Orthopaedics, Spine and Sports Medicine, LLC v Avshalumov
2013 NY Slip Op 34104(U)
April 11, 2013
Supreme Court, Nassau County
Docket Number: 602649/12
Judge: Stephen A. Bucaria
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SHORT FORM ORDER **ORIGINAL**

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/IAS, PART 1
NASSAU COUNTY

ORTHOPAEDICS, SPINE AND SPORTS MEDICINE, LLC d/b/a TOTAL ORTHOPAEDICS AND SPORTS MEDICINE,

Plaintiff,

-against-

STANISLAV AVSHALUMOV, D.O.,

Defendant.

INDEX No. 602649/12

MOTION DATE: Feb. 21, 2012
Motion Sequence # 001

The following papers read on this motion:

Notice of Motion.................................... X
Affirmation in Opposition........................ X
Memorandum of Law............................... X

Motion by defendant Stanislav Avshalumov to dismiss the complaint, or in the alternative for a preliminary injunction restraining plaintiff Total Orthopedics & Sports Medicine, LLP from enforcing the covenant not to compete is **denied**.

This is an action for breach of contract. Defendant Stanislav Avshalumov is an orthopedic surgeon. Defendant Total Orthopedics & Sports Medicine, LLP maintains a medical office at 5500 Merrick Road in Massapequa. Its principal member is Dr Charles Ruotolo.

On February 23, 2009, Dr. Avshalumov entered into a physician employment agreement with Total Orthopedics. The employment agreement provided for a base salary

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of $300,000. Dr. Avshalumov was also to receive "bonus compensation, " defined as 50 % of his "physician collections" over $400,000. The agreement provides that for a period of three years after termination of employment Dr. Avshalumov will not practice orthopedics within an eight mile radius of Total Orthopedics' office. The agreement was for a term of one year, subject to renewal for successive one year periods.

Avshalumov alleges that, after he worked for Total Orthopedics for about a year, he and Dr. Ruotolo began to discuss Avshalumov's becoming a partner and buying into into the partnership at a price of $17,000 per share. Avshalumov alleges that he did extra work in reliance upon the promise of being admitted to the partnership. According to Avshalumov, bonus compensation due him under the employment agreement could be applied toward the buy in price. Avshalumov alleges that, after he was told that he would not be offered an interest in the partnership, he gave 60 days notice of resignation of September 24, 2012.

Dr. Avshalumov commenced an action against Total Orthopedics and Dr. Ruotolo on November 20, 2012 (Index No. 14283/12). In his first cause of action, Dr. Avshalumov asserts a promissory estoppel claim based upon the contractual promise to sell him an interest in the partnership. In his second cause of action, Dr. Avshalumov seeks a declaratory judgment that the restrictive covenant is null and void. In his third cause of action, Dr. Avshalumov asserts a claim for unjust enrichment based upon his recruiting another orthopedist, Dr. Karen Avanesov, for the practice. Dr. Avshalumov also claims that Total Orthopedics was unjustly enriched by his providing free hospital services to the practice. Dr. Avshalumov's fourth cause of action is for quantum meruit. His fifth cause of action is for bonus compensation due under the employment agreement. Dr. Avshalumov alleges that Total Orthopedics reduced his bonus compensation by delaying billing for medical services which he had performed until after termination of his employment. His sixth cause of action is for defamation.

By order dated March 27, 2013, the court dismissed Dr. Avshalumov's claims for unjust enrichment and quantum meruit and his claim for bonus compensation as against Dr. Ruotolo. However, the court denied Total Orthopedics' motion to dismiss Dr. Avshalumov's claims for promissory estoppel, declaratory judgment, bonus compensation, and defamation.

Meanwhile, Total Orthopedics commenced the present action against Dr. Avshalumov on December 24, 2012. In its first cause of action, Total Orthopedics alleges that Dr. Avshalumov violated the restrictive covenant by performing orthopedic surgery at Franklin Hospital in Valley Stream prior to his termination date. In the second cause of action, Total

Orthopedics alleges that Dr. Avshalumov violated the restrictive covenant by performing surgery at St. Joseph's Hospital. In the third cause of action, Total Orthopedics alleges that Dr. Avshalumov breached the employment agreement by soliciting one of its employees, Megan Harthill, to work for him in his new practice.

Defendant Dr. Avshalumov moves to dismiss the complaint on the ground of another action pending, failure to state a cause of action, and that the restrictive covenant is void as against public policy.

CPLR 3211(a)(4) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that there is another action pending between the same parties for the same cause of action in a court of any state or the United States. The court need not dismiss upon this ground but may make such order as justice requires (Id). A court has broad discretion as to the disposition of an action when another action is pending (***Simonetti v Larson***, 44 AD3d 1028 [2d Dept 2007]).

The prior action filed by Dr. Avshalumov has substantially identical parties and arises from the employment agreement. However, the court concludes that the causes of action are not substantially identical. Moreover, because both actions have been assigned to this court, there is no risk of inconsistent adjudication. Accordingly, defendant's motion to dismiss for another action pending is **denied**.

Non-compete clauses in employment contracts are not favored and will be enforced to the extent reasonable and necessary to protect valid business interests (***Morris v Schroeder Capital***, 7 NY3d 616, 620 [2006]). A restraint is reasonable only if it 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 Hirschberg***, 93 NY2d 382, 388 [1999]). A restrictive covenant will be subject to specific performance only to the extent that it is reasonable in time and area (Id).

On this motion to dismiss, the court must assume that Total Orthopedics has a valid business interest in the covenant not to compete. Moreover, covenants not to compete in the practice of medicine or surgery are not per se against public policy (See ***Goriganti v Syracuse Orthopedic***, 60 AD3d 1463 [4th Dept 2009]). Accordingly, defendant's motion to dismiss the complaint for failure to state a cause of action or based upon public policy is **denied**.

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In order to be entitled to a preliminary injunction, plaintiff must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (***Aetna Ins. Co. v Capasso***, 75 NY2d 860 [1990]). As the court held in its order of March 27, 2013, Dr. Avshalumov has not shown a likelihood of success on the merits that the restrictive covenant is unreasonable. Accordingly, defendant's motion for a preliminary injunction restraining enforcement of the covenant not to compete is **denied**.

Counsel are reminded of the preliminary conference scheduled for May 3, 2013.

So ordered.

Dated APR 1 1 2013

J.S.C.

ENTERED

APR 16 2013

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COUNTY CLERK'S OFFICE