SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

In the Matter of the Application of
ASSOCIATED PLASTIC SURGEONS & CONSULTANTS, PC,

INDEX No. 014102/07

MOTION DATE: Aug. 30,2007
Motion Sequence # 001

Petitioner,

-against-

MAHIRA TANOVIC, M.D.,

Respondent.

For a Judgment pursuant to CPLR §7502 (c) awarding Petitioner a preliminary injunction pending an arbitration between the parties.

The following papers read on this motion:

Order to Show Cause..... X
Affirmation in Opposition..... X
Reply Affidavit/Affirmation..... XX

This petition, brought on by order to show cause, for an order pursuant to CPLR §7502(c) enjoining respondent from continuing to breach that certain Physician Employment Agreement dated June 28, 2004 ("Agreement"), specifically: (i) Article 12 of the Agreement in performing physician services within the restricted geographic territory set forth in the

Agreement; (ii) Article 12 of the Agreement in soliciting and/or attempting to solicit petitioner's patients; and (iii) Articles 2 and 3 of the Agreement in wrongfully possessing the petitioner's proprietary information, is determined as hereinafter set forth.

Factually, the petitioner, a medical practice specializing in plastic, cosmetic and reconstructive surgery, hired the respondent. That hiring is evidenced by a Physician Employment Agreement ("Agreement") executed on June 28, 2004, and provides, **inter alia**,

> "Proprietary Information. During the term of this Agreement, Physician will be exposed to information which is confidential or proprietary to Employer or Patients. Physician shall not, either during the term of this Agreement or at any time thereafter, use for her own benefit or the benefit of any other person, or to the detriment of Employer or to any patient, or disclose to any person or entity any secret, private or confidential information, any trade secret or other proprietary knowledge concerning the business or affairs of Employer which Physician may have acquired in the course of or as incident to employment with Employer".
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> "**Non-Solicitation and Restrictive Covenant**. For twenty four (24) months following the termination of this Agreement, Physician shall not, directly or indirectly, as an individual or on behalf of any legal entity or other persons, (i) engage, solicit or entice any other employee or employees, including physician employees, of Employer to terminate his/her employment relationship with Employer. Additionally, for twenty-four (24) months following the termination of this Agreement, Physician shall

> not perform any services as a physician within a ten (10) mile radius of 800 Woodbury Road, Woodbury, New York, or any other office of the Practice at the time of the termination of employment in either Nassau or Suffolk Counties. In the event Employer gives notice of termination pursuant to Section 9.2.1.3 hereof on or prior to November 1, 2004, the provisions of the preceding sentence shall not be applicable; nor shall the provisions of such sentence apply to any office of the Practice opened on or after the Effective Date until such office has been opened for business for a period of four months as an office of Practice".

The respondent severed her ties with the petitioner on June 15, 2007, and commenced her separate medical practice at 444 Lakeville Road, New Hyde Park on July 1, 2007. At the commencement of the Agreement on June 28, 2004, the petitioner was located at 800 Woodbury Road, Woodbury and was re-located to 864 West Jericho Turnpike, West Hills, New York.

The petitioner, by its president and sole shareholder, Dr. Duboys, asserts that the respondent has expropriated proprietary information, i.e., patient records and information, case records, charts and personal files of petitioner's patients and is using those collective records to improperly solicit certain patients from the petitioner. He argues that the respondent is prohibited from such solicitation for 24 months after the termination of the Agreement, i.e., June 15, 2009. He avers that the respondent is also violating the Agreement in that she is performing, or attempting to perform, services at the Plainview and Syosset branches of North Shore University Hospital and New Island Hospital in Bethpage, all of which are within the proscribed 10 mile radius of petitioner's office. He argues that he has established a clear probability of success on the merits; that with respect to the requirement of irreparable injury, the respondent has conceded such in the Agreement, in addition to the new source of new patients for the respondent, i.e., being in the emergency room rotation at the aforementioned hospitals, which will steer new patients away from the petitioner. Considering the balancing of the equities, it also favors the petitioner because her new offices are closer to three other hospitals outside the restricted territory set forth in the Agreement. Counsel for the petitioner argues that applicable case law and statutory law supports the petitioner's position.

Counsel for the respondent asserts that the very language of the Agreement, that was drafted by the petitioner, demonstrates that the prohibitions contained in the Agreement were never triggered by the event contemplated in the Agreement. He further asserts that any photographs (before and after) and pertinent operative reports were copied by the respondent in order for the respondent to document her future application for board certification, but no originals were ever removed from the petitioner's office. Counsel argues that the petitioner has not demonstrated a violation of the non-compete clause because there was no "termination" as it is defined in the Agreement, i.e., that the agreement had reached the end of the term of the Agreement and there was no termination in accordance with the occurrence of one of eight specified acts set forth in the Agreement. He contends that the language of the Agreement must be strictly construed against the petitioner, as it was the drafter of the document; and that an injunction cannot be granted where there is any ambiguity in the Agreement. He further argues that the Agreement cannot be newly-crafted to create a different document with a different intent. With respect to the requirement of irreparable injury, the respondent's attorney avers that applicable case law requires a finding that the petitioner has not demonstrated irreparable injury on the grounds that the petitioner's potential loss of patients translates into a compensable loss, and that is further supported by the petitioner's demand for compensable damages in its demand for arbitration. With respect to the balancing of the equities, counsel argues the unlikelihood of the petitioner's success on this issue-which balances the petitioner's practice and experience, as compared with the respondent. Counsel further contends that, in the event a preliminary injunction is granted, an undertaking to compensate for any damages, in the amount of $75,000, should be required to be posted by the petitioner.

In reply, the petitioner argues that the respondent misrepresents herself as inexperienced, in that the respondent, in an internet advertisement, asserts 20 years in practice. He disputes, as well, the respondent's rationale for her admitted taking of operative reports and photographs of his patients, and notes that the respondent inquired about the restrictive covenant well prior to June 2007. He asserts that the respondent was not owed two weeks vacation and ended her employment prior to the expiration of the Agreement and minimizes the importance of affidavits submitted by other physicians relative to the respondent's value to hospitals. Petitioner's attorney disputes the significance of Section 9 of the Agreement by his averment that, notwithstanding the parameters of the word "Termination" in the Agreement, the Agreement still terminates ". . .by its own terms at the end of its term. . .", and the word termination in the restrictive covenant is not restrictively defined to the Section 9 examples of Termination. Counsel argues that the definitions and uses of the disputed terms could have been differently set forth if there was a different intent

and attempts a different interpretation. He asserts that no prejudice attaches to the respondent because she is permitted to set up practice ". . .outside the ten (10) mile radius of petitioner's current office" and she should be enjoined from ". . .serving as a staff physician at hospitals and/or medical centers located within the ten (10) mile radius surrounding petitioner's office".

DECISION

In addition to Sections 10 and 12 already cited, this Court must also consider Sections 9.1, 9.2.1, which provides:

> "9.1. This Agreement shall become effective on September 1, 2004 and shall expire on June 30, 2007 (the "Expiration Date"). For the purposes herein, year one (1) shall mean September 1, 2004 to June 30, 2005; year two (2) shall mean July 1, 2005 to June 30, 2006; and year three (3) shall mean July 1, 2006 to June 30, 2007.
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> 9.2 Termination
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> 9.2.1. This Agreement shall automatically be terminated upon the occurrence of any of the following events:
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> 9.2.1.1. upon the death of Physician; or
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> 9.2.1.2. upon an absence on account of Physician's disability. Physician shall be deemed disabled for purposes of this Agreement when by reason of physical or mental illness or injury, she is unable to perform her usual and customary duties

> required to be rendered under this Agreement for any three (three) month period during a 12-month period. The determination as to whether Physician is disabled shall be made by a physician chosen by Employer provided Physician is qualified to receive benefits under any disability insurance policy or Social Security. If any provision of this paragraph (9.2.1.) conflicts with any New York or federal law, then it shall be modified in a manner, and to the extent, necessary to comply with such law. Such modification shall not affect the validity of the remainder of this Agreement; or
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> 9.2.1.3. upon three (3) months prior written notice by Employer's or three (3) months' prior written notice by Physician".

The court notes that section 9.2.2 provides for termination for cause, which are not applicable herein.

It is well settled that, in order

> "to demonstrate a likelihood of success on the merits, the prospect of irreparable injury if the relief is withheld, and a balancing of the equities in the movant's favor (see **Doe v Axelrod**, 73 NY2d 748;

> **William M. Blake Agency v Leon**, **supra**; **Miller v Price**, 267 AD2d 363)".

(**Gagnon Bus Company, Inc. v Vallo Transportation Ltd.**, 13 AD3d 334, 786 NYS2d 107, 2nd Dept., 2004). While it is generally held that

> "Restrictive covenants in employment agreements will be enforced if reasonably limited temporally and geographically, and to the extent necessary to protect the employer's use of trade secrets or confidential customer information (see **BDO Seidman v Hirschberg**, 93 NY2d 382; **Reed, Roberts Assoc. v Strauman**, 40 NY2d 303; **Elite Promotional Mktg. v Stumacher**, 8 AD3d 525)".

(**Michael G. Kessler & Associates, Ltd. v White**, 28 AD3d 724, 815 NYS2d 631, 2nd Dept., 2006), in the case at bar, that is not the issue.

The issue at bar is the interpretation of the Agreement relative to the term of the contract, and the court recognizes the well settled principle that ". . .any ambiguity in a contract is to be construed against the drafter (see, **Guardian Life Ins. Co. of America v Schaefer**, 70 NY2d 888)" (**Sievert v Morlef Holding Co.**, 241 AD2d 445, 663 NYS2d 978, 2nd Dept., 1997). Moreover, this Court acknowledges that it is a matter for this Court to interpret any ambiguity in the contract and extrinsic matters will not be considered, nor will terms be implied that are not specifically inserted (see, **Aivaliotis v Continental Broker-Dealer Corp.**, 30 AD3d 446, 817 NYS2d 365, 2nd Dept., 2006). That issue is central to a determination of whether the petitioner is likely to succeed on the merits.

Clearly, the term of the Agreement is September 1, 2004 through June 30, 2007, and

according to Section 9.1, the Agreement expired on June 30, 2007 — defined as "(the 'Expiration Date')". The word "termination", for cause, is severally defined, in Section 9.2.2, et seq., and such definitions are not at issue herein. The two terms are not synonymous. The court will not consider extrinsic matters and contract interpretations in an attempt to rewrite the contract (see, **Aivaliotis v Continental Broker-Dealer Corp., supra**). To define the words "term" and "termination" differently than the petitioner, who crafted the document, had plainly expressed, would be contrary to settled case law (see, **McCabe v Witteveen**, 34 AD3d 652, 825 NYS2d 499, 2nd Dept., 2006).

The petitioner's assertion, that the respondent, by reason of the fact that she was not entitled to two weeks vacation and that she left the petitioner with two weeks left on the term of the contract, voluntarily "terminated her employment" (Duboys affidavit, ¶ 12), standing alone, does not persuade this Court to conclude that such constitutes a "termination" pursuant to the definitions set forth in the contract. Further, Dr. Duboys' assertions regarding the "falsity" of certain of the respondent's statements, while disquieting, do not rise to a level that requires this Court to conclude that the petitioner has demonstrated a likelihood of success on the merits of the claim for violation of the restrictive covenant.

With respect to the second criterion, that the petitioner must demonstrate that he will suffer irreparable damages in the event injunctive relief is not awarded, the petitioner's assertion, while somewhat compelling, is inconclusive, especially when the Court considers the value placed upon its damages by the petitioner in its demand for arbitration, i.e., $10,000 - $75,000. (see, **Matter of Nelson**, 110 AD2d 535, 1st Dept., 1985).

With respect to the final criterion, upon the record presented, the balancing of the equities does not favor the petitioner. Accordingly, the preliminary injunction sought herein with respect to the restrictive covenant is **denied**.

Turning now to the relief sought with respect to the solicitation of the petitioner's patients and possession/retention of the petitioner's proprietary information, i.e., photographs and operative reports, possession of these items by the respondent is conceded. While her rationale for such retention may be understandable, it is not an acceptable rationale that would lead this Court to deny relief to the petitioner on this issue. Strictly speaking, this Court does not view the violation of Section 2 & 3 of the Agreement as one warranting consideration of injunctive relief. Violation of those articles warrants the return of those items inasmuch as Section 2 specifically provides that it "survives"the Agreement.

Accordingly, the respondent is directed to return all copies, electronic or otherwise, of any and all reports and photographs to the petitioner within 20 days after service of a copy of this order upon defendant's counsel.

Therefore, the petitioner's application is **denied** as to the preliminary injunction and **granted** to the extent that the respondent is directed to return the petitioner's property as set forth hereinabove.

A Preliminary Conference is scheduled for November 19, 2007 at 9:30 a.m. in Chambers of the undersigned. Please be advised that counsel appearing for the Preliminary Conference **shall** be fully versed in the factual background and their client's schedule for the purpose of setting **firm** deposition dates.

Dated OCT 10 2007

Stephen A. Bucaria
J.S.C.

ENTERED

OCT 12 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE