Ricca v Ouzounian
2007 NY Slip Op 32371(U)
July 27, 2007
Supreme Court, Suffolk County
Docket Number: 0019595/2007
Judge: Gary J. Weber
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INDEX No. 07-019595

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:
Hon. Gary J. Weber
Acting Justice of the Supreme Court

MOTION DATE July 25, 2007
Motion Seq. # 001-MD

RICHARD J. RICCA, M.D. and EASTERN LONG ISLAND GENERAL & VASCULAR SURGERY, P.C.,
Plaintiff(s)
-against-
STEVEN P. OUZOUNIAN, M.D. and STEVEN P. OUZOUNIAN, M.D. P.C.,
Defendant(s)

FORCHELLI, CURTO, SCHWARTZ, MINEO, CARLINO & COHN, LLP
BY: DONALD JAY SCHWARTZ, ESQ.
ATTORNEYS FOR: RICHARD J. RICCA, M.D. and EASTERN LONG ISLAND GENERAL & VASCULAR SURGERY, P.C.
330 OLD COUNTRY RD, POB 31
MINEOLA, NY 11501
(516) 248-1700

CARTIER, BERNSTEIN, AUERBACH & DAZO, PC
BY: WILLIAM J. BERNSTEIN, ESQ.
ATTORNEYS FOR:
STEVEN P. OUZOUNIAN, M.D. and STEVEN P. OUZOUNIAN, M.D. P.C. THE DEFENDANTS
77 MEDFORD AVENUE
PATCHOGUE, NY 11772
(631) 654-4900

GARFUNKEL, WILD & TRAVIS, PC
BY: ANDREW L. ZWERLING, ESQ.
ATTORNEYS FOR: SOUTHAMPTON HOSPITAL
111 GREAT NECK ROAD
GREAT NECK, NY 11021
(516) 393-2200

The Plaintiffs, by Order to Show Cause granted by the Hon. John Bivona, have moved this Court for a preliminary injunction pursuant to CPLR Article 63 to enjoin the Defendant-STEVEN P. OUZOUNIAN, M.D., among other things, from performing surgery at Southampton Hospital. The Defendants have submitted an Affirmation in Opposition dated
July 23, 2007. The Plaintiffs have submitted a Reply Affirmation dated July 23, 2007. The Court also heard oral arguments on the record on July 25, 2007 and received testimony from Fred Weinbaum, MD of Southampton Hospital which the court finds to have been credible in all material respects.

On July 25, 2007 this Court granted an Order to Show Cause presented by Southampton Hospital requiring the Plaintiffs in this action to show cause why Southampton Hospital should not be permitted to intervene in this action and Southampton Hospital has submitted a proposed complaint in which Southampton Hospital is styled the Plaintiff-Intervenor and RICHARD J. RICCA, M.D. and EASTERN LONG ISLAND GENERAL & VASCULAR SURGERY, P.C. are the Proposed Defendants. Southampton Hospital seeks to retain the continued surgical services of Defendant-STEVEN P. OUZOUNIAN, M.D. This application is returnable next week and, accordingly, Southampton Hospital was not permitted to make argument or present evidence on the hearing on the preliminary injunction.

DECISION

FINDINGS OF FACT

In July of 2002 STEVEN P. OUZOUNIAN, MD entered into an employment agreement with the Plaintiff in this action. It is undisputed by the parties that Dr. OZUOUNIAN is a highly regarded surgeon who has provided his services in both vascular and general surgery to the Southampton community at the Southampton Hospital. The employment agreement at issue, if still in effect and enforceable, would prevent Dr. OZUOUNIAN from performing surgery at Southampton Hospital for a period of two years.

The Court heard the testimony of Fred Weinbaum, MD, the Executive Vice President for Operations and Chief Medical Officer of Southampton Hospital. Doctor Weinbaum explained to the Court that Doctor OUZOUNIAN was an integral part of the surgical team that provides services on both an emergent and non-emergent basis to the hospital and the Southampton community. Dr. Weinbaum was laudatory of the abilities of both the Plaintiff, Dr. Ricca and Dr. OUZOUNIAN and urged that Southampton Hospital should be permitted to have the services of both surgeons. Dr. Weinbaum described his concerns arising from the loss of Dr. OUZOUNIAN's services, these included not only lose of services to the patients, but also the revenue this community hospital would lose and the ripple effects the loss of this revenue would have upon the institution. In particular, Dr. Weinbaum explained that Dr. OUZOUNIAN currently has surgical procedures scheduled to be performed at Southampton Hospital and that if these procedures are cancelled the surgical unit will lay fallow, and the patients' surgeries will be unnecessarily delayed Dr. Weinbaum could not speculate on whether the loss of Dr. OUZOUNIAN would be just one more financial insult absorbed by the hospital or whether it would be the straw that broke the camel's back. This Court will not engage in such speculation either.

The Court further incorporates herein those uncontested allegations of fact submitted in the moving papers.

CONCLUSIONS OF LAW

The question before this Court is whether the Plaintiff can, upon this application for a preliminary injunction, enforce a provision in the employment agreement with Doctor OUZOUNIAN which would bar Doctor OUZOUNIAN from continuing to perform surgery at Southampton Hospital.

The Court must be guided by legal principles and the facts as they are established with due regard to the respective burdens upon the application before the Court. With respect to the present application before the Court:

> "A preliminary injunction will not be granted unless the movant first establishes: (1) a likelihood of ultimate success on the merits, (2) that irreparable injury will occur absent the granting of the preliminary injunction, and (3) a balancing of the equities in the movant's favor. Moreover, preliminary injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant."
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> ***Abinanti v. Pascale, __AD3d___ (2nd Dept. June 5, 2007, aff'g denial of preliminary injunction.)***

The Plaintiffs have cited vintage cases with respect to the enforcement of restrictive covenants in the medical profession. ***See Karpinski v. Ingrasci, 28 NY2d 45 (1971) and Gelder Medical Group v. Webber, 41 NY2d 680 (1977).*** Since these early cases, the Court has had occassion to more recently address the enforeceablity of restrictive covenants with due recognition to the fact that they are generally held in disfavor.[1] ***Morris v. Schroeder Capital Management International, 7 NY3d 616 (Nov. 2006), citing BDO Seindeman 93 NY2d 383.*** In view of this disfavor such a restriction will only be enforced if it is not injurious to the public and, then, only to the extent it is necessary to protect a legitimate business interest. ***Id.***

Plaintiffs, upon this application, must demonstrate they have a legitimate business interest that requires protection. Plaintiffs argue that Dr. OUZONIAN, through his employment with the Plaintiffs, has been able to meet primary care physicians in the Southampton medical community. Primary care physicians are often the source of referrals

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[1]The Court notes that the legal profession has eliminated restrictive covenants with respect to its profession, ***See 22 NYCRR 1200.13, DR 2-109,*** and it appears that attempts to enforce such restrictive covenants in employment agreements will continue to be ever more closely scrutinized by the Courts and arguments in their favor may soon be simply considered atavistic.

[* 3]

for surgery that is performed on a non-emergent basis and Plaintiffs wish to protect against competition from Dr. OUZONIAN for these referrals. Plaintiffs do not contend that they could prevent the primary care providers from recommending that their patients seek the services of Dr. OUZONIAN as they are not a party to the agreement.[2] Plaintiffs argue instead that if primary care physicians do refer patients to Dr. OUZONIAN, that the surgery must not be performed at the Southampton Hospital.

Plaintiffs claim for themselves the geographic advantages of Southampton Hospital as well as any advantages in reputation that Southampton Hospital may have for its quality of care. These are not advantages that are the product of the expenditure of money and effort by the Plaintiffs themselves, but are, instead, the work of all of the staff at Southampton Hospital together with the substantial funding provided by the local community and the State of New York. The advantages possessed by Southampton Hospital as a venue for surgery are not the product of the Plaintiffs business, although Plaintiffs are certainly contributors to the quality of care at the hospital, so too are many, many other employees of the hospital. Based upon the foregoing, Plaintiffs' iatrogenic claims of squatter's rights to the premises of Southampton Hospital and its surgical unit as a legitimate business interest, is, at the very best, questionable.

The decision of whether to grant or deny medical privileges at a hospital is a decision within the province of the hospital itself and subject to review by the New York Public Health Council. ***See Gelbfish v. Maimonides Medical Center, 184 AD2d 614 (2nd Dept. 1992) and Public Health Law § 2801-b.*** The Plaintiffs are in effect claiming the right to dictate staffing at the hospital. The right to control staffing at the hospital resides with the hospital as overseen by the New York Public Health Council. There is a serious question of whether the Southampton Hospital's right and obligation to staff its facility would be usurped by the enforcement of this restrictive covenant.

The Plaintiffs, upon this application, also have the burden of proof that enforcement of the restrictive covenant will not be injurious to the public in general. This is a question that remains unanswered on this application. With respect to the public's interest in the provision of health care, the New York State Legislature is currently in the process of addressing this very issue. In 2005 the Legislature created the Commission on Health Care Facilities in the 21st Century which seven months ago, on December 1, 2006, published its report to the Legislature and the Governor. ***See http://www.nyhealthcarecommission.org/final_report.htm*** This report is often referred to by the eponym "The Berger Report," named after its Commissioner, Stephen Berger. The Berger Report made recommendations for changes in the organization of this State's hospitals and addressed concerns by region. This included the hospital system on Eastern Long Island which is comprised of Eastern Long Island Hospital in Greenport, Peconic Bay Medical Center in Riverhead, and Southampton Hospital in Southampton. The Berger Report has recommended some consolidation of services within the Eastern Long Island hospital system with a further recommendation that tertiary care be provided at Stony Brook University Hospital. These recommendations, if approved by the Governor and the Legislature must be implemented by the Commissioner of Health.

The Legislative effort to provide, through implementation by the New York State Department of Health, for the most advantageous delivery of health care in hospitals throughout the state, including Southampton Hospital, would certainly be impacted by the enforcement of restrictive covenants in employment agreements between doctors individually as well as in the aggregate because the financial interests of the doctors do not necessarily allign with the interests of the hospitals. The Plaintiffs have failed to demonstrate that the public will not be harmed by enforcement of the restrictive covenant. The absence of proof on this point may be remedied later in the proceedings, but upon this application for a preliminary injunction, it is a defect in the Plaintiffs' application.

An examination of the contract of employment itself indicates that, by its own terms, it expired on July 1, 2003, and that the associated restrictive covenant, even if it were to be enforceable, expired on July 1, 2005. ***Exhibit A, page 4 par. 4*** and ***Exhibit A, page 8 par. 11.*** This contract also contains common contractual language to the effect that it

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[2] even if there were such an agreement it would be unenforceable as a physician has a duty of care to his patient, and any monetized relationship between a primary care physician and a surgeon would be in direct conflict with the primary care physician's duty to advise his patients of the best surgeons available for referral care.

may not be modified orally. ***Exhibit A, page 10 par. 19.*** Nonetheless, Plaintiffs argue that the term of employment was extended by implication of Defendant's continued work for the Plaintiffs under the same terms and conditions. Plaintiffs cite ***Borne Chemical Company, Inc., v. Dictrow, 85 AD2d 646 (1981)*** for support of this proposition. However, the ***Borne Chemical*** case involved the sale of a business and did not implicate the plethora of concerns present here when the net result of the restriction is to deny or impede the provision of surgical services by a hospital to the general public.

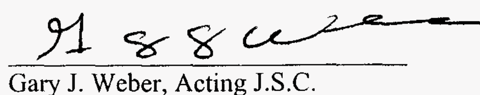
Based upon all of the foregoing, which demonstrate that the Plaintiffs have substantial hurdles to overcome in this case, and that their likelihood of success is very much in doubt, the Court can not conclude that it would be a proper exercise of its discretion to grant the Plaintiffs' application for a preliminary injunction. Accordingly, the Plaintiffs' motion for a preliminary injunction is in all respects denied.

ORDER

ORDERED that Plaintiffs' motion (Mot. #001) for a preliminary injunction is denied. The TRO is now expired and of no force and effect; and it is further

ORDERED that the Defendants are directed to serve a copy of this decision and order together with a notice of entry on the Plaintiffs as soon as is practicable.

This shall constitute the decision and order of the court.



Dated: July 27, 2007

Gary J. Weber, Acting J.S.C.

Non-Final Disposition
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