AMERICAN HEALTH LAWYERS ASSOCIATION
ARBITRATION

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DAVID SHUSTERMAN, M.D.,

Claimant,

-against-

YC M.D., P.C. D/B/A NEW YORK UROLOGIC INSTITUTE,

Respondent.

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Reference No. A-112210-881

Preliminary Arbitration Ruling

October 21, 2016

This matter involves claims and counterclaims relating to Claimant's employment by Respondent. Claimant filed a demand for arbitration on November 15, 2010 pursuant to the Agreement entered into between the parties dated as of April 4, 2008 ("Agreement").

Claimant's Amended Specification of Claims was dated September 16, 2011. It includes claims for breach of contract, intentional misrepresentation, fraud, fraudulent inducement, unjust enrichment, breach of implied contract, breach of covenant of good faith and fair dealing, violation of General Business Law Section 349, quantum meruit, promissory and equitable estoppel, breach of fiduciary duty, slander and accounting.

Respondent then filed counterclaims alleging breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, forfeiture of earnings, unjust enrichment, conversion, attorneys' fees, tortious interference, unfair competition, violation of General Business Law Section 349, and permanent injunction.

At the initial day of hearing, Respondent indicated it was abandoning most of its counterclaims, and limited its claims to those matters set out in its pre-hearing brief, i.e. payment of monies earned by Claimant outside of the practice to the Respondent, forfeiture of earnings due to wrongful activities of Claimant, and attorneys' fees. (Tr. 22-23). *See* also Respondent's Pre-Hearing Brief.

Thereafter, numerous days of hearings were conducted. The arbitrator then ordered briefing. Briefing was delayed by agreement of the parties, with the submission of initial briefs completed on May 20, 2016. The parties then were required to submit reply briefs within 45 days thereafter. No such briefs were submitted within such period. The arbitrator then extended the time for submission of reply briefs to July 27, 2016, but the parties did not submit any further briefing at that point. Thereafter, further extensions were granted, and reply briefs were submitted on or about September 23, 2016.

Facts

Claimant, Dr. David Shusterman is a board certified urologist who received his medical degree from Stony Brook University in 1999 and completed his residency at Robert Wood Johnson Hospital in 2007. After completing his residency, he was recruited into Columbus Medical P.C. ("Columbus") where he worked for another urologist, Dr. Gene Meisenberg. After Dr. Shusterman had worked for Columbus Medical for three months, in October 2007, Dr. Meisenberg decided to leave the practice, thereby leaving the patients to Dr. Shusterman. In that same month, it was learned that the practice was being sold to the NYU School of Medicine ("NYU"). This sale became effective in March, 2008, at which time Dr. Shusterman began working for NYU under a "handshake agreement".

In March, 2008, Claimant was approached by Respondent's principals regarding joining their practice. In April, 2008, Claimant began to provide services to Respondent YCMD, P.C., d/b/a New York Urological Institute ("NYUI"). NYUI was owned by Dr. Vitaly Raykhman and Dr. Yuli Chalik. Claimant began as a part time independent contractor. Dr. Chalik started NYUI in 2000, and brought in Dr. Raykhman in 2003. Dr. Raykhman paid $65,000 as a buy-in to become a partner. No written shareholder or partnership agreement was ever entered into.

The Agreement between Claimant and Respondent provided that Claimant would receive a specified percentage of collections, either 50% or 75% depending upon the service. It further provided pursuant to Section 1.9 of the Agreement, "NYUI shall extend an offer for Physician to become a stockholder of NYUI at . . .(ii) 1/1/2009, providing the Physician is employed full time by NYUI according to the terms of this contract."

Also in March, 2008 Claimant was advised that NYU was going to bring its own urologists into the practice. However, NYU did not immediately terminate Claimant.

Reflecting this, Claimant negotiated an Agreement with NYUI which permitted him to "moonlight" and to complete his current professional commitments. That Agreement was entered into between Dr. Shusterman and NYUI in September 2008, retroactive to April 4, 2008. In particular, Section 1.2 of that Agreement provides that claimant was to "devote the Physician's professional time related to the rendering of urologic medical services to the business of NYUI" except that he was permitted to " (a) Complete his current professional commitments as soon as possible but in any event no later than December 31, 2008; and (b) Teach, participate in conferences, lectures, consulting activities or in publication of medical books, medical articles or other medical publications; review legal cases; provide expert testimony in legal matters: and provide services for moonlighting positions and public health endeavors...." (Emphasis added)

Section 3.1 of the Agreement further provides that all revenue received by claimant for services rendered to patients on behalf of NYUI shall be paid over to NYUI

In accordance with this provision, Dr. Shusterman continued to render services to NYU pursuant to the hand shake agreement. This continued into 2009. Respondent argues that Claimant was "caught moonlighting". But the Agreement permits "moonlighting" as a Permitted Outside Activity. Therefore, it would appear that the services provided to NYU were Permitted Outside Activities.

Dr. Shusterman also provided services at Metropolitan Lithotripter Associates, P.C. ("Metro") Claimant admitted that the monies he earned at Metro during his time with NYUI should have been turned over to NYUI. During the relevant time period, Claimant received $27,700 from Metro. NYUI is entitled to 25% of this amount, or $6,925 pursuant to the terms of the Agreement.

It is undisputed that Claimant became a full time employee by early 2009. Claimant claims that he was working as much as requested prior to that, and Respondent admits he became full time by early 2009. However, no offer of ownership was made as required by the Agreement.

In late 2008, NYUI opened a Queens office. Claimant had input on the choice of location. Claimant told Respondents that he had a good following in Queens and that was one of the reasons the Queens location was opened.

After the Queens office was opened, Claimant received communications dated March 26, April 16 and April 23, 2009 from NYU contending that Claimant violated a restrictive covenant entered into by Claimant with Columbus. Respondent's lawyers then responded by letter dated April 24, 2009 on behalf of Claimant referencing the fact the Claimant had worked at NYU until just prior to that letter, and claiming that no violation of the agreement between Claimant and Columbus Medical had occurred. (*See* Respondent Exhibit 1 and Claimant Exhibit K.)

Respondent now claims a breach of Section 1.10 of the Agreement. This provides as follows:

> *"Lack of Restrictions. Physician covenants, represents and warrants to NYUI that he is under no contractual or other restrictions or obligations that are inconsistent with Physician's execution of this Agreement, the performance of his duties hereunder or the other rights of NYUI hereunder...Physician hereby agrees to indemnify and hold NYUI harmless from and against any and all claims , litigation, damages, liability, costs and expenses (including reasonable attorney's fees) arising out of, relating to or in consequence of the breach of this representation and warranty."*

There was an absence of proof that this covenant, representation and warranty was violated. Respondent's own attorney contended otherwise in his letter to NYU. (Exhibit K). And Respondent paid the attorney to write the letter.

Thereafter, the Claimant spoke to the Respondent about the fact that no offer of ownership had been made, as required by Section 1.9 of the Agreement.

Respondent's response was to advise Claimant that he was terminated. Claimant requested deferral of this decision to give him time to set up a new practice. Then, while Claimant was in the process of doing this, Respondent terminated him by letter dated June 4, 2009.

(Respondent's Exhibit 4). This letter purported to terminate Respondent for cause, but did not provide an opportunity to cure as provided by Section 4.2 (c) (v) of the Agreement (Termination permitted under written notice in the event of "The Physician's material breach of any provision of this Agreement, and failure to cure such breach within ten (10) days of written notice of such breach.") The grounds included (i) solicitation of patients to join him at new practice, (ii) improper use of confidential information, (iii) violation of duty of loyalty based on disparagement of NYUI to patients, employees and vendors of NYUI during employment, tortious interference with NYUI's business relationships, unfair competition and attempts to misappropriate name and goodwill of NYUI (v) failure to turn over outside revenue from Metro and elsewhere and breach of representation and warranty set out in the Agreement concerning competition restriction. At the hearing, Respondent showed that in fact Claimant had solicited patients of NYUI to come to his new practice, and that he had bad mouthed NYUI in that context and in speaking with prospective employees of NYUI.

Therefore, it appears that Claimant was properly terminated for cause under the Agreement, as these violations do not appear to have been curable.

Claimant contends that during the course of his employment, he was paid less than the Agreement provided. This claim was not proven. NYUI had a procedure to identify which services were performed by Claimant, and there is no showing that that procedure was not properly applied in any particular case or in general. Claimant's expert, Michael Kessler, presented evidence on this issue, but his testimony did not show that the provisions of the Agreement were not followed.

Claimant also contends he is owed amounts relating to collections after his termination. However, Section 4.3 of the Agreement provides that no tail collections are due if there is a breach of obligations under Article V of the Agreement or a termination for cause, as is the case here.

Legal Analysis

Claimant has brought multiple claims in this matter. There was an absence of proof of fraud or misrepresentation or deceptive acts or practices or slander by Respondent. Therefore, there is no basis for recovery on the Third, Fourth, Fifth, Eighth and Twelfth Count.

With reference to the claims for breach of contract, Claimant correctly asserts that the failure of Respondent to make an offer of ownership was a breach of the Agreement. This gave Claimant the right to terminate the Agreement, or seek to enforce it. He did not elect to terminate the Agreement, but instead seeks to be compensated in accordance with the Agreement. As for the failure to make an offer of ownership, it appears that it is impossible to enforce this provision in that the essential terms for an offer of ownership were not defined. Furthermore, as noted above, Claimant failed to prove that he was not compensated in accordance with the terms of the Agreement. The Respondent kept records which Claimant was entitled to and did review. He hired Mr. Kessler who did considerable work in trying to uncover additional payments due but none were proven.

Claimant seeks tail collections, but since he was properly terminated for cause, he is not entitled to such collections under the terms of Section 4.3(c) of the Agreement.

Therefore, Claimant is not entitled to recover under his breach of contract claims.

In view of the fact that the Agreement remained in force until terminated by Respondent, there is no basis for the unjust enrichment, quantum merit or promissory estoppel claims. And there is no showing of a breach of the covenant of good faith and fair dealing by the Respondent. Finally, since the Claimant was afforded extensive discovery and had an expert review, there is no basis for an order for an accounting

Therefore, it is the arbitrator's determination that Claimant should recover nothing in respect of his claims.

Next, there is Respondent's counterclaim seeking to recover damages based on monies that Respondent claims should have been turned over to Respondent by Claimant. However, Section 1.2 of the Agreement specifically provides that "Permitted Outside Activities" include "moonlighting". Therefore, no damages are appropriate in respect to the work at NYU.

On the other hand, it is not contested that NYUI is entitled to $6,925 in respect of services rendered by Claimant at Metro. There was a course of dealing whereby certain services were scheduled by Respondent to be conducted a Metro, with the practice to be paid its share of the proceeds.

NYUI also claims that all of Claimant's compensation should be forfeited due to his alleged disloyalty.

The fact that he didn't pay over a small amount that he admitted was due to NYUI in respect to Metro services doesn't mean he was stealing.

It has been shown that at the end of his tenure working for Respondent, Claimant acted inappropriately by soliciting patients, disparaging the Respondent and potentially certain other actions. However, where compensation is forfeited, it is only compensation earned during the period of the disloyalty. But there is no evidence as to when exactly this disloyalty occurred or the amount of compensation during this period. Therefore, there is no basis for an award of damages for forfeiture of compensation during the period of his disloyalty. Further, if there were such proof, it is not clear whether Claimant's actions rise to the level of warranting forfeiture of compensation, particularly in light of Respondent's own contract breach in failing to make an offer of ownership. In addition, the Agreement specifies the penalty for such wrongful conduct as forfeiture of the tail payments, which is what I find is appropriate here.

Both parties seek attorney's fees. Since no relief has been ordered on the Claimant's claims, and since Respondent prevailed on one of its claims, Respondent is the prevailing party. Vertical Computer Systems, Inc. v. Ross Systems, Inc., 59 A.D.3rd 205 (1st Dept. 2009). This means that the "arbitrator may award reasonable costs and attorneys' fees" to the Respondent. (Emphasis added.)

In addition, both parties claim that the other side asserted frivolous claims which should entitle them to attorneys' fees and costs. Under Section 7.6 (c) of the Rules of the American Health Lawyers Association, fees and costs can be awarded for "misbehavior". However, the Arbitrator finds that the actions of the parties in this matter did not amount to "misbehavior", even though both parties made various allegations which were insufficient and /or not proved.

Since the Respondents' have not provided information as to the amount of attorneys' fees and costs requested, the Arbitrator is ordering that such information be provided before a ruling is entered on any award of attorneys' fees.

The Claimant filed a motion to amend to add party. This motion is denied. Since the Claimant is not entitled to recover any money, there would be no benefit to adding a party.

In this matter, the hearing was bifurcated, with the second part of the hearing to deal with valuation of the claimant's stock interest appreciation. In view of this decision, no continued hearing will be required for this purpose. However, the hearing will be continued for purposes of determining the amount of any attorneys' fees to be awarded to respondent.

Conclusion

The Respondent is entitled to recover from Claimant the sum of $6,925.00.

On or before October 31, 2016, the Respondent shall submit an affidavit setting out the amount of attorneys' fees and costs claimed, and the factual basis therefore. This shall include time entry information, and also an allocation should be made of the time spent on the unsuccessful counterclaims. The Respondent shall also describe whether all or part of the fees incurred should be awarded. The Claimant shall then provide a response on or before November 15, 2016. The Arbitrator will then rule on the request for attorney's fees and costs. The hearing in this matter remains open pending these further proceedings.

Paul Knag
Arbitrator