NY Cardio Care PLLC v Salman
2024 NY Slip Op 30850(U)
March 5, 2024
Supreme Court, Kings County
Docket Number: Index No. 525021/2023
Judge: Leon Ruchelsman

MSUPREME 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, March 5, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #2

The plaintiffs have moved seeking to dismiss the first three counterclaims. The defendants oppose the motion. Papers were submitted by the parties and arguments held. After reviewing all the arguments, this court now makes the following determination.

As recorded in a prior order, 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 to dismiss counterclaims filed by the

defendant. Specifically, the plaintiffs move seeking to dismiss the counterclaims seeking an accounting, breach of contract and a declaratory judgement. As noted, the motion is opposed.

Conclusions of Law

It is well settled that upon a motion to dismiss the court must determine, accepting the allegations of the counterclaims as true, whether the defendant can succeed upon any reasonable view of those facts (Davids v. State, 159 AD3d 987, 74 NYS3d 288 [2d Dept., 2018]). Further, all the allegations in the counterclaim are deemed true and all reasonable inferences may be drawn in favor of the defendant (Dunleavy v. Hilton Hall Apartments Co., LLC, 14 AD3d 479, 789 NYS2d 164 [2d Dept., 2005]).

The first counterclaim seeks an accounting. It is well settled that "the right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest" (see, Palazzo v. Palazzo, 121 AD2d 261, 503 NYS2d 381 [2d Dept., 1986]). "The fiduciary relationship necessary to obtain an accounting is created by the plaintiff entrusting to the defendant some money or property with respect to which defendant is bound to reveal his dealings" (Stevens v. St. Joseph's Hospital, 52 AD2d 722, 381 NYS2d 927 [4th Dept., 1976]).

The defendant argues that he entered into an entirely new

partnership agreement with the plaintiffs which superceded the employment agreement. Thus, the oral partnership agreement was not a modification of the agreement which required a writing but rather the employment agreement was "entirely superseded, and effectively terminated by, a subsequent partnership arrangement" (see, Memorandum in Opposition, page 5 [NYSCEF Doc. No. 59]). Thus, he maintains a fiduciary duty and is entitled to an accounting. Likewise, these facts support the counterclaims of breach of contract and a declaratory judgement.

However, notwithstanding earlier conclusions to the contrary, the employment agreement prohibits oral modifications. Thus, Article 12.2 of the employment agreement states that "no amendment, modification, or waiver of any provision of this Agreement shall be binding unless in writing and signed by the Party against whom the operation of such amendment, modification, or waiver is sought to the enforced" (see, Employment Agreement, ¶12.2 [NYSCEF Doc. No. 2]). Further, Section II of the agreement, entitled 'Future Relationship' contemplates the possibility of the defendant becoming an owner or member of the plaintiffs upon an invitation from the plaintiffs at the sole discretion of the plaintiffs. Thus, there can really be no partnership arrangement without compliance with Section II. The argument that a new oral agreement entirely superceded the employment agreement, in effect, means the terms of the employment agreement need no compliance, an untenable conclusion.

Essentially, the employment agreement governed the defendant's employment prospects unless a change occurred. Pursuant to Article 12 any changes required a writing. The nature of the change is immaterial. Indeed, there is little distinction between a modification and a superceding event, when contemplating the defendant's future. Any superceding event, such as an offer of partnership and any modification, such as an offer of partnership, result in the same change. Of course, there could be modifications that could not reasonably be viewed as superceding the entire agreement, for example, changing the salary schedule or vacation days allotted. The plaintiffs concede such changes would require a writing. However, that only strengthens the notion that far more significant modifications also require a writing. It is entirely unreasonable to argue that only minor modifications require a writing but that major modifications somehow transform into a superceding agreement obviating the need for a writing. Thus, there can be no reasonable reliance upon any oral communications allegedly made since a writing was required by the employment agreement (Aris Industries Inc., v. 1411 Trizechahn-Swig LLC, 294 AD2d 107, 744 NYS3d 362 [1st Dept., 2002]). Indeed, it is well settled that a merger clause which states the agreement represents the entire understanding between the parties is "to require full application of the parole evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the

writing" (Primex International Corp., v. Wal-Mart Stores Inc., 89 NY2d 594, 657 NYS2d 385 [1997]). The employment agreement states that "this Agreement and the Exhibits attached hereto constitute the complete and exclusive statement of the agreement among the Parties with respect to the subject matter hereof" (see, Employment Agreement ¶12.1 [NYSCEF Doc. No. 2]). Therefore, there can be no oral agreement the parties entered into a partnership. Thus, all the counterclaims, which are premised upon the existence of such a relationship, cannot establish any valid causes of action.

It is generally true that a preliminary injunction requires a heavier burden of proof than a motion to dismiss (New Hope Family Services Inc., v. Poole, 966 F3d 145 [2d Cir. 2020]). The earlier conclusion granting a preliminary injunction did not establish there are questions of fact that would automatically survive any motion to dismiss. This is particularly true where the court specifically indicated there were questions of fact and moreover, the discrete issues raised here were not fully raised in the prior motion.

Therefore, based on the foregoing, the motion seeking to dismiss the first three counterclaims is granted.

So ordered.

ENTER:

DATED: March 5, 2024
Brooklyn NY

Hon. Leon Ruchelsman
JSC