

| |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| New York Otolaryngology Group, P.C. v Stern |
| 2009 NY Slip Op 33112(U) |
| December 22, 2009 |
| Supreme Court, New York County |
| Docket Number: 115878/2008 |
| Judge: Debra A. James |
| Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

NEW YORK OTOLARYNGOLOGY GROUP, P.C.,

Index No.: 115878/2008

Plaintiff,

Motion Date: 10/06/09

- v -

JORDAN STERN,

Motion Seq. No.: 1

Defendant.

Motion Cal. No.: _____

The following papers, numbered 1 to 7 were read on this motion for a preliminary injunction.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2, 3, 4

5, 6

7

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff's motion for a preliminary injunction shall be GRANTED in part.

In this dispute between plaintiff New York Otolaryngology Group, P.C. ("NYOG"), a medical group specializing in sinus health, head and neck surgery and hearing loss and balance disorders, and defendant Jordan Stern ("Stern"), a physician formerly employed by NYOG, NYOG claims that Stern breached the Employment Agreement (the "Agreement"), which he signed on January 27, 2004 when he commenced employment with the group. Stern informed the group on May 2, 2008 that he wished to resign

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

COURT CLERK'S OFFICE
NEW YORK
JAN 04 2010
FILED

from his employment.

NYOG contends that Stern violated two provisions of the Agreement, which were that (1) upon the termination of his employment, he would not practice medicine within a 20 block radius of any of NYOG's office or solicit NYOG's patients aside from patients he personally introduced to the practice, and (2) all medical records maintained by NYOG are its exclusive property.

The Agreement also provides in pertinent part that

12. Entire Agreement:

This agreement is the entire agreement among the parties concerning the subject matter hereof and supercedes all prior agreements, whether written or oral. It shall not be changed except in writing signed by both parties hereto.

* * *

14. Waiver:

(a) Any consent or waiver executed must be in writing by a party and shall be binding upon such party from and after the date of execution thereof unless a later or earlier date is specified therein.

(b) No delay or failure to exercise any remedy or right occurring upon any default shall be construed as a waiver of such remedy or right, or any acquiescence in such default, nor shall affect any subsequent default of the same or a different nature.

At the time of the Employment Agreement, NYOG's principal Manhattan office was located at 36A East 36th Street. It also maintained an office at 9 West 67th Street, New York, New York. Two years later, NYOG opened another Manhattan office at 150 Broadway. While employed at NYOG, Stern was assigned to staff the Broadway office two days per week.

Three weeks after Stern announced his departure, NYOG by the signatory to the Agreement, Robert L. Pincus, M.D., undertook negotiations of a separation agreement between NYOG and Stern. In an exchange of e-mails dated May 22, 2008, Dr. Pincus agreed that such separation agreement would supplant the Agreement, and would be effective as of May 31, 2008. He also agreed that Stern would, inter alia, accept an assignment of NYOG's sublease at 150 Broadway and abide by a restrictive covenant reduced from twenty to ten blocks from NYOG's other offices. Such agreement was never signed by either party.

NYOG claims that it intended to stay at the 150 Broadway office, but by Dr. Pincus states "It is also my understanding that Dr. Stern has continued to use NYOG's Broadway Office without NYOG's consent or authorization. As a result, we have ceased using the Broadway Office." NYOG provides no specifics with respect to its abandonment of the Broadway office. There is no dispute that since it never consented, Stern did not assume NYOG's sublease of the Broadway office. Instead, it is not refuted that on September 1, 2008, Stern entered into his own lease with the primary leaseholder of the Broadway space, where he practices to this day.

The applicable law is straightforward. Covenants restricting a professional, and in particular a physician, from competing with a former employer or associate are common and generally acceptable (see, e.g., Karpinski v Ingrasci, 28 NY2d 45, 47-49; see, generally, Validity and Construction of Contractual Restrictions on Right of Medical

Practitioner to Practice, Incident to Partnership Agreement, Ann., 62 ALR3d 970). As with all restrictive covenants, if they are reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public, and not unduly burdensome, they will be enforced (citations omitted).

Gelder Medical Group v Webber, 41 NY2d 680, 683 (1977).

"(M) easured by the circumstances and context in which enforcement is sought" (Gelder Medical Group v Webber, *supra*, 684), the non-compete covenant in the Agreement that covers 20 blocks or approximately a circle of 2 mile diameter in the large, populous borough of New York County is reasonable. NYOG developed its business over a decade during which Dr. Pincus and his associates made significant effort in its development, including establishing two doctor's offices. It is clear that Stern's New York County private practice originated during his association with NYOG, and that the restrictive covenant is reasonable consideration for such association.

While Stern suggests that the location of his offices allows the close monitoring that his patients require, there is no evidence that the public will suffer any harm with the enforcing of the covenant, given the many physicians that practice Stern's specialty, including the doctors of NYOG, in New York County.

Stern argues that the Agreement was modified in the exchange of electronic mail in which NYOG agreed to reduce coverage to a 10 block radius. Stern fails, however, to establish a modification of the Agreement, as there is no evidence of

consideration for the purported change. He has not shown that NYOG gained any financial advantage or that he suffered any detriment by reason of the purported change in the coverage of the covenant. See Bank Leumi Trust Co. Of New York v Block 3102 Corp., 180 AD2d 588, 589 (1st Dept 1992). Therefore, the 20 block radius of the Agreement remains unmodified.

Stern further contends that NYOG delayed enforcing the restrictive covenant as it waited six months after substantial negotiations of terms for his separation, before it commenced this lawsuit. He points out that NYOG waited another six months after it filed this action before it moved for the equitable relief sought in the application at bar.

The mere delay in NYOG's seeking injunctive relief after it had reason to believe that Stern was violating the Agreement does not preclude the grant of an injunction. Stern must show that he changed his position or would be prejudiced as a consequence of NYOG's delay in seeking relief, which are the necessary elements of an equitable estoppel. New York Real Estate Institute, Inc. v. Edelman, 42 AD3d 321, 321-322 (1st Dept 2007).

"[A] contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement (citations omitted). Such waiver may be evinced by words or conduct, including partial performance" (Bank Leumi

Trust Co. Of New York v Block 3102 Corp., 180 AD2d 588, 590, supra).

The record presents evidence that NYOG waived the 20 block rule, at least with respect to 150 Broadway, when it abandoned that office, leaving Stern in place to secure his own space from NYOG's prior landlord/lessor. Stern has demonstrated that he relied on NYOG's abandonment of the space and changed his position to his detriment in entering into a lease in his own name with NYOG's former lessor.

Waiver is unilateral and, 'not being a binding agreement, can, to the extent that it is executory, be withdrawn, provided the party whose performance has been waived is given notice of withdrawal and a reasonable time after notice within which to perform.
Bank Leumi Trust Co. v Block 3102 Corp., supra.

Certainly, upon service of the complaint in this action in November 2008, NYOG "informed" Stern of its insistence on his complying with the 20 block provision. On that basis, there is an issue of fact whether NYOG withdrew its waiver of Stern's failure to comply with the 20 block provision as to his two other offices. The question is whether NYOG knowingly waived its rights with respect to the siting of such offices when it delayed the prosecution of this lawsuit or the delivery of any other notice that it would insist on his compliance with the 20 block restriction as to such locations.

While such issue would preclude summary judgment with respect to a permanent injunction were NYOG to move for such

relief at this stage (Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Management, L.P., 7 NY3d 96, 105 [2006]), NYOG has, on its application now before this court, established entitlement to a preliminary injunction with respect to Stern maintaining offices at 381 Park Avenue South, 1020, New York, NY, and 200 West 57th Street, 12th Fl, New York, NY 10019, or any other offices within a 20 block radius of any of NYOG's offices. Such provisional remedy must be conditioned upon the filing of an appropriate undertaking, which will be set at a future hearing pursuant to CPLR 6312(b).

With the use of words such as "potentially" and "may have accessed", NYOG has failed to demonstrate a likelihood of success on the merits of its claim that Stern is soliciting NYOG's patients or interfering with NYOG's referral network to divert referrals from NYOG to himself. Nor does its allegations about fee disputes warrant extraordinary equitable relief, as a monetary award would be adequate should NYOG prevail on such claims.

Accordingly, it is

ORDERED that the motion for a preliminary injunction is GRANTED only to the extent that Jordan Stern be and hereby is restrained from maintaining offices at 381 Park Avenue South, 1020, New York, NY, and 200 West 57th Street, 12th Fl, New York, NY 10019, or within a twenty block radius of any of plaintiff New

York Otolaryngology's offices on condition that and effective only when plaintiff New York Otolaryngology Group, Inc. files an undertaking in an amount to be fixed by the court pursuant to CPLR 6312(b); and it is further

ORDERED that the parties are hereby directed to attend a hearing for the fixing the amount of such undertaking on January 11, 2010, at 2:30 P.M., at the Courthouse, IAS Part 59, Room 1254, 111 Centre Street, New York; and it is further

ORDERED that the motion for a preliminary injunction is DENIED in all other respects.

This is the decision and order of the court.

Dated: December 22, 2009

ENTER:

[Signature]
DEBRA A. JAMES J.S.C.

FILED
JAN 04 2010
NEW YORK
COUNTY CLERKS OFFICE