

Atul Chokshi Physician P.C. v Patel

2010 NY Slip Op 32394(U)

August 27, 2010

Supreme Court, Nassau County

Docket Number: 013343-10

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

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**ATUL CHOKSHI PHYSICIAN P.C. and
ATUL B. CHOKSHI M.D.,**

Plaintiffs,

- against -

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 013343-10
Motion Seq. No: 1
Submission Date: 8/23/10**

**LALIT PATEL, M.D., LALIT PATEL PHYSICIAN P.C.
and VIMAL BHATT,**

Defendants.

-----X

The following papers have been read on this Order to Show Cause:

- Order to Show Cause, Affirmation in Support,**
- Affidavits in Support and Exhibits.....X**
- Plaintiffs' Memorandum of Law in Support and Exhibit.....X**
- Affirmation in Opposition and Exhibits.....X**

This matter is before the Court for decision on the Order to Show Cause filed by Plaintiffs Atul Chokshi Physician P.C. ("P.C.") and Atul B. Chokshi, M.D. ("Chokshi") (collectively "Plaintiffs") on July 13, 2010 and submitted on August 23, 2010, seeking certain injunctive relief. For the reasons set forth below, the Court denies Plaintiff's Order to Show Cause, except that the Court directs that the Temporary Restraining Order issued on July 16, 2010 and continued on August 23, 2010 with the consent of counsel, remains in effect. As per the parties' agreement, the Court will not require Plaintiffs to post a bond as a condition of this continued injunctive relief.

BACKGROUND

A. Relief Sought

Plaintiffs move for an Order, pursuant to CPLR §§ 6301 and 6311, directing that, during the pendency of this proceeding and pending a final decision on the merits, Defendants and their agents be enjoined and restrained from 1) owning, managing, operating, controlling or otherwise participating in any business engaged in the practice of cardiology or internal medicine, or any teaching institution teaching medicine or any medical specialty which is located within a geographical radius of five miles from any office location maintained by the Plaintiff and specifically the office location at 360A 9th Street, Brooklyn, New York which is located within 50 feet of Plaintiffs' office at 370 9th Street, Brooklyn, New York; 2) soliciting or otherwise contacting, by telephone, mail or in person, any patients of Plaintiff who became known to Defendants or whom Defendant served while employed by Plaintiff(s) as an employee or independent contractor (the "Patients"), to become patients of Defendant or any other physician (excluding Defendants' respective immediate family members); 3) approaching within 3000 feet of Plaintiffs' office ("Office") located at 370 9th Street, Brooklyn, New York; 4) approaching within 100 feet of any patient of Plaintiffs admitted to Interfaith Medical Center or New York Methodist Hospital to induce them to become patients of Defendants; 5) soliciting or contacting any employee of Plaintiffs for the purpose of inducing any such employee to terminate his or her relationship with Plaintiffs other than those employees who joined Plaintiffs as a result of Defendants' recruitment efforts; 6) disclosing in any manner, directly or indirectly, the list of Patients to any person, firm, corporation, association or other entity; and 7) destroying, erasing, or otherwise making unavailable for further proceedings in this matter any records or documents, including computer readable media and telephone and cellular phone records, in the possession or control of Defendants which was obtained from or contains any information or which relate to any of the events alleged in the Petition of this proceeding.

Defendants oppose Plaintiffs' application.

B. The Parties' History

In the Verified Complaint (“Complaint”) (Ex. 1 to OSC), Plaintiffs allege that they hired Defendants Lalit Patel, M.D. (“Patel”) and Vimal Bhatt (“Bhatt”) to work in Plaintiffs’ medical professional practice (“Office”) located at 370 9th Street, Brooklyn, New York 11215 . Bhatt was employed as a front desk secretary and her duties included scheduling appointments and maintaining files and patient charts. Patel, a physician, was employed to provide medical professional services in internal medicine to patients. In connection with his employment, Patel executed an Employment Contract (“Agreement”) in 2004 (Ex. 1 to Complaint). Section 10 of the Agreement is titled “Restrictive Covenant” and Paragraph 10(A) provides as follows:

Since the services of Employee [Patel] to the Employer [Atul Chokshi Physician P.C.] are likely to be unique and extraordinary and he has had and will have access to information pertaining to the business of the Employer which may be secret and confidential, including, but not limited to, patient lists, Employee agrees that if the Employee’s employment is terminated for any reason whatsoever, including pursuant to a dissolution of Employer, then for a period of three (3) years after such termination or expiration, Employee will not, without express approval in each case of the Employer, directly or indirectly, (i) own, manage, operate, control, be employed by, participate in or be connected in any manner with the ownership, management, operation or control of any business engaged in the practice of cardiology or internal medicine, or any teaching institution teaching medicine or any medical specialty which is located within a geographical radius of five miles (“as the crow flies”) from any office location maintained by the Employer or, (ii) disclose in any manner, directly or indirectly, the Employer’s list of patients to any person, firm, corporation, association or other entity, (iii) solicit any patients of the Employer to become patients of the Employee or any other physician [, or] (iv) solicit any employees of the Employer (including professional employees) for the purpose of inducing such employee to terminate their relationship with the Employer other than those employees who joined Employer as a result of Employee’s recruitment efforts. For purposes of this Agreement, the term “solicit” shall mean seeking patronage by telephone, mail or in person.

Due to improper conduct by the Individual Defendants, including 1) Patel’s solicitation of Plaintiffs’ patients to change their primary physician designation (“PCP”) to Patel, and 2) Patel and Bhatt’s rescheduling patient appointments to dates that Chokshi was not available, Plaintiffs terminated the employment of the Individual Defendants on January 18, 2010. Plaintiffs allege that following their termination (“Termination”), Patel violated the Agreement by, *inter alia*, 1) soliciting Plaintiffs’ patients by telephone, mail and in person, directly and indirectly through

Bhatt; 2) establishing a competing medical practice at a location that was approximately 100 feet from the Office, at which Bhatt was employed; 3) visiting a patient of Chokshi's in a hospital emergency room, and changing the physician designation and the sign on the hospital room door to reflect that Patel was the treating physician; and 4) improperly removing patient information from the Office. The Complaint contains causes of action for breach of contract, misappropriation, breach of fiduciary duty, tortious interference, conversion, unfair competition and conspiracy.

On July 16, 2010, the Court granted a temporary restraining order ("TRO") directing that, pending hearing on this application and further order of this Court, Defendants were enjoined and restrained from 1) soliciting, by mail, telephone or in person, any patient of Plaintiffs to become patients of Defendant or any other physician or otherwise contacting any Patient whom Defendants treated or contacted or whose name or face became known to Defendants while employed by Plaintiff(s) as an employee or independent contractor (excluding Defendants' respective immediate family members); or 2) destroying, erasing or otherwise making unavailable for further proceedings in this matter any records or documents (including computer readable media, telephone and cell phone records) in the possession or control of Defendants which was obtained from or contains any information or which relate to any of the events alleged in the Petition of this proceeding. On August 23, 2010, the Court conducted a conference on this matter, at which time counsel for the parties 1) stipulated to the TRO continuing during the pendency of this action; and 2) agreed that a bond, as prescribed by CPLR § 6301, would not be required.

In his Affidavit in Support, Chokshi provides details regarding his medical background, the Office and his employment of the Individual Defendants. He cites examples of the Individual Defendants' breach of the Agreement, consistent with the allegations in the Complaint, and provides Affidavits of a paralegal employed by his attorney, and several patients, attesting to those violations.

In one such Affidavit, RH, an 84 year old woman,¹ affirms that she has been a patient of

¹ Although these patients have provided their names in their affidavits, the Court has elected not to print their names in this decision in consideration of the sensitive nature of the doctor-patient relationship.

Plaintiffs since approximately 2004 and was treated by both Chokshi and Patel. In February of 2010, she was contacted by a woman who identified herself as Bhatt and told her that Patel had left Plaintiffs' office and was opening an office on March 1st. Bhatt told RH that she would call back to schedule an appointment with Patel, but never called back. During the first week of April of 2010, RH visited Chokshi's office for a scheduled appointment. On her way home, Bhatt approached her, grabbed her arm and urged her to come to Patel's new office. Bhatt allegedly told RH that Chokshi was not her real doctor, and that Patel was her doctor. RH reported this incident to Chokshi.

Another patient, AS, affirms that Chokshi is her primary caregiver but she was treated on several occasions by Patel when Chokshi was not available. On April 5, 2010, while outside Plaintiffs' office waiting for her appointment, Bhatt approached her, advised her that Patel had moved his office and told her that she should come to Patel's office. AS entered Patel's office and spoke briefly with Patel who told her that he was her doctor and pressured her to switch her medical care to him. AS reported this incident to Chokshi.

In his Affirmation in Opposition, counsel for Defendants affirms as follows:

The Agreement was rescinded, by mutual consent of the parties, in early 2005 at which time Patel was engaged as an independent contractor. This new agreement did not include any restrictive covenant. Thus, the restrictive covenant, which placed limitations on Patel for three (3) years, expired in November of 2008. The Court notes that Paragraphs 26 and 27 of the Complaint allege that 1) between November of 2004 and February 2010, the terms of Patel's employment were modified; 2) Patel was paid as an independent contractor in 2005; and 3) beginning in 2006, checks issued to Patel were reported, for tax purposes, as income to Patel P.C. The Complaint also alleges that, notwithstanding these changes, the Agreement remained in full force and effect.

Counsel for Defendants refers to portions of Chokshi's Affidavit (Ex. A to Nadjari Aff.) setting forth these changes in Patel's employment status in support of Defendants' claim that the Original Agreement was rescinded. In further support of Defendants' claim that the parties reached a new employment agreement, Defendants provide copies of Patel's Internal Revenue Service Form 1099 from 2005, 2006, 2007, 2008 and 2009 (Ex. D to Nadjari Aff.) reflecting that

Patel was engaged and paid as an independent contractor. Moreover, payroll records (Ex. D to Nadjari Aff.) reflect that Patel was paid by a different entity called Atul Chokshi, M.D., P.C.

Defendants' counsel contends that rescission of the original Agreement is further evidenced by the fact that, after 2004, the P.C. no longer 1) paid Patel for his services 2) provided Patel with paid vacation; 3) paid Patel's professional fees or malpractice insurance premiums; 4) offered disability compensation; or 5) provided any retirement benefit for Patel. In his Affidavit (Ex. G to Aff. in Opp.), Patel affirms that the P.C. instituted these changes after 2004.

In addition, Defendants attribute Patel's increased involvement with Plaintiffs' patients between 2005 and 2010 to Chokshi's frequent absences from the office due to his treating patients at other offices and hospitals. Defendants note that Patel, in paragraph 19 of his Affidavit in Support, admitted that he "depended heavily upon Patel to assist me in providing medical professional services which enabled Chokshi P.C. to maintain its seven day per week patient service schedule while I also performed services at IMC, NYMH, Krishna and New Jersey. During my periodic trips to India to work with Krishna, Patel served as senior physician to the practice, substituting for me in many of my medical professional duties in internal medicine both at the Chokshi Office and at hospitals. As a trusted professional, he was not supervised during these periods."

Defendants also allege that, between 2005 and 2010, Chokshi instituted certain improper policies with which Patel and Bhatt disagreed. In his Affidavit, Patel submits that Chokshi instituted these changes "to conceal the constructive abandonment of his patients to an independent contractor" (Patel Aff. at ¶ 12). Patel affirms that he complained to Chokshi about his 1) purposeful misidentification of himself as the provider of services actually provided by Patel in bills submitted to third-party payors, 2) billing insurance companies for tests and services that were not performed, 3) improperly post-dating bills for professional services rendered so that he could fraudulently bill insurance companies, and 4) employment of unlicensed personnel to perform tasks that required licensing. Defendants submit that Patel and Bhatt were terminated in retaliation for their complaints.

Defendants also deny that Patel acted improperly in opening a new practice following his termination. As required, Defendants notified third-party payors of his new address which, in

turn, notified their insured patients of the change. Defendants provide a copy of one such notice (Ex. F to Nadjari Aff.). Moreover, in their Affidavits (Exs. G and H to Aff. in Opp.), Patel and Bhatt deny Plaintiffs' allegations. Patel denies 1) improperly soliciting Plaintiffs' patients; 2) tampering with Plaintiffs' computers; 3) misappropriating patient lists; 4) converting any property; or 5) changing records to reflect that he was the primary care physician when he was not. Bhatt affirms that she did not 1) take home patient contact information; 2) improperly contact or interact with present or former patients of Plaintiffs; 3) urge or encourage patients to change physicians; 4) tamper with Plaintiffs' computers; 5) misappropriate patient lists; 6) convert property; or 7) change records in any fashion, including to indicate falsely that Patel was the primary care physician with respect to particular patients. Defendants submit that Plaintiffs have provided no sworn allegations of fact to support their claim that Defendants misappropriated patient lists and other proprietary information, noting that those allegations are phrased in terms of what Plaintiffs believe to be true.

C. The Parties' Positions

Plaintiffs submit that they have demonstrated their right to injunctive relief by establishing that 1) Plaintiffs have a strong likelihood of success on their claims in light of a) the existence of the Agreement, b) Defendants' misappropriation of patient lists and other information which was used to establish a competing medical practice, c) Patel's improper solicitation of Plaintiffs' patients, d) Patel's establishment of a competing medical practice in close proximity to Plaintiffs' office, e) Patel's ability to practice medicine outside the geographical limitations in the Agreement, and f) Defendants' diversion of patients by improperly designating Patel as the primary care physician; 2) Plaintiffs will suffer irreparable harm without injunctive relief because a) Defendants will continue to benefit from the patient and referral relationships that Plaintiffs have developed over the years and Plaintiffs cannot calculate how much business they will lose; and b) Plaintiffs' professional reputation will continue to be tarnished by Defendants' conduct; and 3) the balance of the equities warrant injunctive relief because a) Patel agreed to the terms of the Agreement and should be required to abide by those terms; b) Patel's continued practice of medicine at a location so near Plaintiffs' office is causing continual harm to Plaintiffs; and c) Patel was well compensated by Plaintiffs

during his employment with them.

Defendants oppose Plaintiffs' application, submitting that 1) Plaintiffs have not demonstrated a likelihood of success on the merits because a) the Agreement was rescinded in 2005, as demonstrated by the evidence establishing that Patel's employment status changed to that of an independent contractor; b) the restrictive covenant at issue is unenforceable because it is overly broad in scope; c) even if the restrictive covenant is enforceable, it expired in November of 2007 in light of the rescission of the Agreement; d) the breach of fiduciary duty and breach of contract claims cannot survive, both because they are duplicative and because they are based on the Agreement which was rescinded; and e) Plaintiffs have not provided sworn factual allegations supporting their claims of tortious interference, conversion and misappropriation; 2) Plaintiffs have not demonstrated that they will suffer irreparable injury without injunctive relief as any loss they may suffer is compensable by money damages; and 3) a balancing of the equities does not favor Plaintiffs because a) a disruption in Patel's current practice may adversely affect his patients; b) Plaintiffs have engaged in fraudulent practices and, therefore, come to this matter with unclean hands; and c) Plaintiffs' willingness to reveal the identities of the patients who have provided affidavits in support demonstrates that Plaintiffs are more concerned about themselves than their patients.

RULING OF THE COURT

A. Standards for Preliminary Injunction

A preliminary injunction is a drastic remedy and will only be granted if the movant establishes a clear right to it under the law and upon the relevant facts set forth in the moving papers. *William M. Blake Agency, Inc. v. Leon*, 283 A.D.2d 423, 424 (2d Dept. 2001); *Peterson v. Corbin*, 275 A.D.2d 35, 36 (2d Dept. 2000). Injunctive relief will lie where a movant demonstrates a likelihood of success on the merits, a danger of irreparable harm unless the injunction is granted and a balance of the equities in his or her favor. *Aetna Ins. Co. v. Capasso*, 75 N.Y.2d 860 (1990); *W.T. Grant Co. v. Srogi*, 52 N.Y.2d 496, 517 (1981); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002); *Neos v. Lacey*, 291 A.D.2d 434 (2d Dept. 2002). The decision whether to grant a preliminary injunction rests in the sound discretion of the Supreme Court. *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988); *Automated Waste Disposal, Inc. v.*

Mid-Hudson Waste, Inc., 50 A.D.3d 1073 (2d Dept. 2008); *City of Long Beach v. Sterling American Capital, LLC*, 40 A.D.3d 902, 903 (2d Dept. 2007); *Ruiz v. Meloney*, 26 A.D.3d 485 (2d Dept. 2006).

Proof of a likelihood of success on the merits requires the movant to demonstrate a clear right to relief which is plain from the undisputed facts. *Related Properties, Inc. v Town Bd. of Town/Village of Harrison*, 22 A.D.3d 587 (2d Dept. 2005); *Abinanti v Pascale*, 41 A.D.3d 395, 396 (2d Dept. 2007); *Gagnon Bus Co., Inc. v Vallo Transp. Ltd.*, 13 A.D.3d 334, 335 (2d Dept. 2004). Thus, while the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that subvert the plaintiff's likelihood of success on the merits to such a degree that it cannot be said that the plaintiff established a clear right to relief. *Advanced Digital Sec. Solutions, Inc. v Samsung Techwin Co., Ltd.*, 53 A.D.3d 612 (2d Dept. 2008), quoting *Milbrandt & Co. v Griffin*, 1 A.D.3d 327, 328 (2d Dept. 2003); *see also* CPLR § 6312(c).

A plaintiff has not suffered irreparable harm warranting injunctive relief where its alleged injuries are compensable by money damages. *See White Bay Enterprises v. Newsday*, 258 A.D.2d 520 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record demonstrated that alleged injuries compensable by money damages); *Schrager v. Klein*, 267 A.D.2d 296 (2d Dept. 1999) (lower court's order granting preliminary injunction reversed where record failed to demonstrate likelihood of success on merits or that injuries were not compensable by money damages).

B. Restrictive Covenants

Covenants restricting a professional from competing with a former employer or associate are common and generally acceptable if they are reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public, and not unduly burdensome. *North Shore Hematology/Oncology v. Zervos*, 278 A.D.2d 210, 211 (2d Dept. 2000).

C. Application of these Principles to the Instant Action

The Court concludes, first, that Plaintiffs have not demonstrated a likelihood of success on the merits in light of the factual disputes regarding 1) whether the Agreement was rescinded in

2004 as a result of the changes in Patel's employment relationship which included his working as an independent contractor; 2) whether Defendants improperly solicited Plaintiffs' patients; 3) whether Defendants improperly removed information regarding Plaintiffs' patients; and 4) whether Plaintiffs terminated Defendants' employment because of Defendants' improper conduct or, rather, because Defendants expressed their disagreement with Plaintiffs' improper billing and other practices.

The Court also determines that Plaintiffs have not demonstrated that they will suffer irreparable harm without injunctive relief, in light of the Court's conclusion that Plaintiffs' injury, if any, is compensable by money damages.

Finally, the Court concludes that Plaintiffs have not demonstrated that the equities balance in their favor. The Court notes that the patients who have provided affidavits on Plaintiffs' behalf have affirmed that they immediately reported Defendants' allegedly improper conduct to Plaintiffs, suggesting that they are loyal to Plaintiffs and will continue to employ Plaintiffs as their physicians. Moreover, in light of the undisputed change in Patel's employment status as a result of his becoming an independent contractor, the Court finds less compelling Plaintiffs' argument that the Court should preclude him, at this early stage of the litigation, from continuing to practice at his current location.

In light of the foregoing, the Court denies Plaintiff's Order to Show Cause, except that the Court directs that the Temporary Restraining Order issued on July 16, 2010 and continued on August 23, 2010 with the consent of counsel, remains in effect. As per the parties' agreement, the Court will not require Plaintiffs to post a bond as a condition of this continued injunctive relief.

All matters not decided herein are hereby denied.

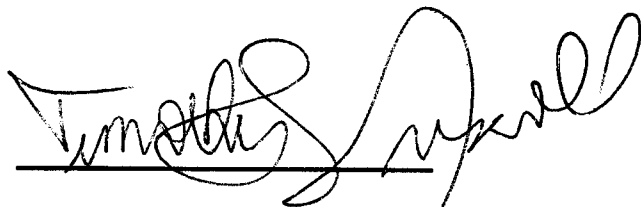
This constitutes the decision and order of the Court.

The Court reminds counsel of their required appearance before the Court on
September 29, 2010 at 9:30 a.m.

ENTER

DATED: Mineola, NY

August 27, 2010

A handwritten signature in black ink, appearing to read "Timothy S. Driscoll", written over a horizontal line.

HON. TIMOTHY S. DRISCOLL

ENTERED

AUG 31 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE