

1 **WO**

2

3

4

5

6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8

9 Nitin Patel, M.D., F.A.C.C., an)
10 individual; and Cardiac Care, P.C., an)
Arizona Professional Corporation,)

No. CV-05-1129-PCT-MHM
CV-05-2926-PCT-MHM
(Consolidated)

11 Plaintiffs-Counterdefendants,)

ORDER

12 v.)

13 Verde Valley Medical Center, an)
14 Arizona non-profit corporation; and)
15 Northern Arizona Healthcare)
Corporation, an Arizona non-profit)
16 corporation,)

17 Defendants-Counterclaimants.)

18 Christian Heesch, M.D., an individual,)

19 Plaintiff,)

20 v.)

21 Verde Valley Medical Center, an)
22 Arizona non-profit corporation; and)
23 Northern Arizona Healthcare)
24 Corporation, an Arizona non-profit)
corporation,)

25 Defendants.)

26

27 Nitin Patel is a board-certified cardiologist practicing in Cottonwood, Arizona,
28 through Cardiac Care, P.C., a professional corporation. Patel and Cardiac Care, P.C. are two

1 of the plaintiffs in an action against Verde Valley Medical Center and Northern Arizona
2 Healthcare, both non-profit corporations. The Second Amended Consolidated Complaint
3 alleges various antitrust violations, as well as tortious interference with contract/business
4 relationships, defamation, injurious falsehood, breach of contract, breach of implied covenant
5 of good faith and fair dealing, wrongful institution and maintenance of an administrative
6 proceeding, and violations of due process and fundamental fairness. (Dkt. #202).

7 VVMC and NAH brought a counterclaim against Patel for defamation. Patel has
8 moved for summary judgment. (Dkt. #164). After consideration of the pleadings, the Court
9 issues the following order.

10 I. Standard of Review

11 A motion for summary judgment may be granted only if the moving party shows “that
12 there is no genuine issue of material fact and that the moving party is entitled to judgment
13 as a matter of law.” Fed. R. Civ. P. 56(c). To defeat a motion, the non-moving party must
14 show that there are genuine factual issues “that properly can be resolved only by a finder of
15 fact because they may reasonably be resolved in favor of either party.” Anderson v. Liberty
16 Lobby, Inc., 477 U.S. 242, 250 (1986). The party opposing summary judgment “may not rest
17 upon mere allegations or denials of [the party’s] pleadings, but . . . must set forth specific
18 facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). See also
19 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). “[T]here
20 is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury
21 to return a verdict for that party.” Anderson, 477 U.S. at 249.

22 II. Background

23 The defamation claim at issue arises out of statements made by Patel to a newspaper
24 reporter regarding Northern Arizona Healthcare and Verde Valley Medical Center
25 (collectively “the Hospital”). The allegedly false statements were published in one or more
26 newspapers in August and September of 2005. The statements were made several months
27 after Patel had filed his original complaint against the Hospital.

28

1 The statements made by Patel about which the Hospital complains include the
2 following:

- 3 (a) “There is a corporate policy at NAH, a big strategy to prevent any competition
4 from coming here”;
- 5 (b) “They [NAH] want to stifle any physician who wants to compete [with] the
6 organization. They say, ‘If that person is not sanctioned by us, we are going
7 to stop that person from practicing here’”;
- 8 (c) “One physician, Dr. Christian Heesch, was drummed out of the hospital through
9 [the Hospital’s] peer review process, only to have those charges brought against
10 him dismissed by the Arizona Medical Review Board”;
- 11 (d) “They are not judging the doctor by whether he is qualified or has experience”;
- 12 (e) “There is a concerted effort on the part of physicians and the hospital to prevent
13 any healthcare organization from coming into the market . . . That’s a
14 conspiracy”;
- 15 (f) The peer review process at NAH is being abused to intimidate doctors [who fail]
16 to “toe [sic] the line.”
- 17 (g) “This hospital has actually had meetings with how to evaluate doctors based on
18 their behavior. Under the wile of peer review, they can use that to get to the
19 doctor.”

20 (Response, Dkt. #182).

21 In his Motion for Summary Judgment, Patel argues that he believed at the time he
22 made these statements — and continues to believe after extensive discovery in his lawsuit
23 against the Hospital — that each and every statement was true and accurate. (Motion for
24 Summary Judgment, Dkt. #164). He believes, therefore, that he is entitled to summary
25 judgment on the defamation claims.

26 III. Discussion

27 A. Actual Malice

1 Patel argues in his Motion for Summary Judgment that the Hospital constitutes a
2 public figure, and thus, it must show by clear and convincing evidence that Patel acted with
3 *actual malice* in making the statements. (Dkt. #164). In other words, Patel asserts that the
4 Hospital must demonstrate that he made the statements “with knowledge that [they were]
5 false or with reckless disregard of whether [they were] false or not.” Id. (citing New York
6 Times v. Sullivan, 376 U.S. 254, 280 (1964)). The Hospital appears to agree that “actual
7 malice” is the appropriate standard, and so the Court will analyze the motion using that
8 framework.

9 As stated by Patel in his briefing, the Court need not (and will not) make a
10 determination at this stage whether his statements to the newspaper were actually true.
11 Rather, it must determine whether the Hospital has presented evidence sufficient to survive
12 a motion for summary judgment that Patel knew the statements were false, or that he acted
13 with reckless disregard as to their falsity. Id.

14 1. Statements Regarding the Hospital’s Strategies to Avoid or Stifle Competition

15 The counterclaim against Patel alleges that he made — with actual malice — various
16 false statements about the Hospital’s attempts to stifle competition. The Hospital makes
17 various assertions in its Response to the Motion for Summary Judgment.

18 The Hospital points to the fact the Patel had admitting privileges at its facilities until
19 he voluntarily resigned them in 2004. “Thus,” the Hospital says, “his competition has not
20 been stifled.” (Response, Dkt. #182).

21 Patel’s admitting privileges, however, do nothing to show that any of the allegedly
22 defamatory statements relating to competition were false, much less that he acted with actual
23 malice. Patel’s statements were that “[t]here is *a corporate policy* at NAH, *a big strategy* to
24 prevent any competition from coming here,” and that “[t]hey *want to stifle* any physician who
25 wants to compete with the organization.” Id. at Exhibit A (emphasis added). Although it is
26 debatable whether Patel was actually stifled, the facts pointed to by the Hospital do nothing
27 to support the objective falsity of his statements. The evidence cited by the Hospital is better
28

1 suited to rebut the underlying antitrust claims; it does not provide evidence of the actual
2 malice component of its defamation counterclaim.

3 Similarly, the Hospital points to Patel’s deposition testimony to establish that he acted
4 with actual malice with respect to his statements about stifling competition. In the
5 deposition, Patel was asked to specify the types of anti-competitive conduct engaged in by
6 the Hospital with respect to thirteen services performed by Patel at his Cardiac Care facility.
7 (Response, Dkt. 182 Exhibit C). It argues that Patel could name no specific anti-competitive
8 behavior relating to any of the thirteen services he provided, and therefore, his statements
9 about stifling competition were false and made with actual malice. The Court disagrees with
10 the Hospital’s characterization of Patel’s testimony.

11 In his deposition, Patel was asked to specify the anti-competitive actions taken
12 *individually* with respect to *each specific service that he provided*.¹ Because “Patel was
13 unable to identify any acts relating to any individual services other than (allegedly) invasive
14 cardiology,” the Hospital argues that he “could not have believed that [the Hospital]
15 attempted to stifle all competition in the region when [it has] not taken action against many
16 of his own competitive activities.” (Response, Dkt. #182). But Patel did not make any
17 statements to the newspaper about anti-competitive practices relating to specific services he
18 provided. Rather, he made general allegations about the anti-competitive policies and
19 strategies of the Hospital, which he reiterated in his deposition.² The Court cannot
20

21 ¹Q: “I’d like to do them one by one. Holter monitoring, anything specifically relating
22 to Holter monitoring that the hospital did anti-competitive and unfair towards you?”
23 (Response, Dkt. 182 Exhibit C).

24 ²A: “I have not understood your question on what exact context you are talking about,
25 because there is certain things that the hospital has done to stop me from performing these
26 procedures also.”

26 Q: “Well, tell me what those are then. What has the hospital done to stop you from
27 performing any or all of the procedures 1 through 13 in Exhibit 1?”

27 A: “Well, it’s a long story.”

• • •

28 Q: “Anything - - let me do this. Are you contending that the hospital has done things

1 reasonably infer actual malice from this deposition testimony. See Barnes v. Arden Mayfair,
2 Inc., 759 F.2d 676, 680 (9th Cir. 1985) (“A party opposing summary judgment is entitled to
3 the benefit of only *reasonable* inferences that may be drawn from the evidence put forth.”).

4 2. Statements Regarding Economic Credentialing

5 Patel made several statements that accused the Hospital of engaging in “economic
6 credentialing,” which Patel defines as: “not judging the doctor by whether he is qualified or
7 has the necessary experience. It’s based on what are the current strategies for NAH as an
8 organization.” (Response, Dkt. #182, Exhibit A).

9 With respect to Patel’s statements regarding economic credentialing, the Hospital
10 again attempts to assert that, because there is evidence that economic credentialing did not
11 occur, Patel “must have known that his defamatory statements to newspapers were false.”
12 (Response, Dkt. #182). The evidence cited to support its assertion is the “admission” by
13 Patel that the Hospital would have benefitted economically if Dr. Heesch had been granted
14 privileges.³ The Hospital points specifically to the fact that Patel had admitting privileges
15 (until he resigned them), but that Dr. Heesch (who was recruited by Patel) had been denied
16 privileges. Id. “Thus,” the Hospital says, “if privileges were based on economic criteria and
17 competition, Dr. Patel’s privileges would have been denied while Dr. Heesch would have
18 received privileges. Since Dr. Patel knew that the opposite had occurred, he must have
19 known that his defamatory statements to the newspaper were false.” Id.

20 The Court is not persuaded that this shows actual malice or presents a genuine issue
21 of material fact. The Hospital appears to falsely assume that financial benefit to the Hospital

22 _____
23 to stop you from practicing cardiology generally?”

24 A: “Yes, I am.”

25 Q: “Okay. Let’s put that to the side for now, though, trust me, we’ll get to it.”
(Response, Dkt. 182 Exhibit C).

26 ³It is notable that the alleged “admission” comes from a proposal drafted by Patel a
27 several years before the current lawsuit. The proposal was provided in order to sell the
28 Hospital on the benefits of adding an additional cardiologist to Patel’s practice. (Response,
Dkt. #182, Exhibits G-H).

1 in the form of increased interventional procedures performed by Dr. Heesch is the only
2 economic factor the Hospital could have taken into consideration if it had, in fact, engaged
3 in economic credentialing. Patel points to evidence in the record that tends to support his
4 contention that the failure to afford Dr. Heesch admitting privileges was based on economic
5 credentialing. (Reply, Dkt. #189). Patel argues that the net economic effect of providing Dr.
6 Heesch with admitting privileges would have been to expand Cardiac Care’s practice and to
7 *increase* competition, and that is why the Hospital denied him privileges.

8 The Court need not decide if the statements were actually true; it must simply
9 determine whether the Hospital raised a genuine issue of triable fact that Patel acted with
10 actual malice. Because Patel has put forth a plausible explanation for why he believed the
11 Hospital’s failure to provide Dr. Heesch with admitting privileges constituted economic
12 credentialing, the Hospital has failed to show that Patel acted with actual malice. The
13 Hospital has not produced any evidence that would allow it to survive summary judgment
14 on this issue.

15 3. Statements Regarding Efforts to Block Entry Into the Market

16 The Hospital argues that Patel acted with actual malice when he made defamatory
17 statements about the Hospital blocking entry into the market. It lists the following evidence
18 to support the fact that Patel knew that the Hospital could not stop all competition:

- 19 1) Despite not being sanctioned by the Hospital, “Dr. Patel believes that his
20 practice ‘has established itself as a dominant player in the Verde Valley’”;
- 21 2) Dr. Patel stated in a document that the Hospital’s Competition policy “will have
22 no impact on our operations or future plans”; and
- 23 3) “Dr. Patel threatened to recruit 30-35 physicians to his practice and ‘aggressively
24 compete’ with [the Hospital] unless [it] purchased his business.”

25 (Response, Dkt. 182). The Court agrees that this evidence does tend to show that Patel must
26 have believed that the Hospital could not stop all competition. The problem with this
27 argument? Patel never said the Hospital could stop all competition. The quotes attributable
28 to Patel seem to be expressing his belief about the Hospital’s *intentions*, rather than its

1 abilities in every circumstance to effectively block entry into the market. Here is what Patel
2 actually said:

- 3 ● “There is *a corporate policy* at NAH, *a big strategy* to prevent any competition
4 from coming here”;
- 5 ● “They [NAH] *want* to stifle any physician who wants to compete [with] the
6 organization. *They say*, ‘If that person is not sanctioned by us, we are going
7 to stop that person from practicing here’”;
- 8 ● “There is *a concerted effort* on the part of physicians and the hospital to prevent
9 any healthcare organization from coming into the market . . . That’s a
10 conspiracy.”

11 Id. at Exhibit A (emphasis added). The Hospital has therefore failed to show actual malice.

12 IV. Conclusion

13 The Hospital has attempted to show actual malice on the part of Patel by attempting
14 to prove the objective falsity of his statements to the newspaper. Put another way, the
15 Hospital has tried to demonstrate circumstantially that, because the statements are objectively
16 false, Patel must have realized their falsity, and therefore he acted with actual malice. Its
17 arguments and evidence, however, basically fail to make either actual knowledge of falsity
18 or reckless disregard more probable.

19 Because the Hospital did not produce sufficient evidence such that a fact finder could
20 find objective falsity, the Hospital has consequently not met its burden — through
21 circumstantial evidence or otherwise — to show that Patel knew or acted recklessly with
22 regard to the statements’ falsity. See Barnes v. Arden Mayfair, Inc., 759 F.2d at 680. By
23 failing to demonstrate a triable issue of material fact regarding actual malice, the Hospital’s
24 claims cannot survive summary judgment.

25 ///

26 ///

27 ///

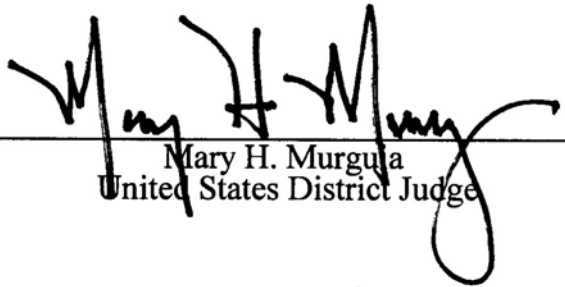
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Accordingly,

IT IS ORDERED that summary judgment be granted in favor of Patel on the Hospital's claims for defamation.

DATED this 7th day of March, 2008.



Mary H. Murgula
United States District Judge