UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

ROGER HERZIG, M.D. PLAINTIFF

v. CIVIL ACTION NO. 3:97CV-795-S

ONCOLOGY/HEMATOLOGY CARE, INC. DEFENDANT

MEMORANDUM OPINION

This matter is before us on the motion of the plaintiff, Dr. Roger Herzig ("Herzig"), for summary judgment pursuant to Fed. R. Civ. P. 56. The matter having been fully briefed, it is now ripe for review.

BACKGROUND

This contract dispute arises out of the employment relationship that once existed between OHCI, as employer, and Herzig, as employee, and its eventual termination. In February of 1993, Herzig, an oncologist, commenced employment with Oncology/Hematology Care, Inc. ("OHCI") in order to "render professional medical services for the Corporation . . .." Pl.'s Mot. Summ. J. (DN 92), Ex. 1 at ¶ 1. The terms of Herzig's employment were set forth in an "Employment Agreement" dated November 2, 1992 ("Employment Agreement"). *See id.* at ¶¶ 1-17. In connection with Herzig's employment with OHCI, the parties also executed a "Stock Purchase (Buy-Sell) Agreement" ("Buy-Sell Agreement") pursuant to which Herzig alleges he became a shareholder in OHCI. *See* Pl.'s Mot. Summ. J., Ex. 11.

In October of 1996, Herzig notified OHCI of his intention to terminate his employment relationship with OHCI, his resignation to become effective on April 30, 1997. *See id.* at Ex. 9. In December of 1997, Herzig filed his Verified Complaint in this matter. Herzig made several claims, all of which concern the circumstances surrounding Herzig's employment, his termination of that

employment relationship, and the sufficiency of Herzig's financial compensation by OHCI both during and after his employment. *See* Pl.'s V. Compl. (DN 1). OHCI subsequently counterclaimed against Herzig, *see* DN 10, and Herzig now requests this court to enter summary judgment in its favor on Count I and Counts III through IX of OHCI's counterclaim.

STANDARD OF REVIEW

A motion for summary judgment will be granted only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). According to the Supreme Court, the standard is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Faced with a motion for summary judgment, the nonmovant must come forth with requisite proof to support its legal claim, particularly where the opposing party has had an opportunity to conduct discovery. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In the Sixth Circuit, "[t]he mere possibility of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F.2d 859, 863 (6th Cir. 1986)). "[T]his standard requires a court to make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than *de minimis*." *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996).

DISCUSSION

This court previously denied in part OHCI's motion for summary judgment, *see Herzig v. Oncology/Hematology Care, Inc.*, Mem. Op. & Order, Civil Action No. 3:97CV-795-S (May 24, 2001) (DN 98) (hereinafter referred to as "*Herzig I*"), and the conclusions reached therein are relevant to our consideration of the arguments made by Herzig in his present motion. Also, Herzig

contends throughout his supporting memorandum that OHCI is not a real party in interest with respect to its counterclaims and that, therefore, those claims should be dismissed. *See, e.g.,* Pl.'s Mem. in Supp. Mot. Summ. J., DN 90, at 4, 8, 10. Because our findings in *Herzig I* and our conclusion, set forth below, that OHCI is entitled to enforce the rights it asserts are determinative of several aspects of Herzig's motion, we will discuss those issues before addressing Herzig's remaining contentions.

I. Real Party in Interest

Throughout his memorandum in support, Herzig contends that when OHCI affiliated with University Internal Medicine Associates, Inc. ("UIMA") on October 1, 1996, his employment with OHCI terminated. *See* Mem. in Supp., DN 90, at 4, 8, 10, 11, 16, 17, 19, 21, 22, 29, 30, 36. Herzig maintains that because he was no longer an employee of OHCI, OHCI may not now bring suit against him for claims which arose subsequent to the affiliation. *See id.* Essentially, Herzig claims that as a result of the OHCI/UIMA affiliation, OHCI is not a real party in interest to this action pursuant to Fed. R. Civ. P. 17 (a) (herein "Rule 17 (a)"). *See id.* at 10.

We find that OHCI is a real party in interest. We do so for two reasons. First, Herzig has waived his right to object to OHCI's status as a real party in interest. While the federal rules do not contain a limitation period within which such an objection must be made, it is well established that such an objection must be made with "reasonable promptness." *See generally Chicago & Northwestern Transp. Co. v. Negus-Sweenie, Inc.*, 549 F.2d 47, 50 (8th Cir. 1977) (citations omitted); 6A Wright, Miller, & Kane, Federal Practice and Procedure: Civil 2d § 1554, at 407. Here, OHCI filed its amended answer and counterclaim over three years ago, on February 24, 1998. *See* DN 10. Herzig has had ample time to raise such an objection, and may not do so now, nearly four years after he initiated this litigation, for the first time.

That Herzig has waived any Rule 17 (a) objection is further supported by his own statements in his Verified Complaint. ¶ 10 of the Verified Complaint states that "[a]t times mentioned herein

Plaintiff was employed by OHCI, during which time OHCI actively engaged in the practice of medicine in hospitals, a cancer center and other medical facilities . . .." It goes on to state that "[f]rom February 1, 1993 through April 30, 1997, Plaintiff was an employee of OHCI." *Id.* at ¶ 16. Regarding the affiliation between OHCI and UIMA, Herzig states that "[o]n information and belief in September or October of 1996, OHCI entered into some form of contract or agreement with [UIMA] which thereafter required Plaintiff to perform services on behalf of OHCI through UIMA . . .." *Id.* at ¶ 21. These admissions, as well as Herzig's failure to subsequently amend his pleadings to add UIMA as a defendant, are significant proof of OHCI's interest in its counterclaims. *See Hughes v. Vanderbilt University*, 215 F.3d 543, 549 (6th Cir. 2000).

Even assuming Herzig has not waived his right to object to OHCI's status as a real party in interest, his motion for summary judgment, to the extent it is based on Rule 17 (a), would still be denied. Herzig has failed to demonstrate that as a result of the OHCI/UIMA affiliation, OHCI is no longer entitled to enforce the rights asserted in its counterclaim.

While the consequences of the affiliation between OHCI and UIMA are not entirely clear from the record, it appears settled that:

- Prior to October 1, 1996, OHCI was a medical practice which employed physicians, as well as other support personnel. *See* Arthur Richards Dep., DN 61, at 7/18- 7/21; Michael Neuss Dep., DN 59, at 8/17- 9/24.

- University Internal Medicine Associates was, at all relevant times, a corporation through which the faculty of the Department of Internal Medicine of the University of Cincinnati practiced medicine. *See* Richard Levy Dep., DN 45, at 10/10; Richard Herzig Dep., DN 73, at 78/23- 79/3; Richards Dep., *supra*, at 13/16- 13/19; Douglas Hawley Dep., DN 55, 11/9- 11/22.

- OHCI and UIMA entered into an affiliation agreement, effective October 1, 1996, whereby most of the employees and shareholders of OHCI who were physicians would become employees of UIMA and would practice as a "hematology/oncology subspecialty group" within UIMA. Affiliation Agreement, DN 101, Ex. 6, at ¶ 1; Mary Heskamp Dep., DN 106, at 56/8- 56/15, 110/14- 111/8. The support personnel currently employed by OHCI would remain as OHCI employees, and OHCI would "manage the business" of UIMA's newly created hematology/oncology group. Levy Dep., *supra*, at 31/10- 31/22; Paul Maddox Dep., DN 66, at 12/25- 14/8; Heskamp Dep., *supra*, at 56/8- 57/24.

- The OHCI/UIMA affiliation agreement stated that "[e]ach physician currently employed by [OHCI] shall terminate his or her employment with [OHCI] and sign a UIMA Employment Agreement . . .." Affiliation Agreement, *supra*, at ¶ 2; Maddox Dep., *supra*, at 16/13- 16/17. However, the record does not contain an employment agreement between UIMA and Herzig. *See* Levy Dep. at 54/1- 57/15. Also, the Employment Agreement between Herzig and OHCI was nonassignable. *See* DN 92, Ex. 1, at ¶ 15.

- Herzig remained an employee of OHCI until April 30, 1997. Aff. of Roger Herzig, DN 92, Ex. 5, at ¶ 5; Def.'s Countercl., DN 10, at ¶ 31.

As noted above, the record does not clearly describe the employment relationship, if one arose at all, between Herzig and UIMA as a result of the OHCI/UIMA affiliation. Regardless, OHCI's claims are not based on his status as a UIMA employee. Rather, its claims are based on: (1) the Employment Agreement entered into by Herzig and OHCI (Counts I, IV-IX); and (2) the Buy-Sell Agreement entered into by Herzig and OHCI (Counts II, III, VI). Both parties agree that OHCI never assigned either the rights or obligations arising under those agreements to UIMA. *See* Pl.'s Mem. in Supp., DN 90, at 4; Def.'s Resp., DN 107, at 3. Therefore, OHCI's ability to enforce its rights arising under the Employment Agreement and the Buy-Sell Agreement is distinct from any employment relationship between UIMA and Herzig. Conversely, Herzig may enforce any rights he has arising under these agreements against OHCI regardless of any relationship with UIMA. Herzig clearly recognized this ability, having named OHCI as the sole defendant in his suit, and it is unclear to the court why OHCI's ability to enforce the same agreements would be any different.

We find that OHCI retains the ability to enforce the rights it asserts against Herzig in its counterclaim. Therefore, to the extent Herzig's motion for summary judgment is based on Fed. R. Civ. P. 17 (a), it will be denied.

II. ***Herzig I***

In *Herzig I*, we found that Herzig failed to demonstrate the existence of a genuine issue of material fact relevant to several of his claims. This led to our dismissal of several counts of Herzig's Verified Complaint. *See Herzig I* at 4-6. On a number of other issues, we concluded that Herzig sufficiently demonstrated the existence of a question of fact. Relevant to Herzig's motion now before us, these issues included:

1. Whether Herzig was, at any time, a shareholder in OHCI;

2. Whether, and to what extent, Herzig interfered with the business relationship that existed between the University of Louisville and OHCI; and

3. Whether Herzig violated his Employment Agreement with OHCI by holding a faculty position at the University of Louisville and retaining remuneration therefrom.

See id. at 4-5, 7-8. Our conclusions in *Herzig I* are significant because they provide the basis for finding that Herzig's motion for summary judgment as to OHCI's counterclaims must be denied in part.

Herzig moves for summary judgment on Count I of OHCI's counterclaim based on the lack of "evidence that Dr. Herzig failed to use his best efforts on behalf of OHCI that OHCI did not receive revenues from his medical practice, or other evidence to prevent the entry of summary judgment." Pl.'s Mem. in Supp. at 24. Count I alleges that Herzig breached his Employment Agreement with OHCI by practicing medicine outside the purview of the agreement. Def.'s Countercl. at ¶¶ 32-41. As noted in *Herzig I*, there exists a genuine issue of material fact with regard to whether Herzig breached the Employment Agreement. *See Herzig I* at 7-8. Therefore, Herzig's motion for summary judgment with respect to Count I of OHCI's counterclaim will be denied.

In Count III of its counterclaim, OHCI alleges that Herzig breached that part of the Buy-Sell Agreement which required Herzig to sell, and OHCI to buy, Herzig's OHCI shares upon the termination of his employment. Countercl. at ¶¶ 48-54. As noted above, we have not yet determined that Herzig was at any time an OHCI shareholder. *See Herzig I* at 4-5. Since Herzig could not have breached the Buy-Sell Agreement if he never owned any OHCI shares, the existence

of a question of fact as to Herzig's ownership precludes summary judgment on Count III. Herzig's motion for summary judgment with respect to Count III will, therefore, be denied.

Count IV of OHCI's counterclaim is a claim of conversion. Countercl. at ¶¶ 55-60. OHCI contends that Herzig received payment for medical services he rendered to the University of Louisville and failed to tender that compensation to OHCI. *Id.* This claim assumes that Herzig breached the Employment Agreement, as alleged in Count I, because otherwise, OHCI would not be entitled to payment. Since we have not yet concluded that Herzig breached his Employment Agreement, it would appear that Count IV should survive Herzig's motion for summary judgment. *See Herzig I* at 7-8. However, as we noted in a different context in *Herzig I*, "a breach of contract does not create a tort claim." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 684 N.E.2d 1261, 1270 (Ohio Ct. App. 1996) (citation omitted). Since OHCI's conversion claim would not "exist independently of the contract action" since there was no duty "owed [by Herzig] separately from that created by contract," Herzig's motion for summary judgment as to Count IV of OHCI's counterclaim will be granted, and Count IV will be dismissed. *See Textron*, 684 N.E.2d at 1270.

Count V of OHCI's counterclaim alleges that Herzig breached a duty of loyalty and due care that he owed to OHCI as an employee. Countercl. at ¶¶ 61-68. OHCI claims that Herzig breached this duty by practicing medicine outside the purview of the Employment Agreement to which Herzig and OHCI were parties. *Id.* As noted above, we have previously determined that a genuine issue of material fact exists with respect to whether Herzig breached his Employment Agreement. *See Herzig I* at 7-8. Therefore, Herzig's motion for summary judgment with respect to Count V will be denied.

In Count VI of its counterclaim, OHCI contends that Herzig breached his "fiduciary duty of loyalty and confidence" by interfering with OHCI's business relationship with the University of Louisville and by engaging in conduct that was otherwise inconsistent with his Employment Agreement. Countercl. at ¶¶ 69-73. Since we have previously determined that a genuine issue of

material fact exists with regard to whether Herzig engaged in such conduct, Herzig's motion of summary judgment as to Count VI will be denied. *See Herzig I* at 7-8.

Count VII of OHCI's counterclaim alleges that Herzig tortiously interfered with OHCI's contractual relationship with the University of Louisville. Countercl. at ¶¶ 74-78. As noted above, we determined in *Herzig I* that a genuine issue of material fact exists as to whether Herzig interfered with OHCI's business relationship with the University of Louisville. *See Herzig I* at 7-8. Therefore, Herzig's motion for summary judgment with respect to Count VII of OHCI's counterclaim will be denied.

III. Counts VIII & IX

Counts VIII and IX of OHCI's counterclaim make allegations concerning issues that this court did not face in *Herzig I*. In Count VIII, OHCI seeks to recover approximately $11,800 from Herzig for his alleged misuse of a company cellular telephone and credit card. Countercl. at ¶¶ 79-85. In Count IX, OHCI requests an accounting of "all of the records relating to its contractual relationship with UL Hospital, including the UL Contracts, all records of services rendered thereunder, and all records relating to payments for such services." *Id.* at ¶ 88.

Herzig's motion for summary judgment with respect to Count VIII of OHCI's counterclaim will be denied. The record reflects that OHCI supplied their physician employees with cellular telephones as a part of their compensation package. *See* Mary Heskamp Dep., DN 106, at 49/20-50/2. Whether Herzig's use was beyond that contemplated by any agreement entered into between OHCI and Herzig is disputed by the parties. *See id.* at 49/10- 50/20; Heskamp Dep., DN 33, at 22/7-26/19. A similar factual dispute exists with respect to the credit card charges for which OHCI maintains that it is entitled to reimbursement by Herzig. *See, e.g.,* Heskamp Dep., DN 106, at 50/21-53/8. Given these factual disputes with respect to Herzig's alleged misuse of the OHCI cellular telephone and credit card, Herzig's motion with respect to Count VIII will be denied.

An equitable action for an accounting "is a species of disclosure, predicated upon the legal inability of a plaintiff to determine how much, if any, money is due him from another. It is an extraordinary remedy, and like other equitable remedies, is available only when legal remedies are inadequate." *Bradshaw v. Thompson*, 454 F.2d 75, 79 (6th Cir. 1972). We believe the legal remedies available to OHCI are adequate to assist in discovering the evidence it seeks given the extensive discovery conducted in the nearly four years since this suit was initiated. *See id.* ("The availability of declaratory judgments and the liberal discovery procedures of the Federal Rules operate to make the legal remedies more 'adequate' than before."). OHCI has failed to demonstrate the inadequacy of legal remedies available with respect to the discovery of documents in Herzig's allegedly in possession, and therefore, Herzig's motion for summary judgment as to Count IX will be granted. Count IX of OHCI's counterclaim will be dismissed.

CONCLUSION

For the abovestated reasons, Herzig's motion for summary judgment with respect to Counts IV and IX of OHCI's counterclaim will be granted, and those claims will be dismissed. Herzig's motion will otherwise be denied in all respects. A separate order will be entered this date in accordance with this opinion.

This _____ day of _____, 2001.

_____
CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ONCOLOGY/HEMATOLOGY CARE, INC. DEFENDANT

ORDER

Motion having been made, and the court being otherwise sufficiently advised, and for the reasons set forth in the accompanying memorandum opinion, **IT IS HEREBY ORDERED AND ADJUDGED** that the motion for summary judgment of the plaintiff, Roger Herzig, is **GRANTED IN PART AND DENIED IN PART** as follows:

1. The plaintiff's motion is **GRANTED** as to Counts IV and IX of the defendant's counterclaim, and those claims are **DISMISSED**; and

2. The plaintiff's motion is **DENIED** in all other respects.

IT IS SO ORDERED this _____ day of _____, 2001.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record