

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
TRIAL TERM, PART 44 SUFFOLK COUNTY**

PRESENT: Honorable Elizabeth H. Emerson

MOTION DATE: 3-16-11
SUBMITTED: 4-7-11
MOTION NO.: 001-MOT D

PECONIC SURGICAL GROUP, P.C., x

Plaintiff,

-against-

AGOSTINO CERVONE, M.D. and GEORGE
KECKEISEN, M.D.,

Defendants.

x

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Upon the following papers numbered 1-73 read on this motion for preliminary injunction ; Order to Show Cause and supporting papers 1-12 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 13-39; 41-62 ; Replying Affidavits and supporting papers 63-73 ; it is,

ORDERED that this motion by the plaintiff for a preliminary injunction is referred to a hearing, which shall be scheduled at the parties' next conference with the court on June 9, 2011; and it is further

ORDERED that the temporary restraining order contained in the order to show cause dated March 3, 2011, is continued pending further order of the court.

The plaintiff, Peconic Surgical Group, P.C. ("PSG"), is a professional corporation of surgeons founded in 1994 by Dr. Leslaw Gredysa. Its offices are located in Riverhead and

Southampton, New York, and its main hospital affiliations are with Peconic Bay Medical Center in Riverhead and Southampton Hospital in Southampton. In 1996, PSG hired the defendant Dr. George Keckeisen, a surgeon affiliated with hospitals in Nassau County, New York. Three years later, in 1999, PSG hired Dr. Agostino Cervone, who had just completed his general surgical residency in Baltimore, Maryland. On January 1, 2003, Drs. Gedysa, Keckeisen, and Cervone entered into a shareholders agreement. Dr. Gedysa became the majority shareholder and President of PSG with a 51% ownership interest therein. Drs. Cervone and Keckeisen became the minority shareholders and the Vice President and Secretary/Treasurer, respectively. Concurrent with the execution of the shareholders agreement on January 1, 2003, each doctor executed an employment agreement with PSG, inter alia, allowing him to resign upon 90 days' written notice and containing the following restrictive covenant:

The Physician covenants and agrees that upon the expiration of his term of employment hereunder, or upon termination of his employment with [PSG] for any other reason, he shall not, for a period of three (3) years thereafter, except with the written consent of [PSG], either directly or indirectly, within a fifteen (15) mile radius of the location of each of [PSG's] then-existing offices in Riverhead and/or Southampton: (i) engage in the practice of Surgery (whether as an employee, independent contractor, shareholder, partner, or otherwise and whether as a separate specialty or in conjunction with any other practice of medicine); or (ii) operate or have any financial or other interest in any medical practice involved in the practice of surgery.

By a letter dated December 13, 2010, Dr. Keckeisen resigned from PSG effective January 1, 2011. By a letter dated December 17, 2010, Dr. Cervone also resigned from PSG effective December 31, 2010. By an order to show cause dated March 3, 2011, PSG commenced this action and moved for temporary injunctive relief. PSG alleges that Drs. Keckeisen and Cervone (collectively "the defendants") breached their employment agreements by failing to give PSG 90 days' written notice of their resignations and by continuing to see patients and to perform surgery at both Peconic Bay Medical Center and Southampton Hospital in violation of the restrictive covenant. PSG also alleges that Dr. Cervone opened an office approximately 3 miles from PSG's Riverhead office in violation of the restrictive covenant. PSG seeks a preliminary injunction enjoining the defendants from practicing surgery within a 15-mile radius of PSG's offices in Riverhead and Southampton during the pendency of this action.

To be entitled to a preliminary injunction, the movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent the granting of a preliminary injunction, and (3) a balancing of the equities in the movant's favor (**Ying Fung Moy v Johi Umeki**, 10 AD3d 604).

Covenants restricting a professional, and in particular a physician, from competing

with a former employer or associate are common and generally acceptable (**North Shore Hematology/Oncology v Zervos**, 278 AD2d 210, 211). They will be enforced if they are reasonably limited in time, geographic area, and scope; necessary to protect the employer's interests; not harmful to the public; and not unduly burdensome (**Battenkill Veterinary Equine P.C. v Cangelosi**, 1 AD3d 856, 857). In the enforcement of restrictive covenants among professionals, great weight is given to the interests of the employer in restricting competition within a confined geographic area. The rationale therefor is that professionals are deemed to provide unique or extraordinary services (**BDO Seidman v Hirshbert**, 93 NY2d 382, 389). In fact, the interests of the employer have enjoyed solicitous consideration by the courts when the restrictive covenant is in an employment agreement between doctors (**Copa v Lederman**, US Dist Ct, EDNY, March 11, 2004, Glasser, J. [2004 WL 884258], *citing Karpinski v Ingrassi*, 28 NY2d 45; **Gelder Medical Group v Webber**, 41 NY2d 680; **Albany Medical College v Loble**, 296 AD2d 701; **North Shore Hematology/Oncology v Zervos**, *supra*).

The prohibition on the defendants from practicing surgery for three years in the 15-mile area within Suffolk County described in the restrictive covenant is reasonably limited in time, geographic area, and scope. The three-year period is reasonable, as is the 15-mile restriction (*see, Battenkill Veterinary Equine P.C. v Cangelosi, supra* at 858 [and cases cited therein]; *see also, Novendstern v Mt. Kisco Medical Group*, 177 AD2d 623, 625). The covenant does not restrict the defendants from practicing general medicine anywhere or surgery outside of the proscribed area or at other nearby hospitals. Thus, it is reasonable in scope and not unduly burdensome (*see, Battenkill Veterinary Equine P.C. v Cangelosi, supra* at 858-859; **Rivkinson-Mann v Kasoff**, 226 AD2d 517, 517-518; **Awwad v Capital Region Otolaryngology Head & Neck Group, LLP**, 18 Misc3d 1111[A], at *5). Moreover, PSG's interest in protection from the competition of those who have been associated with its practice is legitimate (*see, Novendstern v Mt. Kisco Medical Group, supra* at 625) and includes Dr. Keckeisen's employment at Southampton Hospital and Peconic Bay Medical Center (*see, Olean Medical Group v Leckband*, 32 AD3d 1214).

Contrary to the defendants' contentions, enforcement of the restrictive covenant is not harmful to the public. The Appellate Division, Second Department, recently upheld a restrictive covenant in an employment agreement which provided that, upon termination of the agreement, the defendant (a surgeon) could not perform surgery within 15 miles of the plaintiffs' medical office for a period of two years (*see, Ricca v Ouzounian*, 51 AD3d 997). In that case, like the one at bar, the defendant was practicing surgery at Southampton Hospital. The Appellate Division found no harm to the public because several other surgeons practiced at Southampton Hospital and because there are at least two other hospitals in the area¹ (*Id.* at 998). Here, the record reflects that, beside Southampton Hospital and Peconic Bay Medical Center, the East End of Long Island is served by Eastern Long Island Hospital in Greenport to the east of PSG's offices. Additionally, there are several hospitals to the west, including Brookhaven Memorial Hospital Medical Center in Patchogue, which is only 22.5 miles from PSG's office in Riverhead. The court finds that, under

¹Presumably, one of those hospitals is Peconic Bay Medical Center.

these circumstances, PSG has demonstrated a likelihood of success on the merits.

The court also finds that PSG has demonstrated a strong probability of irreparable harm if the preliminary injunction were denied. Not only would PSG lose the investment it made in hiring the defendants and establishing the practice for which they were hired, a loss that is not readily compensated by money damages, it would also lose patients and revenues to Dr. Cervone's new practice, as well as the goodwill associated with the practice, which is difficult to quantify (*see, Battenkill Veterinary Equine P.C. v Cangelosi, supra*, at 859; **Albany Medical College v Lobel, supra**, at 703; **Bollengier v Gulati**, 233 AD2d 721, 722). The defendants' contentions to the contrary notwithstanding, the inclusion of a liquidated damages clause in the defendants' employment agreements does not foreclose the granting of a preliminary injunction (*see, Zellner v Stephen D. Conrad, M.D., P.C.*, 183 AD2d 250, 254, *citing Karpinski v Ingrassi*, 28 NY2d 45).

In balancing the equities, the court should consider various factors, including the interests of the general public, whether the plaintiff was guilty of unreasonable delay, and whether the plaintiff has unclean hands (**United for Peace and Justice v Bloomberg**, 5 Misc 3d 845, 849 [and cases cited therein]). The court has already determined that the public will not be harmed by the granting of a preliminary injunction in this case, and the defendants have failed to prove laches. The two-month delay between the defendants' resignations and this application for injunctive relief was not unreasonable or inexcusable, nor did it result in prejudice to the defendants creating an equitable estoppel (*see, Hay Group v Nadel*, 170 AD2d 398, 399). The defendants' claim of unclean hands, however, is referred to a hearing.

A party to a contract who fails to perform a material obligation of the contract is not in court with clean hands and may not seek the aid of a court of equity in the protection of alleged rights arising out of or connected with the contract (**Malik v Toss 29, Inc.**, 15 Misc 3d 1112 [A] at *5). Thus, when a party benefitting from a restrictive covenant in a contract breaches that contract, the covenant is not valid and enforceable against the other party because the benefitting party was responsible for the breach (**DeCapua v Dine-A-Mate, Inc.**, 292 AD2d 489, 491).

The defendants contend that Dr. Gedysa, who is now PSG'S sole shareholder, has unclean hands because he breached the parties' shareholders agreement, the defendants' employment agreements, and his fiduciary duties to the defendants by diverting cash and checks from PSG's patients to himself, by paying personal expenses with PSG's funds, and by deducting personal expenses as business expenses, among other things. PSG and Dr. Gedysa sharply dispute these allegations.

The court finds that, but for the disputed factual issue regarding PSG'S and Dr. Gedysa's unclean hands, the plaintiff is entitled to a preliminary injunction. A motion for a preliminary injunction need not be denied because there is an issue of fact as to a necessary element (CPLR 6312 [c]; **Albany Medical College v Lobel**, 296 AD2d at 702). Instead, the trial court shall determine, by hearing or otherwise, whether the requisite elements are present (**Id.**). Accordingly, pursuant to CPLR 6312 (c), the unclean-hands issue is referred to a hearing. The date of the

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hearing, as well as any pre-hearing discovery, shall be scheduled at the parties' next conference with the court on June 9, 2011.

Dated: June 1, 2011

J.S.C.