

CCS Med., PLLC v Khadim
2017 NY Slip Op 33245(U)
June 27, 2017
Supreme Court, Erie County
Docket Number: 805792/2017
Judge: Deborah Chimes
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a Civil Special Term of the
Supreme Court, held in and for the
County of Erie, State of New York,
on the 12th day of June 2017.

PRESIDING: HON. DEBORAH A. CHIMES

SUPREME COURT: STATE OF NEW YORK
COUNTY OF ERIE

CCS MEDICAL, PLLC,

Plaintiff,

v

HAIDER ALI KHADIM, M.D. and
HERBERT L. DUVIVIER, M.D.,

Defendants.

DECISION

INDEX NO.: 805792/2017

Plaintiff moved for a preliminary injunction, requesting that the Court issue an Order requiring defendants to comply fully with all restrictive covenants contained within their employment agreements with the plaintiff; refrain from practicing medicine within the geographic limits set forth in the applicable employment agreements for a period of one year; and cease and desist soliciting and treating patients of plaintiff. Defendants opposed the motion. After reviewing all submissions and hearing oral argument, the Court decides as follows:

Plaintiff and defendants entered into employment contracts with restrictive covenants. Defendant Khadim's contract began on March 1, 2014 and terminated on March 1, 2017. In his contract, Khadim agreed that for a period of one year following termination, he would not practice medicine in the field of oncology within a 25-mile radius from any office of the plaintiff or solicit or attempt to solicit any of the plaintiff's patients with intent or purpose to perform medical services for those patients. Defendant Duvivier's contract began on September 1, 2014 and would have ended on August 3, 2017. Duvivier agreed to a similar restrictive covenant, though the radius was limited to 20 miles. In 2017, both defendants ended their employment

with plaintiff and soon after started working for one of plaintiff's competitors. Both defendants are practicing in the field of oncology within the 20 to 25-mile radius of plaintiff's office and continue to perform medical services on plaintiff's patients.

"Preliminary injunctive relief is a drastic remedy that is not routinely granted." Sutherland Global Servs., Inc. v Stuewe, 73 AD3d 1473, 1474 (2010) (internal citations omitted). To prevail on a motion for preliminary injunctive relief, the movant must show (1) a probability of success on the merits; (2) immediate and irreparable injury; and a balance of the equities in its favor. See, Aetna Insurance v. Capasso, 75 N.Y.2d 860, 862 (1990); and Doe v. Axelrod, 73 N.Y.2d 748, 750 (1988).

In opposition to the motion, defendants argue that plaintiff cannot establish breach of contract, because plaintiff failed to meet and negotiate a productivity bonus; failed to provide a productivity bonus; and in the case of Duvivier, denied him vacation time. Therefore, defendants argue, plaintiff does not have a meritorious cause of action. Additionally, defendants argue that plaintiff has not demonstrated irreparable harm and that the public interest outweighs the need for injunctive relief.

Pursuant to Khadim's contract, a meeting to discuss a bonus was to occur after the second quarter of the second year of employment, i.e., after June of 2015. According to Khadim, the meeting did not take place until October of 2016, at which time Khadim was informed that he would not receive a bonus. Neither of those facts are of consequence, because Khadim's contract contained no deadline by which a meeting had to take place and there was no requirement that plaintiff pay a bonus to Khadim. Plaintiff did not breach Khadim's contract.

Pursuant to the Duvivier's contract, a meeting to discuss a bonus was to take place 60 days after the end of year one, or by the Fall of 2015. According to Duvivier, no such meeting took place until the April of 2017, at which time he was informed that he would not receive a bonus. Duvivier's contract contained no provision requiring payment of a bonus. Plaintiff therefore did not breach the contract by failing to pay such bonus. With respect to plaintiff's failure to timely meet with Duvivier to discuss a bonus, the Court finds that the breach was not material.

Whether a breach is material is a question of law. "Under New York law, for a breach to be material, it must 'go to the root of the agreement between the parties.' A party's obligation to perform under a contract is only excused where the other party's breach of the contract is so substantial that it defeats the object of the parties in making the contract." Frank Felix Assocs. v. Austin Drugs, 1997 U.S. App. LEXIS 6647 at *14 (2d Cir. N.Y. 1997) (internal citations omitted). Here, plaintiff's failure to conduct a meeting to discuss a bonus in the Fall of 2015 with Duvivier does not go to the root of the agreement between the parties and is therefore not a material breach of the contract.

In addition, Duvivier's claim that plaintiff breached the contract, because he was denied vacation time lacks merit. The employment agreement does not require that plaintiff permit an employee to take vacation time whenever requested and the plaintiff's employee handbook indicates that once an employee gives notice, they are not permitted to take vacation time.

Generally, a covenant not to compete will be enforced against medical professionals "if reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public and not unduly burdensome." Gelder Med Group v Webber, 41 NY2d 680, 683 (1977). Here, the covenant was restricted to a limited geographic area and was for a limited period of one year. Further, it has been established that the public would not be harmed as the patients who seek treatment by defendants can obtain such treatment through other local oncology providers.

In light of the foregoing, plaintiff has established a probability of success on the merits.

Plaintiff has also established irreparable harm through "loss of patients in a medical specialty, permanent loss of revenues from those patients or clients...and loss of good will associated with a business." Battenkill v. Cangelosi, 1 A.D.3d 856, 859 (3rd Dep't 2003); See also, Bollengier v Gulati 233 Ad2d 721 (3rd Dep't 1996).

Last, it has been established that the balance of equities favor the plaintiff. Plaintiff must show "that the irreparable injury to be sustained ... is more burdensome to the plaintiff than the harm caused to defendant through imposition of the injunction." Destiny USA Holdings, LLC v. Citigroup Global Mkts. Realty Corp., 69 A.D.3d 212, 223 (4th Dep't 2009). Here, plaintiff has worked to establish a business for almost 10 years, while the defendants moved to the area without a patient base and derived their patients wholly from the plaintiff's investment in

developing the business. Weighing those factors against the consideration that defendants have practiced in the area for less than 4 years and are free to practice outside the geographic areas referenced in the agreements, and that patients can obtain oncology treatment through providers other than the defendants, the balance of the equities are in plaintiff's favor. See, Bollengier v. Gulati, 233 A.D.2d 721 (3rd Dep't 1996).

Plaintiff has met its burden. The motion for preliminary injunction is granted. The preliminary injunction is conditioned upon plaintiff filing an undertaking in the amount of Four-Hundred Thousand Dollars (\$400,000.00) for each defendant.

Counsel for the plaintiff is to prepare and submit an Order, attaching the Court's decision, in 30 days.

DATED: Buffalo, New York
June 27, 2017


HON. DEBORAH A. CHIMES, J.S.C.

GRANTED

JUN 27 2017
BY Melanie Rusza
MELANIE RUSZA,
COURT CLERK