

Brathwaite v Brackman

2007 NY Slip Op 30859(U)

April 12, 2007

Supreme Court, Suffolk County

Docket Number: 0001994/2007

Judge: Emily Pines

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Supreme Court - State of New York
Commercial Division, Part 46, Suffolk County

Present:

Hon. Emily Pines
Justice Supreme Court

Motion Date: 02-07-2007
Submit Date: 03-16-2007
Motion No's.: 002 MOTD
003 MOTD

COLLIN E. M. BRATHWAITE, M.D., PLLC,

Plaintiff,

-against-

MATTHEW RICHARD BRACKMAN, M.D.,

Defendant.

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Plaintiff, COLLIN E. M. BRATHWAITE, MD, PLLC. ("BRATHWAITE") moves, by Order to Show Cause (motion sequence number 002) for a Preliminary Injunction, enjoining the Defendant, MATTHEW RICHARD BRACKMAN, MD. ("BRACKMAN") from participating in the practice of surgery, including bariatric surgery, at several hospitals, located in Suffolk County, New York, pursuant to the terms of an Employment Agreement between the parties. Defendant cross-moves, by Notice of Cross- Motion (motion sequence number 003) for an Order vacating the Temporary Restraining Order of Hon. Gary Weber dated January 19, 2007 and denying the Plaintiff's application for preliminary injunctive relief.

In support of his motion, Plaintiff argues that he is a skilled practitioner of surgery with a sub-specialty in bariatric surgery and that he is the Chair of such sub-specialty at St. Catherine of Sienna Medical Center located in Smithtown, New York. Plaintiff employed the Defendant, a surgeon licensed to practice medicine within the State, as part of Plaintiff's overall plan to develop and expand this sub-specialty and the parties entered into an employment agreement on June

17, 2005. At the time of the Agreement, both parties were represented by counsel. The Agreement contains a Restrictive Covenant and separate a "Covenant Not to Compete or Solicit", which acknowledges that the Defendant will be introduced to the Suffolk County medical community by the Plaintiff's practice (the "Practice") and which sets forth a specific term. The Restrictive Covenant states, in pertinent part, that:

"As a part of this agreement and in consideration of the promises made herein you will enter into a separate restrictive covenant which will prohibit you from the practice of general and bariatric surgery at the following specified hospitals: St Catherine's of Siena (sic), Smithtown, New York, New York Stony Brook University Hospital, New York, Brookhaven Hospital, New York, Mather Hospital, Port Jefferson, New York; St. Charles Hospital, Port Jefferson, New York; and Huntington Hospital, Huntington, New York for a period of two years after the termination of your employment by the Practice, except in the case of termination of your employment without cause. In that case the period of the restrictive covenant shall be the lesser of one year or the number of months you have been employed by the practice."

The Covenant Not to Compete states as follows:

"That the Physician will not, directly or indirectly (whether as sole proprietor, partner, stockholder, director, officer, employee, independent contractor or in any other capacity as principle or agent) compete with the Practice in the practice of surgery including bariatric surgery at the following hospitals: St Catherine's of Sienna, Smithtown, New York; Stony Brook University Hospital, New York; Brookhaven Hospital, Brookhaven, New York; Mather Hospital, Port Jefferson, New York; St. Charles Hospital, Port Jefferson, New York; and Huntington Hospital, Huntington, New York"

The covenant, by its terms, is stated to be in effect for either a period of two years after the Physician's last date of employment by the practice or, if the employment is terminated without cause, for the lesser of either one year or the number of months for which the Physician was actually employed by the Practice, post termination.

The term "cause" is defined in the Agreement to include, in relevant part : "[u]nprofessional conduct (as defined in New York's Education Law); violation of any statute, rule or regulation of any governmental body asserting jurisdiction over you or the Practice; . . . your gross deviation from accepted medical standards; . . . misfeasance, malfeasance, or after reasonable notice, failure to

correct performance deficiencies or to follow the lawful and reasonable Directions of the Practice". Although the definition contains other terms involving loss of license, suspension from practice, and arrest/indictment for various crimes, such are not alleged in this lawsuit.

Plaintiff asserts that Defendant was terminated for cause on May 31, 2006 after approximately eleven months of employment. In support of this allegation, BRATHWAITE alleges that the Defendant failed to order appropriate consults when dealing with a critically ill patient; that BRACKMAN failed to write notes in the charts of several patients he claimed to have seen prior to a vacation and/or lied to Plaintiff about having actually seen such patients; that BRACKMAN failed to respond to a request for a consult from another physician for a critically ill patient and Defendant failed and/or refused to come in to see a patient in the emergency room who was suffering from 24 hours of abdominal pain several years after undergoing bariatric surgery.

According to Plaintiff, Defendant began violating the terms of the Agreement immediately following his termination by practicing surgery and bariatric surgery at Brookhaven Hospital. According to Plaintiff's counsel, he was contacted by the attorney who represented the Defendant in negotiating the Agreement, who stated that the Defendant would abide by the terms of the Agreement but asked that his client be allowed to finish certain cases he had been working on at that hospital. Counsel for the Plaintiff agreed but the Plaintiff allegedly learned in January, 2007 that the Defendant had sought to renew his practice at St. Catherine's. Thereafter on January 19, 2007, the current action, seeking to enforce the terms of the Agreement, was commenced.

In support of its Cross-Motion and in opposition to the Plaintiff's application for a Preliminary Injunction, BRACKMAN makes legal and factual arguments, essentially on the ground that the Plaintiff cannot demonstrate a likelihood of success on the underlying merits of the action, irreparable harm or a balancing of equities in his favor, all prerequisites for the grant of the extraordinary remedy

of injunctive relief. Accordingly, BRACKMAN asserts that the employment agreement is overly restrictive and cannot be enforced as a matter of law, since it protects no legitimate business interest and is overly burdensome. Defendant argues that he is seeking to perform bariatric surgery on patients with whom he has developed relationships independently of the Plaintiff and/or the Practice, and that there exists a tremendous need for bariatric surgery in Suffolk County and relatively few practitioners who practice that specialty. Defendant further alleges that the covenant is overly broad in that it seeks to prohibit the Defendant from practicing in hospitals where the Plaintiff himself has no privileges. Defendant states that the Plaintiff only performs this type of surgery during half of the week and that there exists no harm to Plaintiff if Defendant is allowed to perform the surgery during the remainder of the days on patients that contact him through advertisement and his website without any reference to the Plaintiff.

According to BRACKMAN, he was improperly terminated without cause, because the Plaintiff was attempting to expand the practice too quickly and the termination was motivated by the Plaintiff's desire to avoid his financial obligations toward the Defendant, especially the payment of the Defendant's medical liability insurance and automobile stipend. With regard to the Plaintiff's factual allegations, Defendant counters that his treatment of the various patients was not a deviation from good and accepted medical practices and that he exercised proper professional judgment concerning when to obtain consultations from other physicians. Defendant also argues that not making notations in the charts of patients that a doctor sees violates no rule or standard.

Finally, BRACKMAN asserts that the Plaintiff waived his right to enforce the Restrictive Covenant by waiting seven months after he was aware of the alleged violation, to commence this action.

Preliminary Injunction- Restrictive Covenants

To achieve success on a motion for a preliminary injunction, the movant must demonstrate the following: 1) a likelihood of success on the underlying merits of the action; 2) irreparable injury to the movant absent the granting of the motion; and 3) a balancing of the equities in the movant's favor. See, W.T. Grant Co. v Sroggi, 52 NY 2d 496, 438 N.Y.S. 2d 761, 420 N.E. 2d 953 (1977); Ruiz v Meloney, 26 A.D. 3d 485, 810 N.Y.S. 2d 216 (2d Dep't 2006). In the context of restrictive covenants prohibiting professionals, such as physicians, from competing with a former employer, the key to determination of the preliminary injunction is whether the covenant itself is enforceable. See, North Shore Hematology v Zervos, 278 A.D. 2d 210, 717 N.Y.S. 2d 250 (2d Dep't 2000).

The law governing enforcement of restrictive covenants in employment agreements is described in detail in the Court of Appeals case of Seidman v Hirschberg, 93 NY 2d 382, 699 N.Y.S. 2d 854, 712 N.E. 2d 1220 (1990). In that case, the Court upheld in part and struck down portions of a restrictive covenant contained in an accountant's employment agreement with an accounting firm. In setting forth the general rule to be applied, the Court stated that New York has adopted a general standard of reasonableness in determining the validity of such covenants, and that courts will uphold them only to the extent that they are 1) reasonable in duration and area; 2) necessary to protect an employer's legitimate interests; and 3) not harmful to the public nor unreasonably burdensome to the employee. Id. at 856, 389, 1223. Although the Court explained that such requirements have been strictly applied due to their anti-competitive nature, it went on to opine that where professionals are concerned "[w]e have given greater weight to the interests of the employer in restricting competition within a confined geographical area". Id. at 857, 389, 1223. The Court in Seidman also stated that, even with an overbroad restrictive covenant, they expressly recognize the judicial power to sever and enforce such restrictive covenants in part. Id. At 395, 861, 1227.

In the Second Department, restrictive covenants in employment contracts governing physicians have been upheld where and to the extent that the court has found them to be reasonable both in area and

duration. In Kraenzlin v Westchester Medical Group, 10 A.D. 3d 700, 782 N.Y.S. 2d 114(2d Dep't 2004), the Court enforced a restrictive covenant which prohibited a pediatrician, an at-will employee, from practicing pediatric medicine within a 10 mile radius of the Defendant's office for a period of two years and required the employee to resign her medical staff membership and clinical privileges at any hospital within the radius where she had serviced patients of the Defendant for a two year period following cessation of employment for any reason. In North Shore Hematology/Oncology v Zervos, the Second Department upheld the grant of a preliminary injunction, enjoining a former employee from soliciting patients from her employer or from maintaining an office in the fields of oncology and hematology within a three mile radius of her former employer's office. Supra at 211, 251. In Leiboff v Pelaez, 249 A.D. 2d 497, 671 N.Y.S. 2d 336 (2d Dep't 1998) the Appellate Court upheld the lower court's enforcement of an employment agreement which restricted a surgeon with a sub-specialty in colon and rectal surgery, from practicing at John T. Mather Memorial Hospital and St. Charles Hospital for two years after the cessation of his employment with the plaintiff employer.

The TRO

On January 19, 2007, Justice Gary Weber signed the Plaintiff's Order to Show Cause, which brought on the current motion and contained a limited TRO. The restraining order enjoined the Defendant from practicing surgery, including bariatric surgery at St. Catherine's of Siena Hospital, except emergency room coverage limited to the month of January 2007 pending the return date of the motion. Following transfer of this case to this Part, the attorneys for both parties appeared for oral argument on March 16, 2007. Following argument, this Court extended the existing TRO pending the Court's determination of the underlying motion and modified it to state specifically that Brackman would be permitted *pendente lite*, to practice surgery and bariatric surgery at all hospitals, (including Brookhaven Hospital, where he currently has privileges), except for St. Catherine's of

Sienna. Based on the Court's action on March 16, 2007, this Decision will be limited to the issues presented in the motion for a Preliminary Injunction and the opposition thereto, the Cross-Motion having already been determined as set forth.


Applying the law as set forth above to the facts as alleged thus far, the Court finds that the Plaintiff has demonstrated in part, potential entitlement to Preliminary Injunctive relief, because the Restrictive Covenant, as drafted is sufficiently limited in scope and duration to meet the criteria set forth by the Court of Appeals in Seidman v Hirschberg, supra to the extent that it applies to those medical facilities where the Plaintiff has surgical privileges. Clearly such covenants have been recognized especially in the recent rulings of the Second Department, as fulfilling a legitimate business interest, as long as they are limited. Furthermore, they do not appear to require, as Defendant's counsel argues in his papers, that the party against whom the employment agreement is sought to be enforced be terminated for cause. Finally, the two year duration, within a small geographical limit, has been upheld repeatedly in this context as reasonable. In the case at bar, Plaintiff had the right to negotiate an employment agreement which protected his legitimate interest in maintaining his specialized surgical practice from competition by his new employee for a limited time within a limited scope. As set forth above, in this instance, in addition to the above, both physicians were represented by counsel and negotiated the Agreement as finally drafted. As in the cases described above, because the Agreement is enforceable to the extent set forth, the Plaintiff has fulfilled the requirements of likelihood of success, irreparable injury and a balancing of the equities, in part.

The issue that remains in doubt is whether the Restrictive Covenant should be enforced for the period of 10½ months from the date of termination in May 2006, in which case it is essentially no longer in effect, or whether it should be enforced for a two year period, which would extend its enforcement through the end of May, 2008. By its terms, the Employment Agreement and Covenant limit the timing of the restriction to the lesser period only where the Defendant is not

terminated for cause, as defined. Clearly a question of fact remains, based on the Affidavits of the Plaintiff and the Defendant, concerning whether the Defendant was indeed terminated for cause as defined. That issue can only be resolved by a fact finding hearing. Accordingly, the Court sets down for a hearing the limited issue of whether the Defendant's termination was for cause as defined in the parties' Agreement. The Court instructs counsel that it has, at this point made a determination that the Agreement in general is enforceable both in subject and in duration. However, the Court reserves to itself, post hearing, the right to consider restricting its applicability to those medical facilities where the Plaintiff currently has surgical privileges.

The hearing described is scheduled to begin on Thursday, April 26th, 2007 at 9:30 a.m. and Friday, April 27, 2007 at 9:30 a.m. This constitutes the **DECISION** and **ORDER** of the Court.

Dated: April 12, 2007
Riverhead, New York



Emily Pines
J. S. C.