

<b>Martinez v Jerome Med., PLLC</b>
2019 NY Slip Op 34145(U)
September 24, 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. No. 4**

**Submission Date: 8/7/19**

**Papers Read on these Motions:**

- Affirmation in Support with Exhibits.....X**
- Memorandum of Law in Opposition.....X**
- Affirmation in Opposition with Exhibit.....X**
- Reply Affirmation.....X**

This matter is before the Court on plaintiff Virginia Martinez’s (“Plaintiff” or “Dr. Martinez”) motion to reargue. For the following reasons, Plaintiff’s motion is denied.

**BACKGROUND**

**A. Relief Sought**

Plaintiff moves for leave to reargue, pursuant to CPLR § 2221(d), so much of the Court’s Decision and Order dated May 22, 2019 (the “May Order”), as denied Plaintiff’s motion for leave to amend the Complaint, and upon such reargument issuing an Order granting Plaintiff’s motion for leave to amend the Complaint pursuant to CPLR § 3025.

**B. The Parties’ History**

The parties’ history is set forth in detail in the Court’s Decision and Order dated March 11, 2019 (the “March Order”) 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.” Dr. 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 Dr. Florimon breached that fiduciary duty by failing to correct or address these issues. Based on the illegal and/or unethical conduct that Dr. 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 (Dr. 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 the March Order, the Court granted Defendants' motion to dismiss with respect to all claims except the forgery claim and denied Defendants' motion to transfer venue.

On March 15, 2019, Plaintiff moved to amend the Amended Complaint to assert a claim for breach of fiduciary duty against Dr. Florimon (the "Motion to Amend"). In its May Order, the Court denied the Motion to Amend, concluding that Plaintiff's proposed claim for breach of fiduciary duty was palpably insufficient. The Court held, in relevant part, that 1) Plaintiff failed to allege facts demonstrating that her relationship with Dr. Florimon extended beyond a garden variety employment relationship in the context of a medical practice, and 2) Plaintiff's

allegations regarding Dr. Florimon's alleged duty lacked particularity and coherence. *See* May Order, Blodnick Affm. at Exh. A, at pp. 6-7.

C. The Parties' Positions

Plaintiff argues that Dr. Martinez was not only an employee of Defendants, but as a medical doctor, was in a unique position of responsibility with respect to not only patients of Jerome Medical but also to the public at large. The dual nature of Plaintiff's role as a medical doctor is analogous to the circumstances of the plaintiff in *Wieder v. Skala*, 80 N.Y.2d 628 (1992). Plaintiff had every right to expect that Defendants would conduct the practice of medicine in accordance with the ethical standards of the profession and Defendants failed to adhere to ethical standards and created an environment in which it was not possible for Plaintiff to do so. Plaintiff's circumstances are analogous to those in *Wieder* and constitute a breach of fiduciary duty by Defendants.

Plaintiff contends that in *Wieder*, the Court of Appeals drew several distinctions between a corporate employee and an attorney, which created an exception to the at-will employment doctrine. The Court noted that an attorney has a different set of responsibilities than a corporate employee. Similarly, doctors have a personal obligation to patients that transcends the employment relationship and imposes a heightened standard for an employer to adhere to ethical standards and to not prevent employees from adhering to such standards. Here, Defendants purposely prevented Plaintiff from adhering to accepted norms of professional conduct. This breach of the contractual obligation owed to Plaintiff by Defendants gives rise to Plaintiff's claim for breach of fiduciary duty.

Defendants argue that: 1) Plaintiff fails to assert any matter of fact or law overlooked or misapprehended by the Court, 2) Plaintiff's suggestion that the Court overlooked relevant case law in determining the Motion to Amend is patently devoid of merit, as *Wieder* deals exclusively with the employment relationships of professionals in the legal profession and Plaintiff fails to articulate why the exception created in *Wieder* applies to the instant case, 3) Plaintiff's contention that the *Wieder* exception should apply in this case constitutes an impermissible assertion of a new theory of law not previously argued on the underlying motion, and 4) Plaintiff impermissibly rehashes arguments previously raised in her opposition to Defendants' prior

motion to dismiss. Additionally, no court has applied the reasoning of *Wieder* outside of the legal profession, and *Wieder* is distinguishable on its facts insofar as the *Wieder* plaintiff faced the choice of knowingly violating his ethical duties and keeping his job while Plaintiff alleges that Defendants photocopied her signature without her knowledge or consent. Further, Plaintiff fails to plead any facts showing that Jerome Medical was aware of the alleged misconduct and therefore under a duty to act, and *Wieder* deals with contractual duties implied in law as opposed to fiduciary duties. Finally, Defendants argue that they are entitled to recover attorneys' fees and costs, pursuant to 22 N.Y.C.R.R. § 130-1.1, incurred in connection with their opposition to the instant motion and a related action commenced by Plaintiff in Queens County.

On reply, Plaintiff argues that she "fully understands" that the *Wieder* exception to the employment at-will doctrine has been narrowly construed to apply to the legal profession. Plaintiff seeks to highlight the similarity of the ethical rules and considerations of the legal and medical professions, and the fact that the Code of Medical Ethics has a similar self-regulating function that extends to the reporting of incompetent or unethical behavior. Additionally, Defendants have not shown that Plaintiff's motion is sanctionable, as the Court conducted a pre-motion conference call and did not object to the filing of Plaintiff's motion.

#### RULING OF THE COURT

##### A. Motion to Reargue

A motion for leave to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." *Matter of American Alternative Ins. Corp. v. Pelszynski*, 85 A.D.3d 1157, 1158 (2d Dept. 2011), quoting CPLR § 2221(d)(2). A motion to reargue, however, is not designed to provide unsuccessful parties with successive opportunities to reargue previously decided issues. *Williams v. Abiomed, Inc.*, 173 A.D.3d 1115, 1116 (2d Dept. 2019). Similarly, a motion to reargue is not an opportunity for a party to advance a new theory of law. *Frisenda v. X Large Enterprises, Inc.*, 280 A.D.2d 514, 515 (2d Dept. 2001). See also *Sheldrake River Realty, LLC v. Village of Mamaroneck*, 106 A.D.3d 1075, 1076 (2d Dept. 2013).

### B. Relevant Legal Principles

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).

In *Wieder*, the plaintiff-attorney sued his former law firm and claimed that he was wrongfully discharged because he insisted that the law firm comply with the applicable disciplinary rules by reporting professional misconduct allegedly committed by another associate. *Wieder*, 80 N.Y.2d at 631. The Court of Appeals held, *inter alia*, that notwithstanding his status as an at-will employee, the plaintiff stated a viable claim for breach of contract based on an implied-in-law obligation in his relationship with defendants. In so holding, the Court concluded that intrinsic to the relationship between the plaintiff and the law firm was the “unstated but essential compact” that both the plaintiff and the firm would practice law in compliance with the prevailing rules of conduct and ethical standards of the profession. *Id.* at 637-38. By insisting that the plaintiff act unethically and in violation of one of the primary professional rules – that each lawyer has a duty to report any potential violations of the disciplinary rules that raise a substantial question as to an attorney’s honesty, trustworthiness, or fitness in other respects – the law firm’s conduct “amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.” *Id.* at 636-38.

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

Plaintiff’s motion to reargue is denied. Plaintiff’s motion is a conspicuous attempt to advance a new legal theory. Indeed, Plaintiff did not so much as cite *Wieder v. Skala*, a 1992 Court of Appeals decision, in her underlying Motion to Amend. In any event, *Wieder* has no discernable applicability to Plaintiff’s proposed breach of fiduciary duty claim against Dr.

Florimon. *Wieder* involved a breach of contract claim based on a narrow implied-in-law obligation to practice law in accordance with a particular disciplinary rule. Here, Plaintiff seeks to assert an entirely different cause of action for breach of fiduciary duty. The fact that medical professionals, like attorneys, are subject to ethical rules, does not transform the *Wieder* Court's conclusion that the plaintiff-attorney stated a breach of contract claim into the basis for a breach of fiduciary duty claim by Dr. Martinez against her employer. Moreover, as set forth more fully in the May Order, Plaintiff's allegations regarding Dr. Florimon's purported fiduciary duty – which appear to be premised upon Dr. Florimon's alleged failure to create a workplace where Dr. Martinez was free from pecuniary harm, professional harm, and privacy and confidentiality violations– lack particularity and coherence. See Blodnick Affm. at Exh. A, at pp. 6-7.

The Court denies Defendants' request for sanctions. Defendants have not filed a cross-motion and their application for sanctions is not properly before the Court. Moreover, while Plaintiff's motion is without legal merit, it does not rise to the level of frivolity sufficient to warrant sanctions. Defendants' reference to Plaintiff's commencement of a separate action in Queens County has no relevance to the question of whether sanctions should be imposed based on the legal arguments propounded in Plaintiff's motion to reargue.


#### CONCLUSION

Plaintiff's motion to reargue is denied. The parties are reminded of the conference scheduled for October 24, 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  
September 24, 2019

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

**ENTERED**  
SEP 26 2019  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE