

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA
Justice

TRIAL/JAS, PART 2
NASSAU COUNTY

DIANA YOON-SCHWARTZ, M.D., Ph.D.,

INDEX No. 11749/10

Plaintiff,

MOTION DATE: July 27, 2010
Motion Sequence # 001, 002

-against-

ALEX KELLER, M.D., F.A.C.S., P.C. and
ALEX KELLER, M.D.,

Defendants.

The following papers read on this motion:

- Order to Show Cause..... X
- Cross-Motion..... X
- Affirmation/Affidavit in Opposition..... XX
- Affidavit in further Support..... X
- Memorandum of Law..... XX
- Reply Memorandum of Law..... X

Motion by plaintiff for a preliminary injunction is **granted** to the extent indicated below. Cross-motion by defendant for a preliminary injunction is **granted** to the extent indicated below.

This is an action by a physician for sexual harassment and breach of her employment agreement. Plaintiff Diana Yoon-Schwartz and defendant Alex Keller are plastic surgeons. Dr. Keller concentrates his practice in microvascular surgery, which he performs as part of reconstructive surgery, and particularly breast reconstruction. In the early 1990's, Dr. Keller

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pioneered a new technique for breast reconstruction, known as the DIEP procedure. DIEP was an advancement over the prior method because it involves the removal of only skin, fat, and blood vessels from the abdomen; no muscle is displaced in the procedure.

Most of Dr. Keller's breast reconstruction patients are women with breast cancer who are referred to Dr. Keller by their breast surgeons. Dr. Keller's most important source of referrals is surgeons affiliated with Long Island Jewish Medical Center. LIJ is a major cancer center and is located in New Hyde Park, according to Dr. Keller, approximately 2-3 miles from his office in Great Neck. Dr. Keller also receives a significant number of referrals from North Shore University and St. Francis hospitals. St Francis is located in Roslyn approximately 3 miles from Dr. Keller's office, and North Shore is located in Manhasset, less than a mile from his office.

On June 12, 2008, Dr. Yoon-Schwartz and Dr. Keller signed a "working agreement," which provided in essence that plaintiff would be employed by defendant's professional corporation in anticipation of a possible future partnership. At the time of the agreement, Dr. Yoon-Schwartz had just finished her plastic surgery residency but had not received formal training in microsurgery.

The agreement provided that plaintiff's salary was to be \$170,000 per year and, if plaintiff provided annual billing of over \$400,000, 50% of the excess over \$400,000 was to be paid to plaintiff as a bonus. The professional corporation was to provide plaintiff with malpractice insurance. The term of the agreement was one year, commencing on July 1, 2008, or as soon thereafter as plaintiff was able to obtain hospital privileges at Long Island Jewish Medical Center. The agreement was to be "renewable" on a yearly basis, until such time as plaintiff became a partner. While the "goal" was that plaintiff would become a partner in four years, if plaintiff achieved annual billing equal to 75% of defendant's billing, she would be made a partner at that time.

The agreement provided that plaintiff would not work elsewhere or establish her own private practice during the term of the agreement. If their relationship terminated for any reason, plaintiff was not to "set up an office or be employed in the practice of medicine or practice at any hospital" within a 10 mile radius of defendant's office for a period of three years. The agreement acknowledges that the restrictive covenant "may be difficult to enforce" and provides that, at defendant's discretion, plaintiff may repay her last year's salary in order to be relieved of the restrictive covenant. Finally, the agreement provided that any breach of the agreement would not void the restrictive covenant, and plaintiff would not

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challenge the restrictive covenant.

On October 1, 2009, the parties signed a renewal agreement. The renewal agreement increased plaintiff's salary to \$250,000 per year and increased to \$600,000 the billing amount above which plaintiff would receive the 50% bonus. The renewal agreement provided that the other terms of the June 12, 2008 agreement would remain in effect.

On May 25, 2010, plaintiff served defendant with written notice that she was resigning from the practice effective June 8, 2010. Following her departure, Dr. Yoon-Schwartz planned to accept referrals from surgeons at LJJ, North Shore, and St Francis. She also began to develop a practice at Huntington Hospital, which is 18 miles from Dr. Keller's office. Dr. Keller promptly protested plaintiff's violation of the terms of the restrictive covenant. Plaintiff alleges that following her departure, Dr. Keller prevented her from performing surgery on June 11, 2010 on a patient whose surgery had been scheduled while plaintiff was still working for Dr. Keller. Plaintiff further alleges that defendant's employees refused to give plaintiff's address or phone number to patients who called the office.

Plaintiff commenced the present action on June 18, 2010. Plaintiff alleges that defendant made crude, inappropriate, offensive, and derogatory comments regarding women in general on almost a daily basis. Plaintiff alleges that defendant engaged in sexually explicit discussions and comments in her presence and subjected her to sexual harassment. These alleged comments are quoted in detail in plaintiff's affidavit in support of motion (¶ 21-27). Plaintiff asserts claims for sex discrimination, intentional infliction of emotional distress, and breach of her employment agreement.

The same date that the complaint was filed, plaintiff moved by order to show cause for a preliminary injunction restraining defendant from enforcing the restrictive covenant. In the order to show cause, the court issued a temporary restraining order, restraining defendant from interfering with any surgeries which had been scheduled as of the date of the order. Defendant cross moves for a preliminary injunction restraining plaintiff from violating the restrictive covenant.

Noncompete clauses in employment contracts are not favored and will be enforced to the extent reasonable and necessary to protect valid business interests (*Morris v Schroeder Capital*, 7 NY3d 616, 620 [2006]). A restraint is reasonable only if it 1) is no greater than is required for the protection of the legitimate interest of the employer 2) does not impose

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undue hardship on the employee, and 3) is not injurious to the public (*BDO Seidman v Hirschberg*, 93 NY2d 382, 388 [1999]). A restrictive covenant will be subject to specific performance only to the extent that it is reasonable in time and area (1d).

Generally speaking, a reasonable restrictive covenant in an employment agreement covering a health care professional will be enforceable. In *Zellner v Conrad*, 183 AD2d 250 [2d Dept 1992], the court upheld a covenant prohibiting an ophthalmologist from practicing within a two mile radius of the employer's office in Brooklyn for a period of two years. In *Zellner*, there was clearly a legitimate interest for the restraint because shortly after the ophthalmologist began employment, the practice was purchased for over \$1 million.

In *Medical College v Lobel*, 296 AD2d 701 [3d Dept 2002], a restrictive covenant prohibiting an obstetrician/gynecologist from practicing within 30 miles of Albany for a period of five years was upheld. In *Bollengier v Gulati*, 233 AD2d 721 [3d Dept 1996], the court held that a restriction prohibiting a cardiovascular and thoracic surgeon from practicing within a 20 mile radius of the employer's office in Clinton County was enforceable. In *Bollengier*, the employer had spent 29 years developing the practice and cultivating referrals. In *Rifkinson-Mann v Kasoff*, 226 AD2d 517 [2d Dept 1996], a restrictive covenant prohibiting a neurosurgeon from practicing at Westchester County Medical Center for a period of one year was enforceable. In *Gazzola-Kraenzlin v Medical Group*, 10 AD3d 700 [2d Dept 2004], the court held that a restriction prohibiting a pediatrician from practicing within a ten mile radius of the employer's White Plains office for a period of two years was not unreasonable.

In order to be entitled to a preliminary injunction, plaintiff must show a likelihood of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860 [1990]). Dr Keller has established a legitimate interest in protecting his referral network which took almost 20 years to develop. A 10 mile restriction would be reasonable in an upstate county, or other rural locale. However, given plaintiff's narrow field of specialization, a ten mile radius in a densely populated area of Nassau County, containing several major hospitals, is unreasonable.

Nevertheless, a court may cure an overbroad restrictive covenant through the means of partial enforcement (*BDO Seidman v Hirschberg*, supra, 93 NY2d at 394). If the employer demonstrates an absence of overreaching and has in good faith sought to protect a legitimate business interest, partial enforcement may be justified (1d). Since sexual

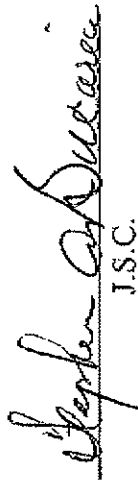
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harassment has no bearing on the issue of good faith with regard to the restrictive covenant, the court determines that Dr. Keller sought to protect a legitimate business interest. Based upon the geographic area and plaintiff's field of specialization, the court concludes that the restrictive covenant is enforceable only as to LIJ and North Shore. The restrictive covenant is not enforceable as to St Francis or any other hospital.

Accordingly, defendant's motion for a preliminary injunction is granted only to the extent that plaintiff is restrained from practicing microvascular surgery at Long Island Jewish Hospital in New Hyde Park or North Shore University Hospital in Manhasset during the pendency of this action. Plaintiff's motion for a preliminary injunction is granted to the extent of restraining defendant from enforcing the restrictive covenant with respect to any other hospital.

So ordered.

Dated SEP 20 2010


J.S.C.