SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 39

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ADAM BROOK, M.D., PH.D.,
ADAM BROOK, M.D., PH.D., P.L.L.C.,
and BROOK CARDIOTHORACIC SURGERY LLC,

DECISION/ORDER
Index No. 652265/2013

Plaintiffs,

-against-

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

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action, defendants Jay Zuckerman, Joan Hoil, R.N., Peconic Bay Medical Center ("PBMC" or "hospital"), Richard Kubiak, M.D. ("Dr. Kubiak"), Daniel Massiah, M.D., Agostino Cervone, M.D., George Keckeisen, M.D. ("Dr. Keckeisen"), Andrew Mitchell, and Daniel Hamou, M.D. (collectively, "defendants") move pursuant to CPLR 3211(a)(1), (4), (5), and (7) to dismiss the complaint.

This motion is being decided along with the motion to dismiss (mot. seq. no. 006) in 650921/2012, *Brook v. Peconic Bay Medical Center* ("2012 Action"). The complaint in this action states that "[t]his action supplements the claims made and defendants named since the filing of [the 2012 Action]," and the complaints in both actions share a number of allegations. Therefore, this decision and order incorporates by reference the facts as set forth in motion sequence number 006

in the 2012 Action, and only discusses allegations relevant to this motion from the complaint in this action that are not discussed in the complaint in the 2012 Action.

In addition to alleging that "the defendants and their attorneys . . . have continued to maintain the fraudulent Adverse Action Report [("AAR")] in the files of the NPDB," plaintiffs put forth additional allegations regarding events that occurred after the filing of the complaint in the 2012 Action. The complaint alleges as follows:

> 5. Moreover, in the fall of 2012, Piedmont Fayette Hospital ("PFH") received the false AAR, requested that Dr. Kubiak and Peconic Bay Medical Center provide them with a "quality profile which reflects the outcomes of the time [Dr. Brook] spent at [PBMC]." Defendants Dr. Kubiak and PBMC refused to do so, with the consequence that Dr. Brook's application for privileges at PFH was summarily denied as incomplete.
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> 6. Likewise, in the fall of 2012, when Atlanta Medical Center ("AMC") requested directly from PBMC "all quality files/peer reviews" regarding Dr. Brook, so that AMC could make its own independent assessment as to Dr. Brook's competence, PBMC, through its attorney Mr. Leonard Rosenberg ("Mr. Rosenberg"), responded that "Dr. [Pano] Lamis [Chief Medical Officer of AMC] asked PBMC to turn over 'all quality files/peer reviews' regarding Dr. Brook, in connection with Dr. Brook's 'preliminary application' to Atlanta, whatever that may be. That request is inappropriate, and frankly unheard of." Ultimately Mr. Rosenberg had PBMC reply to AMC's queries with complete *non-sequiturs*, answering that "Dr. Brook was at the hospital for 4 months" to every question AMC asked, even when such answers were not responsive to the questions.

Footnote omitted. Plaintiffs additionally allege that the AAR was sent to hospitals not listed in the complaint in the 2012 Action.

Further, the complaint in this action adds Dr. Keckeisen as a defendant. Plaintiffs allege that defendant Jay Zuckerman filed an affidavit in support of a motion in the 2012 Action that named "Dr. Keckeisen [as a] 'material non-party witness[]." Additionally, Dr. Keckeisen submitted an affidavit on defendants' opposition to a motion in the 2012 Action. Allegedly, his affidavit stated that "he 'was the attending general surgeon who was involved in reviewing the information obtained during PBMC's investigation of Plaintiff, Dr. Brook," that "he 'assisted in the investigation into Dr. Brook's professional competence, including participating in discussions with

PBMC leadership about what transpired during the underlying surgery,'" and that he "admitted he 'participat[ed]' 'in the Root Cause Analysis ('RCA') Committee which reviewed [Dr. Brook's] handling of the underlying surgery.'"

Plaintiffs allege that, as part of the RCA, Dr. Keckeisen did not interview Dr. Brook or Dr. Rubenstein about the surgical incident, "was aware that Dr. Kubiak misled Dr. Brook into resigning on the false statement that there was no investigation," and that "[he] knew that the RCA gave no notice to Dr. Brook, received no information from him, and that Gerry Zunno and Dr. Ortiz, listed as RCA Committee members in fact never attended any RCA meeting." Plaintiffs aver that Dr. Keckeisen was motivated "to conspire with the other defendants to defame Dr. Brook and wrongfully remove Dr. Brook as a competitor" because "Dr. Keckeisen formerly had a contractual relationship with Dr. Cervone, alleged to be a co-conspirator in the scheme to eliminate Dr. Brook as a competitor at PBMC."

Plaintiffs additionally allege that "[o]n June 8, 2010, Dr. Kubiak's office at PBMC performed a query of Dr. Brook's NPDB file without Dr. Brook's authorization." Subsequently, Dr. Brook wrote to, *inter alia*, a Director of the Division of Practitioner Data Banks and a Director of the Health Resources and Services Administration to inform them of the unauthorized query. In June 2012, a Senior Advisor of the National Practitioner Data Bank ("NPDB") wrote Dr. Kubiak asking for an explanation for the query. Plaintiffs allege that in August 2012 counsel for PBMC responded to the letter, "admitt[ing] that PBMC queried Dr. Brook's NPDB file on June 8, 2010 long after he had left the Hospital and without his permission," and stating "that the 'answer is simple'—because PBMC allegedly 'had not printed a copy of the AAR' which it filed." Allegedly, "[o]n October 12, 2012, [a Senior Advisor] of the NPDB wrote to Dr. Kubiak, rejecting the malicious query complaint without investigation or explanation."

In this action, plaintiffs bring causes of action for breach of fiduciary duty, defamation, unfair competition, tortious interference with economic advantage, and a violation of the Computer Fraud and Abuse Act ("CFAA") against Dr. Kubiak and the hospital.

Defendants now move to dismiss the complaint. Defendants first argue that the complaint should be dismissed pursuant to CPLR 3211(a)(4) due to the 2012 Action. Their arguments for dismissal pursuant to immunity conferred to them by the Health Care Quality Improvement Act of 1986 ("HCQIA"), as well as their arguments regarding plaintiffs' defamation, fiduciary duty, unfair competition, and tortious interference with prospective economic advantage claims are identical or largely similar to the arguments in the defendants' motion to dismiss the 2012 Action. Defendants additionally argue that plaintiffs have failed to state their CFAA cause of action.

In opposition, Dr. Brook first argues that dismissal pursuant to 3211(a)(4) is inappropriate, and that "[i]f [this action] has 'identity' with [the 2012 Action] and arises from the same transaction (which it does only in part), then the Court can treat [this action] as an amended and supplemental complaint, and all the claims are deemed to relate back to the original filing." His arguments regarding HCQIA immunity are largely similar to those in his opposition to the motion in the 2012 Action, but he also requests that if I apply a particular standard and find that immunity applies, that I assess the constitutionality of that standard. His arguments in support of his breach of defamation, fiduciary duty, unfair competition, and tortious interference with economic advantage claims are similar to those arguments in his opposition to the 2012 Action. He additionally alleges that defendants' failure to provide requested peer review information supports the breach of fiduciary duty and tortious interference claims. He also maintains that he has sufficiently alleged a violation of 42 U.S.C. § 11135(a) and 18 U.S.C. § 1030(a)(2)(B).

Adam Brook M.D. Ph.D. P.L.L.C. ("Brook PLLC") and Brook Cardiothoracic Surgery L.L.C. ("Brook LLC") also oppose defendants' motion. By that opposition, Brook PLLC and

Brook LLC "join in the legal arguments and factual analysis in the Memorandum in Opposition filed by plaintiff Dr. Brook pro se, as supported by the record."

Discussion

"CPLR 3211 (subd [a], par 4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action." *Whitney v. Whitney*, 57 N.Y.2d 731, 732 (1982). When looking at the parties in the two actions, "the requirement is that there be substantial identity." *White Light Prods., Inc. v. On The Scene Prods., Inc.*, 231 A.D.2d 90, 93–94 (1st Dep't 1997). As to the claims in both cases, "the two actions must be 'sufficiently similar' and the relief sought must be 'the same or substantially the same.'" *Simonetti v. Larson*, 44 A.D.3d 1028, 1029 (2d Dep't 2007) (citations omitted). "[I]t is necessary that 'both suits arise out of the same subject matter or series of alleged wrongs.'" *Id.* (citations omitted).

Here, the parties in this action are the same as those in the 2012 Action with the exception that this action additionally includes Brook LLC as a plaintiff and Dr. Keckeisen as a defendant. This adequately shows "substantial identity." *White Light Prods.*, 231 A.D.2d at 94; *PK Rest., LLC v. Lifshutz*, 138 A.D.3d 434, 436 (1st Dep't 2016) ("While Steensen is not a party to the other action, there is still a substantial identity of parties; complete identity is not required."). Also, the breach of fiduciary duty, defamation, unfair competition, and tortious interference with economic advantage claims were brought in the 2012 Action, those causes of action in the 2012 Action, as here, are rooted in the filing and maintenance of the AAR, and plaintiffs seek identical relief on those causes of action in both actions. *See Simonetti*, 44 A.D.3d at 1029. Under these conditions, dismissal pursuant to CPLR 3211(a)(4) is appropriate for these claims. *See id.*

However, the CFAA cause of action is not "'sufficiently similar' and the relief sought [is not] 'the same or substantially the same'" as any of the claims in the 2012 Action. *Id.* (citations

omitted). The CFAA cause of action also does not "'arise out of the same subject matter or series of alleged wrongs'" as the claims in the 2012 Action. *Id.* (citations omitted). Plaintiffs' base their CFAA claim on an alleged unauthorized query of Dr. Brook with the NPDB, which is not an allegation raised in the 2012 Action. Accordingly, dismissal of this claim pursuant to CPLR 3211(a)(4) is denied. *See id.*

18 U.S.C.A. § 1030(g) states, in part, "[a]ny person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." The statute defines "'damage'" to "mean[] any impairment to the integrity or availability of data, a program, a system, or information" and "'loss'" to "mean[] any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service." 18 U.S.C.A. § 1030(e)(8), (11); *see also LivePerson, Inc. v. 24/7 Customer, Inc.*, 83 F. Supp. 3d 501, 513–14 (S.D.N.Y. 2015) (quoting 18 U.S.C. § 1030[e][8], [11]). "Both loss and damage must relate to the victim's computer systems." *LivePerson*, 83 F. Supp. 3d at 514.

Here, the complaint states "PBMC's and Dr. Kubiak's access of the NPDB computer and Dr. Brook's confidential record was intentional, without authorization and a violation of applicable law and regulations and caused damage and loss to plaintiffs." However, the complaint fails to allege "loss and damage . . . relate[d] to the victim's computer systems." *Id.* Accordingly, this cause of action is dismissed. *See id.*; *Civic Ctr. Motors, Ltd. v. Mason St. Import Cars, Ltd.*, 387 F. Supp. 2d 378, 382 (S.D.N.Y. 2005) (finding allegations related to losses insufficient and dismissing CFAA cause of action).

In accordance with the foregoing, it is hereby

ORDERED that the defendants' motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATE : 10/17/16

SALIANN SCARPULLA, JSC