

New York Eye Surgery Assoc., PLLC v Kim
2014 NY Slip Op 31808(U)
July 9, 2014
Supreme Court, New York County
Docket Number: 651374/2012
Judge: O. Peter Sherwood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

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NEW YORK EYE SURGERY ASSOCIATES, PLLC,

Plaintiff,

**DECISION AND ORDER
Motion Seq. Nos.: 002 -and- 003**

-against-

Index No.: 651374/2012

JOHN J. KIM and CLEARVIEW EYE CENTER,

Defendants.

**JEROME H. LEVY, JOANNE MCLAUGHLIN,
ERIN DUFFY, AND GEORDIE FRIE,**

**Additional Defendants
on Counterclaims**

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O. PETER SHERWOOD, J.:

In this breach of contract action, motion sequence numbers 002 and 003 are consolidated for disposition¹. In motion sequence number 002, plaintiff and counterclaim defendant New York Eye Surgery Associates, PLLC (NYESA, or plaintiff), and additional counterclaim defendants Jerome H. Levy (Levy), Joanne McLaughlin, Erin Duffy, and Geordie Frie, employees and members of NYESA (together with NYESA, the Counterclaim Defendants), move, pursuant to CPLR 3211 (a) (1) and (7), for dismissal of defendant John J. Kim's four counterclaims based on documentary evidence and failure to state a cause of action.² In motion sequence number 003, NYSEA and Levy (together, the Supplemental Counterclaim Defendants) move, pursuant to CPLR 3211 (a) (7) to dismiss defendants' two supplemental counterclaims, made only against the Supplemental Counterclaim Defendants, for failure to state a cause of action.

¹These motions were filed on September 12, 2012 and March 14, 2013. Oral argument was adjourned several times at the request of the parties to allow settlement talks to proceed. The court heard oral argument on the motions on October 15, 2013 but the parties did not e-file the transcript thereof until May 12, 2014. Thus, the motions were not deemed *sub judice* until May 12, 2014 (*see* Part 49 Rule 7).

²At oral argument, plaintiff withdrew that branch of the motion seeking dismissal of the fourth counterclaim (for attorney fees) (*see* transcript pp 16-17).

Plaintiff is a professional limited liability company that provides ophthalmologic medical and surgical services. It has multiple locations, one of which is located in The Bronx, New York. Defendant John J. Kim (Kim) is a physician duly licensed to practice medicine in the State of New York. Kim is the sole shareholder of Clearview Eye Center Inc. (Clearview, and together with Kim, Defendants), an ophthalmology medical practice organized under the laws of New York.

The following facts are taken from the complaint. On November 26, 2007, pursuant to a written agreement (Agreement), plaintiff hired Kim to provide professional medical services to its patients on a full-time basis of approximately 40 hours per week. The Agreement provided that Kim shall not engage in the practice of medicine except as an employee, or on behalf, of plaintiff or its affiliates. On January 3, 2012, Kim formed Clearview for the purpose of establishing a medical office providing ophthalmology care and surgery. The practice has a location at 1825 Riverside Drive, New York, New York (Riverside Unit). Clearview has a location in the northern Inwood section of New York County, which is in close proximity to plaintiff's Bronx facility. Despite having a duty to do so under the Agreement, Kim failed to inform plaintiff of the formation of his new practice. To aid him in setting up his practice, Kim solicited plaintiff's employee, Clara Napolitano, to assist him with, among other things, undertaking steps to be credentialed with Medicare, Medicaid, managed care companies, and other third-party payors, using plaintiff's computers, confidential information, and databases. Kim directed Napolitano to modify databases to third-party payors Council for Affordable Quality Healthcare and National Plan & Provider Enumeration System by adding Clearview as an organizational provider of medical services owned by Kim.

Plaintiff argues that Kim's practice of medicine at the Riverside Unit and Montefiore Hospital violates section 6.1 of the Agreement because both locations are within plaintiff's practice territory, making Kim's practice there a breach of the Agreement. Plaintiff further argues that it will suffer irreparable harm if Kim is not enjoined from advertising and promoting his new practice to patients in the Bronx and/or Montefiore Hospital. Plaintiff also claims that Kim's solicitation of patients in that area is a violation of section 7.1 of the Agreement. Accordingly, plaintiff commenced this lawsuit asserting a claim for breach of contract and seeking an injunction to stop Kim and Clearview from treating patients, practicing medicine, or soliciting any health care business

from clients or service providers within plaintiff's practice territory during the pendency of this action. Plaintiff also seeks costs and an award of attorney's fees pursuant to section 9.3 of the Agreement.

In his answer, Kim asserted counterclaims for: (1) a violation of 18 USC § 1030 (the Computer Fraud and Abuse Act), for fraud and related activity in connection with computers; (2) a violation of 18 USC § 2701 (the Stored Communications Act), for unlawful access to stored communications; (3) common-law breach of the right to privacy; and (4) sanctions for frivolous litigation pursuant to 22 NYCRR 130-1.1[a].

Kim subsequently filed supplemental counterclaims against plaintiff and Levy for breach of contract and intentional interference with prospective contractual relations. The motions before the court here seek to dismiss all of the counterclaims and supplemental counterclaims.

On a motion to dismiss for failure to state a cause of action, the court must accept each and every allegation as true, and liberally construe the allegations in a light most favorable to the pleading party (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see* CPLR 3211 [a] [7]). The court "determines only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002] [internal quotation and citations omitted]). However, while factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions are not entitled to such consideration (*see Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). With this standard firmly in mind, the court proceeds to review the motions.

Computer Fraud and Abuse Act Counterclaim

The Computer Fraud and Abuse Act is a criminal statute that "provides for a private right of action" under 18 USC § 1030 (g) (*see Cohen v Gerson Lehrman Group, Inc.*, 686 F Supp 2d 317, 325 [SD NY 2010]). The statute provides penalties for anyone who, among other things, "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . (C) information from any protected computer" (18 USC § 1030[a][2]). "A private cause of action can stand only if a plaintiff establishes a violation of one of the factors set forth at section

1030 (c) (4) (A) (i) (I-V)” (18 USC § 1030 [g]). “Those factors include the ‘loss to 1 or more persons during any 1-year period . . . aggregating at least \$ 5,000 in value’” (18 USC § 1030 [c][4][A][i][I]; *Cohen*, 686 F Supp 2d at 325), as well as “the modification or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment, or care of 1 or more individuals” (18 USC § 1030 c)[4][A][i][II]). “Damages for a violation involving only conduct described in subsection (c) (4) (A) (i) (I) are limited to economic damages” (18 USC § 1030 [g]; *Cohen v Gerson Lehrman Group, Inc.*, 686 F Supp 2d at 325).

Defendants allege that, in 2012, Counterclaim Defendants accessed Kim’s computer, which was used in or affected interstate or foreign commerce or communication, without authorization, and, therefore, plaintiff obtained information from Kim’s computer improperly. Defendants also allege that Counterclaim Defendants’s unauthorized activity resulted in the modification, or impairment, or potential modification or impairment, of the medical examination, diagnosis, treatment or care of one or more individuals, as access to the data allowed the Counterclaim Defendants to contact Kim’s patients and interfere with their treatment by Kim. Kim has failed, however, to allege facts supporting an allegation that the unauthorized access resulted in damages totaling more than \$5,000, pointing only to the potential costs of technology consultants for this litigation (*see* Transcript of Oral Argument dated October 15, 2013, NYSECF Doc. No. 77, at 9-10).

In support of its motion to dismiss, Counterclaim Defendants argue that they lawfully had access to Kim’s computer records, files, and activities. However, this is a factual issue, more appropriately raised on summary judgment or trial and not on a motion to dismiss. Accordingly, the counterclaim is dismissed in so far as it relates to 18 USC § 1030 [c][4][A][i][I] (a minimum of \$5,000 in value), but the motion to dismiss the counterclaim is denied as to the portion of the counterclaim implicating 18 USC § 1030 c)[4][A][i][II] (the modification or impairment of medical care).

Stored Communications Act Counterclaim

Kim has stated a valid counterclaim for violations of the Stored Communications Act (18 USCS § 2701 *et seq.*). 18 USC § 2701 states:

“ (a) Offense. Except as provided in subsection (c) of this section whoever-

(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or

(2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section.”

The Stored Communications Act imposes both criminal and civil liability for intentional access without authorization “of a facility through which an electronic communication service is provided, . . . and thereby obtains, alters, or prevents authorized access to wire or electronic communications while it is in electronic storage in such system” (18 USC § 2701, 2707 [providing for private right of action]). Kim asserts that in 2012, Counterclaim Defendants recorded Kim’s telephone conversations and accessed his emails and personal files on his office computer without Kim’s knowledge or consent, despite the fact that Kim’s computer could only be accessed by logging in with a password that was unique to Kim (exhibit B to Modica Aff.), and they thereby obtained confidential information stored therein. Kim further asserts that Counterclaim Defendants intentionally, without authorization, accessed emails stored on an electronic communication service provider’s system after they had been delivered, and thereby obtained access to the electronic communications while they were in electronic storage (*id.*). Although Counterclaim Defendants argue that they were authorized to access Kim’s computer, NYESA has admitted that it had no written computer use policy at the time the data was accessed (Transcript of Oral Argument, dated Oct. 15, 2013, NYSECF Doc. No. 77). Courts have held that allegations that an employer exceeded its authorized scope and accessed an employee’s email are sufficient to survive a motion to dismiss (*see Snyder v Fantasy Interactive, Inc.*, 2012 WL 569185 at *3, 2012 US Dist Lexis 23087 [SD NY Feb. 9, 2012]). Accordingly, Kim has stated a claim under 18 USC § 2701, and the Counterclaim Defendants’ motion to dismiss is denied as to the Stored Communications Act counterclaim.

Right to Privacy Counterclaim

Regarding Kim’s third counterclaim, alleging violations of a common-law right to privacy, Kim has failed to state a cause of action. “New York does not recognize a common-law right to privacy” (*Thomas v Northeast Theatre Corp.*, 51 AD3d 588, 589 [1st Dept 2008]). Hence, Counterclaim Defendants’ motion to dismiss is granted as to the right to privacy counterclaim.

Supplemental Counterclaim for Breach of Contract

“The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages” (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 150 [1st Dept 2013]). Additionally, a complaint must “plead the provisions of the contract upon which the cause of action is based.” (*Bello v New England Fin.*, 3 Misc3d 1109(A), *5, [Sup. Ct. Nassau County 2004] citing *Rattenni v. Cerreta*, 285 A.D.2d 636 [2nd Dept 2001]; see also, *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

Kim alleges a breach of Section 6.6 of the Agreement, which provides:

“Limitations. Notwithstanding anything contained herein, this Article VI shall not be construed to (i) limit the freedom of any patient of Physician to choose the facility or physician from whom such patient shall receive health-care services or (ii) limit or interfere with Physician’s ability to exercise his professional medical judgment in treating his patients or his ability to provide medical services to his patients.”

Kim argues that Supplemental Counterclaim Defendants breached this provision by: (1) refusing to supply patients with Dr. Kim’s forwarding address and contact in response to their inquiries; (2) discouraging patients from contacting Dr. Kim by telling them that he did not take insurance at his new place of business; and (3) scheduling unnecessary appointments for patients previously treated by Kim, so that they would be treated by other physicians in plaintiff’s employ to generate revenue for their practice, instead of following Kim to his new practice.

By its explicit terms, Section 6.6 provides a gloss on the construction of the other clauses in Section 6 of the Agreement. It does not, read alone, require the Supplemental Counterclaim Defendants to take any action or forbear from acting. None of the conduct alleged by Kim is prohibited by Section 6.6. As Kim has failed to point to a contractual obligation which might be breached by the conduct alleged, Kim has failed to state a counterclaim for which relief may be granted, and the motion to dismiss is granted as to the breach of contract counterclaim.

Additional Counterclaim for Tortious Interference with Prospective Contractual Relations

“To state a cause of action for tortious interference with prospective contractual relations, the plaintiff must allege that the defendant directly interfered with a third party and either employed wrongful means or acted ‘for the sole purpose of inflicting intentional harm on [the] plaintiff[.]’” (*Kickertz v New York Univ.*, 110 AD3d 268, 275 [1st Dept 2013] [citation omitted]). “Conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party which the plaintiff has or seeks to have a relationship” (*Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004] [internal citations omitted]). “As a general rule, such culpable conduct must amount to a crime or an independent tort, and may include [w]rongful means, defined as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure . . . [M]ere knowing persuasion would not be sufficient” (*Adler v 20/20 Cos.*, 82 AD3d 915, 918 [2d Dept 2011] [internal quotation and citations omitted]).

Kim fails sufficiently to allege either that Supplemental Counterclaim Defendants used wrongful means or acted for the sole purpose of inflicting intentional harm on him and his practice. While Kim alleges, in conclusory fashion, that “[t]he actions of NYESA and Levy were motivated solely by a desire to harm Dr. Kim, as they sought self-help retribution after the Court denied NYESA’s application to enjoin Dr. Kim from opening the Riverside Drive Office”, Kim also alleges that “Levy instructed NYESA’s employees to schedule appointments for patients previously treated by Dr. Kim so that . . . the patients would be treated by different doctors in NYESA’s employ,” effectively providing a business motive for the Supplemental Counterclaim Defendants’ actions (Verified Supplemental Counterclaims, NYSECF Doc. No. 50, ¶¶ 9, 24).

Instead, Kim relies on allegations that NYESA and Levy used “wrongful means” when they drove his patients away by misrepresenting the fact that he did not accept medical insurance for the payment of his services and that they did not know where Kim was. Kim alleges that the Supplemental Counterclaim Defendants intentionally misled patients regarding these facts. He avers that NYESA and Levy were aware of his contact information, and knew that, on April 26, 2012, he had taken steps to obtain the proper credentials with Medicare and other insurance companies to accept such coverage. Kim alleges that Supplemental Counterclaim Defendants’ misconduct resulted in a loss of revenue and income for his new practice.

To establish a claim for fraud, the claimant must allege a misrepresentation or material omission of fact which was false and known to be false by the speaker, made for the purpose of inducing the claimant to rely upon it, justifiable reliance of the claimant on the misrepresentation or material omission, and injury (*Mandarin Trading Ltd. V Wildenstein*, 16 NY3d 173, 178 [2011]).

Kim has alleged that the plaintiff's conduct constitutes a fraud on Kim (Transcript of Oral Argument at 18). To sustain such a claim, Kim is required to allege that Supplemental Counterclaim Defendants made misrepresentations or omissions with the goal of having Kim rely upon those misrepresentations or omissions, but Kim has failed to do so. All misrepresentations or omissions alleged by Kim were made to third parties. Nor did Kim allege that he had relied on any such statements. Because of these failures, Defendants have failed to state a counterclaim for which relief may be granted, and the motion to dismiss is granted as to the tortious interference with contractual relations counterclaim.

Accordingly, it is

ORDERED that in motion sequence number 002, the motion to dismiss is granted in part and denied in part. The portion of the Computer Fraud and Abuse Act counterclaim based on 18 U.S.C. § 1030 (c) (4) (A) (i) (I) and the Right to Privacy counterclaim are dismissed; and it is further

ORDERED that in motion sequence number 003, the motion to dismiss the supplemental counterclaims is granted; and it is further

ORDERED that an answer to the surviving counterclaims shall be served and filed within twenty days of service of this Decision and Order with notice of entry; and it is further

ORDERED that all counsel for the respective parties shall appear for a preliminary conference on Tuesday, September 9, 2014 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York..

This constitutes the decision and order of the court.

DATED: July 9, 2014

ENTER,


O. PETER SHERWOOD

J.S.C.