STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

PITTSFORD FAMILY DENTAL PRACTICE,P.C.,

Plaintiff, DECISION AND ORDER

v. Index No. 2005/1782

DR. KENNETH TIRONE,

Defendant.

Plaintiff moves by an order to show cause for an order from the court granting a preliminary injunction to enjoin defendant from performing any dental work on any former or current patients of plaintiff, return all confidential and proprietary business records belonging to plaintiff, refrain from contacting or soliciting, whether directly or indirectly, any of plaintiff's patients, an order directing an accounting of all the patients which defendant has solicited, and attorney's fees and costs incurred in this action. Defendant has opposed the order to show cause.

The pertinent facts are as follows. Plaintiff is a professional services corporation which supplies dental services out of its office located in Pittsford, New York. Defendant was employed by plaintiff as a dentist from September 28, 1995 until approximately December 16, 2004. At that time, defendant left

plaintiff's employ, and opened up his own dental practice in the Bushnell's Basin area of Pittsford.

Although defendant began work with plaintiff without a written agreement, he was asked to sign one in January 2004, after he complained of not making partner status and threatened to go off on his own. It is clear in the contract that the patients which defendant treated while with plaintiff were considered the patients of the corporation. Further, all records, daily schedules and "routing slips" were declared the property of plaintiff. Defendant was allowed to identify specific patients which he could consider his own, and this list was attached to the contract. Defendant was also required under the contract to keep confidential all proprietary information which he had acquired from plaintiff during the course of his employment.

The contract also contained a restrictive covenant which essentially consisted of two components. Defendant agreed that, in the event his employment was terminated for any reason, he could not practice dentistry within an identified geographical bounded area or district in proximity to plaintiff's offices. He also agreed that he would not solicit, whether directly or indirectly, any of the plaintiff's patients. Both provisions

were to be binding for two years after defendant's departure. Defendant's new offices do not lie in the described non-competition district.

Plaintiff brought the underlying action by verified complaint dated February 15, 2005. The complaint contains seven causes of action grounded in breach of contract, misappropriation of property, unfair competition, conversion, violation of fiduciary duty, breach of fiduciary obligation, and course of conduct with malicious intent. Plaintiff sought monetary damages for each cause of action, but did not seek injunctive relief in any paragraph of the complaint.

Discussion and Analysis

On this motion, plaintiff seeks two forms of relief. First, it seeks to enjoin and restrain defendant from performing any dental work on any current or former patient of the plaintiff, and to order defendant to refrain from contacting or otherwise soliciting, directly or indirectly, any of plaintiff's current or former patients. Second, plaintiff seeks an order requiring defendant to return all confidential and proprietary business records to it, and for an accounting of all patients that defendant has solicited.

It has been held that a professional services corporation practices medicine through licensed professionals in its designated field. Matter of Olsson, 180 A.D.2d 739 (2d Dept. 1992); Parsley, M.D. v. Associates Internal Medicine,P.C., 126 Misc.2d 996 (Sup. Ct. Broome Co. 1985). As such, the professional services corporation has a property right in its business records and is entitled to get them back, if wrongfully taken. Parsley M.D., supra, 126 Misc.2d at 997. See Roa v. Verde, 222 A.D.2d 569 (2d Dept. 1995); Dampf, P.C. v. Bloom, 127 A.D.2d 719 (2d Dept. 1987). To the extent that he discusses the business records, defendant swears that he did not take them, does not have them, and that he acquired the contacts with his current patients through word of mouth, personal contact, and via blanketed regional paid advertisements. Plaintiff offers no proof that defendant took patient lists or the like except by reference to an allegation that, sometime well before his departure, in the summer of 2003, defendant's day-end routing slips were missing from the office, and were returned after an "unplanned trip outside the office." It is not alleged that the slips taken concerned other than patients served by defendant, nor indeed is there any allegation that the slips did not concern the same patients listed on the employment contract (which plaintiff did not have him sign until many months later). This

is poor proof, but the only proof tendered, of what is alleged happened when defendant finally departed last December.

To warrant issuance of a preliminary injunction, plaintiff is required to demonstrate (1) a likelihood of success on the merits; (2) the prospect of irreparable harm; and (3) a balance of equities tipping in its favor. Doe v. Axelrod, 73 N.Y.2d 748 (1988); Main Evaluations, Inc. v. State of New York, 296 A.D.2d 852 (4th Dept. 2002). Plaintiff seeks monetary damages only in the complaint. Since plaintiff does not request permanent injunctive relief in this action, a request for preliminary injunctive relief is inappropriate and should be denied on that ground alone. Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 94 N.Y.2d 541, 545-46 (2000); Matter of Gebman v. Pataki, 256 A.D.2d 854, 855 (3rd Dept. 1998), lv. to appeal denied, 93 N.Y.2d 808 (1999); Leif B. Pederson, Inc. v. Weber, 128 A.D.2d 453, 455 (1st Dept. 1987); Halmar Distributors, Inc. v. Approved Mfg., 49 A.D.2d 841 (1st Dept. 1975); 13 Weinstein-Korn-Miller, New York Civil Practice, ¶ 6301.04[2], at p. 63-23 (2d ed. 2005); David D. Siegel, New York Practice §327, at 497-98 (3d ed. 1999). Accordingly, plaintiff's motion for a preliminary injunction is

denied.[1]

In any event, plaintiff would not entitled to this relief, at least insofar as it concerns claimed solicitation, even if it requested, as it is entitled to do in a case of this sort, injunctive relief in the complaint. Generally speaking, employment contracts which place both geographical and time limitations on parties following the cessation of their employment are acceptable provided that they are not unreasonable in either area or duration. Gazzola-Kraenzlin v. Westchester Medical Group, P.C., 10 A.D.3d 700 (2d Dept. 2004). No issue is raised on this score. That, however, is not dispositive. Since plaintiff does not contend that defendant violated the geographic portion of this restrictive covenant, the only ground upon which injunctive relief would be relevant is plaintiff's contention that defendant improperly solicited plaintiff's patients. In order to gain a preliminary injunction, plaintiff must prevail on

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[1]Inasmuch as the request for return of business records is in the nature of a request for an injunction, Pace Securities, Inc. v. Pollack, 157 A.D.2d 557 (1st Dept. 1990), the above denial of a preliminary injunction extends to plaintiff's request for document return.

all three prongs of the test described above as it pertains to the solicitation issue.

In that regard, irreparable harm cannot be established as a matter of law, and it is unclear that a likelihood of success on the merits has been established in view of the clear issue of fact presented whether any true solicitation has occurred. As aptly stated in a similar case:

> The court committed no abuse of discretion in denying defendant a preliminary injunction against plaintiff and counterclaim defendant Advantage. Assuming that defendant established the right to enforcement of the restrictive covenant, . . . , there still remain issues of fact as to whether plaintiff has engaged in such solicitations, thus rendering unclear defendant's likelihood of ultimate success on the merits. (W.T. Grant Co. v. Srogi, 52 N.Y.2d 496, 438 N.Y.S.2d 761, 420 N.E.2d 953). In any event, even if defendant were to prevail on the merits, we believe it has an adequate remedy at law so as to render injunctive relief unnecessary.

Perez v. Computer Directions Group, Inc., 177 A.D.2d 359 (1st Dept. 1991). In other words, even if solicitation is ultimately proved, plaintiff has an adequate remedy at law in damages, not only for those already successfully solicited, if any, but also for those currently targeted for solicitation, if any there are. Suburban Graphics Supply Corp. v. Nagle, 5 A.D.3d 663, 667 (2d Dept. 2004)(“injunction was properly vacated on the ground that the expectation that injunctive relief would cause the customers to return to the plaintiff was speculative . . . and the

plaintiff has 'an adequate remedy in the form of damages'")(quoting Singer v. Riskin, 304 A.D.2d 554, 555).

Plaintiff principal argument concerning the alleged solicitation is that defendant has been contacting plaintiff's patients. No support for that proposition was presented in plaintiff's original moving papers, and plaintiff only submitted such support on the day of oral argument, in the form of an affidavit from a single patient, Mary Randall, Esq., of plaintiff, not defendant. She stated that she received an unsolicited letter from defendant in which, it is argued, defendant was trying, evidently unsuccessfully, to improperly lure her from the plaintiff. The letter can also readily be viewed simply as an announcement of the defendant that he left the plaintiff and had a new address, information defendant was entitled to impart, Orthopaedic Associates of Rochester, P.C. v. Nicoletta, unpublished Decision and Order (Sup. Ct. Monroe Co. March 2005)(Index No.: 2004/13443), and plaintiff was not willing to give to its inquiring patients, as the rather deceitful instructions plaintiff gave its employees manifestly demonstrate.

As a separate matter, defendant swears that he received all

his patients, and patient information, legitimately.[2] If so, a court cannot enjoin the use of information which easily can be acquired by others and duplicated, such as names and address from other publicly available sources. JAD Corporation of America v. Lewis, 305 A.D.2d 545 (2d Dept. 2003); Savannah Bank of N.A. v. Savings Bank of the Finger Lakes, G., 261 A.D.2d 917 (4th Dept. 1999); Price Paper and Twine v. Miller, 182 A.D.2d 748, 749 (2d Dept. 1992). Moreover, defendant had contact with these patients for almost a decade and it is possible, if not plausible as defendant maintains, that he simply remembered the names of many of the families. Leo Silfen, Inc.,v. Cream, 29 N.Y.2d 387, 391 (1972)("solicitation of plaintiffs' customers was at most the product of casual memory, or, as defendants would have us believe, coincidence"); Falco v. Perry, 6 A.D.3d 1138, 1138-39 (4th Dept. 2004); Arnold K. Davis & Co. v. Ludeman, 169 A.D.2d 614, 615 (1st Dept. 1990).[3] Although might prevail eventually,

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[2] For example, defense counsel handed up at oral argument a ZabaSearch.com printout of the Randall household address and telephone number.

[3] "While a physical taking or studied copying of the employer's client information may result in a court enjoining solicitation based not on a trade secret violation but as an egregious breach of trust and confidence," Battenkill Veterinary Equine P.C., v. Cangelosi, 1 A.D.3d 856, 859 (3d Dept. 2003)(citing Silfen, Inc. v. Cream, 29 N.Y.2d 387, 391-92

there is such a clear question of fact presented by defendant's sworn affidavit, and the weakness of plaintiff's proof, that a court cannot readily conclude that there is a likelihood that plaintiff indeed will prevail.

Although CPLR 6312[c] was amended to, in effect, make it an abuse of discretion to deny a motion for a preliminary injunction when plaintiff presents a prima facie case for one, Town of Tully v. Valley Realty Dev. Co., Inc., 254 A.D.2d 835 (4th Dept. 1998); but see Gagnon Buss Co., Inc. V. Vallo Transportation, LTD, 13 A.D.3d 334 (2d Dept. 2004)("likelihood of success on the merits based on undisputed facts")(emphasis supplied); Dental Health Assoc. V. Zangeneh, 267 A.D.2d 421 (2d Dept. 1999)("Where the facts are in sharp dispute, a temporary injunction will not be granted."), here plaintiff fails to make that prima facie showing with respect any issue raised in its motion because it did not

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(1972)), on this motion plaintiff's only allegations in this regard concern unrelated events nearly a year and a half before his departure and fall far short of establishing a physical taking or studied copying at times relevant to the complaint. See also, Arnold K. Davis & Co. v. Ludeman, 169 A.D.2d 614, 615 (1st Dept. 1990)("use of information . . . which is based on casual memory . . . is not actionable"), quoted in Falco v.

demand injunctive relief in the complaint. Accordingly, a hearing is unnecessary.

Conclusion

Plaintiff's request for a preliminary injunction is denied. Plaintiff's request for an order of the court compelling defendant to make an accounting is also denied. Discovery will reveal whether defendant ultimately is liable for a breach of the non-solicitation portion of the employment agreement, and a reckoning may be had in light of that discovery.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

Dated: April 4, 2005
Rochester, New York

Perry, 6 A.D.3d 1138, 1138-39 (4th Dept. 2004),