At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw , New York, on the 25th day of May, 2011.

PRESENT: HONORABLE MARK H. DADD
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

ZIBA GUY, M.D.

Plaintiff

ORDER

v.

Index No. 41864

ROMELLE JONES MALONEY, M.D.

Defendant

The plaintiff having moved for an order pursuant to CPLR 3212 granting summary judgment in her favor on the ground that there is no defense to the action, and the defendant having cross-moved for an order pursuant to CPLR 3211 (a)(1), (5), (7), or, alternatively, CPLR 3212, dismissing the complaint on the ground that the alleged contract on which the plaintiff's action is based violates General Obligations Law 5-701(a)(1) and is therefore void and unenforceable, and said motion and cross-motion having duly come on to be heard.

NOW, on reading the complaint and answer herein, and on reading and filing the notice of motion dated November 10, 2010, supported by the affirmation of Dawn J. Lanouette, Esq., attorney for the plaintiff, dated November 10, 2010, together with the annexed exhibits, accompanying memorandum of law, the affidavit of Allan J. Freidman, Esq., sworn to on October 21, 2010, with annexed exhibits, and the affidavit of the plaintiff, sworn to on November 4, 2010, with annexed exhibits; and the notice of cross-motion dated February 18,

2011, supported by the affirmation of Tanya M. Branch, Esq., attorney for the defendant, dated February 18, 2011, together with annexed exhibits; the affirmation in opposition of Tanya M. Branch, Esq., dated February 18, 2011; the reply affidavit of Dawn J. Lanouette, Esq., dated February 28, 2011, together with annexed exhibits and accompanying reply memorandum of law; and the reply affirmation of Tanya M. Branch, Esq., dated March 2, 2011; and upon hearing the arguments of counsel, and due deliberation having been had, the following decision is rendered.

The case arises from the plaintiff's employment as a medical doctor in the defendant's medical practice from August 2007 until March or April of 2008. The exact date of the end of her employment, as well as whether she was terminated by the defendant, or resigned of her own accord, remain in dispute. The plaintiff alleges that she began work in late August of 2007 after signing a 3-year employment contract with the defendant on August 9, 2007. She claims that the contract required the defendant to pay for her professional liability insurance and "tail" coverage insurance, and she is seeking money damages for the defendant's breach of these contract provisions.

The purported contract, attached to the complaint, bears the signature only of the plaintiff, however. The line designated for the defendant's signature remains blank. In her answer, the defendant denies owing the insurance premiums and denies entering into the August 9, 2007 contract. As her fourth affirmative defense, the defendant asserts that the "[o]ral agreements upon which the plaintiff allegedly relied are unavailable as violative of the provisions of the applicable Statute of Frauds."

It is not disputed that the purported contract was drafted by the defendant. The plaintiff had requested a written contract before commencing work, and the August 9, 2007, document incorporated changes requested by the plaintiff from an earlier draft of the agreement, also drafted by the defendant. In her affidavit in support of the motion, the plaintiff states that she was instructed by the defendant to "review and sign" the purported contract.

After reviewing it, she did sign it. Later, prior to starting work, she took the signed document to the defendant's office with the intention of delivering it to the defendant, but found that the defendant was not in the office at the time. The plaintiff relates that the office manager, after appearing to communicate with the defendant by telephone, took the document from her, stating to her that the defendant "would sign the original and keep it on file in her office."

New York's Statute of Frauds renders void any agreement which "[b]y its terms is not to be performed within one year from the making thereof" unless that agreement "be in writing, and subscribed by the party to be charged" (General Obligations Law §5-701[a][1]). Manifestly, the purported contract submitted by the plaintiff, upon which her action is based, is not subscribed by the party to be charged, namely the defendant. If the purported contract is found to be void and unenforceable pursuant to the Statute of Frauds, the plaintiff will have failed to meet her burden upon her motion, and the defendant will have set forth a sufficient basis for the dismissal of the action. Initially, therefore, the Court must examine the purported contract to determine whether, by its terms, it could not be performed within one year.

As noted above, the purported contract sets an employment term of three years. During that definite term, the plaintiff, referred to as "Physician" in the purported contract, is to be employed by the defendant, referred to as "Employer," as a doctor providing "professional medical services on a full time basis in the speciality of Obstetrics and Gynecology" (subsections 1.2 and 3.1). Such medical services must be performed "in accordance with the rules of ethics of the medical profession" and "in accordance with the appropriate standard of care for his/her medical profession and specialty" (subsection 3.6).

Subsection 2.2 allows for the voluntary termination of the employment relationship upon two months notice by either party, but this option becomes available only after the three-year term has expired without an extension of the agreement. Section 10, "Termination," contains a number of provisions which permit the early termination of the agreement. The Court finds, however, that virtually all of these provisions entail breaches of

the contract. For instance, should "Physician" lose her medical license (subsection 10.1 [1][a]) or violate the State Medical Practice Act (subsection 10.1[1][c]), she would certainly also be in breach of her duty under subsection 3.6 to perform medical services "in accordance with the rules of ethics of the medical profession" and "in accordance with the appropriate standard of care for his/her medical profession and specialty." Similarly, should "Physician" have her medical staff privileges at Sound Shore Medical Center suspended or revoked (10.1[2][d]), she would clearly also be in breach of her duty under subsection 3.3 to "remain on active staff at Sound Shore Medical Center."

The fact that a contract may end in breach within one year will not remove the bar of the Statute of Frauds (Solomon v. Urban Dental Management, 39 A.D.3d 529, 531 [2nd Dept., 2007]). Where, however, a contract contemplates a mode of termination within one year at the discretion of either party which does not entail a breach of the contract, that contract will not be rendered void and unenforceable by the Statute of Frauds (North Shore Bottling v. C. Schmidt and Sons, 22 N.Y.2d 171, 176-177 [1968]; Blake v. Voigt, 134 N.Y. 69 [1892]; see also D&N Boening v. Kirsch Beverages, 63 N.Y.2d 449 [1984]).

In this regard, it is noted that subsection 2.3 of the purported contract establishes that "the first three (3) months of employment shall be probationary, with periodic informal reviews of Physician's performance by Employer." Subsection 10.1 (2)(c) then gives to "Employer" the power to terminate the employment agreement "[i]f Physician is found during the probationary review process, to fail to perform his/her duties as measured by criteria set in the discretion of the Employer." Under this provision, it is possible under the terms of the purported contract for "Physician" to be dismissed within the first three months of employment at the discretion of "Employer," despite fully performing her duties "in accordance with the rules of ethics of the medical profession" and "in accordance with the appropriate standard of care for his/her medical profession and specialty." Thus, during the probation period "defendant could fire the plaintiff on account of conduct that would not constitute breach of contract," and

consequently the Court finds that the purported contract falls outside the statute (Ohanian v. Avis Rent a Car System, 779 F.2d 101, 108 [2nd Cir. 1985]).

Having found that the purported contract is not void, the Court further finds that the plaintiff's submissions are sufficient to establish a prima facie case that the purported contract, although not signed by the defendant, contains the terms of the employment agreement reached between the plaintiff and the defendant, and that under that agreement the defendant is obligated to pay the plaintiff's professional liability insurance premiums (see subsection 7.3). The defendant contends, however, that the purported contract is merely a "rough draft"of a never consummated written employment agreement which does not accurately state the terms of the oral agreement under which the plaintiff began work in August 2007 (exhibit G attached to Cross-Motion, deposition of defendant, page 27). Although the defendant acknowledges paying the plaintiff's professional liability insurance premiums while the plaintiff was employed at her office, she contends that, after the plaintiff resigned her position without notice on March 31, 2008, she had no obligation under the employment agreement to pay any further insurance premiums for the plaintiff. Given that the actual terms of the employment agreement remain in dispute – as well as the date when, and the manner in which, that agreement terminated – the granting of summary judgment to either party is precluded.

NOW, THEREFORE, it is hereby

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the defendant's cross-motion for dismissal or summary judgment is also denied.

Dated: May 25, 2011

Acting Supreme Court Justice

GRANTED
MAY 25 2011
CHIEF CLERK
WYOMING COUNTY SUPREME COURT