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Rizvi v North Shore Hematology-Oncology Assoc., P.C.
2020 NY Slip Op 51281(U)
Decided on November 4, 2020
Supreme Court, Suffolk County
Hudson, J.
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Decided on November 4, 2020

Supreme Court, Suffolk County

Hasan A. Rizvi, M.D., Plaintiff,

against

North Shore Hematology-Oncology Associates, P.C. d/b/a/ NEW YORK CANCER & BLOOD SPECIALISTS, JEFFREY VACIRCA, M.D., GERRY RUBIN, M.D., and JOHN DOE 1-10, Defendants.

617346/2019

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James Hudson, J.

As per the Stipulation of the Parties dated January 28th, 2020, the Decision of this Court dated January 23rd, 2020 is vacated and set aside. Upon consideration of the original motion (seq. no.:001), it is

ORDERED that Defendants North Shore Hematology-Oncology Associates ("NSHOA"), Jeffrey Vacirca, M.D. ("Dr. Vacirca"), and Gerry Rubin, M.D. ("Dr. Rubin"), motion for an Order dismissing Plaintiff's Complaint is granted in part and denied in part **(CPLR Rule 3211(a)(4), (7)**. It is further

ORDERED that the portion of Plaintiff's second Cause of Action, sounding in defamation, is dismissed as to the allegations arising from the statements purportedly made by the NSHOA staff. The portion of the second Cause of Action arising from a letter allegedly written to Good Samaritan Hospital, however, has been sufficiently pled. It is further

ORDERED that Plaintiff's third Cause of Action, sounding in Abuse of Process, is dismissed. It is further

ORDERED that Defendants' motion for consolidation of the instant case with the action under Index No.:604833/2019 entitled ***North Shore Hematology-Oncology Associates, P.C. d/b/a New York Cancer & Blood Specialists v. Hasan A. Rizvi, M.D.***is denied **(CPLR Sec.60[a])**; It is further

ORDEREDthat Defendants request for the imposition of sanctions in the form of costs and Attorneys' fees is denied **(22 NYCRR Sec.130-1.1).**

In their instant motion, the Defendants,"NSHOA", Jeffrey Vacirca, M.D. ("Dr. Vacirca"), and Gerry Rubin, M.D. ("Dr. Rubin"), seek an order, pursuant to **CPLR Rule 3211(a)(4), (7)**, to dismiss Plaintiff's First, Second, and Third Causes of Action due to there being another action pending between the same Parties and due to the failure of each Cause of Action to state a claim upon which relief may be granted. Prior to analyzing the respective arguments concerning the motion, the Court must commend Counsel for the quality of their briefs on behalf of their clients. Such advocates honor the profession of law.

In 2015, NSHOA purchased Plaintiff Hasan A. Rizvi, M.D.'s ("Dr. Rizvi") practice, Progressive Oncology. On or about May 1st, 2015, NSHOA and Dr. Rizvi entered into a written Employment Agreement. This document provided, *inter alia*, that Dr. Rizvi would work in North Shore Hematology-Oncology Progressive Oncology Division as its President. In 2018 Dr. Rizvi's Employment Agreement was renewed for a one-year term to expire on April 30th, 2019. On December 31st, 2018, NSHOA provided written notice to Dr. Rizvi of its intent not to renew the Employment Agreement. Thereafter, NSHOA provided notice to Dr. Rizvi instructing him to cease providing professional services on behalf of NSHOA. NSHOA continued to compensate Dr. Rizvi for the remainder of the term of his Employment Agreement.

NSHOA filed a Verified Complaint (hereinafter referred to as the "First Action"), alleging five Causes of Action against Dr. Rizvi arising out of an alleged violation of a covenant-not-to-compete contained in the Employment Agreement. On March 15th, 2019, this Court issued a Temporary Restraining Order ("TRO") in the First Action, enjoining and restraining Dr. Rizvi from violating the restrictive covenant provisions of the Contract, including actively [*2]soliciting the patients of NSHOA pursuant to Paragraph 12(a) of the Employment Agreement and directly or indirectly soliciting the employees of NSHOA as set forth in Paragraph 12(b) of the Employment Agreement. Thereafter, NSHOA filed an Amended Verified Complaint in the First Action alleging ten Causes of Action against Dr. Rizvi. On April 25th, 2019, an Order of this Court was entered granting NSHOA a Preliminary Injunction against Dr. Rizvi, enjoining him from violating the restrictive covenants of his Employment Agreement. Subsequently, Dr. Rizvi interposed his Answer with counterclaims in the First Action.

On June 18th, 2019, NSHOA's Counsel purportedly sent a letter to Dr. Donald Teplitz, D.O., Superintendent of Medical Affairs and Chief Medical Officer of Good Samaritan

Hospital. The letter stated that it had come to Dr. Vacirca's attention that Good Samaritan Hospital had contacted Dr. Rizvi instead of Dr. Vacirca when one of Dr. Vacirca's patients had been admitted to the Hospital. The letter also stated that NSHOA secured a Permanent Injunction against Dr. Rizvi, enjoining him from soliciting NSHOA's patients, but Dr. Rizvi was continuing to treat and solicit treatment from NSHOA's patients, in violation of the Injunction. Defendants maintain that calling the injunction a "permanent injunction" instead of a "preliminary injunction" was a typographical error. On or about July 10th, 2019, Dr. Rizvi's Counsel sent NSHOA's Counsel a cease and desist letter that directed NSHOA to refrain from communicating with Good Samaritan Hospital regarding Dr. Rizvi.

Defendants seek dismissal of all the Causes of Action against them, namely: tortious interference with prospective business advantage; defamation; and abuse of process.

CPLR Rule 3211 provides, in pertinent part:

> "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...
>
> 4. there is another action pending between the same parties for the same cause of action in a court of any state or the United States; or...
>
> 7. the pleading fails to state a cause of action "

"**CPLR 3211** is a purely mechanical device, a procedural Statute through and through [w]hether dismissal is warranted in a given situation will depend on law (substantive, procedural or both) that comes from outside **CPLR 3211's** borders" **(John R. Higgitt, Practice Commentaries, McKinney's C:3211:1 [2018])**. "An order granting a **CPLR 3211(a)** motion is not a disposition on the merits of the action (unless the motion was properly converted to a summary judgment motion). Rather it is *res judicata* of whatever was determined" **(Siegel, NY Prac. §276 [Connors 6th ed.])**.

The Court notes that the Defendants have moved to dismiss under subdivision (**a)(4)** and **(a)(7) of CPLR 3211.** These subdivisions require a separate analysis.

Under **CPLR 3211(a)(4)**

" a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending between the same parties for the same cause of action (*see* ***Whitney v. Whitney****,* 57 NY2d 731, 732, 454 N.Y.S.2d 977, 440 N.E.2d 1324 (1982); ***Cherico, Cherico & Assoc. v. Midollo***, 67 AD3d 622, 886 N.Y.S.2d 914 [2nd Dept.2009]). A court may dismiss an action pursuant to **CPLR 3211(a)(4)** where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same (*see* ***Scottsdale Ins. Co. v. Indemnity Ins. Corp. RRG***, 110 AD3d 783, 784, 974 N.Y.S.2d 476 [2nd Dept. 2013]; ***Matter of Willnus****,* 101 AD3d 1036, 1037, 957 N.Y.S.2d 229 [2nd Dept.2012]). It is not necessary that "the precise legal theories presented in the first action also be presented in the second action" (***Matter of Willnus****, supra* at 1037; *see* ***Syncora Guar. Inc. v. J.P. Morgan Sec. LLC***, 110 AD3d 87, 96, 970 N.Y.S.2d 526 [1st Dept.2013]; ***Simonetti v. Larson****,* 44 AD3d 1028, 1029, 845 N.Y.S.2d 369 [2nd Dept.2007]). The critical element is whether both suits arise out of the same subject matter or series of alleged wrongs (*see* ***Scottsdale Ins. Co. v. Indemnity Ins. Corp. RRG****, supra* at 784; ***DAIJ, Inc. v. Roth***, 85 AD3d 959, 960, 925 N.Y.S.2d 867 [2nd Dept. 2011]; ***Cherico, Cherico & Assoc. v. Midollo****, supra* at 622)."(***Jadron v. 10 Leonard St., LLC***, 124 AD3d 842, 843, [2nd Dept. 2015] 2 N.Y.S.3d 563, 565).

Applying the criteria discussed above, it is apparent that the Defendants' application under **CPLR 3211(a)(4)** is untenable. The Defendants have established that the Parties to the First Action are substantially similar to the Parties in the instant case. This, however, is only one of the elements needed to prevail. As pointed out by Plaintiff's Counsel, the two Actions are not sufficiently similar nor do they arise out of the same subject matter or series of alleged wrongs. The First Action relates the breach of an employment agreement between Dr. Rizvi and North Shore. The case at bar describes tortious interference with prospective business advantage and defamation as the result of a letter NSHOA sent to Good Samaritan Hospital. These are separate facts and legal issues, and there would likely be little overlap in testimony. Accordingly, the request of Defendants that Plaintiff's First, Second, and Third Causes of Action be dismissed pursuant to **CPLR Rule 3211(a)(4)** must be denied.

We now turn our attention to that aspect of Defendants' motion which seeks dismissal under **CPLR Rule 3211(a)(7)**.

In analyzing the sufficiency of a pleading, it is illustrative to compare New York's practice with its Federal counterpart.

Under the rule in ***Conley v. Gibson***, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), there was no substantive difference in pleading requirements between Federal and our State

Courts. As Mr. Justice Black stated " the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." (***Id.*** 45-46). In one of the first cases to discuss the newly enacted **CPLR,** ***Foley v. D'Agostino***, 21 AD2d 60, 63, 248 [*3]N.Y.S.2d 121, 125 (1st Dept. 1964), the Court held that " generally speaking, 'pleadings should not be dismissed or ordered amended unless the allegations therein are not sufficiently particular to apprise the court and parties of the subject matter of the controversy.' (***Id.*** at 63 quoting **3 Weinstein-Korn-Miller, New York Civil Practice, ¶ 3013.03)**.

We must note that the Federal equivalent to **CPLR 3013**, **FRCP Rule 8**, does not use significantly different language from the New York Statute. Likewise, **CPLR Rule 3016**(particularity in specific Actions) finds its companion in **FRCP Rule 9(b)**.

This Federal-State symmetry came to an end in the case of ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). In abrogating ***Conley***, the Court opined that:

> "While a complaint attacked by a **Rule 12(b)(6)** motion to dismiss does not need detailed factual allegations,... a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true." (***Id.*** at 545-46).

The Court in ***Twombly*** was called to address the sufficiency of a claim that an agreement had been in restraint of trade under the Sherman Anti-Trust Act (15 USCA Sec.1). Specifically, it was averred that Petitioners, regional service monopolies created in the aftermath of the 1984 divestiture of AT & T, had agreed to refrain from competing against each other in their respective territories.

> "Applying these general standards to a § 1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects **Rule 8(a)(2)'s** threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A parallel conduct allegation gets the § 1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility." (***Id.*** 545-546).

The Court in ***Ashcroft v. Iqbal***, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) expounded upon ***Twombly's*** plausibility standard when it set forth that:

> "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. Two working principles underlie ***Twombly***. First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. Second, determining whether a [*4]complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense [Citations omitted]." (***Id.*** at 1940-1941).

In ***N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp.***, 709 F.3d 109, 121 (2d Cir. 2013), the Court delineated the Second Circuit rule which requires the factual content of a pleading need only be "suggestive of" liability to comply with **FRCP Rule 8(a)**. Additionally, ***N.J. Carpenters*** stated that "a reasonable inference need not be 'as compelling as any opposing inference' one might draw from the same factual allegation." (***Id***. at 121 quoting ***Tellabs, Inc. v. Makor Issues & Rights, Ltd.,*** 551 U.S. 308, 324, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007). Competing inferences do not affect a complaint's viability unless the non-actionable narrative is considered an "obvious alternative explanation." (***Id.*** at 121).

The dichotomy in pleading requirements in the post ***Twombly*** era has consequences in New York litigation. As noted in ***Williams v. Citigroup, Inc.***, 104 AD3d 521, 962 N.Y.S.2d 96 [1st Dept. 2013], the dismissal of a Federal lawsuit on the basis of facial insufficiency "has no preclusive effect, in light of the heightened pleading requirements in Federal Court [citations omitted]." (***Id***. at 522). In his eloquent opinion in ***ATC Healthcare Inc. v. Goldstein, Golub & Kessler LLP***, 28 Misc 3d 1237(A), 958 N.Y.S.2d 59 (Sup. Ct., Nassau Co. 2009), Justice Warshawsky discussed ***Twombly*** but added that it did not affect the New York rule that "well pleaded complaints may proceed even if recovery appears remote or unlikely." Indeed, the Courts of our state have reiterated that New York's "relaxed notice pleading standard" remains undisturbed post ***Ashcroft v. Iqbal*** (***Artis v. Random House***, 34 Misc 3d 858, 936 N.Y.S.2d 479 [Sup. Ct. NY Co. 2011] citing ***Vig v. New York Hairspray Co. L.P.*** , 67 AD3d 140, 885 N.Y.S.2d 74 [1st Dept. 2009]).

In the area of Fraud or other actions covered by the specificity requirements of **CPLR 3016**, New York's application of pleading Rules closely resembles its Federal counterpart, **FRCP Rule 9(b)**. The Second Department's Decision in ***Pace v. Raisman & Associates,***

Esqs., LLP, 95 AD3d 1185, 945 N.Y.S.2d 118 (2d Dep't 2012) is most illustrative. The ***Pace*** Court was called upon to review an action against a law firm sounding in Legal Malpractice and Fraud. Citing to the holding in ***Eurycleia Partners, LP v. Seward & Kissel, LLP***, 12 NY3d 553, 883 N.Y.S.2d 147 (2009) the Court opined that "[w]hile there is no requirement that there be unassailable proof at the pleading stage, the basic facts constituting the fraud must be set forth ..**CPLR § 3016(b)** is satisfied when the facts suffice to permit a reasonable inference of the alleged misconduct." (***Id.*** at 1189 quoting ***Eurycleia***, at 559).

The divergence between State and Federal pleading requirements is exemplified in the case of ***Leon v Martinez***, 84 NY2d 83, 614 N.Y.S.2d 972 [1994] wherein the Court held that the written complaint "is to be afforded a liberal construction [cite omitted]. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (***Id***. at 87-88 citing ***Morone v Morone***, 50 NY2d 481, 484 [1980]; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 634 [1976]); ***313 43rd Street Realty, LLC v. TMS Enterprises, LP***, 163 AD3d 512, 514, 81 NYS3d 112, 114 [2d Dept 2018]).

State Courts have consistently used this language in reviewing pleadings. "In assessing defendant's motion to dismiss under **CPLR 3211(a)(7)**, [courts] must accept the plaintiff's allegations as true, accord the plaintiffs the benefit of every possible favorable inference, and determine only whether the plaintiffs have a cause of action" (***Connolly v. Long Island Power Authority***, 30 NY3d 719, 728, 70 NYS3d 909, 913, 94 NE3d 471 [2018]). Additionally, " a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (***Carlson v. American Inter. Group, Inc.***, 30 NY3d 288, 298, 67 NYS3d 100, 103, 89 NE3d 490 [2017]; *see also* ***Hutton Group, Inc. v. Cameo Owners Corp.***, 160 AD3d 676, 75 NYS3d 193 [2d Dept 2018]). "In considering the sufficiency of a pleading subject to a motion to dismiss for failure to state a cause of action under **CPLR 3211(a)(7)**, [the court's] well settled task is to determine whether, accepting as true the factual averments of the complaint, the plaintiff can succeed upon any reasonable view of the facts as stated" (***Aristy-Farer v. State***, 29 NY3d 501, 509, 59 NYS3d 877, 883, 81 NE3d 360, [2017]). A complaint which contains only " allegations consisting of bare legal conclusions " however, is not given such deference by the Court (***Connaughton v. Chipotle Mexican Grill, Inc.***, 29 NY3d 137, 142, 53 NYS3d 598, 602, 75 NE3d 1159 [2017]). " affidavits received on a motion to dismiss for failure to state [a] cause of action which has not been converted to [a]

motion for summary judgment are not to be examined for [the] purpose of determining whether there is evidentiary support of [the] pleading" (***Anglero v. Hanif***, 140 AD3d 152, 155, 140 AD3d 905, 907 [2d Dept 2016]; quoting ***Hinrichs v. Youssef***, 214 AD2d 604, 604-05, 625 2d 87 [2d Dept 1995]; *citing* ***Rovello v. Orofino Realty Co.***, 40 NY2d 633, 635, 389 NYS2d 314, 357 NE2d 970 [1976]).

> "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to **CPLR 3211(a)(7)**, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate" (***Gawrych v. Astoria Federal Savings and Loan***, 148 AD3d 681, 683, 48 NYS3d 450, 454 [2d Dept 2017]; *see* ***Guggenheimer v. Ginzburg***, 43 NY2d 268, 401 NYS2d 182, 372 NE2d 17 [1977]).

In deciding a motion to dismiss, the court will not consider whether the plaintiff's case will survive a motion for summary judgment (***Baumann v. Long Island Power Authority***, 45 Misc 3d 257, 989 NYS2d 565 [Sup Ct Queens Co. 2014], *order aff'd* 141 AD3d 554, 34 NYS3d 901 [2d Dept 2016]).

The Defendants argue that Plaintiff's First, Second, and Third Causes of Action fail to state a claim upon which relief can be granted (**CPLR Rule 3211[a][7]).**

Plaintiff's First Cause of Action alleges tortious interference with prospective business advantage. To sufficiently plead this claim, a plaintiff must show the following elements: "(a) business relations with a third party; (b) the defendant's interference with those relations; (c) the [*5]defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship" (*see* ***Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.***, 50 NY2d 183, 428 NYS2d 628, 406, NE2d 445 [1990]; ***Carvel v. Noonan***, 3 NY3d 182, 190, 785 NYS2d 359, 818 NE2d 1100 [2004]; ***NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc.***, 87 NY2d 614, 641 NYS2d 581, 664 NE2d 492 [1996]). ***See, Advanced Glob. Tech. LLC v. Sirius Satellite Radio, Inc.***, 15 Misc 3d 776, 779, 836 NYS2d 807, 809-10 (Sup Ct, NY Co. 2007), *aff'd as modified*, 44 AD3d 317, 843 NYS2d 220 [1st Dept. 2007]). That a defendant acted using "wrongful means" can be established by the defendant's use of "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure" (***Anesthesia Assocs. of Mount Kisco, LLP v. N. Westchester Hosp. Ctr.***, 59 AD3d 473, 873 NYS2d 679 (2nd Dept. 2009); and

Carvel Corp. v. Noonan**,** *supra* at 191; *see also* **Restatement (Second) of Torts § 768, Comment e; § 767, Comment c.**). Where the defendant's wrongful acts were the proximate cause of interference with plaintiff's prospective contractual relations, a claim is made (*see,* ***Jabbour v. Albany Med. Ctr.***, 237 AD2d 787, 654 N.Y.S.2d 862 [3rd Dept. 1997]).

In ***Smith v. Meridian Technologies, Inc.***, 52 AD3d 685, 861 N.Y.S.2d 687 [2nd Dept.2008] an employee, (the Plaintiff Mr. Michael Barry), resigned from Meridian Technologies ("Meridian") and started working for Multidyne Electronics, Inc. ("Multidyne") less than one week later. Meridian sent a letter to Multidyne claiming that Mr. Barry was violating a restrictive covenant of his Employment Agreement with Meridian because Multidyne was a competitor of Meridian. Additionally, in the letter, Meridian claimed that Mr. Barry was exploiting trade secrets acquired from his time with Meridian to help Multidyne unfairly compete. Meridian threatened to "commence a legal action to obtain injunctive relief and damages" if Plaintiff's employment with Multidyne continued. The day the letter was sent, Plaintiff was terminated from his employment with Multidyne. In his subsequent action against Meridian, Plaintiff argued "that Multidyne was not a direct competitor of Meridian, and that the defendants falsely accused him of misappropriating confidential trade secrets." Additionally, he asserted that Defendants provided such allegations "to Multidyne with 'disinterested malevolence' in an effort to secure his termination." In response to Meridian's motion to dismiss, the Second Department determined "plaintiff's allegation that the defendants falsely represented to Multidyne that he was misappropriating trade secrets to engage in unfair competition was sufficient to allege wrongful conduct [as required for the tortious interference claim], and his allegation that he was terminated as a result was sufficient to allege damages." (***Id.*** at 689).

Similarly, ***Steiner Sports Marketing, Inc. v. Weinreb****,* 88 AD3d 482, 930 N.Y.S.2d 186 (1st Dept. 2011), is another example in which a claim for tortious interference with prospective economic relationships was dismissed. In ***Steiner***, an employee (the Defendant Steven Weinreb) brought a counterclaim for tortious interference with prospective economic relationships in response to employer Steiner Sports' Action against him to enforce a covenant not to compete. Mr. Weinreb claimed that "Steiner Sports had caused one of its clients, The Nelson Group, to rescind [their offer of employment] unless Steiner Sports consented to it in writing." Mr. Weinreb asserted this was done "for the sole purpose of harming him." Additionally, the Defendant claimed that Steiner Sports "falsely told 'other potential employers' [*6]that he was subject to an extensive post-termination covenant not to compete,

and had threatened litigation if any of those potential employers hired Weinreb." (***Id.*** at 482). The Supreme Court, New York County dismissed Mr. Weinreb's counterclaim. On appeal, the First Department found that the dismissal was appropriate. The claim that Steiner Sports tortuously interfered in regard to "other potential employers" was "conclusory and unsupported by specific facts alleging any potential relationships." (***Id***. at 482-483). In regard to Mr. Weinreb's potential relationship with The Nelson Group, and that Steiner Sports interfered solely to harm him the Court held that this was "undermined by the factual allegations demonstrating that Steiner Sports had a normal economic interest in interfering with the prospective employment." Even their request "to rescind the offer [did] not constitute the kind of wrongful or culpable conduct required" for a tortious interference with prospective economic relationships claim. (***Id.*** at 483).

The Court finds that the instant case is analogous to the facts presented in ***Smith v. Meridian***, *supra*. Dr. Rizvi alleges that he similarly failed to gain employment with a new medical provider because his former employer sent Good Samaritan Hospital a letter containing purportedly false information. That NSHOA stated that they had obtained a "permanent" injunction against Dr. Rizvi was a clear misrepresentation of the facts. It is debatable as to whether the "permanent" vs. "preliminary" mix-up in the letter was actually a typographical error as Defendants claim, especially because Defendants chose not to correct the error when asked. Regardless, there is a qualitative difference between a permanent injunction and a preliminary one; the former implies finality on the matter, whereas the latter does not. Although Dr. Rizvi was not terminated because of the supposed error, Good Samaritan Hospital said the delay in his employment was a direct result of NSHOA's letter. Affording Dr. Rizvi the benefit of every reasonable inference, it is quite plausible that NSHOA sent the letter with the intentions of preventing his employment with Good Samaritan Hospital, which would satisfy the wrongful means requirement to constitute tortious interference with business relations.

The case at hand can be distinguished from ***Steiner Sports Marketing***. In ***Steiner Sports*** the Defendant had a normal economic interest in interfering with the prospective employment, whereas such a normal economic interest is less clear here.

Defendants argue that the requirement for adequately pleading this tort is that Plaintiff was "prevented from entering into employment by any alleged acts of Defendants." We disagree. Rather, the element referenced simply requires that Plaintiff suffered injury to the

business relationship (*see* ***N. State Autobahn, Inc. v. Progressive Ins. Grp. Co.***, 102 AD3d 5, 21, 953 N.Y.S.2d 96, 108 [2nd Dept. 2012]). Defendants also argued that their actions caused no damages for Plaintiff. Assuming it is true that Good Samaritan said North Shore's letter was the direct cause of the delay to make its hiring decision, Dr. Rizvi did suffer damages. Under those facts, Dr. Rizvi not only lost income due to delayed employment, but he also may have lost potential clients due to what NSHOA staff told his former patients. Defendants point out that Good Samaritan Hospital could have hired Dr. Rizvi any time between their initial meeting and their receipt of the June 18th, 2019 letter. That is true, but that fact would only reduce, not eliminate, damages.

In light of the foregoing discussion and application of controlling law, the Court finds that the First Cause of Action was adequately plead against the Defendants. Therefore, the request of [*7]Defendants in their motion that Plaintiff's First Cause of Action be dismissed pursuant to **CPLR Rule 3211(a)(7)** is denied.

We next turn our discussion to the Plaintiff's Second Cause of Action sounding in Defamation.

"To state a cause of action to recover damages for defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*" (***Rodriguez v. Daily News, L.P.***, 142 AD3d 1062, 1063, 37 N.Y.S.3d 613 [2nd Dept.2016] ; *see* ***El Jamal v. Weil,*** 116 AD3d 732, 733, 986 N.Y.S.2d 146). In turn, defamation *per se* requires that the offending statement meets at least one of the following criteria: "when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession" (***Konig v. CSC Holdings, LLC***, 112 AD3d 934, 935, 977 N.Y.S.2d 756, 758 [2nd Dept. 2013] quoting ***Geraci v. Probst***, 61 AD3d 717, 718, 877 N.Y.S.2d 386 [2nd Dept.2009]; aff'd as modified 15 NY3d 336 [2010])

"A communication made by one person to another upon a subject in which both have an interest is protected by a qualified privilege" (***Stillman v. Ford,*** 22 NY2d 48, 53, 290 N.Y.S.2d 893, 238 N.E.2d 304 [1968]; *see* ***Liberman v. Gelstein,*** 80 NY2d 429, 437, 590 N.Y.S.2d 857, 605 N.E.2d 344 [1992]; ***Colantonio v. Mercy Med. Ctr.***, 115 AD3d 902, 903, 982 N.Y.S.2d 563 [2nd Dept.2014]). This "common-interest privilege," however, may be overcome by a showing of malice (***Colantonio v. Mercy Med. Ctr.,*** *supra* at 903; *see* ***Kamchi v. Weissman,*** 125 AD3d 142, 158, 1 N.Y.S.3d 169 [2nd Dept.2014]). "To establish the

'malice' necessary to defeat the privilege, the plaintiff may show either common-law malice, *i.e.*, 'spite or ill will,' or may show 'actual malice,' *i.e.*, knowledge of falsehood of the statement or reckless disregard for the truth" (***Diorio v. Ossining Union Free School Dist.***, 96 AD3d 710, 712, 946 N.Y.S.2d 195 [2nd Dept.2012], quoting ***Liberman v. Gelstein***, *supra* at 437-438[internal quotation marks omitted]; *see* ***Ferrara v. Esquire Bank***, 153 AD3d 671, 672-73, 61 N.Y.S.3d 73, 75 [2nd Dept. 2017]).

Plaintiff alleges two possible sources of defamation. The first source is the letter that NSHOA sent to Good Samaritan Hospital, and the second source are the alleged statements NSHOA staff were instructed to make to mislead Dr. Rizvi's former patients of his whereabouts and status as a physician. Plaintiff argues that "advising patients that Dr. Rizvi suddenly disappeared leaving no forwarding information, no contract information, suggesting no wish to continue treating those patients whom he had treated while working for NSHOA damage[d] Dr. Rizvi's reputation as a physician." Defendants also assert that Plaintiff's averment in the Complaint that the defamation pertained to "North Shore Hematology Association staff telling patients that Dr. Rizvi suddenly disappeared from practice " permissibly vague. This allegation, Defendants contend, fails to satisfy the specificity required by **CPLR Sec. 3016(a).** (Plaintiff's Memorandum of Law p. 20).

In light of the holding in ***Naderi v. North Shore-Long Island Jewish Health System***, 135 AD3d 619, 24 N.Y.S.3d 55 [1st Dept. 2016], it is clear that the second source of defamation is not actionable. In ***Naderi***, Plaintiff Naderi brought an action for defamation against his former employer, Defendant North Shore-Long Island Jewish Health System. Plaintiff's defamation allegations were based on rumors and "an alleged comment made to him at the termination [*8]meeting by an employee to the effect that she doubted that he would be able to maintain his academic appointment at Hofstra Medical School." The First Department dismissed Naderi's defamation claim due to failure to state a claim. The termination meeting comment simply was not "actionable defamation," and neither were the "nonspecific defamatory rumors" actionable because "the complaint [did] not allege the particular defamatory words or statements, who made the alleged statements, or to whom the alleged statements were made." In our case the statements made by North Shore staff are analogous to the "nonspecific defamatory rumors" in ***Naderi***. In regard to NSHOA staff's statements, Plaintiff did not provide specific statements or names of the parties involved in those communications. Therefore, the request of Defendants that Plaintiff's Second Cause of

Action be dismissed pursuant to **CPLR Rule 3211(a)(7)** for failure to state a cause of action is granted in regard to the statements made by NSHOA's staff.

Plaintiff argues that the letter to Good Samaritan Hospital constitutes defamation in two ways. First, the letter made a false statement in that it claimed there was a permanent injunction against Dr. Rizvi, when it was actually only a temporary injunction. Second, the letter stated that Dr. Rizvi had violated his Employment Agreement with NSHOA. Both of these statements according to Plaintiff were either false or not yet proven when the letter was sent. "In determining whether a statement is defamatory, '[t]he words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader'" (*see* ***James v. Gannett Co.***, 40 NY2d 415, 419, 386 NYS2d 871, 353 NE2d 834 [1976]). Plaintiff asserts that the "[a]verage person is going to interpret a legal document sent to them by an attorney, as described by said attorney." That the letter falsely expressed finality in regard to the injunction against Dr. Rizvi could have damaged Dr. Rizvi's professional reputation in that it implied he is the type of employee to violate employment agreements, other contractual obligations, or even the law in general.

For the June 18th, 2019 letter to constitute defamation, it must cause special harm or constitute defamation *per se.* The defamation *per se* criterion under which the letter could fall is its injurious nature towards Dr. Rizvi's trade, business, or profession. Although it is not as clear as a matter of law whether the letter satisfies the elements for defamation *per se*, it does satisfy the elements for defamation *per quod*. To be defamation *per quod*, plaintiff must have alleged special damages. Such special damages must "contemplate the loss of something having economic or pecuniary value" (***Liberman v. Gelstein***, supra at 434-435 [1992]; *see also* ***Drug Research Corp v. Curtis Publ. Co.***, 7 NY2d 435, 440-441 [1960]). Here, the special damages were any lost income due to delayed employment that was the direct result of the letter.

The next element at issue for the letter to meet the requirements of defamation *per quod* is that the false statement (*i.e.* that there was a permanent injunction) constituted fault by a negligence standard-at minimum. Here, it is clear that the requisite negligence was met if not exceeded. When the letter was initially sent, it was negligent to send a letter containing a patent error that significantly changed the meaning of the letter. Furthermore, Defendants' conduct rose to the level of knowledge when they refused to correct the alleged typographical error despite Plaintiff requesting they do so.

The final element at issue for the letter to constitute defamation *per quod* is that it is not protected by any privileges or defenses. "[T]ruth provides a complete defense to an action [*9]asserting defamation" (*see* ***Fleckenstein v. Friedman***, 266 NY 19, 23 (1934]). "Substantial truth will also defeat an action for defamation." (***Id***. at 23, ***Leibowitz v. St. Luke's Roosevelt Hosp. Ctr.***, 281 AD2d 350, 350 [1st Dept. 2001]). Defendant argues that " [a] typographical error does not rise to the actionable level of negligence." The Court disagrees. Preliminary and permanent are spelled quite differently. Additionally, if it were simply a typographical error, is incongruous that Defendants would not take the opportunity to correct it upon Plaintiff's request to do so. Moreover, it is an error that provides a significant qualitative difference. Calling the injunction permanent implied finality. The implication of finality made the statement untrue. This statement cannot be defeated by the defenses of truth or substantial truth because the statement was plainly false.

For their next defense, Defendants argue that "statements made in the course of legal proceedings are absolutely privileged if they are at all pertinent to the litigation. The privilege applies to statements made in or out of court, on or off the record, and regardless of the motive with which they were made" (***Tourmans v. Smith***, 153 NY 214, 219 [1987]). However, Defendant's allegedly defamatory statements are not what the litigation is intended to protect. The litigation privilege is intended to protect statements like hyperbole in the courtroom, for example, not the allegedly defamatory language here. This statement cannot be protected by the litigation privilege, because that privilege simply does not apply to this utterance.

Defendants raise the defense common-interest privilege. Defendants argue that:

> "Good Samaritan ha[d] a common interest in knowing that one of its physicians with admitting privileges ha[d] a court order enjoining him from soliciting his former employer medical group's patients. This is particularly evident given that, prior to the June 18th, 2019 letter, it [was] alleged that Dr. Rizvi had previously solicited NSHOA's patients at Good Samaritan."

Furthermore, Defendants contend that:

> "NSHOA had the need to remind Good Samaritan that it was obligated to have NSHOA's physicians treat NSHOA's patients at Good Samaritan. NSHOA did not act improperly or defamatorily (sic) in reminding Good Samaritan that it is obligated to inform NSHOA when one of its patients is admitted, rather than

facilitate Dr. Rizvi's impermissible interference and solicitations of NSHOA's patients."

At first glance it appears that the common-interest privilege applies to the letter. However, ***Ferrara v. Esquire Bank*** , 153 AD3d 671, 61 N.Y.S.3d 73 (2nd Dept. 2017) provides an example in which a Cause of Action for defamation was upheld despite such statements falling under the qualified common interest privilege. Mr. Ferrara was an employee of Esquire Bank for several months in 2014 until he was terminated. After his termination, Mr. Ferrara brought an action for defamation against Defendants Esquire Bank and its principals (Sagliocca and Bader). The subject of the defamation claim were the reasons for Mr. Ferrara's termination, as discussed by Sagliocca, Bader, and the recruiting agency Mr. Ferrara used to find a job with Esquire Bank. Defendants argued that the defamatory statements were subject to the qualified [*10]common-interest privilege. However, the Supreme Court, Suffolk County (Pastoressa J.) "denied the defendants' motion to dismiss [because] the defendants had failed to establish that the common-interest privilege applied to the subject communications." Initially the Court determined the common-interest privilege was applicable here because the recruiting agency "had an interest in the reason for the termination of the plaintiff's employment and as to why Esquire was seeking the return of the placement fee it had paid." That did not end the Court's inquiry. It was ultimately determined, however, that the "complaint sufficiently allege[d] malice to overcome the privilege." "Accepting the facts as alleged and according the plaintiff the benefit of every possible favorable inference" while recognizing that "a plaintiff has 'no obligation to show evidentiary facts to support [his or her] allegations of malice on a motion to dismiss.'" Therefore, the Second Department Affirmed the lower Court's denial of the Defendant's Motion to Dismiss.

The instant case is quite similar to ***Ferrara.*** The qualified common-interest privilege applied to the defamatory statements in ***Ferrara***; but for a showing of malice, the defamation claim would have been defeated. Here, although the alleged defamatory statement that there was a permanent injunction against plaintiff likely falls under the purview of the qualified common-interest privilege, the defamation claim would be saved by a showing of malice. Defendants argue this statement was not made with malice because "[i]t was a straightforward letter meant to advise Good Samaritan Hospital that it had come to Dr. Vacirca's attention that Good Samaritan had contacted Dr. Rizvi instead of Dr. Vacirca when one of Dr. Vacirca's patients had been admitted to the Hospital and that Dr. Rizvi had treated Dr. Vacirca's patient, which was improper. It also stated that NSHOA had secured an injunction against Dr. Rizvi,

enjoining him from soliciting NSHOA's patients but that Dr. Rizvi was continuing to treat and solicit for treatment NSHOA's patients, in violation of the Injunction, among other things." Essentially, Defendants argue that their letter was merely a statement of Plaintiff's legal position. This is similar to the case in ***SLC Consultants/Constructors, Inc. v. Raab***, 177 AD2d 965, 578 N.Y.S.2d 284 [4th Dept.1991] *mot for leave to appeal dismissed* 79 NY2d 915, 581 N.Y.S.2d 667 in which a defamation claim was dismissed for failure to state a Cause of Action. The instant case, however, is readily distinguishable from the holding in that 4th Department case.

In, ***SLC*** the Plaintiff sent a letter about former employee, Mr. Raab, to three of its competitors. The Appellate Court determined that the letter was "merely a statement of plaintiff's legal position with regard to its employment agreement with defendant, and the existence of covenants not to compete and of confidentiality. The letter [did] not affect defendant 'in his profession by imputing fraud, dishonesty, misconduct, or unfitness [Citations omitted].'" (***Id.*** at 966). Even considering the extrinsic fact that SLC "told prospective employers that [Raab] was fired and [therefore was] not bound by the restrictive covenants" did not make the letter defamatory. ***SLC Consultants*** differs from the case at hand in that NSHOA's letter was not a statement of Plaintiff's legal position. The letter's false claim that there was a permanent injunction against Dr. Rizvi means the letter as a whole went beyond such a limited purpose. After the letter was sent, Plaintiff asked the Defendants to correct this error (the permanence of the injunction). Defendants chose not to correct the error in the letter when asked shows, for the purposes of this motion, they had actual malice because they perpetuated the falsehood with knowledge it was false. Such malice will overcome the common-interest privilege. It is of no import that Plaintiff did not argue he had actual malice because the standard of review on a **[*11]CPLR Rule 3211(a)(7)** motion is whether the Plaintiff has a Cause of Action, not whether the Plaintiff has stated one. The forgoing constrains the Court to find that Plaintiff has sufficiently plead his Second Cause of Action in regards to the referenced letter. The motion will be granted to the limited extent that claims predicated on conversations with hospital staff will dismissed.

The Court now turns its attention to the Plaintiff's Third Cause of Action which sounds in abuse of process. To successfully plead such a claim, a plaintiff must show the following elements: "(a) there was regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; (b) the person activating the process must be moved by a purpose to do harm without economic or social excuse or justification; and (3)

the person is seeking some collateral advantage or corresponding detriment to the litigant that is outside the legitimate ends of the process" (***Julian J. Studley, Inc. v. Lefrak***, 41 NY2d 881, 883-84 [1977]). "If process has a legitimate purpose, however, the allegation that it was misused does not suffice to state a claim for abuse of process" (***Casa de Meadows Inc. (Cayman Islands) v. Zaman***, 76 AD3d 917, 921 [1st Dept. 2010]). "It is not enough that the actor [has] an ulterior motive in using the process of the court. It must further appear that he did something in the use of the process outside of the purpose for which it was intended." (***Hauser v. Bartow***, 273 NY 370, 374 [1937]). "Every one [sic] has a right to use the machinery of the law, and bad motive does not defeat that right. There must be a further act done outside the use of the process-a perversion of the process." (***Id.*** at 374). A malicious motive alone does not give rise to a cause of action for abuse of process **(*Curiano v. Suozzi***, 63 NY2d 113, 117 [1984]).

Applying the criteria listed above, the Court finds that the abuse of process claim was not plead adequately. Defendants were not seeking some collateral advantage that was outside the legitimate ends of the process. Even if the process was misused in a manner that was not evident, it does not matter because the process also has a legitimate purpose. That a Preliminary Injunction was granted in the First Action makes that clear. Additionally, a malicious motive alone would not give rise to an abuse of process claim. Even if malice were clearly pled in relation to the abuse of process claim, that would not be enough to be actionable. The only way for Plaintiff to make this claim would be if he were to win the First Action. Unless that happens, the abuse of process allegations are conclusory. Controlling case law demonstrates that such a pleading is patently insufficient (*see* ***Caplan v. Tofel***, 65 AD3d 1180, 1181, 886 N.Y.S.2d 182, 183 (2nd Dept. 2009).

Therefore, the request that plaintiff's Third Cause of Action be dismissed pursuant to **CPLR 3211(a)(7)** is granted.

Finally, the Court reviews the Defendants motion for Consolidation Pursuant to **CPLR Section 602(a).**

This Statute relates, in salient part "When actions involving a common question of law or fact are pending before a court, the court, upon motion,...may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." "A motion to consolidate is directed to the sound discretion of the court, and the court is given wide latitude in the exercise thereof"

(***Inspiration Enterprises, Inc. v Inland Credit Corp.,*** 54 AD2d 839, 840 [1st Dept 1976]). "Consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense and prevent [*12]the injustice which would result from divergent decisions based on the same facts" (***Chinatown Apts., Inc. v New York City Tr. Auth.,*** 100 AD2d 824, 825 [1st Dept 1984]).

"Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, 'unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right'" (***Raboy v McCrory Corp.,*** 210 AD2d 145, 147 [1st Dept 1994], quoting ***Amtorg Trading Corp. v Broadway & 54th St. Assocs.,*** 191 AD2d 212, 213 [1st Dept 1993]). "The burden of showing prejudice to a substantial right rests upon the party opposing a motion for consolidation" (***Hill v Smalls,*** 49 AD2d 724, 725 [1st Dept 1975]).

Courts have found that substantial rights are prejudiced when: (1) there are no common facts between the cases (***Heydt Contr. v Tishman,*** 163 AD2d 196, 558 N.Y.S.2d 47 [1st Dept.1990]); (2) the issues in the actions to be consolidated are distinct in nature **(*Beerman v Morhaim,*** 17 AD3d 302, 791 N.Y.S.2d 854 [2d Dept 2005]; and (3) consolidation would result in a common defendant in all cases where "presentation of both claims to the same jury would tend to bolster each claim to defendants' disadvantage" (***Tarshish v Assoc. Dry Goods Corp.,*** 232 AD2d 246, 247, 648 N.Y.S.2d 298 [1st Dept 1996]).

Consolidation should be denied when it would result in jury confusion **(*Skelly v Sachem Cent. Sch. Dist.,*** 309 AD2d 917, 766 N.Y.S.2d 108 [2d Dept 2003]). Jury confusion results when: (1) a party is identified as both a plaintiff and a defendant **(*Geneva Temps, Inc. v New York Communities, Inc.,*** 24 AD3d 332, 806 N.Y.S.2d 519 [1st Dept 2005]; *see also* ***Bass v France,*** 70 AD2d 849, 418 N.Y.S.2d 43 [1st Dept 1979]; (2) consolidation would substantially increase the amount of Causes of Action, witnesses and facts to be heard at trial (***Skelly,*** *supra* at 918); or (3)consolidation would unduly complicate the issues and dis-serve the goal of **CPLR 602** to "avoid[] unnecessary costs or delay" (***Durante v Renstar,*** 76 AD2d 825, 826; 428 N.Y.S.2d 485 [2d Dept.1980]), quoting **CPLR 602 [a])**.

Although any one of the above factors will allow for the denial of consolidation, courts may also review the totality of circumstances that consolidation would create and weigh the competing interests such as common issues as opposed to disparity between the cases' stages of litigation, unwieldiness of a joint trial, risk of jury confusion and the prejudice of the

parties right to a fair trial (***Skelly,*** *supra* at 917; ***Gouldsbury v Dan's Supreme Supermarket, Inc.,*** 138 AD2d 675; 526 N.Y.S.2d 779 [2d Dept 1988]).

The Court in ***M & K Computer Corp. v. MBS Indus., Inc.***, 271 AD2d 660, 706 N.Y.S.2d 194 (2nd Dept. 2000) found consolidation to be improper. In that case, the Trial Court consolidated Action Number One"to recover damages for a breach of a noncompetition clause and tortious interference with a contractual relationship, which was commenced in the Supreme Court, Nassau County" with Action Number Two commenced in the Supreme Court, New York County "to recover damages for fraud." On appeal, it was held to be error to consolidate Actions One and Two because there was "an insufficient identity of factual or legal issues in the actions" to allow for consolidation. Additionally, consolidation would require some parties to "appear as both plaintiff and defendant." (***Id.***at 195).

The holding in ***M & K Computer Corp***. controls the matter before us. As in ***M & K***, [*13]there is not enough overlap between the factual or legal issues in the First and Second Actions. While the First Action is concerns itself with an alleged breach of an employment contract, the instant case is about tortious interference of prospective business advantage and defamation as the result of a letter sent about the First Action. Although most of the Parties appear in both Actions, their respective Actions and claims relate to separate factual and legal issues. There would likely be little overlap in testimony between the two separate Actions. Additionally, consolidation would require Parties to appear as both Plaintiff and Defendant in the consolidated Action, which is likely to cause jury confusion.

Accordingly, the request that instant action be consolidated with the First Action pursuant to **CPLR 602(a)** is denied.

Defendants have sought an award of Attorneys' fees Pursuant to **22 NYCRR Section 130-1.1**. This Rule allows a Court to impose financial sanctions when a party engages in frivolous conduct. The Rule further states at subdivision [c] that "... conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." Under the circumstances presented, the Court finds that such behavior has not been proven nor is a hearing warranted at this time to determine if the Plaintiff has engaged in such activity.

This Memorandum also constitutes the Order of the Court.

DATED: NOVEMBER 4th, 2020

RIVERHEAD, NY

HON. JAMES HUDSON

Acting Justice of the Supreme Court

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