

Burden v Daniel

2015 NY Slip Op 32904(U)

October 26, 2015

Supreme Court, Erie County

Docket Number: 2015-802114

Judge: Timothy J. Walker

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STATE OF NEW YORK
SUPREME COURT : ERIE COUNTY

PATRICIA A. BURDEN, M.D.,

Plaintiff,

v.

GREGORY F. DANIEL, M.D. and
BELAYA MEDICAL, PLLC d/b/a
BELAYA DERMATOLOGY AND SKIN CARE,

Defendants.

**COMMERCIAL DIVISION
DECISION AND ORDER**
Index No.: 2015-802114

BEFORE: HON. TIMOTHY J. WALKER, Presiding Justice

APPEARANCES: LAW OFFICE OF EUGENE VINCENT BURKE
Eugene Vincent Burke, Esq., Of Counsel
Attorneys for Plaintiff

NOTARO & LAING, P.C.
Linda C. Laing, Esq., Of Counsel
Attorneys for Defendants

WALKER, J.

Defendants, Gregory F. Daniel, M.D. ("Daniel") and Belya Medical, PLLC d/b/a Belya Dermatology and Skin Care ("Belya"), have applied, pursuant to CPLR §3211, to dismiss the Complaint, dated February 6, 2015.

BACKGROUND

Belya is a professional service limited liability company that provided skin care and dermatology services. Daniel and Plaintiff, Patricia A. Burden, M.D. ("Burden"), were Belya's only members, and Daniel also acted as its manager.

Upon Belaya's creation in December 2010, Daniel held an 89.1% ownership interest and Burden held the remaining 9.9% ownership interest in the company. As of January 1, 2012, their respective ownership interests changed, as follows: Daniel held a 54.45% ownership interest and Burden held the remaining 44.55% ownership interest in the company.

Burden and Belaya entered into a Member Working Agreement, dated December 15, 2010 (the "MWA"), which provides that Belaya could terminate Burden with or without cause on thirty (30) days written notice. Daniel signed the MWA on behalf of Belaya.

The Complaint seeks damages arising out of Burden's contention that Daniel terminated her without cause and discontinued the practice without providing her with the requisite thirty (30) days written notice required by the MWA. The Complaint asserts four causes of action, briefly summarized as follows: the first cause of action seeks \$100,000 for emotional and physical distress; the second cause of action seeks \$29,666.51 for certain pecuniary losses; the third cause of action seeks \$46,227.01 for financial expenses Burden incurred in setting up her own practice; and the fourth cause of action seeks an unspecified amount of damages for anxiety and mental distress. As pled, each cause of action arises out of breach of contract.

STANDARD OF REVIEW

It is well settled that, in considering a motion to dismiss pursuant to CPLR §3211, the complaint shall be liberally construed (*see* CPLR §3026), and the court shall accept the facts, as alleged in the complaint, as true, and afford the plaintiff the benefit of every favorable inference (*Leon v. Martinez*, 84 NY2d 83 [1994]). Moreover, the court shall avoid assessing the merits of the complaint or any of its factual allegations and instead determine only whether the facts as alleged fit within any cognizable legal theory (*Id.*).

It is equally well settled that allegations lacking factual support need not be accepted as true (*Dominski v. Frank Williams and Son, LLC*, 46 AD3d 1443 [4th Dept. 2007]).

DISCUSSION

Each cause of action is asserted against Daniel. While Belaya is a named defendant, Burden has not asserted any claims against it. Accordingly, that part of the motion seeking to dismiss the Complaint against Belaya is granted.

In seeking to preserve Belaya as a defendant, Burden's submission relies on principles of respondent superior, including that in certain circumstances an employer can be held liable for the wrongful acts of its employee. Such law has no bearing on this matter, where Belaya is a limited liability company and Daniel is a member thereof. Daniel is not Belaya's employee.

With respect to Daniel, the motion is granted relative to the first and fourth causes of action, grounded, respectively, in emotional / physical distress and anxiety / mental distress. It is well settled that "absent a duty upon which liability can be based, there is no right of recovery for mental distress resulting from the breach of a contract-related duty" (*Wehringer v. Standard Sec. Life Ins. Co. of N.Y.*, 57 NY2d 757, 759 [1982]).

Similarly, the Complaint does not allege **intentional** infliction of emotional distress, because it fails to allege conduct "so outrageous in character, and so extreme in degree to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community" (*Murphy v. American Home Products*, 58 NY2d 293, 303 [1983]).

Finally, there is no claim for negligent infliction of emotional distress, because the Complaint fails to allege that the alleged mental injury was a "direct, rather than a consequential, result" of a breach of duty owed by Daniel (*Ornstein v. New York City Health and Hospital*

Corp., 10 NY3d 1, 6 [2008]). Rather, Burden merely pleads a breach of contract allegedly resulting in consequential emotional distress.

Burden's second and third causes of action are asserted against Daniel, individually and as manager of Belaya. With respect to his role as Belaya's manager, Daniel contends that §609 of the Limited Liability Company Law ("LLC Law") renders him immune from this action.

Section 609 provides as follows, in relevant part:

Neither a member of a limited liability company, a manager of a limited liability company managed by a manager . . . nor an agent of a limited liability company . . . is liable for the debts, obligations or liabilities of the limited liability company or each other . . . solely by reason of being such member [or] manager or . . . acting (or omitting to act) in such capacities . . . in the conduct of the business of the limited liability company.

Section 409 of the LLC Law further provides that " a person who performs his or her duties in accordance with this section shall have no liability by reason of being or having been a manager of the limited liability company."

Daniel's reading of these provisions of the LLC Law and his application of them to this matter is too narrow. Burden has not sued Daniel "solely by reason of" his being Belaya's manager (LLC Law §609). Rather, she contends that he breached the MWA by failing to provide her with the requisite written notice prior to terminating her employment. She contends further that he failed to perform his duties in good faith, as required by LLC Law §409. Sections 609 and 409 of the LLC Law do not provide managers with the unfettered right to breach the agreements pertaining to the limited liability company's operation.

Accordingly, that part of the motion seeking dismissal of the second and third causes of

action against Daniel as manager of Belaya is denied.

Burden's claims against Daniel are limited to his having acted as Belaya's manager. At all times, his relationship with Burden via Belaya was contractual in nature and he acted as Belaya's manager when he terminated her employment. He had no authority to act in an individual capacity, nor did he do so. Accordingly, that part of the motion seeking dismissal of the second and third causes of action against Daniel in his individual capacity are granted.

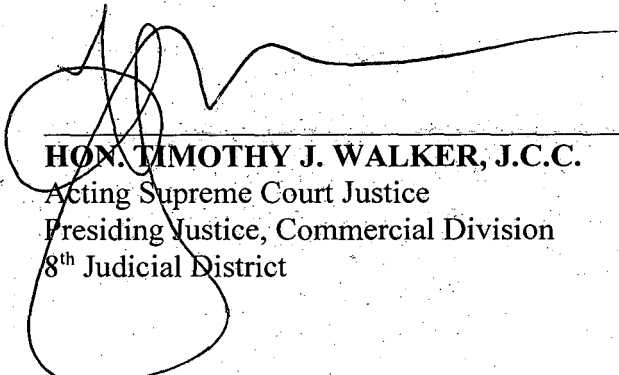
In light of the foregoing, it is hereby

ORDERED, that Defendants' motion is granted, in part, as follows: those claims against Belaya are dismissed; those claims against Daniel in his individual capacity are dismissed; and those claims sounding in tort, are dismissed; and it is further

ORDERED, that the Court has scheduled a preliminary conference in this matter for **November 10, 2015, at 10:00 a.m.**, at which time the Court intends to issue a Scheduling Order.

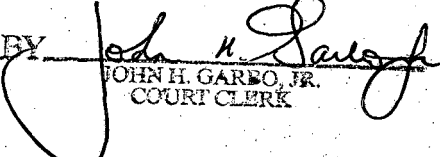
This constitutes the Decision and Order of this Court. Submission of an order by the Parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: October 26, 2015
Buffalo, New York


HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice
Presiding Justice, Commercial Division
8th Judicial District

GRANTED

OCT 27 2015

BY 
JOHN H. GARBO, JR.
COURT CLERK