Archibold v Kwiat Eye & Laser Surgery, PLLC
2017 NY Slip Op 33330(U)
March 2, 2017
Supreme Court, Saratoga County
Docket Number: 2016467
Judge: Thomas D. Nolan

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ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

JUDITH C. ARCHIBOLD, MPH, O.D.,
Plaintiff,

-against-

KWIAT EYE AND LASER SURGERY, PLLC and
DAVID M. KWIAT, M.D.,
Defendants.

DECISION AND ORDER
RJI No. 45-1-2016-1132
Index No. 2016467

FILED
2017 MAR 17 AM 11:45
SARATOGA COUNTY
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BALLSTON SPA, NY

PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

APPEARANCES: LEMERY GREISLER LLC
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This action arises from a professional employment relationship governed by a written contract. Plaintiff, the ex-employee, in an amended complaint containing seven causes of action, contends that she resigned and is entitled to recover unpaid wages and incentive compensation owed to her under the contract plus additional damages and penalties claimed to arise because of defendants' alleged violation of certain provisions of Labor Law. Defendants contend that plaintiff breached the employment contract, was terminated for cause and thereby forfeited her entitlement to contractual benefits, that they do not owe plaintiff additional wages or compensation and that they have not violated the Labor Law. And, in a counterclaim, defendants seek a declaratory judgment confirming that plaintiff was terminated for cause.

A dispute concerning Article 31 discovery exists. Plaintiff moves for an order to compel

defendants' compliance with two sets of discovery demands and two sets of interrogatories, or alternatively, conditionally precluding defendants from introducing evidence at trial to support its affirmative defenses and counterclaim if satisfactory responses to her demands are not served within 30 days of the court's order.

In opposition, defendants contend that their responses were reasonable and appropriate and that many of the demands are overreaching, overbroad, excessive, and seek documents and information not relevant to the salient issues. Stated another way, defendants contend that they have produced all available records relevant to the issues raised and that the plaintiff should first explore in depositions of defendants' specifies relative to their record keeping, computer, e-mail, and telephone systems and document retention policy.

First, some background. In 2012, plaintiff, a licensed optometrist, entered into a five-year employment contract with defendants, David M. Kwiat, M.D., an ophthalmologist, and his medical practice. The contract provided that plaintiff would be paid an annual base salary starting at $85,000.00 and rising to $110,000.00. In addition, defendants agreed to pay plaintiff additional annual compensation equal to 25% of the total fees "actually collected and attributable to services rendered by [plaintiff] [to patients] that exceed $385,000.00" in a "full calendar year [January to December]". Defendants were granted the right to terminate plaintiff's employment for specific reasons enumerated in the contract which generically would constitute termination "for cause". The contract afforded both plaintiff and defendants the option, for any reason, to terminate the agreement, by "giving 120 days written notice of termination to the other".

On January 4, 2016, plaintiff issued a written notice to defendants stating she was exercising her right to terminate the contract effective May 3, 2016 and that she would be

"available to continue working" and fulfill her contractual obligation until the contract ended. One day later, January 5, 2016, defendants terminated plaintiff's employment "for cause" effective immediately and paid plaintiff her wages through January 2, 2016.

Plaintiff now contends, citing her resignation, that defendants are obligated to pay her salary for 120 days and that defendants wrongfully withheld and refused to pay salary due for January 3, January 4, and January 5, 2016 and in doing so, violated Labor Law § 190 and 195. Plaintiff further contends that defendants have failed to pay her full contracted additional compensation due for 2013 and have not paid her additional compensation due for 2015.

Defendants contend that plaintiff's resignation letter was pretextual - an attempt to preempt defendants' termination for cause. Defendants contend that plaintiff's substandard work performance and erratic behavior in 2015 triggered a management review of her status and that defendants had decided in November 2015 to terminate her but decided to delay implementing the decision until January 2016 "after the holidays as a courtesy to plaintiff".

The court's effort to resolve the discovery dispute has been unsuccessful.

The scope of pretrial discovery in New York is broad, consistent with a stated policy permitting full, liberal, and far-reaching access to material and necessary matter. Kavanaugh v Ogden Allied Maintenance Corp., 92 NY2d 952 (1998); American Assn. of Bioanalysts v New York State Dept. of Health, 12 AD3d 868 (3rd Dept 2004). Open and full disclosure is favored but when disputes arise, the trial court is vested with considerable discretion to resolve them by balancing "the need for the information against its possible relevance". Andon v 302-304 Mott St. Assoc., 94 NY2d 740, 745-746 (2000); Herbenson v Carrols Corp., 101 AD3d 1220 (3rd Dept 2012). Yet, the liberal discovery allowed in New York is not unrestricted. "A party is not

entitled to unlimited, uncontrolled, unfettered discovery". Geffner v Mercy Med. Center, 83 AD3d 998 (2nd Dept 2011). Established privileges and restrictions are recognized and enforced. Dolback v Reeves, 265 AD2d 625 (3rd Dept 1999). The appropriate analysis is whether the items sought are material and necessary to assist the litigants in the prosecution or defense of the action, and what is material and necessary must be "interpreted liberally to require disclosure...of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason". Allen v Crowell-Collier Publ. Co., 21 NY2d 403, 406 (1968); People ex rel Spitzer v Pharmacia Corp., 39 AD3d 1117 (3rd Dept 2007); Walsh v Liberty Mut. Ins. Co., 289 AD2d 842 (3rd Dept 2001). A party resisting disclosure has the burden of establishing the material's immunity from disclosure. Koump v Smith, 25 NY2d 287, 294 (1969); Marten v Eden Park Health Services, 250 AD2d 44,47 (3rd Dept 1998). Moreover, the court's supervisory role allows it "to direct the priority in which the parties may use disclosure devices if it finds under the particular circumstances, that the action will be expedited by the use of one device prior to another". Geffner v Mercy Med. Center, supra at 998.

The court has reviewed plaintiff's demands and interrogatories and defendants' responses. As amplified in the motion papers, defendants contend that plaintiff's comments and behavior and treatment of certain patients precipitated a review of her employment status. Plaintiff now requests that defendants identify the patients involved and, inter alia, make available to her all of the defendants' paper and electronically stored information compiled in making the decision to "terminate" her. Plaintiff also avers that she is entitled to all financial records relevant to the computation of the additional compensation called for in the contract. Plaintiff contends that a

full search by its experts of all of defendants' electronic records is appropriate.[1] Defendants have responded that no e-mail communications were generated by defendants relative to plaintiff's employment status., a claim plaintiff's attorney describes as "extraordinary".

Acrimony aside, this case does not appear complex. Plaintiff is entitled to access certain of defendants' financial records to compute and verify the additional compensation which she claims she is entitled to for the years 2013, 2014, and 2015 and of course, plaintiff is not "bound to take defendants' word for what they say [is owed]". Yet, plaintiff is not permitted to "freely roam" through defendants' financial records. JFK Family Ltd. Partnership v Millbrae Natural Gas Dev. Fund 2005 L.P., 132 AD3d 731, 734 (2nd Dept 2015). It appears plaintiff has offered to limit their computer consultant's review of defendants' financial records to information relevant to plaintiff's income production. Moreover, since defendants cite plaintiff's alleged malfeasance in treating certain patients, disclosure of that information should be permitted, subject to a confidentiality agreement, to protect the privacy interest of the nonparty patients. see Cole v Panos, 128 AD3d 880, 883-884 (2nd Dept 2015) [Information related to defendant doctor's surgical procedures should be produced]. Likewise, any and all correspondence - written or electronic - related to defendants' decision to "terminate" must be produced. The exchange of written discovery notices and interrogatories and responses does not appear to be the best course to expedite discovery. Rather, in the court's view, defendants should first submit to depositions

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[1]In a letter submitted to the court after the motion was made requesting a conference to explore resolution of the discovery dispute, plaintiff's counsel included a copy of a letter to defendants' counsel and e-mail correspondence between counsel which, in relevant part, asserts that defendants utilize a specific record keeping system which plaintiff's computer consultant could easily, quickly, and inexpensively, if permitted access, effect a remote connection into defendants' onsite computer server and collect the relevant data for 2013, 2014, and 2015 in "as little as five minutes and certainly in under an hour". Defendants refused to allow access.

during which plaintiff's counsel may explore the systems and procedures defendants follow to collect and store financial data and as well inquire about defendants' claims concerning plaintiff's substandard patient care and erratic behavior and the extent to which defendants utilized electronic communication in their investigation of patient care and behavior. During the deposition(s), the patient(s) who defendants contend were not properly treated by plaintiff can be identified and if the parties are unable to agree to keep such information confidential, the records of those patients should be submitted to the court for in camera review and the court will decide if the records are relevant and, if so, whether any redactions should be made. Following the defendants' depositions, both sides will be better informed whether and how independent access to defendants' financial records can be achieved.

At this time, the court finds no reason to compel defendants' additional compliance with plaintiff's outstanding discovery demands and interrogatories. Plaintiff's motion is denied, without prejudice. The scheduling order dated September 20, 2016 is revised to direct that the depositions of all parties be completed by June 1, 2017 and, if necessary, further motion(s) related to discovery filed by July 1, 2017.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for plaintiff. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for plaintiff is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: March 2, 2017
Saratoga Springs, New York

ENTERED
Craig A. Hayner
Saratoga County Clerk

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

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