

**PM Pediatrics Mgt. Group, LLC v Van Amerongen**

2009 NY Slip Op 32176(U)

September 9, 2009

Supreme Court, Nassau County

Docket Number: 010373/2009

Judge: Ira B. Warshawsky

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**SHORT FORM ORDER**

**SUPREME COURT : STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T :**

**HON. IRA B. WARSHAWSKY,  
Justice.**

**TRIAL/IAS PART 9**

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PM PEDIATRICS MANAGEMENT GROUP, LLC,

Plaintiff,

INDEX NO.: 010373/2009  
MOTION DATE: 06/16/2009  
MOTION SEQUENCE: 001

- against -

ROBERT VAN AMERONGEN, M.D., PRIORITY  
PEDIATRICS, PLLC and JEFFREY R. SCHISSEL,

Defendants.

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The following papers read on this motion:

Order to Show Cause, Affidavit, Affirmations & Exhibits Annexed .....	1
Memorandum of Law in Support of Application for Injunctive Relief .....	2
Affirmation in Opposition of Abe M. Rychik, Esq. & Exhibits Annexed .....	3
Memorandum of Law in Opposition to Plaintiff's Order to Show Cause .....	4
Summons and Verified Complaint & Exhibits Annexed .....	5

**PRELIMINARY STATEMENT**

Plaintiff moves for injunctive relief against Defendants with respect to the following:

- a) planning for the acquisition of a business or practice in the area of pediatric urgent-care or after hours pediatric care;
- b) acquiring a financial interest in any business or practice in the area of pediatric urgent-care or after hours pediatric care;
- c) performing management services for any business or practice in the area

- of pediatric urgent-care or after hours pediatric care;
- d) taking further actions to harm or interfere with Plaintiff's business in violation of the terms and provisions of the parties' June 15, 2006 Non-Disclosure/Non-Competed Agreement (the "Agreement");
  - e) disclosing to any third party PM Pediatrics confidential, proprietary and/or business information and "Confidential Information";
  - f) making or permitting copies of PM Pediatrics' Confidential Information;
  - g) making commercial use of PM Pediatrics' Confidential Information;
  - h) as to Priority Pediatrics, providing pediatric urgent-care or after hours care in Lynbrook, NY;
  - i.) as to Priority Pediatrics, providing pediatric after-hours, urgent care services from any location in Nassau County, including, but not limited to the towns of Lynbrook, Rockville Centre, Oceanside and the "Five Towns";
  - j.) as to Priority Pediatrics, providing pediatric after-hours, urgent care services from any loaction in the State of New York.

#### BACKGROUND

Jeffrey A. Schor, M.D. "Schor" and his business partner Steven J. Katz "Katz" operate PM Pediatrics, a management company for three pediatric, after-hours, urgent care practices in New York. Schor was a professional acquaintance of Robert Van Amorongen, M.D. ("Van Amorongen") and in 2006 they began discussions about opening a fourth facility in southern Nassau County.

Schor recites in his affidavit his educational experience in the area of business management as well as his training and experience as a pediatrician. He claims that Van Amorongen, to the contrary, had no business training or experience in operating a private medical practice. During an approximately two-year period, while Van Amorongen was seeking a source of financing to open a practice to be affiliated with PM Pediatrics, PM hired him to work in their Syosset location and, in connection with the employment, asked Van Amorongen and his accountant, Jeffrey R. Schissel ("Schissel") to execute a non-disclosure, and, with respect to Van Amorongen, a non-compete agreement. Such documents were signed on June 15,

2006.<sup>1</sup>

The Non-Compete Provision in Exh. "4" provides

Receiving Party agrees that in order to protect the Confidential Information while Receiving Party is in negotiation with Disclosing Party, is in business with or employed by Disclosing Party or its related Professional Corporations, and for a period of two (2) years thereafter, Receiving Party shall not:

(a) plan for, acquire any financial interest in or perform management services for (as an employee, consultant, officer, director, independent contractor, principal, agent or otherwise) any business or practice in the area of pediatric urgent care or after hours pediatric care, since, it is agreed, this would require Receiving Party to use or disclose Confidential Information. Receiving Party is not prevented from performing clinical services for any such business or practice; or

Receiving Party is specifically not prevented from working as an employee in a hospital facility.

It also makes specific reference to PM Pediatrics' entitlement to injunctive relief:

Injunctive Relief: Any misappropriation of Confidential Information in violation of this Agreement may cause [PM Pediatrics] irreparable harm, the amount of which may be difficult to ascertain, and therefore [Dr. Van Amerongen] agrees that [PM Pediatrics] shall have the right to apply to a court of competent jurisdiction for an order enjoining any such further misappropriation and for such other relief as [PM Pediatrics] deems appropriate. This right of [PM Pediatrics] is to be in addition to the remedies otherwise available to [PM Pediatrics].

As related in the Schor affidavit, the parties continued to evaluate sites and conduct further discussions over the next approximately two years. The discussions apparently blew hot and cold, with significant gaps in negotiations. While PM Pediatrics continued to provide updated financial information, ostensibly to assist Van Amorongen in his ongoing quest for financing, Van Amorongen's services as an employee of PM Pediatrics ended in early February 2008. By mid-May it was made clear by Van Amorongen that he no longer was interested in

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<sup>1</sup> Exhs. "4" and "5" to Motion.

pursuing a relationship with PM Pediatrics.

In April 2009, slightly less than one year from the final break in the relationship, Van Amorongen was about to open a pediatric after-hours urgent care facility in Lynbrook, one of the areas which he discussed with PM Pediatrics. The facility is, according to the affidavit, known as Priority Pediatrics, PLLC, of which Van Amorongen is the sole member.

Plaintiff alleges that PM Pediatrics has been damaged by the location of a competing facility in the area in which it proposed to expand, and that it was the information gained by Van Amorongen from PM Pediatrics which enabled him to obtain "first mover advantage". Acknowledging that it is too late to prevent Van Amorongen from using PM Pediatrics' financial information to obtain financing, Schor claims that it should not be too late to prevent him from making commercial use of the confidential information that he acquired from PM Pediatrics, and has used to Priority's advantage. Nor, he claims, is it too late to prevent Van Amorongen from acquiring an interest in a management company, such as PM Pediatrics, which provides services to practices in the area of pediatric urgent after-hours care.

Van Amorongen disputes the significance of the Confidential Information and the selection of Lynbrook as a location for his pediatric practice. He cites his position as Director of Pediatric Emergency Services at New York Methodist Hospital in Brooklyn, his position as an attending pediatrician at Winthrop University Hospital, and his 9-year residence in Woodmere, in the Five Towns, as evidence of his familiarity with the south shore of Nassau County.

He contends that neither the location for an acute care pediatric facility, or the means of operating such a facility, were the product of his relationship with PM Pediatrics. He claims to have retained a practice management consultant in 2004, and annexes as an exhibit to his affidavit a March 5, 2005 spreadsheet analysis of projected income and expenses,<sup>2</sup> which predates the initial contact with PM Pediatrics. He further claims to never have seen a PM Pediatrics business plan; rather, he utilized his practice management consultant, Susanne Madden, to develop his own business plan in 2004.<sup>3</sup>

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<sup>2</sup> Exh. "I" to Affidavit in Opposition (Exh. "A" to Affirmation in Opposition).

<sup>3</sup> Attached as Exhibit "H" to Affidavit in Opposition.

While acknowledging receipt of financial information from PM Pediatrics with respect to the Syosset and Mamaroneck location, neither he nor Schissel found the information useful. They have not and do not intend to utilize any of the information in connection with Priority. Also annexed to the Affirmation is an affidavit from Mr. Jeffrey Stern (“Stern”) who states that he saw, but did not utilize, financial information from PM Pediatrics in preparing a 10-year projection of income and expenses in connection with obtaining financing for Priority. He claims it was Amorongen’s past and present experience in Pediatric Emergency Departments at New York Methodist and Winthrop University which enabled him to estimate the number of patients and cost of equipment and supplies for such a facility, as well as the salaries for professional and non-professional staff.

Susanne Madden submits an affidavit that she is the President and Chief Executive Officer of The Verden Group, which provides technical expertise to physicians and medical practices in the operation of their businesses.<sup>4</sup> She met Amorongen in the summer of 2004 to help develop a business plan and assessment of startup costs to create an after-hours urgent care pediatric facility. She participated in the preparation of the business plan<sup>5</sup> and a spreadsheet and balance sheet as to projected income and expenses.<sup>6</sup> She received projections from Amorongen, and considers the material submitted by her to be neither special nor unique, nor constituting confidential information. She notes that this work was done one year before Amorongen became involved in discussions with PM Pediatrics.

Counsel for Defendants take the position that the non-competition clause is unenforceable because of lack of consideration; Plaintiff has not established a likelihood of success on the merits, irreparable injury or a balancing of equities in their favor; and PM Pediatrics is not entitled to equitable relief because fee-splitting between a non-physician and a physician is contrary to Public Health Law § 4501 (1), which deals with referral services.

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<sup>4</sup> Exh. “B” to Affidavit in Opposition.

<sup>5</sup> Exh. “H”.

<sup>6</sup> Exh. “I”.

## DISCUSSION

The requirements for the issuance of a Temporary Restraining Order and Temporary Injunction are set forth in CPLR § 6301:

A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

To be entitled to a preliminary injunction, the movant must demonstrate by clear and convincing evidence “(1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of equities favors the movant's position.” (*Apa Sec., Inc. V. Apa*, 37 A.D.3d 502, 503 [2d Dept. 2007]); (*W.T. Grant v. Srogi*, 52 N.Y.2d 496, 517 (1981)); (*Ruiz v. Meloney*, 26 A.D.3d 485 — 486 [2d Dept. 2006]).

The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property which could render a judgment useless. (*Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604 (*Ying Fung Moy v. Hohi Umeki*, 10 A.D.3d 604 [2d Dept. 2004])). All that is required of the Plaintiff is the likelihood of success, and the existence of factual questions will not preclude the grant of injunctive relief. *Id.* at 604 — 605 (internal citations omitted).

There are two aspects to Plaintiff's claim: the first is that Defendant Van Amerongen used the PM Pediatrics' business model to his own advantage in establishing a competing facility known as Priority Pediatrics; and, secondly, that he violated the non-compete clause in his agreement with Plaintiff when he opened a facility in the area under consideration by Plaintiff within 2 years of the termination of negotiations. Plaintiff has failed to meet the burden for imposition of a preliminary injunction on both accounts.

Defendants have produced affidavits of two individuals who served as business consultants, prior to Van Amorenge's involvement with PM Pediatrics. While one may view this as a factual issue which does not preclude the grant of relief, the fact is that by documentary evidence, as well as the testimony by affidavit of Van Amorenge, the business projection was developed without access to the Plaintiff's business plan, and based on independently produced estimates. Additionally, Van Amorenge attests that he has lived within the area, specifically Woodmere, for 9 years, and did not acquire knowledge as to the character of the community from Plaintiff.

This is significant factual evidence weighing in favor of Defendants, and making it less, rather than more, likely that Plaintiff will succeed on the merits.

PM Pediatrics is not in the business of providing medical care. Its goal, as evidenced by Exh. "B" to the motion, is to develop a network of individual practitioners, such as Amorenge, who will affiliate themselves with PM Pediatrics for the purpose of outsourcing many of the administrative tasks, such as billing, payroll, equipment and supply issues, which occupy an inordinate amount of time and expense for a medical practitioner, as well as computer and software training for administrative personnel. The business plan developed by PM Pediatrics certainly appears sound, with savings achieved by economy of size and bargaining power in the marketplace. But is not so unique as to constitute a trade secret. The concept is apparently successful elsewhere, and is a part of the plan for Priority Pediatrics which was developed in 2005, before the mid-2006 interaction of Drs. Schor and Amorenge in researching the possibility of a pediatric practice affiliate of PM Pediatrics on the south shore of Nassau County.

The business plan which PM Pediatrics developed is not site specific. It documents the factors which ought be considered in locating affiliates, but has resulted in three facilities, the closest of which is in Syosset, some 20 miles from the Priority location in Lynbrook. At least one other is in Westchester County. The point is that, given the nature of the service, urgent pediatric care, Priority Pediatric's location in Lynbrook cannot possibly constitute competition for any existing PM facilities. The fact that Plaintiff recognized the south shore of Nassau County, including Rockville Centre, Lynbrook, the Five Towns of Hewlett, Woodmere, Cedarhurst, Inwood and Lawrence as viable locations, does not give it any vested right to

freedom from competition. Again, given the nature of the service to be provided, this area is considered to be overly-broad. Certainly, a prospective patient in Rockville Centre would be unlikely to travel to Inwood with a child in need of urgent care.

Considering all of the circumstances, Plaintiff is not likely to succeed on the merits of the underlying action, the existence of a competing facility 20 miles from their nearest facility will not produce irreparable injury, and, given the fact that Priority opened its doors approximately one year after the May 2008 final termination of negotiations, 15 months after Van Amorongen last worked for PM at its Syosset location, and about 30 months after even Plaintiff acknowledges that, in retrospect, viable negotiations had probably ended by October or November of 2006. It is not entirely clear when the 2-year period of non-competition actually commenced to run, although the 15 months between termination of employment and opening of Priority is probably the best indicator.

Given that the restrictive area is overly broad, providing as it would, seemingly viable sites for a number of facilities, and the fact that Defendants have undoubtedly expended significant funds to start their practice in an area in which Plaintiff would like to, but does not presently, compete, it would be inequitable, impractical and unduly burdensome to require Defendant to cease operations for a period of between 9 — 12 months for the sake of compliance with a non-compete clause, where Plaintiff is not, in fact, even in competition.

While it does not change the outcome, the Court feels compelled to comment on a situation which it finds distressing. By correspondence dated June 19, 2009, counsel for Plaintiff brought to the Court's attention the fact that Defendants' 10-year projections, alleged in at least two sworn documents, to have preceded the projection prepared by Plaintiff, contain identical numbers for Patient Revenue, Personnel Costs, Office and Overhead and Total Expenses, with the exception of the first two years of Patient Revenue, and the first year for each of the other categories. Since such projections, while requiring thought and analysis, are not considered to be trade secrets, but are rather the expression of reasoned opinion, the Court will take no action, but cautions both counsel and litigants that demonstrably untrue representations are not only unhelpful, but under appropriate circumstances may be subject to disciplinary action.

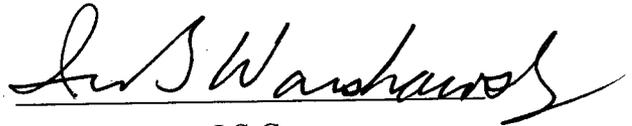
The Court has reviewed the reply to the June 19, 2009 correspondence, and notes that

while it includes criticism of a “backhanded attempt to submit a Reply”, and comments regarding perjury as “spurious and actionable”, it does not explain the fact that despite representations to the contrary, Defendant used Plaintiff’s numbers verbatim in their projections. Nowhere in the reply is this fact denied.

The motion by Plaintiff is in all respects denied.

This constitutes the Decision and Order of the Court.

Dated: September 9, 2009



J.S.C.

**ENTERED**

SEP 17 2009

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**