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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Ramos Justice PART 53m

Joel Batzofin et al

INDEX NO. 107844/06

MOTION DATE

- v -

MOTION SEQ. NO. 006

Geoffrey Shaw, M.D.,

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

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . 006

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

Dated: 9/4/07

HON. CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
JOEL BATZOFIN, PHYSICIAN, PC, and JOEL BATZOFIN, M.D. in behalf of SIRM-NYC, LLP.,

Index No. 107844/06

Plaintiff,

-against-

GEOFFREY SHER, M.D., GEOFFREY SHER, MD PC and SIRM-MOSAIC,

Defendants.

Charles Edward Ramos, J.S.C.:

In this special proceeding, petitioner Dr. Joel Batzofin moves(1) pursuant to CPLR 7502 for an order enjoining respondent Dr. Geoffrey Sher from informing patients and employees that Dr. Batzofin is no longer with, or will soon be leaving, the medical partnership; (2) pursuant to CPLR 6401 appointing a temporary receiver to manage the medical practice called SIRM-NY; and (3)pursuant to CPLR 7502 for an order permitting petitioner to terminate the SIRM-NY receptionist Jessica Ortiz.

BACKGROUND

Dr. Batzofin and Dr. Sher are physicians specializing in the fields of reproductive endocrinology and infertility. They jointly own SIRM-NY, the New York City branch of Dr. Sher's chain of practices, which focuses on in-vitro fertilization and reproductive medicine. Under the SIRM-NY charter there is a non-compete agreement, which reads in relevant part:

> "The Practice Member [Dr. Sher] and its principal, Dr. Batzofin personally, shall not, in or within a ten (10) mile radius of the Center, . . . directly or indirectly own . . . any business, enterprise, organization, or other individual or entity which is engaged in the same Practice or general business as the Partnership."

Dr. Sher's alleged breach of the non-compete gives rise to this proceeding.

In addition to his 51% interest in SIRM-NY, Dr. Sher wholly owns SIRM-MOSAIC, another infertility clinic. Dr. Batzofin claims that Dr. Sher has been using SIRM-NY facilities and staff to treat patients under the business name SIRM-MOSAIC, as well as billing his patients through that entity, thereby competing with SIRM-NY in violation of the prior agreement between the parties.

Dr. Batzofin initiated this special proceeding, to enforce the restrictive covenant. In July of 2006, Dr. Batzofin moved by order to show cause for a preliminary injunction.[1] However, the parties stipulated to an injunction enjoining Dr. Sher from terminating Dr. Batzofin's employment. In turn, Dr. Batzofin agreed to refrain from terminating any employee of the SIRM-NY partnership.

Dr. Batzofin now alleges that Dr. Sher has breached the terms of the stipulation by falsely telling patients and employees that Dr. Batzofin has left, or will soon be leaving, SIRM-NY.

Dr. Batzofin's motion is made pursuant to CPLR 7502(c) which provides:

> (c) Provisional remedies. The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment

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[1] This special proceeding was initiated by order to show cause on June 6, 2006 in aid of then uncommenced arbitration. An arbitration hearing was scheduled to be held on July 16, 2007 in California.

> or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. The provisions of articles 62 and 63 of this chapter shall apply to the application, including those relating to undertakings and to the time for commencement of an action (arbitration shall be deemed an action for this purpose), except that the sole ground for the granting of the remedy shall be as stated above. If an arbitration is not commenced within thirty days of the granting of the provisional relief, the order granting such relief shall expire and be null and void and costs, including reasonable attorney's fees, awarded to the respondent. The court may reduce or expand this period of time for good cause shown. The form of the application shall be as provided in subdivision (a) of this section.[2]

In addition to demonstrating that the arbitration award to which he may be entitled will be rendered ineffectual without this preliminary injunction, Dr. Batzofin must satisfy the traditional requirements (likelihood of success; irreparable injury and balance of equities) for a preliminary injunction. *KWF Realty Corp v Kaufman*, 16 AD3d 688 (2d Dept 2005).

The Likelihood of Success on the Merits

A restrictive covenant is enforceable where it is "reasonably limited, both temporally and geographically, and not unduly burdensome." *DS Courier Servs., Inc. v Seebarran*, 40 AD3d 271 (1st Dept 2007). The restrictive covenant here is reasonable in terms of time and space. Indeed, a restrictive covenant between pediatricians, very much like the one at issue here, was

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[2] It is unclear to the Court whether the arbitration here was commenced within 30 days.

found enforceable. *Gazzola-Kraenzlin v Westchester Med. Group*, 10 AD3d 700 (2d Dept 2004); *see also Gelder Medical Group v Webber*, 41 NY2d 680 (1977)(restrictive covenant of 30 mile radius and 5 years held reasonable). The restrictive covenant here is actually less restrictive than that in *Gazzola-Kraenzlin* in that here the covenant remains in effect only during the time that Drs. Sher and Batzofin remain partners in SIRM-NY.

Enforcement of the restrictive covenant would not be unduly burdensome on Dr. Sher. Enforcement would not prevent Dr. Sher from seeing patients in New York, but only from billing his patients through SIRM-MOSAIC. Dr. Sher would simply be required to share the proceeds of his work with Dr. Batzofin as contemplated in the partnership agreement. This should create no undue hardship on either Dr. Sher or his patients.

In order to determine Dr. Batzofin's likelihood of success, the question is whether Dr. Sher was actually in breach of the agreement. Dr. Sher does not, in any document submitted to the Court, deny having seen patients under the name SIRM-MOSAIC within a ten-mile radius of the SIRM-NY facility. In fact, Dr. Sher states in his July 6, 2006 affidavit, that *at least* 15% of SIRM-MOSAIC patients come from within that area, and all are treated at the SIRM-NY facility. Therefore, Dr. Batzofin is likely to succeed on the merits against Dr. Sher.

Irreparable Injury Absent this Injunction

Irreparable injury, for the purposes of a preliminary injunction, means "any injury for which money damages are

insufficient." *Klein, Wagner & Morris v Klein*, 186 AD2d 631, 633 (2d Dept 1992). Damage to the reputation of a practitioner, firm, or partnership, which may affect one's interaction with clients, potential clients, and the medical community may be "irreparable harm."

In the present case it is possible, if Dr. Sher were to tell potential and actual patients that Dr. Batzofin was no longer with SIRM-NY, that Dr. Batzofin's reputation as a leading physician in his field could suffer. There would likely be additional harm caused to the partnership of SIRM-NY, at which Dr. Batzofin is the managing physician, including lost revenue and patients. Such a result could have an irreversible impact on the partnership.

In defense, Dr. Sher denies ever having made such statements to patients. Furthermore, Dr. Sher argues that the affidavits submitted by Drs. Berkley and Levy, which state that patients whom they referred to Dr. Batzofin have been told that Dr. Batzofin no longer works at SIRM-NY, constitute hearsay evidence and are inadmissible. He argues therefore that the injunction should be denied for insufficient evidence.

The existence of an issue of fact is not sufficient to deny a motion for a preliminary injunction. CPLR 6312(c). Here, Petitioner has a reasonable basis to allege that Dr. Sher or his staff have made the complained of statements and there is a reasonable possibility of irreparable harm if Dr. Sher is allowed to tell patients that Dr. Batzofin has left or is leaving SIRM-

NY. This requirement is therefore satisfied.

Balance of the Equities

The last element for the granting of a preliminary injunction requires the Court to balance the equities. This entails that the petitioner must show "that the irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to the defendant through the imposition of the injunction." *Klein, Wagner & Morris*, 186 AD2d at 633.

In the present case, the balance of the equities clearly supports the Petitioner. To refrain from falsely informing current and potential patients that Dr. Batzofin is no longer with the practice would cause no harm whatsoever to Dr. Sher, who has already agreed not to fire Dr. Batzofin. Indeed, Dr. Sher does not allege that such an injunction would be harmful to him. Conversely, imposing such an injunction could be highly beneficial to both Batzofin and SIRM-NY, preserving Dr. Batzofin's reputation as a physician and, potentially, the financial stability of SIRM-NY. Therefore, the balance of equities supports Dr. Batzofin.

Ineffectual Award

Although not addressed by either party, it is apparent that without this injunction, the relief Dr. Batzofin seeks in arbitration will be rendered ineffectual if patients and employees are misinformed that Dr. Batzofin is no longer with the practice. Business will diminish as this misinformation permeates the market. However, it will be impossible to assess

how much business is lost by this information. Therefore, the motion for a preliminary injunction is granted.

Temporary Receiver

Dr. Batzofin moves for the appointment of a receiver pursuant to CPLR 6401(a). However, Section 7502(c) does not authorize the Court to appoint a receiver in aid of arbitration. Even if the Court had the authority to appoint a receiver, there is a troubling lack of evidence in the petition to support Dr. Batzofin's claim that SIRM-NY is in danger of collapse. The appointing of a temporary receiver is "an extreme remedy which should not lightly be granted." *Nelson v Nelson*, 99 AD2d 917, 918 (3d Dep't 1984). Accordingly, this remedy may be invoked only where a clear showing has been made that it is necessary to protect the parties and their interests. See, *S.Z.B. Corp. v Ruth*, 14 AD2d 678, 679 (1st Dept 1961). Dr. Batzofin alleges that Dr. Sher has "declared all out war on [him]," and that Dr. Batzofin has not been paid his salary. According to Dr. Batzofin, routine bills have not been paid on time, which has resulted in a number of warnings from Con Ed and other utilities.

However, the collapse about which Dr. Batzofin is concerned appears unlikely to occur. Dr. Batzofin gives no evidence that profits or income have dropped, nor does he suggest that SIRM-NY is unable to meet any of the costs it is required to pay. To the contrary, Dr. Sher's exhibits show clearly that the practice has fared even better in recent months than it did in previous years, during which time SIRM-NY had little, if any, financial trouble.

Therefore, that part of the motion is denied.

The Receptionist Jessica Ortiz

Dr. Batzofin's final request is for permission to dismiss a SIRM-NY receptionist by the name of Jessica Ortiz. In July, 2006, the parties entered into a stipulation under which, Dr. Batzofin must refrain from terminating any employee of the SIRM-NY partnership. Dr. Batzofin now seeks permission to terminate Ms. Ortiz.

A stipulation made in open court "becomes enforceable as a contract binding on all the parties thereto, and is governed by general contract principles for its interpretation and effect." *Fukilman v 31st Ave. Realty Corp.*, 39 AD3d 812 (2d Dept 2007). Stipulations are strictly enforced, and "only where there is a cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation." *Hallock v State*, 64 NY2d 224, 230 (1984). Therefore, if a motion to invalidate a stipulation is to succeed, the movant must make a claim that would be sufficient to invalidate a contract.

Dr. Batzofin does not allege that there has been fraud, collusion, or any other cause which would invalidate a contract. Dr. Batzofin simply states that the receptionist Jessica Ortiz has removed patients from his schedule at the request of Dr. Sher, has lied to him about having done so, and has told patients he no longer works there. Because Dr. Batzofin has not made any allegation that, if substantiated, would be sufficient to

invalidate a contract, his request for permission to fire the receptionist Jessica Ortiz cannot be granted without further proceedings. While pursuant to the stipulation, Dr. Batzofin agreed to restrict the right to fire her only with Dr, Sher's consent, she remains an employees at will subject to discharge for any non-discriminatory reason. Accordingly, the issue of employee misconduct remains open. Another open issue is whether the parties agreed that each reserved the right to discharge any employee for cause. What would be done if an employee began to embezzle funds? Would that employee be immune from discharge? It is also unclear if Dr. Batzofin was aware of Ms. Ortiz's alleged actions prior to his agreement not to discharge any employees or if Dr. Sher was breaching the terms of the stipulation by directing Ms. Ortiz to take these actions on his behalf.

Accordingly, it is

ORDERED that Batzofin's motion for a preliminary injunction is granted to the extent that Dr. Sher his employees or those acting on his behalf are enjoined from informing patients and employees that Dr. Batzofin is no longer with the medical practice or will soon be leaving. That branch of the motion seeking to discharge Ms. Ortiz is held in abeyance pending a hearing and the balance of the motion is otherwise denied; and it is further

ORDERED that the issue of whether there is cause to fire Ms. Ortiz and whether Dr. Sher breached to stipulation by directing

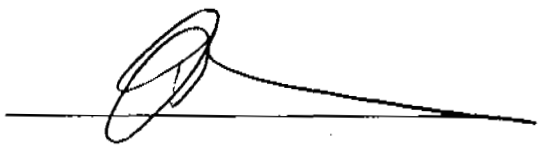
Ms. Ortiz to take the alleged actions is hereby referred to a Special Referee, who shall hear the evidence and report to the Court; and it is further

ORDERED that the above issue is held in abeyance pending a hearing by a referee; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee regarding damages and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

Dated: September 4, 2007



J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.