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Circuit Court
St. Croix County, WI
2020CV000117

BY THE COURT:

DATE SIGNED: January 28, 2022

Electronically signed by Michael Waterman
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT ST. CROIX COUNTY

ST. CROIX HOSPICE, LLC,

Plaintiff,

v.

MOMENTS HOSPICE OF EAU CLAIRE, LLC, et al.,

Defendants.

DECISION AND ORDER

Case No. 2020 CV 117

BACKGROUND

St. Croix Hospice (SCH) is a hospice company that operates in several states, including Wisconsin. SCH's health care and other professionals provide services to hospice-eligible patients who either reside at home or in an assisted living or long-term care facility.

SCH had several professionals who provided services in Hudson, Wisconsin. Dr. Mark Stannard served as the Associate Medical Director of Western Wisconsin, which included Hudson. He held this position as an independent contractor. Other SCH professionals serving Hudson were employees. They included Kate Garza, a social worker; Jessica Fritz, a certified nursing assistant; Pamela Falde, an aide; and Janet Janousek, Amanda Olson and Janell Weber, all registered nurse case managers. All were bound by written agreements with SCH.

Dr. Stannard signed a "Medical Director Services Agreement" with SCH. Under the terms of the agreement, Dr. Stannard was prohibited from entering

agreements with or working for any hospice that competed with SCH. The precise language reads:

> Given the position of trust and influence reposed in Medical Director by virtue of the position, Medical Director shall not, during the term of this Agreement, enter into another agreement for medical director or medical advisory positions, or render such advisory services under any existing or proposed relationship, for, to or on behalf of another competing hospice or other entity providing hospice or palliative care services.

(Doc. #114:29). Either party could terminate the agreement for any reason with 90 days notice, but termination of the agreement did not relieve the parties of any obligations incurred prior to termination. (Doc. #114:31-32).

The SCH employees also signed agreements. All signed a "Confidentiality Agreement." (*See* Doc. #140:1). In it, employees acknowledged certain obligations to preserve and protect patient confidentiality and to use such information for company purposes. Four employees[1] also signed a "Confidentiality and Information Access Agreement." (*See* Doc. #140:7). This document imposed various duties associated with safeguarding and preserving confidential information. The term was undefined but it includes, at a minimum, private patient information.

Moments[2] is a hospice company and business competitor to SCH. In late 2019 or early 2020, Moments expanded into the Hudson market and advertised positions of employment. In January 2020, Moments' vice-president, Kevin Stock, reached out to Kate Garza to see if she was interested in joining Moments as a social worker. Ms. Garza, in turn, told other SCH employees about employment opportunities at Moments. Ms. Garza's conversations with co-workers led to a February 12, 2020 meeting between representatives from Moments and several

[1] Employees Falde, Janousek, Olsen and Weber.

[2] Moments Hospice of Eau Claire, LLC and Guardian Hospice MN, LLC dba Moments Hospice are affiliated companies. The parties analyzed their liability collectively, using the name "Moments." The Court will follow the same practice.

SCH employees. Moments extended job offers and the employees who accepted them tendered their resignations to SCH.

Also in February 2020, Ms. Garza talked to Dr. Stannard about professional opportunities at Moments. This led to direct conversations between Dr. Stannard and Mr. Stock, and ultimately, an agreement. On February 28, 2020 Dr. Stannard signed the "Medical Services Director Agreement" with Moments. Four days later, he gave SCH his 90-day notice, and SCH quickly replaced him as medical director.

Some, but not all, of the employees told patients that they were leaving SCH. Nine patients decided to terminate their care with SCH and move to Moments.

On April 14, 2020, SCH commenced this lawsuit and asserted contract and tort claims against Moments and Dr. Stannard. Both sides moved for summary judgment. SCH moved for partial summary judgment on its breach of contract claim against Dr. Stannard. Moments moved for summary judgment against all of SCH's claims.

DISCUSSION

The legal standard for summary judgment is well-known and it need not be recited in detail. Suffice it to say, summary judgment is appropriate only in the absence of any genuine issue of fact and where the undisputed facts entitle a party to judgment as a matter of law.

1) The Contract Claims against Dr. Stannard.

In Counts I and II, SCH alleged that Dr. Stannard breached his contract and breached the implied covenant of good faith and fair dealing by: (1) accessing the confidential information of SCH or its patients for purposes beyond the scope of providing care, (2) using such confidential information for the benefit of himself or Moments by soliciting patients, and (3) disclosing such information to Moments. (Doc. #7:17-19). SCH did not resist summary judgment on these topics, so the Court concludes that SCH conceded them. Therefore, on these topics, summary judgment is granted in favor of Moments.

Count I of the lawsuit also alleged that Dr. Stannard breached the Medical Director Services Agreement with SCH. The Court concludes he did, but SCH's damages are disputed issues of fact.

Under the Medical Director Services Agreement, Dr. Stannard was prohibited from entering into "another agreement for medical director or medical advisory positions" during the term of his agreement with SCH. (Doc. #114:29). The language of the agreement could not be any clearer, yet on February 28, 2020, while under contract with SCH, Dr. Stannard signed an agreement to serve as medical director for Moments, an undisputed competitor of SCH. He started working for Moments on March 16, 2020. Dr. Stannard clearly breached the agreement.

SCH replaced Dr. Stannard with Dr. Mayo, who was SCH's medical director in Eau Claire. SCH identified at least $9,000 in damages to cover some of Dr. Mayo's duties in Eau Claire as a result of him being assigned to Hudson. (See Doc. #102:4). Moments argued that these damages were self-created by relieving Dr. Stannard of his duties, but the facts suggest that SCH did so to mitigate the damage from the breach of contract. A genuine issue of fact exists.

SCH also identified lost patient referrals and nearly $35,000 in lost revenue from Dr. Stannard's breach. Moments contested the claim because Dr. Stannard was not obligated to provide referrals, but if he had not been simultaneously under contract with SCH and Moments, SCH likely stood to benefit from any hospice-care referrals he may have made. Again, a genuine issue of fact exists, and all disagreements over SCH's claim for damages can be resolved at trial.

2) Tortious Interference of Contract Claims.

In Counts III and IV, SCH asserted tortious interference with contract claims against Moments.[3] Three contractual relationships form the core of the claim. One is the contractual relationship between SCH and its employees. Another is the contractual relationship between SCH and its former patients. The third is the contractual relationship between SCH and Dr. Stannard.

The elements of tortious interference with a contract are: (1) the plaintiff had a contract or prospective contractual relationship with a third party; (2) the defendant interfered with the relationship; (3) the interference was intentional;[4] (4) a causal connection exists between the interference and the damages; (5) the defendant was not privileged to interfere. *Brew City Redevelopment Grp., LLC v. Ferchill Grp.*, 2006 WI 128, ¶ 37 n. 9, 297 Wis. 2d 606, 724 N.W.2d 879. Because SCH would have the burden at trial of proving the first four elements, in order for the tortious interference claim to survive summary judgment, SCH must point to evidentiary materials in the record that establish or place in dispute each of these elements. *See Transportation Ins. Co. v. Hunzinger Const.*, 179 Wis. 2d 281, 291-92, 507 N.W.2d 136, 140 (Ct. App. 1993) ("once sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial to make a showing sufficient to establish the existence of an element essential to that party's case").

The record does not contain facts that establish or place in dispute how Moments intentionally interfered with any of SCH's contractual relationships.

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[3] In Count III, SCH included Dr. Stannard in its claim for tortious interference with patient contracts. (*See* Doc. #7:19). SCH did not oppose Moments' motion for summary judgment relative to Dr. Stannard's liability for Count III. Therefore, the Court will deem the motion conceded as to Dr. Stannard.

[4] To have the requisite intent, the defendant must act with a purpose to interfere with the contract. *Id.* Liability will only be found when the actor knew that the interference was certain, or substantially certain, to occur. *Dorr v. Sacred Heart Hosp.*, 228 Wis. 2d 425, 456–57, 597 N.W.2d 462, 478 (Ct. App. 1999).

Starting with its contracts with employees, SCH argued that Moments interfered with SCH's confidentiality, non-disclosure and non-solicitation agreements with employees. According to SCH, Moments solicited confidential patient information from SCH's former employees in violation of their confidentiality agreements and then used that information to solicit SCH's patients. The facts cited by SCH, however, fell well short.

For starters, the non-solicitation provisions cited by SCH are part of its standards of conduct. (*See* Doc. #140:15). Violating conditions of employment may be grounds for employee discipline, but SCH has presented no legal authority that elevates such terms to actionable, contractual obligations. Nevertheless, the plain language of the standards of conduct do not prohibit former employees from soliciting business from patients or recruiting workers.

Next, SCH failed to present evidence that Moments caused breaches of the confidentiality agreements. SCH primarily relied upon the February 17, 2020 email from Kate Garza to Kevin Stock. (*See* Doc. #139:20). In it, Ms. Garza identified the facilities where SCH patients were treated and the nurses' caseloads. The email also includes Ms. Garza's opinion about the number of patients who may follow nurses to Moments and what facilities may refer patients to Moments.

From the context of the email, it is reasonable to infer that Moments asked for the information that Ms. Garza shared, but that inference alone is insufficient to survive summary judgment. Ms. Garza did not sign the Confidentiality and Information Access Agreement, which protected employee and organizational information. Instead, she signed the Confidentiality Agreement, which prohibited Ms. Garza from disclosing private information about patients and the login and passwords to computers. (Doc. #140:3). Patient information is confidential information about a particular patient. Ms. Garza's email revealed no such information. The locations and numbers of patients served by SCH are not personal or private information about any particular patient and their disclosure does not violate "the patient's and/or family's right to privacy," which the agreement was intended to prevent.

SCH asked the Court to read the Confidentiality Agreement broadly. SCH relied on one sentence that reads, "I understand that all information available is confidential and should only be accessed when required to do my job." Courts do not read one sentence to an agreement in isolation. When this sentence is read in context with the entire document, it is clear that it refers to the type of information described throughout the agreement – confidential patient information and the computer codes to access it. SCH has failed to demonstrate how Ms. Garza's email violated any of its employee contracts, so Moments' request for the information could not have interfered.

SCH also relied upon a text message from Tami Jackson to someone at SCH. Ms. Jackson wrote that a man named "Kevin"[5] told her, "The patients are attached to the nurse not the company and that is why I need the nurses." (Doc. #138). SCH has not made a prima facie showing that Ms. Jackson's text message is admissible evidence. *See Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶ 10, 324 Wis. 2d 180, 781 N.W.2d 503 (the party submitting an affidavit of summary judgment must at least make a prima facie showing that the evidence would be admissible at trial).

The text message was attached as an exhibit to an affidavit from plaintiff's counsel. It was unauthenticated, and counsel had no personal knowledge of the communication. (Doc. #136:2, ¶ 11). Even if the text is taken at face value, Kevin's declaration about his need for nurses does not mean that he engaged in untoward conduct against SCH. One must speculate about Kevin's conduct to reach such a conclusion, and therefore, the text message does not constitute a genuine issue of fact.

Finally, SCH argued that its former employees must have revealed confidential patient information because "Moments reach[ed] out to these patients and solicit[ed] them to revoke their services with SCH and switch to Moments." (Doc. #137:16). In making this argument, SCH relied primarily on two emails. In one, Bethany Dorsdall reported that a patient "already started the process" with

[5] Presumably Moments' vice-president, Kevin Stock.

Moments. (Doc. #139:66). In the other, Bethany Gamble reported that a patient was leaving SCH for Moments and that Moments was taking care of the transfer paperwork. (Doc. #139:68). Neither of these emails mean that a former employee breached patient confidentiality or that Moments solicited confidential patient information. Neither do any of the other emails or treatment notes that SCH put into the record. (Doc. #139:53-72). All they show is that patients decided to transfer care to Moments and that Moments helped facilitate the transfer, neither of which is actionable.

Having concluded that the record does not contain facts that show Moments interfered with employee contracts, the Court next examined patient contracts. SCH argued that Moments interfered with them because several patients decided to leave SCH for Moments. On pages 7 through 9 of SCH's brief opposing summary judgment (Doc. # 137), SCH identifies circumstances in March and early April 2020 where patients left SCH for Moments. While these events may have indisputably happened, they don't show that Moments interfered with SCH's contracts. SCH has not identified any actions by Moments that influenced the patients' decisions.

Instead of identifying specific facts of intentional interference with patient contracts, SCH asked the Court to infer that Moments influenced the patients' decisions. The Court declines. "An elementary principle is that an inferred fact is a logical, factual conclusion drawn from basic facts or historical evidence. It is the probability that certain consequences can and do follow from basic events or conditions as dictated by logic and human experience." *Belich v. Szymaszek,* 224 Wis. 2d 419, 425, 592 N.W.2d 254, 258 (Ct. App. 1999).

It is unreasonable to conclude that the decision of a handful of patients to transfer hospice care to Moments means that Moments intentionally interfered with SCH's patient contracts. One fact is not logically derived from the other. What SCH really asked the Court to do is indulge in SCH's suspicion of misconduct and supply facts that are missing from the record. Guesswork, speculation, and unsubstantiated conclusory remarks do not constitute a genuine issue of fact. *See*

N. Highland Inc. v. Jefferson Mach. & Tool Inc., 2017 WI 75, ¶ 22, 377 Wis. 2d 496, 898 N.W.2d 741.

Lastly, SCH argued that Moments interfered in its contractual relationship with Dr. Stannard. Although it is reasonable to conclude that Moments knew Dr. Stannard had a contractual relationship with SCH, no facts in the record describe what Moments did to dissuade Dr. Stannard from performing it. To the contrary, the facts show that Dr. Stannard became dissatisfied with SCH and pursued a new professional opportunity with Moments.

SCH infered untoward conduct because Moments wanted to keep SCH from knowing about its contact with Dr. Stannard. The Court does not share the inference. Moments and SCH were competitors, and Moments' desire for secrecy does not mean it was engaged in tortious interference. It still begs the question: what did Moments do to interfere in SCH's contract? SCH has not pointed to facts that answer that question.

3) Vicarious Liability for Employees' Solicitation of Patients.

In Count VI of the complaint, SCH alleged that Moments is vicariously liable for Dr. Stannard and other employees for breaching patient confidentiality and soliciting SCH's patients. As a matter of law, Moments cannot be vicariously liable for employee conduct that pre-dated their hire. *See Lewis v. Physicians Ins. Co.*, 2001 WI 60, ¶ 12, 243 Wis. 2d 648, 627 N.W.2d 484. Similarly, Moments cannot be vicariously liable for the conduct of Dr. Stannard, an independent contractor. *Brandenburg v. Briarwood Forestry Servs, LLC*, 2014 WI 37, ¶ 27, 354 Wis. 2d 413, 847 N.W.2d 395. SCH does not contest these points.

SCH's claim boils down to the conduct of one person: Janet Janousek. According to entries made in the records for two patients,[6] Ms. Janousek offered to help family members switch hospice care from SCH to Moments. (Doc. #139:55, 65). Both families declined.

[6] Patients CO and HW, neither of whom switched to Moments. (Doc. #127:4-5).

The treatment notes contain inadmissible hearsay from patients' family members. Only admissible evidence may constitute a genuine issue of fact. Putting that aside and taking the hearsay statements at face value, they still fail to create a genuine issue of fact. There is no evidence that Ms. Janousek breached patient confidentiality. Ms. Janousek was not contractually prohibited from soliciting former patients. And, the families declined Ms. Janousek's entreaties, negating at least two essential elements to tortious interference — interference with a contract and causation of damages.

SCH extrapolates the facts beyond Ms. Janousek's conduct and the two patients mentioned in the treatment record. SCH essentially argued that Ms. Janousek's conduct likely exemplified the conduct of the rest of the former SCH employees who joined Moments.[7] (Doc. #137:24). The facts cited by SCH do not support such a sweeping claim, and the Court will not abandon its role of neutrality to search the record for actionable conduct by others. Therefore, summary judgment is appropriate.

ORDER

1) SCH's motion for partial summary judgment is granted.

2) Moments motion for summary judgment is granted, except against Count I of the complaint.

BY THE COURT:

R. Michael Waterman
Circuit Court Judge
St. Croix County, Wisconsin

[7] Kate Garza, Janet Janousek, Amanda Olson, Pamela Falde, Jessica Fritz and Janell Weber.