

<b>Abbe J. Carni, M.D., P.C. v Ann T. Carlon, M.D., P.C.</b>
2007 NY Slip Op 31833(U)
June 22, 2007
Supreme Court, New York County
Docket Number: 0600612/2006
Judge: Herman Cahn
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. **HERMAN CAHN**

PART 49

Index Number : 600612/2006

CARNI, ABBE J., M.D. PC

vs

CARLON, ANN T., M.D. PC

Sequence Number : 002

DISMISS ACTION

*C*

INDEX NO. \_\_\_\_\_

MOTION DATE 3/5/07

MOTION SEQ. NO. 002

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**  
JUN 26 2007

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
FILED IN MOTION SEQUENCE.....**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Dated: 6/22/07

*Herman Cahn*

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

2]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
ABBE J. CARNI, M.D., P.C.,

Plaintiff,

-against-

ANN T. CARLON, M.D., P.C., and  
GRAZIANO C. CARLON, M.D.,

Defendants.  
-----X

Index No. 600612/06

**FILED**  
JUN 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**CAHN, J.**

This matter is before the court on defendants' motion to dismiss an amended verified complaint for failure to state a cause of action, CPLR 3211 (a) (7). This decision turns on the enforceability of a claimed unlimited oral restrictive covenant allegedly contained in an oral contract of employment for professional medical services.

Plaintiff served an amended verified complaint without leave of court after this motion was interposed. CPLR 3211 (f) and 3025 (a). An earlier version of the amended complaint also appears in the motion papers. The court will direct its attention to the later of the two pleadings. This amended complaint alleges 15 causes of action based on five theories of liability: promissory estoppel as it relates to breach of contract and breach of an oral restrictive covenant; breach of fiduciary duty; tortious interference with contract; tortious interference with prospective business relations; and conversion.

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The Facts as Alleged:

The material allegations of the complaint, which for the purposes of this motion are accepted as true, are that in April 2003, plaintiff Abbe J. Carni, M.D., P.C. (Carni, P.C.) entered into a verbal contract with non-party Yaffe Ruden Associates LLP (Yaffe Ruden) to provide the services of an anaesthetist to Yaffe Ruden and its patients. The contract was allegedly renewed in April 2004, and again in April 2005.

In September 2003, Carni, P.C. entered into an oral agreement with Ann T. Carlon, M.D., P.C. (Carlon P.C.) for her husband and employee, Graziano Carlon, M.D. (Dr. Carlon), to provide medical anesthesia services to Yaffe Ruden and its patients on behalf of Carni, P.C. Carni, P.C. agreed to pay Carlon P.C. and/or Dr. Carlon a salary, discretionary bonuses and a paid vacation for Dr. Carlon. In exchange for this, Dr. Carlon, an employee of Carlon P.C., would perform such services on a full-time basis, five days per week, at locations determined by Carni, P.C. Either Carni, P.C., Dr. Carlon or Carlon P.C. could terminate the oral agreement on 60 days notice.

The oral agreement is alleged to have contained a restrictive covenant which prohibited both Carlon P.C. and Dr. Carlon, individually, upon termination of their relationship with Carni, P.C., from providing medical anesthesia services to medical practices and/or physicians which utilized the medical anesthesia services of Carni P.C., including, but not limited to Yaffe Ruden. The restrictive covenant was unlimited in duration.

[\* 4 ]

Carni, P.C. alleges that defendant Dr. Carlon, on behalf of Carlon P.C., accepted Carni, P.C.'s offer of employment and the terms offered, and promised to perform in accordance therewith and abide by the terms of the oral restrictive covenant. Plaintiff further alleges that he relied, to his detriment, on Carni, P.C.'s representation that defendants would abide by the terms of the offer.

It is further alleged that Dr. Carlon became a "special employee" of Carni, P.C. while remaining a general employee of Carlon P.C. As a special employee, Carni, P.C. controlled Dr. Carlon's work schedule, work location and vacation time.

In November 2005, Dr. Carlon allegedly provided Carni, P.C. with notice that he intended to cease working as a special employee, and that he intended to independently provide medical anesthesiology services directly to Yaffe Ruden.

Dr. Carlon is alleged to have contracted with Yaffe Ruden prior to, or immediately upon, leaving Carni, P.C.'s employ. Carni, P.C. is alleged to have suffered anticipated lost profits of \$2.5 million as a result of Dr. Carlon's conduct. Therefore, it is alleged that it would be unconscionable to permit the statute of frauds to bar plaintiff's claims.

The Complaint:

The first, second and third causes of action allege that defendants are liable to plaintiff "in promissory estoppel" for breach of contract and/or breach of the terms of the restrictive covenant.

In the fourth cause of action, Carni, P.C. alleges that Dr. Carlon, a special

employee of Carni, P.C., breached his fiduciary duty to Carni, P.C. by using Carni, P.C.'s time, facilities, good will and customer relationship with Yaffe Ruden to discuss and enter into a contractual relationship directly with Yaffe Ruden, to the exclusion of Carni, P.C. As a result of this conduct, Yaffe Ruden is alleged to have terminated its contract with Carni, P.C., causing it damage.

In the fifth through eighth causes of action, plaintiff alleges that defendants tortiously interfered with Carni, P.C.'s contract with Yaffe Ruden by arranging the referral of medical patients to Yaffe Ruden by Carlon PC, and by defendant Ann T. Carlon, M.D. and by interviewing Yaffe Ruden's patients and reviewing their medical histories in order to suggest additional medical procedures and/or tests to be performed by Yaffe Ruden, thus increasing Yaffe Ruden's income. As a direct result of Dr. Carlon's conduct, Yaffe Ruden is alleged to have terminated its contracts with Carni, P.C. These actions would not have occurred but for the alleged unlawful interference by defendants, which is alleged to violate Education Law §§ 6530 and 6531.

The ninth through twelfth causes of action, for tortious interference with prospective business relations, allege that the contract between Carni, P.C. and Yaffe Ruden had been renewed annually in April 2004 and April 2005, upon the same terms and conditions as existed in 2003. These contracts were to be renewed, or were renewable on an annual basis, and are alleged to have created a prospective business relationship between Carni, P.C. and Yaffe Ruden. Dr. Carlon knew of the contractual

\* 6 ]  
relationship between Carni, P.C. and Yaffe Ruden. As a result of his conduct, Yaffe Ruden is alleged to have breached and/or terminated its contracts with Carni, P.C.

The thirteenth, fourteenth and fifteenth causes of action, for conversion, allege that defendants directly billed Yaffe Ruden for services performed from November 21, 2005 to November 22, 2005, in the amount of \$20,000, which sums properly belong to plaintiff.

The Motion:

In deciding a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept as true the factual allegations of the complaint and the submissions in opposition to the motion and accord plaintiffs the benefit of every possible inference, and must determine only whether the facts as alleged fit within any cognizable legal theory. *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409 (2001). The court must determine whether the proponent of a pleading appears to have a cause of action, not whether he has stated one. *Leon v Martinez*, 84 NY2d 83 (1994).

Statute of Frauds:

Defendants move to dismiss each of the claims in the complaint, arguing that the Statute of Frauds bars oral employment agreements which contain an oral restrictive covenant for an unlimited period of time, citing General Obligations Law § 5-701 (a) (1).

G.O.L § 5-701 (a) (1) states:

- a. Every agreement, promise or undertaking is void, unless it or some note or memorandum

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thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime[.]

The restrictive covenant, on which the complaint is based, is described as follows:

G. In consideration of the aforesaid monetary and vacation payments by Carni, P.C., defendant Dr. Graziano Carlon and/or Carlon P.C. were prohibited from competing with Carni P.C. Upon the termination of the agreement between Carni P.C. and Carlon P.C. and/or between Carni P.C. and Dr. Graziano Carlon regarding the provision of anesthesia services on behalf of Carni P.C., Dr. Graziano Carlon and/or Carlon P.C. were prohibited from rendering anesthesiology services to physicians/medical groups serviced by Carni P.C. No time limit was placed on this prohibition of competition.

7/25/06 Am Compl ¶ 30(G); 12/7/06 Annenberg Aff, Exh A.

The “paramount rule” with respect to restrictive covenants is that “powerful considerations of public policy . . . militate against sanctioning the loss of a [person's] livelihood.” *Shannon Stables Holding Co. v Bacon*, 135 AD2d 804, 805-06 (2nd Dept 1987) (citations omitted). Thus restrictive covenants which tend to prevent an employee from pursuing a similar vocation after termination of employment are disfavored by the law. *Ken J. Pezrow Corp. v Seifert*, 197 AD2d 856 (4<sup>th</sup> Dept 1993), *lv. dismissed in part denied*

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*in part* 83 NY2d 798 (1994). A restrictive covenant that prevents an employee from pursuing a similar vocation will be enforced only so far as necessary to protect trade secrets or in cases where the employee's services are so unique or extraordinary as to be irreplaceable. *Ken J. Pezrow Corp.*, 197 AD2d at 856.

Here, although Carni, P.C. alleges in the fourth cause of action that Dr. Carlton was a "special employee" who owed it a fiduciary duty, plaintiff has failed to allege that Carlton's professional skills were in any way unique or irreplaceable, or that his leaving would cause special harm to the plaintiff. It has thus failed to allege facts establishing that this case should be excepted from the general policy against limiting an employee from pursuing a similar vocation.

Plaintiff claims that the restrictive covenant at issue protects Carni, P.C.'s legitimate business interests in client development and retention, citing *BDO Seidman v Hirshberg* (93 NY2d 382, 393 (1999)). It further claims that the covenant is not harmful to the public or unduly burdensome on the defendants since only nine medical practices in New York City were clients of plaintiffs, and defendants are free to provide anesthesiology services to any other physicians and medical practices. Plaintiff asks that if the court finds some aspects of the restrictive covenant unreasonable, that it sever those portions of the covenant, and pare the restraint down to an appropriate, enforceable size, citing *Karpinsky v Ingrassi* (28 NY2d 45 (1971)).

Unlike the situation in *BDO Seidman*, where the court only had to pare down the

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class of clients to which the restrictive covenant would apply, and otherwise enforced it as to time and geographic location, here the court would be compelled to add a substantive term, to wit, a time limitation, in order for the restrictive covenant to be enforceable under the statute of frauds. The court will not here engage in rewriting the parties' oral agreement, and this is not an appropriate case for severing the unenforceable terms of a restrictive covenant.

In view of the fact that the alleged oral restrictive covenant was of unlimited duration, it could not, by its terms, be performed within one year. Thus, the restrictive covenant falls within the statute of frauds, (*see Shapiro v Balaban*, 210 App Div 47 (1<sup>st</sup> Dept 1924)), and any claims that turn on enforcement of the restrictive covenant must be dismissed. *Savannah Bank, N.A. v Savings Bank of Fingerlakes*, 261 AD2d 917, 918 (4<sup>th</sup> Dept 1999). The claims for promissory estoppel, breach of contract and breach of the restrictive covenant in the first, second and third causes of action are dismissed. So, too, the claim for breach of fiduciary duty in the fourth cause of action, and the claims for tortious interference with prospective business relations in the ninth through twelfth causes of action are dismissed.

Cases cited by plaintiff in support of the claim that it would be unconscionable to permit the defendants to invoke the statute of frauds under these circumstances, and calling for a decision by the trier of fact, are distinguishable from the present case. In *Shapiro v Shorestein* (157 AD2d 833, 834 (2<sup>nd</sup> Dept 1990)), defendants failed to provide

a written guarantee of their indebtedness or to execute a promissory note, despite numerous alleged requests by the plaintiffs. *Zuccarini v Ziff-Davis Media, Inc.* (306 AD2d 404 (2<sup>nd</sup> Dept 2003)), also cited by the plaintiff, involved an oral agreement to convey an equity interest in a business, which was found to be capable of being performed within one year, and therefore outside the statute of frauds. Neither of these cases is on point here.

Violations of Education Law §§6530 and 6531 are not enforceable through a private right of action, but only through the actions of the state's board for professional medical misconduct. Education Law §230. Thus the claims of tortious interference alleged in the fifth through eighth causes of action are dismissed.

The claims for conversion in the thirteenth through fifteenth causes of action do not turn on the enforceability of the restrictive covenant, and plaintiff may proceed on these claims. Since the amount allegedly converted is within the jurisdiction of the Civil Court, the matter is transferred to the Civil Court, New York County, pursuant to CPLR 325 (d).

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted in part, and denied in part, and the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action are dismissed; and it is further

ORDERED that the action shall continue with respect to the thirteenth, fourteenth

and fifteenth causes of action; and it is further

ORDERED that the action is transferred to the Civil Court of the City of New York, pursuant to CPLR 325 (d).

Dated: June 22, 2007

ENTER:

  
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J.S.C.

**FILED**  
JUN 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE