STATE OF NORTH CAROLINA COUNTY OF ALAMANCE	IN THE GENERAL COURT OF JUSTICE BUSINESS COURT DIVISION FILE NO. 18 CVS 913
ALAMANCE FAMILY PRACTICE, P.A., Plaintiff, v. CHERYL LINDLEY and JEFF KIMBALL, Individually and d/b/a PREFERRED PRIMARY CARE, PLLC, Defendants.	**DEFENDANTS' BRIEF IN SUPPORT OF THEIR RULE 12(B)(6) MOTION TO DISMISS**

INTRODUCTION

This case arises as a result of Defendant Cheryl Lindley's lawful efforts to open her own family health care practice following her departure from the employ of Plaintiff Alamance Family Practice. Plaintiff's Amended Complaint attempts to allege causes of action against Cheryl Lindley, her business partner Jeff Kimball, and the new medical practice Ms. Lindley started and owns, Preferred Primary Care, PLLC (hereafter "PPC"). Plaintiff has failed to state any claims against Defendants Kimball and PPC. Further, Plaintiff has failed to state claims against Defendant Lindley other than a claim for breach of her Employment Agreement with Alamance Family Practice. Accordingly, Defendants respectfully request that the Court: (1) dismiss all claims against Defendants Kimball and PPC; and (2) dismiss Counts II through VIII of Plaintiff's Amended Complaint against Defendant Lindley.

I. PLAINTIFF FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT AGAINST DEFENDANTS KIMBALL AND/OR PPC.

The "existence of a valid contract" is a necessary element of a Breach of Contract claim. *Parker v. Glosson*, 182 N.C. App. 229, 232, 641 S.E.2d 735, 737 (2007). Plaintiff has attached

the Employment Agreement between Plaintiff and Cheryl Lindley to its Amended Complaint and has alleged that Ms. Lindley breached certain provisions thereof, but has not alleged the existence of a valid and enforceable contract between Plaintiff and any other Defendant. (Am. Cplt. ¶¶ 20-24). Having failed to plead the existence of a contract between Alamance Family Practice and Mr. Kimball or PPC, much less any specific terms thereof, Plaintiff has failed to state a claim for Breach of Contract against Mr. Kimball and PPC.

II. PLAINTIFF FAILS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE WITH CONTRACT (OR PROSPECTIVE BUSINESS RELATIONS).

Plaintiff also fails to state a claim for "Intentional and Negligent Tortious Interference With Contract." To state a claim for tortious interference with contract, Plaintiff was required to plead: (1) a valid contract between the plaintiff and a third person, (2) the defendant knew about the contract, (3) the defendant intentionally induced the third person not to perform the contract, (4) the defendant acted without justification, and (5) the plaintiff suffered actual damages. *MLC Auto., LLC v. Town of S. Pines*, 207 N.C. App. 555, 571, 702 S.E.2d 68, 79 (2010). To establish the tort of tortious interference with prospective economic advantage, plaintiff must allege that the defendant, without justification, induced a third party to refrain from entering into a contract with the plaintiff, which would have been made absent the defendant's interference. *Id*.

Plaintiff's tortious interference claim is grounded in its allegation that the Defendants wrongfully solicited patients of the Plaintiff. However, Plaintiff does not allege the existence of an existing or prospective contractual relationship between Plaintiff and any of its patients. For this reason alone, Plaintiff's tortious interference claim should be dismissed. *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 584-85, 561 S.E.2d 276, 285-86 (2002) (plaintiff could not establish claims for tortious interference with contract and tortious interference with prospective economic advantage when plaintiff failed to plead the existence or prospective existence of any

particular contract); see also *Clinard Oil Co. v. Oil Prods. Co.*, 2006 N.C. App. LEXIS 1205, at * 16-17 (N.C. Ct. App. June 6, 2006) (unpublished decision) (affirming trial court's grant of motion for directed verdict on tortious interference claim where plaintiff "failed to prove that it had an enforceable contract with any third party of which it accused [Defendant] of interfering . . .").

The allegations in this case are similar to those in *Superior Performers, Inc. v. Phelps*, 154 F. Supp. 3d 237, 249, 2016 U.S. Dist. LEXIS 977, at * 22 (M.D.N.C. 2016). In that case, the plaintiff alleged that the defendants had interfered with contracts and/or prospective economic relations by soliciting plaintiff's insurance customers to a new insurance agency. *Id*. The court dismissed the plaintiff's claim for tortious interference with contract because the plaintiff failed to allege the existence of a contract between the plaintiff and any third-party insurance customer. *Id*. With respect to the claim for tortious interference with prospective economic advantage, the Court held:

> [Plaintiff] NAA alleges that it 'has a reasonable expectation that existing customers will continue to be customers of NAA' and that those 'customers will purchase additional products from NAA.' These allegations are insufficient, because NAA has not alleged that those customers would have entered into contracts with NAA but for Defendants' actions.

Id. at 249-250 (internal citations omitted).

Similarly, in this case, Plaintiff has alleged that it has "operated over a number of years with many patients and families that are treated and have been treated by Plaintiff for ongoing medical issues. These are loyal patients of Plaintiff." (Am. Cplt. ¶ 27). Plaintiff does not allege that it has a contract with any of these "loyal patients," nor that there was a particular contract contemplated between Plaintiff and these patients with which Defendants interfered. Instead, Plaintiff merely alleges that Defendants have solicited Plaintiff's patients to PPC, and that this solicitation "amounts to a malicious interference with contract between Plaintiff and its patients

and interference with prospective business relations between Plaintiff and it's [sic] patients." (Id. ¶¶ 28-29). As in the *Superior Performers* case, these allegations fall short of stating a claim for tortious interference under North Carolina law. *Superior Performers, Inc. v. Phelps*, 154 F. Supp. 3d 237, 249, 2016 U.S. Dist. LEXIS 977, at * 22 (M.D.N.C. 2016). See also *BioSignia, Inc. v. Life Line Screening of Am., Ltd.*, 2014 U.S. Dist. LEXIS 89678, at *22 (M.D.N.C. June 30, 2014) ("[A] plaintiff asserting a claim for tortious interference with prospective economic advantage must first identify the contract that the defendant induced a third party to refrain from entering.").

III. PLAINTIFF FAILS TO STATE A CLAIM FOR MISAPPROPRIATION OF TRADE NAME.

Plaintiff has also failed to state a claim upon which relief can be granted for misappropriation of a trade name. Plaintiff alleges that "Defendant Jeff Kimball had setup the email account for Plaintiff Alamance Family Practice, PA, (alamancefp@yahoo.com), but would not let anyone else access the account or financials." (Am. Cplt. ¶ 15). Since Mr. Kimball left Plaintiff's employ, Plaintiff complains that Mr. Kimball has "retain[ed] ownership" of the e-mail account, which "contains Plaintiff's name" and "refus[ed] to turn over the password and disabl[e] the account." (Am. Cplt. ¶ 34). This Count of the Amended Complaint should be dismissed for at least three reasons.

First, Plaintiff does not even attempt to state a claim against Ms. Lindley or PPC for "Misappropriation of Trade Name," and therefore this Count of the Complaint should be dismissed as to Ms. Lindley and PPC. Plaintiff does not allege any way in which Ms. Lindley or PPC have misused or infringed upon any trade name belonging to Plaintiff.

Second, Plaintiff does not plead anywhere that the e-mail address alamancefp@yahoo.com has acquired any secondary meaning or has become synonymous with Alamance Family Practice in the marketplace. The e-mail address does not in any way note what type of business it belongs

to, and consists primarily of a geographic location description ("Alamance") for which North Carolina does not provide trade name protection. See, *e.g.*, *Two Way Radio Serv. v. Two Way Radio of Carolina, Inc.*, 322 N.C. 809, 814, 370 S.E.2d 408, 411 (1988). ("At common law generic, or generally descriptive, words and phrases, as well as geographic designations, may not be appropriated by any business enterprise either as a tradename or a trademark.") (quoting *Steak House v. Staley*, 263 N.C. 199, 201, 139 S.E.2d 185, 187 (1964)). Notably, even the domain name of the e-mail address is "yahoo.com" rather than any domain name associated specifically with Plaintiff. Under North Carolina law, the address alamancefp@yahoo.com is not a protectable trade name.

Third, even assuming that the e-mail address alamancefp@yahoo.com could be afforded trade name protection, Plaintiff has failed to plead any use of the e-mail address following the termination of Mr. Kimball's employment with Plaintiff. Instead, all Plaintiff has alleged is that Mr. Kimball created a Yahoo e-mail account that he used in the course of his work for Alamance Family Practice and failed to turn over the login credentials at the end of his employment. (Am. Cplt. ¶¶ 15 & 34). Relief for "Misappropriation of Trade Name" is only available where the Defendant is engaged in the use (or credibly threatens the use) of the same trade name or an infringing trade name. See *Polygenex Int'l, Inc. v. Polyzen, Inc.*, 133 N.C. App. 245, 252, 515 S.E.2d 457, 462 (1999) (finding trademark infringement "facially implausible" where "plaintiff failed in its complaint to specify the infringing use by defendants of plaintiff's tradename or how any alleged use damaged plaintiff; the complaint simply makes conclusory allegations regarding the use."). There is no allegation in the Amended Complaint of any such real or threatened use of the trade name alamancefp@yahoo.com. Accordingly, dismissal is appropriate.

IV. NORTH CAROLINA DOES NOT RECOGNIZE A CLAIM FOR "BREACH OF DUTY OF LOYALTY."

The North Carolina Supreme Court has held that "there is no basis for recognizing an independent tort claim for a breach of duty of loyalty" in the case of a standard employer-employee relationship. *Dalton v. Camp*, 353 N.C. 647, 653, 548 S.E.2d 704, 709 (2001). A duty of loyalty only arises when there is a fiduciary relationship other than the employment relationship. *Id*. Plaintiff does not allege the existence of any fiduciary relationship between Plaintiff and Defendants Lindley and Kimball. Moreover, Plaintiff does not even attempt to allege the existence of any relationship giving rise to a duty of loyalty between Plaintiff and Defendant PPC. Accordingly, Plaintiff's attempt to plead a claim for "Breach of Duty of Loyalty" fails.

V. THE LEARNED PROFESSION EXCEPTION BARS PLAINTIFF'S ATTEMPT TO STATE A CLAIM FOR UNFAIR AND DECEPTIVE TRADE PRACTICES.

The North Carolina Unfair & Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. § 75-1.1 *et seq.*, provides that unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful. N.C. Gen. Stat. § 75-1.1(a). However, the statute specifically defines "commerce" to exclude "professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b).

Medical professionals and medical facilities have long been held exempt from the UDTPA under the "learned profession" exception to the definition of "commerce." See, *e.g., Shelton v. Duke Univ. Health Sys.*, 179 N.C. App. 120, 126, 633 S.E.2d 113, 117 (2006) ("[The] exception for medical professionals has been broadly interpreted by this Court, […] and includes hospitals under the definition of 'medical professionals.'"); *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000) (dismissing UDTPA claim "for the simple reason that medical

professionals are expressly excluded from the scope of N.C.G.S. § 75-1.1(a)"); *Abram v. Charter Medical Corp.*, 100 N.C. App. 718, 722-23, 398 S.E.2d 331, 334 (1990) (similar).

Both Alamance Family Practice and PPC are medical practices offering medical services to patients. Ms. Lindley is a licensed Nurse Practitioner. (Am. Cplt. ¶¶ 7-8). The gravamen of Plaintiff's claim – when stripped of its hysterical rhetoric about everything being done "fraudulently" or "maliciously" – is that Defendant Lindley sent her patients a letter before her departure from Alamance Family Practice notifying them that she was moving. (Am. Cplt. ¶¶ 16, 20). Plaintiff complains that some of those patients followed Ms. Lindley to her new practice for medical services. (Am. Cplt. ¶ 30). As such, "the conduct in question" is Ms. Lindley's "rendering of professional services," which places this case squarely within the "learned profession" exception to the UDTPA. *Reid v. Ayers*, 138 N.C. App. 261, 266, 531 S.E.2d 231, 235 (2000). Accordingly, Count V of the Amended Complaint should be dismissed.

VI. PLAINTIFF FAILS TO STATE A CLAIM FOR FRAUD.

Finally, Plaintiff's Amended Complaint fails to state a claim for Fraud. To state a claim for Fraud, Plaintiff had to allege: (1) False representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with intent to deceive; (4) which does in fact deceive; (5) resulting in damage to the injured party. *Head v. Gould Killian CPA Grp., P.A.*, 812 S.E.2d 831, 837, 2018 N.C. LEXIS 331, at * 13 (N.C. Sup. Ct. May 11, 2018).

Count VIII of Plaintiff's Complaint alleges that Defendants Lindley and Kimball "have told patients of Plaintiff since the Fall of 2017 that Plaintiff's owner Meindert Niemeyer was about to be 'shut down' and that he could not treat patients any longer, such statements being false and reasonably calculated to deceive patients of Plaintiff." (Am. Cplt. ¶ 54). Plaintiff further claims

that these alleged statements deceived patients into "leav[ing] the Plaintiff's treatment plan for the patients." (Am. Cplt. ¶ 56). These allegations do not state a claim for fraud.

At the threshold, Plaintiff cannot state a claim for fraud by alleging that non-parties received false statements and were deceived thereby. Instead, "[a] pleading setting up fraud must allege the facts relied upon to constitute fraud, and that the alleged false representation was made with intent to deceive ***plaintiff***...." *Calloway v. Wyatt*, 246 N.C. 129, 133, 97 S.E.2d 881, 884 (1957) (emphasis added). Plaintiff's allegation that non-parties to this case were deceived by the alleged statements does nothing to plead actual deception or reasonable reliance for purposes of Plaintiff stating a fraud claim against these Defendants. "Where the facts are insufficient as a matter of law to constitute reasonable reliance ***on the part of the complaining party***, the complaint is properly dismissed under Rule 12(b)(6)." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346, 511 S.E.2d 309, 313 (1999) (emphasis added). Plaintiff does not anywhere allege that it reasonably relied on the alleged statements, or was actually deceived by those statements.

Plaintiff has also failed to satisfy the heightened pleading standards for fraud claims set forth in N.C. R. Civ. P. 9(b). Fraud must be pled "with particularity" to withstand a motion to dismiss. Plaintiffs have fallen far short of the heightened pleading standards. "[T]he particularity requirement [of Rule 9] is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations." *Town of Belhaven v. Pantego Creek, LLC*, 793 S.E.2d 711, 718, 2016 N.C. App. LEXIS 1164, at * 13-14 (N.C. App. 2016) (quoting *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39, 626 S.E.2d 315, 321 (2006)). Plaintiff alleges vaguely that statements were made at some point "since the Fall of 2017," and fails to allege any place where

the alleged statements were made. (Am. Cplt. ¶ 54). Accordingly, Plaintiff has failed to plead Fraud with sufficient particularity to withstand a motion to dismiss.

VII. PLAINTIFF'S REQUEST FOR PUNITIVE DAMAGES SHOULD BE STRICKEN.

Finally, Plaintiff's request for punitive damages (Count VI) should be stricken following the dismissal of Counts II through V and Count VIII for the reasons described above. Although Plaintiff's claim for Breach of Contract against Defendant Lindley will survive the Order of dismissal, punitive damages are not available in a garden-variety Breach of Contract suit. See *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 111, 229 S.E.2d 297, 301 (1976) ("North Carolina follows the general rule that punitive or exemplary damages are not allowed for breach of contract."); *James R. Carcano v. JBSS, LLC*, 200 N.C. App. 162, 179-80, 684 S.E.2d 41, 54 (2009) (holding that where "the sole remaining issue for trial is breach of contract" it was proper for the trial court to dismiss "the punitive damages claim pursuant to N.C. Gen. Stat. § 1D-15").

CONCLUSION

For all of the foregoing reasons, Defendants Cheryl Lindley, Jeff Kimball and Preferred Primary Care, PLLC respectfully request that the Court enter an Order: (1) dismissing Plaintiff's Complaint in its entirety with respect to Defendants Jeff Kimball and Preferred Primary Care, PLLC; and (2) dismissing Counts II through VIII of Plaintiff's Amended Complaint against Defendant Cheryl Lindley.

Respectfully submitted this the 26th day of June, 2018.

THE NOBLE LAW FIRM, PLLC

Jennifer L. Bills (N.C. Bar No. 37467)
Kathryn F. Abernethy (N.C. Bar No. 43933)
141 Providence Road, Suite 210
Chapel Hill, NC 27514
Office: (919) 251-6008
Fax: (919) 869-2079
Email: jbills@thenoblelaw.com
Email: katie.abernethy@thenoblelaw.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on this date, the foregoing **DEFENDANTS' BRIEF IN SUPPORT OF THEIR RULE 12(B)(6) MOTION TO DISMISS** was filed with the Alamance County Clerk of Superior Court and electronically filed with the North Carolina Business Court which will send notice to counsel for the Plaintiff shown below:

Julian M. Doby
Whited, Doby & Ray
344 Maple Ave.
Burlington, NC 27215
Attorney for Plaintiff

This 26TH day of June, 2018.

Linda Wylie, Paralegal
The Noble Law Firm, PLLC
141 Providence Road, Suite 210
Chapel Hill, NC 27514
Office: (919) 251-6008
Fax: (919) 869-2079
Email: linda.wylie@thenoblelaw.com
Attorneys for Defendants