SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60M

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NEWARK REHABILITATION CENTER, PA, REHABILITATION MEDICINE PRACTICE OF N.Y., P.L.L.C.

Plaintiff,

- v -

ASHLEY SIMELA, YACIRIS GONZALEZ,

Defendant.

INDEX NO. 651425/2022

MOTION DATE 09/26/2023

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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HON. MELISSA A. CRANE:

The following e-filed documents, listed by NYSCEF document number (Motion 006) 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 818

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiffs/counterclaim-defendants Newark Rehabilitation Center PA (Newark Rehab) and Rehabilitation Medicine Practice of N.Y., P.L.L.C. (Rehab Medicine) (together, the Practice), bring this action against two former employees, defendant/counterclaim-plaintiff Ashley Simela, D.O. (Simela) and defendant Yaciris Gonzalez (Gonzalez). The Practice alleges that Simela committed numerous wrongful acts in breach of his employment agreement, in violation of his duty of loyalty to the Practice. Gonzalez allegedly aided and abetted him. The Practice asserts claims for breach of contract, breach of defendants' duty of loyalty, defendants' aiding and abetting the breach of each other's duty of loyalty, and unfair competition. The Practice seeks compensatory and punitive damages, and a permanent injunction.

The Practice and counterclaim defendant Jose Colon, M.D. (Colon) now move, pursuant to CPLR 3212, for summary judgment on the complaint and dismissing, with prejudice, all counterclaims asserted as against them.

For the reasons set forth below, the motion for summary judgment on the complaint is denied, as there are multiple material issues of fact. The motion to dismiss defendants' counterclaims is granted with respect to the third counterclaim for tortious interference with business relations, and the fourth counterclaim for malicious prosecution.

FACTS

The Practice

Newark Rehab is a New Jersey professional association, that has maintained its principal office in New Jersey. Rehab Medicine is a professional limited liability company, that has maintained its principal office in New York, New York. Colon is a physician licensed to practice medicine in New York and New Jersey, focusing on the areas of physical medicine, rehabilitation

and pain management. Colon is the principal owner of the Practice (Colon aff [NYSCEF Doc No. 262], ¶¶ 3-5). Colon founded Newark Rehab in 1983, and Rehab Medicine in 1998 (*id.*, ¶ 5).

The Practice primarily treats patients from New York and New Jersey who have suffered work-related injuries (patients typically covered by workers' compensation), and patients involved in automobile accidents (patients typically covered by no-fault automobile insurance) (*id.*, ¶ 6). The Practice relies on referrals from attorneys and other sources, cultivated over time, and from whom the Practice derives revenue (*id.*, ¶ 23).

Simela and Gonzalez

Simela is an orthopedic surgeon, licensed to practice in New York and New Jersey. The Practice initially employed Simela in 2018 on a part-time basis (*id.*, ¶ 29). On February 27, 2019, he signed an employment agreement (the Employment Agreement), pursuant to which he was employed for a one-year term, with automatic one-year renewals (*id.*, ¶ 30). The Practice employed Simela until he voluntarily terminated the Employment Agreement as of February 21, 2022, by giving written notice dated January 20, 2022 (*see* NYSCEF Doc No. 265).

Gonzalez is a former employee of the Practice who had administrative duties. Plaintiffs allege that she also had access to confidential and proprietary information, patient files, confidential data, and referral sources (Colon aff, ¶ 33). After Simela left the Practice on February 21, 2022, Gonzalez remained employed until she was terminated on March 18, 2022 (*id.*). Plaintiffs allege that, before she was terminated, Gonzalez acted as Simela's operative within the Practice, and effectively managed Simela's new practice while still in the Practice's employ (*see id.*).

The Employment Agreement

Under the Employment Agreement, Simela expressly assumed specific contractual duties: to preserve confidential information; not to compete; and not to solicit patients. Section 12 (a) specifically defines "Confidential Information," stipulates that it is a trade secret, and expressly prohibits Simela from using or divulging it without the Practice's written consent:

> "Disclosure of Information. Employee acknowledges that the names of the Employer's patients and referral sources, as may exist from time to time, and the Employer's financial statements, business plans, internal memoranda, reports, audits, patient surveys, employee surveys, operating policies, quality assurance materials, fees, and other such materials or records of a proprietary nature (collectively, the 'Confidential Information') are valuable, special and unique assets of the Employer and are deemed to be trade secrets. Without limitation, the term 'Confidential Information' shall include this Agreement and the terms set forth herein.
>
> Employee agrees that Employee will not, during the term of the Agreement and after the date hereof and for so long as any such Confidential Information may remain confidential, secret, or otherwise wholly or partially protectable: (i) use the Confidential Information, except in connection with Employee's retention by the Employer and the provision of services hereunder, or (ii) divulge any such Confidential Information to any third party, unless the Employer gives its prior written consent to such use or divulgence or pursuant to a court or administrative order"

(*id*. at 8).

Section 12 (b) expressly provides for non-solicitation, precluding Simela from interfering with the Practice's relationships with employees, referral sources and patients, among others:

> "Non-Solicitation. Employee shall not, at any time during the term of employment and for a two (2) year period after Employee's employment terminates hereunder (irrespective of the reason for termination), interfere with the Employer's relationship with, or endeavor to entice away from the Employer, any hospital or managed care entity with which the Employer has a contractual relationship, or any person who was an employee or referral source of the Employer, or directly or indirectly solicit any patient of the Employer, who was such during the term of Employee's employment hereunder"

(*id*.).

Section 12 (e) provides for liquidated damages in the amount of $1,000.00 per day for any breach of the covenants and conditions set forth in Section 12.

Section 10 specifies that the Practice's files and records are owned by the Practice:

> "(a) All files and records of every type pertaining to patients of the Employer for whom the Employee renders services hereunder shall belong to the Employer and the Employee shall not, without the prior express written consent of the Employer and the patient, remove them from the Employer's office, copy them, allow them to be removed from the Employer's office, or allow them to be copied.
>
> (b) Upon the termination, expiration or non-renewal of this Agreement, the Employee shall not be entitled to keep or preserve records or charts of the Employer unless a patient specifically requests a different disposition of his or her records.
>
> (c) The Employee hereby agrees that any and all mail and other correspondence addressed to Employee, which arose out of the employment hereunder, shall belong to and is hereby assigned to the Employer, whether said mail and correspondence is received during or subsequent to the termination of employment. Employee shall not, at any time during nor subsequent to the termination of Employee's employment, divert nor attempt to divert any such mail and/or other correspondence from the Employer. Employee hereby authorizes Employer to open any mail addressed to Employee arising out of or by reason of the employment hereunder and hereby authorizes Employer to endorse and deposit in Employer's account any checks made payable to Employee for any services rendered by Employee while employed by the Employer.
>
> * * *
>
> 15. Ownership Interests. The Employee hereby acknowledges that Employee's employment hereunder does not imbue Employee with any financial interest in the Employer's accounts receivable, furniture, equipment, leasehold, leasehold improvements, patient charts, records, and other assets."

(*id.*, ¶¶ 10 [a]-[c]; 15).

Section 32 provides that narrative reports Simela prepared will remain his property, unless he prepared them by using the Practice's resources, or at its direction:

> "Expert and Consulting Services. It is understood and agreed that all consulting services, speaking engagements, expert services, including but not limited to articles, treatises, narrative reports, pre-trial, and trial testimony in connection with such expert and consulting services (hereinafter collectively the "Expert and Consulting Services") created by the Employee will remain the property of the

> Employee during and after this Agreement, except in the event such Expert and Consulting Services are performed using the Employer's resources or at the direction of the Employer"

(*id.*, ¶ 32).

> The Employment Agreement also contains the following covenants and conditions:
>
> • Section 5 (a): Simela agreed to assign all his billings and collections for his services, regardless of where or for whom the services were performed;
>
> • Section 13 (i): Simela promised to complete, in a timely, legible and proper manner, medical records covering his services to patients;
>
> • Section 28: Simela covenanted and agreed that, if litigation ensues to enforce the Employment Agreement, he would be responsible for all expenses incurred by the Practice, including reasonable attorneys' fees.

(*id.*).

Plaintiffs' Allegations

Plaintiffs contend that the incontrovertible evidence demonstrates Simela's and Gonzalez's wrongdoing and liability to the Practice. According to plaintiffs, after Simela terminated the Employment Agreement, the Practice discovered numerous wrongful acts Simela committed in breach of the Employment Agreement, and in violation of his duty of loyalty to the Practice. Plaintiffs claim the Practice discovered that he induced Gonzalez – while she was employed and had access to "Confidential Information" – to solicit Practice patients and referral sources. Then, Gonzalez would redirect patients to Simela's new practice. The pair would also manipulate patient scheduling so that Simela could operate on them after he left the Practice. They also copied patient records for Simela's own use and deleted records from the Practice's electronic health records system (*see generally* affirmation of Judith Frankel, CFO of the Practice [NYSCEF Doc No. 316]).

Specifically, plaintiffs allege that, beginning as early as June 19, 2019, while still employed by the Practice, defendants systemically diverted and misappropriated checks and payments owed

to the Practice for surgeries on Practice patients and for narrative reports that Simela prepared for Practice patients and their attorneys. Plaintiffs allege that, with Gonzalez's assistance, Simela misappropriated not less than $165,096.75 (*see id.*, ¶¶ 5-87).

Plaintiffs allege that these funds pertain to (1) surgeries Simela performed on Practice patients while employed; and (2) narrative reports for Practice patients he had examined as an employee of the Practice (*see id.*). In all such cases, Simela saw patients on Practice time; used Practice resources and facilities; and used Gonzalez to schedule visits and surgeries, to circulate narrative reports, and to bill for services (*see id.*).

According to plaintiffs, Simela stole $128,496.75 in surgical checks from plaintiffs for patients L.D., D.M. and A.T.E. Defendants would ensure that the invoices for these surgeries wrongly directed that checks be payable to Simela, rather than to the Practice (*see id.*, ¶¶ 7, 24, 29, 41, 52). Plaintiffs also allege that, beginning in May 2020, defendants also diverted payments totaling $36,600 from the Practice for narrative reports that Simela drafted based upon his treatment of Practice patients at the Practice's offices and using Practice resources (*see id.*, ¶ 69).

Plaintiffs further claim that, near the end of Simela's employment, around January 2022, defendants cancelled and rescheduled surgeries that Simela was scheduled to perform on Practice patients during his remaining term of employment, so that the surgeries would be diverted to his new practice (*see id.*, ¶¶ 88-109). Simela did not notify the Practice about rescheduling these surgeries to a date subsequent to his employment at the practice. According to plaintiffs, defendants diverted not less than $97,967.36 in surgeries to Simela's new practice (*see id.*, ¶¶ 5, 88-109).

Plaintiffs also assert that a comparison of Simela's patient sign-in sheets with the appointment list in the Practice's electronic health records system establishes that defendants failed

to enter appointments. This was in an effort to hide Simela's treatment of Practice patients, and to collect payments for himself. According to plaintiffs, in furtherance of their scheme, defendants relied on Gonzalez to print patient records from the electronic health records system, and then delete them from the system (*see id.*, ¶¶ 115-17). Plaintiffs assert that an audit of the system revealed that from January 1, 2021, through Gonzalez's last date of employment on March 18, 2022, Gonzalez permanently deleted 53 patient files (*see id.*, ¶ 115).

Plaintiffs further allege that, beginning in 2022, Gonzalez also printed dozens of patient records. The audit revealed that Gonzalez only printed five patient records in September 2021; sixteen in October 2021; thirteen in November 2021; and seven in December 2021. Yet, beginning in January 2022, when Simela announced he was leaving the Practice, Gonzalez printed twenty-eight patient records, and another forty-three records in February 2022. In March 2022, the month Gonzalez was fired, she printed 130 patient records, including forty-three on her last day of employment. She also prepared a spreadsheet with contact information for referral sources (*see id.*, ¶¶ 116-117). Plaintiffs alleges that the Practice discovered the spreadsheet on Gonzalez's computer in March 2022 (*see id.*).

Plaintiffs also allege that the evidence shows that Simela and Gonzalez engaged in solicitation by calling and texting hundreds of Practice patients and numerous attorney referral sources (*see id.*, ¶¶ 118-22). According to plaintiffs, defendants' misappropriation of Practice patient records and solicitation of Practice patients and attorney referral sources resulted in a total of 50 surgeries being scheduled with Simela's new practice, with a collective value of $461,491.13 (*see id.*, ¶¶ 123, 137). Defendants' solicitation also led to defendants improperly scheduling appointments and non-surgical procedures for Practice patients with Simela's new practice, with the payments for these appointments and procedures totaling $13,862.68 (*see id.*, ¶ 138).

Defendant's Allegations

In their affirmations in opposition to the motion for summary judgment, both defendants contest the key facts that plaintiffs contend are incontrovertible, including plaintiffs' main allegation that the patients Simela saw at the Practice belonged to the Practice.

Simela alleges that, in 2014, he began working as a full-time orthopedic and spine surgeon at BronxCare Hospital Center (BronxCare), as a Federal Public Health Service employee. In January 2017, he started his own medical practice, City Health Partners (CHP), with a focus on independent medical exams, record review, and expert witness testimony. At that time, he also joined Advanced Orthopedics PLLC (Advanced Orthopedics) as a part-time employee, and Boutique Dermatology & Aesthetics, LLC (Boutique Dermatology) (Simela affirmation [NYSCEF Doc No. 763], ¶ 9).

In 2018, Simela met Colon, and agreed to provide orthopedic coverage for his practice as an independent contractor through the end of February 2019. Thereafter, he was a part-time employee under the terms of the Employment Agreement, with a schedule of three days per week (Wednesday, Thursday and Friday) (*see id.*, ¶¶ 3, 9). Before, during, and after Simela's employment with the Practice, Simela maintained his own practice, seeing his own patients through CHP, as well as at BronxCare. He also kept his part-time job at Advanced Orthopedics, a medical practice, seeing patients on Saturdays and Sundays, as well as at Boutique Dermatology (*id.*, ¶ 9-10). Section 4 (c) of the Employment Agreement both recognized and permitted this (*see* Employment Agreement, § 4 [c] ["the Employee shall be permitted to render services at BronxCare Health Systems, Advanced Orthopaedics, PLLC, City Health Partners, LLC (and) Boutique Dermatology & Aesthetics, LLC"] (*id.*, ¶ 11). Simela saw these patients at, among other facilities, Hudson Regional Hospital (Hudson) in New Jersey where Simela maintained privileges (*id.*).

After Simela left the Practice, in addition to continuing his practice as described above, he also accepted a full-time position at the Veterans Affairs Hospital (the "VA") in Wappingers Falls, NY (*id.*, ¶ 9).

Simela disputes plaintiffs' allegations that he had Gonzalez invoice patients directly and divert payments to him. He specifically alleges that, from the beginning of his relationship with the Practice, all billing issues and administrative tasks were handled by, and were the sole responsibility of, the Practice. Simela further alleges that, throughout the time that he worked with the Practice, staff turnover, various billing problems, and general disorganization for ensuring payments were prevalent (*id.*, ¶ 5). He references paragraph 5 (a) of the Employment Agreement which states that "[a]ll billings and collections shall be performed by the Employer," and alleges that he never engaged in any billing services for his work at the Practice (*id.*, ¶ 12).

Simela also disputes plaintiffs' allegations that he "stole" the Practice's patient lists. Simela claims various doctors and attorneys referred most of his patients. He kept a Google Documents spreadsheet of all his contacts and connections regarding certain patients (*id.*, ¶ 6; *see* NYSCEF Doc Nos. 612–13). Simela alleges that he created and kept this document for his own benefit. The practice did not create it (*id.*, ¶ 6). Thus, according to Simela, knowledge of these individuals is specific to him and his practice. He contests plaintiffs' suggestion that this list belongs to them (*id.*, ¶ 7).

Simela specifically contests plaintiffs' allegation that all patients seen at the Practice constitute a "Practice patient." Simela alleges that, because the Employment Agreement permitted him to work at other facilities, this arrangement permitted him to continue treatment for his patients from those practices, who were his patients from times prior to working at the Practice, or patients that had been referred directly (and only) to him (*id.*, ¶ 11). According to Simela, on occasion,

some of those patients sought his care and his treatment at the Practice without his knowledge—using the Practice only as means to reach him and gain access to his care (*id.*). Simela specifically alleges that this did not mean that those patients were now suddenly patients "of" the Practice, because they only engaged with the Practice in order to continue their care with him (*id.*).

Simela also contests plaintiffs' position that that all of his patients' care was transferable to any medical practice or provider. According to Simela, the treatment and care of patients through Workers' Compensation requires the doctor to have approval from the New York Worker's Compensation Board in order for that doctor to perform specific procedures, and receive payment (*id.*, ¶ 26). Most of the patients Simela treated were injured in motor vehicle accidents, and covered under their No-Fault automobile insurance. There were no patients treated through traditional health insurance, although there was an occasional patient whose treatment was paid through a lien or "funded case" (a lawsuit loan used by the patient to pay for treatment) (*id.*, ¶ 27). According to Simela, because No-Fault insurance often has short approval periods within which to perform procedures, treatment needed to follow the No-Fault carrier's parameters to ensure payment (*id.*). Simela alleges that, after his departure, the Practice did not have spine surgeons available to treat patients, or to bill under Workers' Compensation for several months, if at all (*id.*, ¶ 29).

Simela disputes plaintiffs' allegation that some patients had surgeries that were delayed, and that he then performed these surgeries after he left the Practice. Simela alleges that almost every patient he treated was referred by a doctor, attorney, or other referral source (*id.*, ¶ 31). Simela asserts that, after his departure from the Practice, most patients followed him by and through their attorneys or other medical specialists who had referred them to him in the first place.

He denies that there was any solicitation of any of these patients. Further, many patients remained with the Practice for services such as pain management or physical therapy (*id.*, ¶ 32).

Simela alleges that, after he provided notice, no one from the Practice ever discussed with him the transition of patient care following his departure, the Practice's plan for the continuity of medical treatment for patients, or a replacement spine surgeon at the Practice who would have the ability to provide the same (or similar) services as himself (*id.*, ¶ 21). Although plaintiffs contend that they hired a spine surgeon in April 2022, Simela asserts that there would have been several months when patients in acute pain and in need of immediate medical treatment would have been left without any options for treatment at the Practice (*id.*, ¶ 33).

Simela also disputes plaintiffs' attempt to demonstrate undisputed material facts through the use of summary charts with patient information that stands for the proposition that he (or Gonzalez) misappropriated payments, diverted surgeries, and/or solicited patients. Simela alleges that all of the patients on these charts either (1) chose to follow-up with him and found his new location, or (2) a referral source sent the patient to him (*id.*, ¶ 40).

With respect to plaintiffs' allegations that he misappropriated surgery patients from the Practice, Simela alleges that there were several patients who would call the Practice to schedule follow-up appointments with him, despite that he was treating them through City Health Partners or Advanced Orthopedics. Simela specifically asserts that these patients were not related to the Practice, but that sometimes they would schedule appointments for care, and other times for him to draft a narrative report. On many occasions, when he saw one of these patients at a Practice office, Simela would tell the patient that he or she needed to reschedule his or her appointment with him at the regular location where he treated them. On other occasions, normally when timing was important or the patient needed surgery in the near-term, he would conduct the visit with the

patient at the Practice's office (*id.*, ¶ 46). According to Simela, once a patient was referred to him, he would contact their attorney to determine what the patient needed. In those instances, he would evaluate or provide treatment, then schedule the necessary surgery (*id.*, ¶ 47).

Simela specifically asserts that these patients "were not patients 'of' the Practice," and "[i]ndeed, they had no interaction with the Practice whatsoever" (*id.*). To the extent that he saw them at a Practice office, a bill was submitted and paid to the Practice for the use of the office location. However, these patients were never designated as patients "of" the Practice, and were part of the carve-out provisions provided for in the Employment Agreement (*id.*, citing Employment Agreement, § 4 [c]).

With respect to solicitation, Simela asserts that plaintiffs cannot identify any patient who was "solicited" because no solicitation occurred (*id.*, ¶ 57). Simela contests plaintiffs' assertion that all communications with patients (e.g. cell phone calls, emails, etc.) constitute a "solicitation," and asserts that proof of solicitation can only come from the patient themselves (*id.*). Simela specifically asserts that plaintiffs have not provided a single statement from any patient or referral source supporting their solicitation allegations (*id.*, ¶¶ 46, 64).

According to Simela, any contact either he or Gonzalez made after his resignation was announced was to patients unrelated to the Practice, and for whom he was entitled to treat as a doctor and surgeon. These were patients who came directly to him through referral sources or never saw him at the Practice at all. Simela further asserts that the Practice did not have exclusive control over any referral sources, and that the referral sources, like the patients, were free to refer patients to any provider they wanted. Therefore, to the extent that these referral sources sought Simela's treatment for their patients, they remained his contacts, and they had the right to communicate with him once he was no longer at the Practice (*id.*, ¶ 66).

Gonzalez's Allegations

Gonzalez disputes plaintiffs' allegations that she deleted patient files while the practice employed her. According to Gonzalez, the Practice used Eclipse as its recordkeeping system, and one of her duties as an employee of the Practice was to clean up the system by deleting certain records, entries, or other items that were no longer relevant or necessary (Gonzalez affirmation [NYSCEF Doc No. 812], ¶ 5). Because there were often duplicate entries in Eclipse, as part of her duties, she would manually delete these duplicate entries as there was no other way to delete them (*id.*, ¶ 6). There also were entries, including appointment entries, previously entered into Eclipse that, from time to time, needed to be deleted because the relevant patient re-scheduled, canceled, did not show up, or some other reason. These entries were, therefore, unnecessary and needed to be deleted (*id.*, ¶ 7). Gonzalez specifically alleges that she never deleted any records or entries from the Practice's recordkeeping system at the direction or request of Simela (*id.*, ¶ 9).

Gonzalez also contests plaintiffs' allegation that she improperly printed dozens of patient-related records from Eclipse as part of some kind of scheme to divert patients away from plaintiffs, and to assist Dr. Simela. Gonzalez contends that this allegation is false, and that between January and March of 2022, she spent time at the Practice cleaning up Eclipse, organizing records in Eclipse, and printing certain records in response to medical records requests made to the Practice by outside parties, including attorneys (*id.*, ¶¶ 11-12).

She further alleges that, after she gave notice, she assisted Joanna, another staff member, in printing certain patient-related medical records to help Joanna respond to records requests attorneys made (*id.*, ¶ 15). Gonzalez asserts that these efforts were solely undertaken to help the Practice and Joanna with medical record requests, and that there was nothing improper about them (*id.*, ¶ 17). Gonzalez specifically denies that she ever printed any patient-related records at the

direction or request of Simela for any improper or disloyal purpose, and states that she did not print any records for Simela after his departure from the Practice (*id*., ¶ 18).

The Complaint

The Practice commenced this action on March 28, 2022 to recover compensatory and punitive damages, and for a permanent injunction. In the complaint (NYSCEF Doc No. 2), The Practice asserts five causes of action: (1) damages against Simela for breaching the Employment Agreement; (2) compensatory and punitive damages under the faithless-servant doctrine; (3) damages against Simela and Gonzalez, jointly and severally, for aiding and abetting a breach of each other's duty of good faith and loyalty; (4) a permanent injunction against Simela and Gonzalez enjoining their wrongful conduct; and (5) compensatory damages against Simela and Gonzalez, jointly and severally, for unfair competition. Plaintiffs also seek punitive damages against Simela and Gonzalez severally.

Simela's Counterclaims

Simela filed an amended answer (NYSCEF Doc No. 101) and asserts four counterclaims. In his first counterclaim against Newark Rehab, Simela seeks damages for breach of contract, alleging that he was not paid all bonuses allegedly due him under the Employment Agreement.

In his second counterclaim against Newark Rehab and Colon, Simela claims a violation of New York Labor Law § 193, alleging improper salary deductions.

In his third counterclaim against the Practice and Colon, Simela alleges tortious interference with his prospective business relations and economic expectations.

In his fourth counterclaim against the Practice and Colon, Simela alleges malicious prosecution by the filing of an allegedly false complaint with the New Jersey Medical Board, in violation of NJSA § 2A:47A-1.

Relief Sought by Plaintiffs on this Motion

Plaintiffs allege that, based on the evidence presented by them, the Practice should be granted summary judgment as follows:

- Judgment for $2,622,472.26 against Simela, and $291,610.06 against Gonzalez, which is the compensation and benefits that the Practice paid them since June 19, 2019, which they are required to disgorge (the Practice's faithless servant claim);

- Judgment for $165,096.75 against Simela and Gonzalez, jointly and severally, for the checks they misappropriated from the Practice (breach of contract and faithless-servant claims);

- Judgment for $97,967.36 against Simela and Gonzalez, jointly and severally, for the Practice patients that they rescheduled while both were still employed by the Practice, to divert them to Simela's new practice (breach of contract, faithless servant, and unfair competition claims);

- Judgment for $475,353.81 against Simela and Gonzalez, jointly and severally, for surgeries, appointments and non-surgical procedures that Simela performed related to Practice patients and referral sources that defendants solicited and diverted to Simela's new practice after Simela's employment terminated (unfair competition claim);

- Judgment for $28,431.00 against Simela for failing to timely complete surgical reports (breach of contract claim);

- Judgment for $ 779,000 against Simela, for liquidated damages under Section 12 of the Employment Agreement, in the amount of $1,000.00 per day for 779 days beginning January 3, 2022 through February 21, 2022, the date of his resignation, and then for each day of his two-year non-solicit, ending February 21, 2024;

- Summary judgment in favor of the Practice on Simela's liability for attorneys' fees and costs (including eDiscovery costs) under the Employment Agreement, and directing an inquest pursuant to 22 NYCRR § 202.46 to assess the amounts owed;

- Assessing punitive damages against Simela and Gonzalez in an amount to be determined by the court;

- Granting a permanent injunction against defendants as requested in the Practice's fourth cause of action, enjoining the defendants from any further wrongful conduct; and

- Dismissing Simela's counterclaims, with prejudice.

Negative Inferences Against Simela And Gonzalez

By decision and order dated July 25, 2023 (NYSCEF Doc No. 227), this court granted the following adverse inferences: "Simela and Gonzalez conspired to steal patients away from plaintiffs," and "[Angela] Polonio and Gonzalez are one and the same."

DISCUSSION

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (*Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039, 1043 [2016]; *see also Brunetti v Musallam*, 11 AD3d 280, 280 [1st Dept 2004] [citations omitted] "summary judgment is a drastic remedy and

should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits"]).

Plaintiffs seek summary judgment on their claims for breach of contract, breach of loyalty, aiding and abetting a breach of loyalty, permanent injunction, and unfair competition, as well as punitive damages, and dismissal of defendants' counterclaims. However, in support of their motion for summary judgment, plaintiffs merely state, in a conclusory manner, that various facts are "indisputable," and that summary judgment is appropriate, without submitting any evidence from patient or referral sources supporting these claims. Plaintiffs submit self-serving affirmations and hundreds of exhibits that, rather than undisputedly supporting their claims, only serve to create issues of fact, requiring denial of the motion.

Defendants' affirmations in opposition to the motion also raise issues of fact. This court rejects plaintiffs' argument that, because defendants submit unsworn affirmations, rather than sworn affidavits, they lack probative value. To the contrary, because this technical defect can be easily cured by the submission of sworn affidavits, this court finds that they do have probative value (*see D'Auria v Doughtery*, 77 Misc 3d 455, 458-459 [Sup Ct, Erie County 2022]). Moreover, CPLR 2106 now allows for affirmations rather than sworn affidavits.

The central issue on this motion is how patient or referral sources are categorized. Plaintiffs argue, without any support, that any patient or referral source with any connection to the Practice belonged to the Practice. Thus, plaintiffs contend, any services that defendants rendered to such patients occurred under plaintiffs' umbrella. Plaintiffs further argue that defendants are precluded from any contact with, or provision of services to, such patients, under their duties of loyalty and/or a restrictive covenant. However, there is insufficient documentary evidence to support plaintiffs'

contentions. Indeed, as set forth below, there is a material issue of fact as to whether these patients and referral sources belonged to plaintiffs, or to Simela.

Breach of Contract (First Cause of Action)

In the first cause of action, plaintiffs contend that Simela breached the Employment Agreement by (1) misappropriating payments for services rendered to Practice patients while he worked for the Practice; (2) failing to maintain medical records (i.e., narrative reports) for services performed while employed; (3) causing Gonzalez to misappropriate and delete medical records the Practice maintained; and (4) violating the Employment Agreement's confidentiality and non-solicitation clauses. Plaintiffs argue that the Practice is entitled to two forms of damages against Simela: (1) liquidated damages under section 12 (e) for breaching section 12 of the Employment Agreement; and (2) compensatory damages for all other breaches of the Employment Agreement. According to plaintiffs, the incontrovertible facts demonstrate, prima facie, Simela's clear breach of the Employment Agreement.

In order to recover on their breach of contract claim, plaintiffs must establish that: (1) a contract existed; (2) plaintiffs performed; (3) Simela breached; and (4) Simela's breach resulted in damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]). Additionally, plaintiffs must show that the contract—and all its terms—is unambiguous because the "[i]nterpretation of unambiguous contracts is a question of law and a proper function of the court on a motion for summary judgment" (*301 E. 60th St. LLC v Competitive Solutions. LLC*, 217 AD3d 79, 84 [1st Dept 2023]). If any "term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact" (*Amusement Bus. Underwriters v American Intl. Group, Inc.*, 66 NY2d 878, 880 [1985]; *see also Hartford Acc. & Indem. Co. v Wesolowski*, 33

NY2d 169, 172 [1973] ["(i)f there is ambiguity in the terminology used ... and determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, then such determination is to be made by the jury"]).

1. Confidentiality and Non-Solicitation Clauses

Here, there are disputed material issues of fact as to the Employment Agreement's Terms, including the confidentiality and non-solicitation clauses contained in sections 12 (a) and 12 (b). First, there are material issues of fact as to the definitions of: (1) "Employer's ... referral source" (Employment Agreement, § 12 [a]); (2) "referral source of the Employer" (*id.*, § 12 [b]); (3) "Employer's patients" (*id.*, § 12 [a]); and (4) "patient of the Employer" (*id.*, § 12 [b]). The meaning, understanding, and interpretation of these are of critical importance. None of these terms are defined. Nor are their meanings plain from the agreement itself. Moreover, the term "Practice patient," that plaintiffs repeatedly refer to in their papers, is neither a defined term, nor a term of art. Thus, there is ambiguity as to what makes a "referral source" or "patient" the "Employer's" or "of the Employer," including, inter alia, whether it is based on a single interaction or a minimum contact requirement, and whether it is impacted by a pre-existing relationship with Simela, or by interactions with plaintiffs for the express purpose of seeking treatment from Simela.

Therefore, the interpretation of these terms depends on extrinsic evidence. Plaintiffs argue that any patient who sought treatment from Simela while the Practice employed him is a Practice patient. However, the evidence submitted on this motion reveals that some of these patients initiated their relationship with Simela during his time working at other practices, which patients are exempted under the Employment Agreement (*see* Employment Agreement, § 4 [c]). It is arguable that these patients and referral sources never chose (or intended) to become associated

exclusively with the Practice, but, rather, came to the Practice for the express purpose of seeking further treatment from Simela.

The evidence also shows that there are patients and referral sources who, on their own volition, decided to follow Simela, and not remain with the Practice after Simela's departure (*see* Simela affirmation, ¶¶ 11, 31, 66). It is arguable that these patients and referral sources did not consider themselves to "belong" to plaintiffs, but merely exercised their choice to continue treatment with Simela. Moreover, some of these patients may have followed Simela because, as Simela alleges, plaintiffs failed to accommodate their continued care after his resignation (*see id.*, ¶¶ 21, 33). Thus, there is an issue of fact as to whether these patients and referral sources "belong" to plaintiffs, or to Simela.

There are also material issues of fact as to whether Simela breached the Employment Agreement by allegedly diverting or soliciting patients or referral sources from the Practice. Simela alleges that he was the only spine surgeon on staff with the Practice, and, therefore, was the sole provider of spine surgery services to patients (Simela affirmation, ¶¶ 21-22). As such, the patients requiring Simela's specialty specifically sought him out – not the Practice – for treatment (*see id.*). According to Simela, these patients were never patients "of" plaintiffs—they were Simela's patients, and many of them followed him on their own volition once he departed the Practice. They did so by choice—believing they were Simela's patients (*see id.*).

In support of this allegation, Simela submits "patient choice confirmation" forms that many patients signed when they began treatment with Simela after he left the Practice (*see* NYSCEF Doc No. 802), as well as multiple affirmations from patients who denied that either defendant contacted them (*see* NYSCEF Doc Nos. 777, 779, 782, 785, 786, 788). Simela

specifically alleges there was no need for him to solicit any of these patients, as they were, and always have been, his patients (*see* Simela affirmation, ¶ 62).

Simela further alleges that he had a personal relationship with each of his referral sources, distinct from the Practice (*see* Simela affirmation, ¶¶ 6-8). Indeed, prior to him joining the Practice, plaintiffs had no spine surgeon, and thus, could not take spine surgery referrals (*see id*., ¶¶ 60-64). In addition, once Simela left the Practice, plaintiffs had no way to treat spine surgery referrals (*see id*.).

Plaintiffs have produced no documentary evidence of interference or solicitation by Simela or Gonzales. Plaintiffs have not identified any patient who will testify that defendants contacted them and encouraged following Simela to his new practice. Nor have they identified a single referral source that will testify to anything similar. Although plaintiffs produced a list of patients Simela supposedly solicited, he specifically denies that he solicited any of the named patients (*see id*., ¶ 64).

Therefore, this court finds that there is an issue of material fact as to whether Simela actually did solicit or divert any patients or referral sources from plaintiffs, despite the adverse inference that "Simela and Gonzalez conspired to steal patients away from plaintiffs." The adverse inference cannot be deemed proof at this juncture.

With respect to the confidentiality clause, Simela contests plaintiffs' allegations that he "stole" the Practice's patient lists, or that these lists were confidential. Simela alleges that most of his patients were referred to him, and that he kept his own list of patients, that he, not the practice prepared (*see* Simela affirmation, ¶¶ 6-7). Accordingly, there are issues of fact as to whether defendants breached the confidentiality and non-solicitation clauses of the Employment Agreement.

2. Misappropriation of Payments for Surgeries and Narrative Reports

There are also issues of fact as to whether defendants misappropriated payments for surgeries and preparation of narrative reports. Simela specifically denies that he had Gonzalez invoice patients directly, and divert payments to him (*see* Simela affirmation, ¶¶ 5, 12). In addition, some of the allegedly misappropriated checks plaintiffs identified are clearly from preexisting patients of Simela, and who were subject to the carveout provision contain in section 4 (c) of the Employment Agreement. Thus, there are issues of fact as to whether or not those checks should properly have been sent to Simela directly or, instead, the Practice, or whether both should have received portions of those checks.

There is also a material issue of fact as to whether Simela's narrative reports fall under the specific carve-out provision contained in section 32 of the Employment Agreement. That provision expressly provides that, certain services, including narrative reports, "created by the Employee will remain the property of the Employee during and after this Agreement," unless these "[s]ervices are performed using the Employer's resources or at the direction of the Employer" (Employment Agreement, § 32).

Simela specifically alleges that he prepared all of his narrative reports on his own time, using his computer, and that, if a narrative report was on the letterhead of the Practice, it was for the patient's benefit to show the treating office for the patient (Simela affirmation, ¶ 81). He further alleges that he never used any of the Practice's resources to prepare any narrative reports (*id.*, ¶ 83). Rather, he reviewed all records from home and prepared the narrative at home (*id.*).

3. Misappropriation and Deletion of Medical Records

Although plaintiffs allege that Gonzalez deleted records and printed patient records for the purpose of diversion, Gonzalez attests that she deleted certain patient-related entries because it

was a standard practice to delete duplicate entries, entries for patients who did not show up, and entries for patients who cancelled (*see* Gonzalez affirmation, ¶¶ 6-8). Similarly, although plaintiffs allege that Gonzalez's printing of patient records is proof of solicitation and diversion, Gonzalez specifically denies this, and states that her printing was, in fact, related to assisting another member of plaintiffs' staff with responding to attorney requests for records (*see id*., ¶¶ 10-18).

Hence, there are also issues of fact as to defendants' misappropriation and deletion of records.

Breach of Duty of Loyalty/Aiding and Abetting (Second and Third Causes of Action)

In support of their motion for summary judgment, plaintiffs contend that, based on the evidence on this motion, it is incontrovertible that, as employees, Simela and Gonzalez owed a duty of good faith and loyalty to the Practice; that they both breached that duty; and that they aided and abetted each other's breaches.

Breach of the duty of loyalty is also known as the faithless servant doctrine. Under this doctrine, "an employee is to be loyal to his employer and is 'prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties'" (*Western Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977] [citation omitted]; *accord Consolidated Edison Co. v Zebler*, 40 Misc 3d 1230[A], 2013 NY Slip Op 51354[U], *4 [Sup Ct, NY County 2013] [this doctrine "has been firmly established in New York for over a century and requires an employee to exercise the utmost good faith, including a duty of loyalty, toward his employer"]).

"An employer who successfully raises a claim under the faithless servant doctrine is entitled to seek the disgorgement of any compensation paid to that employee during his or her period of disloyalty that directly relates to their disloyal acts" (*Kleeberg v Eber*, 331 FRD 302, 319

[SD NY 2019]; *see also Art Capital Group, LLC v Rose*, 149 AD3d 447, 449 [1st Dept 2017] [citation omitted] ["New York's strict application of the faithless servant doctrine 'mandates the forfeiture of all compensation ... where ... one who owes a duty of fidelity to the principal is faithless in the performance of his services'"]; *Mosionzhnik v Chowaiki*, 41 Misc 3d 822, 831 [Sup Ct, NY County 2013] [internal quotation marks, alterations, and citations omitted] ["an employee who acts in any manner inconsistent with his agency or trust and fails to exercise the utmost good faith and loyalty in the performance of his duties is deemed a faithless servant and must account to his principal for secret profits and forfeit his right to compensation"]).

Plaintiffs summarily contend that "the Practice should be granted summary judgment against Simela and Gonzalez on liability for their faithless conduct," and "should be and awarded judgment for $2,622,472.26 against Simela and $291,610.06 against Gonzalez, representing their respective compensation and benefits received from the Practice since June 19, 2019, which they are required to disgorge" (plaintiffs' memorandum of law [NYSCEF Doc No. 260], at 16).

However, as previously discussed, there are numerous issues of material fact as to whether defendants interfered with, solicited, or diverted any patients or referral sources from plaintiffs. This alleged misconduct is the crux of plaintiffs' disloyalty claim. Therefore, plaintiffs cannot prove, as a matter of law, that defendants were disloyal.

There are also material issues of fact as to whether Simela and Gonzalez aided each other's alleged breach of loyalty. To prove aiding and abetting a breach of loyalty, plaintiffs must show there was a breach of loyalty, the aiding party substantially and knowingly assisted, and plaintiffs were damaged (*Yuko Ito v Suzuki*, 57 AD3d 205, 208 [1st Dept 2008]; *see also Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). Importantly, a claim for aiding and abetting requires proof of the underlying disloyalty. Where a plaintiff cannot establish a breach of the underlying claim,

an aiding and abetting claim cannot stand (*see Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 594 [2012]; *McBride v KPMG Intl.*, 135 AD3d 576, 579 [1st Dept 2016]).

Accordingly, because there are issues of fact as to the underlying claim for breach of the duty of loyalty/faithless servant, plaintiffs have failed to prove that they are entitled to summary judgment on the aiding and abetting claim.

Permanent Injunction (Fourth Cause of Action)

In its fourth cause of action, the Practice seeks a permanent injunction against Simela and Gonzalez for the following relief: an injunction enjoining them and anyone acting on their behalf from directly or indirectly (1) using or divulging misappropriated information; or (2) contracting, soliciting, interfering with, or endeavoring to entice away from the Practice, patients or referral sources. However, because there are clear issues of fact as to whether any information was misappropriated, and whether defendants solicited or interfered with any patients or referral sources, plaintiffs' motion for summary judgment on this cause of action is denied.

Unfair Competition (Fifth Cause of Action)

"To establish a cause of action for relief based on unfair competition, a plaintiff must demonstrate that the defendant wrongfully diverted the plaintiff's business to itself," including trade secrets (*McKinnon Doxsee Agency, Inc. v Gallina*, 187 AD3d 733, 737 [2d Dept 2020]). A plaintiff alleging trade-secret misappropriation "'must demonstrate [as relevant here]: (1) that it possessed a trade secret, and (2) that the defendants used that trade secret ... as a result of discovery by improper means'" (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015] [citation omitted]). As is relevant here, although a patient list may constitute a trade secret (*see Prohealth Care Assocs., LLP v Apr.*, 4 Misc 3d 1017[A], 2004 NY Slip Op 50919[U], * 3 [Sup Ct, Nassau County 2004]), the question of whether a list allegedly belonging to a plaintiff constitutes a trade

secret is ordinarily an issue of fact that should be left for trial (*Ashland Mgt. Inc. v Altair Invs. NA, LLC*, 59 AD3d 97, 102 [1st Dept 2008], *affd as modified*, 14 NY3d 774 [2010]).

Plaintiffs summarily contend that "[p]resented herewith is incontrovertible evidence of unfair competition by Simela and Gonzalez, and that "the Practice should, therefore, be granted summary judgment on liability against Simela and Gonzalez, jointly and severally, on its unfair-competition claim" (plaintiffs' memorandum of law, at 19). However, because there are material issues of fact as to whether the patient lists were confidential information; whether they belonged to plaintiffs; whether defendants misappropriated these patient lists or other data; as well as whether defendants wrongfully diverted plaintiffs' business, plaintiffs' motion for summary judgment on this cause of action is denied.

Punitive Damages

Plaintiffs seek punitive damages in connection with its second (faithless servant) and fifth (unfair competition) causes of action, contending that "the conduct of Simela and Gonzalez warrants an assessment of punitive damages, against each of them severally, in connection with the second and fifth causes of action in an amount to be determined by the Court" (plaintiffs' memorandum of law, at 19).

"The basis for an award of exemplary damages depends upon a showing that the wrong is aggravated by evil or a wrongful motive or that there was wil[l]ful and intentional misdoing, or a reckless indifference equivalent thereto" (*Le Mistral, Inc. v Columbia Broadcasting Sys.*, 61 AD2d 491, 495 [1st Dept 1978]). The conduct must be "'morally culpable, or [] actuated by evil and reprehensible motives'" in order to deserve punitive damages (*Seynaeve v Hudson Moving & Storage, Inc.*, 261 AD2d 168, 169 [1st Dept 1999] [citation omitted]). And it "must be 'close to criminality'" (*Camillo v Geer*, 185 AD2d 192, 194 [1st Dept 1992] [citation omitted]). This

showing must be made by "clear, unequivocal and convincing evidence" (*Sladick v Hudson Gen. Corp.*, 226 AD2d 263, 264 [1st Dept 1996]; *accord Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003]).

Plaintiffs' motion for summary judgment on their punitive damages is denied. Plaintiffs merely assert, in cursory fashion, that defendants' conduct "warrants" punitive damages. Plaintiffs make no attempt to describe such conduct, or to even argue why they are entitled to judgment on this claim. This is insufficient to entitle them to summary judgment.

Counterclaims

1. Breach of Contract and Labor Law § 193 (First and Second Counterclaims)

In his breach of contract counterclaim, Simela alleges that plaintiffs breached the Employment Agreement by: (1) failing to pay him his full base salary; (2) failing to pay him during his final two weeks of employment); (3) failing to pay the entire bonus due to him; and (4) failing to account accurately for the services that Simela provided (amended answer, ¶¶ 129, 132, 134).

In his second counterclaim, Simela alleges that plaintiffs violated Labor Law § 193 by improperly withdrawing compensation from his account after it was deposited (*id.*, ¶¶ 137-44). Labor Law § 193 prohibits an employer from deducting any portion of an employee's wages except where allowed by law, or "if the deduction is 'expressly authorized' by and 'for the benefit of the employee" (*Marsh v Prudential Sec. Inc.*, 1 NY3d 146, 152 [2003] [citing Labor Law § 193 (1) (b)]).

Plaintiffs' sole argument in support of dismissal of these counterclaims is that Simela may be liable for disgorgement (plaintiffs' memorandum of law, at 20-21 ["Simela is not, as a matter of law, entitled to recover any compensation under the Employment Agreement, and must disgorge the compensation he has already received"]; plaintiffs' reply memorandum of law (NYSCEF Doc

No. 818), at 17 ["Simela cannot prove a contractual right to the subject wages, because as a faithless servant, he forfeited all compensation"]). However, given that there are factual issues as to plaintiffs' breach of loyalty claim, their motion to dismiss these counterclaims is denied.

2. Tortious Interference with Business Relations (Third Counterclaim)

In his third counterclaim, Simela asserts a claim against the Practice and Colon for tortious interference with his prospective business relations and economic expectations (amended answer, ¶¶ 154, 155). Simela alleges that plaintiffs made false statements to (1) certain patients about Simela's departure from the Practice to convince them to discontinue treatment with Simela; and (2) referral sources to dissuade them from referring patients (*see id.*).

To prevail on a claim for tortious interference with prospective business relations, a party must prove: (1) a business relationship with a third party; (2) that the defendant knew about the relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to that relationship (*Lama Holding Co. v Smith Barney*, Inc., 88 NY2d 413, 424 [1996]; *106 N. Broadway, LLC v Lawrence*, 189 AD3d 733, 741 [2d Dept 2020]). A plaintiff claiming tortious interference must allege specific conduct by the defendants intended to induce a breach, and that the contract would not have been breached but for the defendant's conduct (*Kimso Apts., LLC v Rivera*, 180 AD3d 1033, 1035 [2d Dept 2020]). The but for component is indispensable (*American Preferred Prescription, Inc. v Health Mgt., Inc.*, 252 AD2d 414, 418 [1st Dept 1998]). Indeed, a tortious interference claim cannot survive if it is based on vague and conclusory allegations supported by mere speculation (*Carlyle, LLC v Quik Park 1633 Garage LLC*, 160 AD3d 476, 477 [1st Dept 2018]; *see also Kimso Apts., LLC*, 180 AD3d at 1035).

Simela's tortious interference counterclaim fails as a matter of law. Simela has not presented any evidence demonstrating that, as a direct result of the alleged interference, a specific business opportunity he was about to realize was lost. Simela merely regurgitates, in conclusory fashion, the unsubstantiated allegations that plaintiffs sought to undermine his credibility and "hurt [his] prospective ability to practice medicine," and attempted to interfere with potential referral sources (defendants' memorandum of law [NYSCEF Doc No. 761], at 24; Simela affirmation, ¶¶ 93-102).

During his deposition, Simela failed to identify any referral source or patient that he lost due to the alleged tortious interference of the Practice or Colon (*see* Simela dep [NYSCEF Doc No. 254], at 101-134] [Simela cannot identify any patients or referral sources he lost because of the counterclaim-defendants' alleged conduct]). Moreover, Simela fails to allege that any contract was breached; that he lost a specific opportunity; or that a specific business relationship was lost because of the alleged conduct. Indeed, at his deposition, Simela acknowledged that he has continued to treat Practice patients since he left the Practice, and to receive referrals from referral sources (*see* Simela dep, at 10-13).

Simela also alleges that Colon and the Practice tortiously interfered with his license and standing with the New York Workers' Compensation Board (the WCB) by filing an allegedly false complaint with the WCB. However, the WCB is a regulatory body, not an entity with which Simela could have had a business relationship. Indeed, Simela does not claim to have ever had a contract or business relationship with WCB. Thus, he cannot, as a matter of law, prove tortious interference, and his counterclaim must be dismissed (*see Lama Holding Co.*, 88 NY2d at 424 [tortious interference requires proof that, inter alia, the interference caused injury to a business relationship with a third party]).

Accordingly, the third counterclaim for tortious interference is dismissed.

3. Malicious Prosecution

NJSA § 2A:47A-1 authorizes a civil suit for malicious prosecution of a complaint alleging professional misconduct. In his fourth counterclaim, Simela alleges that plaintiffs violated the statute by falsely, maliciously and without probable cause, making a confidential complaint of unprofessional conduct to the New Jersey Medical Board, and allegedly inducing patient "JH" to also file a confidential complaint against Simela (amended answer, ¶ 34).

Plaintiffs are entitled to summary judgment dismissing Simela's fourth counterclaim. To prevail on this counterclaim, Simela must prove that the underlying professional complaint, inter alia, was (1) instituted without reasonable or probable cause; (2) actuated by malicious motive; (3) ended in favor of the plaintiff; and (4) resulted in a special grievance (*Giri v Rutgers Casualty Ins. Co.*, 273 NJ Super 340, 347-48 [App Div 1994]). "The absence of any one of these elements is fatal" (*id.*; *see also* (*Klesh v Coddington*, 295 NJ Super 51, 58 [Law Div 1996]).

Here, Simela cannot prove a special grievance. A "special grievance consists of interference with one's liberty or property" but not "the routine inconveniences of litigation" (*Giri*, 273 NJ Super at 348, citing *Penwag Prop. Co. v Landau*, 76 NJ 595, 598 [1978]; *see also Brien v Lomazow*, 227 NJ Super 288, 300 [App Div 1988]). Examples of special grievances include injunctions preventing a party from conducting business in a particular area, and from using, interfering with one's liberty or use or possession property by the appointment of a receiver, obtaining a writ of replevin, or filing a lis pendens (*Mayflower Indus. v Thor Corp.*, 15 NJ Super 139, 152 [Chancery Div, 1951]). Mere inconveniences, costs to defend, mental anguish, emotional distress and alleged loss of reputation, flowing from the filing of any complaint, do not constitute special grievances (*Repack v Akimova*, 2023 WL 3312355, * 3 [NJ Superior Ct, App Div 2023]).

During this case, Simela has not proffered any evidence that he suffered any adverse consequences from the complaints filed that would constitute a special grievance under the statute (*see e.g.* Simela dep, at 167-173 [Simela fails to identify any special grievance he suffered as a result of the counterclaim defendants' alleged conduct]). Therefore, he cannot, as a matter of law, prove a case under NJSA § 2A:47A-1. Simela also cannot demonstrate that the proceeding ended in the Practice's favor, as it is undisputed that the New Jersey Medical Board took no action against him. Thus, the fourth counterclaim for malicious prosecution is dismissed.

CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is granted to the limited extent that defendants' third and fourth counterclaims are dismissed; and it is further

ORDERED that plaintiffs' motion is otherwise denied.

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MELISSA A. CRANE, J.S.C.

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