Brook v Peconic Bay Med. Ctr.
2016 NY Slip Op 31977(U)
October 13, 2016
Supreme Court, New York County
Docket Number: 650921/2012
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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ADAM BROOK, M.D., PH.D., and
ADAM BROOK, M.D., PH.D., P.L.L.C.,

Plaintiffs,

-against-

PECONIC BAY MEDICAL CENTER,
RICHARD KUBIAK, M.D.,
DANIEL MASSIAH, M.D.,
AGOSTINO CERVONE, M.D.
JAY ZUCKERMAN,
JOAN HOIL, R.N.,
DANIEL HAMOU, M.D.,
ANDREW MITCHELL,
and JOHN DOES #1-5,

Defendants.

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DECISION/ORDER
Index No. 650921/2012

HON. SALIANN SCARPULLA, J.:

Defendants Peconic Bay Medical Center ("PBMC"), Richard Kubiak, M.D., Daniel Massiah, M.D., Agostino Cervone, M.D., Jay Zuckerman, Joan Hoil, R.N., Daniel Hamou M.D., and Andrew Mitchell (collectively, "defendants") move pursuant to CPLR 3211 (a)(1), (5), and (7) to dismiss the complaint.[1]

Unless otherwise noted, the following facts are drawn/quoted from the complaint or the documents attached thereto. Plaintiff Adam Brook ("Dr. Brook") is certified by the American Board of Surgery in general surgery and by the American Board of Thoracic Surgery ("ABTS") in cardiothoracic surgery. "Plaintiff Adam Brook, M.D., Ph.D. P.L.L.C. ('Brook PLLC') is a New

[1] In this motion, defendants "re-notice and supplement their May 29, 2012 motion." In December 2015, the Court directed PBMC to submit revised written materials to comply with the page limits as set forth in the rules of the Commercial Division, while allowing PBMC a five-page extension for its memorandum of law. This decision and order addresses the arguments made in the memorandum of law filed by defendants, dated December 18, 2015.

York professional limited liability company with a principal place of business at 350 Central Park West, New York, NY located in this City, County and State" (collectively with Dr. Brook, "plaintiffs"). Around February 2009, Dr. Brook was offered a position at PBMC as the Director of the Thoracic Surgery Program. Dr. Brook accepted this position on May 17, 2009, and signed an employment agreement with PBMC, dated May 8, 2009. The agreement states that it would begin "on June 25, 2009 and shall continue through June 24, 2011, unless otherwise terminated as hereinafter provided."

Dr. Brook's employment agreement additionally states that "[a]s a condition of your employment hereunder, you agree at all times to comply with the bylaws, rules and regulations of the Hospital and its Medical Staff." Section 5.9.2(A) of the Medical Staff Bylaws ("Bylaws") state, in part, that "[t]he Credentials Committee shall conduct an investigation which shall include a Special Notice to the Practitioner involved about the investigation," and another part of the Bylaws defines "SPECIAL NOTICE or NOTICE" to be "written notification sent by certified mail, return receipt requested." Further, section 11 of the employment agreement states, in part, that,

> [a]ny provision of Hospital Policies to the contrary notwithstanding, you and the Hospital agree (i) that the Hospital has no duty to provide notice, hearing or review in connection with the termination or suspension of your Medical Staff membership hereunder as a result of your termination of employment; and (ii) that you hereby waive any notice, hearing or review regarding the termination of Medical Staff membership due to the termination or expiration of this Agreement.

Plaintiffs allege that "PBMC is a small 'acute care' hospital on the very eastern end of Long Island," and aver that "Dr. Brook joined PBMC and sought to improve the quality of patient care it provided to ensure that the local communities in eastern Long Island had immediate access to quality health care." The complaint details "a few illustrative examples of Dr. Brook's efforts to improve conditions at PBMC," including Dr. Brook's attempted alteration of "PBMC's policy of not sending critically ill post-operative patients directly to the Intensive Care Unit . . ., but to send

them instead to the Post-Anesthesia Care Unit." Plaintiffs additionally allege that "[Dr. Brook] became an immediate competitive threat to several of the existing PBMC physician defendants" and that "incumbent physician competitor defendants and their administrative allies combined and conspired to eliminate Dr. Brook as a competitor and advocate, regardless of his value to patients, PBMC and his efforts to improve patient care."

"[O]n October 2, 2009, at 3:00 p.m., an adolescent girl presented to PBMC's emergency room, where Dr. Brook was on call, with acute appendicitis." Plaintiffs allege that "[b]ased on a clinical examination of the patient, and laboratory and radiology tests, Dr. Brook diagnosed her as suffering from an infected appendix in a retrocecal position, requiring immediate surgery." After Dr. Brook called Dr. Richard Rubenstein, a physician "with special expertise in laparoscopic surgery," both doctors determined "that the preferred procedure for this case would be a laparoscopic appendectomy." Once Dr. Brook and Dr. Rubenstein began the surgery, they faced complications. During surgery, "[Dr. Brook] noted an inflammatory band overlying the lateral peritoneal reflection." Because the inflammation was great, "none of the three experienced doctors in the OR were able to positively identify the inflamed adherent band."

Plaintiffs allege that

> [u]limately, Dr. Brook and Dr. Rubenstein exercised their best medical judgment and determined that the safest and most appropriate course of action in the context of the emergent laparoscopic surgery was to divide the inflammatory band to gain access to the lateral peritoneal reflection, which Dr. Brook did. Once the band was divided, Dr. Brook was able to follow it and he, Dr. Rubenstein and the anesthesiologist Dr. Nataloni were concerned that it was the right fallopian tube.

Plaintiffs also allege that "Dr. Brook and Dr. Rubenstein were able to access and excise the perforated appendix and save the patient's life." The pathology report later showed "that the removed structures were the perforated appendix and part of the right fallopian tube."

On Monday, October 5, 2009, Dr. Brook was called to the office of Richard Kubiak, M.D. ("Dr. Kubiak"), PBMC's Chief Medical Officer. Also present in the office were Dr. Agostino Cervone, President of the Medical Staff at PBMC, and Dr. Daniel Hamou, acting Chief of Surgery. Plaintiffs allege that, without discussing with Dr. Brook the October 2, 2009 surgery, Dr. Kubiak simply fired Dr. Brook. Dr. Brook left the meeting and called Dr. Rubenstein to inform him of what happened, and Dr. Rubenstein told him he would talk to Dr. Kubiak.

Plaintiffs claim that, later in the day, Dr. Kubiak again called Dr. Brook to his office, told him that he had spoken to Dr. Rubenstein about the surgery, "stated that he understood that it had just been a complicated case, with no malpractice," and "went on to say that under the circumstances it would be very 'unfair' for the Hospital to take any action against Dr. Brook."

"Dr. Brook then explained to Dr. Kubiak that it was extremely likely that he was going to return to Tennessee to complete another year of cardiothoracic surgery fellowship in preparation for his Board exam," and "also stated that he would likely need to resign his position at PBMC in the immediate future."[2] Plaintiffs also allege, that "given his prior experience in seeking hospital privileges, Dr. Brook knew not to resign while under investigation or to avoid investigation," and further allege that "Dr. Brook wanted to make it abundantly clear to Dr. Kubiak that he was resigning to complete the required fellowship in cardiothoracic surgery, and not to avoid any investigation into the appendectomy he had just performed."

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[2] In September 2009, Patricia Watson of ABTS allegedly told Dr. Book that should he wish to be board certified in thoracic surgery, he would likely need additional training at the University of Tennessee to complete a number of cases. She advised Dr. Brook that ABTS's Credentials Committee would meet on October 3, 2009 and would make a final determination about the additional training at that meeting. Plaintiffs allege that before the October 3, 2009 determination of ABTS's Credentials Committee, Dr. Brook knew that, if required, he would resign from PBMC to complete the additional training.

During the meeting, "Dr. Brook . . . proceeded to confirm with Dr. Kubiak that his statement that 'it would be unfair of us to take any action against you,' meant that Dr. Brook was not under investigation," and Dr. Brook "reiterated that he was not resigning to avoid an investigation." Dr. Brook then asked Dr. Kubiak directly "if Dr. Brook was 'under investigation' by PBMC." Dr. Kubiak allegedly responded that he was not, that upon questioning if there would be an investigation Dr. Kubiak responded no, and that when "Dr. Brook asked Dr. Kubiak if anything would be reported anywhere[,] Dr. Kubiak told Dr. Brook 'Nothing is going to be reported anywhere.'" Plaintiffs aver that "[a]t or about the same time, the [ABTS] confirmed to Dr. Brook that he would in fact need to complete another year of fellowship at the University of Tennessee."

Dr. Brook submitted a letter to PBMC, dated October 5, 2009, in which he stated, "I will not operate at [PBMC] for the next two weeks effective October 5, 2009 through October 19, 2009, or until mutually agreed upon. I will however, finish the follow-up care on patients that I am currently involved with on the clinical floors without performing any surgery."

On October 7, 2009, Dr. Brook claims that he again met with Dr. Kubiak to submit his letter of resignation. Prior to submitting the letter, Dr. Brook again asked if PBMC was or would be investigating him, and "Dr. Kubiak unequivocally told Dr. Brook that there was no investigation and would be no investigation." Plaintiffs allege that "Dr. Brook again asked if anything was going to be reported," and "[t]his time, Dr. Kubiak said that the only report that would be filed anywhere, with any agency, would be a routine report to the NY State Department of Health ("DOH"). Dr. Brook then submitted his letter of resignation, dated October 7, 2009, which states, "[e]ffective October 16, 2009, I resign from Peconic Bay Medical Center."

Plaintiffs aver that Dr. Brook's resignation was done "in reliance on Dr. Kubiak's repeated and unequivocal representations that Dr. Brook was not and would not be under investigation." Plaintiffs further allege that Dr. Kubiak knew his representations on October 5, 2009 and October 7,

2009 related to whether Dr. Brook was under investigation were false; he knew that PBMC prepared an incident report on October 5, 2009 about the October 2, 2009 surgery; that Dr. Brook was under investigation; and that PBMC "had planned to submit the surgical case for a QA review." Dr. Brook left to begin a senior fellowship at the University of Tennessee on October 14, 2009.

Plaintiffs allege that "[o]n December 3, 2009, PBMC, under Dr. Kubiak's direction, filed an Adverse Action Report against Dr. Brook with the [National Practitioner Data Bank]" ("NPDB"). The Adverse Action Report ("AAR") is coded "VOLUNTARY SURRENDER OF CLINICAL PRIVILEGE (S), WHILE UNDER, OR TO AVOID, INVESTIGATION RELATING TO PROFESSIONAL COMPETENCE OR CONDUCT." It further states,

> [i]n June 2009, the physician commenced practice at the Hospital in thoracic and general surgery. On Friday, October 2, 2009, the physician performed a laparoscopic appendectomy on a 14-year-old female. In the course of performing the procedure, the physician inadvertently removed part of one of the patient's fallopian tubes. On or about Monday, October 5, 2009, the physician agreed to refrain from exercising his surgical privileges pending the Hospital's investigation of this matter. By letter dated October 7, 2009, the physician advised the Hospital that he resigned from the Hospital effective October 16, 2009. Accordingly, the Hospital took no further action regarding the physician's privileges or employment. However, the Hospital's quality assurance review of this matter indicates departures by the physician from standard of care with regard to the laparoscopic appendectomy that he performed on October 2, 2009.

PBMC allegedly did not provide Dr. Brook with the AAR, although his new address had been given to the hospital. Plaintiffs allege that "[t]he false [AAR] was submitted in furtherance of the conspiracy to, among other things, retaliate against Dr. Brook by defaming him and destroying his reputation, thereby assuring that [he] would never compete with these doctors again." Plaintiffs allege that "the [AAR] falsely stated that Dr. Brook voluntarily surrendered his clinical privileges at PBMC 'while under, or to avoid, investigation relating to professional competence or conduct;" that PBMC made its submission late; that because PBMC did not act against Dr. Brook's surgical privileges that "there was no reportable event and therefore no basis, other than defendants' malice

and retaliation, for PBMC's submission of the [AAR] to the NPDB;" and that "[t]he [AAR] also falsely states that 'PBMC's quality assurance review of this matter indicates departures by the physician from standard of care with regard to the laparoscopic appendectomy that he performed on October 2, 2009." As to the last claim, plaintiffs state that "there was no *bona fide* [Root Cause Analysis ("RCA")] meeting to review Dr. Brook's case," and, instead, "[t]he [AAR] was based on a sham peer review riddled with fabricated meetings and documents designed to suggest that PBMC had conducted a proper peer review of Dr. Brook and his practice."

Plaintiffs allege that Dr. Brook was unaware of the AAR for more than six months. Specifically, plaintiffs allege that Dr. Brook first became aware of the AAR on June 1, 2010 when he sought employment at another hospital and was informed by a hospital employee of the NPDB report. Plaintiffs allege that Dr. Brook has been denied employment at a number of hospitals due to the AAR.

Dr. Brook submitted a Request for Secretarial Review of the AAR to NPDB on August 20, 2010. Plaintiffs allege that PBMC's counsel "then made multiple submissions to the NPDB, including the submission of fraudulent, fabricated documentation by PBMC to thwart Dr. Brook's request to have NPDB void the fraudulent [AAR]." Plaintiffs further aver that during Secretarial Review PBMC and its counsel submitted "new defamatory statements about Dr. Brook."

By letter, dated June 25, 2012, a Senior Advisor of the Division of Practitioner Data Banks informed Dr. Brook of the results of the Secretarial Review. The letter stated that

> [t]here is no basis on which to conclude that the Report should not have been filed in the NPDB or that it is not accurate, complete, timely or relevant. Your request that the Report be voided from the NPDB is hereby denied. The Report will remain in the NPDB.

On February 22, 2013, plaintiffs[3] filed a First Amended Complaint in the District of Columbia ("D.C. Action") against, *inter alia*, a Senior Advisor in the Division of Practitioner Data Banks and the Secretary of the U.S. Department of Health and Human Services ("HHS"), asserting a claim to set aside the AAR as arbitrary, capricious, an abuse of discretion, and not in accordance with law; a claim that defendants' violated the Privacy Act; and various constitutional challenges to the Health Care Quality Improvement Act of 1986 ("HCQIA").

On June 17, 2015 the District Court in the D.C. Action issued an opinion ("D.C. Action Opinion") granting defendants' motion to dismiss plaintiffs' second, third, fifth, and sixth causes of action; and granting defendant's summary judgment motion as to the first cause of action "with the exception of the question of whether the statement that 'the Hospital's quality assurance review of this matter indicates departures by the physician from standard of care with regard to the laparoscopic appendectomy that he performed on October 2, 2009" is reportable. The court dismissed the Privacy Act cause of action in part, but due to the remand for the question identified above, it denied the motion to dismiss the claim in part.

By letter, dated August 25, 2015, a Deputy Director of the Division of Practitioner Data Bank answered the question identified in the D.C. Action Opinion for remand to the Secretary. The letter stated,

> [b]ased on the facts and arguments presented above, we have determined that the statement 'the Hospital's quality assurance review of this matter indicates departures by the physician from standard of care with regard to the laparoscopic appendectomy that he performed on October 2, 2009' is reportable to the NPDB and we are denying your request that the statement be stricken from the Report. This statement provides a more complete history of the events relevant to your resignation while under investigation.

On March 23, 2012, plaintiffs filed their complaint in this action, alleging causes of action for breach of contract, breach of implied covenant of good faith and fair dealing, fraud, breach of

[3] The plaintiffs in that suit are John Doe, M.D., Ph.D. and John Doe, M.D., Ph.D., P.L.L.C.

fiduciary duty, negligent misrepresentation, promissory estoppel, defamation, unfair competition, tortious interference with economic advantage, and prima facie tort. Among other requests for relief, plaintiffs seek monetary damages of at least $25 million, punitive damages of $25 million, and "a declaratory judgment in favor of plaintiffs that the [AAR] filed by PBMC with the NPDB was false, fraudulent, void and should be vacated."

Defendants now move to dismiss the complaint. Defendants first argue that they are immune from damages claims pursuant to the HCQIA. Defendants also argue that plaintiffs are improperly attempting to relitigate, in this action, issues that were decided against them in administrative proceedings and in the D.C. Action.

Defendants next argue that the defamation cause of action cannot stand because PBMC's statements are protected by an absolute or qualified privilege or by New York statutes; the statements are true or are opinions; plaintiffs consented to statements made during Secretarial Review; and most of the disputed statements are time-barred. Finally, defendants argue that plaintiffs' other causes of action fail to state claims.

In opposition, Dr. Brook first argues that HCQIA immunity does not apply under the circumstances. He also argues that immunity cannot be determined as a matter of law on this motion, and the issue should only be determined after plaintiffs have been afforded discovery.

Dr. Brook next argues that collateral estoppel does not apply here for a number of reasons, including because the issues in the D.C. Action and this action are not the same. As to his defamation claim, Dr. Brook argues that an absolute privilege is inapplicable and that plaintiffs' allegations of malice make defendants' qualified privilege arguments irrelevant on this motion. Dr. Brook also contends that the statements were false or deceptive, the "defamatory opinions PBMC published are actionable as 'mixed opinion,'" filing the AAR constituted defamation *per se*, consent

is inapplicable under these circumstances, and the defamation claim is timely. Dr. Brook additionally argues that he properly pleaded the remainder of his causes of action.

Discussion

On a CPLR 3211 motion to dismiss, "[w]e accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994). "[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." *Quatrochi v. Citibank, N.A.*, 210 A.D.2d 53, 53 (1st Dep't 1994). A court should dismiss a claim pursuant to CPLR 3211(a)(1) "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

Notwithstanding the favorable light with which I must view plaintiffs' claims, many of the claims raised by plaintiffs here have already been presented and decided during Secretarial Review and to the District Court in the D.C. Action. Thus, this decision is not rendered upon a blank slate. In particular, defendants' actions in investigating Dr. Brook, and their subsequent reports of that investigation to state and federal agencies, as well as the propriety of filing the AAR, and whether the AAR should be vacated or amended, have all been extensively litigated in administrative proceedings and in the D.C. Action. Allegations based upon the foregoing may not be the basis of any of plaintiffs' claims in this action. With that in mind, I review plaintiffs' claims.

I. HCQIA Immunity

Defendants argue that this complaint must be dismissed in its entirety because they are immune from suit under the HCQIA. "HCQIA was designed to provide for effective peer review and interstate monitoring of incompetent physicians and to grant qualified immunity from damages

for those who participate in peer review activities." *Austin v. McNamara*, 979 F.2d 728, 733 (9th Cir. 1992) (citing 42 U.S.C. § 11101). 42 U.S.C.A. § 11111(a)(1) states, in part:

> [i]f a professional review action (as defined in section 11151(9) of this title) of a professional review body meets all the standards specified in section 11112(a) of this title, except as provided in subsection (b) of this section--
> **(A)** the professional review body,
> **(B)** any person acting as a member or staff to the body,
> **(C)** any person under a contract or other formal agreement with the body, and
> **(D)** any person who participates with or assists the body with respect to the action,
> shall not be liable in damages under any law of the United States or of any State (or political subdivision thereof) with respect to the action.

42 U.S.C.A. § 11151(9) states, in part, that a "'professional review action'" is

> an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician.

"The definition of 'professional review action' encompasses decisions or recommendations by peer review bodies that directly curtail a physician's clinical privileges or impose some lesser sanction that may eventually affect a physician's privileges." *See Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 634 (3d Cir. 1996). However, "'[p]rofessional review actions' do not include a decision or recommendation to monitor the standard of care provided by a physician or fact-finding to ascertain whether a physician has provided adequate care. These are 'professional review activities.'" *Id.*

"'[P]rofessional review activity'" is defined in 42 U.S.C.A. § 11151(10) as

> an activity of a health care entity with respect to an individual physician--
> **(A)** to determine whether the physician may have clinical privileges with respect to, or membership in, the entity,
> **(B)**to determine the scope or conditions of such privileges or membership, or
> **(C)** to change or modify such privileges or membership.

42 U.S.C.A. § 11112(a) states

> [f]or purposes of the protection set forth in section 11111(a) of this title, a professional review action must be taken--
>
> **(1)** in the reasonable belief that the action was in the furtherance of quality health care,
>
> **(2)** after a reasonable effort to obtain the facts of the matter,
>
> **(3)** after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
>
> **(4)** in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).
>
> A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.

The only legitimate ground that Dr. Brook raises here in opposition to the application of HCQIA immunity is his claim that defendants failed to abide by § 11112(a), because "[d]efendants did not give [him] notice that [he] was under investigation, [and] did not afford [him] a hearing."[4] Should Dr. Brook substantiate his allegations related to a lack of notice or a hearing, or show that PBMC did not afford him "such other procedures as are fair to the physician under the circumstances," then HCQIA immunity may not apply. §§ 11111(a)(1), 11112(a); *see Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 879 (3d Cir. 1995); *Nahas v. Shore Med. Ctr.*, 2016 WL 1029362, at *11 (D.N.J. Mar. 15, 2016).

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[4] I note that Dr. Brook's argument regarding notice in the context of § 1111(a) immunity differs from Dr. Brook's previous argument that he had no knowledge of the PBMC investigation. *See, e.g.*, Adam Brook, M.D., Ph.D.'s letter of April 19, 2011 to Anastasia Timothy, M.D., M.P.H. at 7 ("Moreover, even if the Data Bank believes that an 'investigation' was underway at Peconic, not only was that unknown to me, but I was affirmatively advised by Peconic's chief medical officer that there was no such investigation."). The Secretarial Review Decision indicated that Dr. Brook did not need to have knowledge of the investigation in order for PBMC to make the AAR. *See* June 25, 2012 Secretarial Review Decision at 4 ("Regarding your second and third claims, a voluntary resignation while under investigation is reportable to the NPDB regardless of whether you were misinformed as to the investigation's existence and regardless of whether or not you were aware of the ongoing investigation at the time you resigned."). The District Court found that "it is not unreasonable for the Secretary to interpret the statute as imposing a strict reporting requirement in the sense that the physician's motivations for surrendering clinical privileges and knowledge of the ongoing investigation do not bear on whether the surrender while under investigation must be reported." D.C. Action Opinion at 35.

Further, although defendants argue that collateral estoppel should prevent Dr. Brook from "litigat[ing] here . . . the validity of the Hospital's investigation," I find that collateral estoppel is inapplicable on this narrow issue.

> The doctrine of collateral estoppel . . . precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. . . . What is controlling is the identity of the issue which has necessarily been decided in the prior action or proceeding.

Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984). The issue here, and not addressed in the D.C. Action, as related to HCQIA immunity pursuant to § 11111(a), is whether defendants abided by § 11112(a). Because the issues are not the same, collateral estoppel does not apply. *See id.* For the foregoing reasons, I deny defendants' pre-answer motion to dismiss based upon HCQIA immunity.[5]

II. Breach of Contract

"[N]o action for damages may be based on a violation of medical staff bylaws, unless clear language in the bylaws creates a right to that relief." *Mason v. Cent. Suffolk Hosp.*, 3 N.Y.3d 343, 346 (2004). However, "[a] clearly written contract, granting privileges to a doctor for a fixed period of time, and agreeing not to withdraw those privileges except for specified cause, will be enforced." *Id.* at 348–49.

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[5] Also, I am unpersuaded by defendants' arguments that allowing this case to move forward will be burdensome, and that "the Hospital's ability to have staff members conduct investigations will be irreparably harmed, and hospital administrators' willingness to comply with mandated NPDB reporting will be chilled." *See Fontanetta v. John Doe 1*, 73 A.D.3d 78, 87 (2d Dep't 2010) ("We also reject the defendants' position at oral argument, i.e., that the policy considerations underlying the immunity granted to them by the HCQIA mandate that this matter be decided by their section 3211 (a) (1) motion to dismiss, without requiring them to wait and make a summary judgment motion."); *Islami v. Covenant Med. Ctr., Inc.*, 822 F. Supp. 1361, 1378–79 (N.D. Iowa 1992) (denying summary judgment).

Here, plaintiffs have pointed to nothing in the Bylaws that meets the standard for maintaining a viable breach of contract action under the circumstances. Specifically, plaintiffs have pointed to no language in the Bylaws "granting privileges to [Dr. Brook] for a fixed period of time, and agreeing not to withdraw those privileges except for specified cause." *Id.*; *see Meyer v. North Shore-Long Island Jewish Health Sys., Inc.*, 137 A.D.3d 878, 879 (2d Dep't 2016). *Cf. Anesthesia Assocs. of Mount Kisco, LLP v. N. Westchester Hosp. Ctr.*, 59 A.D.3d 473, 480 (2d Dep't 2009) ("The Hospital's bylaws in this case were sufficiently clear and specific to form the basis of a claim alleging breach of contract."). I therefore dismiss the breach of contract cause of action.

III. Breach of Implied Covenant of Good Faith and Fair Dealing

A cause of action for breach of an implied covenant of good faith and fair dealing cannot be maintained "as a substitute for a nonviable claim of breach of contract." *Sheth v. York Life Ins. Co.*, 273 A.D.2d 72, 73 (1st Dep't 2000). Here, plaintiffs cannot assert a claim that PBMC breached the implied covenant of good faith and fair dealing because plaintiffs have not alleged any contractual obligation that was not fulfilled. *See id.*

IV. Fraud, Negligent Misrepresentation, and Promissory Estoppel

Defendants argue that dismissal of the fraud, negligent misrepresentation, and promissory estoppel claims is appropriate for two reasons. First, they argue that plaintiffs are collaterally estopped from raising these claims because of the findings from the District Court in the D.C. Action. Second, they argue that Dr. Brook concedes that he did not rely on any of Dr. Kubiak's alleged false statements concerning the investigation, because Dr. Brook had planned to resign to pursue further training, and, therefore, plaintiffs cannot show reliance.

I agree with defendants that, to the extent that Plaintiffs' fraud, negligent misrepresentation, and promissory estoppel claims are based upon the propriety of filing the AAR, the contents of the AAR, or PBMC's investigation of Dr. Brook, those issues have been extensively litigated

administratively and in the D.C. Action. However, plaintiffs' fraud, negligent misrepresentation and collateral estoppel claims are also based, in part, on defendants' alleged false statement to Dr. Brook that he was not under investigation and would not be investigated, made to him at the time he resigned from PBMC. Collateral estoppel does not bar plaintiffs from pursuing fraud, negligent misrepresentation, and promissory estoppel claims on the basis of that allegedly false statement.

In the D.C. Action the District Court determined, *inter alia,* that the HHS and the NPDB, in accepting PBMC's review of Dr. Brook's surgery and filing of the AAR, maintaining the AAR, and denying Dr. Brooks' demand that the AAR be expunged, did not act arbitrarily, capriciously, abuse its discretion, or otherwise act "not in accordance with law" under the federal Administrative Procedure Act. 5 U.S.C. § 706(2)(A). The District Court further determined that the HHS had not acted arbitrarily or capriciously in determining that PBMC was actually conducting an investigation when Dr. Brook resigned, and that it was not arbitrary or capricious for HHS and the NPDB to interpret the HCQIA as requiring reporting of Dr. Brooks resignation, *whether or not Dr. Brook knew that an investigation had been launched when he resigned.*

With respect to fraud, the District Court found that Dr. Brook had not raised the argument that his resignation was a product of fraud during Secretarial Review, and that, as a result "the Secretary never identified the voluntariness of [Dr. Brook's] resignation to be in dispute or addressed fraud as a basis for [Dr. Brook's] claim that the Adverse Action Report was inaccurate." D.C. Action Opinion at 44. In addition, the District Court stated that

> When considered in light of the entire Administrative Record, the evidence submitted by [Dr. Brook] failed to substantially contribute to a determination that the Adverse Action Report's classification as a "voluntary surrender of clinical privileges" was inaccurate, versus merely disputed. "That the evidence in the record may also support other conclusions, even those that are inconsistent with the [Secretary's] does not prevent [the Court] from concluding that [her] decisions were rational and supported by the record."

D.C. Action Opinion at 44, *quoting Lead Indus. Ass'n v. EPA,* 647 F.2d 1130, 1160 (D.C. Cir. 1980).

As demonstrated by the foregoing, the District Court did not determine plaintiffs' fraud, negligent misrepresentation and promissory estoppel claims, to the extent that these claims are based upon Dr. Brook's allegation that he was intentionally and falsely told that he was not under investigation when he resigned from PBMC.

Further, I find that Dr. Brook has adequately pled reliance. In his complaint, Dr. Brook repeatedly asserts that he was told that he was not under investigation when he resigned from PBMC. He also states that "[p]rior to the October 3, 2009 decision, Dr. Brook had determined that he would, if necessary, resign from PBMC, to complete this advanced training for his Boards if the ABTS Credentials Committee so required." I do not find that allegation wholly inconsistent with plaintiffs' contention that "[b]ut for those misrepresentations, Dr. Brook would not have tendered his resignation," particularly in light of plaintiffs' allegations that on October 7, 2009, before submitting his resignation letter, "[Dr. Brook] again asked Dr. Kubiak to confirm that the Hospital was not and would not be investigating him."

Accordingly, defendants' motion to dismiss the fraud, negligent misrepresentation, and promissory estoppel causes of action is denied. To be clear, I am *only* sustaining plaintiffs' fraud, negligent misrepresentation and promissory estoppel claims to the extent that these claims are based on the allegation that Dr. Brook was intentionally and falsely told that he was not under investigation when he resigned, that he relied upon that alleged false statement in resigning, and that if he knew that he was under investigation he would not have resigned. Plaintiffs may not relitigate the propriety of defendants' investigation of Dr. Brooks' surgery, the filing the AAR, whether the AAR and the statements contained therein are accurate and/or whether the AAR should

be removed from the NPDB. Those issues were exhaustively reviewed in administrative proceedings and in the D.C. Action and may not be relitigated here.

V. Breach of Fiduciary Duty

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699–700 (1st Dep't 2011). However, a claim "that [an employee] trusted [another] as his employer to treat him fairly . . . does not give rise to a fiduciary duty." *Freedman v. Pearlman*, 271 A.D.2d 301, 305 (1st Dep't 2000).

Here, plaintiffs have failed to cite binding, on-point authority that indicates that defendants had a fiduciary duty to plaintiff. Failing to show a fiduciary duty, plaintiffs have not adequately pleaded their breach of fiduciary duty cause of action, and the claim is dismissed. *See Burry*, 84 A.D.3d at 699–700.

VI. Defamation

Plaintiffs assert that essentially all of the documents created in connection with defendants' investigation and reporting of Dr. Brook's October 2, 2009 surgery were false and defamatory. These documents include: (i) the AAR filed with the NPDB *(see* Complaint, ~ 1520)); (ii) the Hospital's alleged defamatory statements responding to HHS's request for information during its Secretarial Review *(see* Complaint,152(1)-(m)); (iii) the reports filed with the Joint Commission, and the various Hospital notes and reports, all of which were made by and/or to hospital officials or to an official body concerning the Hospital's investigation into Dr. Brook's professional competence *(see* Complaint, 152(a)-(i)); and (iv) the statements allegedly made by Dr. Kubiak to Dr. O'Connor of Loudoun Hospital in response to that Hospital's review of Dr. Brook's application for clinical privileges.

Defendants contend that plaintiffs' defamation claim is not cognizable, as it is barred by the statute of limitations, absolute and qualified privileges, New York statutes, because the statements are true or are opinions, and because Dr. Brook consented to many of the statements during Secretarial Review.

"It is well settled that '[p]ublic policy mandates that certain communications, although defamatory, cannot serve as the basis for the imposition of liability in a defamation action.'" *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 365 (2007) (citation omitted). Specifically, "'[w]hen compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only [qualifiedly] privileged.'" *Id.* (citation omitted).

In addition, "a communication is qualifiedly privileged when it is fairly made by a person in the discharge of some public or private duty upon any subject matter in which that person has an interest, and where it is made to a person with a corresponding interest or duty." *Hollander v. Cayton*, 145 A.D.2d 605, 606 (2d Dep't 1988). "Communications that are protected by a qualified privilege are not actionable unless a plaintiff can demonstrate that the declarant made the statement with malice. Malice in this context has been interpreted to mean spite or a knowing or reckless disregard of a statement's falsity." *Rosenberg*, 8 N.Y.3d at 365; *see also Stillman v. Ford,* 22 N.Y.2d 48 (1968); *Farooq v. Coffey*, 206 A.D.2d 879 (4th Dep't 1994).

Here, the allegedly defamatory statements at issue were undoubtedly made under a qualified privilege. All of the communications at issue concerned Dr. Brook's performance of the surgery on October 2, 2009, the hospital's internal review of that surgery, and reporting of its investigation to state and federal agencies that oversee physicians' professional competence and to a potential new employer.

Moreover, other than a vague, conclusory allegation that defendants made the allegedly defamatory statements to eliminate him as a competitor in thoracic surgery, plaintiffs plead no facts to show that defendants acted with malice in making the challenged statements.

As the qualified privilege applies and plaintiffs have failed adequately to plead malice, I dismiss the defamation claim.[6]

VII. Unfair Competition

In New York there are "two theories of common-law unfair competition: palming off and misappropriation," and "'[a]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property.'" *ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 476, 478 (2007) (citation omitted).

While Dr. Brook argues in his memorandum of law that that the complaint avers that "the individual defendants . . . conspired to misappropriate [his] practice back to themselves," the cited sections of the complaint do not set forth this allegation. Rather, the complaint alleges that the individual defendants conspired to remove Dr. Brook as a competitive threat by engaging in an improper peer review, fraud, and defamation "in order to improperly and unfairly harm the business and reputation of plaintiffs," and, as a result, Dr. Brook could not receive privileges or a job. Because they have not pleaded "the bad faith misappropriation of a commercial advantage which belonged exclusively to him." *LoPresti v. Mass. Mut. Life Ins. Co.*, 30 A.D.3d 474, 476 (2d Dep't 2006), plaintiffs fail to state a claim for unfair competition. Defendants' motion to dismiss plaintiffs' unfair competition claim is therefore granted.

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[6] Defendants request that I deem their allegedly defamatory statements absolutely privileged, as in *Rosenberg. See Rosenberg,* 8 N.Y.3d 359, 368 ("[s]tatements made by an employer on a NASD employee termination notice are subject to an absolute privilege in a suit for defamation,"). While I think it is a close question, I do not decide whether absolute immunity applies here, because I find that defendants' allegedly defamatory statements are non-actionable under the qualified privilege.

VIII. Tortious Interference with Economic Advantage

> [W]here there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior. Where there has been no breach of an existing contract, but only interference with prospective contract rights, however, plaintiff must show more culpable conduct on the part of the defendant.

NBT Bancorp v. Fleet/Norstar Fin. Grp., Inc., 87 N.Y.2d 614, 621 (1996) (internal citations omitted). "The claim requires a showing that the interference was accomplished by wrongful means or with malicious intent." *Arnon Ltd (IOM) v. Beierwaltes*, 125 A.D.3d 453, 453 (1st Dep't 2015).

Here, plaintiffs allege that "the defendants combined and conspired to interfere with Dr. Brook's prospective employment opportunities by maliciously leveling false and fraudulent QA charges against Dr. Brook and thereby falsely and adversely reporting him with respect to his professional competence both to NY State agencies and the NPDB." They further allege that when hospitals received the NPDB report, Dr. Brook was subsequently denied employment.

In the D.C. Action the District Court that, despite Dr. Brook's claim that the AAR was inaccurate, it was reasonable for PBMC to file the AAR and for the NPDB to maintain the AAR as written, over Dr. Brooks' objection. As such, plaintiffs may not support their intentional interference with prospective economic advantage claim with allegations that the AAR, or filing of the AAR, was wrongful.

IX. Prima Facie Tort

"[T]he four elements of a prima facie tort are (1) the intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful." *Slifer-Weickerl, Inc. v. Meteor Skelly, Inc.*, 140 A.D.2d 320, 322 (2d Dep't 1988).

Here, plaintiffs' base their prima facie tort claim solely on "the untimely and knowingly false [AAR]." *See* Compl. ¶ 171. As set forth above, plaintiffs many not rehash these allegations, and they do not make out a claim for prima facie tort. Accordingly, the cause of action for prima facie tort is dismissed.

Finally, defendants request in their reply papers that Dr. Brook be reprimanded for statements in his opposition memorandum of law pertaining to defendants' counsel. All parties (including parties representing themselves) and their attorneys have an ethical obligation to proceed with civility and collegiality in this litigation. Plaintiffs' unsubstantiated, personal attacks on defendants' counsel are neither relevant to this litigation nor ethically permissible. I ask that the parties and their counsel be guided accordingly.

In accordance with the foregoing, it is hereby

ORDERED that defendants' motion to dismiss plaintiffs' third, fifth, and sixth causes of action is denied to the extent set forth above; and it is further

ORDERED that defendants' motion to dismiss plaintiffs' first, second, fourth, seventh, eighth, ninth, and tenth causes of action is granted, and those causes of action are dismissed; and it is further

ORDERED that defendants are 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 parties are directed to appear for a preliminary conference in Room 208, 60 Centre Street, on November 2, 2016, at 2:15 PM.

This constitutes the decision and order of the court.

DATE: 10/13/16

SALIANN SCARPULLA, JSC