

Practice Ctr. Concord Rusam, Inc. v Bavrovska

2021 NY Slip Op 33334(U)

July 15, 2021

Supreme Court, Westchester County

Docket Number: Index No. 56810/2019

Judge: Terry Jane Ruderman

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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PRACTICE CENTER CONCORD RUSAM, INC.,

Plaintiff,

Index No.: 56810/2019
Motion Sequence No. 2

-against-

DECISION and ORDER

MARTA BAVROVSKA,

Defendant.

-----X
RUDERMAN, J.

The following papers were considered in connection with the motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff as to all counterclaims asserted against it by defendant:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Affidavit, Exhibits A - T	1
Affirmation in Opposition, Affidavit, Exhibits 1 - 39,	2
Reply Affirmation, Affidavit ¹	3

Plaintiff Practice Center Concord Rusam, Inc. ("Practice Center") asserts that it provides administrative coordination for a distance learning program conducted by an entity called the Obninsk Center, which provides professional retraining for individuals with prior medical

¹ While defendant has filed a separate motion for leave to file a sur-reply, such motion is unnecessary since this Court will not consider evidentiary materials submitted for the first time with reply papers. "[A] party moving for summary judgment cannot meet his or her prima facie burden by submitting evidence for the first time in reply" (*Wells Fargo Bank, N.A. v Lefkowitz*, 171 AD3d 843, 844 [2d Dept 2019]). Exhibits U - CC to Kurashvili's Reply Affidavit, the Vallarelli Affidavit, and Exhibits 1 - 5 were not considered.

training from Russia who are seeking to obtain qualifications for employment in this country, such as retraining to become registered nurses. Plaintiff's complaint asserts that defendant Marta Bavrovska submitted an application to the Obninsk Center through Practice Center staff in early 2016. Plaintiff claims that Bavrovska knew of, but ignored, the program requirement for clinical training. Indeed, in plaintiff's view, the crux of defendant's counterclaims is that she is entitled to be a registered nurse in the State of New York without undertaking the required clinical practice component of the training.

According to plaintiff, defendant has told Obninsk Center applicants, students, graduates, staff members, community members and government officials, that the Practice Center, its staff, and the Obninsk Center are "frauds," "liars," "cheats," or "criminals," and that the Obninsk Center "does not exist," and that an Obninsk Center diploma is "useless." It is asserted that defendant has falsely stated to these persons that she was never informed of the clinical retraining requirement and that plaintiff failed to provide her with any opportunity to complete the clinical retraining requirement; in addition, defendant is said to have falsely stated that Practice Center staff told her and other students to lie to State Education Department officials about completing the clinical retraining requirement. According to the complaint, defendant has threatened to assert claims against plaintiff for fraud and other purported misconduct, and to continue making her false statements against plaintiff, its owners, and related businesses, unless plaintiff provides her with cash payment of \$100,000.

The complaint seeks a declaratory judgment stating, in effect, that it has acted properly, in addition to seeking compensatory and punitive damages based on such causes of action as tortious interference with business relations and defamation.

Defendant's answer includes counterclaims for breach of contract, negligence, deceptive business practice, and intentional infliction of emotional distress.² Defendant alleges in her answer that in January 2017 she enrolled at Practice Center Concord Rusam, Inc. (which she calls "Concord Rusam"), with the goal of qualifying for the nursing licensing exam. She states there that Concord Rusam advertised that upon completion of its program, students would be eligible to take the National Council Licensure Exam ("NCLEX") nursing exam, and that she was not advised that additional clinical practice/training was required in order to qualify for the NCLEX nursing exam, nor did plaintiff provide such practice/training as part of its educational program. She asserts that she paid \$12,500 to Concord Rusam, completed the program, and was issued a diploma in January 2018, which document stated that she had completed 1,018 hours of clinical nursing. She further alleges that on or about December 8, 2018, she received a telephone call from Zinaida Frenk, whom she asserts was the Director of Concord Rusam, who told defendant that if any person or agency asks about the clinical portion of the Concord Rusam program, defendant should falsely claim that clinicals had been completed in Russia. Further, if any person making inquiries wanted to confirm the claimed travel to Russia, defendant was told to respond that her passport was lost or stolen. Defendant states that she responded to Freink that she would not lie. On or about May 6, 2019, her diploma was revoked. In addition, defendant claims, members of Concord Rusam, owners, employees and agents began a campaign of harassment and intimidation against her.

² Defendant's counterclaims for harassment and attorneys' fees were previously dismissed by this Court's order dated October 29, 2019.

Plaintiff's motion for summary judgment dismissing defendant's counterclaims

In moving for summary judgment dismissing the counterclaims, plaintiff submits in support the affidavit of Yuri Kurashvili, who now states that he is president, sole director, and sole shareholder of plaintiff Practice Center (in the previous motion, he stated that he was a consultant for the Practice Center). Kurashvili's affidavit contains assertions as to what other people told defendant, and as to events that occurred when he was not present. For instance, he states: that upon her admission to the program, defendant received a handout from the Practice Center that expressly references the Obninsk Center; that Obninsk Center representatives communicated numerous times with defendant about how she could complete the clinical training requirement; and that defendant was given numerous, flexible options to complete her clinical retraining requirement before an extended deadline of May 1, 2019.

The Practice Center also submits the deposition testimony of Zinaida Frenk, who describes herself as its part-time consultant; at that deposition, Frenk testified, inter alia, that she advised defendant of the Obninsk Center's options for completing the required clinical training.

The central point of the Practice Center's assertions on this motion is that defendant knew all along of the clinical retraining pre-requisite for taking the NCLEX nursing exam, and simply attempted to obtain the nursing credential without taking part in the clinical training, and that her counterclaims are prompted by a desire to punish the Practice Center for her own failure to complete the program.

Plaintiff argues that (1) defendant's breach of contract claim must be dismissed because it is uncontroverted that defendant had knowledge of the clinical requirement, and simply refused to fulfill that requirement; (2) defendant's negligence claim is a mere restatement of her contract

claim, and Practice Center owed defendant no duty outside of the parties' contractual relationship; (3) defendant's claim under General Business Law ("GBL") § 349 must be dismissed because the business practice of requiring clinical practice to become a registered nurse in New York was repeatedly disclosed; (4) defendant's intentional infliction of emotional distress claim must fail because the statements were allegedly made by Anton Rujitsky, who helped defendant find a clinical program in the Ukraine after she decided that she no longer wanted to travel to Russia for clinical practice, and Rujitsky's statements cannot be attributed to the Practice Center because it was not legally responsible for him. Plaintiff also points out that although defendant alleges that threats were made to her parents in the Ukraine, it was disclosed during discovery that they reside in Pennsylvania.

Based on the Kurashvili affidavit, the depositions and the submitted documentation, plaintiff argues that defendant's factual assertions have been conclusively disproved.

Defendant's opposition, in support of the counterclaims

In opposition, defendant submits her own affidavit and deposition testimony, and a number of documents in support. Her affidavit explains the following: she obtained a medical degree in Lviv, Ukraine, in 2009, and worked as a medical doctor in Ukraine thereafter, but in 2013 decided to join her family in this country, and ultimately decided to become a licensed Registered Nurse here. She describes learning about Concord Rusam at the end of 2016, and speaking with Zinaida Frenk in January 2017 and then traveling from Philadelphia to New York to meet with Frenk about Concord Rusam's retraining program. She states: "During the January 23, 2017 meeting with Zinaida Frenk I was informed that Concord Rusam offered a retraining program through Obninsk Center located in Russian Federation, and that upon graduation I

would get a diploma from Obninsk Center, which would qualify me to sit for the NCLEX-RN exam.” Defendant reports that Frenk told her: “1) that Concord Rusam was a licensed and legal school, 2) Concord Rusam has a contract with Obninsk Center, 3) lectures would be televised live from Concord Rusam classrooms located in Manhattan; however, each class was also simultaneously recorded and available for rewatching later, 4) Links to watch the live lectures would be sent by email before the class, 5) I would be able to submit my homework to Concord Rusam by email, 6) and that final exam was in Russian.”

Importantly, defendant states, “There was no mention of any clinical training in the United States, in Russian Federation, Ukraine, or anywhere else in the world. In fact, it was I who had to inquire as to whether any clinical training was needed to graduate, to which Ms. Frenk responded no since I already had all my clinical training done in the Lviv National Medical University in Ukraine and already had a doctor's diploma which included numerous clinical practice hours.”

Defendant submits as exhibits the enrollment form she signed on January 23, 2017, and the document that she says accompanied it, entitled “Rules and Policies,” which includes four items concerning payment, and two items concerning its program, which read as follows:

- “1. Practice Center CONCORD RUSAM INC. (PCCR, Inc.) shall be responsible for facilitating the education Re-training Course for Registered Nurse.
- “2. PCCR, Inc. guarantees the delivery of the Nursing Diplomas to the students upon successful completion of the course of studies and receipt of the full payment.”

Defendant specifically denies having signed, on March 3, 2016, the application form on which plaintiff relies (see plaintiff's exhibit J), and she refers to that document as a sham and a forgery. She suggests that plaintiff will not be able to provide any support for this document, and

proposes that it was created to make it appear that defendant was provided with a two-year education, in compliance with New York State law, and to demonstrate that defendant was provided with a Rules and Policies sheet that advised her about the requirement of clinical training in Obninsk. She further challenges the legitimacy of the purported March 3, 2016 application with an email from Concord Rusam dated January 31, 2017, saying "Dear Students, Welcome to the Re-Training program! Tonight you have the first Lecture!"

Defendant explains that she attended remote live classes from January 31, 2017 until graduating in January 2018. On January 18, 2018 she traveled to Concord Rusam to take the final exam, then on January 22, 2018 she traveled there again to file her dissertation and receive her diploma, which was personally handed to her by Yuri Karashvili. The diploma, a copy of which is attached as an exhibit, stated that defendant attended the Obninsk Center retraining program from March 21, 2016 until January 19, 2018, graduating with 3,500 hours of retraining, including 1,018 hours of practice. Defendant indicates that she inquired as to why the diploma stated that she attended the program beginning on March 21, 2016, and reported that she had 1,018 practical hours, and Frenk told her that the school used theoretical and clinical hours from her Lviv Medical University transcript, which Frenk said were permitted by regulations.

When defendant submitted her Obninsk Center diploma to CGFNS, an independent organization that verifies nursing credentials, that organization requested verification from the Obninsk Center of defendant's completion of all requirements, including 1018 hours of clinical practice. In September 2018, CGFNS received a transcript from Obninsk Center, which stated that defendant had completed 1018 hours of clinical practice and qualified to take the NCLEX-RN exam. Then, on December 3, 2018, defendant received an email from Roseanna

Ristau, an Education Credentials Specialist with the New York State Department of Education. Ristau asked defendant where and how she completed the curriculum for the nursing program at Obninsk Center, where she completed the clinical practicum in nursing, and the amount of time she spent on it.

According to defendant, Frenk responded to her inquiries by telephone on or around December 7, 2018, saying that approximately 20 to 25 other students received the same email from Ristau, requesting verification of clinical practice that none of them had performed. Frenk told defendant that Obninsk Center and Concord Rusam never had any clinical practice portion in New York State, and that if anyone asked her, she should say that she completed her clinical practice in Russian Federation, at the Obninsk Center, and that if anyone asked for her passport or tickets as verification, she should reply that they were lost or stolen. Instead, defendant informed Ristau that she completed the curriculum at the Concord Rusam location in Manhattan, which provides its program in conjunction with Obninsk Center, and that she was told that no practice requirement was imposed on graduates with medical diplomas.

Defendant asserts that plaintiff thereafter started a campaign of harassment and intimidation against her, and, in addition, created a bogus paper trail to create a false narrative in anticipation of litigation and potential government investigation and prosecution. That paper trail involves two letters relied on by plaintiff, both of which defendant suggests were prompted by a February 1, 2019 letter of inquiry, which was not disclosed in discovery, but was apparently sent to the Obninsk Center and/or Concord Rusam from the Director of New York State's Office of Professions. The first document discussed by defendant is a letter addressed to defendant, with a date of January 28, 2019 (plaintiff's exhibit O), although defendant states that it was only

forwarded to her as an attachment to a February 13, 2019 email. That letter states that Obninsk Center recently realized that defendant did not complete her practical hours and needed to do so either at Obninsk Center, or at some other place with which Obninsk Center has an agreement. Defendant suggests that the January date was used to create the impression that Obninsk Center discovered defendant's lack of practicum hours before it received the state agency's inquiry on the subject. The second letter defendant discusses is from Obninsk Center to the Director of New York State's Office of Professions, dated February 7, 2019 (plaintiff's exhibit P), which specifies that it is written in response to the February 1, 2019 inquiry. That letter describes defendant as "a potential 2018 Obninsk Educational Center graduate who required clinical hours to meet requirements of program completion," and asserts that she was scheduled to return to Obninsk Educational Center to complete her clinical hours, but despite her initial agreement to return, she "changed her mind and declined this offer thus not completing the requirements for graduation." The letter ascribes the fact that defendant was given a diploma to a "technical error." Defendant contends that the assertions in the February 7, 2019 letter are false.

Defendant also discusses an email she received on February 17, 2019 from Judy Vallarelli, the consultant for plaintiff, in which Vallarelli stated that defendant had the option to complete the clinical practice by May 1, 2019 by "returning" to the Obninsk Center (where defendant had never been). Defendant points out that, contrary to many previous statements by plaintiff's representatives, Vallarelli asserted in this email that "there are no clinical agreements in the USA."

Discussion

The basis of plaintiff's argument for summary judgment dismissing defendant's contract claim is that "it is uncontroverted that defendant had knowledge of the clinical requirement." However, it has not established that assertion. On the contrary, defendant has consistently asserted that from her enrollment in January 2017 until her completion of the program in January 2018, she was not told at any point that she had to undertake any clinical practice as part of the program. Therefore, the aspect of its motion concerning defendant's counterclaim for breach of contract lacks merit. Issues of fact are presented as to whether plaintiff breached terms of its contract with defendant.

Defendant's negligence counterclaim asserts that plaintiff negligently failed to disclose to her the applicable clinical practice requirement, which it had a duty to do, that it negligently, recklessly, and carelessly advertised its education practices with inaccurate information, and that it negligently failed to ensure that its students would satisfy all qualifications for eligibility for the NCLEX-RN nursing exam. These claims are arguably distinct from the claim that plaintiff breached its obligations under its contract with defendant, and issues of fact with regard to those claims preclude summary judgment dismissing the negligence cause of action.

Defendant's counterclaim alleging a violation of General Business Law ("GBL") § 349 must also stand. GBL § 349 prohibits deceptive business practices. A prima facie showing is made out by evidence (1) that a consumer-oriented practice was deceptive or misleading in a material respect, and (2) that the claimant was injured (*see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 343 [1999]). Defendant has presented evidence that plaintiff engaged in such a deceptive practice and that she was injured thereby. Plaintiff's contention that the Practice

Center was merely an administrative consultant and provided no educational services whatsoever, is a disputed claim, and does not entitle plaintiff to summary judgment on this cause of action.

The counterclaim sounding in intentional infliction of emotional distress survived plaintiff's dismissal motion, based on defendant's claim that plaintiff engaged in a "deliberate and malicious campaign of harassment or intimidation" (*see Eves v Ray*, 42 AD3d 481, 483 [2d Dept 2007], quoting *Nader v General Motors Corp.*, 25 NY2d 560, 569 [1970]), with the use of "menacing phone calls" or "personal threats to [the claimant's] physical safety (*see Gray v Schenectady City School Dist.*, 86 AD3d 771, 772 [3d Dept 2011]).

In her opposition to plaintiff's motion for summary judgment regarding this cause of action, defendant submits her own affidavit asserting that

"[o]n or around February 13th or 14th, 2019, a man by a name of Anton Rujitsky, unannounced, showed up at my father's home located in Lviv, Ukraine. Neither my father nor I ever met or spoke to Mr. Rujitsky before this visit. Mr. Rujitsky told my father that I am causing a lot of problems for very important people, and that I need to go to the hospital associated with Lviv National Medical University in order to complete practical training.

"When it became clear that I will not travel outside of U.S. for practical training, Anton Rujitsky started threatening my father and me, in part telling my father that Yuri Karashvili is a very powerful person with lots of resources, and since I was a nobody, he would crush me, destroy my family and my life. He also told my father that Yuri Karashvili could make it so that my father would never to leave Ukraine and return to the United States."

The foregoing is pure hearsay, since it consists of a statement by defendant of what Anton Rujitsky reportedly said to defendant's father. While "hearsay may be considered in opposition to a motion for summary judgment, it is insufficient to raise a triable issue of fact where, as here, it is the only evidence upon which opposition to the motion was predicated" (*Alpha Invs., LLC v.*

McGoldrick, 151 AD3d 800, 802 [2d Dept 2017]). As the only submitted evidence on this cause of action, it may not be relied on to establish the existence of an issue of fact.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted only to the extent that the counterclaim for intentional infliction of emotional is dismissed, and is otherwise denied; and it is further

ORDERED that the parties are directed to appear in the Settlement Conference Part on a date and in a manner of which they will be notified by that Part.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
July 15, 2021


HON. TERRY JANE RUDERMAN, J.S.C.