

STATE OF NORTH CAROLINA  
COUNTY OF BUNCOMBE

IN THE SPECIAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
CIVIL ACTION NO: 7CV 06055

DANIEL T. EGLINTON, M.D.

Plaintiff,

v.

BLUE RIDGE BONE & JOINT CLINIC, P.A.,  
BRBJ ASHEVILLE, L.L.C. and BRBJ  
FLETCHER, L.L.C

Defendant.

**MEMORANDUM OF LAW  
IN SUPPORT OF  
MOTION TO DISMISS**

COMES NOW Defendant Blue Ridge Bone & Joint Clinic, P.A. (“BRBJ”), pursuant to Rule 15.4 of the General Rules of Practice and Procedure for the North Carolina Business Court and hereby submits the following memorandum of law in support of its Motion to Dismiss the Plaintiff’s Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

**STATEMENT OF CASE**

Plaintiff is a medical doctor, and BRBJ, a medical practice, is his former employer. Plaintiff appears to seek relief for BRBJ’s alleged breaches of contract and BRBJ’s “wrongful termination” of his employment with the practice. However, because Plaintiff fails to allege the terms of any agreement between himself and BRBJ with any particularity or specificity, his claims are fatally flawed. Moreover, because Plaintiff admits that he resigned from his employment with BRBJ and fails to allege that he was terminated in violation of any recognized North Carolina public policy, his claims are fatally flawed. More specifically, BRBJ respectfully contends that Plaintiff’s Complaint should be dismissed for the following reasons:

- (1) **Plaintiff fails to sufficiently allege the existence of anything more than an “at will” employment relationship with BRBJ, and therefore his Complaint fails to state a claim for relief based upon a breach of employment contract;**
- (2) **Plaintiff fails to allege that BRBJ terminated his employment in violation of North Carolina’s public policy, and therefore his Complaint fails to state a claim for relief based upon wrongful termination; and**

- (3) **Plaintiff fails to sufficiently allege the terms of any contract not related to his employment with BRBJ and how BRBJ allegedly breached those terms, and therefore his Complaint fails to state a claim for relief based upon breach of contract.**

### ARGUMENT

The Court may dismiss the Plaintiff's Complaint if no law supports his claims, if sufficient facts to make out a good claim are absent, or if a fact is asserted that defeats his claims. *Imes v. City of Asheville*, 163 N.C. App. 668, 594 S.E.2d 397 (2004). At best, Plaintiff appears to allege (1) that he was employed by BRBJ; (2) that he became hospitalized out of state; (3) that he resigned from his employment "under duress<sup>1</sup>;" and (4) that BRBJ's alleged requests that he resign from his employment with the practice constitute breaches of contract. (Complaint ¶¶ 5-6, 12, 14-15, 23, 27). These allegations are insufficient to state a claim for relief, and accordingly, Plaintiff's Complaint should be dismissed.

- (1) **Plaintiff fails to sufficiently allege the existence of anything more than an "at will" employment relationship with BRBJ, and therefore his Complaint fails to state a claim for relief based upon a breach of employment contract.**

Although Plaintiff alleges that he and BRBJ were parties to a "written Employment Agreement" that was amended by the parties several times, neither the Employment Agreement nor its amendments are attached to the Plaintiff's Complaint. Likewise, Plaintiff fails to include the terms or even a summary of the terms of the alleged Employment Agreement and/or its amendments within the allegations of his Complaint. Plaintiff does not allege that BRBJ agreed to employ him for a specified term. Plaintiff does not allege that he was asked to resign in violation of such an agreement. Plaintiff does not allege that BRBJ agreed to employ him regardless of his job performance, and he does not allege that he could only be asked to resign "for cause."

To adequately allege the existence of any contract, much less a contract for employment, Plaintiff must allege the existence of a valid contract and a breach of the contract's terms. *McLamb v.*

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<sup>1</sup> By way of background, BRBJ refers the Court to the Agreement Regarding Resignation, which is attached to its Response to Plaintiff's Opposition to Notice of Business Court Designation. Although BRBJ contends that Plaintiff's Complaint is insufficient on its face, if this matter progresses, BRBJ intends to rely on the Agreement, which was executed by the Plaintiff, before a notary with the advice of legal counsel.

*T.P., Inc.*, 173 N.C. App. 586, 619 S.E.2d 577 (2005). Here, Plaintiff fails to allege with specificity any terms governing his employment with BRBJ, and he fails to allege what exactly BRBJ did to breach those terms.

Absent factual averments that BRBJ agreed to employ Plaintiff for a specified term, Plaintiff has alleged “no more than a unilateral expectation of continued employment” with BRBJ and not a breach of an employment contract between the parties. See *Privette v. University of North Carolina at Chapel Hill*, 96 N.C. App. 124, 385 S.E.2d 185 (1989), citing *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818 (1985). Likewise, the mere allegation that the Plaintiff was “wrongfully terminated” or terminated absent good cause does not support the existence of an employment contract. As our Court of Appeals held in *Privette, supra*, unless the terms governing the Plaintiff’s termination are expressly delineated and incorporated into a contract, and unless the terms of the alleged contract are specifically plead in the Complaint, the Plaintiff’s claims for breach of employment contract should be dismissed. *Privette*, 96 N.C. App. at 133; 384 S.E.2d at 190. (plaintiff’s failure to specifically reference discharge provisions contained in employee handbook and failure to append those provisions to Complaint resulted in proper dismissal of his Complaint pursuant to Rule 12(b)(6)). Plaintiff’s Complaint fails to allege any of the required elements for breach of an alleged employment contract, and it should be dismissed.

**(2) Plaintiff fails to allege that BRBJ terminated his employment in violation of North Carolina’s public policy, and therefore his Complaint fails to state a claim for relief based upon wrongful termination.**

Reading Plaintiff’s Complaint in the light most favorable to him, Plaintiff has alleged, at best, that his “at will” employment relationship with BRBJ ended when he resigned at BRBJ’s request. Plaintiff appears to contend that BRBJ’s “wrongfully” requested his resignation because he was hospitalized out of state at the time of the alleged request. (Complaint ¶¶ 12-14). Assuming Plaintiff had an “at will” employment relationship with BRBJ and assuming that BRBJ terminated that relationship – an assumption that is controverted by the Plaintiff’s own allegations – North Carolina

law recognizes no cause of action for the “wrongful termination” of “at will” employment unless the termination violates a well-established public policy of the state.

“To state a claim for wrongful discharge in violation of public policy, an employee has the burden of pleading that his ‘dismissal occurred for a reason that violates public policy,’” *Imes v. City of Asheville*, 163 N.C. App. 668, 670, 594 S.E.2d 397, 398 (2004)(holding plaintiff’s allegations that he was discharged following his hospitalization resulting from domestic violence insufficient to state a claim for relief). Wrongful termination in violation of public policy has only been recognized where employees were terminated for refusing to violate the law at their employer’s request or where employees suffered retaliation after engaging in a legally protected activity. *Id.* Terminating an employee because he or she is hospitalized has not been recognized as a violation of North Carolina’s public policy. *Imes*, 163 N.C. App. at 670, 594 S.E.2d at 398. Moreover, terminating an employee because he is an alcoholic, is seeking treatment for alcoholism, or is incapacitated due to alcoholism has been expressly held not to be a violation of North Carolina’s public policy.<sup>2</sup> *See McCullough v. Branch Banking & Trust Co., Inc.*, 136 N.C. 340, 524 S.E.2d 569 (2000). Here, Plaintiff fails to allege that his termination – again, ignoring Plaintiff’s admission that he resigned from his employment with the practice – violated any established public policy of North Carolina, and therefore his Complaint should be dismissed.

- (3) Plaintiff fails to sufficiently allege the terms of any contract not related to his employment with BRBJ and how BRBJ allegedly breached those terms, and therefore his Complaint fails to state a claim for relief based upon breach of contract.**

Similar to Plaintiff’s claims regarding the alleged Employment Agreement between himself and BRBJ, Plaintiff alleges that he and BRBJ are parties to a written “Buy-Sell Agreement” that has been amended. (Complaint ¶¶ 7-9). Plaintiff, however, fails to attach the alleged Buy-Sell Agreement and its amendments to the Complaint. Plaintiff fails to allege facts sufficient to show the terms of the alleged agreement and/or its amendments. Indeed, Plaintiff fails to allege what it is that BRBJ or

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<sup>2</sup> Plaintiff does not state the reason for his alleged hospitalization. However, BRBJ anticipates that the evidence in this case, should it go forward, will demonstrate that Plaintiff left his employment with the practice to seek treatment for alcoholism.

the Plaintiff agreed to buy or sell pursuant to the alleged agreement. Once again, Plaintiff's failure to plead the terms of the alleged contracts between himself and BRBJ necessitates the dismissal of his Complaint. *See McLamb v. T.P., Inc.*, 173 N.C. App. 586, 619 S.E.2d 577 (2005).

Likewise, even if Plaintiff sufficiently alleged the terms of the Buy-Sell Agreement or any other alleged agreement unrelated to his employment with BRBJ, Plaintiff fails to allege how BRBJ breached the agreement. Plaintiff appears to allege that BRBJ breached agreements unrelated to his employment with the practice by "wrongfully" asking him to resign. Of course, because the terms of these additional agreements are not sufficiently pled, it is difficult to understand how BRBJ's request that Plaintiff resign could constitute a breach of those agreements. Because Plaintiff's claims regarding alleged agreements not related to his employment with BRBJ are insufficiently pled, Plaintiff's Complaint should be dismissed.

#### **CONCLUSION**

Plaintiff's Complaint fails to state a claim upon which relief can be granted as to BRBJ, and as a result, it should be dismissed *with prejudice*.

This, the 11th day of February, 2008.

BROWN LAW LLP

By: /S/Jessica C. Tyndall  
GREGORY W. BROWN  
NC Bar # 26238 / VA Bar # 36369  
JESSICA C. TYNDALL  
NC Bar # 28475 / SC Bar # 76424  
5410 Trinity Road, Suite 116  
Raleigh, North Carolina 27607  
PH: (919) 719-0854  
FX: (919) 719-0858  
gregory@brownlawllp.com  
jessica@brownlawllp.com  
*Counsel for Blue Ridge Bone & Joint Clinic, P.A.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of February, 2008, the foregoing **Memorandum in Support of Motion to Dismiss** was served on the following persons by facsimile and by depositing a copy in the United States mail, first class, postage prepaid, addressed to the following counsel of record:

Frank J. Contrivo / Frank J. Contrivo, Jr.  
CONTRIVO & CONTRIVO, P.A.  
20 N. Spruce Street  
Asheville, NC 28801

/S/ Jessica C. Tyndall  
BROWN LAW LLP