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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-0309-99T5

TONY SAMAHA, M.D.,
BARRY ALLEN REITER and
STEPHEN M. SCHREIBMAN, M.D.,
P.A.,

FILING DATE
APPELLATE DIVISION

JUN 21 2000

Plaintiffs-Appellants,

v.


Clerk

NORTHWEST COVENANT MEDICAL
CENTER,

Defendant-Respondent.

Argued May 31, 2000 - Decided JUN 21 2000

Before Judges Muir, Jr., and Lesemann.

On appeal from the Superior Court of New Jersey
Chancery Division, Morris County.

Daniel B. Frier argued the cause for appellants
(Giblin & Combs, attorneys; Mr. Frier,
of counsel and on the brief).

Glenn A. Clark argued the cause for respondent
(Riker, Danzig, Scherer, Hyland & Perretti,
attorneys; Mr. Clark, of counsel; Mr. Clark
and Edwin F. Cociey, Jr., on the brief).

PER CURIAM

In or around 1996, defendant Northwest Covenant Medical Center
("the hospital") entered into a contract with Sloan-Kettering Cancer
Center (Sloan-Kettering) under which Sloan-Kettering was to be the
exclusive provider of oncology services to the hospital. The

agreement specified that the hospital would not extend oncology staff privileges to any doctor not providing services through Sloan-Kettering, although the contract included a "grandfather" clause which exempted doctors who already had such privileges.

Plaintiffs Dr. Barry Allen Reiter (Dr. Reiter) and Dr. Stephen M. Schreibman (Dr. Schreibman) had such pre-existing privileges through their Professional Association (PA), and they continued thereafter to provide oncology services at the hospital. However, in 1998, they determined to employ Dr. Tony Samaha (Dr. Samaha) under an arrangement by which they anticipated selling their practice to Dr. Samaha at some point in the future. Pursuant to the agreement between the hospital and Sloan-Kettering, however, while Dr. Samaha was granted internal medicine and some other privileges at the hospital, he was denied oncology admitting privileges.

Plaintiffs filed this action alleging that the exclusive agreement between the hospital and Sloan-Kettering violated the hospital's fiduciary obligation to the public; violated the New Jersey Anti-Trust Act, N.J.S.A. 56:9-1 to -19, and also constituted an unlawful interference with the contractual relationship among Drs. Reiter, Schreibman, and Dr. Samaha.

The trial court held that the hospital had made a reasonable and rational decision in entering the agreement with Sloan-Kettering, noting particularly Sloan-Kettering's worldwide reputation for excellence in delivering oncology services. The court found that the hospital's alliance with Sloan-Kettering served

the public welfare by making Sloan-Kettering's services available to the hospital's patients, and determined that the hospital had not violated its fiduciary obligation to the public by entering into the contract.

The court also determined that the Anti-Trust Act did not apply because the hospital was a non-profit, charitable entity exempt from the statute. It rejected plaintiffs' claim that the hospital's exemption from the Act was lost because it had breached its fiduciary duty to the public because, the court found, there had been no such breach of fiduciary duty.

Finally, the court rejected the claim of interference with plaintiffs' contractual relationship because the contract between the hospital and Sloan-Kettering had pre-dated the contract among the three doctors, and also because the actions of the defendants were neither malicious nor wrongful and thus provided no basis for liability based on plaintiffs' contract.

We agree with the analysis and conclusions set out in the comprehensive and well reasoned written opinion of Judge MacKenzie, dated August 12, 1999, and therefore we affirm, substantially for the reasons set out in that opinion. We add only our observation that, even if one were to assume that the New Jersey Anti-Trust Act applied to this case, that Act embodies a "rule of reason" and there was no violation of such a rule of reason here.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



Clerk

FILED

AUG 12 1999

Kenneth C. MacKenzie, J.S.C.

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Attorneys for Defendants

TONY SAMAHA, M.D., BARRY ALLEN
REITER AND STEPHEN M. SCHREIBMAN,
M.D, P.A.,

Plaintiffs,

vs.

NORTHWEST COVENANT MEDICAL
CENTER and JOHN DOES, 1-30 (fictitious
names),

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, MORRIS COUNTY
DOCKET NO. MRS-C-94-98

CIVIL ACTION

JUDGMENT

THIS MATTER having been opened to the Court by Riker, Danzig, Scherer, Hyland & Perretti LLP, attorneys for defendants, on application for a Judgment granting defendants' motion for summary judgment dismissing, with prejudice, all counts of plaintiffs' Complaint, and the Court having considered the papers in support of and in opposition to said motion, and having heard oral argument, and for good cause shown,

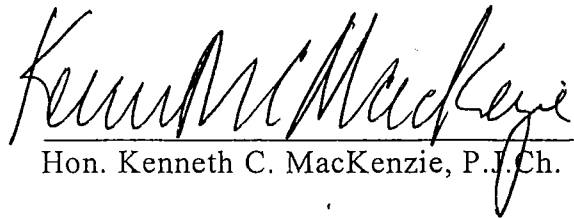
IT IS on this

12th day of August, 1999,

ORDERED AND ADJUDGED that defendants' motion for summary judgment on all counts of plaintiffs' Complaint be and hereby is granted; and it is further

ORDERED AND ADJUDGED that plaintiffs' Complaint, and all counts therein, be and hereby are dismissed with prejudice; and it is further

ORDERED AND ADJUDGED that defendants' counsel shall serve a copy of this Judgment upon plaintiffs' counsel within 7 days of its receipt hereof.


Hon. Kenneth C. MacKenzie, P.J.Ch.

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PAPERS RECEIVED

I. Plaintiffs: Tony Samaha, M.D.; Barry Allen Reiter & Stephen M. Schreiber, M.D., P.A.
Counsel: Daniel B. Frier, Esq., Giblin & Combs

1. Brief in Opposition (inc. Resp. & Additional Statements of Material Facts) (FOS)
2. Appendix to Brief (FOS)
3. Sur-reply letter
4. Amended Affidavit of Stephen Schreiber, M.D.

II. Defendants: Northwest Covenant Medical Center
Counsel: Edwin F. Chociey, Jr., Esq., Riker, Danzig, Scherer, Hyland & Perretti

1. Notice of Motion for Summary Judgment
2. Proposed form of Judgment
3. Statement of Material Facts (FOS)
4. Brief in Support (FOS)
5. Certification of Robert C. Iannacone (FOS)
6. Certification of Nancy Librera (FOS)
7. Certification of Maxine Persson
8. Certification of Edward F. Chociey, Jr., Esq. (FOS)
9. Reply Brief in Support (FOS)
10. Reply Certification of Nancy Librera (FOS)
11. Reply Certification of Edward F. Chociey, Jr., Esq. (FOS)
12. Certification of William Reilly (FOS)
13. Sur-rebuttal letter brief (FOS)

STATEMENT OF FACTS

In 1994, Saint Clare's-Riverside Medical Center ("St. Clare's"), Denville, and Dover General Hospital ("Dover General"), Dover, consolidated to form the defendant entity Northwest Covenant Medical Center ("Medical Center")¹, which operates acute care hospitals at the two campuses, in addition to facilities in Boonton Township and Sussex Borough.

Before the 1994 consolidation, several practices provided medical oncology services at St. Clare's and Dover General under traditional medical staff appointments and privileging relationships between its physician members and the hospitals. One such practice was plaintiff Barry Allen Reiter & Stephen M. Schreibman, M.D., P.A. ("the Group"). The Group's members, Drs. Reiter, Schreibman, and Adler, also maintained privileges at Morristown Memorial Hospital and provided medical oncology services there, as well as in their offices in Denville and Morristown. Plaintiffs point out, however, that the vast majority of hospital services provided by the Group were allegedly rendered at St. Clare's.

The Trustees and Administration of the future Medical Center organized a Joint Task Force, made up of members of the Board of Trustees, management, and medical staffs of St. Clare's and Dover General, to review and study the numerous, complex issues relating to the consolidation's impact upon patient care at the various campuses. One of the Task Force's nine strategic planning teams, the Oncology Strategic Planning Group, consisted of approximately ten St. Clare's and Dover General administrators and physicians, including Dr. Schreibman, who studied the furnishing of oncology services at the Medical Center.

¹ Apparently, according to plaintiffs, the Medical Center has undergone a further name change to St. Clare's Medical Center. However, for purposes of this action, the defendant entity will be referred to as the Medical Center.

Defendant argues that as a result of the study, the Oncology Strategic Planning Group recommended that the Medical Center develop a tertiary care affiliation in oncology for the achievement of three purposes: (1) providing patients with access to services not available at the Medical Center; (2) developing the image of the Medical Center's oncology program; and (3) maintaining the Medical Center's knowledge base for emerging technologies. Defendant states that its administration met with "various tertiary care providers" in its search for a potential affiliation. Plaintiffs argue that the administration met with only two providers. The disputed fact is immaterial.

Based on sound reasons, not the least of which is an international reputation for excellence in cancer care, the administration decided to affiliate with Memorial Hospital for Cancer and Allied Diseases ("Sloan-Kettering"), in New York, the top-ranked cancer care center in the United States, according to U.S. News & World Report, for the past six years. Plaintiffs do not dispute that Sloan-Kettering is a reputable institution. The Medical Center argues that its goal in potentially affiliating with Sloan-Kettering was "to provide the best possible cancer care to our patients." Defendant further offers Sloan-Kettering's goal in the affiliation, but this is essentially hearsay.

After several years of planning, investigation, research, evaluation, and negotiations, in October 1996, the Medical Center and Sloan-Kettering entered into an Exclusive Professional Services Agreement ("the Agreement"), pursuant to which Sloan-Kettering became the exclusive provider of medical oncology and radiation oncology services at the Medical Center. From the outset of the negotiations, Sloan-Kettering explained to the Medical Center that exclusivity was necessary for Sloan-Kettering to implement its "staff model" approach to furnishing cancer care. Under the staff model, Sloan-Kettering employs its physicians who are required to implement Sloan-Kettering's disease management guidelines in treating the over one hundred types of cancer. While plaintiffs

agree that this is what Sloan-Kettering told the Medical Center, they conclude, based on bare speculation about facts and further conclusions, that Sloan-Kettering demanded exclusivity in order to achieve a monopoly on inpatient and outpatient cancer care in the region surround the Medical Center.

Under the Agreement, physician privileges and staff membership in medical oncology already established at the pre-consolidation medical facilities would be “grandfathered” in, a provision allegedly negotiated by the Medical Center to allow current physicians with privileges or on staff to continue providing those services largely so as not to disrupt ongoing patient care. Although plaintiffs deny that the Medical Center negotiated this grandfather clause, they show no evidence to refute the statement and the fact is relatively immaterial. Under the grandfather clause, physicians such as Drs. Reiter, Schreiber, and Adler, shareholders of the Group, were permitted to retain their existing privileges at the Medical Center, allowing them to continue to admit and treat patients on an inpatient basis, but barred them from treating patients in any hospital-based outpatient facility. The Agreement provided further that no new medical oncologist or radiation oncologist who is not a member of Sloan-Kettering’s active medical staff and who is not designated by Sloan-Kettering can be afforded privileges.

Defendant argues that the exclusive contract was intended to and does provide many benefits to the Medical Center, its patients, and its staff. Among the advantages defendant cites are control over the provision of oncology services; cost savings through the standardization of procedures and centralized administration of services; insuring full-time availability of services; permitting better facility use; and “elevating the quality of oncology care at the Medical Center to the level provided by the country’s best cancer center.”

Plaintiffs argue that rather than being beneficial, the exclusive contract is harmful to the public. According to plaintiffs, the provision will eventually limit the pool of medical oncologists at the Medical Center to physicians hand-picked by Sloan-Kettering, although plaintiffs fail to explain how that in and of itself is detrimental given Sloan-Kettering's world-class reputation. Sloan-Kettering must have a number of physicians who will comprise a growing "pool" of available oncologists as the grandfathered physicians leave, as demand dictates. Eventually, plaintiffs argue, primary care physicians will have no choice but to refer their patients to Sloan-Kettering oncologists if they wish to keep their patients at the Medical Center. Plaintiffs argue further that Sloan-Kettering participates in only four managed care companies in New Jersey, while the Medical Center itself and some of the grandfathered physician practices participate in dozens, and this may result in patients being forced to pay out-of-pocket for their treatment. Plaintiffs' final argument implies discrimination, but the facts do not support this and the Court imagines that this "fact" was included only for its potential inflammatory effect.

The Agreement's initial term is for ten years, and it may be renewed for additional five-year terms under certain conditions and at the option of Sloan-Kettering. Defendants argue that through the Agreement, the Medical Center achieved a long-term

affiliation with the best cancer center in the United States that ensures that a world-class level of ontological care is provided to the Medical Center's patients . . . , a level of care that the Medical Center, as a community hospital, could not otherwise provide without affiliation with a major research and teaching institution such as Sloan-Kettering.

(Def.'s Stat. of Mat. Facts ¶ 17.) Plaintiffs agree only that the initial term is for ten years, but point to no evidence to refute the rest of the statement.

Defendants cite statistics on patients and provide examples of benefits to the Medical Center

and its physicians and cancer patients resulting from the affiliation, some conclusions, some facts. The benefits that may have inured from the affiliation are immaterial, however, to the ultimate legal question of whether a decision-making process based on facts available at the time, rather than twenty-twenty hindsight, was legally adequate. While plaintiffs argue repeatedly that defendant provides no evidence that it considered the exclusivity issue in making its decision, evidence in the form of testimony and documents contradict plaintiffs' view. For example, William Reilly, a member of the Board of Trustees of the Medical Center testified that the Board considered and discussed the affiliation's exclusivity, and decided that the benefits to the patients of an affiliation with a premier research and teaching institution such as Sloan-Kettering justified the exclusive arrangement and greatly outweighed any impact upon some physicians. (Reilly Cert. ¶ 2.) The Administration, in making its presentation to the Board, discussed the exclusivity aspect. (Reilly Cert. ¶ 4; Chociey Reply Cert., Ex. N, Board of Trustees Presentation, Sept. 14, 1999.)

In June 1997, plaintiff Tony Samaha requested a pre-application form from the Medical Center. Dr. Samaha had apparently joined the Group. On July 31, 1997, Dr. Samaha submitted his pre-application form, requesting staff appointment and clinical privileges at the Medical Center in the "Department of Medicine, Hematology-Oncology." On August 14, 1997, Kathryn J. McDonagh ("Ms. McDonagh"), the Medical Center's president and CEO, advised Dr. Samaha that due to the Medical Center's affiliation and exclusive arrangement with Sloan-Kettering, medical oncology privileges were only available to physicians new to the medical staff through Sloan-Kettering and that such privileges would not be available to him. By letter of September 2, 1997, Ms. McDonagh advised Dr. Adler of the Group, with whom she had earlier met, that the Medical Center intended to continue to honor the Agreement with Sloan-Kettering.

On September 9, 1997, Ms. McDonagh sent Dr. Samaha application materials for medical staff appointment and clinical privileges, advising him that medical oncology privileges were not available to him pursuant to the Agreement. On September 12, 1997, Dr. Samaha and the Group entered into an employment agreement. On September 22, 1997, Dr. Samaha submitted his application for the medical staff and clinical privileges in internal medicine, hematology, and oncology, despite having been told the latter was not available to him. By letter of January 7, 1998, Ms. McDonagh once again stated that medical oncology privileges were not available to Dr. Samaha, but informed him that he had been granted temporary privileges in internal medicine. By further letter of March 27, 1998, Ms. McDonagh informed Dr. Samaha that the Board of Trustees had approved his appointment to the medical staff with internal medicine privileges, and explained again that Dr. Samaha could not be granted privileges in medical oncology due to the exclusive agreement between the Medical Center and Sloan-Kettering. On June 18, 1998, the Medical Center granted Dr. Samaha further clinical privileges in hematology.

The Group's members were able to, and did, write chemotherapy orders and perform medical oncology consultations on an inpatient basis at the Medical Center for the Group's patients that Dr. Samaha also treated, and there has never been a patient the Group has been unable to treat because Dr. Samaha did not have medical privileges in oncology at the Medical Center. Further, the Group has not referred any patient to the hospital, physician, or practice because Dr. Samaha did not have medical oncology privileges at the Medical Center. Drs. Reiter, Schreiber, and Adler, of the Group, testified that they knew of no patients that the Group lost because Dr. Samaha was not granted privileges in medical oncology. Curiously, plaintiffs argue that they have not obtained sufficient information to either affirm or deny this, despite the fact that this knowledge is solely within

their control and the Group's doctors testified as such. The Group's gross profits have increased, and the amounts of compensation paid to Drs. Reiter, Schreiberman, and Adler have nearly doubled, from 1995, the year before affiliation, through 1997, the last income tax returned produced.

It must be noted that under the Rules of Court, the non-moving party in a summary judgment motion "may also include in the responding statement of additional facts that the party contends are material and as to which there exists a genuine issue." R. 4:46-2(b) (emphasis added). The Rule does not provide that a party may present its own version of, in many cases, the same facts already presented in the moving party's papers, as plaintiffs did here. Plaintiffs' statement hindered rather than assisted the Court by providing twenty-two pages of its own spin on many facts already set forth. Of the new facts plaintiffs asserted, many were not material to the legal issues before the Court on this application, and their inclusion wasted the Court's valuable time. For example, the credentials of the doctors are not at issue in this action, which plaintiffs wasted many paragraphs detailing, nor is the partnership structure of the Group. Apparently, for a period of time, less than three months, Dr. Samaha's application for hematology privileges was not approved because the Medical Center was under a misperception about the Agreement's exclusivity provision. Dr. Samaha's privileges in internal medicine were granted in March 1998; his clinical privileges in hematology were not granted until June 1998. Plaintiffs have showed no harm from this. Plaintiffs argue that Dr. Samaha terminated his employment with the Group on November 30, 1998, solely because he was unable to obtain medical oncology privileges at the Medical Center.

Plaintiffs argue, based on speculations about isolated facts, that the Medical Center did not reach its own conclusion that it should discontinue granting privileges to new medical oncology physicians nor did it, on its own, conclude that new oncologists would not be able to as effectively

carry out the Sloan-Kettering cancer protocols and maintain the consistency of the programs as effectively as Sloan-Kettering physicians. Rather, the determination that exclusivity was necessary, plaintiffs argue, was made entirely by Sloan-Kettering. Therefore, plaintiffs argue, the Medical Center engaged in no independent research on this issue, relying entirely on Sloan-Kettering's determination that exclusivity was necessary to adhere to a high standard of care, and thus violated its "fiduciary duty" to the public.

Plaintiffs argue further that "evidence" raises a material issue of fact as to whether the administration and Board of Trustees of the Medical Center even understood the full meaning of the exclusivity provision before entering the Agreement, or ever used its own discretion or made its own determination that exclusivity benefits the public. The materiality of those possible "facts" will be discussed infra, in the legal analysis. If anything, it appears that the Medical Center may have misinterpreted the exclusivity provision with regard to new physicians in existing practices with privileges.

Plaintiffs make the legally questionable argument that the Medical Center's "fiduciary duty" to the public required that it make an independent determination about the exclusivity policy, rather than rely on Sloan-Kettering's determination. Plaintiffs repeat the argument already made in response to defendant's statement of facts, about what might or will happen when the grandfathered physicians leave and only Sloan-Kettering physicians remain, that Sloan-Kettering will receive all professional fees related to medical oncology services at the Medical Center, that the protocols, which require agreement by patients, are only implemented on a small percentage of cancer patients, and that these protocols are not the only ones used by oncologists, nor are they exclusive to Sloan-Kettering.

Plaintiffs argue that defendant tortiously interfered with its prospective contractual relations

based on the following alleged facts: “The Group hired Dr. Samaha for the purpose of expanding its practice, lightening the responsibilities of the shareholders, and obtaining a future purchaser of the practice upon the shareholders’ retirement.” (Pls.’ Br. in Opp. at 25, Pls.’ Stat. of Mat. Facts ¶ 48.) For this reason, plaintiffs argue, they had a reasonable expectation of economic benefit or advantage through the contractual relationship between the Group and Dr. Samaha.

It must be noted that Dr. Samaha’s hiring occurred after the Agreement between the Medical Center and Sloan-Kettering was entered into. Plaintiffs argue that the Medical Center had not enforced the exclusivity provision until after the Group hired Dr. Samaha, a statement which contradicts defendant’s assertion that Ms. McDonagh informed the Group that it would continue to honor the exclusivity provision, when the Medical Center was approached by one of the Group’s doctors about carving out an exception. Plaintiffs argue that by enforcing the provision, the Medical Center wrongfully and intentionally interfered with plaintiffs’ expectation of an economic benefit., although what the expectation was, in light of the existence of the exclusivity agreement, is unclear. It must be noted that the vast majority of plaintiffs’ “facts” are cited to no portion of the motion record “establishing the fact or demonstrating that it is uncontroverted,” and while some “facts” are followed by a general citation to a whole document, the citation fails to “specify the pages and paragraphs or lines thereof or the specific portions of exhibits relied on.” R. 4:46-2(a).

Plaintiffs argue that the Medical Center knew, or reasonably should have known, that by denying medical oncology privileges to Dr. Samaha, he would not be able to provide many of the inpatient services generally provided by members of a medical oncology practice, including chemotherapy administration and oncology consultations. Plaintiffs argue further that there is a reasonable probability that, but for the Medical Center’s enforcement of the exclusivity provision, by

which it was bound, the Group would have realized economic benefits that they did not realize due to the enforcement. While admitting that the Group's gross revenues have continued to rise, not to mention that the shareholder-doctors' compensation has approximately doubled in three years, plaintiffs argue that its ability to expand has been substantially impaired because they cannot hire medical oncologists who can fully service the Group's patients at the Medical Center.

RELIEF REQUESTED

Defendant Northwest Covenant Medical Center seeks an Order granting summary judgment against the plaintiffs and dismissing the complaint, which alleges breach of fiduciary/healthcare duty, violation of the New Jersey Antitrust Act, violation of the Federal Medicare/Medicaid Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, and tortious interference with a contractual arrangement.

ANALYSIS

The purpose of summary judgment is to:

. . . provide a prompt businesslike and inexpensive method of disposing of any cause of action which a discriminatory search of the merits and the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly has not presented any issue of material fact requiring this position at trial.

Brill v. Guardian Ins. Co. of America, 142 N.J. 520, 541 (1995). A motion for summary judgment requires "searching review" of the record in the case by the court to determine whether there is no genuine issue as to any material fact challenged. Housel v. Theodoridis, 314 N.J. Super. 597, 603 (App. Div. 1998) (citing Brill, *supra*, 142 N.J. at 541). This rule is reiterated in New Jersey Rules Governing Civil Practice:

The judgment or order [for summary judgment] shall be rendered

forthwith if the pleadings, depositions, answers to interrogatories and admissions that are filed together with the affidavits, if any, show that there is no genuine issue as to material facts challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

R. 4:46-2(c). Summary judgment cannot be defeated by merely pointing to any fact in dispute, only those that are material. Brill, supra, 142 N.J. at 529. When the proper circumstances present themselves, *i.e.*, “[w]hen the evidence is so one-sided that one party must prevail as a matter of law,” a trial court should not refrain from granting summary judgment. Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 214 (1986)).

I. The Medical Center’s Enforcement of the Exclusivity Provision Does Not Constitute a Breach of the Hospital’s Fiduciary Duty to the Public.

In the First Count of the Complaint, plaintiffs allege that defendant breached its fiduciary/healthcare duty to the public. Hospitals, even those privately-owned, are quasi-public entities created and licensed by the State for the purpose of serving the public. Berman v. Valley Hosp. 103 N.J. 100, 106 (1986) (citing Doe v. Bridgeton Hosp. Ass’n, Inc., 71 N.J. 478, 486 (1976), cert. denied, 433 U.S. 914, 97 S. Ct. 2987, 53 L. Ed. 2d 1100 (1977)). As a quasi-public entity, a hospital exercises its health-care powers “‘in trust’ ‘for the benefit of the public,’ and ‘in aid of [its] service to the public.’” Id. (quoting Greisman v. Newcomb Hosp., 40 N.J. 389, 403-04 (1963) (alteration in original)). While hospitals are afforded broad discretionary powers in managing their affairs, including the selection of medical staff, “their health-care powers are deeply impressed with a public interest and are fiduciary in nature.” Desai v. St. Barnabas Med. Ctr., 103 N.J. 79, 90

(1986).

Courts are admonished to be “most circumspect” in determining the validity or enforceability of managerial health-care decisions: so long as “a hospital policy decision reasonably serves an evident public-health purpose, it will be sustained, even though it may have a discriminatory effect.” Id. at 91. Thus, where a court is called upon to examine a hospital’s staffing policy, the policy will be upheld “if the public health objective is rationally advanced by the hospital’s staff admissions policy.” Id. Further, courts must be “tolerant and practical” in determining the proper reasonable factual basis for hospital health care decisions, remaining “mindful of the intrinsic complexities that abound in the area of institutional public health care.” Id. at 91-92. The Desai court further stated:

The contours of the factual foundation necessary to support a hospital health-care determination will turn on the nature of the decision, the context in which it is made, the purposes to be effectuated by it, and the parties, persons and general interests that are directly or indirectly affected by it.

Id. at 92.

The decision by the Medical Center to enter into the affiliation Agreement with Sloan-Kettering, and its attendant exclusivity provision, rested on a “broad, general hospital determination,” rather than a “particularized, quasi-adjudicative decision in which a general policy is applied in an individual case,” and thus the court need not find that the decision-making process was attended by strict formality. See id. at 92-93. A hospital is not required to give public notice or conduct formal proceedings, need not allow general participation, and need not create a formal record of its decision-making in support of a managerial determination. Id. at 93. The Medical Center’s decision will be upheld “if it is reached in the normal and regular course of conducting the affairs of the hospital and is based on adequate information, regardless of form, origin, or authorship, that is generally

considered reasonable and reliable by professional persons responsibly involved in the health-care field.” Id.

In Desai, supra, the New Jersey Supreme Court examined the case of Dr. Desai, a gastroenterologist who applied for admission to the staff of St. Barnabas Medical Center and was turned down under a recently implemented closed-staff policy aimed at stemming overcrowding and overutilization of resources. Under the policy, only physicians affiliated with a practice that held privileges prior to the implementation of the policy were considered for admission to the medical staff. The Supreme Court viewed the hospital’s closed-staff admissions policy as a general policy made in the ordinary course of conducting hospital affairs, and thus the court’s task was to determine the adequacy of the informational basis supporting the policy’s adoption, particularly the criterion it used in carving out an exception for new physicians affiliated with already admitted practices. Desai, supra, 103 N.J. at 93.

It should be noted that the policy in Desai was a measure designed to address an immediate problem — overcrowding and overutilization of equipment and facilities — and not part of an overall larger mission statement for a newly consolidated medical care provider. Plaintiffs try to characterize the issue in the instant case as the same as in Desai, but in the instant case, the Court must examine a much larger managerial decision to affiliate exclusively with another institution, Sloan-Kettering, renowned for its excellent cancer care.

Generally, courts do not interfere with a reasonable management decision concerning hospital staff privileges as long as that decision furthers the hospital’s overall health care mission, the hospital adopts rules, regulations, and bylaws concerning procedures for admission, and the decision does not arbitrarily prevent otherwise qualified doctors from exercising staff privileges. Belmar v. Cipolla, 96

N.J. 199, 208 (1984). In the instant case, new, and presumably otherwise qualified, physicians are not prevented from exercising all staff privileges; only staff privileges in medical and radiation oncology. Thus doctors like Dr. Samaha may be granted privileges in many other areas. More importantly, among the stated goals with regard to oncology care in the strategic planning that attended the consolidation was to provide patients with access to services that were not available at either St. Clare's or Dover General.

In Belmar, the Board of Governors of a non-profit corporation, Community, that operated John F. Kennedy Medical Center ("JFK"), decided before opening the medical facility that the hospital's anesthesiology, radiation, and pathology departments would operate under exclusive contracts. Two physicians, defendants Drs. Cipolla and Hsia, and Community entered into an exclusive anesthesiology contract, whereby the hospital agreed to channel all anesthesia work at JFK through Cipolla and Hsia's partnership, and the doctors agreed not to provide anesthesia services to any other hospital and agreed to be bound by JFK's rules, regulations, and bylaws. A day before signing the exclusive agreement, the doctors and a third doctor entered into a partnership agreement. See 96 N.J. at 202-204.

Plaintiff Dr. Belmar joined the practice as an employee several months after the agreement with Community had been exercised, and several months after that, he became a partner, even though he refused to sign the partnership agreement or the contract with Community. See id. at 205. After experiencing some apparent interpersonal difficulties, ten years later Dr. Cipolla dissolved the partnership and formed a new partnership with several other anesthesiologists, but not Dr. Belmar. JFK continued its exclusive relationship with Dr. Cipolla's new partnership. A year later, Dr. Belmar formed a partnership with two anesthesiologists who had left Dr. Cipolla's group and apparently had

privileges at the hospital. Belmar asked JFK to terminate the exclusive arrangement with Dr. Cipolla and open the anesthesia department to all anesthesiologists with hospital privileges; Dr. Cipolla thereafter excluded Dr. Belmar's group from the anesthesiology assignment schedule. Id. at 205-06.

Dr. Belmar and his group initiated two actions, seeking damages and an accounting from Dr. Cipolla's group and damages from and an injunction against Community. The trial court dismissed both complaints, finding there was nothing wrongful in Community's exclusive contract with Dr. Cipolla's group. The Appellate Division and the Supreme Court affirmed. Id. 201, 206, 220. Based on the evidence before it, the Supreme Court found that JFK's decision to enter into an exclusive anesthesiology contract was a reasonable choice because it was based upon the hospital's desire to insure a high standard of medical care. Id. at 211. Even though experts at trial differed about the relative advantages and disadvantages of the exclusive contract between Community and the defendant doctors, the fact that all agreed that the exclusive contract was a recognized method of providing anesthesiology services aided the Court in concluding that the hospital's policy choice was a reasonable one in light of its experience and that of the defendant doctors. Id. at 210.

The Belmar Court further examined the decision in terms of the benefits the hospital expected in meeting its general goal of insuring a high standard of medical care. Justice Pollack concluded that those "benefits included 24-hour-a-day coverage and more efficient use of operating rooms, the easing of tension among staff doctors, and a reduction in administrative problems. Under the circumstances, the decision to enter the contract was a reasonable choice, and the contract does not violate public policy." Id. at 211. The Court further cited decisions of federal and numerous states' courts which held that similar exclusive agreements with "various medical specialists represent the reasonable exercise of discretion by the hospital governing body." Id. (citations omitted).

Similarly, in Bloom v. Clara Maass Med. Ctr., 295 N.J. Super. 594 (App. Div. 1996), the Appellate Division held that the defendant hospital's decision to award an exclusive radiology contract constituted a reasonable management decision, where the record indicated that the hospital's policy was designed to insure central control over the department's services, simplified scheduling of diagnostic procedures, better physician coordination, enhanced availability at all hours, and effective billing and collection. Id. at 609.

All of the foregoing cases indicate that a hospital's decision to enter into an exclusive contract may comprise a reasonable exercise of managerial discretion so long as the hospital made such a decision with legitimate health care objectives in mind, and used means that were reasonable to obtain those objectives. The record in the instant case indicates that the Medical Center wished to provide cancer patients in Northwestern New Jersey with access to services not available at the existing facilities, develop the image of the oncology program, and maintain the Medical Center's knowledge base for emerging technologies. To achieve these goals, a strategic planning committee recommended that the Medical Center affiliate with a tertiary oncology care provider. After investigating options, the Medical Center undertook negotiations with Sloan-Kettering, whose program, in the Medical Center's view, would provide control over the provision of oncology services, lower costs through standardization of procedures and centralized administrative services, permit better facility use scheduling, ensure full-time availability of services, provide programs in the community, and affiliate the Medical Center with one of the top cancer teaching and research institutions in the world.

Both institutions participated in an evaluation of the impact of the affiliation on existing facilities, staff, patients, administration, and other crucial elements. Sloan-Kettering insisted on

exclusivity in its affiliation with the Medical Center; in the words of Albert R. Casazza, M.D., Sloan-Kettering's "core belief" is that its thirty-year old "staff model" of providing cancer care is essential in effectuating its successful outcomes. Joseph D. Trunfio, who served as president and CEO of the Medical Center from its formation until 1997, stated that in making the decision about affiliating with Sloan-Kettering "we did weigh the benefit of the contract versus the exclusivity and felt the benefits to our patients and the community outweighed the exclusivity costs" (Chociey Cert., Ex. F, Trunfio Dep. Tr.71:5-7.) Medical Center Trustee William Reilly stated that after several presentations and discussions, the Board of Trustees "determined that the extraordinary benefits to the Medical Center's patients far outweighed any impact on physicians, especially the apparently minimal impact upon existing medical oncologists." (Reilly Cert. ¶ 5.) Plaintiffs suggestions that the Board and Administration did not fully investigate the impact of their affiliation decision are not supported by anything but speculation and are contrary to the facts. While plaintiffs generally refute these benefits, they incorrectly focus on what has, or has not, occurred, since the affiliation was effected. The Court's inquiry is only into the decision-making process, and plaintiffs' make only general, unsupported speculations about that process that are refuted by the testimony and documents placed on the motion record.

Based on the facts in evidence, as to which there are no genuine disputes, the Court finds as a matter of law that it must decide in defendant's favor. The exclusivity provision in question is not, as plaintiffs suggest in their sur-reply brief, illegal. The Court has seen no competent evidence that supports plaintiffs' theory that the exclusive contract with Sloan-Kettering, and its exclusivity requirement, per se hurts the public, where the courts in this state have often held otherwise. Defendants presented evidence that they were convinced, through their investigation, of the

tremendous benefits that would inure to the Medical Center, its patients, and staff from access to Sloan-Ketterings' teaching and research and whole philosophy of providing oncological care. The affiliation decision here, with its exclusivity provision, genuinely serves legitimate health-care objectives as demonstrated by reasonable and reliable information, and thus it must be upheld.

It must be noted that in plaintiffs' sur-reply brief, they urge the Court to examine Sloan-Kettering's "untested" exclusivity demand, although this issue is not within the purview of the Court in this action. Whether or not Sloan-Kettering would affiliate with a New Jersey hospital if New Jersey courts would not permit its exclusivity provision is a theoretical question that has no bearing on the issues before this Court; furthermore, plaintiffs have no standing to raise such a claim. The only issue before this Court is the reasonableness of the Medical Center's decision to affiliate with Sloan-Kettering for tertiary oncological care, entering into an exclusive agreement with it pursuant thereto.

The evidence shows, and plaintiffs raise no genuine issue as to any material fact, the Medical Center researched the impact of such a move on its patients, staff, administration, facilities, and other resources, and decided the benefits were worth it. There is ample evidence of Sloan-Kettering's national and global reputation; the Medical Center entered into an exclusive contract with Sloan-Kettering in order to bring the benefits upon which the latter's reputation is based to the cancer patients of northwestern New Jersey, whom the former serves. It is a reasonable health care decision, based on adequate information, including reputation evidence, which this Court may not second-guess once finding such adequate information and reasonable health care goals.

II. Plaintiffs' Claims under the New Jersey Antitrust Act Must Be Dismissed as a Matter of Law.

The Second Count of plaintiffs' Complaint alleges that by entering into the Agreement, the Medical Center and Sloan-Kettering intended to restrain trade and competition in violation of the New Jersey Antitrust Act ("the Act"), by allegedly substantially limiting the public's access to local medical oncologists. The Act provides: "[E]very contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, in this State, shall be unlawful." N.J.S.A. 56:9.3. The Act, however, provides an exemption from antitrust liability, certain activities of not for profit corporations. The Act does not apply to "bona fide religious and charitable activities of any not for profit corporation, trust or organization established exclusively for religious or charitable purposes, or for both purposes" N.J.S.A. 56:9-5b(5).

Plaintiffs argue that the exemption does not apply to the Medical Center. Plaintiffs do not deny that the Medical Center is a not for profit corporation established exclusively for religious or charitable purposes. Instead, plaintiffs argue that the Medical Center's decision to enter into an exclusive contract with Sloan-Kettering, thereby creating an alleged closed-staff policy, is not a bona fide religious or charitable activity because it allegedly constitutes a breach of the Medical Center's fiduciary duty to the public, and the Medical Center is therefore not entitled to an exemption.

The fatal flaw in plaintiffs' argument is its reliance on this Court's finding that the Agreement represents a breach of fiduciary/healthcare duty. Since this Court found no such breach of duty, plaintiffs' argument fails. The Court presumes a decision that it has already determined to be a reasonable policy decision to further the Medical Center's health care mission must necessarily further its charitable mission. There are no genuine issues of material fact that would change the Medical Center's entitlement, as a matter of law, to qualify for the exemption from antitrust liability. Therefore, the Court need not consider the meritorious arguments of the parties about the alleged

violation of the Act.

III. Plaintiffs Inform the Court that They Wish to Dismiss Their Claims Under the Medicare/Medicaid Anti-Kickback Statute

In their Third Count, plaintiffs alleged claims under the federal Medicare/Medicaid Anti-Kickback Statute, 42 U.S.C. § 1320a-7b. In their unauthorized sur-reply, however, plaintiffs state that they “have decided to dismiss [their] claims under the Medicare/Medicaid Anti-Kickback Statute at this time.” In a letter brief sent by defendant with the Court’s permission, after defendant and the Court had received plaintiffs’ unauthorized sur-reply brief, defendant urges that the Court dismiss the claim with prejudice, not merely without prejudice as the plaintiffs seem, in defendant’s view, to suggest in their sur-reply letter brief. However, plaintiffs’ voluntary dismissal of the claim before the Court made any determination on the merits ends the claim. There is no longer an issue for the Court to decide in this regard, noting plaintiffs’ voluntary withdrawal of the claim.

IV. Plaintiffs’ Claim that the Medical Center Tortiously Interfered with Plaintiffs’ Contractual Relationship Fails as a Matter of Law.

In the Fourth, and final, Count, of the Complaint, plaintiffs claim that the Medical Center “intentionally and recklessly and/or negligently interfered with Dr. Samaha’s contractual relationship with the Group, and are therefore liable under the doctrine of tortious interference with a contractual relationship,” based on an argument that the affiliation precludes Dr. Samaha from providing medical oncology services to the Group’s patients at the Medical Center.

To succeed on a claim of tortious interference with economic advantage, the claimant must show that he or she had a reasonable expectation of an economic advantage arising out of a contract, and the prospective advantage was lost as result of the defendant’s malicious interference with the

pursuit of that advantage. Baldassarre v. Butler, 132 N.J. 278, 293 (1993). In the context of such tort claims, malicious is defined as a harm that “was inflicted intentionally and without justification or excuse.” Printing Mart v. Sharp Elec., 116 N.J. 739, 751 (1989). Thus, plaintiffs must (1) show a protectable right based on allegations of fact giving rise to a reasonable expectation of an economic advantage; (2) allege that the defendant’s actions were intentional and malicious; (3) show that the interference caused a loss of a prospective gain in that there was a reasonable probability that the victim would have received the anticipated benefit; and (4) show proof that the injury caused damage to the plaintiffs. Id. at 750-52.

Defendant argues that plaintiffs claim must fail because “there was ‘no existing contractual relationship’ between Dr. Samaha and the Group when the Medical Center engaged in its purported tortiously interfering conduct, i.e., entering into the Agreement with Sloan-Kettering.” (Def.’s Br. at 60.) It must be noted that plaintiffs, however, in their responsive brief, do not argue that entering into the Agreement is the alleged tortious conduct; plaintiffs argue that the Medical Center’s enforcement of the Agreement was the offending conduct, enforcement for the first time, plaintiffs argue, after Dr. Samaha and the Group entered their contract.

The facts show, however, that Dr. Samaha executed his Employment Agreement on September 12, 1997, after he had actual notice of the relevant part of the Medical Center’s exclusive contract with Sloan-Kettering with regard to his ineligibility for medical oncology privileges. By letters of August 14, 1997 and September 9, 1997, Ms. McDonagh informed Dr. Samaha that medical oncology privileges were not available to him due to the affiliation agreement with Sloan-Kettering. Thus, when Dr. Samaha entered the agreement with the Group, he did so with the knowledge that the Agreement with Sloan-Kettering prohibited the Medical Center from granting him medical

oncology privileges. For this reason, neither Dr. Samaha nor the Group had any reasonable expectations arising out of Dr. Samaha's desire to practice medical oncology at the Medical Center.

Plaintiffs' argument that the actual enforcement of the policy is the triggering conduct makes no sense; an individual can have no reasonable expectation about an economic advantage if he has knowledge that the relationship upon which the advantage depends is not available to him. Dr. Samaha testified at his deposition that the Medical Center had informed him prior to his signing the employment agreement with the Group that he would not receive medical oncology provisions. Thus, it is not the enforcement of the exclusivity provision that is material, but rather when Dr. Samaha gained the knowledge that medical oncology privileges were not available to him. Plaintiffs arguments that the doctors and the administration may not have fully understood the exclusivity agreement have no bearing.

While the Group may have had expectations about Dr. Samaha's contributions to the partnership, i.e., expanding the practice, lightening the responsibilities of the shareholders, and obtaining a future purchaser of retiring shareholders' interests, those expectations were based on the unwarranted expectation that Dr. Samaha would somehow be exempt from the exclusivity provision. Since Dr. Samaha knew that he did not qualify for privileges, vis-a-vis the two letters sent before the Group agreement, and the Group was shown those letters before the employment agreement was executed, any expectation that the relationship would yield a mutual economic benefit deriving from Dr. Samaha's desired oncology privileges was unreasonable. Thus, plaintiffs' claim fails on the first element.

Even if plaintiffs had shown evidence of the first element, their claim would fail on the second element. Plaintiffs have pleaded no facts which establish that the defendant intentionally and

maliciously interfered with Dr. Samaha's contractual relationship with the Group. Generally, a party may not be held liable for tortious interference for merely providing truthful information to one of the contracting parties. East Penn Sanitation, Inc. v. Grinnell Haulers, Inc., 294 N.J. Super. 158, 180 (App. Div. 1996) (citing Restatement (Second) of Torts § 772(a) (1977)). Thus, the Medical Group's truthful statements to Dr. Samaha about the policy in place under the Agreement with Sloan-Kettering cannot support a finding of malice, because the making of the statements do not constitute a wrong committed without justification or excuse, and there is absolutely no evidence that the statements were not made for the purpose of interfering in any contemplated relationship between Dr. Samaha and the Group. See id.; Printing Mart, supra, 116 N.J. at 751; C.R. Bard, Inc. v. Wordtronics Corp., 235 N.J. Super. 168, 173-74 (Law Div. 1989).

As to the fourth element, plaintiffs have produced no evidence that they suffered an injury and resulting damages. Plaintiffs speculate about the possible long-range economic outlook for their practice, but there are many economic decisions they can make before the unknown future in the changing health care field. Defendant, on the other hand, produced evidence that the affiliation has had a beneficial effect on the Groups' profits and its shareholders' personal incomes.

There are no genuine issues that could change the fact that the defendant is entitled, as a matter of law, to summary judgment on plaintiffs' claim of tortious interference. Dr. Samaha and the Group knew that the Medical Center's contractual obligations with Sloan-Kettering prevented it from granting him privileges in medical oncology, thus the plaintiffs could not have had any reasonable expectation of an economic benefit arising out of Dr. Samaha's association with the Group based on his obtaining privileges.

CONCLUSION

For all of the foregoing reasons, the Court must grant defendant's motion for summary judgment with regard to the first, second, and fourth counts of the Complaint, and the Court duly notes plaintiffs' withdrawal of the federal claim in the third count. Therefore, plaintiffs' Complaint is dismissed.