

Gulfstream Anesthesia Consultants, P.A. v Cortland Regional Med. Ctr., Inc.
2017 NY Slip Op 33128(U)
March 23, 2017
Supreme Court, Cortland County
Docket Number: EF16-497
Judge: Phillip R. Rumsey
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At a Motion Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District at the Cortland County Courthouse, in the City of Cortland, New York on the 16th day of December, 2016.

PRESENT: HON. PHILLIP R. RUMSEY
JUSTICE PRESIDING.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

GULFSTREAM ANESTHESIA CONSULTANTS, P.A.,

Plaintiff,

DECISION AND ORDER

Index No. EF16-497

RJI No. 2016-0382-M

vs.

CORTLAND REGIONAL MEDICAL CENTER, INC.,

Defendant.

APPEARANCES:

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Pages 11

DECISION + ORDER ON MOTION
Elizabeth Larkin, County Clerk



PHILLIP R. RUMSEY, J. S. C.

Gulfstream Anesthesia Consultants, P.A. (Gulfstream) and Cortland Regional Medical Center (CRMC) entered into a written agreement dated April 24, 2015, pursuant to which Gulfstream agreed to provide anesthesiology services to CRMC for an initial term commencing on the latter of (1) August 20, 2015, or (2) the date on which Gulfstream became fully credentialed and began to provide services to CRMC, and ending on August 20, 2018. The agreement dated April 24, 2015 was modified by an amendment dated August 20, 2015 to provide, in relevant part, for commencement of the initial term on September 8, 2015 (the initial agreement dated April 24, 2015 and the amendment dated August 20, 2015 are referred to herein collectively as the Agreement). The Agreement provides for early termination by either party, without cause, stating that: "After August 20, 2016, either party may terminate this Agreement, without cause, upon one hundred eighty (180) days advance written notice to the other party" (Agreement, Section 7.2).

On February 9, 2016, CRMC sent a written notice to Gulfstream purporting to terminate the Agreement, pursuant to Section 7.2 of the Agreement, on August 7, 2016 (180 days from the date of such notice, but prior to August 20, 2016). After noticing that it had sent a notice attempting to terminate the agreement prior to August 20, 2016, CRMC sent an additional notice to Gulfstream dated February 19, 2016, purporting to terminate the Agreement, pursuant to Section 7.2, on August 21, 2016 (184 days after the date of such notice). CRMC later elected to serve notice, dated August 4, 2016, terminating the Agreement as of September 4, 2016 on a different basis, namely that it had not approved a replacement Medical Director selected by Gulfstream, pursuant to Section 1.3.

Gulfstream has steadfastly maintained that CRMC did not have the right to terminate the Agreement for the specified reasons. It commenced this action on August 19, 2016, asserting six causes of action against CRMC: (1) breach of contract and anticipatory breach based on CRMC's purported termination of the Agreement as of August 21, 2016; (2) breach of contract and anticipatory breach based on CRMC's purported termination of the Agreement as of September 4, 2016; (3) breach of contract, based on allegations that CRMC violated a non-solicitation clause in the Agreement by recruiting specialists employed by Gulfstream; (4) tortious interference with prospective economic and business relations; (5) breach of the covenant of good faith and fair dealing; and (6) for declaratory judgment establishing that CRMC's attempts to terminate the Agreement were premature. CRMC made a preanswer motion to dismiss the complaint, pursuant to CPLR 3211(a)(1) and (7).

Whether the first cause of action must be dismissed turns on the construction to be afforded to Section 7.2 of the Agreement, an issue sharply disputed by the parties. CRMC asserts that the required 180-day advance written notice of termination may be served prior to August 20, 2016, so long as it specifies a termination date after August 20, 2016. By contrast, Gulfstream contends that advance notice of termination may not properly be served until after August 20, 2016.

“In determining the obligations of parties to a contract, the threshold determination as to whether an ambiguity exists is a question of law to be resolved by the court. A contract is ambiguous if the language used lacks a definite and precise meaning, and there is a reasonable basis for a difference of opinion.” Agor v Board of Educ., Northeastern Clinton Cent. School Dist., 115 AD3d 1047, 1048 (2014) (quotation and citations omitted).¹

¹ This principle applies whether a motion to dismiss is made pursuant to CPLR 3211(a)(1) (see Weston v Cornell Univ., 56 AD3d 1074 [2008]) or CPLR 3211(a)(7) (see Agor).

The court concludes that Section 7.2 is ambiguous as written because it provides a reasonable basis for a difference of opinion; specifically, it is ambiguous with respect to whether (1) as CRMC asserts, August 20, 2016 refers to the date after which termination is permitted; or (2) as Gulfstream contends, August 20, 2016 provides the date after which an effective notice of termination may be served.

The ambiguity is evidenced by the fact that courts that have considered similar language have reached contrary conclusions, as noted in the persuasive decision of Judge Suddaby, who specifically held that language similar to Section 7.2 of the Agreement was ambiguous and susceptible to the competing interpretations advanced by the parties (see Applied Technology, Inc. v J.R. Clancy, Inc., 2011 WL 1832547 [NDNY 2011]). In reaching his conclusion, Judge Suddaby cited a decision holding that a similar clause permitted notice of termination to be served in advance of the specified date (see Public Relations Bd., Inc. v United Van Lines, Inc., 57 Ill App 3d 832, 833-34 [1978]) and another holding that notice of termination could not be served until after the specified date (see Trustees of N. Nevada Operating Eng'rs Health & Welfare Tr. Fund v Mach 4 Constr., LLC, 2010 WL 3003183 [D Nev 2010]) (see Applied Technology, at n 4; see also 23 E. 39th St. Mgt. Corp. v 23 E. 39th St. Dev., LLC, 32 Misc 3d 1222[A], 2011 NY Slip Op 51390[U] [holding that language similar to that of Section 7.2 permitted notice of termination to be given only after the specified date]).

CRMC argues that even if the language of Section 7.2 is ambiguous, it must be construed against Gulfstream, which it alleges drafted the Agreement. CRMC's argument is unavailing on this motion to dismiss, for that is a rule of last resort which may be utilized only where the parties' intent may not be discerned from the agreement or extrinsic evidence (see Birdsong

Estates Homeowners Assn., Inc. v D.P.S. Southwestern Corp., 101 AD3d 1735 [2012]; 28 NY Prac, Contract Law § 10:19, citing Fernandez v Price, 63 AD3d 672 [2009]). In addition, it may ultimately be established that the rule does not apply in the present case, because it does not apply to agreements that are negotiated by business entities with relatively equivalent bargaining power (see 28 NY Prac, Contract Law § 10:19). Thus, where, as here, the court concludes that a contract is ambiguous, a motion to dismiss “must be denied to permit the parties to discover and present extrinsic evidence of the parties’ intent” (Agor, 115 AD3d at 1049; accord Vectron Intl., Inc. v Corning Oak Holding, Inc., 106 AD3d 1164, 1167 [2013]). Accordingly, the motion to dismiss the first cause of action must be denied.

In the second cause of action, Gulfstream alleges that CRMC improperly attempted to terminate the Agreement in violation of Section 1.3, which governs designation, removal and replacement of an Anesthesiologist to act as Medical Director.

“On a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Further, the court may consider affidavits submitted by the plaintiff to remedy pleading defects. Nevertheless, bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true. Moreover, where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate. A motion to dismiss a complaint based on documentary evidence pursuant to CPLR 3211 (a) (1) may only be granted where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” Dinger v Cefola, 133 AD3d 816, 817 (2015) (quotations and citations omitted); accord Hyman v Schwarz, 127 AD3d 1281, 1283 (2015) (letter written by defendant constituted documentary evidence utterly refuting an element of defendant’s counterclaim); Tenney v Hodgson, Russ, LLP, 97 AD3d 1089, 1090 (2012).

By written notice dated August 4, 2016, CRMC advised Gulfstream that it was terminating the Agreement, pursuant to Section 1.3, on the basis that it did not approve of Gulfstream's identification of Dr. Larry Reid as a replacement Medical Director for Dr. Yuri Khibkin, who resigned effective August 8, 2016, asserting that he was unqualified to serve as Medical Director because he was not located in Cortland and did not regularly treat patients at CRMC. In its unverified complaint, Gulfstream alleged that Dr. Larry Reid had served as Medical Director since August 20, 2015. In support of its motion, CRMC submitted a letter from Gulfstream's counsel dated August 10, 2016, which acknowledged that "the most recent Medical Director, Dr. Yuri Khibkin[,] resigned effective August 8, 2016," and that, in his place, Gulfstream named Reid as Medical Director. Notably, in its opposition to the motion, Gulfstream failed to rebut – or even address – its admission that it had named Reid as a replacement due to Khibkin's resignation or CRMC's assertion that Reid was unqualified to act as Medical Director. Moreover, inasmuch as CRMC rejected the selection of Reid before Khibkin's resignation became effective, Reid was not serving as Medical Director when CRMC sent its notice and, therefore, could not be "removed" as Medical Director. Thus, the documentary evidence, consisting of the letter from plaintiff's counsel, flatly contradicts a necessary element of Gulfstream's second cause of action, namely its claim that Reid was serving as, and, therefore, was wrongfully removed as, Medical Director. Accordingly, the second cause of action must be dismissed.

The third cause of action alleges that CRMC breached the Agreement by soliciting Gulfstream's specialists. Section 9.2 prohibits CRMC, during the term of the Agreement and for one year thereafter, from directly or indirectly impairing any relationship between Gulfstream and the Anesthesiologists it hired to perform under the Agreement, or to offer employment to

such Anesthesiologists. Gulfstream has alleged that CRMC breached that provision and that it was damaged thereby. While its allegations of damages are conclusory, they are sufficient to state a cause of action for breach of contract and to give CRMC sufficient notice of the occurrences on which the claim is based, which can be further explored during disclosure (see Hampshire Props. v BTA Bldg. & Developing, Inc., 122 AD3d 573 [2014]; JP Morgan Chase v J.H. Elec. of N.Y., Inc., 69 AD3d 802 [2010]). Accordingly, the third cause of action may not be dismissed.

To establish the elements of its fourth cause of action for tortious interference with prospective business relations, Gulfstream must allege facts showing that: (1) CRMC had knowledge of Gulfstream's business opportunity with a third party; (2) CRMC's intentional interference with that opportunity; (3) CRMC acted by wrongful means or with the sole purpose of inflicting harm on Gulfstream; (4) that the contract or prospective business relationship would have been entered into but for CRMC's interference; and (5) resulting damages (see 2A NY PJI 2d 3:57 at 585 [2017], citing NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc., 87 NY2d 614 [1996] and Zetes v Stephens, 108 AD3d 1014 [2013]; see also ARB Upstate Communications LLC v R.J. Reuter, L.L.C., 93 AD3d 929, 933 [2012]).

Plaintiff's allegations that CRMC acted solely with malicious motives are conclusory. Notably, plaintiff also alleges that CRMC was motivated by its own "economic self-interest" (complaint, ¶ 89) and makes numerous claims that CRMC was motivated by its desire to terminate the Agreement, impliedly for the purpose of advancing its own self-interest (see complaint, ¶¶ 1, 2, 14, 20 (n 3), 26, 34, 38, 40-42, 114; see also Plaintiff's Memorandum of Law, pp. 13-15). Conclusory allegations that CRMC acted with malicious motives are insufficient to avoid dismissal of this cause of action, especially in light of plaintiff's admission that CRMC

acted with the intent of furthering its own self-interest (see Ullmannglass v Oneida, Ltd., 86 AD3d 827, 830 [2011]; Advanced Global Tech. LLC v Sirius Satellite Radio, Inc., 15 Misc 3d 776, 782 [2007], affd 44 AD3d 317 [2007]; see also International Shoppes, Inc. v At the Airport, LLC, 131 AD3d 926, 935 [2015] [plaintiff's claim for tortious interference with prospective business relations was dismissed where it was alleged that defendants acted to advance their own business interests]; Thome v Alexander & Louisa Calder Found., 70 AD3d 88, 108 [2009], lv denied 15 NY3d 703 [2010] [cause of action for tortious interference with prospective business relations was properly dismissed on a motion to dismiss where plaintiff's theory of the case was that defendants acted to benefit themselves]).

In addition, the complaint fails to allege facts showing that CRMC's conduct was wrongful, i.e., that it constituted a crime or an independent tort, or that CRMC acted for the sole purpose of inflicting harm on Gulfstream (see Carvel Corp. v Noonan, 3 NY3d 182, 190 [2004]). Plaintiff argues that its allegation that CRMC made the "false and disparaging statement[] that Gulfstream 'lost the contract'" (Memorandum of Law in Opposition to Defendant's Motion to Dismiss the Complaint [Plaintiff's Memorandum of Law], p. 12) constitutes the independent tort of defamation; however, it concedes that it did not plead a cause of action for defamation (id., p. 12 [n 5]).² In that regard, it bears noting that Gulfstream did not plead the underlying defamation with the required specificity, because it did not identify the speaker or the person or persons to whom the allegedly defamatory words were published (cf. Amaranth LLC v J.P. Morgan Chase

² In footnote 5, plaintiff requests leave to amend the complaint, pursuant to CPLR 3025(b), which permits amendment of pleadings by stipulation or upon motion. To the extent that leave of court may be required to amend the complaint (see CPLR 320[a], CPLR 3211[f]), plaintiff's informal request for such relief, made in a memorandum of law without motion, and without submission of the proposed amended complaint, is patently improper and may not be considered.

& Co., 71 AD3d 40, 48 [2009], lv dismissed in part, denied in part 14 NY3d 736 [2010]).

Accordingly, the fourth cause of action must be dismissed.

The fifth cause of action alleges a breach of the covenant of good faith and fair dealing. The allegations that CRMC breached this covenant by terminating the Agreement or by directly or indirectly soliciting Gulfstream's specialists are duplicative of claims for breach of contract; therefore, the cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed to that extent (see Martin v Kumar, Sup Ct, Cortland County, September 6, 2012, Rumsey, J., Index No. 09-375, p. 4; see also NYAHS A Servs., Inc., Self-ins. Trust v People Care Inc., 141 AD3d 785, 788 [2016] [cause of action for breach of the duty of good faith and fair dealing was properly dismissed because it was duplicative of a breach of contract claim]). However, Gulfstream also alleges that it was damaged by CRMC's unreasonable refusal to credential its specialists (see complaint, ¶¶ 40, 41, 103, 107, 108). Such allegations are minimally sufficient to state a cause of action for breach of the implied covenant of good faith and fair dealing, as they constitute a claim that CRMC did not exercise the discretion afforded to it by the Agreement in good faith (see Maddaloni Jewelers, Inc. v Rolex Watch U.S.A., Inc., 41 AD3d 269 [2007]).³

Plaintiff erroneously argues that defendant did not seek dismissal of the sixth cause of action seeking declaratory judgment (see Plaintiff's Memorandum of Law, p. 1, n 1). The notice of motion seeks dismissal of the entire complaint, and the affirmation of counsel argues that

³ Such claim, if established, is limited in time and scope to the time period following the purported breach and ending on the date upon which it is finally determined that the Agreement was properly terminated by CRMC. In its reply, CRMC alleges that credentialing of health care professionals requires a recommendation by a Credentialing Committee comprised of members of the Medical Staff, none of whom are CRMC employees. However, this allegation is insufficient to establish that CRMC has no role in the credentialing process or that it performed any duties it may have in that process in good faith by, for example, timely submitting candidates to the Credentialing Committee for consideration.

“Count VI (declaratory judgment) must be dismissed” (Affirmation of Daniel B. Berman, Esq. dated September 30, 2016, ¶ 8). Gulfstream requests judgment declaring that the Agreement was terminated effective February 17, 2017 or, alternatively, that CRMC is required to provide 90 days’ advance notice of its removal of the Medical Director and, once a replacement is named, to provide 30 days’ notice of termination. Gulfstream has an adequate remedy for the relief sought by declaratory judgment in another form of action, namely, breach of contract. In fact, its request for declaratory judgment is duplicative of the first and second causes of action it asserted for breach of contract. Accordingly, the sixth cause of action must be dismissed (see Apple Records v Capitol Records, 137 AD2d 50, 54 [1988], citing James v Alderton Dock Yards, 256 NY 298 [1931], 305, rearg denied 256 NY 681 [1931]; see also Route 217, LLC v Greer, 119 AD3d 1018 1020 [2014], citing James and Singer Asset Fin. Co., LLC v Melvin, 33 AD3d 355, 358 [2006], which, in turn, cites Apple).

Based on the foregoing, defendant’s motion is granted to the extent of dismissing the second, fourth and sixth causes of action in their entirety and, further, dismissing the fifth cause of action, except for the claim that defendant breached the implied covenant of good faith and fair dealing by refusing to credential Gulfstream’s specialists; defendant’s motion is otherwise denied. Defendant shall file and serve an answer in accordance with CPLR 3211(f).

This decision constitutes the order of the court. The transmittal of copies of this decision and order by the court shall not constitute notice of entry (see CPLR 5513).

Dated: March 23, 2017
Cortland, New York


Digitally signed by
Hon. Phillip R. Rumsey
Mar 23, 2017, 6:21 pm


HON. PHILLIP R. RUMSEY
Supreme Court Justice

ENTER

The following documents were filed with the Clerk of the County of Cortland:

- Notice of motion dated September 30, 2016.
- Affirmation of Daniel B. Berman, Esq. dated September 30, 2016, with Exhibits A, A1-A, B, and C.
- Reply affirmation of Daniel B. Berman, Esq. dated December 14, 2016, with Exhibit D.
- Reply affidavit of Mark Webster, sworn to December 14, 2016.
- Original Decision and Order dated March 23, 2017.