SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 16

KEVIN GLASSMAN, M.D.,

Plaintiff,

INDEX NO.: 009774/2001
MOTION DATE: 11/26/2003
MOTION SEQUENCE: 002

- against -

PROHEALTH AMBULATORY SURGERY CENTER, INC. and PROHEALTH CORPORATION,

Defendants.

The following papers read on this motion:

Notice of Motion, Affirmation, Affidavits & Exhibits Annexed.....	1
Defendants' Memorandum of Law in Support.....	2
Affirmation in Opposition & Exhibits Annexed.....	3
Plaintiff's Memorandum of Law in Opposition.....	4
Supplemental Affirmation of Regina M. Alter, Affidavit & Exhibits Annexed....	5
Defendants' Reply Memorandum of Law in Further Support.....	6

This motion by defendants ProHealth Ambulatory Surgery Center, ("ProHealth ASC ") and ProHealth Corporation for an order pursuant to CPLR 3025(b) granting leave to serve an amended answer with counterclaims is determined as follows.

Kevin Glassman, M.D., commenced this action to recover sums due pursuant to his employment contract providing for a distribution from the "Net Annual Anesthesia

Revenue" pool, for severance pay and for a declaratory judgment that the two year, ten mile radius post employment non-competition clause was too restrictive. Dr. Glassman was the Director of Anesthesiology and the Medical Director of ProHealth ASC from September 1, 1998, when it opened, to April 2, 2001, on which date he was fired. Apparently only the Anesthesia Department of the fledgling ambulatory center that was profitable. Plaintiff claims that he was fired because he would not sign an amended employment contract waiving his distributive share of the Net Annual Anesthesia Revenue pool. He alleges that after ProHealth ASC had been in business for approximately a year, without showing an overall profit, the director tried to modify that term of the contract.

Defendant claims the termination was for cause.

It is not clear why the Anesthesia Department was successful and whether it was due to the dual role the anesthesiologists played. Defendant's staff anesthesiologists were contracted out to provide services to physicians for procedures away from ProHealth's operation at 2800 Marcus Avenue in Lake Success, as well as fulfilling all on site anesthesia needs. It is this circumstance that has become integral to the dispute between the parties.

The employment contract at issue states in paragraph 1 that no staff physician shall provide outside services without the approval of the director of the ambulatory facility. Defendants maintain that this clause prevented moonlighting, that is plying their trade on vacation days, sick days or personal days. The new allegations claim that plaintiff assisted other anesthesiologists in taking such jobs. However, it is not clear that these physicians were not doing in their private time exactly what was permitted on their workdays, except that ProHealth ASC did not receive the remuneration. There is even some evidence that such placements were because all doctors scheduled for duty at ProHealth ASC, were busy and none were free to go off site.

Of greater importance, since it effects regulation of the practice of medicine under

the police power of the state, is the approved practice of sending anesthesiologists to private physicians for which ProHealth ASC received the fee. The fee was supposed to be turned over to ProHealth ASC and, seemingly, for a while it was. However, when it developed that defendant was not going to make distributions from the anesthesiologist department's profits, Dr Glassman retained the fees and deposited them in a joint bank account with his wife.

On this motion, ProHealth ASC alleges that during Dr. Glassman's deposition in the early fall of 2003 it was first learned that he violated their employment agreement by rendering services elsewhere without approval and arranging for other employees to do so, and by collecting and withholding the fees earned from private work done in conjunction with ProHealth ASC. If there was a witholding of "moonlight fees" it was diminimus, and since there is no proof that Glassman withheld other doctors' moonlighting fees, that issue is not before the court.

It is also asserted that plaintiff contacted both ProHealth ASC's prospective employees as well as a present employee during the two year non-compete period and discouraged them from working for defendant. In light of these discoveries defendant wishes to amend the answer to plead an affirmative defense that Dr. Glassman's breaches of their agreement constitutes a complete defense to his claims.

Defendants also move to interpose counterclaims for breaches of contract, tortious interference with contractual and prospective contractual relations, breach of loyalty, conversion, money had and received, unjust enrichment, and, fraud.

Finally, defendant seeks permission to advance third-party claims against Dr. Glassman's wife for conversion, aiding and abetting conversion, money had and received, and, unjust enrichment. The proposed claims against Mrs. Glassman are premised entirely upon the funds withheld from ProHealth ASC by Dr. Glassman and deposited into the Glassmans' joint bank account.

In opposition, Dr. Glassman now maintains that these funds, earned by himself and

other ProHealth ASC employees for anesthesiology services rendered off site, were properly retained because ProHealth ASC was licensed to operate at only one site, 2800 Marcus Avenue, and is legally precluded from earning fees for medical services rendered on its behalf anywhere else.

Defendant counters that it was not the ambulatory facility that was providing medical services outside the Marcus Avenue surgical center, but the doctors who were practicing their specialty in private physician offices. Therefore defendant was not providing medical services ultra vires of its license by the New York State Department of Health under Article 28 of the Public Health Law and is entitled to share in revenues generated.

Under CPLR 3025(b), a party may amend a pleading at any time by leave of court. Leave to amend pleadings shall be freely given upon just terms absent prejudice or surprise owing directly to the delay. McCaskey, Davies and Assoc., Inc. v N.Y. City Health and Hospitals Corp., 59 NY2d 755, 757. The statutory provision should be liberally construed to permit pleadings to be amended so as to ensure full litigation of a controversy. Rife v Union College, 30 AD2d 504, 505. However, the decision to grant or deny the motion rests in the sound discretion of the court. Cippitelli Bros. Towing and Collision, Inc. v Rosenfeld, 171 AD2d 637, 639. "[A]n amendment which is devoid of merit, and whose insufficiency or lack of merit is 'clear and free from doubt' will not be permitted.' " Mathison v Zocco, 207 AD2d 434, 435, quoting Hauptman v New York City Health & Hosps. Corp., 162 AD2d 588, 589; see also, Prudential Wykagyl/Rittenberg Realty v Calabria-Maher, 1 AD3d 422; AYW Networks, Inc. v Teleport Communications Group, Inc., 309 AD2d 724, (2d Dept 2003) lv dism., __NY2d __. In light of the timing and manner in which ProHealth ASC alleges it learned of the facts which support its proposed affirmative defense and counterclaims, and their direct relevance to this case, and the fact that this matter is scheduled for trial on February 2, 2004, the amended pleading must be examined for merit and balanced against any

prejudice to the plaintiff.

The first proposed counterclaim seeks to recover for breach of contract based upon Dr. Glassman's misappropriation of all medical fees earned off site in the sum of $541,718.49.

The second proposed counterclaim seeks to recover for Dr. Glassman's breach of his contractual covenant not to compete.

The third proposed counterclaim seeks to recover for breach of contract based upon Dr. Glassman's facilitation of ProHealth ASC's employees moonlighting.

The fourth proposed counterclaim seeks to recover for breach of contract based upon Dr. Glassman's deterring and/or solicitating ProHealth ASC's employees.

The fifth proposed counterclaim seeks to recover for tortious interference with contractual relationships.

The sixth proposed counterclaim seeks to recover for tortious interference with prospective contractual relationships.

The seventh proposed counterclaim seeks to recover for breach of plaintiff's duty of loyalty.

The eighth proposed counterclaim seeks to recover for conversion, the ninth for money had and received, and the tenth seeks to recover for unjust enrichment, all predicated upon Dr. Glassman's retention of medical fees earned off site.

The eleventh proposed counterclaim seeks to recover for fraud based upon Dr. Glassman's alleged lack of intent to fulfill his contractual obligations from the beginning.

In the posture in which this case stands, plaintiff is in the anomalous position of asserting the illegality of a plan in which he was a willing participant.

ProHealth ASC's Operating Certificate issued by the State Department of Health ("DOH") limits it to providing ambulatory surgery at 2800 Marcus Avenue in Lake Success. In fact, its Certificate of Incorporation, as required by Business Corporation Law §201(e) and 10 NYCRR §620.1(a)(1), also limits its operation to that site and

specifically states that "nothing contained therein shall authorize the Corporation to own or operate any other hospital facility, hospital service, or health-related services (emphasis added). ..." DOH's regulations specifically provide that "an operating certificate shall be used only by the established operator for the designated site of operation..." 10 NYCRR §401.2[b]. In fact, ambulatory surgery centers by regulation are authorized "to provide those surgical procedures which need to be performed for safety reasons in an operating room on anesthetized patients requiring a stay of less than 24 hours duration." The regulations preclude it from providing outpatient surgical procedures which can be performed safely in a private physician's office or an outpatient treatment room. 10 NYCRR §709.5[b][1]; 755.1. A review of the Certificate of Need (CON) submitted to DOH shows that the applicant intended to operate a ambulatory surgical center at one location.

Also, fee-splitting among doctors is heavily regulated. Fee-sharing is permitted between employer and physician/employee when authorized by statute and/or regulation, and the applicable corporate charter. See, Albany Medical College v McShane, 104 AD2d 119, aff'd 66 NY2d 982 (1985)("Because plaintiff has a corporate charter empowering it to promote medical science and instruction, its treatment of patients does not constitute an illegal corporate practice of medicine"). It is otherwise not permitted. See, Odrich v Trustees of Colombia University in the City of New York, 308 AD2d 405 (1st Dept 2003)(private physicians no longer on staff of university faculty practice corporation cannot be required to pay 10% of fees to medical school in exchange for staff privileges at hospital); Empire Magnetic Imaging, Inc. v Comprehensive Care of N.Y., P.C., 271 Ad2d 472, 477. It is precluded except by "a partner, employee, associate in a professional firm or corporation, professional subcontractor or consultant authorized to practice medicine, or a legally authorized trainee practicing under the supervision of a licensee," (see Education Law §6530[19]), or for people "practicing as partners, in groups or as a professional corporation or as a university faculty practice corporation."

Education Law §6531.

Ergo, ProHealth ASC may not assert a claim to the medical fees earned off site by Glassman, or for its other medical employees. Contrary to ProHealth ASC's argument, it is not free of culpability so as to warrant enforcement of its contractual rights. Its business is regulated by the DOH and it was a blatant disregard of the applicable regulations and enabling statutes that enabled it to collect and retain income earned by staff practitioners off site. Compare, United Calendar v Mfg. Corp. v Huang, supra; Empire Magnetic Imaging, Inc. v Comprehensive Care of N.Y., P.C.,supra, at p. 477-479; Katz v Zuckerman, 119 AD2d 732; Artache v Goldin, 133 AD2d 596.

Its claim to these fees is not saved by the parties' agreement. Defendant "may not seek the aid of the courts in its effort to enforce such illegal contract." United Calendar Manufacturing Corp. v Huang, 94 AD2d 176, 180. "While the [plaintiff] who participated in the illegal arrangement when it suited [his] purposes to do so [is] not entirely without blame, '[i]t is the settled law of this State (and probably of every other State) that a party to an illegal contract, [in this case the [defendant] corporation], cannot ask a court of law to help [it] carry out [its] illegal object, nor can such a person plead or prove in any court a case in which [it], as a basis for [its] claim, must show forth [its] illegal purpose.' " United Calendar Manufacturing Corp. v Huang, supra, at p. 180, quoting Stone v Freemen, 298 NY 268, 271; see also, Barker v Kallash, 91 AD2d 372; Braunstein v Jason Tarantella, Inc., 87 AD2d 203. "The denial of relief to the [defendant corporation] in this case is not based on any desire of the courts to benefit the particular [plaintiff]. That the [plaintiff] may profit from the court's refusal to intervene is irrelevant. What is important is that the policy of the law be upheld. Where the parties' arrangement is illegal 'the law will not extend its aid to either of the parties ... or listen to their complaints against each other, but will leave them where their own acts have placed them'. United Calendar Manufacturing Corp. v Huang, at 180, quoting Braunstein v Jason Tarantella, Inc., at 207.

The defendant's proposed first, eighth, ninth and tenth causes of action are predicated upon Dr. Glassman's retention of the medical fees earned by him and other ProHealth ASC employees at outside locations. As such, they fail to state a meritorious claim since defendant was licensed to provide medical services only at 2800 Marcus Avenue. The eight, ninth and tenth causes of action would be barred in any event since they are duplicative of ProHealth ASC's breach of contract claims. See, Fesseha v TD Waterhouse Investor Services, Inc., 193 Misc.2d 253, 261, aff'd, 305 AD2d 268, citing Yeterian v Heather Mills, 183 AD2d 493 [Eighth cause of action: conversion] and Phoenix Garden Rest. v Chu, 245 AD2d 164, 166 [Ninth cause of action: Money had and Received]; Welch Foods, Inc. v Wilson, 277 AD2d 882, 885, citing Clark-Fitzpatrick, Inc. v Long Is. R.R.Co., 70 NY2d 382, 388-389 [Tenth cause of action: Unjust enrichment]).

Defendant ProHealth ASC's proposed "third-party claims" against Dr. Glassman's wife, too, are predicated upon Dr. Glassman's withholding of medical fees earned off site. They, too, lack merit. In any event, any claim against Mrs. Glassman would not be a third-party claim. See, CPLR 1007.

Defendant ProHealth ASC's affirmative defense requires a different analysis. It is unable to affirmatively counter-claim for misappropriated medical fees against Dr. Glassman, yet his alleged breach of contract does constitute an affirmative defense. A material breach may warrant denial of a compensation claim. See, Mega Group, Inc. v Halton, 290 AD2d 673, 674-675 (3d Dept 2002); Industrial Paint Servs. Corp. v Flower City Glass Co., Inc., 188 AD2d 990. Indeed, the parties' agreement provides that "[i]f any provision of this agreement or the application of any provision hereof ... is held invalid," the remainder of the agreement will not be enforced if "the invalid provision substantially impairs the benefits of the remaining portions of this agreement." At the very least, plaintiff is barred from recovering compensation for services provided off site.

The second proposed counterclaim alleging a breach by Dr. Glassman of the

restrictive covenant and defendant ProHealth ASC's fourth proposed counterclaim in which it alleges that Dr. Glassman breached their agreement by soliciting and enticing three employees away from it, is not new. It is only modified. It is related to the other underlying issue in this lawsuit which is the enforceability of the post employment restrictive covenant

The third proposed counterclaim sounds in breach of contract, yet it claims that Dr. Glassman tortiously interfered with ProHealth ASC's employee relationships, both during and after his employment by soliciting its employees to perform services elsewhere although he knew that they were not permitted to do so without ProHealth ASC's approval. The legal analysis is flawed; plaintiff was not in breach of his contract by referring staff anesthesiologists to outside assignments without defendant's permission, i.e. moonlighting, which was a breach of their contracts. It is the fifth proposed counterclaim in which defendant alleges tortious interference with contractual relationship that properly addresses this issue.

Turning to the fifth proposed counterclaim, it is alleged that plaintiff induced staff anesthesiologists to perform services on their own time, contrary to their contractual promise to seek approval from defendant's director.

To prevail on a claim for tortious interference with contract a proponent must establish "the existence of a contract between the plaintiff and a third party, the defendant's knowledge of the contract, the defendant's intentional inducement of the third party to breach or otherwise render performance impossible, [by improper means], and damages to the plaintiff." Bayside Carting, Inc. v Chic Cleaners, 240 A.D.2d 687 (2d Dept 1997 (citing to Kronos, Inc. v AVX Corp., 81 N.Y.2d 90, 94). "One who intentionally and improperly interferes with the performance of a contract ... between another and a third person by inducing or otherwise causing the third person not to perform the contract is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract." Guard-Life Corp. v

S. Parker Manufacturing Corp., 50 N.Y.2d 183, 189 (1980).

As plead, the claim passes muster. There is testimony in the record that lends factual support. It will be a question for the trier of fact to determine whether there were breaches of other employees' contracts that were induced by plaintiff for improper reasons. However, the claim for punitive damages is stricken as this is a private dispute seemingly arising out of an evolving arrangement between employer and it's employees. It is the law in this State that punitive damages are not available in a private dispute over money where the dispute does not warrant punishment or deterrence of further malicious acts beyond the concerns of the individuals. Rupert v Sellers, 48 A.D.2d 265 (4th Dept 1975).

Defendant ProHealth's sixth proposed counterclaim in which it alleges that Dr. Glassman tortiously interfered with its prospective contractual relationship lacks merit. Dr. Ellwood, the only person identified as a factual example of an aborted contract, ultimately contracted with ProHealth ASC despite Dr. Glassman's communications with him. ProHealth ASC, therefore, cannot establish that a contract would have been entered into had it not been for Dr. Glassman's conduct. See Vigoda v DCA Productions Plus, Inc., 293 AD2d 265, 266. That ProHealth ASC ended up paying Dr. Ellwood $2,000 additional salary on account of Dr. Glassman's comments does not alter this result.

Defendant ProHealth ASC's seventh proposed counterclaim alleges that Dr. Glassman breached his duty of loyalty. "[T]he same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." Sally Lou Fashions-Corp. v Marcille, 300 AD2d 224, citing Mandelblatt v Devon Stores, 132 AD2d 162. Some of the acts relied upon by ProHealth ASC in advancing this claim emanate from and are completely duplicative of its breach of contract claim, i.e. the withholding and sharing of outside fees and securing moonlighting positions for ProHealth ASC's employees. They are accordingly not an appropriate basis for a breach of loyalty

claim. However, ProHealth ASC's allegation that Dr. Glassman breached his duty of loyalty by soliciting outside medical practices for himself and other ProHealth ASC employees and encouraging them to leave the company is not duplicative of the contractual claim and is in fact independent of the contract. Leave to amend is granted for the seventh proposed counterclaim to that extent only.

Defendant ProHealth ASC's eleventh proposed counterclaim alleges fraud. It is premised upon Dr. Glassman's retention of medical fees earned by himself and other ProHealth ASC employees for anesthesiologist services rendered off site. Specifically, ProHealth alleges that when he entered into their agreement, Dr. Glassman did not intend to abide by his contractual obligation to remit those fees. It is the law that when the only duty between the parties arises out of contract, and there is no independent duty collateral to the contract there can be no cause of action sounding in negligence. Clark-Fitzpatrick v Long Island Railroad, 70 NY2d 382 (1987); Campbell v Silver Huntington Enterprises, LLC, 288 A.D.2d 416 (2d Dept 2001); First Bank of Americas v Motor Car Funding, 257 A.D.2d 287 (1st Dept 1999). Further "where ... a claim to recover damages for fraud is premised upon an alleged breach of contractual duties and the supporting allegations do not concern representations which are collateral or extraneous to the terms of the parties' agreement, a cause of action sounding in fraud does not lie, and the [party] is consigned to his breach of contract claim." Hynes v Griebel, 300 AD2d 628, citing Sforza v Health Ins. Plan of Greater N.Y., 210 AD2d 214; see also, Metropolitan Life Ins. Co. v Noble Lowndes Intern., Inc., 192 AD2d 83, 88, aff'd, 84 NY2d 430, citing North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171, 179. Not only is this proposed cause of action duplicative of the first proposed counterclaim for breach of contract, and fails for the very same reasons, but it is clear that plaintiff did not retain fees until after contracting when it appeared that defendant would not distribute from profits earned by the anesthesiology department.

In conclusion, defendant ProHealth ASC's motion for leave to amend its Answer is

granted to the extent of the second [breach of covenant not to compete], fourth [breach of contract based on soliciting employees], fifth [tortious interference with contract] and in part the seventh [breach of loyalty] proposed counterclaims and its proposed affirmative defense. It is, accordingly,

ORDERED that defendant serve an amended answer with counterclaims and an affirmative defense consistent with the terms of this decision two weeks from the date of this order. It is further

ORDERED that plaintiff serve a responsive pleading within two weeks of receipt of the amended answer.

A conference shall be held before the undersigned on March 4, 2004, at 9:30 A.M.

All other requests for relief not expressly granted are denied.

Dated: February 3, 2004

J.S.C.

ENTERED

FEB 05 2004

NASSAU COUNTY
COUNTY CLERK'S OFFICE