Patients Med., P.C. v Kellman
2011 NY Slip Op 31626(U)
June 14, 2011
Supreme Court, New York County
Docket Number: 601722/2009
Judge: Louis B. York
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[* 1]
SCANNED ON 6/17/2011

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Patients Medical

INDEX NO. 601722/09

MOTION DATE

- v -

MOTION SEQ. NO. 03

Kellman, Raphael

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED

JUN 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/14/11

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2
---X
PATIENTS MEDICAL, P.C.,

Index No. 601722/2009

Plaintiff,

-against-

RAPHAEL KELLMAN, M.D.,

Defendant.
---X

FILED
JUN 17 2011
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.S.C.:

On December 28, 2005, Patients Medical, P.C. ("Plaintiff"), a medical practice located at 800 Second Avenue in Manhattan, entered into both a Consulting Agreement and an Asset Purchase agreement ("Purchase Agreement") with Dr. Raphael Kellman ("Defendant"), who at the time also had a medical practice in Manhattan.[1] The Consulting Agreement created a contract between Plaintiff and Defendant for Defendant's services on an "as needed" basis. The Purchase Agreement arranged for Patients Medical to purchase Kellman's existing practice, including his patient lists, and his website domain, www.mindbodyny.com. An amendment to the Purchase Agreement stipulated that Patients Medical would help with collection of all outstanding receivables and retain a portion of those receivables. Each agreement was executed on the same day and each was contingent on the other agreement becoming effective.

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[1]The Court located Plaintiff's address on the company's website. The parties do not clarify the specific locations of the practice. Although some of the documents the parties have provided refer to other addresses, it appears that there is only one location which Plaintiff operates as a medical office.

The parties agree that the Consulting and Purchase Agreements each contain a non-compete and non-solicit clause. The non-compete clause – at page 3, section 8(b) of the Consulting Agreement and at paragraph 14 of the Purchase Agreement – states:

> **So long as Consultant is engaged by Company and for a period of three (3) years after such engagement is terminated**, whether voluntary or involuntary, Consultant will not…directly or indirectly, own, manage, operate or control, or be employed in a capacity similar to the position(s) held by Consultant with the Company, by any company or other for-profit entity engaged in the provision of medical services…**This restriction shall apply to the five (5) boroughs of New York.**" (emphasis added).

In addition, the Consulting Agreement contains, at paragraph 18, a severability provision which states that (1) if a court rules that any portion of the agreement is unenforceable, the remainder of the agreement remains valid, and (2) the invalid section of the agreement "shall be amended only to the extent necessary to render it valid and enforceable." The survival clause at paragraph 20 provides that "Sections 6(d), 7, 9[,] 11 and this Section 20 shall survive any termination or expiration of the agreement. The term of the agreement is set at 90 days, but the agreement provides that it "may be mutually renewed upon the mutual consent of the parties." Consulting Agreement, ¶ 4.

After he had worked as a consultant for Patients Medical for approximately a year and a half, Defendant was terminated on March 30, 2007. Plaintiff claims the termination occurred because Defendant opened medical offices in Brooklyn and New York City and solicited patients in all five boroughs, including Plaintiff's patients, in violation of the Consulting and Purchase Agreements.

Plaintiff commences this action based on Defendant's alleged breach of the Consulting Agreement, which prohibits Defendant from competing with and/or soliciting Plaintiff's patients.

Plaintiff claims this breach has caused significant damages and continues to cause irreparable damage to Plaintiff's business. Specifically, Plaintiff alleges that Defendant fraudulently induced Plaintiff to enter into the Consulting and Purchase Agreements. Defendant moves to dismiss the complaint and asserts counterclaims based on the alleged over breadth of the non-compete and non-solicitation clauses.

Currently, Plaintiff moves for a protective order before releasing information which defendant sought in discovery demands. Defendant opposes Plaintiff's motion and cross-moves to dismiss the complaint, sever his counterclaims and strike the reply to his counterclaims. The motion for a protective order will be moot if Defendant's motion is granted in full. In order to determine if a protective order is needed, therefore, the court will analyze Defendant's cross-motion in response to the protective order first.

NON-COMPETE/NON-SOLICITATION CLAUSES

As stated, the agreements in question included a non-compete and a non-solicit clause. The non-solicit clause, in the Consulting agreement, prohibits Defendant from soliciting Plaintiff's patients and implements the same time and geographic restrictions as the non-compete clause above. The parties disagree as to the term and validity of these clauses. Plaintiff contends the clauses were in effect and valid until March 30, 2010 and Defendant directly violated the terms of the two agreements. Defendant contends that the terms expired on March 27, 2006. Even if the provisions were valid until March 30, 2010, defendant alternatively claims that the clauses were too broad and not enforceable.

Initially, defendant contends that the non-compete and non-solicit provisions in the Consulting Agreement have expired. Section 4 of the Consulting Agreement specifies that "the

term of [the] Agreement shall commence on the Effective Date [2/28/2005] and shall continue for a period of ninety (90) days thereafter." Defendant contends that the three year non-compete and non-solicit provisions took effect after the ninety-day term set forth in the contract. This would mean that the three year term on the non-compete and non-solicit clause expired on March 27, 2006 and therefore Defendant did not violate the terms of the agreement. Defendant points out, in particular, that the non-compete and non-solicit clauses were not included in the survival clause which the Court described earlier in this decision. Instead, only sections 6(d), 7, 9 and 11 explicitly survive the ninety-day term of the Consulting Agreement. Defendant further claims that if the non-complete and non-solicit clauses had survived the ninety-day term, they ran from the termination of the agreement, March 27, 2006, and therefore expired on March 26, 2009. This is not a logical interpretation of the intention of the parties pursuant to these clauses. The last sentence of section 4, the "Term" provision, of the Consulting Agreement, states "This Agreement may be mutually renewed upon the mutual consent of the parties." Plaintiff and Defendant continued to work together, abiding by all provisions in the Consulting and Asset Purchase Agreements, until Defendant's termination on March 30, 2007. Therefore, the non-solicit and non-compete clauses would have gone into effect on that day, and therefore been valid until March 30, 2010.

The Court next turns to defendant's alternative argument – that even if these clauses were valid until March 30, 2010, they are too broad in temporal scope and geographic region to be enforced. Restrictive covenants such as the ones at issue here are not favored by the courts. Thus, they will be enforced only "to the extent reasonable and necessary to protect valid business interests." *Morris v. Schroder Capital Management Int'l*, 7 N.Y.3d 616, 620, 859 N.E.2d 503,

506 (2006); *accord Gilman & Ciocia, Inc. v. Randello*, 55 A.D.3d 871, 872, 866 N.Y.S.2d 334, 335 (2nd Dept., 2008). Courts will uphold the validity of the agreement only if (1) it is no greater than necessary to protect the employer's legitimate business interests, (2) it does not cause the employee undue hardship, and (3) it does not injure the public. *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 388-89, 690 N.Y.S.2d 854, 856-57 (1999). Under this standard, covenants can 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." *Ricca v. Ouzounian*, 51 A.D.3d 997, 998, 859 N.Y.S.2d 238, 238 (2nd Dept., 2008). Greater weight is accorded to these agreements where, as here, the agreement involves what the courts describe as learned professionals. *See id.* at 389, 690 N.Y.S.2d at 857. This includes, in particular, medical professionals. "Each case must, of course, depend, to a great extent, upon its own facts." *Karpinski v. Ingrasci*, 28 N.Y.2d 45, 49, 320 N.Y.S.2d 1, 4 (1971).

Finally, if a restrictive covenant is overbroad but has some merit, the Court is permitted to modify it accordingly. *BDO Seidman*, 93 N.Y.2d at 394, 690 N.Y.S.2d at 860-61. However, the Court's ability to modify what essentially is the parties' contract is limited. If the modification "alter[s] the original contract so drastically as to preclude a present finding that [either party] would have accepted the contract under those terms," judicial modification is not allowed. *Crippin v. United Petroleum Feedstock, Inc.*, 245 A.D.2d 152, 153, 666 N.Y.S.2d 156, 156-57 (1st Dept., 1997).

First, in the context of the medical profession, the time frame at issue is not unreasonable. Similar time restraints have been deemed acceptable in similar circumstances. *See, e.g., Ricca v. Ouzounian*, 51 A.D.3d 997, 859 N.Y.S.2d 238 (2nd Dept., 2008)(two-year restriction upheld

against surgeon); *Battenkill Veterinary Equine P.C. v. Cangelosi*, 1 A.D.3d 856, 768 N.Y.S.2d 504 (3rd Dept., 2003)("Battenkill")(three-year restriction upheld against veterinarian); *Novendstern v. Mount Kisco Medical Group*, 177 A.D.2d 623, 576 N.Y.S.2d 329 (2nd Dept., 1991)(three-year covenant deemed enforceable against physician); *Awwad v. Capital Region Otolaryngology Head & Neck Group, LLP*, No. 5334/07, 2007 Slip Op. 52492(Sup. Ct. Albany County Nov. 27, 2007)(avail at 2007 WL 4623509)(preliminary injunction granted with respect to three-year restriction against otolaryngologist). Here, especially, where Plaintiff purchased Defendant's practice, there is an additional interest in protecting its purchase from Defendant while Plaintiff built up its own goodwill as to these patients. Thus, Defendant's arguments as to the duration of the non-compete and non-solicit would fail if that was the only challenge he'd asserted.

Second, the Court must consider the other aspects of the non-compete and non-solicit agreements. This is where the agreement overreaches. In virtually all of the cases which upheld two or three year covenants, the geographic scope was more limited, the restriction generally pertained only to the practitioner's area of expertise, and the ban usually applied only to present clients/patients of the practice. In *North Shore Hematology/Oncology v. Zervos*, for example, the Second Department found a preliminary injunction was properly issued where the physician was restrained from 1) soliciting former patients of the employer, 2) soliciting relationships with medical professionals who'd referred patients to the employer, 3) taking fees for services the employer had rendered, and 4) operating within a 3-mile radius of the employer's office. *North Shore Hematology/Oncology v. Zervos*, 278 A.D.2d 210, 717 N.Y.S.2d 250 (2nd Dept. 2000)("Zervos"). The covenant in *Awwad* restrained the plaintiff, who'd joined a forty-three-

year-old clinic and practiced a specialized area of medicine (otolaryngology, or the treatment of ear, nose and throat conditions), from competing with his former employer within thirty miles of one of the its five clinics. The court found the restraint reasonable because it concluded that the plaintiff, who'd just completed his residency when he joined the defendant, had the ability to steal some of the goodwill that had accrued to the defendant over the years; and, because "[e]nforcement of the covenant here would leave [the plaintiff] free to practice otolaryngology in all but a small portion of New York State (including the region where he did his residency) and anywhere else in the country." *Awwad*, 2007 WL 4623509, at *7. It was also critical that there were only five similar clinics in the affected region; therefore, any breach by the plaintiff could damage the defendant's practice. The court in *Battenkill* restricted the defendant from practicing within a thirty-five-mile radius of the plaintiff's clinic. In its decision, the Third Department noted that the radius of restriction was narrower than the plaintiff's actual practice area. *Battenkill*, 1 A.D.3d at 858, 768 N.Y.S.2d at 506.

In the case at hand, there are many critical distinctions. As noted earlier, it appears that plaintiff has one operating medical office, at 2nd Avenue between 42nd and 43rd Streets. Yet, the agreement at issue prohibit defendant from practicing medicine in the entire New York City region, an area which exceeds 300 square miles. This obviously goes well beyond the scope of the prohibition in all the cited cases. Moreover, unlike the agreement in *Zervos*, which essentially prohibited the defendant from stealing the plaintiff's clients and its medical referral contacts, this agreement bars Defendant from obtaining any patients whatsoever in the region. Finally, unlike those restrictive covenants which barred one party from practicing in a limited area in a small city with a smaller pool of both patients and doctors, the non-compete and non-

solicit agreements here bar Defendant from practicing in a city with millions of potential patients and thousands of doctors and clinics. The potential damage to Plaintiff's practice is much more remote if, for example, Defendant were to open an office in another borough and solicit patients with no knowledge of Plaintiff's office/s or practice.

For all these reasons, the agreements are too broad to be enforceable as written. This does not mean that the covenants should be stricken altogether. As stated earlier, *see supra p. 5*, restrictive covenants pertaining to doctors are enforced more frequently than covenants not involving one of the "learned professions." In addition, here, defendant sold his medical practice to plaintiff. "[W]hen the intangible asset of good will is sold along with the tangible assets of a business, the seller makes an implied covenant to refrain from soliciting the former customers of the business in order to prevent the seller from taking back what he has purported to sell." *Autz, M.D., D.P.M. v. Fagan*, 16 Misc. 3d 1140(A), 851 N.Y.S.2d 56 (Sup. Ct. Nassau County Sept. 6, 2007)(avail at 2007 WL 2701305, at *3).

Finally, as stated, Courts are permitted to modify a restrictive covenant in order to render it enforceable, *see BDO Seidman*, 93 N.Y.2d at 394, 690 N.Y.S.2d at 860-61, as long as it does not alter the contract "so drastically as to preclude a present finding that [either party] would have accepted the contract under those terms." *Crippin v. United Petroleum Feedstock, Inc.*, 245 A.D.2d at 153, 666 N.Y.S.2d at 156-57. Here, the Consulting Agreement contains a severability provision which provides that an invalid section of the agreement may be amended to render it enforceable. The existence of this provision indicates the parties' willingness to accept an amended covenant, if the covenant must be amended to render it enforceable.

Therefore, the Court finds that the non-compete and non-solicit agreements are

enforceable for the three-year-period contained in those agreements, but only bar Defendant from (1) opening a practice within 10 miles of any of the offices Plaintiff had during the period of the parties' business relationship[2]; and (2) from soliciting any of the patients he treated at the time he sold his practice to Plaintiff and from soliciting any of Plaintiff's patients. Defendant's cross motion as it relates to the first through third causes of action is denied, and the first through third causes of action remain in effect as limited by the amended form of the restrictive agreements.

FOURTH THROUGH SIXTH CAUSES OF ACTION

As for Plaintiff's fourth cause of action, for conversion, Defendant believed – not without basis, as there are ambiguities in the pleadings – that this claim also stemmed from the alleged solicitation of Plaintiff's clients. However, Plaintiff has clarified that the cause of action is based on the alleged conversion of certain accounts receivable which Defendant sold to Plaintiff. A cause of action does lie for the conversion of accounts receivable. *E.g.*, *Fopeco, Inc. v. General Coatings Technologies, Inc.*, 107 A.D.2d 609, 483 N.Y.S.2d 1015 (1st Dept. 1985)(including this claim); *Two Clinton Square Corp. v. Friedler*, 91 A.D.2d 1193, 459 N.Y.S.2d 179 (4th Dept. 1983)(same). Any arguments as to the factual basis for the cause of action have no weight here, in the context of a motion to dismiss under CPLR § 3211.

Defendant incorrectly argues that Plaintiff's fifth cause of action, which alleges breach of the duty of loyalty, cannot lie against an independent contractor. *See Feiger v. Iral Jewelry, Ltd.*, 85 Misc. 3d 994, 999, 382 N.Y.S.2d 216, 219 (Sup. Ct. N.Y. County 1975)(stating that "regardless of whether plaintiff was an employee or simply an agent, ... he owed defendant good

[2] The Court believes that Plaintiff has one office, on Second Avenue between 42nd and 43rd Streets, but this is not entirely clear from the papers submitted.

faith and loyalty, but finding no breach in this instance), *aff'd*, 52 A.D.2d 524, 382 N.Y.S.2d 221 (1st Dept., 1976), *aff'd*, 41 N.Y.2d 928, 394 N.Y.S.2d 626 (1977); *see also Barber v. Actknowledge, Inc.*, No. 33224/08, 2009 slip op. 51419(U)(Sup. Ct. Kings County June 30, 2009)(avail at 2009 WL 1912381, at *2)(asserting that plaintiff was correct to rely on *Feiger* for proposition that independent contractor is an agent and thus the duty of loyalty applies). Instead, the question is one of fact, inappropriate for disposition under CPLR § 3211. *See Barber*, 2009 WL 1912381, at *2. Thus, this claim survives the cross-motion.

In its sixth cause of action, Plaintiff alleges that Defendant fraudulently induced Plaintiff to enter into the Consulting and Purchase Agreements. In moving to dismiss this claim, defendant points to case law that states "a breach of contract claim [may not] be converted into a fraud claim by the mere additional allegation that the contracting party did not intend to meet his contractual obligation." *Golub Assocs. Inc.v. Lincolnshire Mgmt., Inc.*, 1 A.D.3d 237, 767 N.Y.S.2d 571 (1st Dept. 2003)(citation and internal quotation m arks omitted). Moreover, Plaintiff has not shown that its claim amounts to more than "the additional allegation that [Defendant] did not intend to meet his contractual obligation." Id. Finally, Defendant sold his practice and then worked with Plaintiff for approximately a year and a half before his termination; a relationship of this length militates against the idea that Defendant entered into the agreements with fraudulent intent. There is no showing that when he entered the contract or during this period of his employment he committed any acts of fraud. Plaintiff's allegations are insufficient to create a valid argument. Thus, this claim should be dismissed.

PROTECTIVE ORDER

Plaintiff seeks a protective order and Defendant seeks sanctions and/or an order to compel the discovery of Plaintiff's patient lists. Plaintiff does not refuse to hand over the list to Defendant, but is unwilling to do so unless Defendant signs a confidentiality agreement. Defendant claims he already knows the names of many of the patients, as he sold his practice to Defendant. In addition, he claims that Plaintiff's motion for a protective order is a tactic to stall discovery.

Patient lists often are treated as confidential information. *Prohealth Care Assoc., LLP v. April,* No. 15830-03 slip op. 50919(U)(Sup. Ct. Nassau County Aug. 18, 2004)(avail at 2004 WL 1872915, at *3)(citing *Alan Dampf, P.C. v. Bloom*, 127 A.D.2d 719, 512 N.Y.S.2d 116 (2nd Dept., 1987)); *see Battenkill*, 1 A.D.3d at 857 n.1, 768 N.Y.S.2d at 505 n.1 (parties conceded confidentiality of list in their original agreement). Moreover, as Plaintiff notes, if the list is maintained by a medical corporation, as opposed to a partnership, the list is the property of the corporation rather than of any particular doctor. *See Orthopaedic Assoc. of Rochester, P.C. v. Nicoletta*, No. 2004/133443 (Sup. Ct. Monroe County March 29, 2005)(avail at 2005 WL 4712264, at *2-3). Also, as Defendant has noted, Plaintiff purchased at least a portion of its client list from Defendant. Thus, the list has monetary as well as proprietary value. Under the circumstances, Plaintiff's desire to protect the patient list is reasonable and the scope of the agreement itself appears to be suitably limited. Defendant has proffered no reasonable legal argument against the confidentiality agreement. The Court will not coerce Defendant to sign the document but rules that if Defendant wants to obtain a copy of the client list, then he must sign the confidentiality agreement.

Accordingly and for the reasons set forth in this decision, it is

ORDERED that the motion for a protective order is granted to the extent that Plaintiff is directed to provide a copy of the patient list within 30 days of the signing of the confidentiality agreement, and is *not* required to provide the discovery absent the signing of the confidentiality agreement; and it is further

ORDERED that defendant's cross-motion is granted to the extent of severing and dismissing the sixth cause of action and allowing the first through third causes of action to stand based on the modified restrictive covenant; and it is further

ORDERED that the cross-motion is denied in full with respect to the fourth and fifth causes of action; and it is further

ORDERED that the prong of the cross-motion seeking to sever the counterclaims and continue to litigate them is denied as moot. As the action survives, there is no need to sever the counterclaims.

Dated: 6/14/11

ENTER:

LOUIS B. YORK, J.S.C.

FILED

JUN 17 2011

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