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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000102-MR

JOSE W. ALZADON, M.D. APPELLANT

v. APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 08-CI-00450

HIGHLANDS HOSPITAL CORPORATION, INC., AND CONSOLIDATED HEALTH SYSTEMS, INC. APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, LAMBERT, AND NICKELL, JUDGES.

LAMBERT, JUDGE: Jose Alzadon, M.D., appeals from the Floyd Circuit Court's entry of summary judgment in favor of Consolidated Health Systems, Inc., d/b/a Highlands Health System, and Highlands Hospital Corporation, Inc., d/b/a Highlands Regional Medical Center (hereinafter collectively "Highlands"). After careful consideration of the parties' briefs and the record, we affirm.

In 2005, Alzadon was recruited by Highlands to practice medicine in the Floyd County, Kentucky, area to fulfill a need for surgeons. Alzadon executed an Agreement and Note under which he agreed to work in the area as a general surgeon for two years in exchange for receiving a one-year income guarantee from Highlands. Under the Agreement and Note, Alzadon agreed to reimburse Highlands for the income guarantee payments if he failed to practice for two years or otherwise breached the Agreement.

The Agreement stated that, among other reasons, it could be terminated and Alzadon declared in breach thereof if his clinical privileges to practice at Highlands' facility were reduced, suspended, or terminated. Alzadon's privileges at Highlands were first suspended less than two months after he was granted temporary privileges. Highlands notified Alzadon that the Medical Executive Committee (MEC) had been provided with information relative to his substandard performance as a surgeon and that he was being placed on probationary suspension. Alzadon was advised of the relevant section of the Medical Staff Bylaws (Bylaws) and was advised that if the MEC decided an investigation was warranted, he would have an opportunity to provide information to the investigating body under Section 1.3 of the Bylaws.

On October 7, 2005, Alzadon was advised that the MEC determined his privileges would be restricted to certain limited procedures (basically minor procedures, not including open abdominal cases), and he would be required to complete a surgical mini-residency and submit a report thereof to the MEC prior to

reinstatement of full privileges. When Alzadon failed to enter a mini-residency, Highlands advised him on December 16, 2005, that he was not performing under the Agreement and provided him with an additional 30 days to arrange the training.

Alzadon attended a meeting with the MEC on January 13, 2006, at which the mini-residency requirement was further explained. Due to his claimed confusion, Highlands again offered Alzadon a thirty-day extension to complete the request. By letter dated February 15, 2006, Alzadon wrote the MEC claiming a university in Louisiana had agreed to work with him. However, Alazdon never actually worked with the university as claimed in his letter.

After five months passed with Alzadon failing to complete additional training and being unable to safely practice in the area of general surgery for which he was recruited, in March 2006, Highlands issued a letter to Alzadon advising him that the MEC had decided to recommend that his privileges be suspended. The letter further advised him of his right to request a hearing and stated in part: "If you do not request a hearing within 30 days of the date of your receipt of this letter, you will be deemed to have waived the right to a hearing and appellate review of the current restriction on your privileges." The letter also contained a copy of Part III, Section 4.5 of the Bylaws. On May 19, 2006, Highlands advised Alzadon he was in breach of the Agreement and Note due to the reduction of his privileges. That letter also included an amortization schedule and offered to accept monthly payments from Alzadon towards the outstanding balance due of

$305,217.00, as well as a copy of the Note. On May 23, 2006, Highlands notified Alzadon of the MEC's recommendation to suspend his privileges.

After Alzadon received notification that his privileges were suspended and his repayment obligation would begin, Highlands received a letter from a physician in Louisiana who had agreed to work with Alzadon. In reliance on that letter, Highlands lifted the total suspension of Alzadon's clinical privileges and reinstated the prior limited privileges. Highlands also agreed to defer Alzadon's repayment obligation until February 1, 2007.

However, in order to be accepted into the Louisiana program, Alzadon intentionally concealed the nature of his status to the Louisiana program. As a result, Alzadon was terminated from the program, and at no point did he actually complete the required additional training.

Highlands then advised Alzadon that he was in breach of the Agreement as a result of his failure to complete the training and further advised him that his repayment obligations would begin. Highlands also notified Alzadon that the unappealed suspension of his clinical privileges was converted to a revocation of his privileges. Additionally, Highlands advised Alzadon that he had waived his right to a hearing as to the MEC's adverse recommendation to suspend his privileges for quality deficiencies since he had failed to request a hearing within 30 days after notice of same. Alzadon was then notified that Highlands' Board had voted to revoke his privileges.

Pursuant to Kentucky Revised Statutes (KRS) 311.606, by reference back to KRS 311.595 (20) and (21), Highlands was legally required to notify the Kentucky Board of Medical Licensure (KBML) of the revocation of Alzadon's privileges. KBML thereupon instituted proceedings against Alzadon. Highlands received several subpoenas requiring the testimony of its staff during the proceedings. After KBML's initial review of the information alleging "substandard or inadequate care," the KBML Panel found that disciplinary action was warranted against Alzadon's medical license.

KBML and Alzadon subsequently entered into an Interim Agreed Order on November 30, 2007, pursuant to which Alzadon agreed that he "SHALL NOT perform general surgery unless and until approved to do so by the Panel" and that should he violate any "term or condition of this Interim Agreed Order, the licensee's practice will constitute an immediate danger to the public health, safety, or welfare, as provided in KRS 311.592and 13B.125." At the time he executed the Interim Agreed Order, Alzadon was represented by legal counsel.

On April 16, 2009, Alzadon executed an Agreed Order of Indefinite Restriction with KBML pursuant to which he acknowledged the following facts, among others:

> 4. The licensee [Alzadon] was granted temporary privileges in August 2005, with his specialty being general surgery. Shortly after the licensee began practicing at HRMC, there were 6 surgical cases where there was either a written or a verbal occurrence report. After a quality review, which determined that there were multiple errors in technique and judgment by the licensee. [sic] His privileges were restricted and the

> [MEC] requested that he complete additional hands-on training, or a mini-residency, within 90 days to improve his skills. When he did not meet that deadline, he was granted additional time, until August 2006, to complete this re-training. When he failed to do so, his privileges were revoked.
>
> 5. The licensee did not exercise his right to challenge the hospital action through a due process hearing.

Additionally, Alzadon agreed to the following Stipulated Conclusion of Law:

> While the licensee denies any wrongdoing and/or violation of any statutes, he understands and agrees that the [KBML] Hearing Panel could conclude from the evidence outlined in the Stipulations of Fact that he has engaged in conduct which violates the provisions of KRS 311.595(21) and (9), as illustrated by KRS 311.597(3) and (4).

This Agreed Order remains in effect; thus Alzadon's medical license remains restricted, including a prohibition against performing general surgery.

As noted above, Alzadon accepted income guarantee payments from Highlands throughout the year (during most of which his privileges were suspended in whole or in part) in the total amount of $305,217.10. Pursuant to the terms of the Recruitment Agreement:

> [Alzadon] acknowledges and agrees that all amounts paid by [Highlands] to [Alzadon] in the form of income guarantee shall be paid to physician personally and shall be considered as a personal loan from Medical Center to Physician…upon the end of the Guarantee Period (or the termination of this Agreement if terminated prior to the end of the Guarantee Period), the Principal Sum shall be memorialized in a separate Promissory Note…

The Note specifically enumerates Alzadon's obligation to repay Highlands the principal amount of $305,217.10 with interest at the rate of prime plus 1%. The

Note also allows Highlands to collect late fees in the amount of 5% of any installment payment not timely received. Additionally, Alzadon agreed to pay Highlands all of its "out-of-pocket" costs and attorneys' fees relating to the collection of any indebtedness included in the Note.

On or about September 27, 2006, Alzadon made a payment of $75,000.00 to Highlands towards the outstanding balance due under the Agreement and Note. Highlands received no other payments from Alzadon and brought suit against him to recover the sums loaned to him. Alzadon filed a counterclaim seeking punitive damages and claiming Highlands engaged in "bad faith" in dealing with him and interfered with his employment. On November 17, 2011, the Floyd Circuit Court entered summary judgment in favor of Highlands, awarding judgment in the amount of $230,210.00, plus interest, and attorneys fees in the amount of $67,015.17. This appeal now follows.

On an appeal from the entry of summary judgment, our standard of review is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Lewis v. B & R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001). Because summary judgment involves only questions of law, the standard of review on appeal is *de novo*. *Id*.

First, Alzadon argues that there were material issues of fact with respect to whether the hospital obstructed his performance of the recruitment contract. Alzadon argues that Highlands breached its own contract and then tried to take

advantage of its own acts or omissions to escape liability under the contract, citing *Cowden Mfg. Co., Inc. v. System Equipment Lessors*, 608 S.W.2d 58, 61 (Ky. App. 1980). Alzadon argues that there is an issue of fact as to whether Highlands was justified in terminating his privileges before the note forgiveness period, claiming that Highlands induced him to continue to work throughout the first year of the contract by telling him it planned to restore his full surgery privileges, and that they instead terminated him at the beginning of the forgiveness period. In addition, Alzadon claims that Highlands caused him to be expelled from the Louisiana mini-residency program and instructed local doctors not to refer cases to him. Alzadon contends Highlands was not justified in hindering and obstructing his acceptance into the training program when acceptance into the program was a condition to reinstatement with full privileges.

Highlands argues that it was Alzadon's insufficient surgical skills that were the cause of his inability to perform under the Agreement and contends there is absolutely no evidence that Highlands improperly impaired Alzadon's performance under the Agreement or Note. Highlands notes that in less than two months after Alzadon received privileges, six incidents of quality care concerns were reported that necessitated a review. In the interest of patient safety and quality of care, his privileges were limited, and he was asked to complete additional training, yet he failed to do so. Highlands and the MEC extended the deadline for the additional training until August 2006, some eleven months after Alzadon's privileges were originally suspended. Highlands contends that Alzadon,

not Highlands, failed to complete the additional training, in part because he intentionally concealed the nature of his training requirement to the prospective program. Highlands argues Alzadon's claims that it caused him to be expelled from the Louisiana mini-residency program and notified local doctors not to refer cases to him are directly refuted by the record, which reflects that Alzadon admitted under oath that he intentionally concealed the nature of his training to the Louisiana facility, and it was this intentional concealment that caused him to be rejected from the program. Highlands argues that it tried to work with Alzadon, halting his suspension and deferring his income guarantee repayment when it appeared he might be in compliance. Highlands notes that only after it was clear that he did not complete the program, did it revoke Alzadon's privileges and terminate his contract. Highlands argues that Alzadon and Highlands expressly agreed that the Agreement could be terminated due to restriction of his privileges.

We agree with Highlands that there is no genuine issue of material fact indicating that Highlands obstructed Alzadon's performance under the recruitment contract. To the contrary, the record reflects that Highlands restricted Alzadon's privileges but continued to pay him and work with him while he sought additional training. Most importantly, we agree with Highlands that when Alzadon executed the April 2009 Agreed Order, Alzadon acknowledged he had failed to exercise his due process rights and further admitted that the KBML could "conclude from the evidence outlined in the Stipulation of Fact that he has engaged in conduct which violates the provisions of KRS 311.595(21) . . . ." Likewise, he admitted that his

practice of surgery, which was the whole point of the Agreement, could "constitute an immediate danger to the public health, safety, or welfare . . . ."

Alzadon could have complied with the Agreement and Note if he performed the duties of a general surgeon, which he did not do. His alternative was to repay the sums loaned to him by Highlands. In fact, Alzadon acknowledged both this option and his financial repayment obligation by making a $75,000.00 payment. We discern no material issue of fact indicating that Highlands obstructed Alzadon's performance of the recruitment contract.

Next, Alzadon argues that he did not waive his right to a hearing before the hospital committee because he was told that he did not have a right to a hearing after being reinstated. Highlands notes that Alzadon fails to articulate where in the record this argument is preserved for this Court's review. We agree that Alzadon does not provide a citation to the record regarding preservation of this argument. Thus, our review will be for palpable error/manifest injustice. Palpable error requires that the error be "easily perceptible, plain, obvious and readily noticeable," and a failure to notice and correct such error would seriously affect the fairness, integrity or public reputation of the proceeding as to be shocking or jurisprudentially intolerable. *Martin v. Commonwealth*, 207 S.W.3d 1, 5 (Ky. 2006). Palpable error is such that the case would have turned out differently without the error. *See Brewer v. Commonwealth*, 206 S.W.3d 343 (Ky. 2006).

As a member of Highlands' medical staff, Alzadon was at all times subject to the Bylaws. In Section 9.5, the Bylaws expressly required Alzadon to exhaust

his administrative remedies and provided that his failure to do so waived his right to bring legal action against Highlands. The record reflects that Alzadon did not exhaust the administrative remedies afforded to him. There is no dispute as to the fact that Alzadon executed an Agreed Order with KBML pursuant to which he agreed and acknowledged that he did not exhaust the administrative remedies available to him. The record contains several examples of Highlands' provision of notice to Alzadon of his administrative rights via written correspondence, often with copies of the applicable Bylaws enclosed. Thus, we are not persuaded by Alzadon's argument that he did not waive his right to a hearing or that Highlands failed to advise him of his right to a hearing. We find no palpable error in this regard.

Next, Alzadon argues that his execution of the Agreed Order with the KBML failed to justify entry of summary judgment in Highlands' favor. Alzadon argues that the Agreed Order was not relevant because it did not occur during the relevant time and did not concern Alzadon's performance at the time of Highlands' disciplinary actions. A review of the record indicates that, following the termination of Alzadon's medical staff privileges, Highlands was required to report the matter to KBML and later to provide information to KBML pursuant to subpoenas. Those matters directly related to Alzadon's surgical performance while on staff at Highlands. After review of the information, the KBML determined that "it was the decision of the [KBML] Panel that disciplinary action was warranted against Dr. Alzadon's medical license." The April 2009 Agreed Order undeniably

relates to the matters at issue in this appeal—in fact it contains a summary of the facts set forth herein. The Order includes Alzadon's acknowledgement that he did not exhaust the administrative remedies available to him, and the KBML panel could conclude from the evidence as outlined therein that Alzadon's conduct would also have been deemed gross incompetence, ignorance, negligence or malpractice. We find Alzadon's argument that the Agreed Order(s) did not concern his performance at the time of Highlands' disciplinary actions to be completely without merit. Thus, the circuit court properly considered them during the summary judgment phase.

Next, Alzadon argues that there is an issue of fact as to whether he was required to reimburse the hospital $230,210.00. Alzadon contends that summary judgment is not proper when there is an issue of fact as to the amount of damages. *Perkins Motors v. Autotruck Federal Credit Union*, 607 S.W.2d 429 (Ky. App. 1980).

Highlands claims this issue was never raised before the circuit court. In his brief to this Court, Alzadon claims that this argument was preserved for review in "Responses filed by Alzadon" and cites to pages 754 and 767 of the record. Page 754 is a reference to Alzadon's Response to Highlands' Motion to Quash and Motion for Protective Order relative to subpoenas issued by Alzadon against physicians. It contains no mention of his claim that the $230,210.00 principal balance was miscalculated. Instead, it appears Alzadon is citing a one-paragraph

argument that Highlands was not permitted to complete the Note by inserting the amount due after its execution.

Alzadon's reference to Page 767 in the record on appeal also does not support his statement that the error was preserved for our review. Page 767 in the record is the first page of Appellant's Response to Plaintiff's Motion for Summary Judgment and makes no mention of any issue with the amount claimed by Highlands. Furthermore, Alzadon did not include this argument in his Prehearing Statement. It does not appear this argument was presented to the circuit court and therefore is not properly before this Court for review. *See Fischer v. Fischer*, 197 S.W.3d 98, 102 (Ky. 2006).

Even assuming that this argument was properly before us for review, we do not find a material issue of fact warranting a reversal of the circuit court's entry of summary judgment. A review of the record indicates that Highlands loaned Alzadon a total of $305,217.10 pursuant to the terms of the Agreement and Note. Alzadon argues in his brief that the Agreement was that Highlands would pay him $350,000.00. To the contrary, Highlands agreed to subsidize Alzadon's net practice income as necessary to enable Alzadon to earn a minimum net practice income of $350,000.00 per year. It was not required to actually pay him $350,000.00, as Alzadon claims, since it was anticipated that Alzadon would have his own income from his medical practice which would be included in the net practice income. Alzadon's earned net practice income would have naturally reduced the amount of income guaranty payments made by Highlands.

It is also undisputed that Alzadon made a one-time payment to Highlands in the amount of $75,000.00. It is well-established "that a partial payment on an obligation made before it is barred by limitation is *prima facie* an acknowledgment that the residue is unpaid and of a continuing liability therefor . . . ." *City of Louisa v. Horton*, 263 Ky. 739, 93 S.W.2d 620, 623 (1935). Alzadon's arguments that he did not agree to pay the $305,217.10 balance and that the figure was improperly entered on the Note after its execution are untenable due to his acknowledgement of the debt in his partial payment thereof, but also due to the fact that pursuant to the Agreement he specifically agreed to repay the sums provided by Highlands, and further agreed that the principal sum due could be entered on the Note by Highlands. We find no material issue of fact as to whether Alzadon was required to repay the $230,210.00 to Highlands.

Alzadon further argues that the trial court abused its discretion when it refused to permit him additional discovery and granted summary judgment. In support of this argument, Alzadon contends that as a general rule, summary judgment is not proper if the nonmovant is not given sufficient opportunity to take discovery. *Vance By and Through Hammons v. United States*, 90 F.3d 1145, 1148 (6th Cir. 1996). Alzadon claims he was precluded from taking any discovery by the Floyd Circuit Court. To the contrary, Alzadon was afforded ample opportunity to conduct discovery. The initial complaint in this matter was filed on April 14, 2008, and summary judgment was granted on November 17, 2011. Therefore, Alzadon was afforded over three years to conduct discovery, and the record

reflects that he did in fact conduct discovery by serving at least two sets of interrogatories and requests for production of documents on Highlands. The facts in the instant case are not comparable to those in *Vance*, *supra*, wherein the complaining party was not permitted to conduct any discovery. Because Alzadon had ample time to conduct discovery, we find no abuse of discretion.

Finally, Alzadon argues that the attorneys' fees awarded in this case are excessive and urges this Court to vacate and remand for a hearing. Alzadon claims the attorneys' fees in the instant case were not reasonable.

Highlands argues that Alzadon is contractually obligated to pay its attorneys' fees and court costs. In support of this argument, Highlands cites the Agreement:

> [Alzadon] agrees to pay upon demand all out of pocket costs and expenses incurred by [Highlands] in the servicing, administration, or collection of any indebtedness evidenced by this Note, including reasonable attorneys' fees, to the extent permitted by law.

We agree with Highlands that Alzadon was contractually obligated to pay the attorneys' fees incurred in the prosecution and defense of this case. Thus, the issue is whether the attorneys' fees awarded were reasonable. Attorneys' fees are an issue of law and the court has the duty to ensure they are reasonable. *Inn-Group Management Serv. v. Greer*, 71 S.W.3d 125, 130 (Ky. App. 2002).

Highlands contends that the fees were reasonable, given the overwhelming evidence that Alzadon's claims were frivolous, in bad faith, and were unreasonable. Highlands argues it is patently frivolous that after signing two

Agreed Orders wherein he acknowledged the existence of evidence demonstrating his gross unprofessional misconduct, Alzadon would sue Highlands over its review of his quality of patient care. Under these circumstances Highlands contends an award of a reasonable fee for the defense of this matter was warranted.

We agree with Highlands that a reasonable fee was warranted. We find the award of attorneys' fees in the instant case to be reasonable and will not disturb it on appeal.

Finding no genuine issues of material fact and no errors as a matter of law, we affirm the Floyd Circuit Court's November 17, 2011, order entering summary judgment in favor of Highlands.

ALL CONCUR.

BRIEF FOR APPELLANT:

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