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This memorandum is uncorrected and subject to revision before publication in the New York Reports.

No. 105
Kevin Glassman &c.,
Respondent,
v.
ProHealth Ambulatory Surgery Center, Inc. et al.,
Appellants.

Evan H. Krinick, for appellants.
David M. Wirtz, for respondent.
New York State Association of Ambulatory Surgery Centers, Inc.; Greater New York Hospital Association, amici curiae.

MEMORANDUM:

The judgment appealed from and the October 2008 order of the Appellate Division brought up for review should be reversed, with costs, and the matter remitted to Supreme Court for further proceedings in accordance with this memorandum.

Even assuming that the provision of the employment

contract allowing defendant to collect fees emanating from plaintiff's off-site anesthesiology services is inconsistent with 10 NYCRR 401.2 (b), which provides that "[a]n operating certificate shall be used only by the established operator for the designated site of operation," we conclude that the provision is merely malum prohibitum and, therefore, enforceable in this breach of contract action (see Lloyd Capital Corp. v Pat Henchar, Inc., 80 NY2d 124, 127-128 [1992]; see also Charlebois v Weller Assoc., 72 NY2d 587 [1988]). Forfeitures by operation of law are disfavored, and allowing parties to escape their contractual obligations, freely entered into, "is especially inappropriate where there are regulatory sanctions and statutory penalties in place to redress violations of the law" (Lloyd Capital Corp., 80 NY2d at 128).

Here, Public Health Law § 2806 (1) (a) authorizes the Department of Health to revoke, suspend, limit or annul an ambulatory surgery center's operating certificate where it "has failed to comply with the provisions of this article or rules and regulations promulgated thereunder." Additionally, the State Board for Professional Medical Conduct has the power to impose sanctions for fee-splitting arrangements that violate statutory prescriptions (see Education Law § 6530 [19]; § 6531; see also Public Health Law §§ 230, 230-a). Neither agency has been involved in this matter, nor has plaintiff identified an overarching public policy that mandates voiding the contract (see

generally Albany Med. Coll. v McShane, 66 NY2d 982 [1985], rearg denied 67 NY2d 757 [1986]). For this reason, Supreme Court shall consider whether defendant is entitled, under the terms of the agreement, to a set off derived from the funds, if any, held by plaintiff, against the amount of recovery in this case. We see no reason to disturb the remaining conclusions of the courts below.

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Judgment appealed from and the October 2008 Appellate Division order brought up for review reversed, with costs, and case remitted to Supreme Court, Nassau County, for further proceedings in accordance with the memorandum herein. Chief Judge Lippman and Judges Ciparick, Graffeo, Read, Smith, Pigott and Jones concur.

Decided June 3, 2010