009-8-034

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

GENERAL SURGERY SPECIALISTS, P.C.	
Plaintiff,	
v.	Case No. CL07000033-00
TIMOTHY K. BOWERS, M.D.	
Defendant.	

ORDER

UPON CONSIDERATION OF Plaintiff General Surgery Specialists, P.C. and Defendant Timothy K. Bowers, M.D.'s Joint Motion to Vacate the Court's February 11, 2008 Findings of Fact and Conclusions of Law, it is hereby **ORDERED** this 4th day of MAR ~~February~~ 2008 that the Parties' Joint Motion to Vacate is **GRANTED**, and it is further **ORDERED** that this Court's February 11, 2008 Findings of Fact and Conclusions of Law is hereby **VACATED**; and this matter is DISMISSED WITH PREJUDICE AS TO ALL CLAIMS.

JUDGE JOHN E. WETSEL, JR.
CIRCUIT COURT FOR THE CITY OF
WINCHESTER, VIRGINIA

WE ASK FOR THIS:

VSB 72718

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WINCHESTER CIRCUIT COURT

008-8-034

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF WINCHESTER

GENERAL SURGERY SPECIALISTS, P.L.C.,
Plaintiff

v. **Civil Action No. 07 - 033**

TIMOTHY K. BOWERS, M.D.,
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW
GRANTING DEFENDANT'S MOTION TO STRIKE
AND
DENYING THE DEFENDANT'S MOTION FOR ATTORNEY'S FEES

This case came before the Court on February 7, 2008, for trial on the Plaintiff's claim that its former employee was practicing medicine in violation of a covenant not to compete. Brad D. Weiss, Esquire, appeared for the plaintiff; and Stephen L. Pettler, Jr., Esquire, appeared for the defendant.

Thereupon, the respective findings of fact were reviewed, and because of the Defendant's late filing of exhibits, the issue of the reasonableness of the term and scope of the covenant not to compete was bifurcated from the issue of whether the covenant not to compete was void because it violated the Stark Law, which issue was then tried. Evidence and exhibits were introduced.

At the conclusion of the Plaintiff's case, the Defendant moved to strike the Plaintiff's evidence and enter summary judgment for the Defendant. For the reasons stated in court and herein, the Court granted the Defendant's Motion to Strike the Plaintiff's Evidence and Enter Summary Judgment for the Defendant. The restrictive covenant is not enforceable because it violated the Stark Law, which is part of the panoply of statutes and regulations governing health care providers who receive payments under Medicare and Medicaid.

After the Court granted the Defendant's motion to strike the Plaintiff's evidence, the Defendant moved for an award of attorney's fees. Upon consideration, the Court has decided to deny the Defendant's motion for an award of attorney's fees.

I. Statement of Material Facts.

At the conclusion of the Plaintiff's case, the following material facts were not in dispute:

1. After discussions in the period from July to October 2006, GSS and Dr. Bowers, a general surgeon practicing in Martinsburg, West Virginia, agreed that Bowers would come to work for GSS in Winchester, Virginia. The attorneys for the parties then negotiated the details of an employment agreement between Bowers and GSS, which was signed by the parties on January 20, 2006. The Employment Contract contained a narrow, artfully drawn covenant not to compete:

Covered Activity	Practice of Medicine Specializing in General Surgery
Period of Covenant	2 years
Covered Territory	City of Winchester, Virginia Frederick County, Virginia

The covenant not to compete was preceded by a full page of recitals of fact about the nature of GSS's practice, which supported the necessity of the covenant not to compete.

2. Dr. Thomas Marfing is the President of GGS, and he was the point man for GSS during its negotiations with Bowers. While Marfing said that he and Bowers never discussed any arrangements between Bowers and Winchester Medical Center before they entered the Employment Contract, at some point he learned that WMC that might have recruitment money to pay to physicians. On January 10, 2006, Marfing had a casual conversation with another physician, who does not practice with GSS, who told Marfing that if the hospital paid Bowers any money that payment might adversely affect a noncompete agreement and that Marfing should check on that. Consequently, Marfing became concerned that any payments made by WMC to Bowers incident to his coming to Winchester might adversely affect the covenant not to compete in the contemplated employment agreement between GSS and Bowers, so Marfing immediately talked to Jim Woodward, President of WMC, about the effect of any payments made by WMC to Bowers on any covenant not-to-compete that GSS would ask Bowers agree to as a term of his employment with GSS. Based on his conversation with Woodward, Marfing believed that any payments that WMC made to Bowers incident to his coming to Winchester would not affect the covenant not to compete in GSS's Employment Agreement with Bowers.

3. On January 11, 2006, Cindy Lee, Business Manager of GSS, and Nancy Hiett, physician recruitment coordinator for the Winchester Medical Center ("WMC"), talked about the situation, and Hiett sent Lee an email with a draft "Physician Recruitment Agreement" between Bowers and WMC attached. Her email stated:

Dr. Marfing discussed the hospital agreement with Jim Woodward and clarification was given that this agreement doesn't negate the practice non-compete. Based on this, Dr. Marfing felt it reasonable to proceed.

Lee delivered the email with attachment to Marfing with a note that "Nancy Hiett is forwarding this (attached Physician Recruitment Agreement) to Truban (GSS's attorney). The attached draft Physician Recruitment Agreement contained the financial incentives which the hospital initially agreed to provide to Bowers incident to his coming to Winchester and his employment with GSS: reimbursement for up to $15,000 in moving expenses and a $25,000 signing bonus after he commenced his employment in Winchester. From this time forward, GSS was aware that Dr. Bowers was going to enter a Physician Recruitment Agreement with WMC pursuant to which Dr. Bowers would receive remuneration from WMC in conjunction with his coming to Winchester to practice with GSS. Marfing must have been satisfied with Woodward's response because he and Bowers apparently did not discuss the issue before they signed the Employment Contract on January 20, 2006.

4. Bowers began working for GSS on February 20, 2006. In early March 2006, there was a discussion between Marfing and Bowers in which Marfing said that he told Bowers "don't sign anything that would compromise the covenant not to compete." This is a rather cryptic admonition to give a new employee, but is obvious that Marfing was referring to the Recruitment Agreement which had been sent to GSS on January 11, 2006, and that his concerns about the legal efficacy of the covenant not to complete had not been completely satisfied.

5. Medical malpractice insurance premiums for doctors practicing in West Virginia are high. Apparently, sometime between January 11 and March 14, 2006, Dr. Bowers negotiated with WMC for WMC to pay his tail malpractice premium in addition to the relocation expense reimbursement and sign-on bonus earlier agreed to and provided for in the draft Recruitment Agreement which Hiett sent Lee on January 11, 2006.

6. On March 14, 2006, Dr. Bowers signed the Physician Recruitment Agreement with WMC, containing the exact same terms as the draft agreement which had been sent to GSS on January 11, 2006, with the addition of the provision to pay for Dr. Bowers' "tail" premium.

7. Dr. Bowers practiced with GSS from February 20, 2006 until July 19, 2006 when he was terminated by GSS. During the term of his employment with GSS, Dr. Bowers and GSS referred patients to WMC.

8. GSS and Dr. Bowers had a "financial relationship" with WMC (as that term is defined in Section 1877 of the Social Security Act (42 U.S.C. 1395), the "Stark Law," and the regulations promulgated thereunder (42 C.F.R. § 411)) during the term of

Dr. Bowers' employment with GSS.

9. Dr. Bowers currently practices medicine in Winchester in ostensible violation of the covenant not to compete.

11. The "Stark Law", 42 U.S.C. § 1395nn, which is part of the anti-fraud provisions of Medicare and Medicaid entitlement programs, is an arcane statute with considerable import in this case, but its full implications were not understood by the parties when they entered their respective agreements: the January 20, 2006, Employment Agreement (Bowers and GSS) and the March 14, 2006, Physician Recruitment Agreement (Bowers and WMC).

II. Conclusions of Law.

> 1. In considering a motion to strike, the trial court must view the evidence and all reasonable inferences drawn from the evidence in the light most favorable to the plaintiff. Any reasonable doubt as to whether the plaintiff has produced sufficient evidence of the wrong alleged must be resolved in the plaintiff's favor and the motion to strike denied.

Izadpanah v. Boeing Joint Venture, 243 Va. 81, 82 (Va. 1992). In this case the Plaintiff's own evidence showed that the Stark Law prohibitions had been violated. There is no question but that GSS knew by January 11, 2006, before they signed the Employment Agreement with Bowers that he would be receiving recruitment incentive payments from WMC incident to his move to Winchester. Therefore, the fact that the WMC Recruitment Agreement was signed after the GSS Employment Agreement does not effect the result, because the evidence showed unequivocally that the substance of the agreements had been reached before January 11, 2006. The Court "looks at the substance of a transaction and not its mere form." Virginia Machinery & Well Co. v. Hungerford Coal Co., 182 Va. 550, 556 (Va. 1944); see also Burrus Timber Co. v. Frith, 228 Va. 701 (1985)(law looks at the substance of a real estate transaction not its form to determine whether a commission is payable).

2. "Covenants not to compete are restraints on trade and accordingly are not favored." Motion Control Sys., Inc. v. East, 262 Va. 33, 37 (Va. 2001). In *Omniplex World Services Corporation v. US Investigation Services, Inc.*, 270 Va. 246, 249, 618 S.E.2d 340, 342 (2005) (emphasis added), the Supreme Court stated:

> The standards we apply in reviewing a covenant not to compete are well established. A non-competition agreement between an employer and an employee will be enforced if the contract is narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to earn a living, and *is not against*

public policy. Modern Env'ts, Inc. v. Stinnett, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002); *Simmons v. Miller,* 261 Va. 561, 580-81, 544 S.E.2d 666, 678 (2001). Because such restrictive covenants are disfavored restraints on trade, the employer bears the burden of proof and any ambiguities in the contract will be construed in favor of the employee. *Id.* at 581, 544 S.E.2d at 678. Each non-competition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the businesses and employees involved.

3. Dr. Bowers challenged the enforceability of the restrictive covenant on the grounds that it is against public policy and is void because it violated the Stark Law and because it is unreasonable in terms of its scope and term. Whether the restrictive covenant is against public policy is a narrow legal issue, as contrasted with the fact rich inquiry of whether the covenant is unenforceable because it is unreasonable in terms of its scope or term.

4. The power of courts to vitiate a contract on the grounds of public policy is very limited. "[I]t is the responsibility of the legislature, not the judiciary, to formulate public policy, to strike the appropriate balance between competing interests." Wood v. Board of Supervisors of Halifax County, 236 Va. 104, 115, 372 S.E.2d 611, 618 (1988). The parties' contract "is the law of the case unless it is repugnant to some rule of law or some principle of public policy." Mercer v. S. Atlantic Ins. Co., 111 Va. 699, 704, 69 S.E. 961, 962 (1911). It is only when the General Assembly or Congress has clearly pronounced public policy in a relevant area that public policy can be applied to bar enforcement of a covenant not to compete.

5. The "Stark Law", section 1877 of the Social Security Act (42 U.S.C. 1395), and the regulations promulgated thereunder (42 C.F.R. § 411), prohibit a physician (Bowers), who received recruitment remuneration from a hospital (WMC), and the physician practice employing him (GSS) from referring patients to the hospital unless certain requirements are met. One of the requirements or exceptions, which is pertinent to this case, is that "the physician practice may not impose additional practice restrictions on the recruited physician other than conditions related to quality of care."[1]

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[1] Under the Stark Law, a doctor, or practice who employs a doctor, who received remuneration provided by a hospital to recruit the doctor is prohibited from referring patients to the hospital for services unless an exception otherwise applies. 42 U.S.C. § 1395nn. One of the exceptions to the blanket prohibition barring referrals is 42 C.F.R. §411.357 (e), which provides in relevant part:

(e) Physician recruitment.

(1) Remuneration provided by a hospital to recruit a physician that is paid directly to the physician and that is intended to induce the physician to relocate his or her

The Stark Law defines "financial relationship" or "financial interest" as remuneration provided by a hospital to recruit a physician. 42 U.S.C. 1395nn(a)(2). The Secretary of the U.S. Department of Health & Human Services (HSS) provides a website to explain its regulations (www.cms.hhs.gov). On the website, HSS explains "a hospital-funded recruitment arrangement in which the recruited physician is subject to a restriction against competing with the [medical] group will not comply with the new joint recruiting exception in the [Stark Law] regulations [42 C.F.R. §511.357 (e)(4)(iv)]. Parties should document that any non-compete clause is void and will not be enforced." (HSS Centers for Medicare & Medicaid Services, FAQ and Answers, ID No. 3163)

6. The arrangements for the employment of a physician by a physician practice group are frequently memorialized in a concatenation of contracts, and this case follows that general paradigm. The resolution of this case turns upon whether the March 14, 2006, Physician Recruitment Agreement between Bowers and WMC was a later, independent contract between Bowers and WMC about which GSS had no knowledge when it entered the January 20, 2006, Employment Agreement or whether GSS had knowledge of the payments to be made to Bowers by WMC when GSS and Bowers entered their Employment Agreement on January 20, 2006.

It is clear from the Plaintiff's evidence that on January 20, 2006, when it entered the Employment Agreement, GSS was aware of the terms of the Recruitment Agreement between Bowers and WMC and that it knew that Bowers would be receiving payments from WMC incident to his moving to Winchester to practice with GSS; therefore, the parties, Bowers, GSS, and WMC, are all *in pari delecto* (equally culpable) with respect to the Stark Law prohibitions, and the covenant not to compete is void as

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medical practice to the geographic area served by the hospital in order to become a member of the hospital's medical staff, if all of the following conditions are met:
(I) The arrangement is set out in writing and signed by both parties; . . .

(4) ***In the case of remuneration provided by a hospital*** to a physician either indirectly through payments made to another physician or physician practice, or ***directly to a physician who joins a physician practice***, the following additional conditions must be met: . . .

(ii) Except for actual costs incurred by the physician or physician practice in recruiting the new physician, the remuneration is passed directly through to or remains with the recruited physician; . . .

(vi) The physician or ***physician practice may not impose additional practice restrictions on the recruited physician other than conditions related to quality of care***; . . .

against public policy. See Waller v. Eanes Adm'r, 156 Va. 389 (1931), cited Cline v. Berg, 273 Va. 142, 148 (2007). By January 11, 2006, GSS had a copy of the Recruitment Agreement in substantially the same form as was ultimately entered into between Bowers and WMC; the only material difference was the addition of the provision by which WMC would pay the medical malpractice premium for Bowers' tail coverage. Accordingly, there is no question but that GSS was aware of the terms of the Recruitment Agreement, which when executed violate the Stark Law and potentially vitiate the covenant not to compete. Like the adjoining landowners in Cline v. Berg, supra, GSS does not have "clean hands" insofar as the enforcement of the covenant not to compete is concerned.

7. The public policy of the United States has been expressed in the Stark Law and its implementing regulations. Therefore, where a physician practice employs a physician who received recruitment remuneration from a hospital to which the physician and the physician's practice group refer patients, and where the physician practice which employs the physician had knowledge of the recruitment agreement when it employed the physician and nonetheless subjects the employed physician to a covenant not to compete as a condition of employment with the practice group, the covenant not to compete is void because it contravenes the clear language of the Stark Law and violates a clearly expressed public policy. The fact that the parties were unaware of the implications of the Stark Law when they negotiated their respective agreements does not affect the result – *ignorantia legis neminem excusat* (ignorance of the law is no excuse). As arcane as the Stark Law may be, it is still the law, and it is a clear expression of public policy prohibiting a covenant not to compete between a physician and his practice group under the circumstances of this case.

8. Since the covenant not to compete is void because it violates the Stark Law, its violation cannot be a premise for the imposition of liquidated damages.

9. In this case the Employment Contract provided that "in the event of litigation brought by either party to enforce the terms of this agreement, the losing party will pay the reasonable legal and other costs of the prevailing party." After the Court granted the Defendant's Motion to Strike the Evidence, the Defendant moved for an award of attorney's fees. "Where, as here, the contracts provided for attorney's fees, but did not fix the amount thereof, a fact finder is required to determine from the evidence what are reasonable fees under the facts and circumstances of the particular case." Mullins v. Richlands National Bank, 241 Va. 447, 449, 403 S.E.2d 334 (1991).

> An award of attorney's fees rests within the sound discretion of the trial court. Ingram v. Ingram, 217 Va. 27, 29, 225 S.E.2d 362, 364 (1976). In Mullins v. Richlands National Bank, 241 Va. 447, 403 S.E.2d 334 (1991), we said:
>
> Where [a contract] provides for attorney's fees, but [does] not fix the

> amount thereof, a fact finder is required to determine from the evidence what are reasonable fees under the facts and circumstances of the particular case. . . . In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances. . .
>
> Id. at 449, 403 S.E.2d at 335.

Coady v. Strategic Resources, Inc., 258 Va. 12, 18 (Va. 1999).

In this case the covenant not to compete ostensibly complied with applicable precedent as this court understands it. Its term was for two years. Its territorial limit was the city and county in which the hospital and the practice group were located, and it just prohibited the practice of general surgery. "While the law frowns upon unreasonable restrictions, it favors the enforcement of contracts intended to protect legitimate interests. It is as much a matter of public concern to see that valid engagements are observed as it is to frustrate oppressive ones." Meissel v. Finley, 198 Va. 577, 584 (1956) (upholding covenant not to compete to for 5 years within 50 miles to write insurance).

While the enforceability of these covenants not to compete is "a question of law", the cases applying these general principles reach varying results. Compare Lifesource Institute v. Gianfortoni, 18 Va.Cir. 330 (Henrico 1989)(noncompete barring 4 specialized OBGYN procedures OBGYN within 100 miles upheld) with Statkus v. Loudoun Anesthesia Assocs., 42 Va. Cir. 35 (Loudoun 1995) (anesthesiologist noncompete for 1 year within Loudoun County held invalid as over restrictive). Viewing the universe of these cases in the United States, there is a sea of authority on the subject of covenants not to compete in the employment context, and one can pluck a fish to suit one's taste. It is an unfortunate state for the law and an impossible position for the contract scrivener when the legal viability of a covenant not to compete is largely determined by the palate of the judge who is asked to enforce the covenant as opposed to a set of objective standards.

Time and geography are finite concepts. The practice of medicine is subject to the same standards of care throughout the state, economic principles defining market structure are a generally recognized intellectual concepts which apply to all markets, and the work force in modern society is highly mobile – many of the citizens of both Winchester and Frederick County travel to Northern Virginia to work as do many citizens of the surrounding areas in both Virginia and West Virginia. Accordingly, it would seem that if the efficacy of a covenant not to compete is to be decided as a matter of law, there should be objective standards to be applied in considering their validity. While time is finite, there may be a range of reasonable time periods, but the law regularly sets time periods which it considers to be reasonable. All of the statutes of limitations are examples periods of time periods that the General Assembly has

considered to be reasonable, and most statutes of limitations fall within the time frame of one to five years. While perhaps coincidentally or perhaps because both apply to human behavior, the terms of covenants not to compete in the employment context generally range from one to five years. See generally 54A Am. Jur. 2D Monopolies § 904.

What is the informed scrivener to do? In terms of the geographic scope of the limit, the city or county of practice would appear to be reasonable. See generally 54A Am. Jur. 2D Monopolies §§ 905-911; but see Statkus v. Loudoun Anesthesia Assocs., supra. In this circuit a noncompete covenant of 5 years and 25 miles between veterinarians has been enforced. Fish v. Collins, 9 Va. Cir. 64 (Frederick 1987). The covenant in this case comported with those crafted by lawyers in other areas of the state. See, e.g. Parikh v. Family Care Ctr., Inc., 273 Va. 284, 288-289 (Va. 2007) (while not ruled upon the physician restrictive covenant was 3 years and 20 miles). See also Clinch Valley Physicians, Inc. v. Garcia, 243 Va. 286 (1992) (while not ruled upon the physician restrictive covenant was 3 years 25 miles).

If physicians are special because of the beneficial services which they provide to the public and these covenants should not be enforced as a matter of public policy, or if enforced be limited to a set time and the city and county where the practice is located, then either the Supreme Court or the General Assembly should say so. Unfortunately, until some objective standards are prescribed, drafting a viable covenant not to compete is a problematic exercise at best. It is a contract drafting subject that invites rather than prevents litigation.

The covenant in this case was for two years and limited to the practice of general surgery in Frederick County or the City of Winchester. Dr. Bowers could have moved back to Martinsburg, West Virginia, which is only 24 miles away, and resumed his surgical practice. From a purely legal standpoint considering the applicable precedent in Virginia, the covenant in this case was prima facia valid (consistent with prior precedent), but for the Stark Law violation. In terms of culpability with respect to the Stark Violation and borrowing concepts from criminal law, Dr. Bowers and WMC were principals in the first degree, whereas GSS was a principal in the second degree. One who signs a contract, commits an unlawful act, and then hides behind the "unlawful" shield which he created is not entitled to recover his attorney's fees. Relative culpability is a concept which courts apply in attorney's fee cases. See Rodriguez v. MEBA Pension Trust, 956 F.2d 468 (4th Cir. 1992). Accordingly, the Defendant's Motion for an award of attorney's fees is denied.

III. Decision.

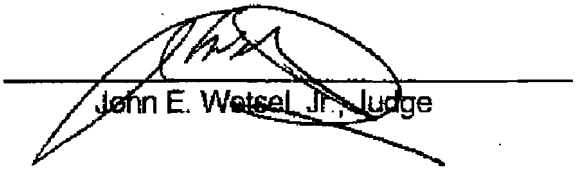
For the foregoing reasons, the Court decided to:

1. Grant the Defendant's Motion to Strike.

2. Deny the Defendant's Motion for an award of attorney's fees and costs.

The Clerk is directed to send counsel copies of these findings of fact and conclusions of law to counsel for the parties. Counsel for the Defendant is directed to prepare a final order and to sent it to counsel for the Plaintiff for his endorsement, and to then send it to the Court for entry. The Clerk has been directed to place this case on March 4, 2007, at 4:00 p.m. for entry of the final order if not previously entered.

Filed February 11, 2008.



John E. Wetsel, Jr., Judge