SHORT FORM ORDER

INDEX No. 04-16355
CAL. No. 07-02198-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 1-30-08
ADJ. DATE 4-30-08
Mot. Seq. # 001 - MD

FELIX M. GERMAN, PHYSICIAN, P.C. and FELIX M. GERMAN, M.D.,	:	WEISS & ZARETT, P.C. Attorneys for Plaintiffs 3333 New Hyde Park Road, Suite 211 New Hyde Park, New York 11042
Plaintiffs,	:	
- against -	:	
	:	CAHN & CAHN, LLP
STEVEN R. BAUER, D.O., MARC J. MESSINEO, D.O. and BABYLON VILLAGE MEDICAL ASSOCIATES, L.L.C.,	:	Attorneys for Defendants 445 Broadhollow Road, Suite 332 Melville, New York 11747
Defendants.	:	

Upon the following papers numbered 1 to 39 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 23 - 37 ; Replying Affidavits and supporting papers 38 - 39 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion for summary judgment dismissing plaintiffs' complaint is denied.

Defendants Steven R. Bauer, D.O., Marc J. Messineo, D.O., and Babylon Village Medical Associates, L.L.C. have moved for summary judgment dismissing the complaint of their former employer, plaintiffs Felix M. German, Physician, P.C., and Felix M. German, M.D.

The complaint alleges that after the defendants' business relationship with plaintiff ended, defendants breached their fiduciary duty to him, as well as their duties of good faith and loyalty; that they misappropriated and converted trade secrets, unfairly competed with his business, and tortiously interfered with his prospective business relationships.

Defendants have moved for summary judgment on the grounds there is no evidence to support plaintiffs' claims. In support of their motion, they offer, *inter alia*, the pleadings, several redacted patient medical and billing forms, and the deposition testimony of defendants.

Defendant Dr. Bauer("Bauer") avers that prior to entering into a business relationship with Dr. German ("German"), he practiced medicine at a private office in Massapequa Park called South Shore Family Practice, P.C. He left that position to work with plaintiff in July 2001. He states that almost all the patients he saw at South Shore Family Practice followed him to Dr. German's office.

Bauer first met plaintiff in 1999 while attending grand rounds at Good Samaritan Hospital. Soon thereafter, they discussed entering into a business relationship. According to Bauer, the nature of the relationship was as follows: He was to help provide primary medical care to German's pre-existing patients and help to expand German's by bringing in his own previously established patients, as well as new patients he garnered as a result of his affiliation with Good Samaritan Hospital, the Martin Luther King clinic, and other medical facilities. Bauer also states he brought numerous patients to Dr. German's practice by virtue of the fact that he was listed on several insurance companies' lists of medical providers, whereas Dr. German was not affiliated with these insurance companies.

Bauer maintains he began his employment with German in 2001 by working nine hours a week in plaintiff's office. Over the course of his employment, he steadily increased his hours at the office and, in addition, took over all plaintiff's hospital and nursing home rounds. Plaintiff was paid $60 per hour for his work in plaintiff's office but was not paid for taking over the plaintiff's hospital coverage or for answering his night and emergency calls.

After about a year, upon Bauer's suggestion, plaintiff agreed to take in Dr. Messineo ("Messineo"), a former colleague of Bauer's. Messineo came to work at the practice, splitting hospital coverage with Bauer. Messineo also opened the office every Wednesday and was the only doctor in the office on that day.

It is undisputed that there was no employment contract, restrictive covenant, non-compete clause, or any other written agreement between the defendants and the plaintiffs that would have prohibited the defendants from leaving plaintiff German's practice and opening up their own medical practice at any time.

At various times during Drs. Bauer and Messineo's employment, there were discussions with Dr. German about the co-defendants purchasing his medical practice. Bauer claims he repeatedly complained to Dr. German about problems with the office, including the absence of any trained medical assistants and the fact they had only one phone line which was constantly busy. Additionally, Bauer learned that plaintiff's building had been denied a professional zoning variance in the past and he was operating the practice as if it was a home office; however, to Bauer's knowledge, Dr. German did not reside at the office address.

Defendant Bauer states that over the course of the last nine months of his business relationship with plaintiff, he had at least half a dozen financial discussions with him in which he asked him to formalize their agreement. At one point, they discussed Bauer purchasing the practice for a price of $600,000.00 as well as plaintiff making application for the appropriate rezoning.

In July 2003, when no agreement had been finalized, Bauer informed German that he and

Messineo would be leaving plaintiff's practice and establishing a medical practice of their own, Babylon Village Medical Associates. Drs. Bauer and Messineo transmitted announcements to patients they had treated during their affiliation with German's practice, notifying them of the location of their new medical practice.

According to defendants, sometime thereafter, German wrote and mailed an allegedly defamatory "FYI" notice, along with a defamatory letter, to patients who requested transfer of their medical records to defendants' new medical practice, and German also handed the "FYI" notice to patients who visited the office and inquired about Drs. Bauer and Messineo.

The notice stated, in sum and substance, that Drs. Bauer and Messineo were "sinister and unethical"; that they had "operated behind [Dr. German's] back in opening their practice in Babylon"; that they had completely abandoned "trust, respect, honor and dignity"; that they had a strong drive for "personal edification and greed"; that they were less qualified to practice medicine than German because they are Doctors of Osteopathy, while German is a Doctor of Medicine."

According to Bauer, because the defamatory "FYI" letter disparaged both his and Dr. Messineo's professional qualifications as physicians, as well as their honesty, moral qualifications, and character, their relationship with many of their existing patients became strained, and establishing relationships with new patients became extremely difficult, if not impossible.

As a result of the allegedly defamatory letters circulated by plaintiff, defendants instituted a separate but related defamation action against plaintiff under Index No. 2003-26170 ("Action No. 1").

It is well established that summary judgment should only be granted where there are no material and triable issues of fact (*see,* ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395; ***Ptasznik v Schultz***, 223 AD2d 695 [2d Dept 1996]). It is equally well established that issue finding, as opposed to issue determination, is the key to summary judgment and that the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*see,* ***Ptasznik v Schultz***, *supra*).

Plaintiffs' complaint alleges the following six causes of action: (1) breach of fiduciary duty; (2) breach of duty of good faith and loyalty; (3) misappropriation of trade secrets; (4) conversion; (5) unfair competition; and (6) tortious interference with prospective business relations.

Defendants argue that since they did not have an employment contract with the practice, there was no "restrictive covenant" preventing them from opening a competing medical practice. Bauer claims he repeatedly tried to speak with German about purchasing the practice and sent him numerous e-mails. He further claims he never removed any records, files, or ptaient information from plaintiffs' office without his permission.

In opposition, German argues that defendants were clearly employed by him as evidenced by the W-2s that were filed with their tax returns. They saw Dr. German's overflow patients and rounded on his patients in the hospital. German avers that he only learned during the depositions that while he was negotiating for Drs. Bauer and Messineo to buy the practice, and paying them a salary, defendants had

already made plans to establish a competing medical practice, Babylon Village Medical Associates, L.L.C. ("BVMA"). While the defendants were telling patients they would be opening up their own practice, they never told plaintiff. Over the course of a few months, German claims over 300 of his patients requested that their medical records be transferred to the defendants' new practice.

"A fiduciary owes a duty of undivided and undiluted loyalty to those whose interest the fiduciary is to protect. This is a sensitive and 'inflexible' rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty". (***Birnbaum v Birnbaum***, 73 NY2d 461, 541 NYS2d 746 [1989]).

Further, in the absence of an agreement to the contrary, "[s]olicitation of an employer's customers by a former employee through the use of a customer list is not actionable unless the customer list is considered a trade secret or there was wrongful conduct by the employee such as physically taking or copying the employer's files or using confidential information" (***Apa Security v Apa***, 37 AD3d 502 [2d Dept. 2007] *quoting* ***Eastern Bus. Sys. v Specialty Bus. Solutions***, 292 AD2d 336 [2d Dept. [2002]; *see* ***Amana Express Int v Pier-Air Int.***, 211 AD2d 606 [2d Dept. 1995]; ***Walter Karl Inc v Wood***, 137 AD2d 22 [2d Dept. 1988]). Trade secret protection will not attach to customer lists where such customers are readily ascertainable from sources outside the former employee's business unless the employee had stolen or memorized the customer lists (*see,* ***WMW Machinery Co v Koerber AG***, 240 AD2d 400 [2d Dept. 1997]; ***Amana Express Int v Pier-Air Int.***, *supra*; ***Walter Karl Inc v Wood***, *supra*). Moreover, an essential element of a trade secret is the element of secrecy (*see*, ***Ashland Mgt v Janien***, 82 NY2d 395, 407; ***Atmospherics Ltd. v Hansen***, 269 AD2d 343 [2d Dept. 2000]. Even in the absence of a trade secret, however, an employee is prohibited from taking or copying an employer's files or confidential information.

Conversion is the unauthorized exercise of dominion and control over specifically identified property which interferes with the owner's rights (*see,* ***Hoffman v Unterberg***, 9 AD3d 386, 388 [2d Dept. 2004]; ***Galtieri v Kramer***, 232 AD2d 369 [2d Dept. 1996]).

The elements of a claim for tortious interference with prospective business relations are: (1) business relations with a third party, (2) the defendant's interference with those business relations, (3) the defendant acted with the sole purpose of harming the plaintiff or used dishonest, unfair or improper means, and (4) injury to the business relationship (***Nadel v Play-By-Play Toys & Novelties, Inc.*** ,208 F. 3d 368, 382 [2nd Cir. 2000]).

German maintains that defendants used confidential and proprietary information, made available to them during their employment to solicit the practice's patients. He has submitted redacted copies of the specific documents used by defendants to (allegedly) solicit patients — Face sheets, Explanation of Benefits ("EOB's") and Insurance lists. Among other things, these documents contain identifying information such as patient's name, address, insurance identification number and other demographics.

While defendants claim they took only records of their own patients, plaintiff has raised an issue of fact as to whether defendants engaged in the unauthorized physical taking of the practice's confidential

and proprietary documents during their employment, and whether they used the information for the benefit of their new competing medical practice. For example, Dr. Messineo gave the following testimony:

Q: Did Dr. German know that you were making copies of the EOBs on the hospital work?
A: Probably not.

Q: Okay. did you tell him that you were?
A: No.

Q: Did he ever tell you that you could use this information in order to send announcements to patients if you opened your own practice?
[Objection as to form]
A: Nope

Under the circumstances here, plaintiffs' have raised issues of fact sufficient to warrant denial of defendants motion for summary judgment.

Dated: JUN 11 2008

J.S.C.
JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION