

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JERRY A. DANCIK, M.D.,

Plaintiff,

v

Case No. 13-136046-CK  
Hon. Wendy Potts

MICHIGAN KIDNEY CONSULTANTS,  
P.C.,

Defendant.

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OPINION AND ORDER RE: CONTEMPT HEARING

At a session of Court  
Held in Pontiac, Michigan

On  
NOV 10 2014

The matter is before the Court on Defendant Michigan Kidney Consultants, P.C. (MKC)'s motion to hold Plaintiff Jerry A. Dancik, M.D. in contempt for violating the December 16, 2013 consent decree and Dr. Dancik's motion to hold MKC in contempt for breaching the parties' confidential settlement agreement. Pertinent to this dispute, the consent decree enjoined Dr. Dancik until May 12, 2015, from providing treatment or assessment to any of MKC's dialysis patients listed on an exhibit to the settlement agreement. Under the settlement agreement terms, MKC agreed to pay Dr. Dancik \$126,000 in deferred compensation through 18 monthly payments of \$7,000 beginning December 1, 2013. Although the settlement agreement states that it is effective November 12, 2013, it was not signed by the parties until December 14, 2013. Dr. Dancik agreed that MKC's payments under the settlement agreement are contingent on his compliance with the terms of the Consent Decree.

The Court will first address whether Dr. Dancik violated the consent decree. There is no dispute that Dr. Dancik provided treatment to several MKC patients that the consent decree barred him from treating. At issue is whether Dr. Dancik has an affirmative defense to the alleged violation and whether his violation constitutes contempt. Dr. Dancik has the burden of producing evidence to support his claimed affirmative defenses. *Palenkas v Beaumont Hospital*, 432 Mich 527, 548; 443 NW2d 354 (1989).

Dr. Dancik first claims that his treatment was not a violation of the consent decree because he “merely accommodated patients’ choices.” Citing American Medical Association ethical standards and case law from other states, Dr. Dancik contends that to the extent the consent decree bars him from treating patients who seek him out, it is unethical and unenforceable because it fails to make reasonable accommodation for the patients’ choice of physician. Dr. Dancik claims he did not solicit any of the patients on the list, and he only treated patients when they insisted on receiving his treatment and refused to be treated by an MKC physician. However, the AMA ethical standards and case law from other jurisdictions are not binding authority on this Court that could serve to invalidate any provision of the consent decree. Dr. Dancik cites no Michigan authority holding that settlement agreement or consent decree barring a doctor from treating certain patients is unenforceable if it does not accommodate the patients’ choice of physician. Because Dr. Dancik fails to show that the consent decree is unethical or unenforceable under Michigan law, the Court will not excuse his violations of the decree on this ground.

Dr. Dancik also asserts that he cannot be held liable for violating the consent decree because MKC breached the settlement agreement by failing to pay him deferred compensation. Dr. Dancik is correct that a party who substantially breaches an agreement may not maintain an

action against the other contracting party for its subsequent breach. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). A breach is considered substantial where it “has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party.” *Baith v Knapp-Stiles, Inc*, 380 Mich 119, 126; 156 NW2d 575 (1968). Thus, if MKC substantially breached the agreement by failing to make the payments, Dr. Dancik could be relieved of his obligation to perform under the agreement.

However, there is nothing within the consent decree that required MKC to pay Dr. Dancik or to otherwise comply with the terms of the settlement agreement. Regardless whether MKC breached its payment obligations under the agreement or whether the breach was substantial, Dr. Dancik cites no authority for the notion that MKC’s breach of the agreement excuses Dr. Dancik’s violation of the consent decree. While Dr. Dancik’s claim that MKC substantially breached the settlement agreement may support an action for enforcement of the agreement or absolve Dr. Dancik of performing under it, the alleged breach does not excuse Dr. Dancik from complying with the consent decree, an order of this Court. Dr. Dancik cannot excuse his violation on this ground.

Dr. Dancik next asserts that MKC waived enforcement of the consent decree by acquiescing in his treatment of its patients. “A waiver is the intentional relinquishment of a known right.” *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 719; 179 NW2d 252 (1970). MKC maintains that Dr. Dancik must prove waiver with clear and convincing evidence, citing *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362; 666 NW2d 251 (2003). The issue in the *Quality Products* case was the standard required to show a waiver or

modification of an agreement that has an anti-waiver provision. *Quality Products, supra* at 364. Because the settlement agreement has a provision requiring all modifications to be in writing, Dr. Dancik would have to present clear and convincing to show that MKC waived its rights under the agreement. However, the issue here is whether MKC waived the right to enforce the consent decree. Because the consent decree has no anti-waiver provision, *Quality Products* does not apply and MKC cites no authority holding that all waivers must be proven with clear and convincing evidence. Thus, Dr. Dancik must produce sufficient evidence demonstrating a prima facie showing of waiver.

Dr. Dancik claims that MKC waived enforcement of the consent decree because its physicians acquiesced in Dr. Dancik's treatment of MKC's patients. To demonstrate waiver, Dr. Dancik must show that MKC engaged in conduct giving rise to an inference that it intended to relinquish its rights. *Fitzgerald, supra* at 718. As support for its waiver theory, Dr. Dancik testified that MKC doctors Gold, Ratan, Reddy, and Dhillon allowed him to treat their patients. Dr. Dancik also cited a note by Dr. Gold stating that Dr. Gold "deferred to Dr. Dancik" on treatment of a patient. However, Dr. Dancik fails to explain how mere acquiescence of Dr. Gold or any other MKC doctor demonstrates an actual intent of MKC to relinquish its rights. Dr. Dancik presents no evidence that Drs. Gold, Ratan, Reddy, or Dhillon had authority to waive MKC's rights. Further, there is no evidence that Dr. Al-Saghir, who signed the settlement agreement, or any other officer or manager of MKC acquiesced in Dr. Dancik's treatment. To the contrary, when Dr. Gold reported the incident to MKC's principals, they promptly took action by asking the Court to hold a show cause hearing on whether Dr. Dancik violated the consent decree. Based on the evidence presented, Dr. Dancik has not made a prima facie showing that MKC waived its right to enforce the decree.

Dr. Dancik raises a similar defense by asserting that MKC should be equitably estopped from claiming a violation of the agreement where it knew Dr. Dancik was treating patients on the list and did nothing to stop him. Equitable estoppel arises where (1) a party by representation, admissions, or silence, intentionally or negligently induces another party to believe facts; (2) the other party justifiably relies and acts on this belief; and (3) the relying party will be prejudiced if the representing party is permitted to deny the existence of the facts. *Cook v Grand River Hydroelectric Power Co, Inc*, 131 Mich App 821, 828; 346 NW2d 881 (1984). Although Dr. Dancik claimed that he relied on the acquiescence of the MKC physicians, he fails to explain how his reliance was justifiable. Dr. Dancik knew or should have known that the consent decree barred him from treating MKC patients. He presents no evidence or argument as to why an MKC physician acquiescing in his treatment of an MKC patient would justifiably lead him to believe that MKC was not going to enforce the consent decree. Thus, Dr. Dancik's equitable estoppel claim fails as well.

In sum, there is no question of fact that Dr. Dancik violated the consent decree and he has not presented evidence demonstrating a prima facie affirmative defense to the violation. The only remaining question is whether Dr. Dancik's violations constituted contempt. "Contempt of court is a wilful act, omission or statement tending to impair the authority or impede the functioning of a court." *Williams International Corp v Smith*, 144 Mich App 257, 261; 375 NW2d 408 (1985). "A contempt order may be entered only when the violation alleged has been 'clearly and unequivocally shown.'" *ARA Chuckwagon of Detroit, Inc v Lobert*, 69 Mich App 151, 159; 244 NW2d 393 (1976). As noted above, Dr. Dancik knew or should have known the terms of the consent decree and that it enjoined him from treating MKC patients. By treating MKC patients despite his knowledge of the decree, Dr. Dancik knowingly and intentionally violated the decree.

*Williams, supra* at 261-262. Therefore, the Court finds Dr. Dancik in contempt and under MCL 600.1715(1) the Court fines him \$5,000 which must be paid to the Clerk of the Court within 7 days.

The final question is whether Dr. Dancik is entitled to an order enforcing MKC's payment obligations under the settlement agreement. MKC does not dispute Dr. Dancik's claim that it did not pay him as agreed. Instead, MKC claims that it had no obligation to pay because Dr. Dancik was the first party to substantially breach the settlement agreement, *Michaels, supra*; *Baith, supra*. MKC further notes that Dr. Dancik's right to payment was contingent on his compliance with the consent decree. Under the terms of the settlement agreement, MKC's first payment to Dr. Dancik was due December 1, 2013. However, the parties did not sign the agreement until December 14, and the consent decree was not entered until December 16. Further, there is evidence that Dr. Dancik began treating MKC patients as early as December 1, and by the time the agreement and consent decree were in place, Dr. Dancik treated at least three MKC patients. The Court agrees with Dr. Dancik that MKC's failure to pay was a substantial breach of the settlement agreement because it amounted to a complete failure of consideration. *Baith, supra*. However, Dr. Dancik also substantially breached the agreement by treating MKC patients, which deprived MKC of its consideration. Because both parties were in breach of the settlement as of December 1, 2013, the Court cannot conclude that Dr. Dancik was the first to substantially breach or that his breach absolved MKC of its obligation to pay. Thus, both parties breached the agreement on or before December 1, and both parties are entitled to a remedy for the other side's breach.

These mutual, apparently simultaneous breaches of the settlement agreement pose a dilemma for fashioning a remedy. In essence, neither party received the benefit of the bargain –

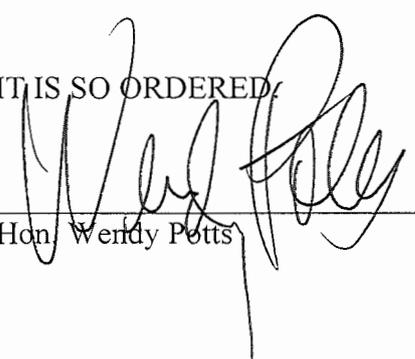
Dr. Dancik did not get his deferred compensation and MKC lost the benefit of Dr. Dancik's promise that he would not usurp its patients. MKC proposes that the Court relieve it of any obligation to pay Dr. Dancik the deferred compensation and allow Dr. Dancik to continue treating the eleven MKC patients who were identified at the hearing and in the "Relief Requested" portion of MKC's post-hearing brief. However, this solution appears to benefit MKC more than Dr. Dancik. MKC's principal Dr. Al-Saghir testified that it lost approximately \$5,000 per year for each patient. The consent decree barred Dr. Dancik from treating the patients for 18 months, from December 2013 through May 2015. After May 12, 2015, Dr. Dancik was free to treat any of those eleven patients. Assuming that those patients continued to treat with MKC from December 2013 through May 2015, MKC lost approximately \$7,500 per patient for a total loss of \$82,500. On the other hand, Dr. Dancik was entitled to \$126,000 in compensation.

Considering the original intent of the settlement agreement and the consent decree, the comparative losses of the parties, and the overall circumstances of this case, the Court enters judgment as follows: (1) Dr. Dancik is in contempt for violating the consent decree and must pay a fine of \$5,000 within 7 days to the Clerk of the Court; (2) Dr. Dancik may continue treat to the eleven MKC patients through May 2015; (3) Dr. Dancik is entitled to a judgment against MKC of \$126,000, offset by MKC's losses of \$82,500, for a net judgment of \$43,500 plus statutory interest and taxable costs; and (4) in all other respects the consent decree remains in place through May 2015.

Dated:

NOV 10 2014

IT IS SO ORDERED:

  
Hon. Wendy Potts