

Cristinoiu v Perez
2018 NY Slip Op 31876(U)
July 30, 2018
Supreme Court, New York County
Docket Number: 157077/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED

PART

IAS MOTION 2

Justice

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INDEX NO. 157077/2017

LUCIA CRISTINOIU,

Plaintiff,

MOTION SEQ. NO. 001

- v -

LUISA PEREZ, M.D. and GODWIN MEDICAL, PC,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 12, 13, 14

were read on this motion to/for

DISMISS COUNTERCLAIMS

Upon the foregoing documents, it is ordered that the motion is granted.

In this action sounding, inter alia, in conversion and breach of contract, plaintiff Lucia Cristinoiu ("Dr. Cristinoiu") moves, pursuant to CPLR 3211(a)(2) and (a)(7), to dismiss the counterclaims asserted by defendants Luisa Perez, M.D. ("Dr. Perez") and Godwin Medical, P.C. ("Godwin") (collectively "defendants"). After a review of the parties' motion papers and the relevant statutes and case law, the motion is granted.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an employment dispute between Dr. Cristinoiu, a pediatrician, and Dr. Perez, an internist who worked at Godwin, a domestic professional corporation and small group medical practice located on the Upper West Side of Manhattan. Godwin was founded, owned and controlled by Dr. Perez, who was Dr. Cristinoiu's employer from 2012 through 2017.

On or about June 1, 2012, Dr. Cristinoiu became a full-time employee of Dr. Perez. Dr. Cristinoiu agreed to work for a relatively low salary and Dr. Perez promised that, when she was in better financial condition, she would adjust Dr. Cristinoiu's salary upward as soon as possible, but no later than two years after Dr. Cristinoiu's starting date. Although Dr. Perez and Dr. Cristinoiu entered into an employment agreement, Dr. Cristinoiu was never provided with an executed copy of the same by Dr. Perez.

Dr. Cristinoiu claimed that, although Dr. Perez eventually increased her salary in January 2016, this was 3 ½ years after the start of her employment and 1 ½ years after her salary was supposed to have been increased. This, urges Dr. Cristinoiu, resulted in a loss of earnings between June 2014 and January of 2016 in the amount of \$25,200.

Further, Dr. Cristinoiu claims that, from June 1, 2012 through March 30, 2017, she earned approximately 15 weeks of paid vacation benefits but was only compensated for 8 weeks of those benefits, resulting in at least \$22,050 in unpaid benefits.

In February of 2015, Dr. Cristinoiu applied, in her personal capacity, to become, and was approved as, a medical provider under the New York Medicaid EHR Incentive Program ("the Medicaid program"). This program encouraged medical providers to use certified electronic health record ("EHR") technology in order to improve health care. Dr. Cristinoiu received a personal registration number from the Medicaid program was listed as the sole payee of any incentive funds she received from Medicaid under the program. Dr. Perez was not registered with the Medicaid program.

In 2015, Dr. Cristinoiu was awarded \$21,250 for medical services rendered pursuant to the Medicaid program in 2013. She was awarded \$8,500 for medical services rendered pursuant to the Medicaid program in 2014. She thus was awarded a total of \$29,750 for services rendered

pursuant to the incentive program. Dr. Cristinoiu claimed that, although Dr. Perez knew that these funds belonged solely to Dr. Cristinoiu, Dr. Perez converted these funds, in the form of checks, for the exclusive use of the defendants. When Dr. Cristinoiu confronted Dr. Perez about these funds, Dr. Perez refused to pay this sum to Dr. Cristinoiu and maintained that she needed the money to operate Godwin.

Dr. Cristinoiu maintained that, as a result of the stress and anxiety induced by her working conditions, she resigned from Godwin on March 30, 2017.

On August 7, 2017, Dr. Cristinoiu commenced the captioned action by filing a summons and complaint. In the complaint, Dr. Cristinoiu asserted claims for conversion, breach of contract, unjust enrichment, and breach of good faith and fair dealing. She claimed damages of \$29,750 arising from monies she should have been paid by the Medicaid program, as well as \$63,630 constituting unpaid or underpaid compensation and benefits.

On September 18, 2017, defendants joined issue by filing their answer. Defendants denied all substantive allegations of wrongdoing and asserted affirmative defenses. They also asserted several counterclaims, the first of which was that, on or about April 1, 2017, Dr. Cristinoiu violated the regulations of the New York State Board of Regents (“the misconduct rules”) by “abandoning or neglecting a patient or client under and in need of immediate professional care, without making reasonable arrangements for the continuation of such care, or abandoning a professional employment by a group practice, hospital, clinic or other health care facility, without reasonable notice and under circumstances which seriously impair the delivery of professional care to patients or clients.” They also asserted that Dr. Cristinoiu’s abandonment of Godwin and its patients was without sufficient notice in violation of the misconduct rules and constituted a breach of fiduciary duty to defendants under those rules. Defendants further alleged that Dr. Cristinoiu acted in bad

faith and breached her agreement with Godwin; breached her fiduciary duty as an employee of Godwin; trespassed on Godwin's property; was unjustly enriched; converted defendants' property; and unlawfully interfered with defendants' relationship with its patients.

By notice of motion filed October 6, 2017, Dr. Cristinoiu now moves, pursuant to CPLR 3211(a)(2) and (a)(7), to dismiss defendants' counterclaims. In support of the motion, Dr. Cristinoiu argues that the motion must be granted since defendants, whose counterclaim arising from Dr. Cristinoiu's alleged abandonment is based on violations of the misconduct rules, failed to exhaust their administrative remedies before resorting to litigation. Thus, she claims that defendants are attempting to do an "end run" around the requirement regarding the exhaustion of administrative remedies. Dr. Cristinoiu further asserts that defendants' counterclaim sounding in breach of a fiduciary duty fails to state a claim. Finally, she asserts that the remainder of the counterclaims must be dismissed since they are conclusory and without merit.

In opposition to the motion, defendants argue that, although Dr. Cristinoiu's abandonment of her patients constituted professional misconduct, it also gave rise to a breach of fiduciary duty claim by defendants against her since she owed a duty of loyalty to her employer. Defendants further assert that, if their counterclaims are dismissed, this Court should grant them leave to replead them.

In reply, Dr. Cristinoiu argues that defendants' opposition to the motion is untimely.¹ Dr. Cristinoiu also reiterates her argument that the counterclaims must be dismissed because they have no merit and because defendants failed to exhaust their administrative remedies.

¹ Even assuming that defendants' opposition papers are untimely, they were submitted long before the date scheduled for oral argument, Dr. Cristinoiu had ample time to respond to the same, and she in fact did so. Thus, this Court will consider defendants' opposition papers. CPLR 2001.

LEGAL CONCLUSIONS:

Initially, Dr. Cristinoiu's argument regarding the exhaustion of administrative remedies is misplaced.

"It is a well settled principle of administrative law that one who objects to the acts of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (*Matter of Doe v Axelrod*, 71 NY2d 484, 491 (Simons, J., concurring); *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978))" (*Galin v Chassin*, 217 AD2d 446, 447, 629 NYS2d 247 [1995]). "Thus, absent extraordinary circumstances, courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency" (*Doe v St. Clare's Hosp. & Health Ctr.*, 194 AD2d 365, 366 (1993), *lv denied* 82 NY2d 662 (1993))."

Matter of DiBlasio v Novello, 28 AD3d 339, 341 (1st Dept 2006).

In this action, there is no objection by any party to the findings of an administrative agency. Indeed, there is no indication in the motion papers that there is pending before any administrative agency any matter relating to any of the parties. Since there is no such pending administrative proceeding, there is no administrative remedy to exhaust.

However, Dr. Cristioiu is correct that the counterclaim sounding in breach of fiduciary duty fails to state a claim. That counterclaim arises not only from an alleged violation of the misconduct rules, but also from Dr. Cristinoiu's alleged actions towards her employer. "The elements of a breach of fiduciary duty cause of action are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct, which elements must be pleaded with the particularity required by CPLR 3016(b) (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807-808)." *Stinner v Epstein*, ___ AD3d ___, 2018 NY Slip Op 04371 (2d Dept 2018). Since defendants failed to plead this claim with the requisite particularity, it is dismissed. *See Stang v Hudson Sq. Hotel, LLC*, 158

AD3d 446 (1st Dept 2018). For example, although defendants claim that Dr. Cristianoiu “abandoned Godwin and its patients with little or no prior notice” on or about April 1, 2017, they fail to set forth when, if ever, such notice was given. They also fail to set forth the damages they allegedly sustained with any specificity.

Defendants’ counterclaim sounding in fraud is also pleaded without the specificity required by CPLR 3016.

The remainder of defendants’ counterclaims, sounding in breach of contract, trespass, unjust enrichment, conversion, and unlawful interference with defendants’ relationships with their patients, are dismissed as conclusory in nature. *See Professional Adv., Inc. v Intercontinental Capital Group, Inc.*, 113 AD3d 412 (1st Dept 2014); *Steiner Sports Mktg., Inc. v Weinreb*, 88 AD3d 482 (1st Dept 2011). “Although on a motion to dismiss [a party’s] allegations are presumed to be true and accorded every favorable inference, conclusory allegations--claims consisting of bare legal conclusions with no factual specificity--are insufficient to survive a motion to dismiss (*Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234, 612 NYS2d 146 [1st Dept 1994]).” *Godfrey v Spano*, 13 NY3d 358, 373 (2009).

Finally, defendants urge that they should be granted leave to replead in the event their counterclaims are dismissed. “[T]he standard to be applied on a motion for leave to replead pursuant to CPLR 3211 (e) is consistent with the standard governing motions for leave to amend pursuant to CPLR 3025. Namely, motions for leave to amend pleadings should be freely granted absent prejudice or surprise to the opposing party, unless the proposed amendment is devoid of merit or palpably insufficient (citations omitted).” *Janssen v Inc. Vil. of Rockville Ctr.*, 59 AD3d 15, 27 (2d Dept 2008). Here, defendants not only failed to affirmatively seek this relief by cross-moving for such relief (*See* CPLR 2215), but also failed to submit a proposed amended

pleading to replace their current counterclaims. Thus, their request to plead their counterclaims is denied. *See Parker Waichman LLP v Squier, Knapp & Dunn Comms., Inc.*, 138 AD3d 570 (1st Dept 2016).

In support of their request to replead their counterclaims, defendants cite *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). However, that case is silent regarding leave to replead. Rather, the court in that case granted plaintiff leave to amend its complaint where, unlike here, it presented the court with a proposed amended pleading.

In light of the foregoing, it is hereby:

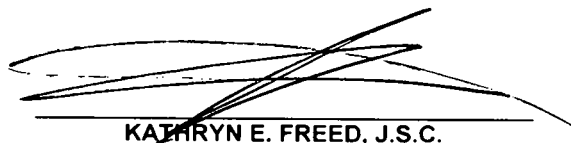
ORDERED that the motion by plaintiff Lucia Cristinoiu, M.D. to dismiss the counterclaims asserted by defendants Luisa Perez, M.D. and Godwin Medical, P.C. is granted; and it is further

ORDERED that the counterclaims are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

7/30/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE