

STATE OF NORTH CAROLINA  
COUNTY OF BUNCOMBE

IN THE SPECIAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
File No. 7 CV 06055

DANIEL T. EGLINTON, M.D. )  
)  
)  
Plaintiff, )  
)  
vs. )  
)  
)  
BLUE RIDGE BONE & JOINT )  
CLINIC, P.A., BRBJ ASHEVILLE, )  
L.L.C. and BRBJ FLETCHER, L.L.C., )

MEMORANDUM OF LAW  
IN OPPOSITION TO DEFENDANT’S  
MOTION TO DISMISS  
AND IN SUPPORT OF PLAINTIFF’S  
MOTION TO AMEND

Defendants.

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NOW COMES Plaintiff Daniel T. Eglinton, M.D., pursuant to Rule 15.6 of the General Rules of Practice and Procedure for the North Carolina Business Court and hereby submits the following memorandum of law in opposition to Defendant Blue Ridge Bone & Joint Clinic’s Motion to Dismiss Plaintiff’s Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

**STATEMENT OF CASE**

Plaintiff is an Orthopaedic Surgeon licensed to practice medicine in the State of North Carolina and was formerly an employee and member-physician of Defendant Blue Ridge Bone & Joint Clinic, P.A. (BRBJ), a medical practice specializing in orthopaedic medicine. On November 28, 2007, Plaintiff filed a complaint alleging that BRBJ had constructively terminated his employment by forcing him to sign a resignation through the use of coercion and duress. BRBJ’s actions in obtaining the termination were in violation of the public policy of the State of North Carolina and Plaintiff alleges represent a wrongful termination of his employment. Plaintiff also

alleges that he was a party to valid contracts with BRBJ in the form of an employment agreement and its subsequent amendments, a written Physician's Agreement, and a Buy-Sell Agreement. Plaintiff also alleges in his complaint that BRBJ breached all of the above-mentioned contracts. Plaintiff respectfully contends that he has sufficiently pled both claims and that the Court should deny BRBJ's Motion to Dismiss. Below, Plaintiff addresses each of the reasons for dismissal contained within BRBJ's memorandum of law. If the court should hold that there are deficiencies in the Complaint, Plaintiff respectfully contends that such deficiencies are addressed in Plaintiff's Motion to Amend Complaint, filed contemporaneously with this memorandum of law. The final section of the argument section of this Memorandum of law gives a brief argument in support of Plaintiff's Motion to Amend.

### **ARGUMENT**

The court must liberally construe the allegations of the complaint when ruling on a Rule 12(b)(6) motion to dismiss. *Dixon v. Stuart*, 85 N.C. App. 338, 354 S.E.2d 757 (1987). Mere vagueness or lack of detail is not ground for a motion to dismiss. *Redevelopment Commission of Washington v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971). The function of a motion to dismiss is to test the law of a claim, not the facts. *White v. White*, 296 N.C. 661, 252 S.E.2d 698 (1979). The rules governing discovery and motion for summary judgment provide adequate procedure to obtain details not set out in the complaint. *Lupo v. Powell*, 44 N.C.App. 35, 259 S.E.2d 777 (1979). Based upon these foregoing principles of a Rule 12(b)(6) motion, Plaintiff has adequately pled his claims for breach of contract and wrongful termination, and therefore, Plaintiff respectfully requests that BRBJ's Motion to Dismiss be denied.

- (1) **Plaintiff has sufficiently alleged the existence of an valid employment contract and a breach of that employment contract by BRBJ pursuant to the requirements of Rule 8(a)(1) of the Rules of Civil Procedure.**

The State of North Carolina long ago abandoned the requirement of fact pleading in favor of the more liberal principle of notice pleading as encompassed in Rule 8(a)(1) of the North Carolina Rules of Civil Procedure. The adoption of the notice pleading system affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 481, 298 S.E.2d 751, 755 (1985).

Counsel for the plaintiff had been in negotiations with attorneys representing BRBJ for four months prior to filing the subject complaint. During those negotiations and during the pendency of this action, the Plaintiff has never alleged that the employment agreement between Plaintiff and BRBJ contained a term for a specified employment period. The entirety of the BRBJ's First Reason for dismissal seeks to demonstrate to the court the failure to allege such a term. This argument, at best, mischaracterizes the basis of Plaintiff's claims against BRBJ. Through this argument BRBJ attempts to merge, and thereby obscure, the two separate claims made by Plaintiff; Breach of Contract and Wrongful Termination.

A breach of contract claim has two elements: (1) existence of a valid contract; and (2) breach of the contract. *Poor v. Hill*, 138 N.C.App. 19, 530 S.E.2d 838 (2000). Where the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under Rule 12(b)(6). *Woolard v. Davenport*, 166 N.C.App. 129, 134, 601 S.E.2d 319, 322 (2004). To the extent that BRBJ's Memorandum insinuates that the Plaintiff has failed to adequately allege the existence of an employment agreement, a review of Plaintiff's Complaint, and only Plaintiff's complaint, demonstrates that Plaintiff has complied with the liberal principle of notice pleading as to this element of the claim. Plaintiff has pled that a written contract exists and the dates on which the agreement and its subsequent Amendments were created. (Complaint, §§ 5-9) This

description of the subject contracts meets the requirement of a short, plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions that are the subject of the claim. *N.C. Gen. Stat. '1A-1, Rule 8(a)(1)*. For the purposes of this motion, the court must consider the information in Plaintiff's allegations as true. *Governor's Club, Inc. v. Governor's Club Limited Partnership*, 152 N.C.App 240, 567 S.E.2d 781 (2002). If BRBJ is later able to prove that no written agreements were entered on the specified dates, its counsel has available the option of a Motion for Summary Judgment.

BRBJ attempts to state that Plaintiff's failure to attach the various written agreements to his complaint is somehow fatal to his allegation of a valid contract. (Movant's Memorandum of Law, p. 2) Not surprisingly, BRBJ cites no case law or statute to support this novel argument. Plaintiff's counsel is unaware of any such requirement and did not attach copies of the lengthy agreements to the complaint as BRBJ is, and has been for many years, in possession of the original agreements. In similar fashion, BRBJ states repeatedly that Plaintiff has failed to allege the existence of an agreement and its terms with particularity or specificity and that this omission is fatal to the breach of contract claim. (Movant's Memorandum of Law, pp. 1 and 3). While such stringent pleading requirements of particularity and specificity are required when pleading special matters described in Rule 9 of the Rules of Civil Procedure, BRBJ offers no case law or statute that demonstrates these requirements extend to pleading a claim for breach of contract.

The second element of a breach of contract claim is the actual breach of the subject contract. Contrary to BRBJ's unsupported contention that the breach involves the loss of employment, Plaintiff's claim for breach of the employment agreement revolves around the termination clause of the agreement and the means and amounts by which Plaintiff would be

compensated for his accounts receivable held and collected by BRBJ. Plaintiff alleges in his complaint that BRBJ has breached the terms of the employment agreement and its amendments. (Complaint P15). Plaintiff contends that under the liberal requirements of Rule 8(a)(1) such allegations are sufficient to state a breach of contract claim.

In his complaint, Plaintiff has alleged the two essential elements of a breach of contract claim. Plaintiff has alleged sufficient facts to place BRBJ on notice of the applicable transaction equipping BRBJ to obtain additional, specific facts through the normal discovery process. Finally, Plaintiff has not alleged any facts in his complaint that renders his legal theory impossible. The North Carolina Supreme Court has held that a 12(b)(6) motion to dismiss should not be granted unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. *Isenhour v. Hutto*, 350 N.C. 601, 604-05, 517 S.E.2d 121, 124 (1999).

Pursuant to the afore-mentioned reasons, Plaintiff respectfully requests that Defendant BRBJ's Motion to Dismiss as to the breach of contract claims be denied.

**(2) Plaintiff has sufficiently pled a claim for relief for wrongful termination based upon a violation of North Carolina's public policy.**

In addition to Plaintiff's contractual claims under the employment agreement with BRBJ, Plaintiff has made a claim based upon wrongful termination. Plaintiff alleges that while he was disabled and seeking medical treatment in Alabama, BRBJ demanded Plaintiff's resignation under threat of negative monetary sanctions. (Complaint & 12). While under inpatient medical treatment, Plaintiff was out of regular and continuous contact with his family and attorney. The resignation presented to Plaintiff significantly and negatively altered his monetary compensation from BRBJ upon termination. Plaintiff alleges that the practice of an employer demanding an unnecessary

resignation agreement of an disabled employee who is in a vulnerable state for the purpose of reducing the amount of compensation to which the employee is contractually entitled offends the public policy of the State of North Carolina. BRBJ asserts that the Court of Appeals has held that terminating an employee because he was hospitalized did not fall within the public policy exception (Movant's Memorandum of Law, pg. 4, citing *Imes v. City of Asheville*, 163 N.C.App. 668, 594 S.E.2d 397 (2004).) The facts of *Imes* are distinct from Plaintiff's claim. Plaintiff does not allege that he was wrongfully discharged because of his hospitalization. Plaintiff alleges he was wrongfully discharged because of a disabling condition and that BRBJ took unwarranted advantage of Plaintiff's condition to obtain illegitimate monetary benefits at Plaintiff's expense. (Complaint PP 12-13).

Although the North Carolina Appellate courts have never addressed a public policy exception such as the one alleged in Plaintiff's Complaint, the North Carolina Supreme Court has held that the definition of "public policy" approved by this Court does not include a laundry list of what is or is not "injurious to the public or against the public good[.]"@ *Amos, et al. V. Oakdale Knitting Co.*, 331 N.C. 348, 353, 416 S.E.2d 166, 169 (1992). Additionally, BRBJ states that the *Imes* court held that the public policy exception "has only been recognized where employees were terminated for refusing to violate the law at their employers request or where employees suffered retaliation after engaging in a legally protected activity."@ (Movant's Memorandum of Law pg. 4, citation omitted) Conspicuously omitted by BRBJ was the third public policy exception enumerated by the *Imes* court, which was (3) based on activity by the employer contrary to law or public policy.@ *Imes v. City of Asheville*, 163 N.C.App. at 671, 594 S.E.2d at 399. This is precisely the type of activity alleged by the Plaintiff.

In its memorandum of law, BRBJ gratuitously enters a footnote regarding its intention to

introduce allegations of alcoholism on the part of the Plaintiff. (Movant's Memorandum of Law, pg. 4) Movant then proceeds to argue that point and cite related cases as if the Plaintiff made the allegation in his complaint. Plaintiff will not only dispute such an allegation when and if BRBJ makes it in an appropriate pleading, but also points out that review of a claim for the purposes of a Rule 12(b)(6) Motion to dismiss is confined to the four corners of Plaintiff's complaint. *Perkins v. Healthmarkets, Inc.*, 2007 NCBC 25 (2007).

Plaintiff respectfully asserts that he has sufficiently pled a public policy exception and should be allowed the opportunity to develop and argue its merits. Therefore, BRBJ's Motion to dismiss Plaintiff's wrongful termination claim should be denied.

**(3) Plaintiff has sufficiently alleged the existence of an valid Buy/Sell Agreement and a breach of that contract by BRBJ pursuant to the requirements of Rule 8(a)(1) of the Rules of Civil Procedure.**

The third reason for dismissal listed in BRBJ's memorandum of law is essentially identical to its first reason. Plaintiff has alleged both the existence of valid Buy/Sell and Physicians agreements between the parties and the breach of those agreements. (Complaint §§ 7-9 and 23). By pleading these essential elements to a breach of contract claim, Plaintiff has satisfied the notice pleading requirements of Rule 8(a)(1) of the North Carolina Rules of Civil Procedure. BRBJ has failed to cite any case law or statutes that require plaintiff to attach the contracts to his complaint or to describe the terms of the agreements with particularity or specificity. Specific facts or greater detail may be obtained by BRBJ through the normal discovery tools available to all litigants pursuant to the North Carolina Rules of Civil Procedure. Additionally, Plaintiff notes that BRBJ, as well as the other two defendants, has filed for and received extensions of time to respond to Plaintiff's discovery requests. The Defendants' responses to this discovery, when they are served, will provide much of the factual background that BRBJ claims to require.

The only relevant case cited by BRBJ in its first and third reasons for dismissal of Plaintiff's complaint is clearly distinguishable from the case at hand and the argument the Defendant is attempting to make. In the *McLamb* case, the Court of Appeals upheld the dismissal of the plaintiff's breach of contract claim because the language of the agreement attached to the complaint was insufficient to create a valid contract under North Carolina law. *McLamb v. T.P., Inc.*, 173 N.C. App. 586, 619 S.E.2d 577 (2005). *McLamb* does not hold, as BRBJ insinuates, that failure to plead the specific terms of an agreement is fatal to a breach of contract claim. The *McLamb* Court merely held that if facts alleged in the complaint render a claim legally impossible, dismissal of the claim is proper.

Pursuant to the afore-mentioned reasons, Plaintiff respectfully requests that Defendant BRBJ's Motion to Dismiss as to the breach of contract claims be denied.

**(4) Plaintiff's Motion to Amend his Complaint should be allowed as there has been no undue delay and there is no evidence of undue prejudice to any of the Defendants by such Amendment.**

Plaintiff maintains that the allegations contained within his original complaint are sufficient to state a claim for which relief may be granted. Nevertheless, desirous to move this case forward, Plaintiff requests leave to amend his complaint to address some of the issues raised by BRBJ in its motion to dismiss.

In support of his Motion to Amend his Complaint, Plaintiff shows the court that none of the three defendants have filed an Answer to Plaintiff's original complaint. The only actions taken by the defendants to respond to this action were the Notice of Designation to place this case in the North Carolina Business Court, which was opposed by the Plaintiff, Motions for extensions of Time to Answer the Complaint filed by all three Defendants, and BRBJ's recently filed Motion to

Dismiss.

The Rules of civil procedure state that leave to amend a pleading shall be freely given when justice so requires. *N.C. Gen. Stat. ' 1A-1, Rule 15(a)*. As the proposed Amended Complaint attached to Plaintiff's Motion to Amend merely addresses the concerns raised by BRBJ's Motion to Dismiss, Plaintiff is unable to discern any possible prejudice to BRBJ or the other defendants to this action if leave to Amend is allowed. Further, the Court of Appeals has held that denial of a Motion to Amend is not proper when there is no justifying reason for denying the amendment such as undue delay, bad faith, undue prejudice or futility. *White v. Union County Zoning Board of Adjustment*, 93 N.C.App. 148, 153, 377 S.E.2d 93, 95-96 (1989).

For the above-mentioned reasons, Plaintiff respectfully requests that his Motion for leave to Amend his Complaint be allowed.

### **CONCLUSION**

Plaintiff has sufficiently pled claims against Defendant Blue Ridge Bone & Joint Clinic, P.A. for Breach of Contract and Wrongful Termination pursuant to the North Carolina Rules of Civil Procedure and the Law of the State of North Carolina. If the Court should find any deficiencies, Plaintiff asserts that such deficiencies are cured by the Amended Complaint attached to Plaintiff's Motion to Amend filed contemporaneously with this Memorandum of Law. Therefore, Plaintiff respectfully requests that Defendant Blue Ridge Bone & Joint Clinic's Motion to Dismiss be denied and that Plaintiff's Motion to Amend be Allowed.

This the 26<sup>th</sup> day of February, 2008.

CONTRIVO & CONTRIVO, P.A.

/s/Frank J. Contrivo  
FRANK J. CONTRIVO  
FRANK J. CONTRIVO, JR.  
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the undersigned has this date served this pleading in the above-entitled action to all parties to this cause by facsimile and by depositing a copy hereof in a postpaid wrapper in an official depository under the exclusive care and custody of the United States Postal Service, properly addressed to the attorney or attorneys for said parties.

THIS the 26<sup>th</sup> day of February, 2008.

/s/Frank J. Contrivo  
FRANK J. CONTRIVO  
Attorney for Plaintiff