STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

ROBERT S. WANG and
ANTHONY R. IANNUCCILLO,

Plaintiffs,

-against-

DECISION & ORDER

SCHENECTADY PULMONARY &
CRITICAL CARE ASSOCIATES, P.C.,
MICHELE GORLA, EUGENE
GOYKHMAN, SAEED U. KAHN,
ANTHONY L. MALANGA, BRIAN A.
McDONALD and PETER F. WEINBERG,

Defendants.

Index No.: 906590-19

(Judge Richard Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

This is a commercial action brought by two physicians, Robert S. Wang and Anthony R. Iannuccillo, against Schenectady Pulmonary & Critical Care Associates, P.C. ("SPCC" or "Practice") and its physician-members.

Plaintiffs, who resigned as shareholder-employees of SPCC almost a decade ago, allege that defendants refused to pay them "compensation that they earned while employed by SPCC" and "distributions as shareholders of SPCC, all while failing to redeem their shares" (NYSCEF Doc No. 13 ["Complaint"], ¶ 1).

The action was commenced on September 26, 2019, discovery is complete, a note of issue was filed, and a jury trial has been demanded (*see* NYSCEF Doc Nos. 7-8).

Defendants now move for the summary dismissal of all claims alleged in plaintiffs' Complaint, except for the claims for declaratory relief, upon which defendants seek a declaration in their favor (*see* NYSCEF Doc No. 11).

Plaintiffs oppose certain aspects of the motion and cross-move for favorable declaratory relief (*see* NYSCEF Doc No. 35).

BACKGROUND

"SPCC is a medical practice specializing in critical care, pulmonary critical care, internal medicine, pulmonary disease and sleep medicine" (Complaint, ¶ 11). "As a professional corporation, SPCC is owned by its physician-shareholders" (*id.*, ¶ 14).

Dr. Robert Wang was hired as an employee of the Practice effective July 6, 2009 (*see* NYSCEF Doc No. 31 ["SOMF"], ¶ 53; NYSCEF Doc No. 37 ["R-SOMF"], ¶ 53). In that role, Dr. Wang executed a non-shareholder employee agreement (*see* SOMF, ¶ 54; R-SOMF, ¶ 54). He then became a shareholder-employee of the Practice in June 2010 (*see* SOMF, ¶ 55; R-

SOMF, ¶ 55). In November 2013, Dr. Wang resigned from the Practice, effective December 27, 2013 (*see* SOMF, ¶¶ 93-94; R-SOMF, ¶¶ 93-94).

Dr. Anthony Iannuccillo was hired as employee of the Practice effective August 30, 2010 (*see* SOMF, ¶ 76; R-SOMF, ¶ 76), and he executed a non-shareholder employee agreement in that capacity (*see* SOMF, ¶ 77; R-SOMF, ¶ 77). He then became a shareholder-employee in July 2012 (*see* SOMF, ¶ 78; R-SOMF, ¶ 78). Dr. Iannuccillo ultimately resigned from the Practice, effective March 31, 2014 (*see* SOMF, ¶ 102; *see also* R-SOMF, ¶ 102).

ANALYSIS

To obtain summary judgment, a movant must establish its position "'sufficiently to warrant the court as a matter of law in directing judgment'" in its favor (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]). The proponent of the motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any genuine material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to satisfy this initial burden, the motion must be denied, "regardless of the sufficiency of the opposing papers" (*id.* at 324). But if the movant meets its initial burden, the burden shifts to the nonmoving party to demonstrate the existence of disputed material facts or a legal defense to the claim (*see id.*).

The Complaint alleges 22 causes of action, sounding in breach of contract, quasi-contract, constructive trust, breach of fiduciary duty, conversion, Labor Law § 198, declaratory judgment, injunction and accounting.

For purpose of analysis, defendants group plaintiffs' claims into four categories: (1) claims based on events that occurred while plaintiffs were non-shareholder employees of the Practice; (2) claims based on events that resulted in plaintiffs becoming shareholders; (3) claims

that occurred while plaintiffs were shareholders, but prior to their resignations; and (4) claims based on plaintiffs' resignations from the Practice.

Although the Court finds defendants' mode of analysis to be helpful, the clear focus of plaintiffs' cross motion/answering papers is the Practice's alleged obligation to redeem their shares ("Redemption Claims"). Accordingly, the Court will address the Redemption Claims separately after first disposing of the non-redemption claims.

A. Non-Redemption Claims

1. Non-Shareholder Employee Claims

Certain of plaintiffs' claims are based on events that occurred while they were non-shareholder employees of the Practice (*see e.g.* Complaint, ¶¶ 60-67 [alleging breaches of employment agreement with SPCC]).[1] Dr. Wang was a non-shareholder employee from July 2009 until June 2010, and Dr. Iannuccillo held this status from August 2010 until July 2012.

Defendants argue, among other things, that any claims based on events from 2009 through 2012 are barred by the expiration of the statute of limitations (*see* CPLR 213 [2]).

The only opposition to this branch of defendants' motion comes from Dr. Iannuccillo, who seeks to recover damages for SPCC's alleged delay in advancing him to shareholder. Dr. Iannuccillo argues that his failure-to-advance claim is timely, "given the plain applicability of the 'continuous wrong' doctrine" (NYSCEF Doc No. 36 ["Opp Mem"], p. 4).

The Court rejects Dr. Iannuccillo's argument and concludes that all of plaintiffs' claims as non-shareholder employees are barred by the expiration of the statute of limitations. Even assuming that the Practice's failure to timely advance Dr. Iannuccillo to shareholder represented

[1] "Every shareholder of the Practice also is an employee of the Practice" (SOMF, ¶ 10; R-SOMF, ¶ 10), but "[t]he form of employment agreement executed by shareholder-employees of the Practice is different than that of non-shareholder employees" (SOMF, ¶ 11; R-SOMF, ¶ 11).

a continuing wrong, this alleged "wrong" ended by July 2012, when Dr. Iannuccillo was admitted to the Practice as a shareholder. As defendants properly observe, a continuing wrong must be based on a "continuous series of wrongs[,] . . . not on the continuing effects of [an] earlier [wrong]" (*Capruso v Village of Kings Point*, 23 NY3d 631, 640 [2014] [internal quotation marks and citations omitted]).

And given that Dr. Iannuccillo was not in a fiduciary relationship with SPCC prior to becoming a shareholder and his claimed entitlement to advancement is contractual in nature, plaintiffs' reliance on the open repudiation doctrine (*see* Opp Mem, pp. 20-21) is unavailing.

Accordingly, claims based on events that occurred while plaintiffs were non-shareholder employees of the Practice are dismissed as time-barred.[2]

2. Claims Based Upon Becoming Shareholders

Defendants move for the dismissal of any claims based on plaintiffs' admission to the Practice as shareholders. This branch of defendants' motion responds to plaintiffs' allegation that SPCC breached an unwritten agreement regarding the process by which newly-admitted shareholders would pay the Practice their proportionate share of the adjusted accounts receivable, either in a lump sum or through a deduction in quarterly bonuses (*see* NYSCEF Doc No. 32 ["MOL"], p. 15).[3] According to defendants, plaintiffs allege that SPCC breached this implied agreement by improperly calculating their buy-in prices (*see id.*).

Defendants argue that these claims are untimely and otherwise lacking in merit, and plaintiffs do not offer any opposition to the statute-of-limitations defense tendered by defendants.

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[2] In view of this conclusion, the Court need not reach the alternative arguments tendered by defendants in opposition to Dr. Iannuccillo's failure-to-advance claim (*see* MOL, p. 14).

[3] The purported rationale for this "buy-in"/"buy-out" process is detailed in Part B (4), *infra*.

Thus, while plaintiffs apparently continue to take issue with the manner in which the Practice calculated their buy-in prices and believe that it is an issue for trial (*see* Opp Mem, p. 7), they have failed to rebut defendants' *prima facie* showing that claims based upon plaintiffs' acquisition of shares in the Practice were not interposed within six years from the dates upon which plaintiffs paid (or had withheld) the allegedly excessive buy-in prices (*see Hoosac Val. Farmers Exch. v AG Assets*, 168 AD2d 822, 823 [3d Dept 1990]).

Accordingly, any claims based upon plaintiffs' admission to the Practice as shareholder-employees, including any challenge to the buy-in prices they paid, are barred by the expiration of the statute of limitations (*see* CPLR 213 [2]).

3. Claims While Shareholder-Employees

Defendants move for the dismissal of all claims based on events that occurred after plaintiffs became shareholder-employees and prior to their resignation from the Practice.

Plaintiffs deny raising any such claims, other than alleging continuing damages from Dr. Iannuccillo's failure-to-advance claim (*see* Opp Mem, p. 22), a claim that the Court already has determined to be time-barred (*see* Part A [1], *supra*).

Accordingly, all claims for damages based on events that occurred while plaintiffs were shareholder-employees are dismissed.

4. Post-Resignation Compensation

Defendants seek the dismissal of any claims by which plaintiffs seek post-resignation compensation (*see* MOL, pp. 18-19). Plaintiffs respond that they do not seek post-resignation compensation from the Practice, but they are entitled to pursue distributions as shareholders until their shares are redeemed (*see* Opp Mem, p. 22).

As alleged shareholders of the Practice, plaintiffs' only right to compensation is the payment of authorized dividends (*see* Business Corporation Law § 510). But the undisputed proof shows that profits from the Practice always have been paid to shareholders in the form of wages, a base salary and bonuses, based on services rendered to the Practice (*see* SOMF, ¶ 16; R-SOMF, ¶ 16).

Accordingly, plaintiffs do not possess a viable claim for post-resignation compensation, apart from their alleged right of redemption.

B. Redemption-Based Claims

Plaintiffs' cross motion and their opposition to defendants' motion are predicated largely on the Practice's alleged failure to redeem their shares. Plaintiffs maintain that the motion record establishes "as a matter of law that (i) the parties agreed that Plaintiffs' shares would be redeemed upon their departure from the Practice, and (ii) the Practice has not yet redeemed Plaintiffs' shares" (Opp Mem, p. 3).

1. Express Contract

"To recover for a breach of contract, a party must establish the existence of a contract, the party's own performance under the contract, the other party's breach of its contractual obligations, and damages resulting from the breach" (*LaPenna Contr., Ltd. v Mullen*, 187 AD3d 1451, 1453 [3d Dept 2020] [internal quotation marks and citation omitted]).

"'To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound'" (*Resetarits Constr. Corp. v Elizabeth Pierce Olmsted, M.D. Center for the Visually Impaired*, 118 AD3d 1454, 1455 [4th Dept 2014], quoting 22 NY Jur 2d, Contracts § 9).

It is undisputed that there is no written agreement governing the redemption of plaintiffs' shares. Although the initial shareholders of the Practice did execute a stock purchase agreement providing for the redemption of shares based on an adjusted book value of the Practice (*see* NYSCEF Doc No. 18, pp. 101-106 ["SPA"]), plaintiffs did not sign that agreement and do not consider themselves bound by it (*see* SOMF, ¶¶ 11-12, 57, 86; R-SOMF, ¶¶ 11-12, 57, 86).

The parties further agree that there is no evidence of any express oral agreement governing the redemption of plaintiffs' shares (*see e.g.* SOMF, ¶¶ 62-63, 65, 82, 95; R-SOMF, ¶ 62-63, 65, 82, 95).

Based on the foregoing, the Court concludes that the parties did not form an express contract governing the redemption of plaintiffs' shares.

2. Implied Contract

Even absent an express agreement, "a contract may be implied in fact where inferences may be drawn from the facts and circumstances of the case and the intention of the parties as indicated by their conduct" (*AMCAT Global, Inc. v Greater Binghamton Dev., LLC*, 140 AD3d 1370, 1371 [3d Dept 2016] [internal quotation marks and citation omitted], *lv denied* 28 NY3d 904 [2016]; *see Coca-Cola Refreshments, USA, Inc. v Binghamton Giant Mkts., Inc.*, 127 AD3d 1319, 1320 [3d Dept 2015]).

Stated differently, an implied-in-fact contract "arise[s] from a mutual agreement and an 'intent to promise, when the agreement and promise have simply not been expressed in words'" (*Maas v Cornell Univ.*, 94 NY2d 87, 93 [1999], quoting 1 Williston, Contracts § 1:5 at 20 [4th ed 1990]). Where the parties' conduct shows "a meeting of minds of the parties constituting an agreement" (*Berlinger v Lisi*, 288 AD2d 523, 524 [3d Dept 2001] [internal quotation marks and

citation omitted]), the resulting contract "is just as binding as an express contract" (*Jemzura v Jemzura*, 36 NY2d 496, 504 [1975]).

Defendants argue that plaintiffs' claim of an implied redemption agreement should be rejected because plaintiffs have not identified any meeting of minds on the financial terms of the redemption, particularly the repurchase price. Nonetheless, defendants concede that that an agreement may be implied based upon SPCC's past practice of deeming shares redeemed upon payment to the departing shareholder of their share of the Practice's adjusted accounts receivable ("AAR") as of the date of their resignation. But defendants maintain that such amount already was paid to Dr. Iannuccillo and tendered to Dr. Wang.

In their cross motion/answering papers, plaintiffs argue that a contract obliging the Practice to redeem their shares should be implied based on the parties' words and conduct (*see* Opp Mem, p. 6). Plaintiffs cite a consistent practice of redeeming the shares of departing SPCC shareholders, treating all SPCC shareholders equally, and treating all departing shareholders equally. Plaintiffs also emphasize communications from the Practice indicating that "buy-out calculations" were being performed and would be provided to them, as well as Dr. Khan's notes referring to buy-ins and buy-outs in relation to plaintiffs.

Defendants respond that they "stand ready to be bound by [the Practice's] treatment of departing shareholder-employees" (NYSCEF Doc No. 58 ["Reply"], ¶ 20). "The undisputed evidence before this Court is that the Practice has paid each departing shareholder-employee his share of the adjusted accounts receivable of the Practice as of the effective date of his resignation and deemed his shares to be redeemed upon payment" (*id.*).

"'For a contract to be implied in fact, there indeed must be proof of a meeting of the minds . . . [which] may be inferred from [the parties'] acts as well as words'" (Opp Mem, p. 6,

quoting *AMCAT*, 140 AD3d at 1372). The only words or conduct from which a reasonable trier of fact could imply the terms of a repurchase agreement are those pertaining to the treatment of prior departing SPCC shareholders: (1) the redemption provisions of the SPA, which were applicable to the Practice's initial shareholders; and (2) payment of the outgoing shareholder's share of the AAR in the manner described by Dr. Khan. "This is the only possible redemption price that may be inferred to be applicable to the parties" (Reply, ¶ 20).

The Court therefore concludes that the only implied-in-fact redemption contract that may be discerned is one consistent with the Practice's past treatment of departing shareholder-employees.

3. Past Practice

The record shows that there were three shareholder-employees who resigned prior to plaintiffs.

First, when Dr. Patel left the Practice on December 18, 2007, he was paid a lump-sum reflecting the book value called for under the SPA ("Book Value") (*see* NYSCEF Doc No. 18, pp. 101-106), together with his share of the AAR (*see* NYSCEF Doc No. 30 ["Khan Aff."], ¶¶ 16-17).

Next, Dr. Yannios left the practice on March 31, 2009, and he also was paid the Book Value, together with his share of the AAR (*see id.*).

Finally, Dr. Weinberg left the Practice on December 31, 2012. He received his share of the AAR, but it is unclear whether the Practice calculated and paid him the Book Value: "It may/may not have been done" (*id.*, ¶ 21).

All three of these departing shareholder-employees were initial shareholders, meaning that they were signatories to the SPA. Nonetheless, the Practice has not objected to extending

the benefits of the SPA redemption provisions to plaintiffs and treating them in the same manner as the other shareholders who left the Practice. In fact, Dr. Khan could not even recall why SPCC did not have its accountants calculate the Book Value for Dr. Wang's shares in accordance with the SPA (*see id.*, ¶ 22).

The Court therefore concludes that the present record sufficiently demonstrates an implied-in-fact redemption contract that obliges the Practice to redeem the shares of a departing shareholder in a manner consistent with the treatment of other departing SPCC shareholders. Specifically, the shares shall be deemed redeemed upon payment (or tender) to the departing shareholder of: (1) the Book Value, as computed under the SPA, together with (2) the departing shareholder's share of the AAR.

4. Calculation of Redemption Price

Dr. Khan's moving affidavit explains the rationale for the buy-in and buy-out process employed by the Practice. The buy-in payment required of an incoming shareholder is computed by dividing the Practice's total accounts receivable as of the date of admission by the number of shareholders, adjusted by the Practice's historic rate of collections (*see id.*, ¶ 12). The result is the incoming shareholder's proportionate share of the AAR (*see id.*).

> The reason that [SPCC] treated each incoming shareholder-employee in this fashion is that he/she is immediately made eligible to receive future quarterly bonus payments based upon profits of the Practice. However, when we decided to admit [the first non-initial shareholder], [SPCC] determined that it would not be reasonable to allow the incoming shareholder to share in the profits resulting from accounts receivable that were generated by the Practice *before* the date of his/her admission (because he/she was compensated as a salaried non-shareholder employee up until then)" (*id.*, ¶ 13).

"Thus, each incoming shareholder-employee does not actually pay anything out-of-pocket for his/her shares in the Practice. It is simply the profits to which he/she was not entitled" (*id.*, ¶ 14).

Upon Dr. Yannios's departure in 2009, the Practice decided to adopt a receivables-based buy-out approach that corresponds to the buy-in process. "Namely, each outgoing shareholder-employee would receive his/her share of the adjusted accounts receivable of the Practice as of the effective date of resignation" (*id.*, ¶ 16).

As the treasurer of SPCC, Dr. Khan calculated the payments of AAR made to Drs. Patel, Yannios and Weinberg (*see id.*, ¶¶ 16-21). Using the same methodology, Dr. Khan calculated Dr. Wang's share of the Practice's AAR to be $46,836 (*see id.*, ¶ 23; *see also* NYSCEF Doc No. 24 ["Khan EBT"], pp. 168-177). Dr. Khan followed the same process for Dr. Iannuccillo, whose AAR payment was calculated to be $100,000 (*see* Khan Aff., ¶ 24).

Plaintiffs respond that the record plainly discloses an issue of fact as to the computation of their AAR. In particular, plaintiffs cite Dr. Khan's submission of "multiple versions of documents he created in connection with discovery," together with certain alleged inconsistencies identified in Dr. Khan's deposition (Opp Mem, p. 20, citing Khan EBT, pp. 166, 168, 171, 176-185, 189; *see* NYSCEF Doc No. 40).

The Court concludes that the present record is insufficiently developed to determine plaintiffs' redemption prices as a matter of law.[4] Even if the Court were to accept Dr. Khan's calculations as conclusive of the AAR computation, Dr. Khan acknowledges that the Practice did not have its accountants "calculate a share sale/purchase price in accordance with the [SPA]" (*id.*, ¶ 22). Thus, there is no evidence of the Book Value of plaintiffs' shares under the SPA, which is a component of the implied redemption contract formed by past practice.

[4] The parties did exchange expert disclosure, but neither side's disclosure addresses the computation of the AAR undertaken by Dr. Khan or computation of the Book Value under the SPA. Rather, plaintiffs undertook a useless exercise by which they purported to compute their proportionate interest in the Practice as a going concern (*see* NYSCEF Doc No. 29), to which defendants were compelled to serve responsive disclosure (*see* NYSCEF Doc No. 60).

5. Redemption of Plaintiffs' Shares

Given that the present record does not conclusively establish the redemption price for plaintiffs' shares, defendants have not demonstrated that they already have paid or tendered such price to plaintiffs.[5]

6. Conclusion

The Court concludes that plaintiffs have established an implied-in-fact contract that obliges SPCC to redeem their shares in a manner consistent with the Practice's treatment of other departing shareholders. Under this past practice, the shares of a departing shareholder shall be deemed redeemed upon the payment (or tender) of: (1) the Book Value, as computed under the SPA, together with (2) the departing shareholder's share of the AAR at the time of their resignation/retirement. However, determination of the redemption price applicable to plaintiffs and whether any portion of such price already has been paid must await the plenary trial of this action.

CONCLUSION

Accordingly,[6] it is

ORDERED that all of plaintiffs' claims, except for their Fifth, Sixth, Nineteenth and Twentieth Causes of Action, are dismissed in accordance with the foregoing; and it is further

[5] Specifically, the Practice submits that it tendered a check in the amount of $46,836 for AAR to Dr. Wang (*see* Khan Aff., ¶ 23), but "[t]he check was never cashed or picked-up" (*id.*). As to Dr. Iannuccillo, the Practice claims to have paid him $100,000 "via paycheck and contribution to his retirement account" (*id.*, ¶ 24), but Dr. Iannuccillo disputes the Practice's claim of payment.

[6] In their answering papers, plaintiffs consented to the dismissal of the following claims: the Seventeenth and Eighteenth Causes of Action; with the exclusion of Dr. Iannuccillo's failure to advance claim, all other claims based upon the time period they were non-shareholder employees; all claims based upon the time they were shareholder-employees; and, with the exclusion of the failure to redeem claims, all claims based upon their resignation from the Practice (*see* Opp Mem, p. 22).

ORDERED that defendants' motion is granted to the extent indicated in the preceding paragraph and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is granted to the extent stated in Part B (6), *supra*, and is otherwise denied in accordance with the foregoing; and finally it is

ORDERED that a remote conference hereby is scheduled for **July 12, 2023 at 10:00 a.m.**, and counsel shall confer with their clients and each other in advance of the conference regarding mutually agreeable dates for a jury trial in October or November of 2023.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for electronic entry by the Albany County Clerk. Upon such entry, counsel for plaintiffs shall promptly serve notice of entry on all parties entitled thereto.

Dated: Albany, New York
June 6, 2023

RICHARD PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Doc Nos. 11-32, 35-56, 58-63.

06/06/2023