

Bonner v Wittlin
2017 NY Slip Op 32596(U)
December 13, 2017
Supreme Court, Tompkins County
Docket Number: EF2017-0129
Judge: Eugene D. Faughnan
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At a Special Term of the Supreme Court of the State
of New York held in and for the Sixth Judicial
District at the TOMPKINS County Courthouse,
New York, on the 27TH day of October, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

KIM BONNER,

Plaintiff,

-vs-

WILLIAM WITTLIN, M.D. and
GABRIEL TORNUSCIOLO, PsyD,

Defendants.

DECISION AND ORDER

Index No. EF2017-0129
RJI No. 2017-0376-M

APPEARANCES:

PLAINTIFF:

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DEFENDANT

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon Gabriel Tornusciolo's ("Defendant's")¹ motion dated August 15, 2017 seeking to dismiss Kim M. Bonner's ("Plaintiff's") complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7).

This action was commenced by the filing of a Verified Summons and Complaint on July 14, 2017 seeking money damages from Defendant for disclosure of confidential medical information in violation of "CPLR 4504 and related provisions of law" (Complaint ¶ 41). In July of 2013, the Plaintiff was appointed to a one year position as a resident in the Department of Biomedical Sciences Section of Anatomic Pathology at the College of Veterinary Medicine at Cornell University. In November of 2013, Plaintiff was placed on probation due to unsatisfactory performance. During the probationary period, Plaintiff took a leave of absence and Cornell extended her appointment to September 2014.

In July 2014, Plaintiff's faculty supervisor advised Cornell human resources that she was concerned regarding Plaintiff's mental state. A human resources employee contacted Defendant, a psychologist, with the Cornell University Faculty and Staff Assistance Program to obtain his input regarding the reported condition of the Plaintiff. Human resources advised Defendant that Plaintiff had been under the care of William Wittlin, MD, a psychiatrist. It is undisputed that Defendant contacted Dr. Wittlin, and Plaintiff alleges that Dr. Wittlin disclosed privileged medical information to Defendant. Defendant then provided this information to the human resources department. Plaintiff does not allege that she was ever under the care of Defendant. In September of 2014, a faculty committee in the pathology department voted to not reappoint Plaintiff to another one year term.

¹The Verified complaint also lists William Wittlin, MD as a defendant, but Dr. Wittlin has not moved for relief.

Plaintiff, in her complaint, alleges that Defendant “breached [P]laintiff’s confidentiality and privacy rights in violation of CPLR §4504 and related provisions of law”. Defendant argues that there is no private cause of action under CPLR §4504 and that there was no psychologist/patient relationship between the Defendant and Plaintiff.

Discussion

"On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, we must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the nonmoving party the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory" *NYAHS Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 141 AD3d 785, 787-788, (3rd Dept. 2016) [internal quotation marks, brackets and citations omitted]; *see Maki v. Bassett Healthcare*, 141 AD3d 979, 980 (3rd Dept. 2016), *appeal dismissed and lv denied* 28 NY3d 1130 (2017).

The Defendant argues, and the Plaintiff appears to concede, that CPLR §4504 is an evidentiary rule and does not give rise to a private right of action. *Waldron v. Ball Corp.*, 210 AD2d 611, 613 (3rd Dept. 1994). Additionally, CPLR §4504 applies to disclosure by medical professionals of information “acquired in attending a patient in a professional capacity”. CPLR §4505 (a). In the present matter, Plaintiff does not allege that Defendant attended to her, or had any professional relationship with her. Therefore, the Court finds that the Plaintiff can not pursue a cause of action pursuant to CPLR §4504.

In her response to the motion to dismiss, Plaintiff argues that § 29.1(b)(8) of the Rules of the Board of Regents provides that unprofessional conduct in the practice of any profession which is licensed, certified or registered pursuant to Article 131 of the Education Law (which includes the practice of medicine) includes “revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law”. Further, 131-A reiterates that professional misconduct includes

“revealing of personally identifiable facts, data or information obtained in a professional capacity without the prior consent of the patient or client, except as authorized or required by law.”

Although, as Plaintiff argues, the foregoing *may not* require a doctor/patient relationship to apply, there is nothing in the provisions nor any case law that authorizes a cause of action based thereupon. Rather, they pertain to potential professional disciplinary actions. Therefore, the Court finds that neither the Rules of the Board of Regents nor Article 131 or 131-A of the Education Law give rise to a cause of action. Similarly, HIPPA and the privacy rules (45 CFR parts 160, 164) promulgated thereunder do not create a private cause of action *Webb v. Smart Document Solutions*, 499 F3d 1078 (9th Cir. 2007).

Absent a statutory cause of action, the Court must look at whether there is a common law cause of action which might apply to the facts as alleged in the complaint. Generally, “New York does not recognize a common-law right of privacy” *Messenger v. Gruner + Jahr Print. & Publ.*, 94 NY2d 436, 441 (2000). However, it has long been recognized that a “duty not to disclose confidential personal information springs from the implied covenant of trust and confidence that is inherent in the physician patient relationship, the breach of which is actionable as a tort” *Doe v. Community Health Plan - Kaiser Corp.*, 268 AD2d 183, 187 (3rd Dept. 2000), *rejected on other grounds Doe v. Guthrie Clinic, Ltd.*, 22 NY3d 480 (2014). “The elements of a cause of action for breach of physician-patient confidentiality are: (1) the existence of a physician-patient relationship; (2) the physician's acquisition of information relating to the patient's treatment or diagnosis; (3) the disclosure of such confidential information to a person not connected with the patient's medical treatment, in a manner that allows the patient to be identified; (4) lack of consent for that disclosure; and (5) damages” *Chanko v. American Broadcasting Cos. Inc.*, 27 NY3d 46, 53-54 (2016).

In the present matter, the Plaintiff fails to allege a physician-patient relationship as she never saw Defendant for psychological treatment and Defendant never provided treatment to Plaintiff. Defendant was consulting with Cornell Human Resources to assist them in assessing Plaintiff's performance. There is no allegation that Plaintiff ever sought treatment or counseling from the

Cornell University Faculty and Staff Assistance Program. In short, there is no allegation of a relationship between Plaintiff and Defendant that would give rise to a duty and thus there can be no cause of action for a breach of such duty.

For the reasons set forth herein, the motion to dismiss Plaintiff's complaint, as it pertains to Defendant, is **GRANTED**.

This constitutes the Decision and Order of this Court.

Dated: December 13, 2017



HON. EUGENE D. FAUGHNAN
Supreme Court Justice