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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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FELDMAN MEDICAL, P.C.,

Plaintiff,

-against-

MANUEL SANGUILY, M.D.,

Defendant.

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Decision/Order
Index No.: 110861/06
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Pltf's amended OSC#1 [pi] w/EL, M.D. affid in support, exhs	1
Pltf's OSC#1 [pi] w/EL, M.D. affid in support, exhs	2
Def's affid in opp (MS, M.D.)	3
Pltf's affirm in support (KLK)	4
Non-Party affids (CL, D.O.)	5

Gische J.;

Upon the foregoing papers, the court's decision and order is as follows:

Plaintiff, a medical professional corporation, is the former employer of defendant, a medical doctor. This is a breach of contract action in which plaintiff alleges that defendant has violated the non-solicitation, non-competition provisions of his employment agreement (respectively, 1st and 2nd causes of action). Plaintiff also alleges that defendant has used or threatened to use confidential information that belong to it (3rd cause of action), and that these actions, in sum, form the factual predicate for its unfair competition cause of action (4th cause of action). Other causes of action asserted are for tortious interference with economic advantage (5th cause of

action) and unjust enrichment (6th cause of action).

The court presently has before it plaintiff's motion for a preliminary injunction preventing defendant from soliciting patients, practicing at his present location, directing the return of confidential information to plaintiff, and related relief. The motion is opposed by defendant in most respects.

Background

Defendant is a 73 year old medical doctor who is a family or general practitioner. He entered into an employment agreement with defendant dated January 1, 2004 ("employment agreement"). The employment agreement has a restrictive covenant (Section 13) that restricts defendant from working within a 10 miles radius of his former employer (plaintiff) once he separates from employment, and for a two (2) year period thereafter.

It is undisputed that defendant separated from employment in July 2006. The parties disagree, however, whether defendant was constructively terminated (reduction in hours) or he simply walked out one day and never returned. Regardless, it is also undisputed that defendant now works at another medical practice which is only a few blocks (approximately 8) away from the plaintiff's medical practice (or corporate offices).

Plaintiff contends 5 of its patients have left its practice and are now patients of defendant at his new location. Although proof of file transfer requests has not been provided, defendant does not deny this, but argues that he was the primary physician for hundreds of patients, and had he been soliciting patients, "surely many more would have transferred their records to my current employer so they could continue their care with me." He admits he told "two or three" patients he was going to be working at his

new location, but stopped when reminded of the non-solicitation clause in his employment agreement.

Plaintiff contends it is entitled to a preliminary injunction (hereinafter, "PI") because the employment agreement expressly provides it is entitled to one under these circumstances and there being no ambiguity in their contract, the contract must be enforced according to its terms. W.W.W. Associates, Inc. v. Giacontieri, 77 NY2d 157 (1990).

Plaintiff contends also that, as a matter of law, restrictive covenants are routinely upheld and enforced, if reasonable as to time and area, necessary to protect the employer's interests, not harmful to the general public, and not unreasonably burdensome to the employee. BBDO Seidman v. Hirshberg, 93 NY2d 382 (1999); Gelder Medical Group v. Webber, 41 NY2d 680 (1977); North Shore Hematology/Oncology v. Zevros, 278 AD2d 210 (2nd dept 2000); Zelner v. Conrad, 183 AD2d 250 (2nd dept 1992). Plaintiff contends that these material elements are met and satisfied. It offers the affidavit of its medical director who asserts that defendant is has his new office only a few blocks away, well within the 10 miles radius clause in the employment agreement, he has solicited patients who have, in fact, followed him to his practice, there is no harm to the general public because there are doctors at each office who will continue to provide health care, and enforcement of the clause is not unduly burdensome because it is only for a limited period of time.

Plaintiff contends further that even without the restrictive covenant which provides express consent to a PI, it would be entitled to a preliminary injunction under CPLR § 6301 because it has shown: [1] a likelihood of success on the merits; [2]

irreparable injury, and [3] a balancing of the equities in its favor. Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 (1990). It further contends that the PI is necessary to maintain the *status quo* pending a determination on the merits of the parties' disputes. Schweizer v. Town of Smithtown, 19 AD3d 682 (2nd dept. 2005).

Before turning to defendant's arguments and defenses, examination of the restrictive covenant in the employment agreement is instructive. In relevant part it provides that patient lists and certain other information is the plaintiff's property. It also provides as follows:

> "the knowledge of the Physician of these matters would enable the Physician, upon termination of this Agreement, to compete with the Corporation in a manner likely to cause the Corporation irreparable harm, and disclosure if such matters by the Physician would, likewise, cause such harm; and that the restrictions imposed upon the Physician herein would not hamper the Physician in the practice of medicine [. . .] "

Section 13.2 of the employment agreement provides further that:

> "a. During the term of this Agreement and for two (2) years thereafter, the Physician shall not take any action whatsoever which may disturb the existing business relationship of the Corporation with any patient or referral source of the Corporation.
>
> b. During the term of this Agreement and for two (2) years thereafter, the Physician shall not solicit business from patients or referral sources of the Corporation.
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> c. For a period of two (2) years after leaving the employment of the Corporation, the Physician shall not practice medicine in, or in any manner be associated with an office where medical care is provided within ten (10) miles of the office(s) of the Corporation."

There is a further provision that:

> "13.3 . . . in the event of a breach of any provision of section 13, the Corporation "shall be entitled to obtain a permanent injunction or similar court order enjoining the Physician from violating any of the provisions of this Agreement, and that pending the hearing and the decision on the application for such permanent injunction, the Corporation shall be entitled to a temporary restraining order, without prejudice to any other remedy available to the Corporation, all at the expense of Physician; [* * *] "

Defendant agrees - without admitting he ever did - that he will not solicit any of plaintiff's patients. He states he never took any of plaintiff's records, or any confidential information belonging to it. Defendant disagrees that plaintiff is entitled to a PI either as per the restrictive covenant, or by the standards found in the applicable statute [CPLR § 6301], for the reasons that follow.

First, defendant contends that he did not voluntarily leave his job, but was effectively terminated because his hours were reduced by plaintiff from 40 hours per week to 32 hours per week, and these (possible) counterclaims should be considered by the court when examining and weighing the equities.[1] While admitting that he is competing in the general sense with plaintiff for patients he claims this is "to the same extent as any other physician in the community" and that "Doctors Medical Group [his new employer] is "competing" for patients with plaintiff to exactly the same extent that Doctors Medical Group competed with plaintiff before employing me." Though defendant also admits that his new employer expanded its practice when it hired him (it

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[1]This action was commenced upon the filing of the summons and complaint with the Order to Show Cause. As of the date of this motion, defendant's time to answer had not yet expired.

used to have only 4 doctors, with him it now has 5) he claims that he has no special skills or particular expertise, therefore his new employer has gained no added edge or advantage having hired him, that it did not previously have.

In support of his opposition, defendant offers the sworn affidavit of Dr. Lefevre who states that "Doctors Medical Group draws its new patients from the community . . ." and that most of its patients are "walk-ins" who come in "based upon nothing more than the fact the sign on the office identifies us as a medical office . . ."

Finally, defendant argues that the 10 mile radius is over broad to accomplish plaintiff's objective, which is to eliminate him as unfair competition.

Discussion

This employment agreement is first and foremost a contract between the parties, like any other, to be enforced in accordance with its terms. W.W.W. Associates, Inc. v. Giacontieri, 77 NY2d 157 (1990). The contract expressly provides that defendant cannot practice medicine in, or in any manner be associated with, an office where medical care is provided within ten (10) miles of plaintiff's office, either during the term of the agreement or for two years thereafter. Defendant has violated that provision by obtaining employment immediately nearby. Any argument that the covenant is over broad or over inclusive, is directly at odds with appellate authority that has enforced restrictive covenants in employment agreements, even in rural locales, where presumably there are fewer trained doctors than in larger metropolitan areas. Gelder Medical Group v. Webber, 41 NY2d 680 (1977); Karpinski v. Ingrasci, 28 NY2d 45 (1971).

This argument, in any event, fails because defendant accepted employment and

is practicing medicine only blocks away from his former employer's medical practice. The court need not consider under the facts presented whether a 10 mile radius in a densely populated urban area is over burdensome. Defendant and his new employer both recognize that they and plaintiff serve the exact same community, offer the same kind of care, and largely rely on people who are walking in the neighborhood and notice their sign. Based upon the express terms of the employment agreement, plaintiff is entitled to the PI it seeks.

Even without the express (consent) provision in the restrictive covenant relating to a PI pending a decision in this action, plaintiff has satisfied the requirements of CPLR § 6301 and is, therefore, entitled to a PI applying that standard as well. Plaintiff has proved a likelihood of success on the merits, irreparable injury if the PI is not granted, and a balancing of the equities in its favor. Aetna Insurance Co., Inc. v. Capasso, 75 NY2d 860 (1990). It has also established that a PI is necessary to maintain the *status quo* pending the trial, otherwise defendant will continue working for the Doctors Medical Group and more patients may leave plaintiff's practice and seek defendant's care . Schweizer v. Town of Smithtown, 19 AD3d 682 (2nd dept. 2005).

Defendant, on the other hand, has not come forward with any facts to defeat plaintiff's motion. He has not, for example, shown that enforcement of the restrictive covenant would be inequitable, or unduly burdensome to him. Aetna Insurance Co., Inc. v. Capasso; *supra*; BBDO Seidman v. Hirshberg, *supra*. Defendant has portable skills that appear to be valuable to any community, and he presents no reason why he cannot comply with the restrictive covenant.

Based upon the foregoing, plaintiff is entitled to the relief it seeks, whether under

the express terms of its employment contract with defendant, or under CPLR § 6301.

Because the parties have contracted to a temporal restriction (i.e. two (2) years)[2], the PI may not exceed that limitation.

Therefore, plaintiff's motion is granted as follows:

Defendant shall observe and comply with the terms of the parties' employment agreement that prohibits him practicing or providing professional medical services within a ten mile radius of plaintiff's medical practice at 4290 Broadway, New York, New York, pending a trial or other decision on the merits of plaintiff's claims, or the expiration of two (2) years from the date of defendant's separation from employment whichever is shorter (13.2.c).

Since this will require defendant to essentially leave his present employment, shall have two (2) weeks to effectuate his separation from service with his present employer upon service of a copy of this decision/order with notice of entry.

Plaintiff's motion, for a PI enjoining defendant from violating the non-solicitation provisions of the restrictive covenant is granted on consent. Defendant shall not solicit any business from any patient of plaintiff in violation of the employment agreement, which injunction shall remain in place pending the determination on the merits of this action, or two (2) years from the date of the expiration of the employment agreement, (13.2.b), whichever is shorter.

Plaintiff's motion, for a PI enjoining defendant from accepting any business from any patient of plaintiff in violation of the employment agreement, is also granted subject

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[2]The two (2) years runs from slightly different points in time, as set forth in the employment agreement, and laid out further below.

to the two (2) year limitation of 13.2.b.

Plaintiff's motion, however, for a PI directing defendant to return records or other confidential information in his possession belonging to plaintiff, is denied at this time. Plaintiff has not identified any documents its believes were removed. Although reference is made to patient's records, that argument is not fully developed. If those patients requested the transfer of their respective files, plaintiff cannot reclaim those files.

Conclusion

In accordance with the foregoing,

It is hereby

ORDERED that plaintiff Feldman Medical P.C.'s motion, for temporary restraining order is granted as to items "a, "b" and "d" in its amended order to show cause of August 7, 2006; and it is further

ORDERED that defendant Manuel Sanguily, M.D. shall observe and comply with the terms of the parties' employment agreement that prohibits him practicing or providing professional medical services within a ten (10) mile radius of plaintiff's medical practice at 4290 Broadway, New York, New York, pending a trial or other decision on the merits of plaintiff's claims, or the expiration of two (2) years from the date of defendant's separation from employment whichever is shorter (13.2.c); and it further

ORDERED that defendant Manuel Sanguily, M.D. shall have two (2) weeks to effectuate his separation from service with his present employer upon service of a copy

of this decision/order with notice of entry; and it is further

ORDERED that defendant plaintiff's motion, for a PI enjoining defendant Manuel Sanguily, M.D. from violating the non-solicitation provisions of the restrictive covenant is granted on consent; Defendant shall not solicit any business from any patient of plaintiff in violation of the employment agreement, subject to he two (2) year limitation of 13.2.b of the employment agreement; and it is further

ORDERED that plaintiff's motion for a PI directing Manuel Sanguily, M.D. to return records or other confidential information in his possession belonging to plaintiff, is denied at this time, for the reasons provided; and it is

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York
November 20, 2006

So Ordered:

Hon. Judith J. Gische, J.S.C.
JUDITH J. GISCHE, J.S.C.