SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Index Number : 100138/2006

TSADIK, SEIFE M., M.D.

vs

BETH ISRAEL MEDICAL CENTER

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE 6/5/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

JUL 18 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUL 12 2006

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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SEIFE M. TSADIK, M.D., a/k/a SEIFE WOLDE-TSADIK,

Plaintiff,

-against-

BETH ISRAEL MEDICAL CENTER, a/k/a BETH MEDICAL CENTER FOUNDATION, INC., CHANDRANATH SEN, M.D., and JUDITH BLOCK,

Defendants.

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Decision/Order
Index No.: 100138/06
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs motion [dismiss] w/MW affid in support, exh, affid in support (CS, M.D.), exhs	1
Pltf's affid in opp (SMT, M.D.) w/exh	2

Upon the foregoing papers, the decision and order of the court is as follows:

Defendants move, pre-answer, to dismiss plaintiff's complaint for wrongful termination/breach of contract, breach of the implied covenant of fair dealing and tortious interference with contract. Plaintiff opposes the motion in all respects.

Background and factual allegations

The court accepts plaintiff's factual allegations as true for the purpose of this motion. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). The primary issue raised is whether the court has subject matter jurisdiction over the parties' dispute or whether plaintiff must first exhaust certain

administrative remedies under the Public Health Law that are available to medical doctors.

In deciding defendants' motion, the court considers the following alleged facts:

On January 30, 2003, plaintiff, a medical doctor, entered into an employment contract with defendant Beth Israel Medical Center a/k/a Beth Israel Medical Center Foundation, Inc. ("Beth Israel" or "the hospital") for employment as a Hospitalist and Attending Physician in the Neurosurgery Department ("the contract"). Plaintiff began working at the hospital on the effective date of the contract (March 3, 2003), but resigned on April 16, 2003. He contends his resignation was forced and demanded by Dr. Fink who told him he would be "fired," and his termination reported to the National Practitioner Data Bank (NPDB), if he did not comply. The NPDB collects information about adverse actions involving health care practitioners.

Notwithstanding the forgoing, defendant Judith Block, a Divisional Risk Manager for the hospital, filed a report about plaintiff with the NPDB on May 23, 2003. She reported that plaintiff had been asked to resign and his clinical privileges terminated "due to substandard or inadequate care" provided by plaintiff and "because of serious problems with his job performance including failure to communicate with other staff re[garding] patient care plans and followup, providing unreliable infor[mation] re[garding] patients to other staff, unsound medical judgment and leaving work early."

Plaintiff wrote to the hospital on June 3, 2003 demanding that the hospital remove the entry. The hospital responded by letter dated June 13, 2003 as follows:

> "At the time of your resignation, the credentialing process was not complete and your appointment to the Medical Staff was pending. However, as a hospitalist, even had you received an appointment to the Medical Staff, such appointment would automatically end with termination of employment. Under these circumstances, the Medical Staff By-Laws do not give you the right to a hearing with respect to termination of your position. We will forward a copy of the Medical Staff By-Laws to you should you so request.
>
> As you were informed, there were quality issues in the care you rendered that led to the request for your resignation. These are documented in your QI [quality improvement] file. You were offered the opportunity to resign in lieu of termination and you did submit a letter of resignation. I am satisfied that the request for your resignation was justified.
>
> We are obligated by law to report to the National Practitioner Data Bank terminations and resignations of physicians under investigation relating to professional incompetence. We will however clarify to the Data Bank that at the time of your resignation you did not have recourse to a hearing or other form of due process. . ."

Plaintiff alleges that although he was ready to perform under the contract, the hospital wrongfully and without cause discharged plaintiff and refused to let him serve as agreed under the contract (1st cause of action). He further alleges his contract included an implied covenant of good faith and fair dealing, which the hospital breached (2nd cause of action). His 3rd and 4th causes of action assert claims that Dr. Sen and Ms. Block induced the hospital to breach the contract. Plaintiff's 5th and 6th causes of action are that Dr. Sen and Ms. Block tortiously interfered with the contract. In support of the 3rd, 4th, 5th and 6th causes of action against the named individual defendants,

plaintiff states that Dr. Sen is the Chairman of his department, and that Dr. Sen disliked him on a personal level having nothing to do with his (plaintiff's) abilities. Plaintiff claims Ms. Block acted outside the scope of her employment by inducing the hospital to breach the contract, and by reporting him to the NPDB.

Defendants contend that because this dispute arises from plaintiff's termination by the hospital, he must first exhaust the administrative remedies found within Public Health Law §§ 2801-b and 2801-c. Having failed to first pursue such administrative remedies, defendants argue, deprives this court of subject matter jurisdiction. Defendants contend that the administrative grievance process must be followed regardless of whether plaintiff seeks only monetary damages or some other remedy as well. Indemini v. Beth Israel Medical Ctr., 4 NY2d 63 (2005); Moallem v. Jamaica Hospital, 264 AD2d 621 (1st dept. 1999).

Plaintiff argues that his claims are not subject to the administrative remedies of the Public Health Law (§ 2801-b) for three reasons. First, because the contract contains a clause requiring all disputes under the contract to be brought in the courts in the State and County of New York. Next, plaintiff contends that because he was not terminated by the governing body of the hospital, but forced to resign by his direct supervisor, PHL § 2801-c does not apply, because there is no "improper practice" to challenge at an administrative hearing. Finally, plaintiff contends that there are two aspects to the contract: his hospital privileges and his right to remuneration. While he acknowledges that any dispute about hospital privileges would have to be resolved administratively; he argues that disputes about money damages alone cannot be resolved by the administrative agency and needs to be brought to court.

Discussion

Section 2801-b (1) of the Public Health Law provides in relevant part:

> "It shall be an improper practice for the governing body of a hospital to refuse to act upon an application for staff membership or professional privileges or to deny or withhold from a physician...staff membership of professional privileges in a hospital or to exclude or expel a physician...from staff membership in a hospital or curtail, terminate or diminish in any way a physician's ...privileges in a hospital, without stating the reasons therefore, or if the reasons are unrelated to standards of patient care, patient welfare, the objectives of the institution or the character or competency of the applicant."

If the governing body of the hospital engages in an improper practice, as that term is statutorily defined, then an aggrieved physician can file a complaint with the Public Health Council, which must promptly conduct a confidential investigation. PHL §§ 2801-b (2); (3).

In enacting PHL § 2801-b, the Legislature intended to provide physicians and hospitals with a forum for their disputes, discourage groundless claims, and to offer the courts some aid in resolving such disputes, where parties fail to reach agreement. Matter of Cohoes Memorial Hospital v. Dept of Health of State of New York, 48 NY2d 583 at 589 (1979). Therefore, the protections of PHL § 2801-b are a two way street for the protection of both the physician and the public. Gelbard v. Genesee Hospital, 211 AD2d 159 at 161 *aff'd* 87 NY2d 691 (1996).

The statute itself, however, provides that the remedies under PHL § 2801-b do not "impair or affect any other right or remedy" that a physician may have. PHL § 2801-b (4). Notwithstanding such statutory reservation, the Court

of Appeals has held that, at least in some circumstances, the administrative remedy must be invoked before a physician can seek recourse in the courts. Indemini v. Beth Israel Medical Center, 4 NY3d 63 (2005).

Defendants essentially argue that the Court of Appeals decision in Indemini means that all disputes between the governing body of a hospital and a physician emanating from a termination must be vetted through the administrative process, including ordinary contract disputes. Defendants rely upon dicta in Indemini that a physician cannot circumvent the administrative procedures specified in Public Health Law § 2801-b by bringing a breach of contract action. Indemini, however, involved not only a claim of breach of contract but also "reinstatement" and "expurgation of the Medical Center's records to delete any reference to personnel actions taken against [plaintiff]." Indemini, *supra* at 66.

Reinstatement necessarily carries with it reinstatement of hospital staff membership and/or hospital privileges, the very rights that PHL § 2801-b addresses. Thus, while a physician cannot cloak remedies like reinstatement under the guise of breach of contract, Indemini does not stand for the legal principal that a pure breach of contract action, seeking only monetary damages, must go through the statutorily created administrative process for hospital staff and privilege grievances. Indeed, defendants' broad reading of Indemini would completely eviscerate the statutory language which expressly provides that the administrative remedies are not a physician's sole remedy in termination disputes. Albeit in a different context, the Court of Appeals in Indemini expressly

left open the issue of whether there are circumstances when administrative review is not required before proceeding to court.

In this court's view and based upon the statutory language, whether the dispute should first be heard administratively (by the Public Health Council), or in the courts, turns on whether the dispute is about the doctor's competency or ethics to continue to practice, and the kind of relief the aggrieved physician seeks. Gelbard v. Genesee Hospital, 211 AD2d 159 at 161 (4th dept. 1995) *aff'd* 87 NY2d 691 (1996). Where the physician seeks to continue and/or establish staff membership or hospital privileges, then proceeding before the Public Health Council before any court action is commenced is appropriate. PHL specifically relates to issues of staff membership and hospital privileges. Where, however, no such staff membership or hospital privileges are sought, then a physician should be free to pursue his/her other rights or remedies, including direct access to court proceedings.

In this case plaintiff does not seek reinstatement to his former job, but only monetary damages for breach of an employment contract. Mason v. Central Suffolk Hospital, 3 NY3d 343 (2004). Thus, while the proper recourse for challenging termination with a view toward reinstatement would have been the grievance process set out in Public Health Law § 2801-b [Indemni v. Beth Israel Medical Center, *supra* at 68], where, as here, the physician is not complaining about the decision to terminate, or seeking reinstatement, but only monetary damages under the contract, the dispute may be heard in the courts in the first instance. Mason v. Central Suffolk Hospital, *supra* at 347-8; *See also*: *Mahmud*

v. Bon Secours Charity Health System, 289 FSupp2d 466 (S.D.N.Y. 2003).

This result is consistent with the salutory goal of PHL § 2801-b to protect physicians and the public. Gelbard v. Genesee Hospital, 211 AD2d 159 at 161 (4th dept. 1995) *aff'd* 87 NY2d 691 (1996). It is also consistent with section 2801-b not being the sole or exclusive remedy for a terminated physician. PHL § 2801-b (4). Defendants' motion to dismiss the complaint on the basis that the court does not have subject matter jurisdiction over this lawsuit is, therefore, denied. Having so decided, the court need not further address plaintiff's other claims about whether the ultimatum about his resignation was by a "governing body" or otherwise.

Defendants' argue, alternatively, that plaintiff has pled redundant causes of action, and asserted causes of action against the individually named defendants without any factual claims to support them. Therefore, the individual defendants seek the dismissal of the 3rd, 4th, 5th and 6th causes of action against them. The hospital seeks the dismissal of the 2nd cause of action against it as being redundant.

The individual claims against defendants are predicated on causes of action for tortious interference with contact. In order to establish a validly stated cause of action for tortious interference with contract a plaintiff must the allege the existence of a valid contract between plaintiff and a third party, the defendants's intentional and unjustified procurement of the third party's breach of contract and resulting damages. JM Ball Chrysler LLC v. Marong Chrysler-Plymounth, Inc., 19 AD3d 1094 (4th dept. 2005). The allegations cannot be

conclusory, but must include facts sufficient to support the conclusions to be drawn. Mere conclusions that third parties cancelled contracts because of defendants' action will not withstand a motion to dismiss. MJ & K Co. Inc. v. Matthew Bender and Company Inc., 220 AD2d 488 (2nd dept. 1995).

Plaintiff alleges the existence of a valid contract between himself and the hospital. He further alleges that although Dr. Sen and Ms. Block are hospital employees, they acted outside the scope of their employment in procuring or encouraging the hospital to repudiate the contract. Kosson v. Algaze, 203 AD2d 112 (1st dept. 1994) *aff'd* 84 NY2d 1019 (1995). Plaintiff, does not elaborate what either Dr. Sen or Ms. Block did to procure the breach of contract. He does not allege what either of them did that was outside the scope of their employment, or what exactly was the nature of the interference. Thus, for example, the report to the NPDB was by Ms. Block in her official capacity. There is no claim that Ms. Block acted without the hospital's knowledge or consent when she filed the report. With respect to Dr. Sen, plaintiff avers that Dr. Sen's personal dislike for him "rendered defendant Beth Israel's performance of its obligations under the Contract more difficult." This is also too vague to withstand a motion to dismiss.

After careful consideration, the court finds that the causes of action against the individual defendants fail, even according them every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st dept. 1997). Therefore, the 3rd, 4th, 5th and 6th causes of action against the individual defendants are hereby severed and dismissed.

Plaintiff acknowledges some redundancy between the 1st cause of action wrongful termination/breach of contract and the 2nd cause of action for breach of the implied covenant of fair dealing. Rather than dismiss the 2nd cause of action, the court grants defendants' motion only to the extent of incorporating the 2nd cause of action into the 1st cause of action because it is conceptually and legally encompassed anyway. Otherwise, the motion to dismiss the 2nd cause of action is denied.

The remaining defendant shall serve its answer within ten (10) days from the date of this decision/order, below.

Conclusion

It is hereby:

ORDERED that defendants' motion to dismiss this action on the basis that this court does not have subject matter jurisdiction is hereby denied; and it is further

ORDERED that defendants' motion to dismiss the individually named defendants from this case is hereby granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendant Chandranath Sen, M.D. and defendant Judith Block, against plaintiff Seife M. Tsadik, M.D. a/k/a Seife Wolde-Tsadik, dismissing the complaint against them; and it is further

ORDERED that the Clerk shall amend the caption to delete the names of defendant Chandranath Sen, M.D. and defendant Judith Block therefrom; and it is further

ORDERED that the court grants defendants' motion only to the extent of incorporating the 2nd cause of action into the 1st cause of action, because it is conceptually and legally encompassed with the 1st cause of action, otherwise, the motion to dismiss the 2nd cause of action altogether is denied.

ORDERED that the remaining defendant shall serve its answer to the complaint within ten (10) days from the date of this decision/order, below; and it is further

ORDERED that **a preliminary conference will be held in this case on August 10, 2006 at 9:30 a.m. in Part 10.**

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
July 12, 2006

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.