IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

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

This matter is before the Court upon both parties competing motions for summary judgment. As both parties have filed responses in opposition to the other's respective motion and discovery is complete the Court is of the opinion that these matters are ripe for determination. Accordingly, the Court finds and orders the following.

Standard for Summary Judgement

"Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Painter v. Peavey, Syl. Pt. 4, 192 W.Va. 189, 451 S.E.2d 755 (1994). Furthermore the Court shall only grant a motion for summary judgment when "there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law". Syl. Pt. 3, *Aetna Casualty and Surety Co. v. Federal Ins. Co. of N.Y.*, 148 W.Va. 160, 133 S.E.2d

770 (1963). Lastly, the Supreme Court of Appeals of West Virginia stated in *Williams* that "summary judgment is appropriate if from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party." *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995).

Statement of Facts

By an employment agreement dated April 1, 1978, the Defendant, Dr. Tarakji, began working for the Plaintiff, Dr. Rashid. Employment Agreement of April 1, 1978. This agreement was for the specific term of three years. Additionally, the 1978 Agreement in paragraph 9 contained a covenant not to compete. In pertinent part paragraph 9 stated, "[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, Dr. Tarakji covenants and agrees that he shall not directly or indirectly engage in the practice of medicine" in Kanawha County, West Virginia for two (2) years from the date of termination. The parties continued under this agreement until its expiration and on April 1, 1981 entered into a new employment agreement.

In most respects the 1978 Agreement and the 1981 Agreement were the same but the 1981 Agreement contained two significant departures. First, the 1981 Agreement did not contain an expiration date. Employment Agreement of April 1, 1981. Secondly, the covenant not to compete contained in Paragraph 9 was changed. Paragraph 9 of the April 1, 1981 Employment Agreement stated,

> Upon the termination of Dr. Tarajki's services hereunder, for whatever reason, whether by termination by Dr. Rashid, by termination by Dr. Tarajki, or otherwise, Dr. Tarajki covenants and agrees that he shall not directly or indirectly engage in the practice of medicine, including limiting the generality of the foregoing practice of ophthalmology, within Kanawha County, West Virginia, and will not treat or see as a patient any

> person who had been billed for medical services by Dr. Rashid's office within three (3) years prior to the date of termination, for a period of two (2) years following the date of the termination of this agreement, either as an individual for his own account, as a partner, employee, associate or any other capacity with another person, firm or corporation engaged in the practice of medicine within Kanawha County, West Virginia.

The 1981 Agreement is the agreement that parties were operating under most recently with the exception of a the additions contained in the First Amendment to Agreement. Most notably the parties on the 23rd day of December, 1994 amended the 1981 Agreement to include an expiration date of March 23, 1995. First Amendment to Agreement, ¶2. This amendment and the 1978 and 1981 Agreements were all drafted by attorney employed by the Plaintiff. Rashid Depo pages 67, 139, and 144 (also see affidavit of Jeffery Wakefield). The main purposes behind the agreements were the same with only a few particulars being changed by subsequent agreements. The genesis of all the agreements is that the Defendant would see patients and remit the right to all payments to the Plaintiff who would then see that the proper party was billed and collect what payments were due. Under the 1978 Agreement the Defendant received a set salary from the Plaintiff, but under the 1981 Agreement the Defendant's pay was based on the fees the Plaintiff was able to collect from the Defendant's patients. The Defendant was to receive forty-five percent (45%) of the fees collected by the Plaintiff. 1981 Agreement, ¶2.

On December 4, 1993 the United States government conducted a raid on the Plaintiff's office as part of an investigation regarding billing practices. Then on December 23, 1994, the Plaintiff and the United States of American entered into a settlement agreement where the Plaintiff divested himself of the practice where the Defendant worked. Additionally, the Plaintiff was barred from participating in federal and state health programs for ten years beginning on March 23, 1995. Settlement Agreement of December 23, 1994. At that time of the Plaintiff's disbarment from participating in federal and state health programs the Defendant would have lost

forty percent (40%) of his fees. Deposition of Mr. Robey at Exhibit 6. Then on March 24, 1995, the Defendant opened his own practice on the same block as the Plaintiff. Furthermore as the result of this federal investigation both parties paid penalties to the United States of America. The Plaintiff agreed to pay one million two hundred and fifty thousand dollars ($1,250,000) to the United States of America. The Defendant was ordered to pay two hundred and thirty thousand dollars ($230,000) to which the Plaintiff paid one hundred and seventy-eight thousand two hundred and fifty dollars ($178,250) on his behalf thus leaving the Defendant to pay fifty-one thousand seven hundred and fifty dollars ($51,750) himself.

Complaint

Count I – Breach of Contract

The Defendant in his Motion for Summary Judgment makes five separate arguments why the Court should grant his motion. The Court is only going to address his first two arguments because the remaining three arguments become moot after the Court addresses the first two. The Defendant's first argument is that the covenant not to compete and for that matter the entire 1981 Agreement expired on March 23, 1995 per the terms of the First Amendment. The Court is in agreement with the Defendant on this point.

In West Virginia the "[t]he question as to whether a contract is ambiguous is a question of law to be determined by the court." Syl. Pt. 1, *Berkley County Public Service District v. Vitro Corp. of America*, 152 W.Va. 252, 162 S.E.2d 189 (1968). As this Court stated in its previous order 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). Furthermore, the circuit courts have been instructed that "[e]xtrinsic evidence may be used to aid in the construction of a contract if the matter in controversy is not clearly expressed in the contract, and in such case the intention of the parties is always important and the court may consider parol evidence in connection therewith with regard to conditions and objections relative to the matters involved. *Berkley County Public Service District* at Syl. Pt. 2. Finally, "[i]t is also well settled that any ambiguity in a contract must be resolved against the party who prepared it." *Nisbit v. Watson*, 162 W.Va. 522, 251 Se2d 774 (1979).

As this Court stated in its previous Order the 1981 Agreement was ambiguous as to the survivability of the covenant not to compete. At the time of the entry of that Order the Court felt the facts were not developed enough for the Court to ascertain the intent of the parties. Now that discovery is complete and in light of the law quoted above the Court is of the opinion it can rule on the survivability of the covenant not to compete as a matter of law. First, both parties are in agreement that every document defining the employment relationship between the parties was drafted by the Plaintiff's attorney. Accordingly, any ambiguity must be resolved in favor of the Defendant. The 1978 Agreement between the parties contained language very clearly stating

that the covenant not to compete was to survive the expiration of that agreement. The 1981 Agreement was silent as to the survivability of the covenant not to compete upon expiration as the parties chose not to include an expiration date in that agreement. Then in 1994 the parties amended the 1981 Agreement to include an expiration date but failed to address the survivability of the covenant not to compete thus creating an ambiguity. As such it is the role of the Court to determine the intent of the parties.

In doing this it is necessary and permissible for the Court to consider the 1978 Agreement in determining the parties' intent. As stated previously the 1978 Agreement contained very clear specific language that the covenant not to compete would survive the expiration of the agreement. This demonstrates to the Court that had the parties intended to make the covenant not to compete extend past the expiration of the agreement they knew all too well how to accomplish that feat. It would have only taken one additional line in the First Amendment to Agreement if that was indeed the intent of the parties. As no such line was included the Court is of the firm opinion that making the covenant not to compete survive the expiration of the agreement was not the intent of all the parties. Accordingly, as the Court must construe the ambiguous terms of the agreement against the party drafting it finds as a matter of law that the covenant not to compete did not survive the expiration of the agreement on March 23, 1995.

The Defendant's second argument is that the Plaintiff's disbarment from Medicare/Medicaid and his breach of the employment agreement bars enforcement of the restrictive covenant. The Court is again in agreement with the Defendant.

"The general rule of contracts is that a party is not excused by the other party's breach of contract unless the breach is material or essential." *Emerson Shoe Company v. Neely*, 99 W.Va. 657, 129 S.E. 718 (1925) quoting *Ellison Shoe Co. v. Flat Top Grocery Co.*, 69 W. Va. 380, 71

S. E. 391 (1911) quoting Williston on Sales, § 453. In determining what is a material breach the Court found the definition of material breach in Williston on Contracts very useful. Williston defined a material breach as "a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract… In other words, for a breach of contract to be material, it must 'go to the root' or essence' of the agreement between the parties… " 23 Williston on Contracts §63:3 (4th ed.).

Very simply the main purpose or the essence of the agreement between these two parties was for the Defendant to see patients, remit any right to payment to the Plaintiff who would then bill the appropriate party, and then pay the Defendant forty-five percent (45%) of what was collected. At some point after agreeing to this arrangement the Plaintiff either intentionally or negligently failed to live up to his part of the bargain. The Court agrees with the Plaintiff that simply failing to bill correctly may not be a material breach but the manner in which the Plaintiff breached the agreement got him disbarred from participating in either federal or state health programs. The fact that forty percent (40%) of the Defendant's payees participated in these programs made it a material breach. The Court is simply not moved by the Plaintiff's argument that even if the Defendant lost forty percent (40%) of his pay he still had a significant income thus making the breach immaterial. Accordingly, the Court finds as a matter of law that the Plaintiff's breach of the agreement was material and thus bars enforcement of the covenant not to compete.

Therefore, the Defendant Motion for Summary Judgment as to Count I of the Complaint is **GRANTED**; and Plaintiff's Motion for Partial Summary Judgment on Count I of the Complaint is **DENIED**.

Count II- Fraud

The Defendant in his motion prays that the Court dismiss Count II of the complaint because the Plaintiff failed to plead his claim specifically enough to satisfy Rule 9 of the West Virginia Rules of Civil Procedure and West Virginia case law. The Court does not share the Defendant's opinion on this matter.

Rule 9 in pertinent part states, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." West Virginia Rules of Civil Procedure Rule 9(b). In order for the Plaintiff to survive a motion to dismiss or a motion for summary judgment regarding lack of specificity he would have to at least aver a violation of each of the required elements. In order to prove fraud a Plaintiff must prove "(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it." *Lengyel v. Lint*, Syl. Pt. 1, 167 W.Va. 272, 280 SE2d 66 (1981). The Plaintiff in his complaint specifically addressed each and every one of the elements for fraud. See Complaint at ¶¶25-31. Accordingly, the Court is of the opinion that a genuine issue of material fact exist regarding Count II of the Plaintiff's Complaint; therefore, the Defendant's motion for summary judgment regarding Count II of the Plaintiff's Complaint is **DENIED**.

Count III- Violation of Uniform Trade Secrets Act

The Defendant in his motion for summary judgment also request that the Court dismiss Count III of the Complaint for two reasons. First because the Plaintiff failed to adequately plead the cause of action. Secondly, the Defendant argues that information the Plaintiff is claiming

was misappropriate does not constitute trade secrets under the Uniform Trade Secrets Act. The Court is not of the opinion that summary judgment should not be granted for either reason.

In the Court's review of the Defendant's brief on this issue and its independent research on the issue it has been unable to find a case in this jurisdiction that requires the Plaintiff to plead a violation of the uniform trade secrets act with specificity. But even if such precedent existed the Court is of the opinion that the Complaint sufficiently puts the Defendant on notice. The Complaint is clear that Plaintiff is only alleging misappropriation of trade secrets that would go to either opening up a competing practice or recruitment of the Plaintiff's patients. See Complaint at ¶34. Additionally, the Court is of the opinion that whether or not the information allegedly misappropriated is a trade secret as defined in West Virginia Code § 47-22-1 is a matter to be determined by the tier of fact. Accordingly, the Court is of the opinion that a genuine issue of material fact exist regarding Count III of the Plaintiff's Complaint; therefore, the Defendant's motion for summary judgment regarding Count III of the Plaintiff's Complaint is **DENIED**.

Count V- Unjust Enrichment

Although the Defendant did not request summary judgment on the Plaintiff's claim for unjust enrichment the Court still wishes to touch upon the subject. The Court is of the opinion that a separate recovery for unjust enrichment is unavailable to the Plaintiff. Regarding damages for a misappropriation of trade secrets West Virginia Code states, "[d]amages may include both the actual loss caused by the misappropriation and the unjust enrichment caused by the misappropriation." West Virginia Code §47-22-3. Accordingly, the Court is of the opinion that a separate recovery for unjust enrichment is unavailable to the Plaintiff as that would constitute a double recovery.

Counterclaim

Counts I- Breach of Contract and Count II- Indemnification

The Plaintiff's motion for summary judgment regarding Count I and Count II of the Counterclaim are both premised on essentially the same argument (with two small nuisances) so the Court will simply address both counts together. That being said the Court is of the opinion that summary judgment is not appropriate for either.

Essentially the Plaintiff bases his motion upon the Court finding that summary judgment should be granted to the Plaintiff on Count I of his complaint. As the Court has previously stated in this Order it actually has a different opinion on this issue as it ruled in the Defendant's favor regarding Count I of the Complaint. As to Count I of the Counterclaim the Plaintiff avers that the Defendant is not entitled to compensation after the expiration of the agreement. The Court does not agree with the Plaintiff on this issue. The Court's reading of the Counterclaim is that the Defendant is alleging that he is due compensation for fees collected upon work he performed before the expiration of the agreement thus still cognizable. On the issue of the Defendant's prayer for indemnification the Plaintiff alleges that if such an award is granted it should be subject to an offset. The Court is of the opinion that this matter is more appropriate for determination by the tier of fact. Accordingly, the Court is of the opinion that genuine issues of material fact exist regarding Count I and Count II of the Counterclaim; therefore, the Plaintiff's motion for summary judgment regarding Count I and Count II of the Counterclaim is **DENIED**.

Accordingly, the Court **ORDERS** as follows:

1. That the Defendant's motion for summary judgment regarding Count I of the Complaint is **GRANTED**, Plaintiff's motion for partial summary judgment regarding Count I of the Complaint is **DENIED**, and Count I of the Complaint is **DISMISSED**.

2. That the Defendant's motion for summary judgment regarding Count II of the Complaint is **DENIED**.

3. That the Defendant's motion for summary judgment regarding Count III of the Complaint is **DENIED**.

4. That the Plaintiff's cause of action in Count V of the Complaint is redundant as recovery on Count III of the Complaint is still available and is thereby **DISMISSED**.

5. That the Plaintiff's motion for partial summary judgment regarding Count I of the Counterclaim is **DENIED**.

6. That the Plaintiff's motion for partial summary judgment regarding Count II of the Counterclaim is **DENIED**.

All accordingly which is ORDERED and DECREED.

Enter this 12th day of January, 2016.

ORDER ENTER: James H. Young

HONORABLE JAMES H. YOUNG, JR.

Date: 1/14/16
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B Carender
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