

<b>Martinez v Jerome Med., PLLC</b>
2019 NY Slip Op 34142(U)
May 22, 2019
Supreme Court, Nassau County
Docket Number: 612237-18
Judge: Timothy S. Driscoll
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**SUPREME COURT-STATE OF NEW YORK  
SHORT FORM ORDER**

**Present:**

**HON. TIMOTHY S. DRISCOLL**  
**Justice Supreme Court**

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**VIRGINIA MARTINEZ,**

**Plaintiff,**

**-against-**

**JEROME MEDICAL, PLLC, HECTOR  
FLORIMON, and JASON FAENA,**

**Defendants.**

-----X

**TRIAL/IAS PART: 10**

**NASSAU COUNTY**

**Index No: 612237-18**

**Motion Seq. Nos. 2 and 3**

**Submission Date: 4/5/19**

**Papers Read on these Motions:**

- Affirmation in Support with Exhibit.....X**
- Memorandum in Opposition and in Support of Cross Motion.....X**
- Reply Affirmation.....X**

This matter is before the Court on plaintiff Virginia Martinez’s motion to amend and defendants Jerome Medical, PLLC, Hector Florimon, and Jason Faena’s (collectively, “Defendants”) cross motion for sanctions. For the following reasons, the motions are denied.

**BACKGROUND**

**A. Relief Sought**

Plaintiff Virginia Martinez (“Plaintiff” or “Dr. Martinez”) moves for leave to file an amended complaint pursuant to CPLR § 3025. Defendants oppose Plaintiff’s motion and cross move for an Order, pursuant to N.Y.C.R.R. § 130-1.1, imposing monetary sanctions against Plaintiff, including Defendants’ costs and reasonable attorneys’ fees incurred in opposing Plaintiff’s motion to amend. Plaintiff opposes Defendants’ cross motion.

**B. The Parties’ History**

The parties’ history is set forth in detail in the Court’s Decision and Order dated March 11, 2019 (the “Prior Decision”) and is incorporated by reference as if set forth fully herein. Briefly, the

Amended Verified Complaint alleges that Dr. Martinez is a duly licensed, board certified physician in New York specializing in family medicine. From July 1, 2010, through September 8, 2018, Dr. Martinez was employed by Jerome Medical, PLLC (“Jerome Medical”), an entity formed and licensed to practice medicine in New York with an office located in the Bronx. Hector Florimon (“Dr. Florimon”), is a duly licensed physician practicing medicine in New York and the sole owner of Jerome Medical. Jason Faena (“Faena”) was and is an employee of Jerome Medical.

On or about May 19, 2010, Dr. Martinez began her employment with Jerome Medical pursuant to a written agreement (the “Agreement”). The Agreement automatically renewed on an annual basis and contained the same terms and conditions regarding the parties’ rights and obligations. The Agreement provides a one-year term of employment and is subject to and conditional upon Dr. Martinez maintaining her medical license.

On September 8, 2018, Dr. Martinez involuntarily terminated her employment due to “impossible working conditions.” Florimon had a fiduciary duty to Dr. Martinez not to permit anything in the work environment that was illegal or would jeopardize Dr. Martinez’s medical license, and Florimon breached that fiduciary duty by failing to correct or address these issues. Based on the illegal and/or unethical conduct that Florimon created or permitted, Dr. Martinez was compelled to file complaints with the New York Attorney General’s Medical Fraud Unit and the Office of Professional Misconduct.

Dr. Florimon encouraged and condoned illegal, unethical, and/or unprofessional acts of Jerome’s Medical employees. Faena photocopied and appended Dr. Martinez’s signature on Form MIIQs and photocopied her signature on other documents without her knowledge or consent, and ordered unnecessary home care for Jerome Medical’s patients. After Dr. Martinez confronted Faena about photocopying her signature, Jerome Medical’s staff improperly and secretly erased information from patient charts. Jerome Medical’s staff members, including Luisa Ortega, Arlenys Alcantara, Awilda Hiraldo, Cecilla Inoa (Florimon’s sister-in-law), and Faena (collectively, “Staff Members”) directed patients to file complaints with insurance providers and government agencies falsely claiming that Dr. Martinez acted improperly as their doctor even though the patients and Staff Members knew this was untrue. The Staff Members also hid important patient information from

Martinez to the detriment of patients. A patient asked Dr. Martinez if she was gay, which the patient only could have known if told by one of the Staff Members.

Additionally, Defendants and Staff Members 1) falsely told patients that Dr. Martinez did not want to see them, 2) hid information from Dr. Martinez regarding Jerome's business operations so she did not know what was occurring with the medical practice or patients, 3) falsely told patients that Dr. Martinez missed performing tests for patients and/or patient follow-up appointments, 4) called patients and told them to come in early so they would need to wait for their appointments with Dr. Martinez, 5) falsely told patients that Dr. Martinez denied services to them, and 6) provided MIIQ forms to patients and told patients that Dr. Martinez would suggest they use Royal Company for home care, then told patients that they should not accept services from Royal Company and directed them to request specific other companies. Defendants also called a gastroenterologist assistant and advised him or her of operational problems or other clinic issues to coerce the assistant to take their side on disputes. On a daily basis, patients screamed at Dr. Martinez and threatened to sue her for referrals, follow-ups, transportation, home aides, and equipment at the direction of Jerome Medical's staff. Luisa Ortega instructed a patient not to complete her laboratory testing, and the patient later went to Jerome Medical for an MIIQ form to obtain home health care.

On September 10, 2018, Dr. Martinez commenced the instant action. On January 7, 2019, Dr. Martinez filed an Amended Complaint asserting the following causes of action: 1) breach of contract against Jerome Medical, 2) tortious interference with contract against Dr. Florimon and Faena, 3) defamation with malice against Defendants, and 4) forgery against Defendants. In its Prior Decision, the Court granted Defendants' motion to dismiss with respect to all claims except the forgery claim and denied Defendants' motion to transfer venue to Bronx County.

Plaintiff now seeks to amend the Amended Complaint to assert a claim for breach of fiduciary duty against Florimon. Plaintiff's proposed second amended complaint includes the following additional allegations:

Florimon had certain fiduciary duties to Plaintiff as employer. Specifically, said duties included ensuring a workplace in which Plaintiff was safeguarded from the pecuniary and professional harm caused by the actions of Florimon and/or other employees of Florimon and in which Plaintiff was free to practice without her privacy and the privileged and confidential of the physician-patient relationship being violated as a result of the actions of Florimon and/or other employees. As set forth

herein, Florimon engaged in misconduct and otherwise condoned and/or encouraged the misconduct of others which constitute a breach of fiduciary duties including, but not limited to, those set forth above.

*See* Blodnick Affm. at Exh. A, ¶¶ 23-24.

C. The Parties' Positions

Plaintiff argues that she should be granted leave to file a second amended complaint. Plaintiff asserts that while Florimon's breach of fiduciary duty was set forth in the factual allegations of the Amended Complaint, the pleading did not specifically assert breach of fiduciary duty as a discrete claim. Plaintiff contends that her proposed amendment is not palpably insufficient or devoid of merit, and leave to amend would not result in prejudice or surprise. Plaintiff's proposed pleading has also been amended to exclude the causes of action that were dismissed pursuant to the Prior Decision.

Defendants contend that Plaintiff's new claim for breach of fiduciary duty rehashes her dismissed claims for breach of contract and tortious interference with contract claims, as well as the implied covenant of good faith and fair dealing claim that was addressed by the Court in the Prior Decision. Plaintiff alleges that she was an employee, not a partner, and her allegation that her employer owed her a fiduciary duty is without merit because: 1) Florimon is not her employer, 2) an employer does not owe a fiduciary duty to an at-will employee, and 3) Plaintiff has failed to plead facts supporting the existence of a fiduciary relationship with the requisite particularity. Further, Plaintiff has not alleged with particularity that the harm that she suffered as a result of Dr. Florimon or his employees' actions, which renders her claim deficient regardless of her status as an employee or partner of Jerome Medical. Plaintiff's conclusory assertion that she suffered pecuniary and professional harm is not factually supported and contradicted by documents establishing that Dr. Martinez entered into an employment agreement with a different medical office two days after resigning from Jerome Medical. Plaintiff has also failed to explain the factual basis for seeking to hold Dr. Florimon personally liable for a breach of Plaintiff's right to privacy and/or doctor-patient confidentiality.

Defendants contend that Plaintiff's motion is sanctionable and her attempt to file another complaint following the Prior Decision is aimed solely at prolonging litigation in the hope that

Defendants will agree to her settlement demand. Additionally, Plaintiff's motion constitutes an attempt to "deceive the Court" with respect to a baseless claim for breach of fiduciary duty premised upon the false notion that Plaintiff was a partner at Jerome Medical when she was actually an at-will employee.

On reply, Plaintiff argues that she seeks to file a breach of fiduciary duty claim based upon the same conduct of Florimon that gave rise to her dismissed contractual causes of action, and the forgery claim, which was not dismissed. Plaintiff asserts that she was not, simply, Florimon's employee and by agreeing to work for Jerome Medical, she entrusted Florimon to ensure a workplace environment that was free from Jerome Medical employees' interference with Plaintiff's doctor-patient relationships, and in which Plaintiff's signature would not be forged on medical forms without her knowledge or consent. Fiduciary liability is not solely dependent upon an agreement or contractual relation between the parties. While the employment agreement between Plaintiff and Jerome Medical appears to establish an employer-employee relationship, an examination of the nature of Plaintiff's relationship with Florimon leads to the conclusion that a fiduciary relationship existed. Florimon failed in his fiduciary obligations through his own misconduct and Plaintiff has been damaged as a result of this failure. Further, Plaintiff's breach of fiduciary duty claim is distinct from the dismissed contractual causes of action. Finally, Plaintiff contends that Defendants are not entitled to sanctions, as her motion is not frivolous.

#### RULING OF THE COURT

##### A. Motion to Amend

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Servs., LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CPLR § 3025(b); *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

##### B. Breach of Fiduciary Duty

The elements of a claim for breach of fiduciary duty are: "1) the existence of a fiduciary relationship, 2) misconduct by the defendant, and 3) damages directly caused by the defendant's misconduct." *Armentano v. Paraco Gas Corp.*, 90 A.D.3d 683, 684 (2d Dept. 2011), quoting *Rut v. Young Adult Inst., Inc.*, 74 A.D.3d 776, 777 (2d Dept. 2010). Breach of fiduciary duty claims are

subject to the particularity requirements set forth in CPLR § 3016(b). *Arementano*, 90 A.D.3d at 684.

A fiduciary relationship exists where one person is “under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.” *Carbon Capital Management, LLC v. American Exp. Co.*, 88 A.D.3d 933, 938 (2d Dept. 2011), quoting *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y. 3d 11, 19 (2005). Generally, courts look to the parties’ contractual agreement to determine the nature of their relationship. The existence of a fiduciary relationship, however, does not solely depend upon an agreement or a contractual relationship, and is instead determined by the actual relationship between the parties. *Carbon Capital Management, LLC*, 88 A.D.3d at 938. An employment relationship does not create a fiduciary relationship. *Rather v. CBS Corp.*, 68 A.D.3d 49, 55 (1st Dept. 2009). *See also Schenkman v. New York College of Health Professionals*, 29 A.D.3d 671, 672 (2d Dept. 2006) (plaintiffs “failed to plead any facts demonstrating how the arm’s length, employer-employee relationship between the defendants and the plaintiffs gave rise to any fiduciary duty”).

#### C. Sanctions

Sanctions may be awarded with respect to frivolous conduct undertaken by a party or attorney. 22 N.Y.C.R.R. § 130-1.1. Conduct is frivolous where it is 1) without legal merit and unsupported by an argument for extension, modification, or reversal of existing law, 2) undertaken for purposes of delay or harassment, or 3) asserts false material factual statements. 22 N.Y.C.R.R. § 130-1.1(c). The determination as to whether sanctions are appropriate is generally within the court’s sound discretion. *Perna v. Reality Roofing, Inc.*, 122 A.D.3d 821, 822 (2d Dept. 2014).

#### D. Application of the Principles to the Instant Action

Plaintiff’s motion to amend is denied. The Court concludes that the proposed claim for breach of fiduciary duty is palpably insufficient. Plaintiff has not alleged facts demonstrating that her relationship with Florimon extended beyond a garden variety employment relationship in the context of a medical practice. The proposed second amended complaint’s allegations regarding Florimon’s duty to “ensur[e] a workplace in which Plaintiff was safeguarded from the pecuniary and professional harm caused by the actions of Florimon and/or other employees of Florimon and in which Plaintiff was free to practice without her privacy and the privileged and confidential of the

physician-patient relationship being violated as a result of the actions of Florimon and/or other employees,” *see* Blodnick Affm. at Exh. A, ¶ 23, lack particularity and coherence. In sum, Plaintiff fails to allege that Florimon “had a duty to act for or give advice for the benefit of the plaintiff, or, indeed, that any type of a relationship of trust existed between them which would give rise to a fiduciary obligation on [Florimon’s] part.” *Faith Assembly v. Titledge of N.Y. Abstract, LLC*, 106 A.D.3d 47, 62 (2d Dept. 2013).

Defendants’ cross motion for sanctions is denied. While Plaintiff’s proposed second amended complaint is without merit, the Court concludes that Plaintiff’s motion does not rise to the level of frivolity that would warrant the imposition of sanctions. Defendants’ unsupported statement that Plaintiff filed her motion with the sole aim of prolonging litigation, *see* Defs. Memo of Law at p. 8, does not establish that Plaintiff’s motion was undertaken for purposes of delay or harassment. Moreover, notwithstanding the Amended Complaint’s somewhat confusing footnote with respect to a partner’s fiduciary duty to his or her partner, *see* Am. Compl. ¶ 13, n.1, Plaintiff was not attempting to “deceive” the Court into accepting that she was a partner at Jerome Medical. As set forth above, Plaintiff’s breach of fiduciary duty claim was predicated on Florimon’s alleged duty to create a workplace free from pecuniary harm, professional harm, and privacy and confidentiality violations.

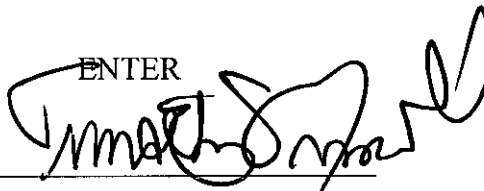
#### CONCLUSION

Plaintiff’s motion to amend and Defendants’ cross motion for sanctions are denied. The parties are reminded of the conference scheduled for July 18, 2019 at 9:30 a.m.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

DATED: Mineola, NY  
May 22, 2019

ENTER  
  
HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
MAY 24 2019  
NASSAU COUNTY  
COUNTY CLERK’S OFFICE