SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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SASSAN NADERI, M.D.,

Index No. 158028/13

Plaintiff,

-against- **DECISION/ORDER**

NORTH SHORE-LONG ISLAND JEWISH HEALTH SYSTEM, LONG ISLAND JEWISH MEDICAL CENTER and NORTH SHORE UNIVERSITY HOSPITAL,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Affidavits in Reply.....	3
Exhibits.....	4

Plaintiff commenced this instant action asserting claims for breach of contract, breach of the implied covenant of good faith and fair dealing, defamation, tortious interference with prospective economic advantage and willful violations of the New York Labor Law against defendants arising out of his termination of employment. Defendants now move for an Order pursuant to CPLR §§ 3211(a)(1), (a)(7) and § 3016(a) dismissing certain claims in plaintiff's complaint. Plaintiff cross-moves pursuant to CPLR § 3211(d) for an order permitting further discovery. For the reasons set forth below, defendants' motion is granted and plaintiff's cross-motion is denied.

The relevant facts are as follows. Defendant North Shore-Long Island Jewish Health

System ("NS-LIJ System") is a health care network comprised of sixteen hospitals, including defendants Long Island Jewish Medical Center ("LIJMC") and North Shore University Hospital ("NSUH"). According to the complaint, plaintiff entered into an employment contract dated December 24, 2008 (the "First Contract") to work as a "'full time staff physician and Director, International Emergency Medicine Fellowship in the Department of Emergency Medicine' at [LIJMC] of [NS-LIJ System]" ("LIJMC" and "NS-LIJ System" are collectively referred to herein as the "Hospital"). The First Contract provided for a two-year term of employment commencing January 5, 2009, which would be "automatically renewed on a biennial basis unless terminated by either party." Plaintiff alleges that he performed successfully under the First Contract and that the Hospital prepared and offered him a new contract dated July 16, 2012 (the "Second Contract"), which provided for a promotion, enhanced compensation and other benefits. Plaintiff alleges that he "accepted and signed the contract and sent it to Defendants, but Defendants claimed not to have received it, and . . . later sent another copy of the new contract re-dated in September." The Second Contract provided that "[i]f this letter is signed by you and the authorized representatives of the [Hospital] in the spaces provided on the final page hereof, then it shall become a binding agreement." It is undisputed that the Hospital never signed the Second Contract.

On or about September 7, 2012, plaintiff alleges that he was summoned to a meeting with several representatives for the Hospital, wherein he was informed that "there was an ongoing investigation into allegations that he had (a) clinical shortcomings, (b) lack of leadership skills, (c) a personal life not conducive to a leadership position, and (d) an 'inappropriate relationship' with [his colleague] Dr. Sama." At this same time, plaintiff alleges he was suspended with pay

for one week pending the results of an investigation and was escorted from the premises. Additionally, plaintiff alleges that while he was on suspension, defendants "falsely claimed to members of their staff that [plaintiff] had to leave suddenly to attend a family problem."

Thereafter, on or about September 14, 2012, plaintiff alleges that he was again summoned to a meeting with representatives for the Hospital, where he was told that his employment was being terminated for "cause" and that he was losing his clinical privileges. However, plaintiff alleges that Elizabeth Norberg, Associate Executive Director of Human Resources for LIJMC, informed him that "such designation and action was subject to change, depending on whether he decided to cooperate with Defendants in their investigation of Dr. Sama." Plaintiff alleges that he "refused to yield to defendants' attempt to pressure him and told Ms. Norberg that he had no knowledge of any wrongdoing by Dr. Sama, and refused to malign or otherwise harm him." Plaintiff's termination was confirmed in writing by letter dated October 10, 2012, which stated: "This letter confirms that following a Human Resources investigation, on September 17, 2012 your employment was terminated for misconduct."

Plaintiff now brings the instant action alleging that his termination was unlawful and in breach of the First and Second Contract. Additionally, plaintiff alleges that after his termination defendants proceeded to utter and publish a series of false and defamatory statements about him. Specifically, in his complaint, plaintiff asserts five causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) defamation; (4) tortious interference; and (5) failure to pay wages in violation of New York Labor Law Sections 191 and 193. Defendants now move to dismiss plaintiff's second through fifth causes of action in their entirety but move to dismiss the first cause of action only to the extent it is based on the Second

Contract, is based on defendants' alleged failure to provide plaintiff due process prior to his termination and is stated against NSUH.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). "[A] complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). However, "conclusory allegations–claims consisting of bare legal conclusions with no factual specificity–are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Additionally, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

In the present case, as an initial matter, defendants' motion for an order pursuant to CPLR §3211(a)(1) dismissing plaintiff's first cause of action for breach of contract to the extent it is based on the Second Contract is granted on the ground that the documentary evidence clearly establishes that the Second Contract is not binding on defendants. "It is well settled that, if the parties to an agreement do not intend for it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Jordan Panel Systems Corp. v. Turner Constr. Co.*, 45 A.D.3d 165, 166 (1st Dept 2007) (quoting *Scheck v. Francis*, 26 N.Y.2d 466, 469-70 (1970)). Here, the explicit language of the Second Contract clearly establishes that the parties did not intend to be bound by

it until it was signed by both parties. Specifically, the Second Contract states: "If this letter is signed by you and the authorized representatives of [LIJMC] and [NS-LIJ System] in the spaces provided on the final page hereof, then it shall become a binding agreement ("Agreement")." Plaintiff concedes and even alleges in his complaint that defendants never executed the Second Contract. Thus, defendants are not bound by the Second Contract and plaintiff cannot maintain an action for breach of contract thereunder.

Additionally, defendants' motion for an order pursuant to CPLR § 3211(a)(1) dismissing plaintiff's first cause of action for breach of contract to the extent it arises out of the purported deprivation of plaintiff's right to a medical staff hearing and other procedural due process related rights is granted on the ground that the documentary evidence clearly establishes that plaintiff was not entitled to such procedures. Section V of the First Contract provided:

> Notwithstanding anything to the contrary contained herein or in Hospital's Medical Staff Bylaws, if you cease for any reason to be an employee of Hospital, or your employment is suspended, upon such suspension of employment or cessation of employment you shall cease to be a member of the Medical Staff and cease to have the right to exercise clinical privileges at Hospital and at any other System facility at which you have been providing professional services attendant to your employment hereunder. Under such circumstances, you will not be entitled to any notice, hearing or review as may be provided for in the Medical Staff Bylaws, and you hereby waive any such notice, hearing and review.

By its clear and unambiguous terms, this provision establishes that upon plaintiff's termination of his employment, for any reason, he waived any right to a hearing or other procedural rights he might otherwise have under the Hospital's Bylaws. Thus, plaintiff never had a right to such procedures regardless of what the reason for his termination was and defendants' failure to provide such procedures cannot constitute a breach of contract.

Additionally, to the extent plaintiff alleges that defendants breached his right to notice

and a chance to cure pursuant to Section VI(B) of the First Contract, such allegation is directly contradicted by the clear terms of the First Contract. The right to written notice and an opportunity to cure pursuant to Section VI(B) only applied if the Hospital intended to terminate plaintiff for: (1) his "failure to fill [his] material duties or responsibilities;" or (2) his "engagement in the practice of medicine, other than as an employee of Hospital, without first having obtained Hospital's written consent." Here, as conceded by plaintiff in his complaint, the Hospital terminated his employment pursuant to Section VI (A)(vii) for engaging in misconduct. Thus, plaintiff was not entitled to notice and an opportunity to cure at the time of his termination and defendants' failure to provide such procedures cannot constitute a breach of contract.

Additionally, the court notes that it need not reach defendants' arguments relating to the dismissal of plaintiff's first cause of action for breach of contract to the extent it is based on the Hospital's Bylaws as plaintiff concedes it is only seeking damages for defendants' "breach of the First Contract and Second Contract, not the Bylaws."

Additionally, defendants' motion for an order dismissing plaintiff's first cause of action for breach of contract as asserted against NSUH is granted as there is no privity of contract between plaintiff and NSUH. A complaint adequately states a cause of action for breach of contract when it alleges: (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010). Here, it is undisputed that NSUH was not a signatory to the First Contract and plaintiff's complaint fails to allege any facts demonstrating any other contractual relationship between him and NSUH. Thus, plaintiff has failed to adequately allege the existence of a contract between him and NSUH to

state a cause of action for breach of contract against NSUH. To the extent that plaintiff argues that NSUH may be liable under a joint employer relationship, such contention is without merit as plaintiff fails to allege any facts in his complaint supporting such a contention but only asserts such a proposition in his opposition papers. Moreover, plaintiff has failed to present the court with any authority finding that a claim for breach of contract can be stated against a non-signatory, non-party to an employment contract under a joint employer theory.

Additionally, defendants' motion for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is granted on the ground that the claim is duplicative of the breach of contract claim. It is well settled that New York Law does not recognize a separate cause of action for breach of the implied covenant of good faith and fair dealing when a breach of contract claim based on the same facts is also pled. *See Kaminsky v. FSP Inc.*, 5 A.D.3d 251, 252 (1st Dept 2004). In order to maintain such a claim, plaintiff must allege a "breach of a duty other than, and independent of, that contractually established between the parties." *Id.* Here, plaintiff's claim for breach of the implied covenant of good faith and fair dealing rests on the sole allegation that "[t]otally aside from the breaches of contract set forth above, Defendants frustrated and destroyed Dr. Naderi's contractual purposes and expectations." This conclusory allegation is insufficient to state a claim for breach of the implied covenant of good faith and fair dealing as it contains no facts demonstrating a duty independent of one present in the First Contract. Indeed, plaintiff's breach of contract and breach of the implied covenant of good faith and fair dealing claims both arise from plaintiff's alleged improper termination and seek the same damages.

Additionally, defendants' motion for an order pursuant to CPLR §§ 3211(a)(7) and

3016(a) dismissing plaintiff's third cause of action for defamation is also granted. Defamation arises from "the making of a false statement which tends to 'expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999), citing to *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996). To state a claim for defamation, a plaintiff must plead "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,* 261A.D.2d at 38. Moreover, CPLR § 3106(a) establishes a heightened pleading requirement for defamation claims, which requires the plaintiff to allege the specific nature of any alleged defamatory statement, including the time, place and manner of the purported defamation. *See Buffolino v. Long Is. Sav. Bank*, 126 A.D.2d 508, 510 (2nd Dept 1987).

In the present case, the court finds that plaintiff's complaint fails to state a claim for defamation with the required specificity. While plaintiff alleges that a series of allegedly defamatory statements were made by "agents" of defendants, such as "[t]hat Dr. Naderi had sexual contact with a deceased patient," plaintiff fails to allege any facts establishing who specifically made the statements, to whom the statements were made or even when such statements were made. Indeed, plaintiff's complaint is completely devoid of any particularity with regard to alleged defamatory statements made by any agents or employees of defendants. Instead, plaintiff relies on several emails he received from third-parties concerning rumors they heard about plaintiff's termination. These emails are insufficient to make out a claim for defamation against defendants as none of them contain a false statement made by any defendant

or their agent. Indeed, the emails only refer to rumors the authors purportedly heard regarding plaintiff's termination of employment from the Hospital without identifying who they heard such rumors from or when such rumors were communicated to them. Additionally, to the extent plaintiff relies on the alleged actions of defendants in escorting him from the premises to assert a claim for defamation, the court notes that such conduct is not actionable as defamation as the conduct is not a false statement published without permission.

Additionally, defendants' motion for an order dismissing plaintiff's compelled self-defamation claim is granted on the ground that such claim does not exist under New York Law. Indeed, it is well settled that "New York does not recognize defamation via compelled self-publication" and plaintiff's contention to the contrary is without merit. *Phillip v. Sterling Home Care, Inc.*, 103 A.D.3d 786, 787 (1st Dept 2013).

Additionally, defendants' motion for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's fourth cause of action for tortious interference is granted. To state a claim for tortious interference with business relations in New York, plaintiff must allege "(1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 47 (1st Dept 2009). Here, plaintiff alleges in his complaint that "[d]efendants interfered with Dr. Naderi's business relations with Hofstra Medical School, Co-authors, prospective employers, and existing insurers, including without limitation, by disseminating the defamatory statements about the termination of his employment. Such interference could have

had no purpose other than to harm Dr. Naderi, and was inherently dishonest, unfair, malicious and improper." Additionally, plaintiff alleges that as a result of defendants' interference, "Dr. Naderi was neither reappointed nor promoted by Hofstra, thereby suffering damages." While plaintiff sufficiently identifies an established business relationship with Hofstra known by defendants to satisfy the first element, he fails to allege any facts establishing that defendants took any tortious activity with respect to or directed at his Hofstra employment. Indeed, plaintiff only generally alleges that defendants made "defamatory statements about the termination of his employment." This speculative and conclusory allegation is insufficient to sustain a claim for tortious interference with business relations on a motion to dismiss.

Additionally, defendants motion for an order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's fifth cause of action for violation of New York State Labor Law §§ 190 and 193 based on defendants' failure to pay him his accrued paid time off upon his termination is granted. Labor Law § 193 provides that:

> No employer shall make any deduction from the wages of an employee, except deductions which: (a) are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency; or (b) are expressly authorized in writing by the employee and are for the benefit of the employee; provided that such authorization is kept on file on the employer's premises.

Section 190 defines wages as "the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis." Additionally, Section 190 provides that "[t]he term 'wages' also includes benefits or wage supplements as defined in section one hundred ninety-eight-c of this article." Section 198-c(2) defines "benefits or wage supplements" to include "reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay." However, Section

198-c(3) states that "[t]his section shall not apply to any person in a bona fide executive, administrative, or professional capacity whose earning are in excess of six hundred dollars a week."

In the present case, as plaintiff concedes that he worked in a bona fide professional capacity making over six hundred dollars a week and his claim stems from unpaid time off, which only qualifies as wages pursuant to 198-c(2), this court must determine, as a threshold matter, whether Section 198-c(3)'s exclusion for employees in a bona fide professional capacity applies to protection from deductions in benefits and wage supplements under Section 193 or whether it refers solely to the criminal penalties imposed by Section 198-c(1) and has no bearing on liability under Section 193. The Second Department, in considering this same issue, found in accordance with the former interpretation–i.e. that Section 198-c(3) operates as a limitation on the protection of benefits and wage supplements under Section 193 by expressly excluding certain classes of employees from the protections thereunder. *See Fraiberg v. 4Kids Entertainment, Inc.*, 75 A.D.3d 580 (2nd Dept 2010) (citing *Wagner v. EdisonLearning, Inc.*, 2009 WL 1055728 (S.D.N.Y. 2009)). Additionally, the Fourth Department unanimously affirmed *Cohen v. ACM Med. Lab.*, 178 Misc.2d 130 (N.Y. Sup. Ct. 1998), wherein the court also interpreted 198-c(3)'s exclusion to exempt employees in a bona fide professional capacity earning in excess of $600 a week from the protection of deductions in their benefits or wage supplements under Section 193. *Cohen v. ACM Med. Lab.*, 178 Misc.2d 130 (N.Y. Sup. Ct. 1998), *aff'd*, 265 A.D.2d 839 (4th Dept 1999). Here, the court follows this precedent and, as such, given plaintiff's undisputed professional capacity at the Hospital and the exclusion of said employees from the protection of benefits as wages, finds that plaintiff cannot maintain a claim

under Labor Law § 193 in this instance.

Finally, plaintiff's motion pursuant to CPLR § 3211(d) for an order granting a continuance to permit further discovery is denied. Pursuant to CPLR § 3211(d):

> Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Here, plaintiff has failed to identify any facts that exist but cannot now be stated that would change the courts determination on this motion. In support of his request for pre-dismissal discovery, plaintiff claims he needs the following discovery to oppose defendants' motion: (1) materials regarding what happened to the supposed first version of the Second Contract that he claims to have signed; (2) documents to confirm and corroborate NSHU's status as a potential joint employer; (3) discovery to determine who made defamatory statements, when they were made and to whom they were made; and (4) information showing defendants' knowledge of his business relationship with Hofstra. However, none of these documents or materials contain essential facts that cannot now be stated by plaintiff to oppose defendants' motion to dismiss. As an initial matter, no amount of information regarding defendants actions in regard to the Second Contract would change the undisputed fact that defendants never signed the Second Contract and as such it is not binding. Moreover, plaintiff has not identified any information exclusively in the possession of defendants that would have any bearing on NSHU's position as an alleged joint employer. Additionally, no amount of information could change the fact that plaintiff's employment contract was only with the Hospital defendants, not NSHU. Additionally, in regards to his defamation claim, plaintiff must first assert a cognizable meritorious defamation claim to

obtain discovery and cannot seek discovery to remedy the defects in his pleading. Finally, a claimed need for discovery relating to defendants' knowledge of plaintiff's employment with Hofstra is without merit as defendants do not dispute such fact.

Accordingly, defendants' motion to dismiss is granted and plaintiff's motion is denied. This constitutes the decision and order of the court.

Dated: 2/28/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.