STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

MICHIGAN NEUROLOGY ASSOCIATES, P.C.
Plaintiff/Counter-Defendant,

vs. Case No. 2016-4048-CB

STEVEN S. BEALL, M.D.,
Defendant/Counter-Plaintiff.
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OPINION AND ORDER

This matter is before the Court after a bench trial.

I. Factual and Procedural History

This matter arises out of an employment relationship between the parties. On August 1, 2003, Plaintiff and Defendant executed a Physician Employment Agreement ("Original Employment Agreement") governing Defendant's employment with Plaintiff. On or about the same day, Defendant commenced his employment with Plaintiff. On or about January 1, 2006, the parties executed an amended employment agreement ("Amended Employment Agreement").

On or about December 6, 2010, Dianna Wallace began working for Plaintiff as a medical assistant. On or about September 2, 2010, Christine Nettie commenced her employment with Plaintiff as a human resource generalist. On May 16, 2011, Defendant resigned.

On or about December 27, 2011, Ms. Wallace and Ms. Nettie filed a complaint against Plaintiff, Defendant, and Dr. Thomas Giancarlo, D.O. for claims under the Elliot-Larsen Civil Rights Act, *inter alia* ("2011 Case"). Those claims were settled in 2012. Plaintiff and Dr. Giancarlo settled Ms. Wallace's and Ms. Nettie's claims.

On November 21, 2016, Plaintiff filed its complaint in this matter ("Complaint"). In the Complaint, Plaintiff seeks indemnification for the costs and expenses incurred in resolving the 2011 Case (Counts I (Ms. Wallace) and II (Ms. Nettie)). In addition, Plaintiff seeks an order requiring Defendant to contribute his prorated share of the settlement amount paid in the 2011 Case (Count III). Further, Plaintiff seeks "Collection of Assigned Claims and Judgement" (Count IV) and "Collection of Overpayment Pursuant to the Compensation Model Part A of Exhibit B" (Count V).

On March 24, 2017, Defendant filed his counterclaim ("Counterclaim"). In the Counterclaim, Defendant alleges that Plaintiff breached the Amended Employment Agreement by failing to pay him the required compensation.

The Court conducted a bench trial over the course of January 12, 2018, February 27, 2018 and April 11, 2018. On April 11, 2018, the parties executed a stipulated order setting forth a briefing schedule for their proposed findings of fact and conclusions of law and requiring them to order the transcript of the trial and split the cost 50/50. On August 2, 2018, Defendant filed his proposed findings of fact and conclusions of law. On the same date, Plaintiff filed its proposed findings of fact and conclusions of law. On August 20, 2018, Defendant filed his response to Plaintiff's proposed findings of fact and conclusions of law and Plaintiff filed its reply to Defendant's proposed finds of fact and conclusions of law. On August 22, 2018, the parties each filed one additional brief in support of their respective positions.

II. Law and Analysis

A. Indemnity

The Court will first examine Plaintiff's position that Defendant is required to

indemnify it from the costs of settling the 2011 Case. In support of its claim, Plaintiff relies on Section L of the Amended Employment Agreement, which provides:

> [Defendant] agrees to indemnify and hold [Plaintiff] harmless from any liability, expense, payment or cost of any kind incurred or suffered by [Plaintiff] as a result of a claim against [Plaintiff] based on vicarious liability for [Defendant's] acts or omissions. The foregoing indemnification shall survive termination of [Defendant's] employment with [Plaintiff].
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> (See Trial, Exhibit A.)

A contract must be interpreted according to its plain and ordinary meaning." *Ally Fin, Inc. v. State Treasurer*, 317 Mich App. 316, 329; 894 NW2d 673 (2016) (quotation marks and citation omitted). "Courts should construe contracts so as to give effect to every word or phrase as far as practicable." *Barton–Spencer v. Farm Bureau Life Ins. Co. of Mich.*, 500 Mich 32, 40; 892 NW2d 794 (2017) (quotation marks and citations omitted). "[C]ontract interpretation that would render any part of the contract surplusage or nugatory must be avoided." *McCoig Materials, LLC v. Galui Constr., Inc.*, 295 Mich App 684, 694; 818 NW2d 410 (2012). A contract is ambiguous if it allows two or more reasonable interpretations, or if the provisions cannot be reconciled with each other. *Woodington v Shokoohi*, 288 Mich App 352, 373-374; 792 NW2d 63 (2010). When a contract is ambiguous, "factual development is necessary to determine the intent of the parties and summary disposition is inappropriate." *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997).

Section L of the Amended Employment Agreement unambiguously provides that Defendant is responsible for indemnifying Plaintiff for costs, expenses, liability and payments suffered by Plaintiff as a result of a claim against Plaintiff based on vicarious liability for Defendant's acts or omissions. (See Trial Exhibit A.) The complaint filed in

the 2011 Case contained seven counts, only one of which sought to hold Plaintiff liable under a claim of vicarious liability (Count I). (*See* Trial Exhibit B, 2011 Case complaint.) While it is undisputed that Plaintiff settled Ms. Wallace's claims for $120,000.00 and Ms. Nettie's for $30,000.00, it has presented no evidence as to what portion of that amount is attributable to the portion of Count I based on vicarious liability. Consequently, the Court, as trier of fact, would be required to speculate in order to award Plaintiff any damages in connection with its indemnification claim. Where the only evidence presented on an issue requires the trier of fact to speculate or guess as to the answer to the issue, the plaintiff has not sustained his burden of proof. *Coles v Galloway*, 7 Mich App 93, 98; 151 NW2d 229 (1967)(internal citation omitted). Accordingly, based on Plaintiff's failure to present sufficient evidence to allow this Court to determine what portion, if any, of the settlement paid to Ms. Wallace or Mr. Nettie was attributable to claims against Plaintiff based on vicarious liability, Counts I-II must fail.

B. Contribution

Count III of the Complaint alleges that Plaintiff is entitled to a contribution from Defendant for the amounts it paid to Ms. Wallace. Specifically, Plaintiff alleged that it is entitled to such relief "on the basis of equitable principles" (See Complaint at Par. 36.) However, Defendant has not established a basis for such relief. Consequently, the Court must find no cause of action with respect to Count III.

C. Collection on Assigned Claims and Judgment (Count IV)

Count IV of the Complaint appears to be Plaintiff attempting to bring Ms. Wallace's sexual assault and battery claims against Defendant by virtue of the settlement agreement entered into with Ms. Wallace. However, Plaintiff has not

addressed those claims whatsoever at trial. As a result, the Court must enter a judgment for no cause of action with respect to Count IV.

D. Breach of Contract Regarding Defendant's Compensation

Plaintiff's final claim, as well as Defendant's counterclaim, center on the parties' dispute as to whether Defendant received the appropriate amount of compensation under the Amended Employment Agreement. With respect to Plaintiff's claim, it alleges that Defendant breached the Amended Employment Agreement by failing to pay it funds he was required to pay pursuant to Section 2D of the Amended Employment Agreement. Section 2D provides:

> In the event that [Defendant's] Individual Clinical Bonus and/or Global Practice Bonus are insufficient to make up any shortfall between compensation paid to [Defendant] and the compensation to which [Defendant] was actually entitled, for such Tri-Annual Bonus Period or calendar year, as the case may be, such shortfall shall be applied against each subsequent Tri-Annual Bonus until such shortfall has been fully accounted for out of any such future Bonuses to which [Defendant] would have otherwise been entitled. In the event of the termination of [Defendant's] employment at a time a shortfall exists, [Defendant] agrees to repay [Plaintiff], within thirty (30) days of any such termination of employment, any and all amounts of such shortfall and [Defendant] agrees that [Plaintiff] may deduct any such shortfall from any other amounts owed by [Plaintiff] to [Defendant], including wages, at the time of [Defendant's] termination of employment.

(*See* Trial Exhibit A.)

Plaintiff, as the party bringing Court V, has the burden of establishing that an overpayment has been made and that Defendant has failed to pay back those funds, if any. See *Residential Ratepayer Consortium v Pub. Serv. Comm.*, 198 Mich App 144, 149; 497 NW2d 558 (1993)(A party claim breach of contract must establish the elements of its claim by a preponderance of the evidence.) In order to determine whether Defendant owed Plaintiff anything upon the termination of his employment, the

Court must first examine the compensation structure applicable to Defendant's employment.

Compensation is set forth in Section 2 of the Amended Employment Agreement. (See Trial Exhibit A.) Section 2 provides, in pertinent parts:

> 2. Compensation. In consideration of his services, [Plaintiff] agrees that during the term of this Agreement [Defendant] shall be entitled to "Annual Compensation" determined as follows:
> A. For the period commencing January 1, 2006 through December 31, 2006, and for each calendar year thereafter during the Term hereof, [Defendant's] Annual Compensation shall be based on the following Compensation Formula:
>
> (i) a Base Salary draw payable in monthly installments, in that amount as is equal to the lowest monthly net income paid to [Defendant] during the immediately preceding calendar year based on [Defendant's] collections less overhead, direct Doctor expenses and fringe benefits for such month, subject to reduction for all Federal and State income tax withholding and all other legally required items of withholding;
>
> (ii) an Individual Clinical Productivity Bonus to be calculated in accordance with Paragraph A on the attached Exhibit A which is incorporated herein and made a part hereof by this reference, and, if such calculation results in a bonus, paid on a tri-annual basis as herein provided;
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> (iii) a "Global Practice Performance Bonus" to be calculated in accordance with Paragraph B of said Exhibit A, and, if such calculation results in a bonus, paid on an annual basis as hereinafter provided; and
>
> (iv) the Fringe Benefits to which Employee is entitled, and/or chooses to add, under Paragraph 3 hereof.

(See Trial Exhibit A.)

At issue in this matter are the first two elements of Defendant's compensation, the Base Salary draw ("Draw") and the Individual Clinical Productivity Bonus ("Individual Bonus"). Plaintiff argues that Defendant was overpaid compensation and is responsible

for paying back the difference pursuant to Section 2D of the Amended Employment Agreement.

In response, Defendant denies he was overpaid, and argues instead that the Individual Bonus was improperly calculated from 2008 until his resignation in 2011, and rather he is owed unpaid compensation from Plaintiff. Accordingly, the Court will now examine the parties' disputes concerning the calculation of Defendant's compensation, share of the expenses and the Individual Bonus.

The calculation of the Individual Bonus is governed by Paragraph A of Exhibit A of the Amended Employment Agreement, which provides:

> A. Individual Clinical Productivity Bonus
>
> 1. Individual Clinical Productivity Bonuses shall be calculated tri-annually. "Tri-Annual Bonus Periods" are January 1 to April 30, May 1 to August 31, and September 1 to December 31.
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> 2. The total "Revenue Generated" of the Employee during the applicable Tri-Annual Bonus Period shall be calculated. "Revenue Generated" is hereby defined as all collections received by [Plaintiff] on account of medical services personally performed by [Defendant].
>
> 3. [Defendant's] salary draws, fringe benefit costs and direct expenses, together with [Defendant's] share of actual fixed and variable expenses and other operating expense for the same applicable Tri-Annual Bonus Period shall be subtracted from [Defendant's] Revenue Generated for such Tri-Annual Bonus Period to establish [Defendant's] Individual Clinical Productivity Bonus for said Tri-Annual Bonus Period.
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> (*See* Trial Exhibit A.)

Neither side has contested that the Individual Bonus was calculated on a tri-annual basis as required by subsection 1. Indeed, Defendant testified that he received a "fact sheet" providing his revenue and purported expenses for each tri-annual period. (*See* 4/11/18 Transcript, at 134.) Further, the parties have stipulated that the revenue

reflected on Trial Exhibits G, H and I are accurate. (*See* 1/12/18 Transcript, at 13-14.) Accordingly, the remaining issue, which is disputed by the parties, is whether the calculation set forth in subsection 3 was done correctly. In particular, the parties dispute whether Defendant was properly allocated employee costs, certain direct expenses, as well as his "share" of fixed and variable expenses. The Court will begin by addressing the question of whether Defendant was properly allocated his "share" of fixed and variable expenses.

Plaintiff's accountant, Peter Sinishtaj, testified that Defendant's "share" of the fixed and variable expenses was determined by taking the total amount of each type of expense for the general neurology department, dividing it by the total number of hours worked by those doctors on the same overhead model and then multiplying that number by the amount of hours worked by Defendant. (*See* 1/12/18 Transcript, at 119, 122.) In response, Defendant argues that "share" was not supposed to be calculated in that manner. Rather, Defendant testified that his "share" was to be the amount of expenses directly attributable to him rather than the amount of average expenses of all of the doctor's in the general neurology department. (See 4/11/18 Transcript, at 136, 140.)

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Rasheed v. Chrysler Corp.*, 445 Mich 109, 127, n. 28, 517 NW2d 19 (1994). In order to determine the intent of the parties, the Court must look at the words used in the instrument. *UAW-GM Human Resource Ctr. v KSL Recreation Corp.*, 228 Mich App 486, 491-492; 579 NW2d 411 (1998). Where the language of the contract is clear and unambiguous and has a definite meaning, the Court must apply the language as written. *Id.* at 492.

In *Port Huron Ed. Ass'n v. Port Huron Area School Dist.*, 452 Mich 309, 323, 550 NW2d 228 (1996), the Michigan Supreme Court stated:

> The initial question whether contract language is ambiguous is a question of law. If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact. [Citations omitted.]

A contract is ambiguous if "its words may reasonably be understood in different ways." *Raska v. Farm Bureau Ins. Co.*, 412 Mich 355, 362, 314 NW2d 440 (1982). Courts shall not find an ambiguity where none exists. *Smith v Physicians Health Plan*, Inc., 444 Mich 743, 759, 514 NW2d 150 (1994). "Contractual language is construed according to its plain and ordinary meaning, and technical or constrained constructions are to be avoided." *Dillon v. DeNooyer Chevrolet Geo*, 217 Mich App 163, 166, 550 NW2d 846 (1996). If the meaning of an agreement is ambiguous or unclear, the trier of fact is to determine the intent of the parties. *Chrysler Corp. v. Brencal Contractors, Inc.,* 146 Mich App 766, 775, 381 NW2d 814 (1985).

In this matter "share" is not defined in the Amended Employment Agreement. Words and phrases are to be construed in context, and a Court may consult a dictionary in order to ascertain the plain and ordinary meaning of terms found in a document. *Auto Owners Ins. Co. v Seils*, 310 Mich App 132, 145, 871 NW2d 530 (2015). Merriam-Webster dictionary defines "share" in two ways: 1) a portion belonging to, due to, or contributed by an individual or group, and 2) the part allotted or belonging to one of a number owning together property or interest. Merriam-Webster's Collegiate Dictionary (11th ed.). Neither of those definitions is illustrative in this case. The definition merely states that a share is a portion of a given amount. In this matter, it is clear that

Defendant is responsible for a portion of Plaintiff's overall fixed and variable expenses. However, the parties' dispute how large of a share Defendant was responsible for. Further, the language of the Amended Employment Agreement as a whole lends no further guidance. As a result, the Court is convinced that the term "share" as it is used in Exhibit A, Section A(3) of the Amended Employment Agreement is ambiguous.

Where a term is ambiguous and subject to more than one interpretation, the Court may consider parole evidence is ascertaining the parties' intent. *Zurich Ins. Co. v CCR & Co.*, 226 Mich App 599, 607-608; 576 NW2d 392 (1997). When language is ambiguous a court may look to such extrinsic evidence as the parties' conduct, the statements of its representatives, and past practice to aid in interpretation. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469-70; 663 NW2d 447 (2003). "If the parties' intent cannot be determined after considering extrinsic evidence, the court should construe the contract against the drafter." *Wagner v Farm Bureau Mutual Ins Co of Michigan*, 321 Mich App 251, 258; 908 NW2d 327 (2017).

In this matter, Plaintiff points to the parties' course of performance in support of its interpretation of the word "share". In particular, Plaintiff relies on Dr. Giancarlo's testimony that the doctors had monthly meetings where compensation was addressed. (*See* 1/12/18 Transcript, at 48.) Further, Plaintiff points to Dr. Beall's testimony that he was presented with a fact sheet periodically setting forth his revenue and the expenses attributed to him. (See 4/11/18 Transcipt, at 134, 183.) Moreover, Plaintiff relies on its accountant, Peter Sinishtag's testimony that the same methodology was utilized for all of the "similarly situated" doctors working for Plaintiff. (See 1/12/18 Transcript, at 129-130.)

While Defendant concedes that he was given a "fact sheet" every year summarizing his revenue and the expenses he was charged, he also testified that the fact sheets did not explain how the numbers were calculated, and that he questioned the numbers at the end of every tri-annual period and asked for back up documentation, but that such documentation was not provided until after this litigation began. (Id. at 163, 183.) Moreover, Dr. Beall testified that he asked repeatedly for support for the calculations at the end of 2010. (Id. at 164.)

In addition to the parties' actions since entering into the Employment Agreement, Defendant also relies on his own testimony as to the parties' intentions at the time of entering the Employment Agreement. Specifically, Defendant testified that Dr. Giancarlo explained to him at the time of entering into the Employment Agreement that he would only be charged for the expenses he caused. (Id. at 136, 140.) However, Dr. Beall also testified that there was no discussion of the word "share" at the time he executed the Employment Agreement. (Id. at 142.)

Based on the above-referenced testimony the Court finds both sides' above-referenced testimony credible. Specifically, the Court finds that Defendant intended the word "share" to mean that he would be responsible for those costs directly attributable, such as the amount of medical assistant's hours he utilized, the amount of office supplies he used, etc. rather than be accountable for the average amount of each item used by all of the doctors in general neurology. Likewise, the Court finds Mr. Sinishtaj's testimony that the average expense model was utilized for all of the similar doctors in general neurology credible. Further, the Court finds that the fact that that model had been utilized for all of those doctors indicates that Plaintiff intended the word "share" to

be interpreted in a manner consistent with that model. However, whether it be because Defendant was misled to believe that he and Plaintiff were agreeing to a different definition of the word share, or whether the parties simply failed to define their expectations to each other at the time of drafting the Employment Agreement, the Court finds that the parties did not have the same intentions as each other as to the definition of share at the time the Employment Agreement was executed.

Moreover, the parties' expectations have not merged since the Employment Agreement was executed. From the time the Employment Agreement was signed Plaintiff has operated consist with its interpretation, as is evidenced by Trial Exhibits G, H, I, and K-N. However, Defendant questioned the expense figures he was given each time they were given and asked for back-up information, but no such information was given. While Defendant continued to work for Plaintiff while questioning the amount of expenses he was being allocated, Plaintiff has failed to establish that such action amounted to Plaintiff agreeing to Defendant's methodology. Under these circumstances, where the ambiguity of the word "share" cannot be reconciled by examining the extrinsic evidence, the term must be construed against the drafter, who in this case is Plaintiff. Given that principle, as well as the fact that it is Plaintiff's burden to prove its case, the Court is satisfied that Plaintiff has failed to establish that the word "share" required Defendant to pay expenses in the manner consistent with the model it used during Defendant's employment. Having failed to establish that the way it allocated expenses was consistent with the Employment Agreement, Plaintiff has also failed to establish that Defendant is liable for any alleged overpayment. For these reasons, the Court must find no cause of action with respect to Count V.

With respect to the Counterclaim, Defendant argues that given the ambiguity of the word "share", and Plaintiff's role as the drafter, the term should be interpreted in the manner consistent with his intent. However, even if that were true, which the Court need not determine, Defendant has failed to present the Court with any evidence establishing that he has suffered any damages as a result of Plaintiff's actions. Specifically, Defendant has not presented any evidence as to the amount of expenses that should have been allocated to him. Without that information there is no way to determine whether he has been properly compensated. As a result, Defendant has failed to establish his claim.

Finally, Plaintiff argues that Defendant breached the Amended Employment Agreement without providing 6 months' notice. First, it is undisputed, and Court hereby finds, that Section 9 of the Amended Employment Agreement unambiguously requires an employee who wishes to terminate his employment to given Plaintiff 6 months advanced written notice. (See Trial Exhibit A, at Section 9.) Defendant maintains that the parties agreed to waive that provision. However, Defendant himself testified that Dr. Giancarlo never agreed orally, or in writing, to waive the provision. (*See* 4/11/18 Transcript, at 179.) Accordingly, based on Defendant's own concession, and Defendant's failure to otherwise establish that the parties agreed to waive the 6 month notice requirement, the Court is satisfied that Defendant's position is without merit. Therefore, the issue becomes what effect, if any, that breach has on the parties' claims.

Plaintiff has not provided any evidence that Defendant's breach of that has caused it any damages. Plaintiff's entire case is based on their position that Defendant was operating at a loss year after year. If that was the case, Defendant's failure to

comply with Section 9 did not cause any harm to Plaintiff, and if it did Plaintiff has failed to establish that amount. For these reasons, the Court is satisfied that Plaintiff has failed to establish that they are entitled to any relief with respect to the portion of its claims based on Section 9 of the Amended Employment Agreement. Consequently, the final issue is to determine how Defendant's breach of Section 9 affects his claims.

Section 10 of the Amended Employment Agreement governs the compensation Defendant was entitled to receive upon leaving his employment with Plaintiff. Section 10 provides:

> 10. Compensation Upon Termination. Upon any termination of this Agreement, the Employee shall be entitled to receive within ten (10) days after termination the Base Salary draw pro-rated to the date of termination and those Fringe Benefits, also pro-rated up to the date of termination, which have not been used as of the date of termination.
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> Further, in the event the Employee shall be "in good standing" (as herein defined) at the time of such termination, the Employee shall also be entitled to receive (i) whatever Tri-Annual Bonus that may be payable at the date of such termination, (ii) whatever Global Practice Performance Bonus that may be payable at the date of such termination, (iii) a severance bonus equal to the unvested portion of Employee's account balance in the profit-sharing plan maintained by Employer, and (iv) an incentive bonus of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) if the Employee originates the identification of a physician candidate who signs an Employment Agreement with Employer and thereafter commences employment with Employer in accordance therewith. If Employee shall not be "in good standing" as defined above, Employee shall forfeit the foregoing bonuses.
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> "In good standing" is hereby defined as a termination.....by Employee in strict accordance with [Section 9].
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> (*See* Trial Exhibit A.)

In this matter, Defendant did not comply with Section 9. As a result, to the extent Defendant seeks any of the benefits set forth in Section 10, his claim also fails based on his violation of Section 9.

III. Conclusion

Based upon the reasons set forth above, the Court find NO CAUSE OF ACTION with respect to the parties' claims. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order CLOSES this matter.

IT IS SO ORDERED.

DATED: JAN 02 2019

Kathryn A. Viviano

Hon. Kathryn A. Viviano, Circuit Judge