IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

DOROTHY M. MOORE, M.D.,	)	
	)	
Plaintiff,	)	
	)	C.A. No. 01C-02-103 MJB
v.	)	
	)	
STEFAN S. O'CONNOR, M.D.,	)	
	)	
Defendant.	)	
	)	
STEFAN S. O'CONNOR, M.D.,	)	
	)	
Counterclaim Plaintiff,	)	
	)	
v.	)	
	)	
DOROTHY M. MOORE, M.D.	)	
	)	
Counterclaim Defendant.	)	

Submitted: June 12, 2006
Decided: August 23, 2006

MEMORANDUM OPINION

J. Michael Johnson, Esquire, Rawle & Henderson, LLP, Wilmington, Delaware, Attorney for Plaintiff/Counterclaim Defendant Dorothy M. Moore, M.D.

David P. Cline, Esquire, David P. Cline, Attorney at Law, Wilmington, Delaware, Attorney for Defendant/Counterclaim Plaintiff Stefan S. O'Connor, M.D.

BRADY, J.

Procedural History

This breach of contract action was filed by Dorothy M. Moore, M.D. ("Dr. Moore") against Stefan S. O'Connor, M.D. ("Dr. O'Connor") to collect $30,000 Dr. Moore alleges Dr. O'Connor owes to her pursuant to agreements the parties entered into upon the separation of their ophthalmology practice.[1] Dr. O'Connor denies owing any amounts to Dr. Moore and counterclaimed for various forms of breach of contract allegedly resulting from Dr. Moore's breach of agreements between them. The matter was tried before this Court as a non-jury trial on January 30 through 31, 2006. Post trial briefing has been received and the findings of the Court are below.

Preliminary Matters

It appears some claims initially made by Dr. O'Connor in the counterclaim were abandoned at trial. Thus, the Court will not address them here.[2]

[1] Due to inactivity by the parties, this case has been pending in this Court since February 9, 2001.

[2] First, in the counterclaim, Dr. O'Connor argued the Court should void the agreements with Dr. Moore because Dr. Moore breached them. This issue was not addressed at trial or in post trial briefing and the Court will not consider it here. Second, in the counterclaim, Dr. O'Connor claimed Dr. Moore charged him more for overhead than he should have paid. This issue was not addressed at trial or in post trial briefing and the Court will not consider it here. Lastly, in the counterclaim, Dr. O'Connor claimed Dr. Moore owed funds to Dr. O'Connor that belonged to him. This issue was not addressed at trial or in post trial briefing and the Court will not consider it here.

At trial in this matter Dr. Moore conceded she owed Dr. O'Connor $2,160.64 in copier costs. This amount will be awarded to Dr. O'Connor.

At trial Dr. O'Connor abandoned his portion of the counterclaim relating to the amount he paid to "buy in" to the partnership. Therefore, the Court will disregard this claim.

Facts and Contentions of the Parties

Dorothy M. Moore, M.D. and Stefan S. O'Connor, M.D. are ophthalmologists and were previously partners in an ophthalmology practice with Dr. Ralph S. Milner called Delaware Eye Associates, Inc. ("DEA"). The practice had offices on Limestone Road and Foulk Road. The Limestone Road office represented the primary office for business billings and patients.[3] The Foulk Road office was smaller.[4] In 1994 Dr. O'Connor signed an employment contract with DEA whereby he would pay $1,019 each month into the partnership for a period of ten years "in recognition of the administrative responsibilities and seniority of Milner and Moore" pursuant to paragraph 1.f of his employment agreement. This amount was subtracted directly from his draws.

DEA was dissolved in 1996 and Advanced Eye Care, Inc. ("AEC") was created. Dr. Milner, Dr. Moore and Dr. O'Connor carried on as

[3] January 30, 2006 Transcript at 153.
[4] *Id*.

Delaware Eye Associates, Division One of AEC. In May 1998 Dr. Milner left DEA. The $1,019 was continually deducted from Dr. O'Connor's draws under the employment agreement after Dr. Milner left.

At some point, in late 1998 or early 1999, Dr. Moore and Dr. O'Connor decided to end their partnership. On June 28, 1999, after some apparent vigorous exchange, the parties signed a separation agreement, which provided Drs. Moore and O'Connor would maintain separate practices. The Limestone Road office was split with a wall separating the two practices.[5] Each doctor obtained separate offices on Foulk Road.[6] On June 30, 1999 Dr. Moore and Dr. O'Connor signed another agreement to end their association with AEC.

The June 28, 1999 agreement provided that Drs. Moore and O'Connor were to put automated messages at each of the telephone numbers for the practice and explicitly provided the language to be used in the automated message in Paragraph 7 of the June 28th agreement. Dr. Moore was charged with the task of placing the message on the automated service for the larger Limestone Road office. Dr. O'Connor was to place the message on the smaller Foulk Road office automated system. The message for the Limestone Road telephone number (302-992-0420) was to have an

[5] January 30, 2006 Transcript at 202; January 31 Transcript at 53.
[6] January 30, 2006 Transcript at 199; January 31, 2006 Transcript at 52.

automated message stating: "You have reached the offices of Dr. Moore and Dr. O'Connor. For Dr. Moore, press #1. For Dr. O'Connor, press #2." The Foulk Road telephone number (302-475-2500) was to have an automated message stating: "You have reached the offices of Dr. O'Connor and Dr. Moore. For Dr. O'Connor, press #1. For Dr. Moore, press #2."

At approximately the same time the June 28, 2006 and the June 30, 2006 agreements were entered into by Drs. Moore and O'Connor, Dr. Moore formed a new corporation named Delaware Eye M.D. Associates, a name with near total consistency to that of the previous practice.[7]

Pursuant to the June 28, 1999 agreement, Dr. Moore placed a message on the Limestone Road automated system stating: "You have reached Delaware Eye M.D. Associates and the office of Dr. Stefan O'Connor, M.D., for Dr. Moore press 1, for Dr. O'Connor, press 2." During the time Drs. Moore and O'Connor were partners at DEA, the phones were answered with the greeting "Delaware Eye Associates." Dr. O'Connor claims both he and Dr. Moore agreed not to use the name "Delaware Eye Associates" after the dissolution of their partnership.[8] Dr. Moore testified she never promised not to use the name "Delaware Eye Associates."[9]

[7] January 30, 2006 Transcript at 75, 83.
[8] January 30, 2006 Transcript at 177-178.
[9] *Id* at 79.

Dr. O'Connor argues the incorrect phone message breached the terms of the agreement and diverted patients away from him. Dr. O'Connor argues Dr. Moore purposely used a name similar to "Delaware Eye Associates" to improperly divert patients from Dr. O'Connor to herself, resulting in monetary damages to Dr. O'Connor, which he seeks through his counterclaim.

Patricia Ferrari and Ruth Hartnett, from Dr. O'Connor's office, testified they notified Dr. Moore's office several times about the incorrect message because patients of Dr. O'Connor were calling and saying they were having trouble getting through to Dr. O'Connor's office because the phone message was confusing. Dr. O'Connor also testified he notified Dr. Moore's office of the problem with the phone message within the first two months it was in use[10] and in writing on November 19, 1999, which was mailed and hand delivered to Dr. Moore's office.

Ms. Ferrari also testified Dr. Moore's office would not give out Dr. O'Connor's number to patients whom were confused by the phone message and mistakenly got Dr. Moore's office instead of Dr. O'Connor's office.[11] Ms. Harnett testified regarding the effect of the message: "People were confused because the practice used to be called Delaware Eye Associates.

[10] *Id* at 154-155.
[11] *Id* at 119.

So they automatically think to get a hold of Dr. O'Connor, you need to call Delaware Eye Associates."[12]

Dr. Moore claims she instructed her office manager to record a message consistent with the separation agreement, and that she was unaware that the office manager did not. Dr. Moore also claims she was unaware of the discrepancy with the phone message until November 2000, after approximately 17 months in use.[13] Dr. Moore did not feel there was any reason to change the message at that point.[14] Dr. Moore also claims her office did not give out the number for Dr. O'Connor's office to patients that mistakenly got Dr. Moore's office because she did not have the new number.[15] Her office instructed people to re-dial the main number and press 2 to get Dr. O'Connor.[16] Dr. O'Connor testified that Dr. Moore had his phone number because it was listed in the separation agreement and contends that Dr. Moore's actions in this regard are further evidence of her attempt to usurp his patients.[17]

Dr. O'Connor believes Dr. Milner breached the employment agreement when he left the practice and that the amounts Dr. O'Connor paid under the employment agreement previously should be returned to him and

[12] *Id* at 131.
[13] *Id* at 76.
[14] *Id* at 78.
[15] *Id* at 94.
[16] *Id*.
[17] *O'Connor Opening Brief* at 36.

he should not have had to pay under the employment agreement after Dr. Milner left the practice.[18] Dr. Moore argues because there were no contingencies included in the contract terms to address changes in the composition of the parties, Dr. O'Connor was obligated to continue paying these amounts.[19]

Dr. O'Connor also claims Dr. Moore advertised in the New Journal on September 23, 1999 using the shared phone number from the Limestone Road office of (302) 992-0420 in violation of the separation agreement, which provided neither doctor would use the number through December 2000. Dr. O'Connor further claims Dr. Moore listed the Limestone Road telephone number as her own in the January 2000-December 2000 Yellow Pages. Dr. Moore testified the News Journal used the incorrect phone number in the advertisement, and that she did not intend to advertise using that number.

Dr. O'Connor next argues he is not obligated to pay Dr. Moore $30,000 in good will pursuant to the June 30, 1999 agreement. Dr. O'Connor argues he agreed in the June 28, 1999 agreement he would pay Dr. Moore $30,000, minus any deficit she had with the partnership, which

[18] *O'Connor Opening Brief* at 13.
[19] *Moore Opening Brief* at 8.

Dr. O'Connor thought was substantial.[20] Dr. O'Connor argues it is "impractical" to conclude he would modify the June 28, 1999 agreement, which provided that the $30,000 payment to Dr. Moore be reduced by the amount of her deficit, with the June 30, 1999 agreement, which provided the good will payment would be calculated by taking Dr. O'Connor's deficit into account as well.[21] Dr. Moore argues Dr. O'Connor agreed to abide by whatever findings accountant Robert Smith made, and that Mr. Smith found Dr. O'Connor should pay the full $30,000 to Dr. Moore.[22] Dr. O'Connor also contends he is entitled either to the return of all the money he paid for good will pursuant to the employment contract, or in the alternative, to the amount he paid after Dr. Milner left the practice.[23]

Dr. O'Connor also claims someone altered some of his patient's charts to reflect Dr. Moore as the treating physician instead of Dr. O'Connor, to the benefit of Dr. Moore.[24] Dr. O'Connor does not allege Dr. Moore did this herself, but the insinuation is that someone did it on her behalf.

[20] January 30, 2006 Transcript at 204; *O'Connor Opening Brief* at 43.
[21] *O'Connor Opening Brief* at 43.
[22] *Moore Opening Brief* at 9.
[23] *Dr. O'Connor Opening Brief* at 13.
[24] *Id* at 52.

Dr. O'Connor further claims Dr. Moore, through her administrative position in the partnership, failed to designate him as a medicare provider, causing him a 5% loss in billings per year for the period of 1992-2000.

Findings of Fact, Applicable Law and Holdings

The Amounts Claimed in the June 30, 1999 Agreement

It is undisputed that Dr. O'Connor signed the June 28, 1999 agreement in which he agreed to abide by the findings of Robert Smith. Paragraph 6 of the agreement states:

> For goodwill or income reduction after June 30, 1999, Dr. O'Connor shall pay to Dr. Moore a one-time lump-sum payment of $30,000. This amount shall be reduced by the amount of the deficit, if any, which Dr. Moore has incurred with Advanced Eye Care through June 30, 1999. The deficit amount, if any, shall be determined by Robert Smith. The net amount of the goodwill or income reduction payment that Dr. Moore shall receive shall be determined by Robert Smith.

The parties then agreed to a handwritten provision in the June 30, 1999 agreement to take Dr. O'Connor's deficit into consideration also.

In his letter dated August 14, 2000, Mr. Smith determined the amount Dr. O'Connor owed to Dr. Moore to be $30,000. While Dr. O'Connor argues that he was unaware of the contents of the June 30th agreement and that he did not intend to modify the June 28th agreement language in paragraph 6 outlined above, the Court concludes that Dr. O'Connor was aware that he was obligated to abide by the findings of Robert Smith regarding the deficits

of both parties and to pay whatever amount Mr. Smith determined was required. This provision was handwritten on the agreement and initialed by both Dr. Moore and Dr. O'Connor on Exhibits A and C.[25] Even if Dr. O'Connor was, in fact, unaware of the effect his initials on the June 30, 2006 agreement would have regarding the good will payment, he is still responsible for the contents of the writing to which he assented.

One of the basic tenets of contract law is that a party is responsible for the terms of a contract they sign, even if unaware of the terms.[26] "A party to a contract cannot silently accept its benefits and then object to its perceived disadvantages, nor can a party's failure to read a contract justify its avoidance."[27] To modify a quote to include the facts of our case; "[i]f [Dr. O'Connor's] argument were followed to its logical extreme, [a contracting party] could radically redefine [a contract] simply by proving that he had not been informed of its stated terms in advance…"[28]

In *Graham v. State Farm Mut. Auto. Ins. Co.* the Delaware Supreme Court enforced the terms of an adhesion contract in the insurance policy

---

[25] January 30, 2006 Transcript at 219.

[26] *See e.g.* 17A Am. Jur. 2d Contracts § 210 stating in relevant part:

> People are free to sign legal documents without reading them, but the documents are binding whether read or not. The failure to read a document before signing it does not enable one to ignore the obligations imposed by that document on the ground that they did not read the contract or that the contents of the contract were not known to the party.

[27] *Graham v. State Farm Mut. Auto. Ins. Co*., 565 A.2d 908, 913 (Del. 1989); *see also Pellaton v. The Bank of New York*, 592 A.2d 473 (Del. 1991) (enforcing the terms of loan documents despite the argument of the signing party that he should not be bound by the terms because he did not read the document prior to signing).

[28] *Graham v. State Farm Mut. Auto Ins. Co*., 565 A.2d at 912.

arena even though the insureds argued they should not be bound by the terms of the policy because they were unaware of some of them before they signed.[29]

Perhaps the United States Supreme Court stated the rule best over 130 years ago in *Upton, Assignee v. Tribilock*:[30]

> It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.[31]

Based on the facts and the case law outlined above, the Court finds Dr. O'Connor is bound by the terms of the June 30, 2006 agreement and pursuant to the August 14, 2000 letter of Robert Smith, is obligated to pay Dr. Moore $30,000.[32]

---

[29] *Id* at 913.
[30] 91 U.S. 45 (1875).
[31] *Id* at 50.
[32] Dr. O'Connor argued at trial and in post trial briefing that the Court should disregard the letters from Robert Smith concluding Dr. O'Connor owed Dr. Moore $30,000 in good will payment because the letters are hearsay. Dr. O'Connor argues he only stipulated to the admissibility of the letters because Dr. Moore listed Robert Smith as a witness and Dr. O'Connor intended on challenging the factual basis and methodology employed by Mr. Smith when determining the amount Dr. O'Connor owed to Dr. Moore. Having stipulated to the admissibility of the letters from Robert Smith, with the understanding that he did not agree with the conclusions therein, it was the duty of Dr. O'Connor to secure Mr. Smith's presence at trial. While it might be redundant for Dr. O'Connor to list Robert Smith as a witness in the pre-trial stipulation when he was already listed as a witness for Dr. Moore, if Mr. Smith's testimony at trial was a vital basis upon which Dr. O'Connor intended to challenge the conclusions in the letters of Mr. Smith, Dr. O'Connor was obligated to secure Mr. Smith's presence at trial for those purposes. The Court will, therefore, not exclude the letters on this basis.

Dr. O'Connor's Counterclaim

The Court finds no basis to award a return to Dr. O'Connor of any amounts he paid under the employment agreement. At least a portion of this issue was settled in the June 30, 1999 agreement as discussed above. As to any other amounts, the Court has not been presented with sufficient evidence to determine whether the amounts Dr. O'Connor seeks in this regard are merited, and what specific amounts are requested. Dr. O'Connor acceded to the amounts being deducted from his draw on a continuing basis without objection. Therefore, the Court makes no award to Dr. O'Connor for the return of any amounts paid pursuant to the employment contract.

The Court finds no basis to hold Dr. Moore accountable for allegedly misfiling or changing the labels on Dr. O'Connor's charts, as there is no evidence to support this allegation in the record. Therefore, the Court declines to find in Dr. O'Connor's favor in this regard.

The Court finds no basis to award Dr. O'Connor damages for Dr. Moore allegedly failing to list him as a medicare provider. Dr. O'Connor failed to prove Dr. Moore had such a duty at trial. In addition, this issue was not addressed in Dr. O'Connor's post trial briefing. Dr. O'Connor merely testified he understood Dr. Moore was responsible for listing him as a

medicare provider as a part of her administrative duties to the partnership.[33] The Court finds this testimony alone is inadequate to make an award on this allegation.

The Court also finds no basis for holding Dr. Moore directly liable for the use of the name "Delaware Eye M.D. Associates." Although Dr. O'Connor stated Dr. Moore promised not to use the name Delaware Eye Associates, and the name Dr. Moore used was similar, there is no evidence in the record to support the alleged promise by Dr. Moore. The use of the name, however, does inform the Court's decision regarding the telephone message machine.

With regard to the claim she breached the contract terms regarding the telephone answering machine messages, Dr. Moore argues the message actually placed on her automated message system is more advantageous to Dr. O'Connor because it mentions his name twice and Dr. Moore only once. Consequently, Dr. Moore argues, Dr. O'Connor has no damages resulting from this act. However, Dr. Moore concedes that the message her office manager put on the system for the Limestone Road office was not the message to which the parties agreed in the June 28th agreement.

[33] January 30, 2006 Transcript at 176-177.

"Once an agency relationship is created, the principal may then be vicariously liable for the negligent acts of its agent performed within the scope of the agent's authority."[34] "[A] principal is only liable when the act of an agent is within the scope of his apparent or ostensible authority."[35] The Court finds Dr. Moore's office manager acted within the scope of her authority when she took steps to put the automated message on the Limestone Road telephone number. The Court also finds Dr. Moore was aware of the discrepancy with the phone message prior to November 2000 when she claims she was first aware. The testimony of Dr. O'Connor, Ms. Ferrari and Ms. Hartnett that Dr. Moore's office was notified of the discrepancy is accepted as true in this regard. Additionally, the Court finds Dr. O'Connor was harmed by the different phone message because it gave callers the impression that the former entity, Delaware Eye Associates, with whom they had previously treated, could be reached by pressing 1.

Dr. O'Connor testified regarding a statistical analysis he conducted of the books and records from his Limestone Road client base for the eighteen months after the June 30, 1999 separation from Dr. Moore and compared them to the eighteen months before the separation from Dr. Moore. He claims new patients were down 28%, representing 497 people; existing

[34] *Argoe v. Commerce Square Apartments, L.P.*, 745 A.2d 251, 255 (Del. Super. Ct. 1999).
[35] *McCabe v. Williams*, 45 A.2d 503, 505 (Del. 1944).

patients were down 23%, representing 503 people; emergency patients were down 19%. Dr. O'Connor testified he is qualified to calculate such amounts because he has an engineering degree.[36] While his engineering credentials may or may not provide relevant expertise, the Court finds the analysis Dr. O'Connor performed to be primarily an exercise in mathematics, which would require no such expertise. Additionally, Dr. Moore did not challenge the analysis. The Court, therefore, accepts these amounts as accurate representations of the reduction in his client base. Dr. O'Connor testified the only difference regarding patients after the separation from Dr. Moore was the phone message put on the automated system by Dr. Moore.[37]

The Court finds Dr. O'Connor's reduction in patients was directly attributable to the incorrect automated message on the Limestone Road telephone number, the advertisement in the News Journal using that number, and the listing in the Yellow Pages using that number, in violation of the express language of paragraph 7 of the June 28, 1999 agreement excerpted above. In addition, the Court finds Dr. Moore was on notice of Dr. O'Connor's office telephone number because the telephone number for Dr. O'Connor was listed in paragraph 8 of the June 28, 1999 agreement.

[36] *Id* at 167.
[37] *Id* at 170.

Confused patients that got Dr. Moore's office instead of Dr. O'Connor's office could have been directed to that number by Dr. Moore's office.

Damages Relating to Counterclaim

Dr. O'Connor calculated his damages attributable to loss of patients. As to each category he concluded: new patients represented a loss of $52,682 at $106 per person; existing patients, a loss of $45,270 at $90 per person; emergency patients, a loss of $30,150 at $50 per person. Again, these calculations were not challenged by Dr. Moore. The Court, therefore, finds that damages for loss of patients in the amount of $128,102 should be awarded to Dr. O'Connor.

Conclusion

The Court hereby awards damages to Dr. Moore in the amount of $30,000 in good will payment. The Court awards damages to Dr. O'Connor in the amount of $2,160.64 for the copiers and $128,102 for the loss of patients due to Dr. Moore's violation of the June 28, 1999 agreement, for a total of $130,262.24 in damages awarded to Dr. O'Connor.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge