

Delisi v Memorial Sloan-Kettering Cancer Ctr.
2020 NY Slip Op 30350(U)
February 4, 2020
Supreme Court, New York County
Docket Number: 150184/2019
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ

PART

IAS MOTION 47EFM

Justice

-----X

SUZANNE DELISI

INDEX NO. 150184/2019MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 001

- v -

MEMORIAL SLOAN-KETTERING CANCER CENTER,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for

DISMISS

Plaintiff Suzanne Delisi, who was the life partner of Louis Bradford Paar, commenced this action against the defendant Memorial Sloan-Kettering Cancer Center based on its alleged refusal to allow plaintiff to visit Mr. Paar while he was hospitalized at the defendant's facility from January 25, 2018 until his death in February 2018. In her complaint, plaintiff asserts three causes of action against defendant: (1) violation of Public Health Law § 2805-q; (2) tortious interference with contract; and (3) intentional infliction of emotional distress. Defendant now moves pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action.

Public Health Law § 2805-q provides that "[n]o domestic partner . . . shall be denied any rights of visitation of his or her domestic partner . . . when such rights are accorded to spouses and next-of-kin at any hospital, nursing home or health care facility." Defendant argues that they are immunized from liability under Public Health Law § 2986(1), which provides that "[n]o health care provider or employee thereof shall be subjected to criminal or civil liability . . . for honoring in good faith a health care decision by an agent" According to defendant, the

hospital employees were acting pursuant to the directives of Mr. Paar's health care proxy and, in any event, Public Health Law § 2805-q does not give plaintiff a private right of action.

Public Health Law § 2805-q does not expressly permit recovery by a domestic partner for damages based on the alleged improper denial of visitation rights. "Consequently, recovery may be had only if a legislative intent to create such a right of action is fairly implied in the statutory provision and its legislative history. *Haar v. Nationwide Mutual Fire Ins. Co.*, 2019 N.Y. Slip. Op. 08445, 2019 WL 6183610, at *2 (2019) (holding that Public Health Law § 230(11)(b) does not imply a private right of action to a physician based on alleged lack of good faith in reporting misconduct) (internal citations and quotations omitted). Courts consider three essential factors in determining whether a private right of action can be implied from a statute and its legislative history: "(1) whether the plaintiff is one of the class for whose particular benefit the statute was enacted; (2) whether recognition of a private right of action would promote the legislative purpose; and (3) whether creation of such a right would be consistent with the legislative scheme." *Id.* (internal citations and quotations omitted). All three factors must be satisfied before an implied private right of action will be recognized. *Id.*

With respect to the first factor, plaintiff alleges she is a "domestic partner" in her complaint. Based on the plain text of the statute and its legislative history, the legislature made clear that the provision was intended to protect domestic partners and patients against discrimination by affording them with the same visitation rights as those afforded to patients and their spouses. (Sponsor's Mem, Bill Jacket, L 2004, ch 471).

With respect to the second factor, "whether recognition of a private right would promote the legislative purpose" of the statute, the answer is less clear. Obviously, giving domestic partners the right to bring a private cause of action under this statute would help ensure that their

visitation rights are not improperly denied. However, the parties did not cite any statute or case permitting the spouse or next of kin of a patient to recover damages based on the hospital's refusal to permit visitation and the court's independent research resulted in no such statute or case. Since the stated purpose of the statute was to prevent discriminatory practices, giving such rights to domestic partners where no such rights are available to a patient's spouse or next of kin would not promote the legislative purpose of the statute.

Finally, the third factor of the analysis, "whether creation of such a right would be consistent with the legislative scheme," also militates against recognition of an implied right of action. The Public Health Law explicitly confers a private right of action to patients based on the alleged denial of "any right or benefit," including, notably, the patient's right to authorize those family members and other adults who will be given priority to visit. Public Health Law §§ 2801-d(1) and 2803-c(3)(o). These two sections explicitly give patients the right to sue for damages for the alleged deprivation of a patient's rights or benefits. *See Zeides v. Hebrew Home*, 300 A.D.2d 178, 179 (1st Dep't 2002). By contrast, Public Health Law § 2805-q does not include explicit language granting domestic partners the right to sue for damages "and none may be judicially engrafted." *DeCintio v. Lawrence Hosp.*, 299 A.D.2d 165, 166 (1st Dep't 2002) (citing *Patrolmen's Benevolent Assn. v. City of New York*, 41 N.Y.2d 205, 208 (1976); holding that Public Health Law 29-C does not permit recovery by a health care proxy for his individual damages); *see also* McKinney's Cons. Laws of N.Y., Book 1, Statutes §§ 240, 310(c).¹ Moreover, even if plaintiff could sue for damages under the statute, Public Health Law § 2986(1) immunizes defendant from any liability for honoring the directives of a patient's health care proxy, as plaintiff admits occurred in this case. Complaint, ¶ 69. Thus, the first cause of action

¹ The court does not reach the issue of whether a domestic partner may sue for equitable relief under Public Health Law § 2805-q.

must be dismissed as it does not afford plaintiff with a private cause of action for damages against the hospital.

In the second cause of action, plaintiff alleges that defendant tortuously interfered with her alleged agreement with Mr. Paar whereby plaintiff and Mr. Paar allegedly agreed that plaintiff would manage Mr. Paar's medical and financial affairs. Complaint, ¶¶ 9, 86. In order to state a claim for tortious interference with contract, a plaintiff must plead that its contract with a third party has been breached. *NBT Bancorp Inc. v. Fleet/Norstar Financial Group*, 87 N.Y.2d 614 (1996). Here, plaintiff has not pled the basic elements of her contract with Mr. Paar as she fails to set forth what consideration was provided by Mr. Paar in exchange for plaintiff's alleged agreement to manage his affairs. Moreover, plaintiff has not pled that the defendant's actions caused Mr. Paar to breach any such alleged agreement, which is required to state a claim for tortious interference with contract. *See Farkas v. River House Realty Co.*, 173 A.D.3d 405, 406 (1st Dep't 2019). Accordingly, this claim will be dismissed.

Finally, plaintiff's cause of action for intentional infliction of emotional distress must also be dismissed as the pleading falls short of the extreme and outrageous conduct required to support this claim, particularly given plaintiff's admission in her allegations that defendant was acting pursuant to the wishes of Mr. Paar's health care proxy. *Brankov v. Hazzard*, 142 A.D.3d 445, 447 (1st Dep't 2016). Accordingly, it is

ORDERED that the motion is granted and the complaint is dismissed, with costs and disbursements awarded to defendant, and the Clerk shall enter judgment accordingly.

2/4/20

DATE

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PAUL A. GOETZ, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

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GRANTED

☐

DENIED

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GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE