SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART 54**

Justice

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INDEX NO 650921/2012

ADAM BROOK, ADAM BROOK M.D., PH.D., P.L.L.C.,

MOTION SEQ NOS 022 023

Plaintiffs,

- v -

PECONIC BAY MEDICAL CENTER, RICHARD KUBIAK, DANIEL MASSIAH, AGOSTINO CERVONE, JAY ZUCKERMAN, JOAN HOIL, ANDREW MITCHELL,

DECISION + ORDER ON MOTIONS

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 022) 1140, 1141, 1142, 1143, 1144, 1145, 1146, 1147, 1148, 1149, 1150, 1151, 1152, 1153, 1154, 1155, 1156, 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1229, 1231

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

The following e-filed documents, listed by NYSCEF document number (Motion 023) 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1054, 1055, 1056, 1057, 1058, 1059, 1060, 1061, 1062, 1063, 1064, 1065, 1066, 1067, 1068, 1069, 1070, 1071, 1072, 1073, 1074, 1075, 1076, 1077, 1078, 1079, 1080, 1081, 1082, 1083, 1084, 1085, 1086, 1087, 1088, 1089, 1090, 1091, 1092, 1093, 1094, 1095, 1096, 1097, 1098, 1099, 1100, 1101, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1111, 1112, 1113, 1114, 1115, 1116, 1117, 1118, 1119, 1120, 1121, 1122, 1123, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1133, 1134, 1135, 1136, 1137, 1138, 1139, 1175, 1176, 1177, 1178, 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1228, 1232

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

Upon the foregoing documents, it is ORDERED that plaintiffs' motion for summary judgment is DENIED, defendants' motion for summary judgment is GRANTED, and the Clerk is directed to enter judgment dismissing the complaint with prejudice.

Construing the record in the light most favorable to plaintiffs and giving them the benefit of every possible inference, there are no material questions of fact that preclude granting summary judgment to defendants.

There is no basis to proceed to trial on the breach of contract and fraud claims. Even if Dr. Brook was fraudulently induced to resign, his rights were still not violated under the bylaws. Section 5.9.2(A)'s notice requirement only applies to a hearing based on a "Request for Corrective Action" pursuant to section 5.9.1 (*see* Dkt. 1180 at 33-34). There

is no question of fact that there was no adverse or corrective action being contemplated (*see id.* at 20 ["An action that adversely impacts an AHPs **clinical privileges** and is based upon patient care, treatment or services issues shall be considered to be an adverse action" ... "The request for corrective action may include, without limitation, a recommendation of a restriction, suspension or termination of the AHP's **clinical privileges**"] [emphasis added]). It is undisputed that the hospital was aware that Dr. Brook intended to resign to begin a fellowship elsewhere and that his decision had nothing to do with the incident and investigation. There is no record evidence that the hospital, before Dr. Brook tendered his October 5 and October 7 letters, was considering adverse or corrective action as defined by the bylaws (for example, that any of his privileges would be suspended or revoked). Though Dr. Brook claims his October 7 resignation letter (Dkt. 1033) was fraudulently induced, he does not claim that his voluntary agreement to cease performing surgeries in his October 5 letter (Dkt. 1064 ["I will not operate . . . for the next two weeks effective October 5, 2009 through October 19, 2009, or until mutually agreed upon"]) -- which Dr. Brook admits was tendered in light of his departure for the fellowship since he would be unavailable to follow up with patients after surgeries -- was the product of fraud. The hospital's knowledge that Dr. Brook was leaving and would not be performing any more surgeries in the interim perhaps explains why no adverse action was contemplated; it would have been pointless. But regardless of the reason, since there is no evidence that any adverse action was contemplated, Dr. Brook's notice rights under the bylaws were not triggered. The contract is unambiguous in this regard and must be interpreted based exclusively on its clear language without consideration of extrinsic evidence (*Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]). The court may not read into the contract obligations not actually contained therein based on regulations or legislative history. The breach of contract claim is therefore dismissed.[*]

The fraud claim fails for lack of out-of-pocket damages (*Stryker Sec. Group Inc. v Elite Investigations Ltd.*, 170 AD3d 553, 555 [1st Dept 2019] ["under the out-of-pocket rule, (plaintiff) may not recover profits that would have been realized had there been no fraud"]). Rescission of the resignation would not afford Dr. Brook additional rights under the bylaws on this record and Dr. Brook does not seek restoration of his employment. The only other type of remedy permitted on his fraud claim--out-of-pocket damages--is lacking here. It is well settled that lost future profits are not recoverable when they do not directly flow from the fraud because they are "the quintessential lost opportunity, which is not a recoverable out-of-pocket loss" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 143 [2017]; *see Arena Riparian LLC v CSDS Aircraft Sales & Leasing Co.*, 184 AD3d

[*] Even if the breach of contract claim survived, the lost earnings sought are unrecoverable consequential damages because there is no evidence that they "were fairly within the contemplation of the parties at the time the contract was made" (s*ee Age Group, Ltd. v Martha Stewart Living Omnimedia, Inc.*, 160 AD3d 498 [1st Dept 2018]). The lost earnings did not directly flow from the alleged breach of the notice provision but rather were the collateral consequences of the databank reporting (*see Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 806 [2014]).

509, 510 [1st Dept 2020] ["plaintiffs cannot be compensated under a fraud cause of action for what they might have gained"]). Here, the only alleged proximately-caused loss was the inability to be hired by other hospitals due to the allegedly false statements in the reports on the databank (*see Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgt. Co.*, 149 AD3d 146, 149 [1st Dept 2017] ["To establish loss causation a plaintiff must prove that the subject of the fraudulent statement or omission was the cause of the actual loss suffered"]). While, as discussed below, there is no proof of falsity, Dr. Brook's lost earnings due to his inability to obtain more lucrative surgery jobs in the United States are lost opportunities and are not recoverable out-of-pocket losses (*see Connaughton*, 29 NY3d at 143). Absent viable damages, the fraud claim must be dismissed (*CWCapital Investments LLC v CWCapital Cobalt VR Ltd.*, 182 AD3d 448 [1st Dept 2020]).

Additionally, even if there were recoverable damages, there is no question of fact that Dr. Brook cannot prove justifiable reliance (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Rosenblum v Glogoff*, 96 AD3d 514, 515 [1st Dept 2012]). There is no question that the hospital was required to conduct an investigation of the incident (*see* Public Health Law § 2805-L[2][a]), and Dr. Brook has conceded that reporting his resignation during the pendency of the investigation was mandatory (Dkt. 1237 at 11; *see Hooda v W.C.A. Serv. Corp.*, 2013 WL 2161821, at *6 [WDNY May 17, 2013]). He contends, however, that he was duped by Dr. Kubiak into believing that there would be no investigation. Dr. Brook's reliance on Dr. Kubiak's alleged assurances was not justifiable as a matter of law because a party cannot justifiably rely on a representation that a regulated entity will not comply with its legal obligations (*Merrick Gables Assn, Inc. v Town of Hempstead*, 691 F Supp 2d 355, 363 [EDNY 2010]; *see PHL Variable Ins. Co. v Town of Oyster Bay*, 929 F3d 79, 95 [2d Cir 2019]; *see also Rosenkrantz v Rosenkrantz*, 184 AD2d 478, 479 [1st Dept 1992] ["parties are deemed to have incorporated all provisions of law in effect as of the time the agreement was executed"]). Indeed, even if Dr. Brook was unaware of the rule, his reliance would still not be justifiable (*Michael R. Gianatasio, PE, P.C. v City of New York*, 53 Misc 3d 757, 775 [Sup Ct, NY County 2016] ["MRG could have, and should have, been aware of the law requiring the job to be bid-out and could not justifiably rely on ACS's invitation to work on a no-bid contract"], *affd* 159 AD3d 659 [1st Dept 2018]).

The negligent misrepresentation and promissory estoppel claims fail for the same reasons (*King Penguin Opportunity Fund III, LLC v Spectrum Group Mgt. LLC*, 187 AD3d 688 [1st Dept 2020]).

The only stated claim that could possibly warrant damages for lost earnings--tortious interference with business relations--also fails on summary judgment. "To prevail on a claim for tortious interference with business relations in New York, a party must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that 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 the relationship with the third party"

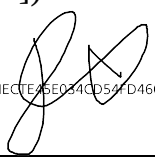
(*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009]). The conduct that forms Dr. Brook's fraud claim cannot support the "improper or illegal means" requirement since those were statements made to Dr. Brook (*Arnon Ltd v Beierwaltes*, 125 AD3d 453, 454 [1st Dept 2015] ["conduct constituting tortious interference with business relations is, by definition, conduct directed not at the plaintiff itself, but at the party with which the plaintiff has or seeks to have a relationship"], quoting *Carvel Corp. v Noonan*, 3 NY3d 182, 192 [2004]). Moreover, the statements made in the databank cannot give rise to liability because defendants are immune from liability for them (42 USC § 11137[c] ["No person or entity ... shall be held liable in any civil action with respect to any report made under this subchapter ... without knowledge of the falsity of the information contained in the report"]; *see Hooda*, 2013 WL 2161821, at *5 ["Immunity under this section extends to state law tort claims where the damages are solely the result of a report to the NPDB"]). There are no materially false statements (*see* Dkt. 1138 at 14-15). Dr. Brook was under investigation; he resigned while it was pending; and he was not performing surgeries during that time. At most, Dr. Brook claims that these statements were misleading because they do not disclose that Dr. Brook was fraudulently induced into resigning. However, there is no "misleading" exception to the statute. Indeed, even if stated reasons were pretextual, immunity applies if they are literally true (*Sheikh v Grant Regional Health Ctr.*, 2014 WL 28658, at *2 [WD Wis Jan. 2, 2014]). Thus, the true statement that the hospital had, at the time, formed the opinion that Dr. Brook departed from accepted practice cannot defeat the hospital's immunity, even if, in fact, that opinion was incorrect (*see id.* ["the determination of whether the report was 'false' does not turn on whether the underlying merits of the reported action were properly determined. Instead, the court's role is to evaluate whether the report itself accurately reflected the action taken"]). Because immunity applies unless there is proof of knowing falsity, the absence of any evidence that the hospital did not, at the time, genuinely believe its position on plaintiff's conduct renders defendants absolutely immune. To the extent the claim is based on the hospital communicating the substance of the information in the databank to prospective employers upon request in a manner that is not covered by statutory immunity, since the information itself is not false, its communication cannot possibly constitute wrongful means.

Regardless, even if defendants lacked immunity and the information was false, the predicate wrong on the tortious interference claim--the statements made in the databank--is at its core really defamation, which the Appellate Division already rejected as unactionable based on qualified privilege and lack of malice (152 AD3d at 438-39). The privilege cannot be vitiated merely by recasting the defamation claim as one for tortious interference. Virtually all defamation per se claims can be recast as tortious interference, and doing so is ordinarily not permitted (*see Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993]). To determine whether the claim is properly characterized as tortious interference or defamation, the relevant inquiry is whether the defendant interfered with specific business prospects or plaintiff's reputation generally (*Amaranth*, 71 AD3d at 48). Here, defendants are not alleged to have interfered with any specific business relations of Dr. Brook but rather to have sullied his professional

reputation by posting allegedly false information in the databank (with which Dr. Brook had no business relationship). The Appellate Division already held that a defamation claim is subject to a qualified privilege that was not overcome due to lack of malice. It cannot be the predicate for tortious interference as a matter of law.

In permitting the tortious interference claim to survive the pleading stage because it was not barred by collateral estoppel, the Appellate Division had no occasion to reach whether there was any evidence of actionable misrepresentations and whether the claim was barred under *Carvel* and *Arnon*, which preclude claims based on wrongdoing directed solely at the plaintiff. As discussed, the alleged fraud was directed solely at Dr. Brook and the defamation claim has been rejected. Ultimately, plaintiffs lack of evidence of any actionable predicate wrong directed to third parties with whom they had prospective relations on which to support their tortious interference claim. Plaintiffs' reliance on law of the case stemming from a decision holding that collateral estoppel was not a bar is unavailing (*RXR WWP Owner LLC v WWP Sponsor, LLC*, 145 AD3d 494, 495 [1st Dept 2016] ["Our earlier holding, on a motion to dismiss, brought pursuant to CPLR 3211, that plaintiff plausibly pled a claim for lost profits, does not constitute 'law of the case' barring ARC from moving for summary judgment, which is subject to a different standard of review"]; *see Moses v Savedoff*, 96 AD3d 466, 468 [1st Dept 2012] ["the law of the case doctrine does not apply when a motion to dismiss is followed by a summary judgment motion, as is the case here"]). That issue preclusion based on certain administrative and federal court rulings and failure to state a claim were not threshold grounds to bar this action does not mean that the claims are not amenable to summary judgment based on the record evidence for the reasons set forth.

In the end, Dr. Brook's grievances are not actionable on this record. In response to defendants' showing, plaintiffs failed to demonstrate evidence raising a triable issue that the report was knowingly false or that they are entitled to the recovery sought. Monetary damages are unquestionably unavailable under controlling authority on the fraud, negligent misrepresentation, and breach of contract claims (the latter of which is predicated on an obligation that simply does not exist in the bylaws), and defendants are immune from liability on the tortious interference claim (the elements of which were unsatisfied here anyway) because Congress precluded state-law claims. Nor can the court order defendants to remove anything from the databank particularly where, as here, plaintiffs have not made a showing of entitlement to such relief (*Murphy v Goss*, 103 F Supp 3d 1234, 1239 [D Or 2015] ["Section 11137(c) immunity is complete: it provides immunity from both damages and suits for injunctive relief"], *affd* 693 F Appx 636 [9th Cir 2017]). Summary judgment is therefore granted to defendants.



9/14/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: [X] **CASE DISPOSED** [ ] **NON-FINAL DISPOSITION**
[ ] **GRANTED** [ ] **DENIED** [ ] **GRANTED IN PART** [X] **OTHER**