IN THE CIRCUIT COURT OF THE 17th JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

INPHYNET CONTRACTING SERVICES, INC.,

Plaintiff,

v.

DAVID M. SORIA, M.D.; EMERGENCY SPECIALISTS OF WELLINGTON, LLC; and MEDICAL EDGE HEALTHCARE GROUP, INC.,

Defendants.
_____/

Complex Litigation Unit
Case No. 05-016999 CACE (07)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY FINAL JUDGMENT

THIS CAUSE came before the court for hearings on Thursday, July 30, 2009 and Friday, July 31, 2009, on the Supplemental Motion to Allow Punitive Damages Claims, dated April 28, 2009 ("Punitive Damages Motion"), filed by InPhyNet Contracting Services, Inc. ("InPhyNet"), and Defendants' Opposition to Plaintiff's Supplemental Motion to Allow Punitive Damages Claims and [incorporated Defendants'] Motion for Summary Final Judgment, dated June 19, 2009 (collectively, the "Summary Judgment Motion").

In its Second Amended Complaint InPhyNet seeks to enjoin David Soria, M.D. from violating the non-compete provision in his August 18, 2004 Employment Agreement (Claim I) and for breach of fiduciary duty of loyalty to InPhyNet (Count II). In addition, InPhyNet seeks damages from all defendants for conspiring to breach Dr. Soria's fiduciary duties to InPhyNet (Count III); Aiding and Abetting Breach of Fiduciary Duty Against ESOW and Medical Edge

(Count IV); Injunctive Relief Against ESOW and Medical Edge (Count V); and Tortious Interference Against Dr. Soria, ESOW and Medical Edge (Count VI).

On August 27, 2009 this court entered an Order which denied plaintiff's punitive damages motion and defendants' summary judgment motion. However, with the court's permission, defendants filed their Post-Hearing Memorandum of Law in Support of Motion for Summary Final Judgment, and plaintiff filed its Closing Submission on Defendants' Motion for Summary Final Judgment, both on August 28, 2009. Further, on September 16, 2009 defendants filed their Motion for Clarification of [the] August 27, 2009 Order because, in part, this court had not considered the parties' August 28, 2009 filings. This Order grants such clarification and revisits the August 27, 2009 Order, as set forth below.

The court, having considered plaintiff's punitive damages motion and defendants' summary judgment motion, the parties' opposing memoranda and replies thereto (including the August 28, 2009 post-hearing filings), the record evidence before the court, and the extensive argument of counsel for the respective parties at the hearings referenced above, and being otherwise duly advised in the premises, it is hereby:

ORDERED and **ADJUDGED** that defendants' Motion for Final Summary Judgment is GRANTED. Further, plaintiff's punitive damages motion is DENIED, as moot. InPhyNet's claims in its Second Amended Complaint for Injunctive Relief and Compensatory and Punitive Damages, dated August 21, 2007 are dismissed with prejudice. The court reserves jurisdiction in order to entertain post-judgment motions for remuneration of attorneys' fees and taxable costs, as applicable. *Fla. R. Civ. P.* 1.525.

Overview

InPhyNet is a provider (or staffer) of emergency department physicians and other services to hospitals. The gravamen of this case involves InPhyNet's claims against its former employee, Dr. Soria, who, while employed by InPhyNet between January 2003 and October 2005, served as an emergency department physician and Chief of the Emergency Department at Wellington Regional Medical Center ("Wellington"). Dr. Soria held this position under two employment contracts; the first in 2003 and the second in August 2004. InPhyNet held a terminable-at-will Emergency Department Agreement with Wellington until it was terminated by the Hospital, effective October 31, 2005.[1]

InPhyNet sued Dr. Soria's current employer, Emergency Specialists of Wellington, LLC ("ESOW"),[2] and ESOW's parent company, or owner, Medical Edge Healthcare Group, Inc. ("Medical Edge"). The factual underpinning of each of InPhyNet's claims is its contention that the defendants conspired to "pirate away" the Emergency Department Agreement. InPhyNet claims that Dr. Soria and the defendants conspired, or were in league, with the Hospital's Chief Executive Officer, Kevin DiLallo to replace InPhyNet while still maintaining Dr. Soria as Emergency Medical Director contrary to Dr. Soria's fiduciary and contractual duties.

[1] The Emergency Department Agreement was originally held by EMSA Limited Partnership at the time of its execution on February 27, 1995. On December 1, 1998, EMSA Limited Partnership assigned the contract, with the Hospital's consent, to an affiliate, EMSA Contracting Services, Inc., EMSA Contracting Services, Inc. changed its name to InPhyNet Contracting Services, Inc. - - the Plaintiff here - - on March 8, 1999.

[2] ESOW now holds an Emergency Department Agreement with the hospital.

InPhyNet has not brought suit against DiLallo, Wellington Regional Medical Center, Inc., or its parent, UHS of Delaware, Inc.

InPhyNet's claims against the defendants must be viewed from the terminable-at-will nature of the Emergency Department Agreement, and the reasons, if any, for termination by the hospital.

Count I: Breach of [August 18, 2004] Employment Agreement Claim for Injunctive Relief Against Dr. Soria

Mr. DiLallo testified that he had multiple reasons when he notified InPhyNet of the termination on July 28, 2005, even though he was not required to have "cause" to terminate the at will contract. In his deposition, and as discussed more fully below, DiLallo articulated several reasons for the decision to end the relationship with InPhyNet. Mr. DiLallo confirmed Dr. Soria had nothing to do with his decision to terminate the Hospital's business relationship with InPhyNet. On this critical point, DiLallo testified (Deposition of Kevin DiLallo, p. 127, lines 14-23; p. 129, lines 22-25; p. 133, lines 11-15; p. 134, lines 2-5):

QUESTION:	Did Doctor Soria say or do anything that caused you to give notice to InPhyNet in 2004?
ANSWER:	No.
QUESTION:	Does Doctor Soria decide which emergency department provider Wellington contracts with?
ANSWER:	No, he does not.
QUESTION:	And I think you mentioned on both occasions, both 2004 and 2005 you're the one who made the decision to change

providers; is that accurate?

ANSWER: Yes.

* * *

QUESTION: In 2004 did Doctor Soria ever suggest to you in any way that you should contract with [Medical Edge] or one of its affiliates instead of InPhyNet?

ANSWER: No.

* * *

QUESTION: Okay. When you made the decision not to continue with InPhyNet's contract in 2005, did Doctor Soria say or do anything that led you to make that decision?

ANSWER: No.

* * *

QUESTION: Prior to you giving notice to InPhyNet in 2005, did Doctor Soria ever suggest or encourage you to contract with a different provider; in particular ESOW?

ANSWER: No, he did not.

Mr. DiLallo explained his concern over physician turnover with InPhyNet and complaints by physicians that they did not feel they were being paid competitively. *Deposition of Kevin DiLallo, p. 31, In. 7-14.* As a result, InPhyNet began to lose some of the better physicians in the group and it became difficult to fill vacant positions. *Deposition of Kevin DiLallo, p. 31, In. 11-14; In. 4-22; p. 35, In. 16-18.* No direct counter-evidence was filed, proffered or argued by InPhyNet.

In Count IV, InPhyNet asserts a claim for injunctive relief, requesting the court enter a "permanent injunction" against Medical Edge and ESOW with respect to Dr. Soria's alleged restrictive covenants for his continued employment at Wellington. The entry of summary judgment in favor of defendants, however, is warranted by a plain reading of InPhyNet's own August 18, 2004 Employment Agreement with Dr. Soria - - particularly EXHIBIT "B" (STANDARD TERMS AND CONDITIONS). At page 5, ¶3 ("Medical Staff Privileges"), the Employment Agreement provides, in pertinent part:

> If this Agreement is terminated or if Our contract with the Facility is terminated, You agree to voluntarily relinquish Your medical staff appointment and clinical privileges at such Facility or at any Facility where Our Facility contract terminates, unless such Facility determines, ***in its sole discretion***, to permit You to retain Your medical staff privileges. (*e.s.*)

The record indicates that DiLallo, on behalf of the hospital, exercised, at all times, discretion to permit Dr. Soria to maintain his medical staff privileges at the hospital and remain the hospital's Medical Director in the emergency department. All reasonable inferences being drawn in favor of InPhyNet, as the non-moving party, militate in favor of summary judgment for the defendants. *Martin Petroleum Corporation v. Amerada Hess Corporation*, 769 So.2d 1105 (Fla. 4th DCA 2000) ("Although it is true that, generally speaking, issues of negligence cannot be resolved on summary judgment, commercial litigation is another matter. Where a claim such as this one is filed, and after full discovery there is no evidence to support the allegations and there are thus no genuine issues of material fact, summary judgment should be granted. A party should not be put to the expense of going through a trial, where the only possible result will be a directed verdict").

Events Prior to Dr. Soria's Second Employment Agreement

The hospital terminated InPhyNet's Emergency Department Agreement *twice*: initially on June 16, 2004 (rescinded on August 6, 2004); and subsequently on July 28, 2005 (effective October 31, 2005). In 2004, DiLallo gave written notice to InPhyNet that the hospital was electing to discontinue the Emergency Department Agreement. It is undisputed on the record before the court that DiLallo, *alone*, was responsible for the hospital's decision. Prior to providing a termination notice to InPhyNet, DiLallo had been approached by David Singley, on behalf of Medical Edge, about the possibility of Medical Edge providing the staffing for Wellington's emergency department.[3] DiLallo expressed interest, and invited Medical Edge to submit a proposal. DiLallo had also advised Singley of Wellington's strong preference that Dr. Soria remains as the Medical Director - - as the hospital was entitled to require in its sole discretion. Medical Edge then submitted a proposal to the hospital.

It is undisputed that InPhyNet never lost the Emergency Department Agreement in 2004; thus, InPhyNet suffered no damages as a result. The evidence suggests that Dr. Soria was actually instrumental in InPhyNet retaining the Emergency Department Agreement when, on August 6, 2004, DiLallo rescinded the June 16, 2004 termination. In this regard, Dr. Soria's willingness to be re-employed by InPhyNet commencing August 18, 2004 was paramount in the decision by Wellington to rescind the termination with InPhyNet.

[3] Dr. Lynn Massingale, Chairman and Chief Executive Officer of InPhyNet's parent company, Team Health, Inc., testified on December 19, 2007 (p. 59, line 4 to p. 60, line 6) that there was nothing inappropriate or untoward with InPhyNet's competitor, Medical Edge, prospecting for new business from

DiLallo and the hospital.

The court finds the events transpiring in 2004 - - particularly those prior to Dr. Soria's second Employment Agreement - - are not actionable, and that the defendants are entitled to summary judgment for the following reasons. InPhyNet admittedly is not suing Dr. Soria under his 2003 Employment Agreement, which was in effect through the end of July 2004. In addition, the court finds that any disputes and disagreements between InPhyNet and Dr. Soria existing as of August 18, 2004 (*i.e.,* the date of his new Employment Agreement) were affirmatively resolved between the parties, indicating an accord and satisfaction. *Martinez v. South Bayshore Tower, L.L.L.P.*, 979 So.2d 1023 (Fla. 3d DCA 2008). The affidavits of InPhyNet's corporate officers, as well as its own contemporaneous internal documents, confirm that InPhyNet was well aware of the events forming the foundation to this lawsuit prior to reaching an accord with Dr. Soria. InPhyNet cannot now sue for the same conduct.

There is no dispute that InPhyNet's Emergency Department Agreement was reinstated by the hospital as of August 6, 2004 - - before a 90-day notice period had expired. Thus, InPhyNet's contract was not interrupted, and it was not damaged as a result of any events allegedly transpiring in 2004. As a result, summary judgment against InPhyNet is appropriate. *Gracey v. Eaker*, 837 So.2d 348, 353-354 (Fla. 2002) (damages are a necessary element to a claim for breach of fiduciary duty); *Merin Hunter Codman, Inc. v. Wackenhut Corrections Corporation*, 941 So.2d 396, 398 (Fla. 4th DCA 2006) (necessary element for breach of contract claim is damages); *American Medical International, Inc. v. Scheller*, 462 So.2d 1, 9 (Fla. 4th DCA 1984) ("Unsuccessful interference is simply not the kind of interference upon which

damages may be assessed").

Finally, the undisputed testimony of DiLallo was that Dr. Soria did not do, or say, anything which caused DiLallo to terminate InPhyNet in 2004; nor did Dr. Soria suggest to DiLallo that the hospital should contract with Medical Edge. This is dispositive of InPhyNet's claims.

Events Subsequent to Dr. Soria's Second Employment Agreement

After the reinstatement of InPhyNet's Emergency Department Agreement, the hospital claimed it continued to encounter operational deficiencies with InPhyNet. On July 28, 2005, DiLallo again provided written notice to InPhyNet that the hospital was not going to continue the contract, effective November 1, 2005. The hospital invited proposals from other emergency room providers, including InPhyNet. Mr. DiLallo ultimately selected Medical Edge [through its subsidiary, ESOW] as the new emergency department provider.

ESOW currently holds the emergency department staffing contract with the hospital. Dr. Soria does not. Admitting it no longer has any contractual relationship with the hospital, InPhyNet is nonetheless seeking to enforce restrictive covenants against Dr. Soria (and his new employer, ESOW) to prevent him from working at that facility, and only at that facility.

It bears repeating that Dr. Soria's second employment agreement with InPhyNet specifically allowed for the hospital to retain his medical staff privileges at their discretion. Section 542.335(1)(b), *Fla. Stat.*,[4] requires the party seeking enforcement of a restrictive covenant to

[4] The validity and enforceability of a covenant not to compete under Florida law is governed by the law in effect at the time the agreement was entered into. *Gupton v. Village Key & Saw Shop, Inc.*, 656 So.2d 475, 477-79 (Fla. 1995). In this case, the 2004 version of the statute applies.

"plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. Any restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable." *See also Passalacqua v. Naviant, Inc.*, 844 So.2d 792, 795 (Fla. 4th DCA 2003). It is noteworthy the statute authorizes the court to consider:

> the fact that the person seeking enforcement no longer continues in business in the area or line of business that is the subject of the action to enforce the restrictive covenant only if such discontinuance of business is not the result of violation of the restriction.

§542.335(1)(g)(2), *Fla. Stat.* (2004). The court finds that InPhyNet has failed to establish any legitimate business interest in seeking to enforce the restrictive covenants against Dr. Soria (and, indirectly, against ESOW). The hospital is the only facility where InPhyNet is seeking to prevent Dr. Soria from working and is the "subject of [this] action."

The opinion in *PHP Healthcare Corporation v. EMSA Limited Partnership*, 14 F.3d 941 (4th Cir. 1993), applying Florida law, addresses enforcement of restrictive covenants on similar facts. The decision in that case turned on the fact that EMSA Limited Partnership no longer held the contract at the facility where the restrictive covenants were sought to be enforced and, therefore, was no longer engaged in a "like business" in the "protected area" as Florida law required. The court concluded, *Id.* at 947-48:

> We hold, as a matter of law on facts not in genuine issue, that (1) the covenant does contain area limits; it doesn't purport to be geographically unbounded; (2) those "area" limits are narrowly the specific facilities in which by the covenant's terms competitive activity is prohibited; (3) as sought to be applied here, that area would be the Millington Facility; and (4) in that facility EMSA was

> not any longer at the time in issue carrying on a "like business" within the meaning of the Florida statute.
>
> '[L]ike business' as applied here refers only to the continued provision of emergency medical serves at the Millington facility, a business that at the critical time EMSA was not still 'carrying on.' Because this is a critical condition to the covenant's enforceability against the Millington physicians, this determination is dispositive on that issue and requires affirmance of the district court's dismissal of the EMSA counterclaim.
>
> [A]s indicated, the Florida statute then requires that to enforce its covenant in any such facility-limited "area" EMSA must still be carrying on a "like business therein" – here, in the Millington facility.

The court finds the instant case to be indistinguishable from *EMSA Limited Partnership*. Dr. Soria's Employment Agreement with InPhyNet contains a similar non-compete provision. InPhyNet previously held the Emergency Department Agreement with the hospital for the provision of emergency room services. But, as in *EMSA Limited Partnership*, the hospital notified InPhyNet of its intent not to continue with the contract, and it was then awarded to a competitor. InPhyNet's engagement in "the area or line of business that is the subject of [this] action" thus ended on October 31, 2005 when its contract with the hospital ended. Shortly before the contract changed hands, ESOW and/or Medical Edge negotiated with Dr. Soria to employ him where he would continue to serve as an emergency room physician at the hospital. Thus, as the court found in *EMSA Limited Partnership*, InPhyNet does not, and cannot, have a legitimate business interest to protect at the hospital.

InPhyNet argues that *EMSA Limited Partnership* is distinguishable and that it has a legitimate business interest because, in this case, Dr. Soria was the cause of InPhyNet losing the

Emergency Department Agreement. InPhyNet relies upon a number of communications between Dr. Soria and Medical Edge, which it claims shows complicity between the defendants to take the contract from InPhyNet. These communications, however, fail to provide an obstacle to summary judgment for a number of reasons.

The vast majority of the communications took place, and relate to, events in 2004 and, as discussed above, prior to InPhyNet's agreement to re-hire Dr. Soria. The communications in 2005 (although not linked directly, or indirectly, to DiLallo's decision to terminate InPhyNet) took place after the hospital provided notice to InPhyNet it was again terminating the contract. Mr. DiLallo expressed his desire to retain Dr. Soria as the Medical Director of the emergency department and, significantly, had the "sole discretion" to do so.

The record evidence demonstrates that DiLallo had several reasons for decision to terminate InPhyNet, none of them attributable to Dr. Soria. For example, DiLallo explained his decision on July 28, 2005 to terminate InPhyNet related to events involving InPhyNet that even pre-dated Dr. Soria's employment in January 2003. In 2005, DiLallo continued to express concern to InPhyNet about multiple issues, including physician turnover in the emergency department and the physicians' complaints about compensation. *See* Deposition of Kevin DiLallo, dated October 10, 2006, p. 87, line 16 to p. 90, line 21. Mr. DiLallo also felt that InPhyNet had not properly handled matters involving another InPhyNet physician, Dr. Blossom Kunnell, who InPhyNet had refused to discharge. *See* Deposition of Kevin DiLallo, dated October 10, 2006, p. 102, lines 1-16. Mr. DiLallo ultimately described the relationship with InPhyNet in 2005 as being plagued by "distrust" based upon events pre-dating the reinstatement

of the contract, a description corroborated by James Provo. *See* Affidavit of James Provo, M.D., at ¶¶12 and 15. Under this circumstance, InPhyNet was not entitled to single out the actions Dr. Soria. *Pieter Bakker Management v. First Fed. Sav. & Loan Assoc.*, 541 So.2d 1334, 1335 (Fla. 3d DCA 1989), *citing Uvanile v. Denoff*, 495 So.2d 1177 (Fla. 4th DCA 1986), *rev. dismissed*, 504 So.2d 766 (Fla. 1987).

InPhyNet presented no competent, reasonable evidence that Dr. Soria can be liable for the loss of its contract with Wellington. The court cannot draw any alternative inferences, or adopt InPhyNet's stacking of such inferences, in light of this uncontradicted testimony. *Merrill Stevens Dry Dock Company v. G&J Investments Corporation, Inc.*, 506 So.2d 30, 32 (Fla. 3d DCA 1987), *and cases cited therein.* These cases are also dispositive of InPhyNet's claims for conspiracy, tortious interference and injunctive relief. In the absence of an underlying cause of action or misconduct, there can be no conspiracy. *Davis v. Hilton*, 780 So.2d 974, 975 (Fla. 4th DCA 2001). The claims for tortious interference with respect to Dr. Soria's Employment Agreement and the terminable-at-will Wellington contract are, likewise, non-actionable. *PHP Healthcare Corporation v. EMSA Limited Partnership*, 14 F.3d 941, 945, n. 4 (4th Cir. 1993) ("Specifically, the district court properly held that . . . if under Florida law the covenant was invalid, this would defeat EMSA's tortious interference claim without any need to address the claim's other essential elements." *See also, Mariscotti v. Merco Group at Akoya, Inc.*, 917 So.2d 890, 892 (Fla. 3d DCA 2005).

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DONE and ORDERED in Fort Lauderdale, Broward County, Florida, on this 27th day of October, 2009.

ROBERT A. ROSENBERG
Circuit Court Judge

cc: Peter R. Goldman, Esq. and Vanessa M. Serrano, Esq. (for Plaintiff)
Glenn J. Waldman, Esq. and Douglas T. Marx, Esq. (for Defendants)