SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 8

MARTIN SEROTA, DDS, P.C.,

Plaintiff,

INDEX NO.: 009357/09
MOTION DATE: 2/18/10
MOTION SEQUENCE: 02

-against-

MIDDLE VILLAGE DENTAL ASSOCIATES, LLP, ANATOLIY BARAK and NANDOR HALPERT,

Defendants.

The following papers read on this motion:

Order to Show Cause for TRO and Preliminary Injunction	1
Memorandum of Law in Support of Motion	2
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Reply Affirmation of Scott J. Steiner, Esq.	5
Reply Affidavit of Nandor Halpert	6

PRELIMINARY STATEMENT

Defendant seeks by Order to Show Cause an Order enjoining Plaintiff or his affiliates from treating patients or otherwise practicing dentistry within a 15 mile radius of the Defendant's dental practice at 73-38 Bell Boulevard, Bayside, New York; from soliciting patients of Defendants' dental practice through the use of a patient list from Defendants' practice; from soliciting patients from the Defendants' practice by means of

defamatory comments concerning Defendants' practice; commencing any action to enforce the Independent Contractor Agreement, providing for Consulting Fees in any other Court; and for an Order removing two actions commenced in Nassau County District Court, Small Claims Part, relating to the Consultant Fee provisions of the Independent Contractor's Agreement.

Plaintiff contends that Defendants are not entitled to a Preliminary Injunction because of their failure to establish likelihood of success on the merits, the existence of irreparable harm if relief denied, and a balance of equities in favor of movant. They contend that the language of the restrictive covenant against competition concluded upon the termination of Plaintiff by Defendants in May 2009, and that he is not restricted as to where he may practice dentistry. He further contends that the restrictive covenant was with Defendants' predecessor and it was not transferable to them.

BACKGROUND

In 2005 Dr. Martin Serota ("Serota") joined in the practice of dentistry as an independent contractor, Drs. Bruce and Richard Corbin. Serota had been in practice nearby the Corbins for some 30 years, and, in addition to being paid for work he performed, the Corbins paid him a monthly "consultant fee" which, in fact, was payment for the practice which Serota brought to the Corbins.

In 2008 Middle Village Dental Associates, LLP acquired the Corbins' practice, and continued to deal with Serota as an independent contractor under the terms of the Independent Contractor Agreement, which was for a period of seven years. From the inception of the relationship, there was significant discord and this carried forward into the Middle Village era. After Plaintiff commenced action against them on May 13, 2009, Defendants terminated the Independent Contractor Agreement.

Since the termination, Plaintiff has been working as a dentist at two locations, one of which is Patriot Dental, in Fresh Meadows, well within the 15-mile radius contained in the non-compete clause. Defendants contend that he is no longer entitled to be paid the

"consultant fee" of $4,000 per month, and Plaintiff has, according to them, commenced monthly proceedings in that amount in Small Claims Part of the District Court. Defendants seek by this motion to require Plaintiff to terminate his relationship with Patriot, stop soliciting patients of Defendants by use of derogatory comments about them, preventing him from commencing litigation against them in any Court but this one, and for an Order transferring the open Small Claims proceedings to this Court and consolidating them with this action.

DISCUSSION

The Independent Contractor Agreement is located as Exhibit "A" to the motion. § 8 provides as follows:

> 8. Restrictive Covenant. As a material inducement for Corbin to enter into this Agreement, the P.C. and the Dentist hereby covenant and agree that they will not, directly or indirectly, whether as a sole proprietor, partner, stockholder, director, officer, employee or in any other capacity as principal or agent, during the entire seven (7) year period commencing as of the date hereof and terminating upon on (sic.) The seven year anniversary of the date hereof engage in the practice of dentistry as an employee or contractor (except on behalf of Corbin as contemplated herein), or acquire any direct or indirect ownership interest in any dental practice, in either case within a radius of fifteen (15) miles from Corbin;s existing Premises; provided, in accordance with Section 5, the P.C. and the Dentiset agree that they will not seek other engagements during the term hereof, unless the P.C.'s compensation falls below $65,000 during any consecutive four (4) month period during the first three years of this Agreement.
>
> In the event that any of the provisions of this Section 8 relating to the period or geographical area of restriction shall be deemed to exceed the maximum period of time or geographical area which a court of competent jurisdiction would deem valid and enforceable, then the maximum time and area restriction would be that which a court of competent jurisdiction would deem valid and enforceable.

Before 2005, Serota was engaged in the private practice of dentistry virtually directly across the street from the Corbins' offices. As part of the Agreement, the Corbins agreed to pay Plaintiff a "consultant fee", commencing at the conclusion of the first two years of the agreement and continuing at the rate of $4,000 per month for a total of 60 months. The provisions of the Agreement relating to the "consultant fee" are in pertinent part as follows:

> 4. Compensation for Consulting Services. As compensation for the Consulting Services to be rendered by the P.C. hereunder, Corbin shall pay to the P.C. a total of Two Hundred Forty Thousand ($240,000) Dollars in connection with it starting up and running the newly established Corbin facility at the Premises. This compensation is not based upon any fee production.
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> . . .
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> In the event the Dentist fails to work an average of at least thirty-five (35) hours per week (excluding up to twenty-five (25) days vacation during the first two years and thirty (30) days vacation during the third year) during the initial three (3) years of this Agreement, the Consulting Fee shall be subject to reduction.
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> . . .
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> Notwithstanding the foregoing, or anything to the contrary contained herein: (i) in no event shall the total Consulting Fee be less that $150,000 in the aggregate; and (ii) if Dentist works at least an average of thirty-five (35) hours per week during the first year of this Agreement (excluding up to twenty-five (25) vacation days), in no event shall the total Consulting Fee be less then (sic.) $200,000 in the aggregate.

Injunctive Relief

"To establish entitlement to a preliminary injunction, a movant must establish (1) a

likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction." (*De Fabio v. Omnipoint Communications, et al.*, 2009 WL 3210142 [N.Y.A.D. 2d Dept., 2009]); citing, CPLR 3201, *Doe v. Axelrod,* 73 N.Y.2d 748, 750 (1988), *W.T. Grant v. Srogi,* 52 N.Y.2d 496. 517 (1981); *See also, Automated Waste Disposal, Inc., v. Mid-Hudson Waste, Inc.,* 50 A.D.3d 1072 — 1073 (2d Dept. 2008).

"Irreparable injuries for the purpose of equity, has been held to mean any injury for which money damages are insufficient". (*Walsh v. Design Concepts,* 221 A.D.2d 454, 455 (2d Dept. 1995). On the contrary, "(e)conomic loss, which is compensable by money damages, does not constitute irreparable harm". (*EdCia Corp. v. McCormack,* 44 A.D.3d 991, 994 (2d Dept. 2007). Failure to enunciate non-economic loss constitutes a failure to demonstrate irreparable harm so as to warrant equitable relief in the form of an injunction (*Automated Waste Disposal* at 1073.

Likelihood of ultimate success on the merits does not import a predetermination of the issues, and does not constitute a certainty of success. The requirement is a protection against the exercise of a court's formidable equity power in cases where the moving party's position, no matter how emotionally compelling, is without legal foundation (*Tucker v. Toia,* 54 A.D.2d 322, 326 [4th Dept. 1976]).

In balancing the equities, the court must weigh the harm each side will suffer in the absence or in the face of injunctive relief. (*Washington Deluxe Bus, Inc. v. Sharmash Bus Corp.,* 47 A.D.3d 806 [2d Dept. 2008]). This is, by definition, a fact-sensitive inquiry. Thus, for example, where a pharmaceutical manufacturer of a non-prescription product was seeking to enforce exclusivity agreement and preliminarily enjoin defendant from importing and marketing the same product, the balance of equities favored defendant, since plaintiff could recover damages, while defendant would have to remove product from the shelves for an indeterminate length of time. (*OraSure Technologies, Inc. v. Prestige Brands Holdings, Inc.,* 42 A.D.3d 348 [1st Dept. 2007]).

Likelihood of Success on the Merits

In order to meet this standard, movant must show a probability of success on the ultimate issue in dispute. In this case, there is no post-employment restriction on employment. The Independent Contractor Agreement originally anticipated a 7-year term, after which there would be no restriction on where Plaintiff worked or to whom he was providing services. The Agreement, at ¶ 7 established the term and the bases under which Corbin was authorized to earlier terminate the arrangement. Defendants contend that the May 20, 2009 termination was warranted under these terms. Since there is no provision for a restrictive covenant beyond the term of Agreement, whether completed or earlier terminated, it is not likely that Defendants will succeed on the claim to preclude Plaintiff from performing dental services within the 15-mile radius provided for in the Agreement.

The relief requested, that is, the preclusion of Plaintiff from practicing dentistry within a 15-mile radius of Defendants' offices, is the ultimate relief to which Defendants would be entitled, would upset the status quo, and they would be required to demonstrate extraordinary circumstances in order to obtain such injunctive relief. (*St. Paul Fire & Mar. Ins. Co. v. New York Claims Serv.,* 308 A.D.2d 347 [1st Dept. 2003]). The circumstances presented in this case are not of such extraordinary nature as to warrant mandatory injunctive relief .

Injunction Against Use of Patient Lists

If there were evidence that Plaintiff was misusing a trade secret in the form of a patient list, solicitation by means of such a list could well be subject to injunctive relief. The issue is whether or not such a patient list constitutes confidential information. In *Leo Silfen, Inc. v. Cream,* 29 N.Y.2d 387 (1972), the former employer of Defendant sought to enjoin him from using a list of customers and catalogue of customer data to compete with Plaintiff after the discharge. The complaint alleged that Defendant had been soliciting Plaintiff's customers, had made copies of Plaintiffs' secret and confidential customer

files, and was using such information in his solicitation. This is similar to the claim of Defendant herein.

The Court in *Silfen* distinguished when and when not customer lists constituted a trade secret. Initially, the Court noted that a former employee "may use in competition with his former employers names, even lists, of customers retained in his memory". *Id.* at 392. In addition, "where customers are readily ascertainable outside the employer's business as prospective users or consumers of the employer's services or products, trade secret protection will not attach and courts will not enjoin the employee from soliciting his employer's customers". *Id.* To the contrary, where the identity of customers is not known in the trade, and could be discovered only by extraordinary efforts, courts are inclined to protect the customer lists and files as trade secrets. *Id.*

Movant has provided no evidence, other than generalized statements, that Plaintiff's solicitations are based upon reference to a patient list, whose names are not recoverable from the memory of Serota, or which could not be replicated by other than extraordinary efforts, and which has been developed only through extensive cost and effort by the employer. (*Town & Country House & Home Serv. V. Newbery,* 3 N.Y.2d 554, 560 [1958]). In this instance Defendants acquired a portion of the patient list by acquisition of the practice from Cobrin, and a portion from the customer list of Serota's practice in the immediate neighborhood.

Defendants have not submitted adequate evidence that the Plaintiff's solicitations were by access to a patient list which, by virtue of the cost of development, or impracticality of discovery by other means, constituted a trade secret. Neither have they offered any evidence that the names of the patients, some of whom may have been Serota's for many years, were not available through his own memory.

The application to enjoin Plaintiff from soliciting former patients of Defendants is denied. It is impractical for the Court to issue a blanket injunction against defamatory comments concerning Defendants' dental practice, since, at the very least, it would

constitute an unwarranted intrusion upon free speech. It has long been held that a court will not enjoin publication of an allegedly libelous statement prior to publication. (*Marlin Firearms Co. v. Shields,* 171 N.Y. 384, 392 [1902]). Of course, language which is indeed defamatory, and which produces damages, is separately actionable.

Injunction against Multiple Actions in District Court

Plaintiff continues to seek payments of $4,000 per month under the Consultant Agreement, apparently by filing monthly proceedings in the Small Claims Part of District Court. Defendants' application to enjoin Plaintiff from continuing this practice and to remove pending actions in District Court to this Court for joint trial is granted. The Clerk of the District Court is directed to transfer files commenced by Martin Serota against Middle Village Dental Association, LLP, Anatoliy Barak and Nandor Halpert to the Nassau County Clerk, to be filed with this action under Index No. 09/009357.

Parties are not permitted to split a single cause of action and maintain successive actions for different parts of it, the purpose of the rule being to prevent expensive, vexatious and oppressive litigation. *(O'Brien v. City of Syracuse,* 54 N.Y.2d 353 [1981]).

Serota has a single cause of action for alleged breach of contract with respect to Compensation for Consulting Services under ¶ 4 of the Agreement. The clause provides for payment to Serota of $240,000, at the rate of $4,000 per month over a period of 60 months. The payment was subject to reduction depending upon the number of hours worked during the initial three years of the Agreement; but this period has long ago expired.

While there may well be an equitable claim that Serota should not be receiving payments for what is in reality reimbursement for the purchase of his dental practice, while he is actively soliciting the same patients to another practice, the language of ¶ 7 is quite clear. "Upon any such termination, the Dentist shall immediately cease performing Dental Services at the Premises; however, the P.C. shall continue to provide the Consulting Services in accordance with Section 4 above".

CONCLUSIONS

The motions for injunctive relief are in all respects denied, except to the extent that Plaintiff is precluded from splitting his cause of action for Consulting Fees under the Agreement, and the matters presently pending in Nassau County District by Plaintiff against Middle Village Dental Associates, LLP, Anatoliy Barak and Nandor Halpert, are removed to this Court, to be tried jointly with this action, and the Clerk of the District Court is directed to transfer the files for these proceedings to Nassau County Clerk, to be filed under Index No. 09/009357.

This constitutes the Decision and Order of the Court.

Dated: May 19, 2010

J.S.C.

ENTERED
MAY 25 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE