Filed 9/27/06 Tenet Healthsystems Hospitals v. Abravesh CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

TENET HEALTHSYSTEM HOSPITALS, INC. etc.,

Plaintiff and Respondent,

v.

SOODABEH ABRAVESH,

Defendant and Appellant.

B184561

(Los Angeles County Super. Ct. No. BC302264)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor H. Person, Judge. Affirmed.

Law Office of William D. Becker and William D. Becker for Defendant and Appellant.

Nemecek & Cole, Jonathan B. Cole, Greg Ozhekim, and Susan S. Baker for Plaintiff and Respondent.

____

INTRODUCTION

Defendant Soodabeh Abravesh, M.D. (Dr. Abravesh) appeals from a summary judgment entered in favor of plaintiff Tenet Healthsystem Hospitals, Inc., doing business as Lakewood Regional Medical Center (Hospital).[1] She claims the trial court erred in granting summary adjudication of plaintiff's causes of action for breach of contract and money had and received, in that there are triable issues of fact as to her affirmative defenses of illegality of the contract, laches and impossibility of performance, and she does not have any money she received from Hospital. We disagree and affirm the judgment.

FACTS[2]

Dr. Abravesh graduated from the Medical College of Pennsylvania in 1994 and completed her residency at Hahnemann University in Pennsylvania in 1999. She sought

---

[1] In actuality, Dr. Abravesh purports to appeal from a judgment entered on May 13, 2005. The judgment was entered on March 25, 2005. May 13 is the date of the notice of ruling, which is not an appealable judgment. (Code Civ. Proc., § 904.1; *Engel v. Worthington* (1997) 60 Cal.App.4th 628, 630-631.) Inasmuch as Hospital was not prejudiced by the erroneous date given in the notice of appeal, we will deem Dr. Abravesh's appeal to have been taken from the judgment. (Code Civ. Proc., § 904.1, subd. (a)(1); Cal. Rules of Court, rule 1(a); see *Roston v. Edwards* (1982) 127 Cal.App.3d 842, 846.)

[2] On summary judgment, the facts are those supported by the evidence contained in the "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken" submitted by the parties, "except that to which objections have been made and sustained by the court." (Code Civ. Proc., § 437c, subds. (b), (c).) Additionally, any evidence on which a party wishes to rely must appear in his or her separate statement of undisputed and/or disputed facts. (*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337.) On appeal, we consider only those factual statements by the parties which are supported by citations to the record on appeal. (*Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1; *Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

employment in Southern California, near El Segundo, where her husband had recently obtained employment.

Effective December 15, 2000, Dr. Abravesh entered into an employment contract with New Woman Medical Care (New Woman), an obstetrics and gynecology practice in Lakewood, operated by Dr. Haifa Azawi (Dr. Azawi). Section 6.1 of the employment contract gave New Woman the right to terminate the employment agreement upon 60 days' notice. The employment contract provided that New Woman would pay a salary to Dr. Abravesh, while Dr. Abravesh would assign all professional fees earned for her services to New Woman. It additionally provided that "[a]ll gross receipts and monies received from Lakewood Reginal [*sic*] Medical Center will be the property of Dr. Haifa Azawi, and New Woman Medical Care therefore not the tax responsibility of Dr. Abravesh."

As a condition of her employment with New Woman, Dr. Azawi required Dr. Abravesh to enter into a Relocation Agreement with Hospital, where Dr. Azawi was one of the alternating chairpersons of the obstetrics and gynecology department. On December 15, 2000, Dr. Abravesh entered into a Relocation Agreement with Hospital. The agreement was for a three-year period—from December 15, 2000 through December 14, 2003. Under this agreement, Hospital agreed to pay certain of Dr. Abravesh's relocation and marketing expenses and made collection guarantees. Dr. Abravesh agreed inter alia to maintain a full time practice within Hospital's service area for the three-year period, to maintain professional liability insurance and to establish medical staff membership at Hospital. The agreement also contained a liquidated damages clause, providing that if Hospital terminated the agreement based on a breach of the agreement by Dr. Abravesh, Hospital would be entitled to recover as liquidated damages all amounts it had paid to Dr. Abravesh.

Dr. Abravesh received $86,500 from Hospital under the Relocation Agreement. She paid all the money she received from Hospital to Dr. Azawi.

On February 13, 2001, New Woman gave Dr. Abravesh 60 days' notice of termination of the employment agreement, the termination to be effective April 14, 2001. Dr. Abravesh did not work for New Woman after February 2001.

Dr. Abravesh looked for a new job in Hospital's service area, but she was unable to find one. She acknowledged that she could have rented office space in Hospital's service area, but she did not consider this to be her "first option."

In September 2001, Dr. Abravesh accepted employment at a medical practice operated by Dr. Kurian in Lancaster. In February 2002, she started her own medical practice there. She and her husband purchased a home in the area in 2002.

Dr. Abravesh's staff privileges at Hospital were suspended on January 9, 2002. In July 2002, Hospital sent a letter to Dr. Abravesh at the address of Dr. Kurian's medical practice notifying her that it considered her in breach of the Relocation Agreement. When Dr. Abravesh moved to Lancaster, she had not notified Hospital of her new address.

PROCEDURAL BACKGROUND

Hospital filed this action on September 11, 2003, alleging causes of action for breach of contract, unjust enrichment and money had and received. On December 8, 2003, Dr. Abravesh filed an answer, setting forth a number of affirmative defenses. She also filed a cross-complaint against Hospital, New Woman and Dr. Azawi. She alleged causes of action for breach of contract, unfair business practices, indemnity, tortious interference with contractual relations and fraud.

After Dr. Abravesh filed a first amended cross-complaint, the trial court sustained Hospital's demurrer with leave to amend. Dr. Abravesh filed a second amended cross-complaint, dropping the fraud cause of action. The trial court sustained Hospital's demurrer thereto, without leave to amend.

Hospital filed a motion for summary judgment or, in the alternative, summary adjudication of issues, on December 17, 2004. While the motion was pending, on

January 27, 2005, Dr. Abravesh filed a first amended answer to the complaint. Among the affirmative defenses alleged were that the contract was void as violative of public policy, impossibility, and laches.

On March 2, 2005, the trial court denied Hospital's motion for summary judgment but granted its alternative motion for summary adjudication as to its causes of action for breach of contract and money had and received. On March 7, 2005, the court granted a motion by New Woman and Dr. Azawi for summary judgment. Hospital then dismissed its second cause of action for unjust enrichment with prejudice. On March 25, 2005, the trial court entered judgment in favor of Hospital and against Dr. Abravesh. On April 1, 2005, it filed an order granting the motion for summary judgment by New Woman and Dr. Azawi.

At some point in 2005, Dr. Abravesh filed an action against Hospital in federal court (*Abravesh v. Tenet Healthsystem Hospitals, Inc.* (C.D. Cal., CV 05-4735 SJO (PJWx)), alleging causes of action for unfair business practices in violation of California Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) and the federal anti-kickback statute (42 U.S.C. § 1320a-7b(b)) and injunctive relief. This action was based on the same facts as the instant case. Hospital moved to dismiss the action based on preemption and res judicata. On December 9, 2005, the court granted the motion to dismiss with prejudice.

DISCUSSION

Summary judgment properly is granted if there is no question of fact and the issues raised by the pleadings may be decided as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) To secure summary judgment, a moving plaintiff has the "burden of showing that there is no defense to a cause of action [by proving] each element of the cause of action entitling the party to judgment on that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar*, *supra*, at p. 849.) The burden then shifts to the defendant "to show that a triable

issue of one or more material facts exists as to that cause of action or a defense thereto." (Code Civ. Proc., § 437c, subd. (p)(1).)

On appeal, we exercise our independent judgment in determining whether there are no triable issues of material fact and the moving party thus is entitled to judgment as a matter of law. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334-335.) Inasmuch as the grant or denial of a motion for summary judgment strictly involves questions of law, we must reevaluate the legal significance and effect of the parties' moving and opposing papers. (*Salazar v. Southern Cal. Gas Co.* (1997) 54 Cal.App.4th 1370, 1376; *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal.App.4th 544, 548, disapproved on another ground in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1245.) We must uphold the judgment if it is correct on any ground, regardless of the reasons the trial court gave. (*Salazar*, *supra*, at p. 1376; *Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 385.)

Dr. Abravesh contends she presented sufficient evidence to establish a triable issue of fact as to her affirmative defenses to Hospital's breach of contract cause of action, namely illegality, laches and impossibility. She also contends Hospital's cause of action against her for money had and received is without merit.

In granting summary adjudication of Hospital's breach of contract cause of action, the trial court explained that Hospital established all elements of the cause of action: (1) the existence of a contract, the Relocation Agreement; (2) Hospital's performance, payment to Dr. Abravesh of $86,500; (3) Dr. Abravesh's breach of the contract by leaving Hospital's service area before the expiration of the three-year contract period; and (4) liquidated damages of $86,500. (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830.)

The trial court found Dr. Abravesh failed to show a triable issue of fact as to this cause of action. While she argued that the Relocation Agreement was invalid because it violated the "Medicare Anti-kickback statute," 42 United States Code section 1320a-7b, she did not raise violation of this statute in her answer as an affirmative defense. In

addition, she "fail[ed] to point to anything in her additional disputed facts that has any bearing on this issue."

We need not decide whether it was necessary for Dr. Abravesh to set forth in her answer the statutory basis of her claim that the Relocation Agreement was an illegal contract. The only fact in Dr. Abravesh's statement of disputed facts[3] bearing on this issue was the following: "Tenet Healthsystems, Inc. has been prosecuted criminally for entering into Relocation Agreements." This statement was supported by a copy of a July 17, 2003 indictment in the United States District Court for the Southern District of California against Tenet Healthsystem Hospitals, Inc. and others for violation of the federal anti-kickback statute (42 U.S.C. § 1320a-7b(b)). In the indictment, it was alleged in part that the defendants used relocation agreements as a means of obtaining referrals for their hospitals. Monies paid under the relocation agreements were passed through the relocating doctors to the practices for whom they worked, which "were loyal referrers of patients" to Tenet's hospitals.

A federal indictment involving other doctors and relocation agreements, with nothing more, does not establish that the Relocation Agreement at issue here was illegal because it violated the federal anti-kickback statute. Without any admissible evidence that Hospital and Dr. Azawi were involved in a conspiracy similar to that alleged in the indictment and Hospital entered into the Relocation Agreement with Dr. Abravesh in furtherance of this conspiracy, there simply is no evidence that the Relocation Agreement is illegal and therefore unenforceable. Dr. Abravesh failed to meet her burden of proving, by *admissible evidence*, that a triable issue of material fact exists as to the defense of illegality. (Code Civ. Proc., § 437c, subds. (b), (c), (p)(1).)[4]

---

[3] As previously stated, any evidence on which Dr. Abravesh wished to rely in opposing summary judgment had to be set forth in her separate statement of undisputed and/or disputed facts. (*United Community Church v. Garcin*, *supra*, 231 Cal.App.3d at p. 337.)

[4] Additional evidence that Dr. Abravesh submitted on the matter included speculation, hearsay statements and legal opinions by her and Dr. Astrid Mendoza on the

The trial court also found no triable issues of fact as to Dr. Abravesh's affirmative defenses of laches and impossibility. It noted that Dr. Abravesh failed to address the elements of the defense of laches and failed to "point to any of her additional disputed facts that bear on the matter," waiving the defense.

The affirmative defense of laches may be applied to bar relief to a plaintiff who has delayed unduly in seeking relief. (*Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors* (1974) 38 Cal.App.3d 257, 265.) A defendant seeking to apply the affirmative defense must demonstrate prejudice, making it unjust to grant relief to plaintiff. (*San Bernardino Valley Audubon Society v. City of Moreno Valley* (1996) 44 Cal.App.4th 593, 607.) On undisputed facts, the applicability of laches may be decided as a matter of law. (*Ibid*.)

It is undisputed that Dr. Abravesh did not work for Dr. Azawi after February 11, 2001, her employment was terminated effective April 15, 2001, and Hospital sent her a letter stating that it considered her in breach of the Relocation Agreement on July 12, 2002. Dr. Abravesh argues that Hospital's delay in notifying her that it considered her in breach of the agreement was prejudicial, in that, had she known it considered her in breach of the agreement, "she could have taken action to avoid liability. . . . [P]erhaps Dr. Abravesh could have complied with the Relocation Agreement simply by maintaining an office space sharing arrangement near the hospital. She could have become a subtenant of another physician at a medical office in Lakewood."

What Dr. Abravesh failed to do, however, was submit any *evidence* as to the options available to her to avoid her breach of the Relocation Agreement and that she

---

nature of the relationship between Hospital and Dr. Azawi, Dr. Azawi's practice and the federal anti-kickback statute. Hospital objected to this evidence. Inasmuch as we have not been provided with a transcript of the hearing on the summary judgment motion, at which the trial court ruled on these objections, we will presume the trial court ruled correctly and did not consider these inadmissible statements in the declarations. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357; see Evid. Code, §§ 702, subd. (a), 800, subd. (a), 1200, subd. (a).)

would have taken one of those options had she known Hospital was going to declare her in breach of the agreement. The only evidence on the matter, submitted by Hospital, was that Dr. Abravesh looked for a new job in Hospital's service area, but she was unable to find one. She acknowledged that she could have rented office space in Hospital's service area, but she did not consider this to be her "first option." Dr. Abravesh therefore failed to meet her burden of proving that a triable issue of material fact exists as to the defense of laches. (Code Civ. Proc., § 437c, subds. (b), (c), (p)(1).)

The trial court also found that Dr. Abravesh presented evidence that after she was terminated by Dr. Azawi, she searched "diligently" in the Lakewood area but was unable to find another job. "While this may show that performance may have been difficult, it does not satisfy the legal doctrine of impossibility. In order to be an excuse for not performing a contract, 'the impossibility of performance must attach to the nature of the thing to be done and not to the inability of the obligor to do it.' [*Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 84.] 'One who binds himself to a contract which cannot be performed without the consent or cooperation of a third person is not relieved of liability because of his inability to secure the required consent or cooperation.' [*Ibid.*] This amounts to mere subjective impossibility, which is not an excuse for nonperformance. [*Ibid.*] Defendant has not raised a triable issue concerning impossibility."

As Dr. Abravesh argues, performance of a contract will be excused not only where it becomes impossible but also where it becomes impracticable "because of extreme and unreasonable difficulty, expense, injury, or loss involved." (*Oosten v. Hay Haulers etc. Union* (1955) 45 Cal.2d 784, 788.) The defendant claiming impossibility must demonstrate "'that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive'" or otherwise impracticable. (*Id*. at p. 789.) As the trial court noted, however, the mere fact that a third person will not cooperate in a party's attempt to perform a contract will not excuse performance. (*Hensler v. City of Los Angeles*, *supra*, 124 Cal.App.2d at p. 84.)

The evidence Dr. Abravesh submitted on this issue was that she "diligently searched for employment with Lakewood physicians. [She] even worked with [a hospital employee] to help [her] find a job. [She] was open to taking any job in the Lakewood community but none were offered." Dr. Abravesh presented no admissible evidence as to her inability to open and maintain her own full time practice in Hospital's service area. As discussed above, Hospital submitted evidence that Dr. Abravesh acknowledged that she could have rented office space in Hospital's service area, but she did not consider this to be her "first option." That she was unable to find a third person to employ her is insufficient to establish impossibility. (*Hensler v. City of Los Angeles*, *supra*, 124 Cal.App.2d at p. 84.) Dr. Abravesh accordingly failed to meet her burden of proving that a triable issue of material fact exists as to the defense of impossibility. (Code Civ. Proc., § 437c, subds. (b), (c), (p)(1).)

As to Hospital's cause of action for money had and received, the trial court noted that Dr. Abravesh "contends there is a triable issue because she signed the money over to [Dr.] Azawi." It noted, however, that "direct possession or receipt of money is not essential; it is sufficient if the defendant knowingly and consensually had its use and benefits even though the money was possessed by a third party. [Hospital] has satisfied these elements, and [Dr. Abravesh] has not raised a triable issue of fact."

A cause of action for money had and received will lie "'. . . wherever one person has received money which belongs to another, and which "in equity and good conscience", or in other words, in justice and right, should be returned.'" (*Mains v. City Title Insurance Co.* (1949) 34 Cal.2d 580, 586.) Dr. Abravesh argues that she "NEVER received money from [Hospital]. Instead, she was required to countersign checks made out to her to her employer, Dr. Azawi. Dr. Abravesh never had the money. From the beginning of this transaction, [Hospital] knew that the money was being paid to Dr. Azawi in a pass through arrangement."

It is undisputed that Dr. Abravesh received $86,500 from Hospital under the Relocation Agreement. It also is undisputed that, upon breach of the Relocation Agreement, she was required to repay that money to Hospital. She cites no authority for

the proposition that she was excused from her obligation of repayment because she paid the money she received from Hospital to Dr. Azawi under a separate agreement with Dr. Azawi. Dr. Abravesh therefore has not demonstrated error in the trial court's adjudication of this cause of action in Hospital's favor.[5]

The judgment is affirmed.

NOT TO BE PUBLISHED

JACKSON, J.[*]

We concur:

MALLANO, Acting P. J.

ROTHSCHILD, J.

---

[5] Dr. Abravesh sought indemnification from Dr. Azawi by cross-complaint, but Dr. Azawi obtained a summary judgment on the cross-complaint.

[*] Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.