STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

HOSPITALISTS OF NORTHWEST MICHIGAN, P.L.L.C., a Michigan Professional Services Limited Liability Company,

Plaintiff/Counter-Defendant,

v

File No. 09-27718-CK
HON. PHILIP E. RODGERS, JR.

ERNEST G. FISCHER, III, M.D.,

Defendant/Counter-Plaintiff.
_____/

James A. Christopherson (P31585)
Attorney for Plaintiff/Counter-Defendant

John A. MacNeal (P24098)
Maurice A. Borden (P34603)
Attorneys for Defendant/Counter-Plaintiff

Robert B. Bettendorf (P30733)
Co-Counsel for Defendant/Counter-Plaintiff

DECISION AND ORDER

The bench trial in the above-captioned matter concluded on September 16, 2010. The parties were provided the opportunity to file final written arguments no later than September 29, 2010. Timely arguments were submitted by both parties and the Court took the matter under advisement. Plaintiff Hospitalists of Northwest Michigan ("HNM") is a limited liability company composed of physicians who provide internal medicine and pediatric specialty services to in-patients at Munson Medical Center. Defendant Ernest G. Fischer, III, M.D. ("Fischer") was

a member of the Plaintiff corporation until his services were involuntarily terminated. The circumstances surrounding his termination give rise to this litigation.[1]

The Defendant was hired by Plaintiff and immediately had difficulty obtaining staff privileges at Munson Medical Center because he was on a "do not pay" list. His appearance on this list not only limited the Plaintiff's ability to receive compensation from various insurance companies but, equally importantly, it impacted Munson Medical Center's ability to bill for services provided by HNM as well. The Defendant was on this list due to the lack of consistent payments on his student loans.

Rather than terminate the Defendant, Plaintiff chose to put him on a paid furlough where he could not see patients for one month while the problem was resolved. Subsequently, HNM received a call from the Department of Education regarding the Defendant's loans which then had a balance in excess of $220,000. The caller complained of multiple unsuccessful efforts to negotiate a payment plan with the Defendant.

The Defendant's failure to be in good standing on his loans was a serious problem for the Plaintiff. HNM only had one number for billing purposes and if any member of the group was on the "do not pay" list, the entire group would be effectively precluded from receiving payment.

Again, HNM chose not to terminate the Defendant and instead went to a bank where a number of the group's members signed personal guaranties to borrow the money necessary to satisfy the Department of Education. Having successfully transferred the Defendant's debt from the Department of Education to themselves, they were disappointed at the Defendant's failure to immediately assume responsibility for making payments to the bank and set up an automatic payment from his payroll check. The Defendant did sign a Loan Agreement and pledged his accounts receivable as security.

The Defendant was immediately treated as an HNM owner even though he was asked to and never paid a Subscription fee as all the others had done. Defendant did however sign a Subscription and Operating Agreement. Subsequently, five members of the group bought out the others and the Defendant entered into an employment agreement identical to all the other non-

[1] The proofs were narrowed after a meeting between the parties' accounting experts where they were able to review original computer data and discuss the accounting records with each other. The principal dispute between the parties at trial centered on the Defendant's accounts receivable and the application of those collections to reduce his debt to HNM.

owners. Simply stated, 70 percent of his actual collections went to him and the remaining 30 percent were retained by the Plaintiff.

After HNM loan to the Defendant was made, there was another unfortunate incident. The Defendant cashed two small insurance reimbursement checks and retained the proceeds even though those checks belonged to HNM. While this may have been inadvertent, the testimony was that no other doctor in the group had ever done this and that the matter was never resolved by repayment of the monies taken.

The Defendant's problems with money and lack of communication continued when he was sued by Munson Medical Center for the failure to pay a medical bill incurred by a member of his family. Having been sued, the Defendant failed to resolve the matter and the debt was reduced to a judgment. Once the judgment was entered, the Defendant failed to pay it and HNM learned of the litigation when it received a notice of garnishment. The Defendant's failure to pay Munson Medical Center occurred at a time when HNM was renegotiating a contract with Munson Medical Center and was a source of embarrassment to the negotiating team when the Munson Medical Center CEO made a comment about HNM not paying its debts.

These actions were recognized by HNM as violations of the Defendant's Loan Agreement. If the Defendant was to repay HNM and refinance his debt, it was imperative that he keep his credit rating as high as possible. Being sued for nonpayment of a debt and having a creditor enter a judgment against him were clear violations. All these financial issues were unfolding as the Defendant was making approximately $250,000 a year.

Principals of HNM attempted to communicate with the Defendant regarding the issues of his credit and the repayment of the HNM loan. The Plaintiff complained that the Defendant ignored a hand-delivered letter on his desk and refused to open a similar e-mail. HNM wanted to accelerate repayment and it wanted more security. Neither was forthcoming. Notice of default was provided to the Defendant on June 28, 2009 which led to the decision to terminate the Defendant. Given the choice of resigning or being fired for cause, the Defendant and the Plaintiff entered into a written Separation Agreement.

The Plaintiff did not waive the Defendant's default and as his accounts receivable were collected, they were kept by the Plaintiff and applied to the Defendant's loan balance. While the Defendant disputes the application of these funds to his loan as opposed to a payment to him

directly, he does not dispute the mathematics. Net of the accounts receivable which were applied to his loan, the Defendant owes Plaintiff $88,532.

Additionally, Plaintiff complains that the Defendant also owes overhead expenses described by their accountant, Kate Thornhill, CPA, in the amount of $33,147. Plaintiff seeks a judgment against the Defendant in the amount of $121,679 which it argues is consistent with the terms of the Loan Agreement.[2]

The Defendant's initial counter-complaint alleged financial improprieties in the calculation of compensation due the Defendant in the years 2006 through 2008. Yet, by trial a damage claim in excess of $158,000 for these years was abandoned. At the conclusion of the trial, the Defendant's damage claim was limited to the year 2009 and totaled $18,337. The Defendant's calculations assumed that the accounts receivable were to have been paid directly to the Defendant with monthly deductions of $2,002.63 on his loan which together with other 2009 credits for accounting fees, legal fees and billing services yielded a proposed net recovery to the Defendant.

Having concluded the trial, the Court has some empathy for the Plaintiff. Despite the red flags associated with the length of Defendant's residency and his default on student loans, the Plaintiff chose to offer him a position. When the Defendant appeared on the "do not pay" list to his detriment as well as to that of all HNM members and Munson Medical Center, HNM chose not to terminate him but to make his debt their own. Then, as HNM entered into negotiations with Munson Medical Center to improve their contractual relationship, group members were embarrassed by the Defendant not paying the hospital for services provided to his family and actually forcing the hospital to pursue garnishment to collect the debt. And, all this occurred with a physician who HNM was paying approximately $250,000 per year.

The Defendant's serious charges of improprieties in calculating his compensation for the years 2006 through 2008 were withdrawn and no evidence was ever presented supporting them. The Defendant quarrels over the 10 percent collection fee assessed in 2009 but would have paid HNM 30 percent had he remained with them. The Plaintiff acknowledges that the Defendant

[2] The Court ruled that the dispute regarding overfunding of Defendant's retirement plan was within the exclusive jurisdiction of the Federal Courts. The Plaintiff's CPA, Kate Thornhill, testified that Defendant's retirement account was overfunded in the amount of $16,002. The Defendant conceded the point at trial and offered no testimony regarding a different number. While the Court believes that the retirement account has been overfunded in the amount of $16,002, it has no authority to order a remedy. Accordingly, this Court simply accepts the Defendant's admission that the retirement account was overfunded by $16,002.

should not have been charged the 2009 accounting fee in the amount of $1,125 or a legal fee in the amount of $1,906. The collections were performed by Insurance Data Service whose fee was 5.25 percent and Defendant objects to paying $1,686 of collection fees in excess of a 6 percent collection charge. Together, these total $4,717.

For reasons that will be discussed further ahead, the Court rejects the Defendant's arguments with respect to accounts receivable. Accounts receivable can hardly be security for the payment of a loan if they are paid to a Defendant whose history is one of not paying his debts or communicating with his creditors and whose employer had to resolve his debt problems for him. The Defendant was not harmed with respect to the accounts receivable since they have all been applied to a loan debt to Plaintiff which he acknowledges is a valid and binding obligation.

Having grounds to terminate the Defendant for cause, Plaintiff could have kept the Defendant's accounts receivable and not applied them to the loan balance. Yet, HNM understood how devastating such an event would be for a physician in an effort to retain or gain staff privileges. Despite the fact that the Defendant kept insurance reimbursement checks to which he was not entitled and caused Munson Medical Center to garnish HNM for a debt the Defendant chose to ignore, the Defendant was allowed to sign a Separation Agreement, resign and not forfeit his accounts receivable.

Pursuant to the terms of the September 20, 2007 Loan Agreement, the Defendant acknowledged that his accounts receivable could be applied to his loan balance if he breached the terms of his loan agreement. Clearly, he did so. The Defendant acknowledged taking checks that belonged to the Plaintiff and causing Munson Medical Center to issue a garnishment to the Plaintiff. These acts violated the terms of the Loan Agreement.

The Defendant was given written notice of his default on June 5, 2009 and the balance was accelerated in a written communication dated June 30, 2010. The written Separation Agreement does not say that the Defendant will be paid his accounts receivable directly. Given his history with the Plaintiff, it would have been bizarre to include such a provision. The accounts receivable were security for a loan balance and the Defendant was in breach of his loan agreement and had a poor credit history due to his mishandling of his student loans and his debt to Munson Medical Center. Principals of the Plaintiff testified that Defendant was told his accounts receivable would be applied to his loan balance at the time of separation. The

Defendant testified to the contrary, but he admitted during cross-examination that on that point he would not call the other witnesses liars.

Although the Defendant acknowledged his obligation to repay the loan in its entirety at trial, he had clearly indicated on prior occasions that he should not have to repay the loan. Surrendering the accounts receivable to the Defendant would have destroyed their efficacy as security. The Defendant's history of debt mismanagement does not support a reasonable conclusion that these proceeds would have been applied to Defendant's loan. On this point, the Court does not find the Defendant to be credible and the great weight of the evidence is against him.

The Court finds that the balance due on the Defendant's loan as of the time of trial was properly computed to be $88,532. Additionally, the evidence presented at trial persuades the Court that the Defendant owes the Plaintiff an additional $33,147 in overhead expenses. The Court is satisfied that the Defendant's retirement plan was inadvertently overfunded in the amount of $16,002 and, finally, that the Defendant is entitled to a credit against the sums he owes the Plaintiff in the amount of $4,717.

The Court finds that the parties had a legitimate, although modest, dispute regarding the calculation of the Defendant's 2009 compensation with respect to legal fees, accounting fees and billing service charges. In view of the totality of the claims asserted by the parties, Plaintiff has prevailed overwhelmingly. However, the Separation Agreement makes no provision for proportionate repayment. No attorneys' fees will be assessed consistent with the terms of the Separation Agreement. However, Defendant's allegations regarding compensation for the years 2006 through 2008 were frivolous and Defendant is solely responsible for paying HNM attorneys' fees associated with those claims.

Finally, Kate Thornhill's fees for complying with the Defendant's subpoena have yet to be paid. Given the scope of the subpoena and the nature of the work performed by Ms. Thornhill, the Court is satisfied that 8.5 hours is reasonable as is her rate of $250 per hour. Accordingly, it shall be the obligation of the Defendant and his attorneys to pay Ms. Thornhill the sum of $2,125 within 14 days of the date signed below.

Counsel for the Plaintiff shall submit a detailed itemization of all fees and costs they believe are payable to them consistent with the Court's findings with regard to frivolous claims. The affidavit and supporting documentation with respect to these fees and costs must be

submitted within 14 days of the date signed below. A Judgment consistent with this Decision and Order shall also be submitted within 14 days of the date signed below.[3]

The failure to timely provide the supporting documentation shall be deemed a withdrawal of the request for attorneys' fees and costs.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 11/04/10

[3] Once the affidavit and documentation are submitted, the Defendant shall have 14 days thereafter to file detailed objections to the sanctions being requested. If necessary, a hearing will be scheduled on the objections.