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| <b>Zywiec v Brooklyn Hosp. Ctr.</b>                                                                                                                                                                                            |
| 2023 NY Slip Op 31151(U)                                                                                                                                                                                                       |
| April 6, 2023                                                                                                                                                                                                                  |
| Supreme Court, Kings County                                                                                                                                                                                                    |
| Docket Number: Index No. 537321/2022                                                                                                                                                                                           |
| Judge: Ingrid Joseph                                                                                                                                                                                                           |
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6<sup>th</sup> day of April, 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW  
YORK COUNTY OF KINGS

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ANDREW ZYWIEC, M.D.,  
Plaintiff (s),

-against-

THE BROOKLYN HOSPITAL CENTER,  
Defendant(s).

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**The following e-filed papers considered herein:**

Complaint/Order to Show Cause/Affirmation in Good Faith....  
Memo in Opposition/Affidavits in Opposition/Exhibits Annexed....  
Reply/Affidavits in Support/Exhibits Annexed.....

**DECISION AND ORDER,**

Mot. Seq. No. 1

Index No. 537321/2022

**NYSCEF E-filed docs**

2; 18-21  
49-74  
75-84

Andrew Zywiec, ("Plaintiff"), a second-year resident in the Brooklyn Hospital's ("Defendant") Pediatric Residency Program, commenced this action by filing a summons and verified complaint, on December 21, 2022. In his complaint Plaintiff alleges a cause of action against the Defendant based on Labor Law § 740(2). Plaintiff claims that the Defendant has and will take retaliatory action against him because he disclosed activities or practices of the Defendant that he claims are in violation of a law, rule, or regulation, and that these violations created a substantial and specific danger to the public and to him. Issue was joined by the answer filed by Defendant's attorney on January 17, 2023.

An Order to Show Cause ("OSC"), and Plaintiff attorney's affirmation of good faith were originally filed on December 21, 2022 ("December OSC"). The December OSC was not signed, however, a second OSC and Plaintiff attorney's good faith affirmation which included notice to be heard on February 9, 2023, were filed on February 7, 2023. The OSC was rejected on February 9, 2023, pursuant to Uniform Civil Rules § 202.7 (f).<sup>1</sup> The OSC was submitted again on February 10, 2023, without an affidavit of the Plaintiff or affirmation in support by Plaintiff's attorney and without the appearance of Defendant's attorney. However, the OSC was signed on February 10, 2023, by Justice Ottley, the Part 72 judge. The signed OSC granted the relief requested by the Plaintiff, namely, to:

<sup>1</sup> On February 10, 2023, the Plaintiff's attorney submitted a copy of the original good faith affirmation filed on February 7, 2023, with an email receipt of notice to Defendant and language indicating that "the matter was being submitted Thursday-February 9, 2023, at 10:00 a.m. and that "prejudice will befall the Plaintiff if this matter is not determined on an *ex parte* basis."

- (1) Temporarily restrain and enjoin Defendant from taking any action to terminate the Plaintiff's pay or otherwise act in a manner which will in any way alter the terms and conditions of his employment as Resident, including, without limitation, requiring him to appear for work in light of the danger presented to him by third party threats against his life which Defendant had denied were made.
- (2) Prohibiting the Defendant from destroying or altering any or all records and communications by or about Plaintiff, including but not limited to any and all current and historical communications and/or information contained in his email account; and
- (3) Ordered to provide Plaintiff unlimited access to this e-mail account in keeping with his role as a resident of Defendant hospital.

Additionally, the OSC required that Personal Service be made on the attorney for the Defendant on or before February 15, 2023, and it was returnable on March 1, 2023, in Part 83. Plaintiff's affidavit and his attorney's affirmation in support of the February 10, 2023, OSC were filed on March 1, 2023. On February 27, 2023, Defendant filed opposition papers to the February 10, 2023, OSC. On March 1, 2023, oral argument was held virtually, and the matter was marked fully submitted.

On February 13, 2023, Defendant filed an OSC seeking to vacate Plaintiff's OSC. Plaintiff's opposition was filed on February 17, 2023, however, this OSC and the accompanying documents were withdrawn on March 14, 2023, following a virtual conference with the parties.<sup>2</sup> Thereafter, a plethora of documents and communications were filed by the parties. These documents will not be considered by this Court since an emergency OSC allows only for opposition papers pursuant to Uniform Civil Rules § 202.8-c.

In his complaint, Plaintiff alleges that Defendant hospital performs "gender affirming care" which includes the pharmacological treatment, prescription and administration of puberty blockers on minor patients. Plaintiff claims that he has refused to participate in administering such care because of his Christian religious beliefs.<sup>3</sup> Plaintiff alleges that as a result of expressing such views to his peers and because he is the only white, heterosexual, Christian male in the Residency program, he was repeatedly reported to the Defendant's Human Resources Department ("HR") for false allegations of being "anti-LGBT," "anti-gay," "a misogynist," "racist," "a QAnon conspiracy theorist," and "an Islamaphobe."

Plaintiff in his affidavit in support of his OSC in essence asserts two reasons why he should be granted injunctive relief: (1) that there are safety issues to him and the public then and now as a result of Defendant failing to comply with certain mandatory Mental Hygiene procedures that he alleges were not implemented during an incident that occurred in October 2022; and (2) that after he reported the Defendant's failure to comply with the mandatory Mental Hygiene and/or security protocols coupled with his refusal to comply with the Defendant's

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<sup>2</sup> All papers pertaining to Defendant's motion will not be considered or addressed by this Court.

<sup>3</sup> (NYSEF Doc No. 2, complaint; Plaintiff states "that one cannot truly change his or her biological sex and that one's biological sex will always exist as it does at birth and that it is in the best interest of his minor patients who are interested in such care to provide them with information about the dangers such care may cause their long-term health and mental welfare").

gender affirming program, and because of his religious beliefs, that his colleagues have taken retaliatory action by making false complaints against him and that the Defendant will use some pretextual reason to fire him causing irreparable harm to him and his career.

Plaintiff alleges that an incident occurred on October 20, 2022,<sup>4</sup> that caused him to currently fear for his safety if he were to return to work. According to Plaintiff, a former male patient, ("Patient X") who Plaintiff alleges had "oppositional defiant disorder and conduct disorder" and had previously been removed from the hospital for being aggressive, was brought into the locked Pediatric Emergency Department ("PEDs") by Defendant's security personnel. Plaintiff claims that Patient X had already been behaving in a dangerous and violent manner when he was brought into the locked PEDs and while there he declared that he was a "gang banger" and used loud and threatening statements. Plaintiff also alleges that Patient X repeatedly reached into his hoodie as if he was looking for a weapon and claimed that he "will end everybody here" and put his hand up like a gun, pointed to Plaintiff and said, "I'll put one in you" and that prior to being removed, Patient X told Plaintiff that he would "see him outside."

Plaintiff argues that pursuant to Mental Hygiene Law § 9.39, Defendant was obligated to admit Patient X to the hospital as a patient for a minimum of 72 hours, and that the security personnel were obligated to call the police as part of their security protocol. However, neither Defendant's security detail nor the medical personnel performed or fulfilled their duties. Plaintiff claims that even after Patient X threatened the nurses behind the nursing station, and scared other patients, the hospital's security complained and sided with Patient X and failed to enforce the security protocol to call the police and that he was the one to call the police. Plaintiff maintains in his affidavit and complaint that he immediately reported the incident to his superiors including the Head of Emergency Medicine, Dr. Steve Miller, and Dr. Patil, who he claims witnessed the incident and who noted that Patient X had been aggressive with them in the past. Plaintiff maintains that because of the failures of the hospital and security to act in keeping with protocol, the threats of Patient X and potential future encounters has presented and will present specific danger to his life and personal safety.

In the complaint, Plaintiff also states that shortly after the October incident, he contacted Dr. Miller, the supervising physician on duty and advised him of what happened. Plaintiff claims he informed Dr. Miller that he would not come to work under circumstances where he believed his life is in danger, but was advised by Dr. Miller that he should still come to work.<sup>5</sup> Plaintiff states, in his affidavit, that on November 4, 2022, he advised his direct superior, Dr. Louisdon Pierre, that he was sick and needed to go home because he was suffering from the effects of stress caused by the October incident and the ongoing discriminatory animus against him by other staffers. Plaintiff also alleges that while gathering his belongings to leave, the Chief Resident, Dr. Amanda Gordon approached him and asked him for a "sign out" of his patients, which Plaintiff states is not required and is not the standard protocol in instances when a doctor

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<sup>4</sup> There is a discrepancy as to the exact date of the October incident. Plaintiff's Complaint cites October 20, 2022 and Defendant's memo in opposition cites October 25, 2022.

<sup>5</sup> No affidavit of Dr. Miller has been submitted.

goes home sick. On November 6, 2022, Plaintiff claims that he wrote an email to several supervisors and colleagues including Drs. Miller, Asarian, Williams, Kondamudi, Tolbert, Pierre, Patil, and Pothuri, detailing the October 25, 2022, incident and advising that he would not return to work while his life was endangered.<sup>6</sup>

Plaintiff states that on November 7, 2022, Dr. Krata sent him an email with several other doctors copied, stating to “please see the attached memo.”<sup>7</sup> The contents of the attached memo were not submitted, however email threads appear to have informed Plaintiff that he was being placed on paid leave subject to a pending misconduct investigation. Plaintiff filed an inquiry on November 21, 2022, and a revised inquiry on November 29, 2022, with the Equal Employment Opportunity Commission (“EEOC”) with respect to Defendant’s alleged discrimination against him.

Plaintiff alleges, in both his complaint and affidavit, that at some point he was locked out of his email account which contained all of his important contract and union documents, as well as emails to corroborate his story of the alleged discrimination he faced throughout his Residency. Plaintiff also alleges that he has been denied representation by the union with respect to the investigatory meeting as well as his inquiry with the EEOC, further evidencing Defendant’s retaliatory behavior. The investigatory meeting was scheduled for December 22, 2022 but was held virtually on January 19, 2023. Plaintiff claims, that during that meeting, he was told to provide a psychological evaluation by February 10, 2023, and report to work or he will be terminated. Plaintiff claims that this was the underlying basis for the *ex parte* application.

Defendant, in opposition to Plaintiff’s OSC, claims that Plaintiff obtained an improper Temporary Restraining Order (“TRO”) because Defendant was not given an opportunity to oppose the TRO on February 10, 2023, the day that the OSC was signed. As a result, Defendant states the hospital has been severely harmed not only by the expense of defending this case, but also by Plaintiff’s disruptive behavior including harassment towards hospital staff and his social media presence, which has exposed the hospital to scrutiny from the medical community and negative publicity.<sup>8</sup> Moreover, Defendant contends that there was no imminent threat to Plaintiff’s life on February 10, 2023, the date the TRO was granted, or now.

Defendant argues that Plaintiff’s Labor Law § 740 claim has little chance of success on the merits because no adverse or retaliatory actions have been taken by the hospital against Plaintiff. Defendant denies that it has threatened to terminate Plaintiff. Defendant claims that it has repeatedly invited Plaintiff to return to work with the proviso that he submits to a psychological exam. Defendant also informed Plaintiff that if he failed to return or secure an accommodation that he may ultimately be deemed to have abandoned his position.<sup>9</sup>

Defendant contends that the investigatory meeting, scheduled for December 22, 2022, that was referenced in the Complaint has concluded and that Plaintiff is still an employee.

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<sup>6</sup> (NYSCEF Doc No. 11, 64, 78, Plaintiff’s email to hospital).

<sup>7</sup> (NYSCEF Doc No. 80, 81, emails dated 11.7.22 and 11.8.22).

<sup>8</sup> (NYSCEF Docs No. 49, 50, 54, Defendant’s memo of law in opposition; Hoey affirmation in opposition; Hoey exhibit 4 – Zywiec Tweets).

<sup>9</sup> (NYSCEF Docs No. 52, 53, Hoey exhibit 2– letter dated 2.9.23; Hoey exhibit 3– email dated 2.10.23).



Defendant disputes Plaintiff's retaliation claims and contends that it did not receive notice of the October incident from Plaintiff until November 6, 2022, after he became aware that he was under investigation for his alleged unprofessional behavior on November 4, 2022. Defendant also claims that Plaintiff's colleagues, who were either present or contacted by Plaintiff, maintain that the timeline and accounts of the incidents did not occur in the manner or circumstances as described by Plaintiff.

In addressing the October incident, Defendant states that in the early hours of October 25, 2022, there was a disruptive patient in PEDs. Defendant states that the patient made threats, and hospital security responded and intervened. Defendant concedes that Plaintiff called the police who responded but Defendant claims that hospital security did not enable the danger since Patient X was escorted off the premises and no one was touched or injured by the patient and that Patient X has not returned to the hospital. Defendant claims that there is no record that Plaintiff sought to have the patient admitted for mental health reasons and that the only report filed that night was by a security officer. Defendant submits an email statement from Dr. Charishma Pothuri, dated November 8, 2022, sent to Dr. Krata detailing the incident. In her statement, Dr. Pothuri states she was present in PEDs assisting a patient when she heard an argument going on in the hallway between Plaintiff, Patient X, and security personnel. Dr. Pothuri states that Patient X was yelling and making threats, and that another doctor, Dr. Tolbert, came over from the adult emergency department and tried to deescalate the situation, to no avail. Dr. Pothuri states that she and Plaintiff followed Dr. Tolbert back to the adult emergency department side, wherein Dr. Tolbert began looking up Patient X's chart, which showed a documented history of aggressive behavior. Dr. Pothuri states that Plaintiff then called the police requesting to press charges on Patient X for threatening his life. At this point, Dr. Pothuri states that there were already several police officers in the emergency department who went to the pediatric side and removed Patient X.

Defendant also submits an affidavit of John Quinn, Senior Director of the Security Department, who discussed the security protocol that the hospital takes to keep staff and patients safe from threats of violence in general. He specifically highlighted the use of "code green" buttons on phones located throughout the hospital. He stated that the buttons can be pressed by employees to inform security that they are in physical danger. Quinn claims that no code green was ever activated on the date of the October incident in response to Patient X's behavior, nor had the security department received any reports after October 25, 2022, that Plaintiff had any further problem with Patient X or felt threatened by any other patient. Furthermore, in reviewing the incident report that was prepared by an on-duty security officer, Quinn states that the security department acted within protocol by responding right away and attempting to remove the patient, who ultimately was removed by the police. Furthermore, Quinn states he has personally checked the records and there have been no further security incidents involving Patient X, who has not been back to the hospital.

Defendant claims that Plaintiff did not ask leave on November 4, 2022, due to illness but because he was upset after he received a rejection from another residency program and

further submits affidavits from the following people who were present and or participated in the actions leading up to and during the incidents mentioned in the Complaint: Dr. Amanda Gordon, Dr. Lewis Krata, and Dr. Louisdon Pierre. In his affidavit Dr. Krata, an Attending Physician and the Program Director of the Pediatric Residency Program at the hospital, states that he has participated in the hiring and supervision of Plaintiff and that his record at the hospital has been spotty and difficult. Dr. Krata states that Plaintiff's attendance and reliability has been a consistent problem since July 2020, when he was hired, as he has requested and been granted multiple leaves of extended absences from the Program, to allow him to address physical and mental health issues. In addition to his excused absences, Dr. Krata states that Plaintiff has called in sick many times and was on several occasions "no call/no show," which placed immense strain on his fellow residents who would have to take on unexpected additional shifts to cover Plaintiff's work and patients. Furthermore, Dr. Krata claims that on several occasions in 2020 and 2021, Plaintiff engaged in unprofessional behavior when he made very offensive comments to his fellow residents which resulted in a written complaint signed by the entire second-year residents' class in July 2021.<sup>10</sup> Dr. Krata states that this complaint was not made based on Plaintiff's religious or other beliefs but because the residents were complaining about Plaintiff's offensive speech and disruptive behavior and that Plaintiff was given a warning about his behavior shortly after the complaint was received as well as subsequent warnings regarding his attendance. Dr. Krata states that because of the number of his absences Plaintiff was allowed to continue in the Residency Program but was required to repeat his first year and during his second year, Plaintiff has continued to call out and fail to show up for shifts although less frequently than in 2021. Dr. Krata states Plaintiff did not complain to him about Patient X or about feeling unsafe until after Plaintiff was reported by Dr. Gordon as having been unprofessional towards her on November 4, 2022.

With respect to the November 4, 2022, incident, Dr. Krata states that Dr. Gordon contacted him to report that there was an incident on the Pediatric Intensive Care Unit ("PICU") wherein Plaintiff went to attending physician Dr. Pierre claiming that he had to leave prior to the end of his shift, and after Dr. Gordon went to PICU to relieve Plaintiff, he raised his voice, and refused to provide her with a sign out record for his patients before leaving. Dr. Krata states he received an email from Dr. Gordon on November 5, 2022, wherein other staffers were also copied, complaining about Plaintiff's behavior on November 4, 2022. Subsequently, Dr. Krata states that he then investigated the incident and requested statements and had follow up calls from Dr. Gordon and Dr. Pierre. Dr. Krata claims that he is not aware of any formal complaint about the October 25, 2022, incident being made through any of the hospital's reporting systems, nor were any made to him, and that he only became aware of Plaintiff's safety concerns after receiving his November 6, 2022, email. Afterwards, Dr. Krata states he requested the submitted statement from Dr. Pothuri detailing the October 25, 2022, incident.

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<sup>10</sup> (NYSCEF Doc No. 59, Krata exhibit A – class letter (Plaintiff's fellow Residents expressed concerns and issues with Plaintiff including his repeated absences, negative comments made about foreign medical graduates, offensive comments about homosexuality, disrespectful treatment of female staff, and other racist or inappropriate remarks made to his peers).

Dr. Gordon states in her affidavit, that on November 4, 2022, she was notified by Dr. Pierre that Plaintiff, who was covering the PICU, was unable to finish his shift, and his 24-hour call later that night. Dr. Gordon states that when she went to relieve Plaintiff and ask for his sign out sheet, which is required of physicians at the end of their shifts for the next physicians to have during their shift, Plaintiff began to berate her before picking up another sign out sheet and throwing it at her. The following day, on November 5, 2022, Dr. Gordon sent Dr. Krata and other hospital leadership an email regarding Plaintiff's behavior.<sup>11</sup>

In Dr. Louisdon Pierre's affidavit, he states that on November 4, 2022, incident, Plaintiff approached him in his office and was distraught because he was rejected from another residency program, and he did not feel fit enough to finish his shift. Dr. Pierre claims that Plaintiff did not mention any safety incident or anything about a violent patient. Dr. Pierre claims that while Plaintiff was upset and acting agitated, he did not appear to be physically unwell. Also submitted is an e-mail from Dr. Pierre to Dr. Krata dated November 4, 2022, in which he states that Plaintiff was distraught, and he was permitted to leave after he disclosed that his transfer application to a family medicine program in North Dakota was rejected and that he could not continue working his shift.<sup>12</sup>

Defendant also argues that Plaintiff cannot establish irreparable harm because under the law, although loss of employment is most likely to cause severe hardship, it does not cause irreparable damage. Defendant claims that in a recent interview, Plaintiff openly admitted that he is not taking leave because of some alleged fear for his safety but because he objects to the hospital's treatment of transgender youth highlighting that false facts were used to obtain the TRO.<sup>13</sup> Furthermore, Defendant states that the balance of equities is in its favor as Plaintiff will still have his lawsuit and will be able to litigate claims against the hospital without the injunction.

At the outset, the Court notes that procedurally, this order to show cause for injunctive relief was problematic and should not have been granted since Plaintiff did not provide supporting documents such as an affidavit from Plaintiff or an affirmation in support by Plaintiff's attorney setting forth immediate or irreparable harm to Plaintiff, at the time the OSC was submitted, and failed to comply with notice requirements. Pursuant to CPLR § 6311(1), in general, a preliminary injunction may be granted only upon notice to the Defendant. A temporary restraining order, however, may be granted in the interim without notice pending the hearing for a preliminary injunction when it appears that immediate and irreparable injury, loss or damage will result unless the Defendant is restrained before the hearing can be had (CPLR §§ 6301 and 6313[a]). Any application for temporary injunctive relief shall contain, in part, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving notice (*see* Uniform Civil Rules §§ 202.7[f] and 202.8[e]). In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to

<sup>11</sup> (NYSCEF Doc No. 62, Krata exhibit D – Gordon statement).

<sup>12</sup> (NYSCEF Doc No. 70, Pierre exhibit A – email dated 11.4.22).

<sup>13</sup> (NYSCEF Doc No. 49, Defendant's memorandum in opposition at 3).



notify the party, against whom the temporary restraining order is sought, of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application (*Id.*).

Here, Plaintiff's February 7, 2023, application seeking an *ex parte* TRO, was initially rejected pursuant to Uniform Civil Rules § 202.7 (f). On February 10, 2023, Plaintiff's attorney re-submitted a copy of the original application, with an attached email also dated February 7, 2023, notifying the Defendant that an application would be filed on February 9, 2023. No new notice was issued when the OSC was resubmitted and signed on February 10, 2022. Even if Plaintiff argued that no notice was necessary, Plaintiff has failed to demonstrate that he would suffer significant prejudice by giving notice, since the only document submitted in support of the application was the affirmation in good faith which set forth bare conclusory factual allegations and did not provide any substantive arguments or law to demonstrate Plaintiff's entitlement to injunctive relief at the time it was presented for signature. Moreover, temporary injunctions involving labor disputes may only be granted after a hearing which meets requisite statutory requirements (CPLR §6313(a); Labor Law § 807).

Assuming *arguendo*, that the February 10, 2023, *ex parte* application was proper the Court will next consider on substantive grounds whether Plaintiff has satisfied his burden to establish entitlement to continued injunctive relief. The purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of parties on the underlying action while an action is pending (*Zheng v City of New York*, 19 N.Y.3d 556 [2012]; *Shake Shack Fulton Street Brooklyn, LLC v Allied Property Group*, 177 A.D.3d 924 [2d Dept. 2019]). Preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant (*Shake Shack Fulton Street Brooklyn, LLC* at 927; *Saran v Chelsea GCA Realty Partnership, L.P.*, 148 A.D.3d 1197 [2d Dept. 2017]; quoting *Hoeffner v John F. Frank, Inc.*, 302 A.D.2d 428, 429-430 [2d Dept. 2003]).

To establish entitlement to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable harm in the absence on an injunction, and (3) a balance of the equities in favor of granting the injunction (*Stockley v Gorelik*, 24 A.D.3d 535 [2d Dept. 2005]; *Aetna Ins. Co. v Capasso*, 75 N.Y.2d 860 [1990]). To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts (*Matter of Related Props., Inc. v Town/Vil. of Harrison*, 22 A.D.3d 587, 590 [2d Dept. 2005]). Furthermore, the prospect of irreparable harm must be imminent, not remote, or speculative (*Family-Friendly Media, Inc. v Recorded Television Network*, 74 A.D.3d 738 [2d Dept. 2010]; *Golden v Steam Heat*, 216 A.D.2d 440 [2d Dept. 1995]). In general, economic loss, which is compensable by money damages, does not constitute irreparable harm (*Family-Friendly Media* at 739; *EdCia Corp. v McCormack*, 44 A.D.3d 991 [2d Dept. 2007]; *Stewart v Parker*, 41 A.D.2d 785 [3d Dept. 1973]). The existence of an issue of fact shall not in itself be grounds for denial of the motion (*see* CPLR § 6312[c]; *Winzelberg v 1319 50th Realty Corp.*, 52 A.D.3d 700 [2d Dept. 2008]). Additionally, absent

extraordinary circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief to which he or she would be entitled in a final judgment (*Zoller v HSBC Mortg. Corp. (USA)*, 135 A.D.3d 932 [2d Dept. 2016]; *SHS Baisley, LLC, v Res Land, Inc.*, 18 A.D.3d 727 [2d Dept. 2005]).

Here, with respect to a determination of likelihood of success on the merits the Court finds that issues of fact have been raised with respect to the underlying action regarding Plaintiff's claims of retaliatory behavior by the Defendant and the parties claims on how the incidents occurred. Accordingly, the likelihood of success on the merits must be determined by the trier of fact.

However, with respect to the second prong of the test for a preliminary injunction, Plaintiff has not demonstrated irreparable harm in the absence of an injunction since Plaintiff has failed to demonstrate by undisputed facts within the moving papers that entitlement to employment is a clear right established under the law. Plaintiff claims that without an injunction, Defendant will terminate Plaintiff's Residency and salary if he does not return to work, thus preventing Plaintiff from having his own medical practice in the future. These claims are wholly speculative and conclusory, and therefore insufficient to satisfy the burden of demonstrating irreparable injury (*see Khan v State University of New York Health Science Center at Brooklyn*, 271 A.D.2d 656 [2d Dept. 2000]) (in which the lower court's preliminary injunction was reversed wherein a university employee sought to enjoin the university from taking any retaliatory action against him including termination because it would financially harm plaintiff and cause them to have to move back to Australia). Additionally, economic loss, which is compensable by money damages, does not constitute irreparable harm since Plaintiff may seek redress in the form of reinstatement and back pay if he prevails on the merits of a termination claim. Moreover, Plaintiff has failed to establish that Defendant has or is about to do an act that is violative of his rights or if committed the Defendant's actions would cause Plaintiff irreparable harm as Plaintiff has not submitted any evidence showing that Defendant has taken any action to potentially terminate his employment nor has Plaintiff established that he is in imminent danger of suffering physical harm. Nevertheless, Plaintiff may still seek relief for his claims without a preliminary injunction.

The Court also finds that Plaintiff has not satisfied the third prong of the test for a preliminary injunction establishing that the balance of equities weighs in his favor. Plaintiff insists that without an injunction he will be forced to return to work where he fears for his safety, or he will be deemed to have resigned from his Residency program, however, Plaintiff has not established how the isolated incident in October 2022 continues to be a threat to his safety. Plaintiff has also failed to establish that Patient X has been in or near the hospital since the October incident. Defendant has submitted affidavits stating that Patient X has not returned to the hospital since the date of the incident and has also shown that the hospital implements various safety procedures as well as employs security personnel to keep staff and patients safe from threats of violence. Additionally, the Court finds that granting a preliminary injunction at this stage would ultimately grant Plaintiff the relief sought in this action which includes

determining that there has been retaliation and enjoining Defendant from taking any action with respect to Plaintiff's employment. Thus, the Plaintiff has failed to establish two of the three criteria for granting injunctive relief.

With respect to that branch of Plaintiff's motion seeking to enjoin Defendant from destroying or altering any or all records or communications by or about Plaintiff as well as providing Plaintiff with access to his work e-mail, the Court agrees that measures are necessary to ensure that documents, potentially pertaining to the underlying matter, are protected so that Plaintiff can proceed on his claim.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion is granted only to the extent that Defendant is enjoined from destroying or altering any or all records and communications by or about Plaintiff, for purposes of retrieving necessary documents for this action. Furthermore, Plaintiff as a resident of The Brooklyn Hospital is entitled to continued access to his work email account.

This constitutes the decision and order of the Court.



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Hon. Ingrid Joseph J.S.C

Hon. Ingrid Joseph  
Supreme Court Justice