NY Cardio Care PLLC v Salman
2023 NY Slip Op 33697(U)
October 10, 2023
Supreme Court, Kings County
Docket Number: Index No. 525021/2023
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL PART 8
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NY CARDIO CARE PLLC and NY CARDIAC
& VASCULAR PLLC,

Plaintiffs, Decision and order

- against - Index No. 525021/2023

ALI SALMAN, M.D. and RICHMOND MEDICAL
CENTER d/b/a RICHMOND UNIVERSITY
MEDICAL CENTER,

Defendants, October 10, 2023
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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #1

The plaintiffs have moved seeking an injunction enjoining the defendant Dr. Ali Salman from continuing to violate a non-competition clause, a non-solicitation clause and confidentiality provisions of an employment agreement. The defendant opposes the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

According to the complaint in July 2020 Dr. Mohammad Zgheib the owner of the plaintiff facilities located in Staten Island offered a job to the defendant Dr. Ali Salman as a physician. The parties executed an employment agreement which commenced July 2, 2020. On June 30, 2023 Dr. Salman resigned and shortly thereafter began working at defendant Richmond University Medical Center where he is still employed. The plaintiff instituted this lawsuit alleging the defendant breached the employment agreement by violating the non-compete, non-solicitation, confidentiality and other provisions of the employment agreement. The verified

complaint also asserts causes of action for unfair competition and tortious interference with contracts. The plaintiffs have now moved seeking an injunction to enjoin the defendant from continuing to remain employed by Richmond University Medical Center. As noted, the motion is opposed.

Conclusions of Law

In relevant part, CPLR §6301 allows the court to issue a preliminary injunction "in any action...where the plaintiff has demanded and would be entitled to a judgment restraining defendant from the commission or the continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff" (id).

It is well established that "the party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of the injunction and a balance of the equities in its favor" (Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 NY3d 839, 800 NYS2d 48 [2005], see also, Alexandru v. Pappas, 68 AD3d 690, 890 NYS2d 593 [2d Dept., 2009]). The Second Department has noted that "the remedy of granting a preliminary injunction is a drastic one which should be used sparingly" (Town of Smithtown v. Carlson, 204 AD2d 537, 614 NYS2d 18 [2d Dept., 1994]). Thus, the Second Department has been clear that the party seeking the drastic remedy of a preliminary injunction has the burden of proving each

of the above noted elements "by clear and convincing evidence" (Liotta v. Mattone, 71 AD3d 741, 900 NYS2d 62 [2d Dept., 2010]).

First, an employment agreement not to compete is valid if it is no greater than necessary to protect the legitimate interests of the employer, does not impose undue hardship on the employee and does not injure the public (Brown & Brown, Inc., v. Johnson, 25 NY3d 364, 12 NYS3d 606 [2015]). Further, such non-solicitation and non-compete agreements must be reasonably limited in time and geography (BDO Seidman v. Hirshberg, 93 NY2d 382, 690 NYS2d 854 [1999]).

The restrictive covenant in this case states that for a period of three years after employment the defendant "shall not, directly or indirectly, practice medicine: (1) in Staten Island, New York, or (2) within a three (3) mile radius of any office where Physician has been assigned to work during the Term of this Agreement ("Restricted Area"). Additionally, during the Restricted Period, Physician shall not: (i) practice medicine or maintain medical staff privileges at any hospital, surgery center, surgical practice or other facility at which Physician worked on behalf of Employer during the term of this Agreement within Staten Island or the Restricted Area, and (ii) in any manner become interested, directly or indirectly, either as an Physician, owner, landlord, partner, agent, consultant, independent contractor, stockholder, director or officer of any other practice or entity involving the practice of medicine

and/or surgery in the Restricted Area" (see, Physician Employment Agreement, ¶10.1 [NYSCEF Doc. No. 2]). Essentially, this agreement prohibits the defendant from practicing medicine in the entire Staten Island for a period of three years. In Coppa v.Lederman, 2004 WL 884258 [E.D.N.Y. 2004] the court held that a restrictive covenant covering the entire Borough of Staten Island was reasonable. Likewise, in Albany Medical College v. Lobel, 296 AD2d 701, 745 NYS2d 250 [3rd Dept., 2002] the court held a restrictive covenant lasting five years was reasonable. Therefore, there is no basis to question the validity of the precise terms of the restrictions in this case and the length of time or the geography is not a basis to deny the injunction.

However, considering the first prong, establishing a likelihood of success on the merits, the plaintiff must prima facie establish a reasonable probability of success (Barbes Restaurant Inc., v. Seuzer 218 LLC, 140 AD3d 430, 33 NYS3d 43 [2d Dept., 2016]). In this case the basis for the injunction concerning the non-compete and non-disclosure clauses is the allegation the defendant has been working for another entity in violation of the employment agreement and therefore breached the agreement in significant ways. Of course, the defendant denies these underlying facts supporting the injunctive relief. The defendant asserts the employment agreement was orally modified and a new partnership was created between the defendant and Dr. Zgheib thereby extinguishing the non-compete and non-solicitation

agreements. While the plaintiffs dispute that any new oral partnership was created, that is surely a question of fact that will require further discovery. This is especially true since the employment agreement does not contain any clause prohibiting any modifications unless in writing. Thus, while it is true that a preliminary injunction may be granted where some facts are in dispute and it is still apparent the moving party has a likelihood of success on the merits, (see, Borenstein v. Rochel Properties, 176 AD2d 171, 574 NYS2d 192 [1st Dept., 1991]) some evidence of likelihood of success must be presented. Therefore, when "key facts" are in dispute and the moving party cannot satisfy the necessary elements then an injunction must be denied (Digestive Liver Disease P.C. v. Patel, 18 AD3d 423, 793 NYS2d 773 [2d Dept., 2005]). Dr. Salman states that the relationship changed and that as of January 2022 they were now partners. Indeed, Dr. Salman asserts that he was no longer paid a salary as further evidence he was now a partner (see, Affidavit of Dr. Ali Salman, ¶18 [NYSCEF Doc. No. 23]). That assertion contradicts Richmond University Medical Center's opposition to the motion wherein they argue the failure to pay Dr. Salman a salary for three months in early 2022 is evidence the plaintiff breached the employment agreement and that therefore the non-compete is no longer operative (see, Memorandum of Law in Opposition, pages 6,7 [NYSCEF Doc. No. 20]). However, Dr. Salman, the party actually subject to the agreement did not so argue. Thus, the defendant

did not merely assert a conclusory and unsubstantiated argument simply to contrive questions of fact to deny an injunction. Rather, significant material facts are presented whether a partnership really existed which eliminated the non-compete and non-solicitation clauses or whether at least Dr. Zgheib explicitly acquiesced and even assisted the defendant to become employed at other locations to supplement his income.

Therefore, there are significant questions whether the non-compete and non-solicitation clauses are even operative and consequently, an injunction cannot be imposed at this time. Therefore, the motion seeking an injunction is denied.

So ordered.

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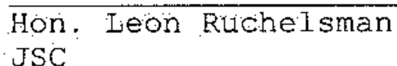

DATED: October 10, 2023
Brooklyn NY

Hon. Leon Ruchelsman
JSC