IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

RICHARD C. RASHID, M.D.,

Plaintiff,

v

MUHIB S. TARAKJI, M.D.,

Defendant.

Case No.: 97-C-725
Judge: James H. Young, Jr.
Business Court Division

ORDER

Upon the above referenced case being assigned to the Business Court Division the Court ordered the parties to brief the pending issues. In doing so the Plaintiff, Richard C. Rashid, M.D., by counsel, Scott S. Segal, Esq., filed an Initial Brief of Plaintiff Richard C. Rashid, M.D. Regarding Issues of Law Identified in The Parties' Statements of the Case. The Defendant, Muhib S. Tarakji, M.D., by counsel, David K. Schwirian, Esq., filed a Motion for Summary Judgment. In addition both parties filed subsequent replies to each's initial filing. Upon review of the statements of the parties; the above referenced filings; and the pleadings, the Court is of the opinion that certain issues may be disposed of at this time as a matter of law while others will require further factual development.

Therefore, based upon the statements of the parties; the above referenced filings; and the pleadings, the Court finds the following:

Covenant Not To Compete

The Supreme Court of Appeals of West Virginia in *Reddy v. Community Health Foundation of Man*, 171 W.Va. 368 (1982), set out the proper procedure for reviewing covenants

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not to compete. In that decision the Supreme Court stated, "[t]he approved procedure for reviewing a covenant not to compete, briefly summarized, thus involves three steps: (1) The court must determine that the covenant is reasonable, and is being used reasonably by the employer. If not, the covenant is set aside. If the covenant is inherently reasonable the inquiry continues. (2) The employer must show, under the circumstances, what legitimate interests of his are implicated. When these are established, the reasonable covenant is presumptively enforceable in its entirety. (3) The employee is then given the chance to rebut the presumptive enforceability of the covenant by showing either that he has no company trade assets to abuse, or that the assets made available to him properly belong to him, that the interests asserted by the employer may be protected by a partial enforcement of the covenant." *Reddy v. Community Health Foundation of Man*, 171 W.Va. 368,380 (1982). The *Reddy* Court went on to say that whether the covenant not to compete is reasonable on its face is "an issue of law for the court that can usually be decided by inspection of the contract alone. However, to the extent that the issue of reasonableness is not apparent from the four corners of the contract alone, the burden of demonstrating reasonableness is upon the employer." *Id.* at 383.

The Supreme Court of Appeals again took up the issue of covenants not to compete in *Gant v. Hygeia Facilities Foundation, Inc.,* 181 W.Va. 805 (1989). In *Gant* the Supreme Court of Appeals instructed the Circuit Courts that, "[t]o determine if a restrictive covenant is reasonable, we use a three part inquiry: 'A restraint is reasonable only if it (1) is no greater than is required for the protection of the employer, (2) does not impose undue hardship on the employee, and (3) is not injurious to the public.'" *Gant v. Hygeia Facilities Foundation, Inc.,* 181 W.Va. 805, 807 (1989). To examine the first two inquiries in this reasonableness test Syllabus Point 2 of *Reddy* is beneficial. Syllabus Point 2 in pertinent part states, "[a]n employee

covenant not to compete is unreasonable on its face if its time or area limitations are excessively broad or where the covenant appears designed to intimidate employees." *Reddy* at 370.

In the case currently before this Court, we are confronted with a covenant not to compete that limits the Defendant from practicing medicine in Kanawha County, West Virginia, for two (2) years following the termination of the contract. Agreement of April 1, 1981 at ¶ 9. In both *Reddy* and *Gant* the Supreme Court of Appeals upheld covenants not to compete of thirty (30) miles and three (3) years. See *Reddy* and *Gant*. In *Huntington Eye Associates* the Supreme Court of Appeals found that a covenant not to compete of fifty (50) miles from any of the Plaintiff's offices for two (2) years was not facially unreasonable. *Huntington Eye Associates v. LoCascio*, 210 W.Va. 76 (2001). This specific covenant not to compete in the opinion of the Cabell County Circuit Court may have been as wide as one hundred and twenty miles, and yet the Supreme Court of Appeals did not find the area limitation to be excessively broad. *Id.* at 84 Based upon *Reddy* and its progeny, this Court finds a covenant not to compete limited to just Kanawha County for only two (2) years is not excessively broad or designed to intimidate employees.

The third area the Court must consider to determine if the covenant not to compete is facially reasonable is the effect on the public. Per the Supreme Court of Appeals decision in *Reddy* and *Gant* the Court is of the opinion that this issue can be decided as a matter of law, but to date the parties have not submitted any facts to the Court to which it could base a decision. Therefore, the Court finds that once this issue is more factually mature it may issue a decision as a matter of law.

Assuming that the covenant not to compete is reasonable the employer must prove "that he has interests requiring protection from the employee," for it to be enforceable. *Reddy* at

Syllabus Point 3. To this issue the Defendant has alleged that the Plaintiff sold his medical practices and related business to certain trusts and ceased to practice medicine. While the Plaintiff acknowledges selling some of his medical practices and related business to certain trusts he maintains that he continues to practice medicine in the Kanawha County area. More succinctly, the Defendant argues that the Plaintiff no longer has an interest requiring protection. The Court is of the opinion, assuming the Plaintiff prevails after an initial finding that the covenant not to compete is reasonable, that there are still genuine issues of material facts in dispute regarding the Plaintiff's interest in the covenant not to compete. Therefore, the Court finds that at his time it is unable to make a ruling as a matter of law regarding the Plaintiff's interest **in the covenant not to compete.**

Survival of Covenant Not to Compete after Expiration of the Contract

The Defendant has argued in his Motion for Summary Judgment that the contract in its entirety expired on March 23, 1995. More specifically, the Defendant alleges that the expiration of the contract included the covenant not to compete; thus it was impossible for him to be in violation of this contract when he opened his new medical practice on March 24, 1995. The Defendant in support of this contention has quoted a litany of case from across the nation. Without addressing every out of jurisdiction case the Defendant cited the Court can quickly sum up the proposition of each as a restrictive covenant does not survive the expiration of a contract unless the terms of the contract specifically states that the covenant not to compete survives the expiration of the contract. *Defendant Tarajki's Memorandum in Support of Motion for Summary Judgment.* The Court up to this point has been unable to find any case law in this state that supports this contention, but the Court is of the opinion that having a case directly on point in this jurisdiction is unnecessary as general rules of contract interpretation can answer this

quandary. Furthermore, the Court is in agreement with the Plaintiff that the covenants not to compete in *Huntington Eye Associates* and *Gant* are similar to the covenant currently before the Court; but nonetheless, as stated above the Court is of the opinion that this question is more simply answered by applying the general rules of contract interpretation.

The Supreme Court of Appeals in *Fraternal Order of Police, Lodge 69*, instructed the Circuit Courts that "[i]n construing the terms of a contract, we are guided by the common-sense canons of contract interpretation. One such canon teaches that contracts containing unambiguous language must be construed according to their plain and natural meaning. *Payne v. Weston,* 195 W.Va. 502, 507, 466 S.E.2d 161, 166 (1985). Contract language usually is considered ambiguous where an agreement's terms are inconsistent on their face or where the phraseology can support reasonable differences of opinion as to the meaning of words employed and obligations undertaken. In note 23 of *Williams [v. Precision Coil, Inc.],* 194 W.Va. [52,] at 65, 459 S.E.2d [329,] at 342 [(1995)], we said: "A contract is ambiguous when it is *reasonably* susceptible to more than one meaning in light of the surrounding circumstances and after applying the established rules of construction." *Fraternal Order of Police, Lodge No. 69 v. City of Fairmont,* 196 W.Va. 97, 101, (1996). Paragraph 9 of the 1981 Agreement (contract) contains the language that triggers applicability of the covenant not to compete. It states, in pertinent part, "[u]pon the termination of Dr. Tarakji's services hereunder, for whatever reason, whether by termination by Dr. Rashid, by termination by Tarakji, or otherwise..." the Defendant may not practice medicine in Kanawha County, West Virginia for two (2) years. 1981 Agreement at ¶ 9. On the other hand the 1978 Agreement (contract) states, in pertinent part, "[u]pon the termination of Dr. Tarakji's employment, for whatever reason, whether by the expiration of this employment agreement, by termination by Dr. Rashid, by termination by Dr. Tarakji, or

otherwise..." the Defendant shall not practice medicine in Kanawha County, West Virginia for two (2) years. 1978 Agreement at ¶ 9. The Court is of the opinion that the changes made to the 1978 Agreement by the 1981 Agreement creates an ambiguity in paragraph nine (9) of the 1981 Agreement as to the survivability of the covenant not to compete past the expiration of the agreement. This ambiguity creates a genuine issue of material fact that shall be determined by the finder of fact.

Therefore, Court is unable to rule as a matter of law that the covenant not to compete does not survive the expiration of the contract; accordingly, the Defendant's Motion for Summary Judgment regarding the enforceability of the covenant not to compete after the expiration of the contract is denied.

Damages

Currently the Court sees that there are two separate and distinct issues regarding possible damages. The first issue is whether or not the liquidated damages clause as drafted is reasonable and not punitive; and the second is whether or not the Plaintiff could collect both liquidated damages and actual damages. The Court will address issue one first as its success or failure will directly impact the second issue.

The issue of liquidated damages was taken up by the Supreme Court of Appeals in some detail in *The Wheeling Clinic v. Van Pelt*. In *Wheeling Clinic* the Supreme Court of Appeals stated, "[p]arties may properly contract for liquidated damages (1) where such damages are uncertain and not readily capable of ascertainment in amount by any known or safe rule, whether such uncertainty lies in the nature of the subject, or in the particular circumstances; or (2) where from the nature of the case and tenor of the agreement, it is apparent that the damages have already been the subject of actual fair estimate and adjustment between the parties." Syllabus Pt.

3, *The Wheeling Clinic v. Van Pelt*, 192 W.Va. 620 (1994). This particular case is quite instructive to the Court for more than just a standard to examine liquidated damages. *Wheeling Clinic* involved a physician who resigned from his employment and opened a new practice within close proximity to his former employer much like we have in the case currently before the Court. The liquidated damages clause called for the former partner to pay damages in the amount of one hundred percent (100%) of his annual earnings if he practiced medicine with thirty (30) miles of his former employer. Originally, the Circuit Court in *Wheeling Clinic* reduced the Plaintiff's liquidated damages to fifty percent (50%) of the Defendant's annual earnings, but the Supreme Court of Appeals reversed this and reinstated the liquidated damages to its full one hundred percent (100%) of his annual earnings. *Id.* at 628. In reaching this decision the Supreme Court of Appeals delineated very succinctly why an exact calculation in these types of cases can be very difficult. The Supreme Court of Appeals stated, "[s]uch damages included the obvious lost revenues from patients who choose to continue to see the departing partner at his new location; the loss of patients referrals from the departing partner to the remaining partners; the loss of departing partner's billing power; the cost of the Clinic's overhead which remain after a partner leaves and which must be spread among the fewer, remaining partners; the damage to the Clinic's reputation due to the loss of a "name" physician; costs of recruiting another physician. The amount of such anticipatory expenses and losses is not susceptible to determination, yet they are almost certain to occur." *Id.* at 625.

In the case currently before the Court the factual situation is strikingly similar. Although there are a few factual differences none of them alters the Courts thinking or reliance on *Wheeling Clinic*. The parties in this case had contracted for liquidated damages of one-third (1/3) of all the Defendant's compensation. 1981 Agreement at ¶ 9. This is roughly thirty-three

and three tenths percent (33.3%) which is drastically less than the one hundred percent (100%) the Supreme Court of Appeals upheld in *Wheeling Clinic*. Additionally, in our case just as with *Wheeling Clinic* we have a former doctor opening up a practice in close proximity to his former employer. For the reasons the Supreme Court of Appeals found in *Wheeling Clinic* this Court is of the opinion that it would be nearly impossible to determine actual damages. Therefore, the Court finds that as a matter of law the liquidated damages clause is reasonable and not punitive in nature.

Secondly, the Plaintiff alleges that he may recover both liquidated and actual damages. The Defendant in response argues that this would constitute an impermissible double recovery and should be barred. In furtherance of his argument the Plaintiff relies upon *VanKirk v. Green Construction Company*, 195 W.Va. 714 (1996). Specifically, the Plaintiff relies upon the Supreme Court of Appeals in *VanKirk* quoting the North Dakota case of *Meyer v. Hansen*, 373 N.W.2d 392 (1985), where the that Court stated, "a provision for liquidated damages will not prevent recovery for actual damages for events which are not covered by the liquidated damages clause, unless the contract expressly provides that damages other than those enumerated shall not be recovered." *VanKirk* at 719. While the Supreme Court of Appeals allowed the Plaintiff to recover liquidated and actual damages in *VanKirk* that case is distinguishable from the one before this Court. In *VanKirk* the Supreme Court of Appeals found that the liquidated damages were for any damages for delays in construction but that the actual damages awarded were for something "entirely separate." *Id.* Although, the Court agrees with the Plaintiff in what *VanKirk* stands for the Court must part ways with the Plaintiff in its application. The actual damages incurred by the Plaintiff are not "entirely separate" from the liquidated damages. The parties clearly anticipated what the measure of damages should be if the Defendant's services were

terminated for any reason. It is clear that in the intervening years the positions of the parties has changed drastically but that does not alter the fact that the parties had contemplated and contracted to a measure of damage should the Defendant violate paragraph 9 of the 1981 Agreement. Therefore, the Court finds as a matter of law that the Plaintiff cannot recover actual damages in addition to liquidated damages.

Tortious Interference

The Plaintiff in his complaint put forth a cause of action for tortious interference. In *Torbett v. Wheeling Dollar Savings & Trust Company*, 173 W.Va. 210 (1984), the Supreme Court of Appeals opined that, "[t]o establish prima facie proof of tortious interference, a plaintiff must show:

(1) existence of a contractual or business relationship or expectance;

(2) an intentional act of interference by a party outside that relationship or expectancy;

(3) proof that the interference caused the harm sustained; and

(4) damages." Syllabus Pt. 2, *Torbett* at 210.

Since the parties were in a contractual relationship with one another the Plaintiff is unable to show an intentional act by a party outside of the contractual relationship. Accordingly, the Court finds that as a matter of law the Plaintiff is simply unable to make a prima facie case for tortious interference.

Prejudgment Interest

The Plaintiff avers that he should be entitled to prejudgment interest of ten percent (10%) per annum for at least some of his cause of actions. Of course the Defendant argues that the Plaintiffs alleged losses are based in contract and not automatically entitled to prejudgment interest. Prejudgment interest in West Virginia is discussed in two separate code sections. First,

West Virginia Code § 56-6-27 states, "The jury, in any action founded on contract, may allow interest on the principal due, or any part thereof, and in all cases they shall find the aggregate of principal and interest due at the time of the trial, after allowing all proper credits, payments and sets-off; and judgment shall be entered for such aggregate with interest from the date of the verdict." *W.Va. Code* § 56-6-27 (2012). The second statute, *West Virginia Code* § 56-6-31, states in pertinent part, " Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract or otherwise, entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: *Provided,* That if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree. Special damages includes lost wages and income, medical expenses, damages to tangible personal property and similar out-of-pocket expenditures, as determined by the court. If an obligation is based upon a written agreement, the obligation shall bear a prejudgment interest at the rate set forth in the written agreement until the date the judgment or decree is entered and, thereafter, the judgment interest rate shall be the same rate as provided for in this section." *W.Va. Code* § 56-6-31(a) (2012). Although, the two code sections appear to be at odds with one another the Supreme Court of Appeals has addressed this issue on a couple of occasions. Most recently the Supreme Court of Appeals in *Ringer v. John*, 230 W.Va. 687 (2013), stated "[i]n an action founded on contract, a claimant is entitled to have the jury

instructed that interest may be allowed on the principal due, *W.Va. Code*, 56-6-27 [1923], but is not entitled to the mandatory award of interest contemplated by *W.Va. Code,* 56-6-31 [1921], since this statute does not apply where the rule concerning interest is otherwise provided by law." Syllabus Pt. 3, *Ringer v. John,* 230 W.Va. 687 (2013).

The Court is of the opinion that all matters arising in this cause of action flow from the 1981 Agreement. Therefore, this is a contractual matter; thus the determination of prejudgment interest is for the trier of fact.

Spoliation

The Plaintiff has claimed that the Defendant's destruction of certain documents warrants an adverse inference instruction and sanctions. Specifically, the Plaintiff alleges that the Defendant destroyed "work papers and business records ("the Business Records") generated by or for Dr. Tarajki's practice during tax years 1994 to 1998." Initial Brief of Plaintiff Richard C. Rashid, M.D. Regarding Issues of Law Identified in The Parties' Statements of the Case, page 28. The Defendant does not dispute that the documents in question were destroyed but that at the time of destruction there was not a law suit pending.

Syllabus Point 2 of *Tracy v. Cottrell*, 206 W.Va. 363 (1999), sets out four factors for the Court to consider when addressing the issue of spoliation. The Supreme Court of Appeals stated, "[b]efore a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or

had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed." Syllabus Pt. 2, *Tracy* at 363.

Factors two and three of this syllabus point are particularly significant to the Courts findings on this issue. As to factor two, the Defendant alleges and the Plaintiff does not contest that the tax filings for 1995, 1996, and 1997 have been produced. If the Plaintiff is in possession of these documents the Court is unable to imagine how he may be prejudiced without the destroyed documents. Secondly, and more importantly, the Plaintiff cannot satisfy factor three. This cause of action originally filed in 1997 was dismissed and stricken from the Court's docket by Order dated July 5, 2001. The Motion to Reinstate the cause of action was not filed until the 22nd day of March, 2006. Accordingly, during the time period that the Plaintiff alleges that the Defendant destroyed discoverable records there was no litigation pending before any Court. Since the Plaintiff had failed to prosecute this cause of action up until 2006 there was no reason for the Defendant to anticipate any further litigation in this matter. Therefore, the Plaintiff is not entitled to an instruction regarding spoliation.

Defendant's Counterclaim

The Defendant in his Motion for Summary Judgment moved the Court to grant his Counterclaim regarding the Plaintiff's failure to pay employee benefits due him. The West Virginia Rules of Civil Procedure states, "(a) Compulsory Counterclaims. A pleading shall state

as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13." *West Virginia Rules of Civil Procedure* 13(a) (2014).

As the basis for this cause of action is the Plaintiff's alleged failure to pay the Defendant's employee benefits as required by the 1981 Agreement, the Court fails to see how this could be anything except a compulsory counterclaim under the West Virginia Rules of Civil Procedure. The Defendant failed to plead this as a counterclaim when answering the Complaint and has never asked leave of the Court to do so now. The only mention of this counterclaim has been in a designation of issues before the Court on March 31, 2014. The Defendant's Motion for Summary Judgment regarding the Plaintiff's failure to pay employee benefits due him is denied; and as a matter of law the Defendant's claim for value of employee benefits is barred.

All accordingly which is ORDERED and DECREED.

Enter this 26th day of August, 2014.

Date: 9/5/14
Certified copies sent to: DS. SS. MS
counsel of record
parties
other (please indicate)
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ORDER ENTER: James H. Young

HONORABLE JAMES H. YOUNG, JR.