

Weg v Kaufman

2011 NY Slip Op 34302(U)

July 28, 2011

Supreme Court, Westchester County

Docket Number: 8875/11

Judge: Richard B. Liebowitz

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
STUART L. WEG, M.D., STUART L. WEG, M.D.,
L.L.C., WILLIAM P. TSENG, M.D., and WILLIAM
P. TSENG, L.L.C.,

Plaintiffs,

-against-

BRUCE D. KAUFMAN, M.D., OUTPATIENT
MANAGEMENT PHYSICIAN SERVICES,
L.L.C., OUTPATIENT MANAGEMENT PHYSICIAN
SERVICES ESSEX, L.L.C., OUTPATIENT
MANAGEMENT PHYSICIAN SERVICES ALBANY,
L.L.C., OUTPATIENT MANAGEMENT SERVICES,
L.L.C., and BRUCE D. KAUFMAN, M.D., P.C.,

Defendants.

-----X
LIEBOWITZ, J.

**FILED
AND
ENTERED**
ON July 29 2011
**WESTCHESTER
COUNTY CLERK**

DECISION AND ORDER
Sequence No. 1

Index No. 8875/11

FILED

JUL 29 2011

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following documents numbered 1 to 19 were read in connection with plaintiffs' motion for a preliminary injunction preventing defendants from dissipating assets, for an Order appointing a receiver or custodian to maintain the *status quo*, for an Order directing the immediate production of books and records for inspection by plaintiffs, for an Order declaring certain restrictive covenants null and void and for an Order disqualifying the law firm of Simon

& Partners, LLP (“S &P”) from representing defendants in this action.

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This action was brought by plaintiffs Stuart L. Weg, M.D., Stuart L. Weg, M.D., L.L.C., William P. Tseng, M.D., and William P. Tseng, L.L.C. to recover damages from defendant Bruce D. Kaufman, M.D. (“Dr. Kaufman”) and various business entities with which he is affiliated. As of the date of the oral argument held in connection with this motion, defendants had not yet interposed an answer in this action.

Bruce Kaufman, M.D. P.C. (“BKMDPC”) is a professional services corporation engaged in the practice of anesthesiology, internal medicine and pain management. Dr. Kaufman is the sole member and manager of BKMDPC. Dr. Kaufman is also the sole member and manager of several other professional services companies, including but not limited to, defendants Outpatient Management Physician Services, L.L.C., Outpatient Management Physician Services Essex, L.L.C., Outpatient Management Physician Services Albany, L.L.C., and Outpatient Management Services, L.L.C.

On November 28, 2001, Stuart L. Weg, M.D. (“Dr. Weg”) entered into an Independent Contractor Agreement with BKMDPC, to provide medical services. A portion of this Agreement was assigned and amended by the parties on October 6, 2006. This “Assignment and Amendment” was signed by Dr. Weg alone. On June 15, 2007, Dr. Kaufman and Dr. Weg attempted to execute another Independent Contractor Agreement, two versions of which have been submitted to the Court, one between “Outpatient Management Services, L.L.C. and Stuart L. Weg, M.D.L.L.C. (“SLWLLC”) and another between “Bruce D. Kaufman, M.D.P.C. and

Stuart L. Weg, M.D.L.L.C.” Once again the latter agreement is signed only by Dr. Weg, as a member of SLWLLC. The Agreement between Outpatient Management Services, L.L.C. and SLWLLC remains unsigned.

Likewise, on June 15, 2007, William P. Tseng, M.D. executed Independent Contractor Agreements as a member of William P. Tseng, Physician, L.L.C with both Outpatient Management Services, L.L.C and Bruce D. Kaufman, M.D.P.C. On January 28, 2010, an “Amended and Restated Operating Agreement of Outpatient Management Physician Services, L.L.C” was executed by Dr. Kaufman and Dr. Weg.

On April 29, 2009, Outpatient Management Physician Services, Essex, L.L.C. and Outpatient Management Physician Services, L.L.C. (“OMS Parent Company”) entered into an exclusive Anesthesia Service Agreement with Omni Eye Specialists, P.A., (“The Company”) in New Jersey, whereby the managing members of OMS, namely, the OMS Parent Company, Bruce Kaufman, M.D. and Stuart Weg, M.D. have exclusive control over its business. Additionally, Dr. Kaufman was named as the initial Director of Anesthesiology at the Center. The terms of the Agreement provide that only Dr. Kaufman, Dr. Weg or another managing member of OMS could hold the title of Director of Anesthesiology. Section 7(c) of the Agreement specifically states that the “.. [a]greement may be terminated by the Company by notice effective immediately, (1) if both Kaufman and Weg are terminated as a Center Anesthesia Service Provider or as applicable, the Center’s Director of Anesthesia (identified in Section (2) at such time or within 5 business days following such notice....” The Company exercised this termination clause on December 22, 2010.

Plaintiffs have brought the instant motion for a preliminary injunction and for a

variety of other relief. Defendants oppose all the avenues of relief sought by plaintiffs.

“To be entitled to a preliminary injunction, the movant must establish (1) the likelihood of success on the merits, (2) irreparable injury absent granting the preliminary injunction, and (3) a balance of the equities in the movant’s favor.” Ying Fung Moy v. Hohi Umeki, 10 A.D.3d 604 (2nd Dept., 2004). See also, Hightower v. Reid, 5 A.D.3d 440 (2nd Dept., 2004). A preliminary injunction is used to maintain the *status quo* and further prevent a party from dissipating property that could be used to satisfy a judgment. Rattner & Assoc. v. Sears, Roebuck & Co., 294 A.D.2d 346 (2nd Dept., 2002).

Plaintiffs contend that the immediate appointment of a receiver or custodian to take control of all of defendants’ bank accounts and collection of receivables is necessary to maintain the *status quo*. Drs. Weg and Tseng further contend that the appointment of a receiver or custodian will prevent Dr. Kaufman from dissipating the assets of defendant entities which would cause such entities to have various outstanding financial obligations. Both plaintiffs and defendants acknowledge that Dr. Kaufman is the sole manager of OMPS, thus having exclusive control over the books, records and bank accounts. Notably, the Operating Agreement executed by Dr. Weg and Dr. Kaufman, clearly authorizes Dr. Kaufman to have such control over the financial documents.

“The appointment of a temporary receiver is an extreme remedy resulting in the taking and withholding of possession of property from a party without an adjudication on the merits.” Schachner v. Sikowitz, 94 A.D.2d 709 (2nd Dept., 1983). See also, Hahn v. Garay, 54 A.D.2d 629 (1st Dept., 1976). In the instant case, plaintiffs have failed to demonstrate sufficient waste and/or mismanagement of defendant entities or that defendant entities are at risk of

insolvency to warrant appointment of a receiver or custodian. Absent a showing by plaintiffs of dissipation of assets or removal of those assets from the state, there is no basis to appoint a temporary receiver. At the Airport LLC v. Isata, LLC, 15 Misc.3d 1145 (Sup. Ct., Nassau Co., 2007). As such plaintiff's request for a preliminary injunction to appoint a receiver or custodian is denied.

The Independent Contractor Agreements signed by both Dr. Weg and Dr. Tseng, individually, contain restrictive covenants which would restrict their practice of medicine for a period of two (2) years, in a specified area with certain specified persons. Plaintiffs contend that the restrictive covenants are overly broad, unduly burdensome, serve to impede plaintiffs' ability to work and further serve to monopolize all ocular anesthesia services causing irreparable harm. Plaintiffs, thus, seek to have the restrictive covenant declared null and void.

New York courts will enforce a restrictive covenant not to compete where the restraint "(1) is *no greater* than is required for the protection of the legitimate interest of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public." BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388-9 (1999). "[U]nder New York law, a covenant not-to-compete that is reasonable in time and geographic scope will be enforced 'to the extent necessary (1) to prevent an employee's solicitation or disclosure of trade secrets, [and] (2) to prevent an employee's release of confidential information regarding the employer's customers.'" Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dunn, 191 F. Supp. 2d 1346 (M.D.Fla, 2002) citing Ticor Title Insurance Co. v. Cohen, 173 F.3d 63, 70 (2nd Cir., 1999).

It is well established in New York that restrictive covenants "generally will be enforced against medical and dental professionals if such covenants are reasonably limited

temporally and geographically and without being harmful to the public or unduly burdensome, serve the acceptable purpose of protecting the former employer or associate from unfair competition.” Rifkinson-Mann v. Kasoff, 226 A.D.2d (2nd Dept., 1996). In Gelder Medical Group v. Webber, 41 N.Y.2d 680 (1977), the Court determined that a restrictive covenant not-to-compete between a physician and a medical group, for a period of five years, within a 30 mile radius was reasonable and enforceable. The restrictive covenant in this matter specifically restricts plaintiffs from practicing ocular anesthesiology, internal medicine or pain management for a period of two years within a 15 mile radius of each facility they previously worked or with any facility or person listed on Schedule A which is attached to said restrictive covenant. As such, plaintiffs’ application for an Order declaring the restrictive covenants null and void is denied.

Plaintiffs seek an order requiring the immediate production of books and records of defendant entities for inspection by Dr. Weg and or his designee. Article VI entitled “Books and Records; Accounting Matters; Bank Accounts” of the Amended and Restated Operating Agreement of Outpatient Management Physician Services, L.L.C dated January 25, 2010 clearly states the procedure for obtaining the documents plaintiffs now seek. Plaintiff s have failed to show that they exercised the conditions and requirements as set forth in the Operating Agreement to obtain these documents. As such, the requested relief is denied.

Plaintiffs also seek to have S & P disqualified from this matter as counsel for defendant entities. The request for disqualification is based on plaintiffs’ assertion that S & P appeared on behalf of all defendants, including Outpatient Management Physician Services, L.L.C., in the New Jersey action. Plaintiffs then conclude that since plaintiff, Stuart Weg, M.D.,

is a 49% owner of Outpatient Management Physician Services, L.L.C., S & P represents both plaintiff and defendant. There is an inherent flaw in this logic, which would prevent not only S & P, but any attorney from representing defendant, Outpatient Management Physician Services, LLC., where Dr. Weg is the plaintiff, since Dr. Weg allegedly continues to hold a 49% share in this entity.

Plaintiffs further contend that Dr. Weg had several telephone meetings with S & P during which various issues pertinent to this litigation were discussed. A party seeking to disqualify an attorney or law firm on the grounds of prior representation must establish the following "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matter involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse." Medical Capital Corp. v. MRI Global Imaging, Inc., 27 A.D.3d 427, 428 (2nd Dept., 2006), citing Gussack v. Goldberg, 248 A.D.2d 671, 672 (2nd Dept., 1998), quoting Tekni Plex, Inc. v. Mayer & Landis, 89 N.Y.2d 123,131 (1996). See also, 22 NYCRR §5-108.

S & P contends that the firm has a longstanding relationship as personal counsel to Dr. Kaufman and as counsel to OMPS. In this capacity, S & P spoke with Dr. Weg only as an employee of OMPS. S & P further contends that any legal opinions rendered did not involve the operation of the Kaufman entities at issue in this matter. In the instant matter, since the exact relationship between S & P and Dr. Weg is unclear, a hearing is required to determine the extent of said relationship, if any.

On the basis of the foregoing, it is hereby

ORDERED that plaintiffs' motion for a preliminary injunction preventing defendants from dissipating assets is denied; and it is further

ORDERED that plaintiffs' motion for an Order appointing a receiver or custodian to maintain the *status quo* is denied; and it is further

ORDERED that plaintiffs' motion for an Order directing the immediate production of books and records for inspection by plaintiffs is denied; and it is further

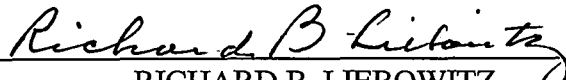
ORDERED that plaintiffs' motion for an Order declaring certain restrictive covenants null and void is denied; and it is further

ORDERED that plaintiffs' motion for an Order disqualifying the law firm of Simon & Partners, LLP from representing defendants in this action is granted to the extent that a hearing will be held to determine if Simon & Partners, LLP should be disqualified from representing defendants in this action; and it is further

ORDERED that the parties appear in the Settlement Conference Part, Room 1600, on August 16, 2011 at 9:30 a.m. in order to schedule a hearing to determine if Simon & Partners, LLP should be disqualified from representing defendants in this action.

This constitutes the Decision and Order of this Court.

Dated: White Plains, New York
July 28, 2011


RICHARD B. LIEBOWITZ
SUPREME COURT JUSTICE