Suffolk Anesthesiology Assoc., P.C. v Verdone
2009 NY Slip Op 33385(U)
September 28, 2009
Supreme Court, Suffolk County
Docket Number: 37932/2008
Judge: Ralph T. Gazzillo
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PUBLISH

SHORT FORM ORDER

Index No: 37932/2008

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOTION DATE:
ADJ. DATE:
MOT. SEQ: 003 Mot D
004 MD
005 MD

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

SUFFOLK ANESTHESIOLOGY ASSOC., P.C., by its Board of Directors consisting of ELLIOT ROSSEIN, M.D., ANTHONY BONANNO, M.D., BENJAMIN KIRSCHENBAUM, M.D., and JAMES SUAZO,	:	ROSENBERG CALICA & BIRNEY, LLP Attorneys for Plaintiffs 100 Garden City Plaza, Suite 408 Garden City, N.Y. 11530-3200
Plaintiff(s),	:	DEVITT SPELLMAN BARRETT, LLP
- against -	:	Attorneys for Defendant 50 Route 111
MATTHEW J. VERDONE, D.O.,	:	Smithtown, N.Y. 11787
Defendant(s).	:	

Upon the following papers numbered 1 to 84 read on these motions for a preliminary injunction and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; ; Notice of Cross Motion and supporting papers 11-22; 23-34 ; Answering Affidavits and supporting papers 35-45; 46-53; 54-59; 60-69; 70-79; Replying Affidavits and supporting papers 80-84 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 003) for a preliminary injunction by plaintiffs; the motion (seq. 004) for partial summary judgment by defendant, Matthew J. Verdone, D.O., and the cross-motion (seq 005) by plaintiff for partial summary judgment are consolidated for purposes of this decision and are decided herewith; and it is further

ORDERED that upon consent of both parties, the plaintiffs' Supplemental Affirmation, dated February 18, 2009, pp 5 and 7, together with Exhibit "D", pp 7, 9, 10 and 12, annexed thereto are sealed and not subject to disclosure; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this Order with Notice of Entry

upon counsel for defendant, pursuant to CPLR 2103(b)(l), (2) or (3), within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

Suffolk Anesthesiology Associates, P.C., (hereafter SAA) is the exclusive provider of anesthesia services at St. Catherine of Siena Medical Center in Smithtown, NY. The defendant, Matthew J. Verdone, D.O., as a licensed anesthesiologist, was an employee and shareholder of SAA. A prior order of this Court (Weber, J.) dated, November 20, 2008, granted plaintiff's motion for partial summary judgment and upheld plaintiff's right to terminate defendant's employment, without cause, pursuant to the express terms of the Employment Agreement between the parties, i.e., by a vote of 75% of the corporate shareholders. That same order denied defendant's motion which sought a preliminary injunction prohibiting plaintiffs from terminating him and cancelling his shares as a shareholder. The defendant's motion for a stay of his termination was denied by the Appellate Division of the Supreme Court, Second Department on December 10, 2008. Thereafter, on December 15, 2008, the shareholders and Directors of SAA, unanimously voted to terminate Dr. Verdone's services.

The parties' dispute appears to have started when the shareholders of SAA agreed to purchase the shares of SurgiCare Ambulatory Center, Inc., for $6.1 million and to pay off SurgiCare's bank debt of $1.2 million. October 6, 2008 was set as a time of the essence deadline to fund the $4.1 million remaining balance of the purchase price for Surgicare, after approximately $2 million of installment payments had been made.

Through its President, plaintiff contends that all twelve shareholders of SAA, including Dr. Verdone, signed a Certificate of Need as required by the NYS Department of Health, in order to approve a change of ownership for SurgiCare. That Certificate allegedly disclosed that 90% of the purchase price would be financed by J.P. Morgan Chase. However, Dr. Verdone voted against allowing SAA or its corporate affiliates to be either the guarantor or principal borrower of the $4.1 million balance.

Plaintiff alleges that a corporate affiliate of SAA had received preliminary approval by Chase for a $5 million loan. This loan was to be guaranteed by the shareholders, SAA and another corporate affiliate. However, Dr. Verdone emailed SAA's accountant, Steven Stolzenberg, CPA, a copy of a letter he had sent to Chase, indicating his disapproval of any guaranty by SAA or any of its corporate affiliation. Plaintiff also alleges that Dr. Verdone threatened the bank with litigation if SAA's assets were used. Thereafter, the bank withdrew their loan offer. This forced the remaining shareholders, to individually raise the $5 million in order to save the $2.1 million investment already made.

Plaintiffs have provided several affidavits of its physician shareholders. In his affidavit dated, October 28, 2008, Philip Kurlander, M.D. detailed a conversation with Dr. Verdone, as the October 6, 2008, time of the essence deadline loomed. Dr. Kurlander averred that Dr. Verdone expressed his intent to cause the plaintiffs to default. In that way, only the shareholders who could

personally finance the purchase price would be able to buy SurgiCare. The others would be forced out of the deal. In a similar vein, Salvatore Buffa, M.D., claims that he also had a conversation with Dr. Verdone shortly before the October 6 deadline. He reiterated that Dr. Verdone's expressed intent to exclude any shareholders from the purchase who could not fund it personally. Additionally, the doctors described earlier conversations with Dr. Verdone wherein he indicated his desire to oust SAA as the anesthesia provider at St. Catherine's and also expressed his antagonism toward plaintiff, Anthony Bonanno, M.D., as the Chairman of the Anesthesia Department. Dr. Verdone was willing to use his position on St. Catherine's Board of Trustees to force out SAA.

Plaintiffs further contend that Huntington Hospital is within the twenty mile radius of St. Catherine's. Shortly after his termination, Dr. Verdone contacted another anesthesia provider associated with Huntington Hospital seeking to induce that group to provide anesthesia services at St. Catherine's.

Dr. Verdone counters that the separate ambulatory care facility (SurgiCare) was to be purchased by the individuals of SAA and not as SAA shareholders. In fact, he argues that the contract with SurgiCare was signed by the individuals. He had been assured by counsel for the corporation, that SAA's assets would not be used to guaranty the loan. Accordingly, his intention in notifying the bank was to ensure that the parties adhered to the agreement, i.e., that the individuals, not the corporation, funded the purchase. However, he did not want to prevent the purchase agreement. In fact, he had previously tendered his share of the down payment for the purchase.

Defendant also denies the various claims by plaintiff. He concedes that he had conversations with various prospective employers, but contends that those conversations do not amount to unfair competition. Further, he notes that competition with SAA at St. Catherine's would be impossible. Patients do not routinely seek out a particular anesthesiologist. Rather, anesthesiologists are referred to patients by St. Catherine's. He claims that plaintiffs' conduct amounts to retaliation against him for commencing an action to obtain a forensic accounting report. He contends that the report supports his claims of retaliation, professional misconduct, breach of fiduciary duty, waste and breach of contract. He further denies that he has attempted to induce a competing practice to compete with St. Catherine's. Finally, by not paying defendant his deferred compensation, plaintiffs have materially breached their agreement. This conduct precludes enforcement of the restrictive covenants.

Defendant asserts that such covenants should be rigorously examined. Further, enforcement against a medical professional is only warranted if they are reasonably limited temporally and geographically and, without being either harmful to the public or unduly burdensome, serve the acceptable purpose of protecting the former employer from unfair competition. In that regard, he asserts that the covenant is being vindictively used by plaintiffs in order to impair his ability to practice his profession. He asserts that plaintiffs have no legitimate employer interest to protect since he can not compete at St. Catherine's. Patients are referred directly by St. Catherine's to SAA pursuant to their agreement.

Plaintiffs move for various relief. They seek a preliminary injunction and partial summary judgment (1) enjoining Dr. Verdone from violating the restrictive covenant and non-solicitation agreement within twenty (20) miles of St. Catherine's of Siena Medical Center in Smithtown for a period of three years from the date of his termination, (2) prohibiting him from practicing anesthesiology or pain management within twenty (20) miles of St. Catherine's, (3) requiring him to surrender his medical staff privileges at St. Catherine's, and (4) enjoining him from efforts to cause replacement or removal of plaintiff as the exclusive provider of anesthesia services at St. Catherine's.

Defendant's motion for partial summary judgment seeks a declaration that various clauses in the Employment and Shareholder Agreements are void and unenforceable: (1) the covenants not to compete, (2) the non-solicitation agreement, and (3) the surrender of his staff privileges at St. Catherine's.

The party seeking a preliminary injunction must demonstrate a likelihood of success on the merits, irreparable injury if temporary relief is not granted, and that a balancing of the equities favors the movant (*see* ***Doe v Axelrod,*** 73 NY2d 748; ***Ashland Mgt. Inc. v. Altair Invs. NA, LLC,*** 59 AD3d 97; ***Marietta Corp. v Fairhurst,*** 301 AD2d 734). Covenants not to compete will be enforced if reasonably limited as to time, geographic area and scope, are necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome on the employee (*see* ***BDO Seidman v Hirshberg,*** 93 NY2d 382; ***Gelder Med. Group v Webber,*** 41 NY2d 680; ***Albany Med. Coll. v Lobel,*** 296 AD2d 701). For example, a three-year period has been held reasonable. Similarly, a 35-mile restriction has been held to be reasonable (*see* ***Gelder Med. Group v Webber,*** *supra* [five years and 30 miles]; ***Karpinski v Ingrasci,*** 28 NY2d 45 [five counties forever]; ***Albany Med. Coll. v Lobel,*** *supra* [five years and 30 miles]).

The restrictive or non-compete clause at issue was negotiated by all the shareholders of SAA. In that regard, plaintiffs note that SAA provides exclusive services at St. Catherine's, at the SurgiCare ambulatory facility it purchased in the Bronx, and at a similar facility in Brooklyn. SAA also provides in-office services at medical and dental offices in Smithtown.

For purposes of its motion for preliminary injunctive relief, plaintiffs seek to limit the non-competition clause against defendant to a radius of twenty miles from St. Catherine's. In that regard, when an otherwise valid restrictive covenant and non-solicitation agreement are found to be overbroad, the proper remedy is to limit their scope as opposed to nullifying them. Here, plaintiff has demonstrated an absence of overreaching, coercive use of dominant bargaining power, or other anti-competitive misconduct, but has in good faith sought to protect a legitimate business interest, consistent with reasonable standards of fair dealing. However, since the agreement was executed, SAA has greatly expanded its business area. To enforce the agreement without limitation would severely limit the defendant's ability to obtain employment. Under such circumstances partial enforcement of the agreement is justified (*see* ***BDO Seidman v Hirshberg,*** 93 NY2d 382). Enforcement is hereby limited to a twenty (20) mile radius of St. Catherine's, which seems to be the area originally contemplated by the parties when the agreements were executed.

Covenants restricting a professional, and in particular a physician, from competing with a former employer or associate are common and generally acceptable (*see,* ***Karpinski v Ingrasci,*** 28 NY2d 45). 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 (*see,* ***Reed, Roberts Assoc. v Strauman,*** 40 NY2d 303 mot for rearg den 4 NY2d 918; ***Karpinski v Ingrasci,*** *supra;* ***Gelder Med. Group v Webber,*** 41 NY2d 680; ***Novendstern v Mt. Kisco Med. Group,*** 177 AD2d 623).

Further, unlike a motion for summary judgment, a motion for a preliminary injunction need not be denied even if there is an issue of fact as to a material element (CPLR 6312[c]. ***Egan v New York Care Pllus, Ins. Co.,*** 266 AD2d 600). The mere fact that there may be questions of fact for trial does not preclude a court from granting an injunction (*see,* ***SPQR Co., Inc. v United Rockland Stairs, Inc.,*** 57 AD3d 642; ***Ying Fung Moy v Hohi Umeki,*** 10 AD3d 604; ***Albany Med. College v Lobel,*** 296 AD2d 701). All that must be shown is the likelihood of success. Conclusive proof is not required. Even, as here, when facts are in dispute, a finding that plaintiff has demonstrated a likelihood of success on the merits warrants the granting a preliminary injunction.

Considering the likelihood of plaintiffs prevailing under this rule, the harm that would be irreparably inflicted, and the relative equities, a preliminary injunction is warranted as to the following requests enjoining Matthew Verdone, M.D. from violating the restrictive covenant and non-solicitation agreement within twenty (20) miles of St. Catherine's of Siena Medical Center in Smithtown, NY; enjoining him from practicing anesthesiology of pain management within twenty (20) miles of St. Catherine's in Smithtown; and enjoining him from efforts to cause the replacement or removal of plaintiff as the exclusive provider of anesthesia services at St. Catherine's in Smithtown until the final disposition of this action. In all other respects, the motion for a preliminary injunction is denied.

Plaintiff has shown a likelihood of success on the merits on its motion for a preliminary injunction on three of its requests, i.e., (1) enjoining Dr. Verdone from violating the restrictive covenant and non-solicitation agreement within twenty (20) miles of St. Catherine's of Siena Medical Center in Smithtown for a period of three years from the date of his termination, (2) prohibiting him from practicing anesthesiology or pain management within twenty (20) miles of St. Catherine's, and (3) enjoining him from efforts to cause replacement or removal of plaintiff as the exclusive provider of anesthesia services at St. Catherine's.

Moreover, the plaintiff is required to post an undertaking (see CPLR 6312[b]). If the parties cannot stipulate to an appropriate amount, the parties shall submit papers to the Court regarding the amount of the undertaking by October 30, 2009.

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd [b]). Such showing must be by a tender of evidentiary proof in admissible form"

(***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065,1067; ***Zuckerman v City of New York,*** 49 NY2d 557)

Summary judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of a triable issue (see, ***Alvarez v Prospect Hospital,*** 68 NY2d 320; ***Bennett v Knipfing,*** 262 AD2d 260). The Court will not determine issues of credibility or the probability of success on the merits on a motion for summary judgment, and issue finding rather than issue determination is the key to summary judgment (***Grahm v Columbia-Presbyterian Medical Center,*** 185 AD2d 753). If material facts are In dispute or if different inferences may reasonably be drawn from the facts or testimony, a motion for summary judgment must be denied (*see,* ***Gusek v Compass Transp. Corp.,*** 266 AD2d 923; ***Morris v LenoxHill Hosp.,*** 232AD2d 184, aff'd 90 NY2d 953). The decision to grant or deny summary judgment is based on the facts in the entire record and not simply the pleadings (see, McIntyre v State, 142 AD2d 856), and these facts must be analyzed in a light most favorable to a non-moving party, here the Defendant Caballero (***Jastrzebski v North Shore School Dist.,*** 223 AD2d 677). It is well settled that on a motion for summary judgment, the court's function is to determine whether material factual issues exist, not to resolve such issues (*see*, ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395; ***Baker v D.J. Stapleton, Inc.***, 43 AD3d 839). A motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (***Lopez v Beltre***, 59 AD3d 683; ***Scott v Long Is. Power Auth.***, 294 AD2d 348).

Here, it is clear that factual issues exist that can not be determined by summary judgment. The affidavits are in sharp conflict and raise issues of credibility. On any summary judgment motion, the Court's responsibility is issue finding not issue determination. Here, each party has raised a triable issue of fact mandating denial of both motions for summary judgment (*see* ***Zuckerman v City of NY,*** 49 NY2d 557; ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966*;* ***Barrett v Freifeld,*** 64 AD3d 736). The ultimate relief of summary judgment is not warranted for either party. The Court finds that the conflicting affidavit and documentary evidence of the parties represent issues of credibility, which is a matter strictly for the jury to determine (*see*, ***Pannetta v Ramo***, 138 AD2d 686).

In light of the foregoing, the motion by plaintiff for a preliminary injunction is granted solely to the extent noted herein. The motions by plaintiff and defendant seeking partial summary judgment are denied. Further, plaintiff obtained the deposition of a non-party witness during the pendency of defendant's motion for summary judgment in violation of CPLR 3214 (b), without obtaining the prior consent of the Court. Defendant objected to the deposition of the witness. As such, the deposition has not been considered by the Court.

Dated: 9/28/09
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

FINAL DISPOSITION_____ NON-FINAL DISPOSITION_____