IN THE SUPERIOR COURT OF THE STATE OF DELAWWARE
IN AN FOR NEW CASTLE COUNTY

ROBERT C. VILLARE, M.D. and DELAWARE VALLEY PHYSICIANS & SURGEONS, PA, Plaintiffs, v. BEEBE MEDICAL CENTER, INC.; CAPE SURGICAL ASSOCIATES, PA; ERIK STANCOFSKI, MD; SOUTHERN DELAWARE SURGERY CENTER, LLC; JAMES SPELLMAN, MD; and JAMES SPELLMAN, MD, LLC, Defendants.	)	C.A. No.: 08C-10-189 JRJ

Submitted: December 16, 2013
Decided: March 19, 2014

Upon Defendants' Motion for Summary Judgment – **GRANTED**

ORDER

AND NOW, TO WIT, this _____ day of March, 2014, the Court having duly considered Defendant Beebe's Motion for Summary Judgment Addressing Plaintiffs' Breach of Contract Claim and Proffered Damages, Plaintiffs' opposition thereto, and oral argument, it is hereby determined that:

1. The facts of this case have been recited in detail in prior opinions.[1] In 1999, Robert Villare, M.D. ("Villare"), was appointed to Beebe Medical Center, Inc.'s ("Beebe") medical staff and given surgical privileges.[2] Villare's surgical privileges had to be renewed biannually, a process known as "credentialing."[3] Around this time, Villare began his own surgical practice, Plaintiff Delaware Valley Physicians & Surgeons, PA ("DVPS"), which relied upon Villare's continued privileges at Beebe.[4]

2. Since his appointment in 1999, Villare completed the credentialing process without incident.[5] For the pertinent period, Villare's privileges were set to expire on July 30, 2005.[6] According to Beebe's Medical Staff Policy on Appointment (the "Appointment Policy" or "Bylaws"),[7] Beebe was to forward Villare a reappointment application five months prior to his current privileges expiration date.[8] Villare alleges Beebe mailed the application to an incorrect

[1] *See Villare v. Beebe Med. Ctr., Inc.*, 630 F. Supp. 2d 418 (D. Del. 2009); *Beebe Med. Ctr., Inc. v. Villare*, 950 A.2d 658, 2008 WL 2137860, at *1 (Del. May 20, 2008) (TABLE); *Villare v. Beebe Med. Ctr., Inc.*, 2013 WL 2296312, at *1 (Del. Super. May 21, 2013) (Jurden, J.); *see also*, *Villare v. Beebe Med. Ctr., Inc.*, C.A. No.: 05C-10-023 CLS, Mem. Op., Trans. ID 18945342 (Del. Super. Mar. 11, 2008) (Scott, J.)
[2] *Villare*, 2013 WL 2296312, at *1.
[3] *Id*.
[4] Compl., Trans. ID 22038299, at ¶ 13, 15, 19.
[5] *Id*. ¶ 12.
[6] *Id*. ¶ 16
[7] The parties use "Appointment Policy" and "Bylaws" interchangeably. Because the parties consider the Appointment Policy as Bylaws, so will the Court.
[8] *Id*. ¶ 20.

address, resulting in his delayed application process.[9] Beebe acknowledged receipt of Villare's application on June 20, 2005.[10] Villare alleges Beebe then made "unprecedented requests" for more information, to which Villare promptly responded.[11] Villare's privileges were not renewed and ultimately expired on November 1, 2005.[12] Although Villare initially demanded an appeal hearing regarding his lost privileges, he voluntarily withdrew the demand.[13] As a result of his lost surgical privileges, Villare closed DVPS.[14]

3. Villare filed this case on October 20, 2008, alleging, among other things, "breach of contract and breach of duty of good faith and fair dealing,"[15] intentional interference with contractual relations,[16] and civil conspiracy.[17]

4. On August 16, 2012, the Court signed a Stipulation and Proposed Order, dismissing all of Villare's claims except Count I, "breach of contract and breach of duty of good faith and fair dealing" against Beebe.[18]

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[9] *See id.* ¶¶21-30.
[10] *Id*. ¶ 29.
[11] *Id*. ¶ 30.
[12] *Villare*, 2013 WL 2296312, at *1.
[13] Villare Aff. ("Aff"), March 31, 2010, at ¶¶ 8-12.
[14] Compl. ¶ 39.
[15] *Id*. ¶¶ 54-72. Villare asserts that Beebe's Appointment Policy created a contract between Villare and Beebe.
[16] *Id*. ¶¶ 73-78.
[17] *Id*. ¶¶ 114-136. Villare also made federal Sherman Act claims, which prompted the removal of this case to the United States District Court in the District of Delaware. Trans. ID 22966955. District Judge Robinson dismissed the federal claims and remanded the case here for the matter's conclusion. *See Villare v. Beebe Med. Ctr., Inc.*, 630 F. Supp. 2d 418 (D. Del. 2009); Order of Remand, Trans. ID 27832650.
[18] Trans. ID 45941553.

5. On May 21, 2013, the Court granted, in part, Beebe's Motion for Summary Judgment on the Grounds of *Res Judicata*.[19]

6. On December 16, 2013, the Court held oral argument on the instant motion, Beebe's Motion for Summary Judgment as to Breach of Contract and Proffered Damages.

7. Beebe moves for summary judgment on the basis that there is no enforceable contract between the parties and, even if there were, Villare cannot prove damages.[20] Beebe asserts that the plain and unambiguous language of the Appointment Policy explicitly disclaims any right to reappointment:

> Appointment to the Medical Staff is a privilege and not a right. No individual shall be entitled to appointment to the Medical Staff or to exercise particular clinical privileges in the Hospital merely by virtue of the fact that such individual: […] 3. Has had in the past, or currently has, Medical Staff appointment or privileges at this or any Hospital or health care facility [….][21]

Beebe further asserts that when the credentialing committee requires additional information to consider an application, the applicant bears the burden of supplying the information or risks relinquishment of privileges:

> If at any time an Appointee fails to provide required information pursuant to a formal request by [the credentialing committees], the Appointee's clinical privileges shall be deemed to be voluntarily relinquished until the required

[19] *Villare*, 2013 WL 2296312, at *1.
[20] Deft. Mtn. for Summ. J. ("Op. Br."), Trans. ID 53327660, at 3-10.
[21] Op. Br., Ex. A § 2A.03.

> information is provided to the satisfaction of the requesting party.[22]

8. Beebe further argues that Villare cannot articulate a sufficient basis for his alleged breach of contract damages.[23] First, Beebe points out that Villare voluntarily withdrew his expert witness and an expert is required to prove lost profits.[24] Second, Beebe argues that Villare's damage disclosure sets forth the incorrect damages model of gross revenue rather than lost profits and, by Villare's own admission, the damages are "guestimates."[25]

9. Villare responds that the Appointment Policy constitutes a valid, enforceable contract.[26] Villare also asserts a new claim for Due Process, arguing that his hospital privileges are a fundamentally vested property right which cannot be denied without a hearing.[27] As to Beebe's damages argument, Villare counters that damages are inappropriate for summary judgment consideration and asserts that his accountant will testify regarding his pre-breach tax returns.

10. The standard for summary judgment is well known. Summary judgment must be granted if the moving party establishes that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of

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[22] *Id*. at § 3F.05.
[23] Op. Br. 6-10.
[24] *Id*. 7-8.
[25] *Id*. 7-8, Ex. E.
[26] Pltf. Ans. Br. in Opp. ("Ans. Br."), Trans. ID 53517163, at 2-5. Indeed the question of whether the Hospital's bylaws/Appointment Policy creates a contract is an issue of first impression.
[27] *Id*. 5-6.

law.[28] The non-movant cannot genuine factual issues with bare assertions, but must produce facts which would sustain a verdict in its favor.[29] The Court considers the facts in the light most favorable to the non-moving party.[30]

11. The Court will not consider Villare's Due Process claim. Villare's complaint, filed in 2008, does not set forth a Due Process violation claim and he cannot raise it now, six years later, in the posture of a summary judgment opposition. Even if the claim were allowed, to the extent such a basis has been established, the claim is meritless because Villare himself admitted that he demanded a hearing (without the advice of counsel), but subsequently withdrew the request (after being advised by counsel).[31]

12. As to the enforceability of the Appointment Policy as a contract between the parties, jurisdictions are split and Delaware has yet to decide the issue.[32] In *Mason v. Central Suffolk Hospital*, the New York Court of Appeals set

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[28] *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001).
[29] *Atamian v. Hawk*, 842 A.2d 654, 658 (Del. Super. 2003).
[30] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).
[31] Aff. ¶¶ 8-12.
[32] *See, e.g., Kaufman v. Columbia Mem'l Hosp.*, --- F.Supp.2d ---, 2014 WL 652886, at *14 (N.D. N.Y. Feb. 19, 2014) (finding no contract in most circumstances) (discussing *Mason v. Cent. Suffolk Hosp.*, 819 N.E.2d 1029 (N.Y. 2004)); *Brintley v. St. Mary Mercy Hosp.*, 2013 WL 6038227, at *1 (6th Cir. Nov. 15, 2013); *Medical Staff of Avera Marshall Reg'l Med. Ctr.*, 836 N.W.2d 549 (Minn. Ct. App. 2013) (the court analyzed the issue under Minnesota's contract formation law and found the parties had a preexisting duty, therefore, the bylaws did not create a contract) (also finding that under the bylaws' plain language, the hospital could unilaterally amend the bylaws, which emphasized the hospital's ultimate control); *Granger v. Christus Health Cent. Louisiana*, 2013 WL 3287128, at *1 (La. Aug. 30, 2013) (finding bylaws create a contract if Louisiana's contract requirements are fulfilled: capacity, consent, a lawful cause, and a valid object); *Hildyard v. Citizens Med. Cent.*, 286 P.3d 239 (Kan. Ct. App. 2013) (finding no

forth the general policy reasons that deter enforcing bylaws as a contract.[33] Even with the policy considerations, the *Mason* court concluded that in certain instances, hospitals cannot avoid liability, for instance, "[a] clearly written contract, granting privileges to a doctor for a fixed period of time, and agreeing not to withdraw those privileges except for specified cause, will be enforced."[34] The *Mason* court did not find the bylaws at issue to be such a contract.[35]

13. The Court finds *Mason* persuasive, which is supported by Delaware's own case law addressing that "[l]ike Delaware, New York follows traditional contract law principles."[36] An enforceable contract under Delaware law requires "an offer, an acceptance, and consideration."[37] Similar to *Mason*, the Court finds the Bylaws here do not create an enforceable contract because the Bylaws expressly state that "[a]ppointment to the Medical Staff is a privilege and not a

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contract, the court stated "Kansas law requires an intent to be bound and a meeting of the minds on all essential terms of a contract); *Kessel v. Monongalia Cnty. Gen. Hosp.*, 600 S.e.2d 321 (W.Va. 2004) (holding bylaws are not a contract between hospital and staff physician); *Houston v. Intermountain Health Care, Inc.*, 933 P.2d 403 (Utah Ct. App. 1997) (bylaws are "a contract between the hospital and physician"); *Macomb Hosp. Centr. Med. Staff v. Detroit-Macomb Hosp.*, 1996 WL 33347517, at *1 (Mich. Ct. App. Dec. 20, 1996) (bylaws do not constitute enforceable contract); *Terra Haute Reg'l Hosp. v. El-Issa*, 470 N.E.2d 1371 (Ind. Ct. App. 1984) (finding bylaws created a contract based, in part, on mutuality of obligation); *Anne Arundel Gen. Hosp., Inc. v. O'Brien*, 432 A.2d 483 (Md. Ct. Spec. App. 1981) (bylaws have force and effect of an enforceable contract).

[33] 819 N.E.2d 1029, 1031-32 ("It is preferable for hospital administrators who decide whether to grant or deny staff privileges to make those decisions free from the threat of a damages action against the hospital. It is not just in a hospital's interest, but in the public interest, that no doctor whose skill and judgment are substandard be allowed to treat or operate on patients.").

[34] *Id*. at 1032.

[35] *Id*.

[36] *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14, 54-55 (Del. Ch. 2001) (citing several Delaware cases).

[37] *Patel v. Patel*, 2009 WL 427977, at *3 (Del. Super. Feb. 20, 2009) (Cooch, R.J.).

right"[38] and otherwise set forth the process to acquire Medical Staff privileges.[39] In other words, the Bylaws provisions at issue are not written to provide a basis for breach of contract, but to set forth a procedural process. There is no express intent to be bound by the provisions at issue or any indicia of a promise.[40] Moreover, it seems Villare violated the procedures when he failed to complete the administrative appeal process by withdrawing his demand for a hearing.

14. Even if the Appointment Policy were a contract, Villare's breach of contract claim still fails because he is unable to prove damages. In a breach of contract claim, damages are intended to "restore the injured party to the position it would have been in had the breach not occurred."[41] Villare does not contest that the proper measure of damages is lost profits and that an expert is necessary.[42] Indeed, "no recovery can be had for loss of profits which are determined to be uncertain, contingent, conjectural or speculative."[43] The law requires "a sufficient evidentiary basis for making a fair and reasonable estimate of damages."[44]

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[38] Op. Br., Ex. A

[39] The Court points out that Villare failed to exhaust the underlying remedies. Although he demanded an appeal after failing to renew his privileges, he voluntarily withdrew his demand for a hearing. *See Mason*, 819 N.E.2d at 1032 (finding the "relevant provisions of the bylaws are procedural, not substantive").

[40] Villare's act of simply completing the application and credentialing process in accord with the Bylaws does not create a contract or a property right.

[41] *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *39 (Del. Ch. Apr. 25, 2005) (Noble, V.C.).

[42] *See* Ans. Br. 7; Deft. Reply Br. 5.

[43] *Pharmathene, Inc. v. Siga Technologies, Inc.*, 2011 WL 4390726, at * 31 (Del. Ch. Sept. 22, 2011) (Parsons, V.C.)

[44] *Id*.

15. After six years of litigation, Villare does not have an expert to prove damages, and admits that he only has "guesstimates." Further, Villare has submitted a damages disclosure not related to lost profits.[45] All Villare has are his tax returns to show "gross receipts" and personal income. Villare claims that his personal accountant will testify, but the accountant was not timely disclosed as an expert and, at this point, the Court is not going to permit it. In the end, Villare is unable to present a "sufficient basis" upon which a jury could find a "fair and reasonable estimate" of his lost profit damages.[46]

For the foregoing reasons, Defendant Beebe's Motion for Summary Judgment Addressing Plaintiffs' Breach of Contract Claim and Proffered Damages is **GRANTED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

Cc: All counsel via LexisNexis

[45] Op. Br., Ex. E.
[46] *Pharmathene, Inc.*, 2011 WL 4390726, at *31.