which it could have done business, but for the purported interference by the Hospital (*see GS Plasticos Limitada v Bureau Veritas*, 88 AD3d 510, *supra*; *Vigoda v DCA Prods. Plus*, 293 AD2d 265, *supra*; *see Schoettle v Taylor*, 282 AD2d 411 [1st Dept 2001]). Thus, the Wong Group fails to state a claim for tortious interference with prospective business opportunities, and, accordingly, it is dismissed.

The third cause of action purports to state a claim for tortious interference with doctor-patient relationship. A claim for tortious interference with a contract or business relations requires the existence of a valid contract, defendants' knowledge of a valid contract, defendants' intentional interference with the contract, a resulting breach, and damages (*Avant Graphics Ltd. v United Reprographics*, 252 AD2d 462 [1st Dept 1998]). The Wong Group alleges that the Hospital's conduct regarding the non-compete clause

and the purported defamatory Notice was designed "to ruin its respected professional standing," "to restrain their practice of medicine and to destroy their long standing professional relationship with their patients of many years" (Complaint, ¶ 74). For the reasons previously discussed, the purported interference alleged may not serve as a basis for the interference required for this claim. Further, the doctor-patient relationships alleged are those arising from the Wong Group's employment at the Clinic. There is no allegation that the Wong Group, as salaried staff physicians of the Hospital, had independent existing contractual relationships with the Hospital's patients, which gave rise to a pecuniary interest in these relationships (*Simae v Levi*, 22 AD3d 559 [2d Dept 2005]; *Bronx-Lebanon Hosp. Ctr. v Wiznia*, 284 AD2d 265 [1st Dept], *lv dismissed* 97 NY2d 653 [2001]). Further, breach of a contract is an essential element of this claim (*see Marks v Smith*, 65 AD3d 911 [1st Dept 2009], *lv denied* 15 NY3d 704 [2010]). Since the Wong Group fails to allege the existence of a contract or a breach thereof, the third cause of action is dismissed.

The fourth cause of action purports to state a claim for tortious interference with Healthfirst. The Wong Group alleges that the Hospital tortiously interfered with its relationship with Healthfirst, the Hospital's health care provider, when, after the Wong Group's termination on May 16, 2008, the Hospital notified Healthfirst that "the Wong Group had discontinued their involvement

with Health First (sic)" (Complaint, ¶ 77); that the Hospital continued to use the provider numbers for the Wong Group after they were terminated from May 15-June 30 (*id.*, ¶ 79); and that the Hospital "requested, directed, solicited, demanded or implored Health First (sic) to send letters out to all of the patients who have been patients of the Wong Group and had Health First (sic) as an insurance provider informing them that the Wong Group no longer serviced Health First (sic) insurance patients (*id.*, ¶ 80). It further asserts that, pursuant to the direction of the Hospital, Healthfirst "sent letters to all of their patients indicating that they (Wong Group) no longer participated in plan" (*id.*, ¶ 82).

The Hospital seeks dismissal of this claim, arguing that the complaint fails to allege that the Wong Group had any relationship, contractually or otherwise, with Healthfirst. It submits an affidavit by Jeffrey Menkes, President & CEO of the Hospital, who alleges that physicians employed by the Hospital do not have individual contracts or arrangements with Healthfirst; and that each physician employed by the Hospital is assigned a provider number which is used by the Hospital to identify the physician when bills for treatment of a patient covered under Healthfirst are submitted to Healthfirst. Menkes maintains that this provider number is used for identification purposes only for billing, and is included with the Hospital's tax identification number when bills are submitted. He further acknowledges that, following the Wong

Group's termination, the Hospital notified Healthfirst that the Wong Group was no longer employed with the Hospital and advised Healthfirst to cancel the provider number used by the Wong Group during its employment with the Hospital. Menkes maintains that it was each plaintiff's responsibility to contact Healthfirst and set up his own arrangements with the insurance company if he wanted to be a participating provider under Healthfirst's insurance program.

In his opposing papers, the Wong Group's counsel notes Menkes's admission that the Hospital advised Healthfirst to cancel the Wong Group's provider number. Counsel claims that, as a result of this advice, Healthfirst sent the letter dated October 31, 2008, submitted as Exhibit C, to all of the Clinic's patients on October 31, 2008, which informed them that its previous letter of May 2008, indicating that the Wong Group no longer took their medical coverage, was sent in error, and that plaintiff Dr. Min Aung Wong was still participating with Healthfirst.

Here, in affording the Wong Group a liberal construction of the complaint; and considering the parties' respective submissions, including Menkes's affidavit regarding, *inter alia*, the Hospital's interactions with Healthfirst concerning the Wong Group, and the letter from Healthfirst regarding plaintiff Dr. Wong (the Wong Group's Exhibit C, letter from Healthfirst dated 10/31/2008) (*Thomas v Thomas*, 70 AD3d 588, *supra*; *Rovello v Orofino Realty Co.*, 40 NY2d 633, *supra*), this court finds that the Wong Group

sufficiently demonstrates that its claim for tortious interference with Healthfirst is potentially meritorious (*Avant Graphics Ltd. v United Reprographics*, 252 AD2d 462, *supra*). Therefore, the fourth cause of action is sufficiently alleged.

Thus, the Hospital's motion, in Motion Sequence No. 001 to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), is granted only to the extent of dismissing the first through third causes of action.

Accordingly, it is

ORDERED that the New York Downtown Hospital's motion, in Motion Sequence No. 001 to dismiss the complaint, pursuant to CPLR 3211 (a) (1) and (7), is granted only to the extent of dismissing the first, second and third causes of action as asserted against it; and it is further

ORDERED that the remainder of the action against the New York Downtown Hospital shall continue; and it is further

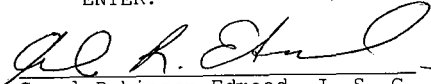
ORDERED that the New York Downtown Hospital is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion to dismiss, in Motion Sequence No. 002, by defendant Dr. Yong Kang He, is granted and the complaint against him is severed and dismissed with costs and disbursements to defendant Dr. Yong Kang He as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 4, 2012

ENTER:



Carol Robinson Edmead, J. S. C.

HON. CAROL EDMEAD,