SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2250-14T3

FARIBORZ ASHTYANI, M.D., and HACKENSACK SLEEP & PULMONARY CENTER,

Plaintiffs-Appellants,

v.

CRITICAL CARE UNIT RESOURCES, LLC and LEON L. TING, M.D.,

Defendants-Respondents.

Argued March 9, 2016 – Decided March 30, 2017

Before Judges Fuentes, Koblitz and Kennedy.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6613-12.

Jason R. Melzer argued the cause for appellants (Cole Schotz, P.C., attorneys; Mr. Melzer, of counsel and on the brief; Michael R. Yellin, on the brief).

Daniel K. Winters argued the cause for respondents (Reed Smith, LLP, attorneys; Mr. Winters, Shana E. Russo and Cara L. DeCataldo, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Plaintiff Dr. Fariborz Ashtyani's third amended complaint against defendants Critical Care Unit Resources, L.L.C. (CCUR) and Dr. Leon L. Ting alleged breach of contract, wrongful termination, tortious interference, breach of fiduciary duty, unfair competition, and civil conspiracy. After conducting extensive discovery, the matter came before Judge Charles E. Powers on the parties' cross-motions for summary judgment. After considering counsel's arguments, Judge Powers found the core facts underlying plaintiff's cause of action were undisputed. Applying the well-established standard for determining when summary judgment is warranted, Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); Rule 4:46-2(c), Judge Powers granted defendants' motion and dismissed plaintiff's civil action as a matter of law. Judge Powers explained the legal and factual bases for his decision in a Statement of Reasons attached to the order granting defendants' motion.

Plaintiff appeals, arguing Judge Powers erred when he held plaintiff did not present competent evidence showing he was ever a member of CCUR. Plaintiff also argues Judge Powers wrongfully dismissed his remaining claims, which were in large part predicated on his CCUR membership. Defendants argue Judge Powers correctly applied the prevailing version of the Limited Liability Act at the

time, N.J.S.A. 42:2B-21, to conclude plaintiff was never a member of CCUR.

We review a trial court's decision to grant or deny a motion for summary judgment de novo, using the same standards the Law Division used in this case. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). That standard is codified in Rule 4:46-2(c). We are compelled to grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Ibid.

Applying this standard to the record presented by the parties, we are satisfied that there are no disputed material facts and the case is ripe for disposition as a matter of law. Brill, supra, 142 N.J. at 540. In this light, we agree with Judge Powers's legal analysis and affirm substantially for the reasons he expressed in his Statement of Reasons dated December 19, 2014.

I

In late 2009, Dr. F. Ashtyani[1] and Dr. Ting treated patients admitted to the Hackensack University Medical Center's (HUMC)

[1] We identify plaintiff's name with an "F" to distinguish him from his brother, Dr. Hormoz Ashtyani, whom plaintiff's counsel represented as a "Managing Partner" of CCUR.

intensive care unit (ICU) and coronary care unit (CCU). Dr. Ting became aware that HUMC planned to close the ICU and CCU, and that it intended to provide these specialized services through a privately owned and operated medical group. As he explained in his deposition, Dr. Ting discovered HUMC had been in contact with a group called "The Intensivist Group" (TIG) and "had almost given a contract to them . . . to take over the ICU." HUMC engaged TIG as a consultant to provide recommendations for a model of care at the ICU/CCU. TIG recommended "a closed model intensivist program" wherein a single intensivist would be responsible for all patients in the ICU and a single group of intensivists would have "accountability for ICU stewardship and outcomes."

Dr. Ting organized a group of HUMC intensivists to take over services at the ICU. On January 26, 2010, Dr. Ting drafted a letter to Robert Garrett, the President and Chief Executive Officer of HUMC. Dr. Ting intended to communicate the group's interest in providing exclusive 24-hour coverage of the ICU. This "Statement of Intent" stated the following:

> We have been informed of your request for a statement of purpose regarding the institution of a closed 24-hour covered critical care program. We would like to assure you of our strong commitment to this initiative. Pending the necessary logistical and contractual steps, we will begin the program as soon as possible. As a sign of our commitment, we are beginning evening rounds in the intensive care

> units within one week as we finalize plans for 24-hour care. We will implement vigorous quality and performance monitoring within our practice in conjunction and cooperation with HUMC.
>
> HUMC is our professional home. Collectively, our group has served HUMC for many years[.] [O]ur roots in the community run deep. We are already invested in helping HUMC build on its tradition of excellence in patient care. Moving forward will require significant resources, so we hope you will understand our need for assurance from HUMC regarding its commitment to our group's role as exclusive provider o[f] critical care. Our group and HUMC share common objectives. By working together, we will achieve a standard of critical care services of which we will all be proud. Pending affirmation by the hospital, we will have a preliminary operational proposal shortly.

The document was signed by the following physicians: Dr. F. Ashtyani (plaintiff), Dr. Vagram Ovnanian, Dr. Ossama Ikladios, Dr. Deborah Goss, Dr. Robert Lee, Dr. Weekon Choi, Dr. Andrea Isaacs, Dr. Renuka Mapitigama, Dr. Lauren Koniaris, and Dr. Hormoz Ashtyani (plaintiff's brother). According to Dr. Ting, the document's language referenced all of the individuals who signed it.

On January 27, 2010, Dr. Lee sent an email to the physicians who signed the Statement of Intent, informing them that he had set up a limited liability partnership entitled "Critical Care Unit

Resources, LLP" (CCUR).[2] Dr. Lee requested the email recipients to send him their social security numbers "to add names to the company." Dr. Lee noted that at the time, he was the company's "only member" and was thus using his office address as the company's address. Plaintiff provided his social security number the following day. As Dr. Ting explained in his deposition, however, the entity known as Critical Care Unit Resources was not yet formed at this time.

> [T]his was . . . the beginning so we could actually start to negotiate with the hospital as an entity, but prior to all this there was nothing ever set up. There [were] no ground rules set up. There was no working relationship set up.
>
> This was two weeks after hearing that the hospital was going to give this to another group that we said we need to get together and tell the hospital we want to be able to . . . provide the critical care for the hospital.
>
> So in order to kind of negotiate with the hospital, we needed to set this thing up. But there [were] no ground rules set up. There were actually no rules amongst ourselves.

Thereafter, CCUR held several meetings in which the physicians attempted to draft a proposal to HUMC. Dr. Ting confirmed that plaintiff attended most of these meetings and

[2] Although Dr. Lee mentioned in the email that an LLP is "better than" an LLC "for liability reasons," the record shows that CCUR was formed as a limited liability company.

participated in the discussions therein. Dr. Ting also acknowledged that by giving his social security number, plaintiff "expected his name to be added to the company at that time[.]"

The record reflects that CCUR filed as a domestic limited liability company on February 3, 2010. Plaintiff's name is not included in the list of principals or "reported officers/directors[.]" His brother, Hormoz Ashtyani, is listed as a "Managing Member[.]" Dr. Robert Lee is listed as "President[,]" and Dr. Ting as "Vice-President[.]" On February 17, 2010, HUMC approved in-house intensivist coverage in the ICU/CCU.

On April 26, 2010, Dr. Lee sent the following email to all prospective members, including plaintiff:

> Now as far as incorporating goes, those people who are really interested in starting up the corporation need to come to the meeting on Friday or let [Dr. Ting] know. The name of the corporation is registered with the state -- Critical Care Unit Resources, LLC. There is a tax [ID] already.
>
> In order to register with the NJ Division of Revenue, we need to submit the names, SS#, and home addresses of all the members of the corporation. This is serious now. This is so you can all be taxed by the local government of course. This is needed to open the bank account as well. Time to make up your minds.
>
> [(Emphasis added).]

On April 27, 2010, plaintiff responded to Dr. Lee's email as follows: "The next step is to hire a lawyer who is not connected to [any one] of us or the hospital [to] start the process of [creating] a group, participate in our meetings[,] and be involved in formal negotiation with the hospital. There is no short cut." Plaintiff also provided his home address and social security number.

Negotiations between CCUR and HUMC began thereafter and continued until May 2, 2010. HUMC, acting through Dr. Julius Gardin, Chairman of Internal Medicine, and Dr. Peter Gross, Executive Vice President and Chief Medical Officer, sent Dr. Ting a "Letter of Intent" (LOI), which expressed the parties' "mutual desire to work towards a definite agreement . . . with respect to the provision of a 24/7 In-House Intensivist Coverage Program at HUMC (the 'Program') as soon as appropriate infrastructure and staffing is available." Following these prefatory remarks, the LOI described the terms of the agreement. The LOI was drafted in the form of a contract. Pages three and four were dedicated almost entirely to recording the parties' signatures. Immediately following the names and signature lines for HUMC's representatives were the names and signature lines of CCUR's principals. Plaintiff's name and signature line were included to the right of Dr. Ting's name and signature line.

On May 6, 2010, Dr. Lee sent an email to CCUR's principals, including plaintiff, addressing four distinct matters. Item two concerned new hires. Dr. Lee noted that new hires would not be necessary because plaintiff and his brother were both planning to recruit new attending physicians. Dr. Lee noted that these new physicians "may or may [not] be part of the [CCUR] group. That remains to be decided by the current members." Item four of Dr. Lee's email concerned funds to hire "lawyers, accountants, etc." Dr. Lee suggested "$2000 per person[,] which would be $18000 in the account."

Although the parties had not yet finalized the contract's terms with HUMC in May 2010, the physicians agreed to provide temporary night-coverage to the ICU under their own individual contracts with the hospital. Dr. Ting negotiated the terms of this temporary coverage on behalf of the "group" of physicians who agreed to provide night-coverage. Plaintiff did not participate.

In an email dated May 12, 2010, Dr. Lee asked each prospective member (including plaintiff) to contribute $2000. He asked the recipients to make the checks payable to "Critical Care Unit Resources, LLC." He ended the email with the following statement: "Hopefully, we can get an attorney soon." On May 24, 2010, Dr. Lee sent another email to the members of the LLC, again asking them to contribute $2000. Dr. Lee listed six items for discussion

in the email, including the total number of people who should participate in the LLC. He noted: "[W]e [don't] want to have [an] unlimited number of people as then no one will make any money[.]" Plaintiff did not contribute the $2000 or any other sum of money. The record is not clear as to whether all of the remaining physicians contributed money. Plaintiff gave the following explanation for his failure to contribute:

> Q. At any point did you go up with checkbook in hand and say[,] ["H]ere's my $2,000[;] what's going on?["]
>
> A. [If] [a]t any point they said[,] ["O]kay, we need the money now[;] we know what we are doing,["] absolutely. I was never given that opportunity. If you find a check date and things, [it] was not that time.
>
> Q. But in your mind[,] if you were a member of the group and you were aware that the group needed money to retain a lawyer, you never thought to inquire as to the status of that lawyer?
>
> . . . .
>
> A. If we know, yes. If we know who the lawyer is that was what they were supposed to do. They didn't share with me any information about that. As far as I know, nobody else gave that money or told me "Look, I'm giving $2,000. Where is yours?" I was totally cut off from the information, never got an opportunity[,] and I don't think as far as I know at that time anybody gave any money to that account.

On May 28, 2010, Dr. Lee sent an email stating that he and Dr. Ting had done "most of the work in setting up the corporation and corporate accounts[.]" Dr. Lee noted that the group "need[ed] to nominate 3 officers and have them facilitate the decision making process. The democratic system is not working and we feel a republic (where we vote on our representatives who then make the decisions) may be more effective given the time limitations that face us." On June 3, 2010, Dr. Lee sent a second email providing notice of the meeting that would occur on the following day. As Dr. Ting explained during his deposition, the June 4, 2010 meeting was intended for the LLC's members to adopt bylaws and set up a system to make decisions on contracts, billings, and ownership.

On September 12, 2010, Dr. Ting sent an email to Dr. Julius Gardin (HUMC Chairman of Internal Medicine), Dr. Peter Gross (Executive Vice President and Chief Medical Officer), and the prospective CCUR members. Dr. Ting attached "a draft of all of the terms which have been discussed and agreed upon by the majority over the last three months." Of particular importance, Dr. Ting informed the email's recipients as follows:

> As time is running very short, please e-mail me with your acceptance of the terms by Monday, Sept. 21st[,] [2010]. If I don't hear from you by this time, I will assume you are not interested in proceeding with the terms agreed upon by the majority, and the group will proceed with the formation of the

> corporation involving only the interested parties.

On September 12, 2010, plaintiff emailed Dr. Ting expressing his concern about certain proposed terms and recommended changes. Dr. Gardin responded directly to plaintiff the next day in an attempt to convince plaintiff that the terms were fair and worthy of his acceptance. On September 15, 2010, Dr. Ting sent plaintiff the following email:

> We have had this discourse before and the majority of us agree with the above plan. I need to know by Monday if you want to join this, but I will not have any further discussion about this. I am disappointed that you think that it is within reason to have a critical care group without each member having the basic accreditation in the field.

The other physicians agreed to the terms expressed in Dr. Ting's email. On October 13, 2010, Dr. Ting, Dr. Ovnanian, Dr. Lee, Dr. Isaacs, Dr. Choi, and Dr. Hormoz Ashtyani met to discuss the situation. The minutes of this meeting memorialized the decisions of the members:

> [Plaintiff] had expressed a desire to Dr. Ting that he would like to return to the group. After an intense discussion on the matter and a majority vote, it was decided that the group did not favor Dr. F. Ashtyani being part of the group once again. The main reasons for this decision was Dr. F. Ashtyani['s] disruption of group meetings and group dynamics; his unwillingness in the past to work as a team player; and his lack of credentials -- this physician is not board

> certified in critical care which is a leapfrog requirement. There were also some concerns that this physician has misrepresented himself in regards to his training and credentials on the [I]nternet. Dr. Ting will inform Dr. F. Ashtyani of the final decision. Dr. Ting will also tell Dr. F. Ashtyani that he is free to negotiate his own contract with the hospital to provide critical care coverage for 1/6 weeks as a separate entity.

According to Dr. Lee, there was no formal vote on whether to remove plaintiff. Dr. Choi stated during his deposition that the vote to terminate plaintiff was not unanimous. Dr. Mapitigama testified that he voted against plaintiff's termination.

On December 3, 2010, CCUR entered into a professional services agreement with HUMC. CCUR's list of members did not include plaintiff. Once the parties finalized their contract, the hospital closed the CCU. According to Dr. Ting, this is when CCUR began operating. CCUR did not adopt formal bylaws until January 2014.

II

As stated earlier, we review a trial court's summary judgment ruling de novo. Globe Motor Co., supra, 225 N.J. at 479. Plaintiff argues that the trial court erred when it determined he was not a member of CCUR. According to plaintiff, evidence of his CCUR membership includes: (1) emails that acknowledged his participation in the group of physicians who formed CCUR; (2) his inclusion as a signatory in the May 2, 2010 Letter of Intent; (3)

his inclusion in Dr. Lee's May 6, 2010 email addressed to CCUR's "members[;]" (4) CCUR meeting notices sent to him on May 28, 2010 and June 3, 2010; and (5) Dr. Ting's admissions recognizing him as a CCUR member.

Plaintiff argues this evidence constitutes CCUR "records" within the meaning of the LLC Act in effect at the time. In relevant part, the former LLC Act provided as follows:

> a. In connection with the formation of a limited liability company, a person acquiring a limited liability company interest is admitted as a member of the limited liability company upon the later to occur of:
>
> > (1) The formation of the limited liability company; or
> >
> > (2) The time provided in and upon compliance with the operating agreement or, if the operating agreement does not so provide, when the person's admission is reflected in the records of the limited liability company.
>
> [N.J.S.A. 42:2B-21(a) (emphasis added).]

After formation, a person becomes a member when acquiring a direct interest "at the time provided in and upon compliance with the operating agreement or, if the operating agreement does not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company[.]" N.J.S.A. 42:2B-21(b)(1) (emphasis added). The term

"'[l]imited liability company interest' means a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets." N.J.S.A. 42:2B-2. The key question in this matter is whether the motion judge erred in determining plaintiff's membership is not demonstrated in CCUR's "records[.]" See N.J.S.A. 42:2B-21(a)(1), (b)(1). Notably, the former act does not define "records[.]"[3]

The motion judge found the operating agreement was the controlling document. Thus, the emails and other items were not records of the LLC. The judge further concluded plaintiff failed to show he was in compliance with the operating agreement. Plaintiff argues the evidence he presented constituted CCUR's "records" under the former LLC Act. He maintains the motion judge erred by failing to consider the parties' interactions up to the time when CCUR and HUMC formally entered into a professional services contract. Furthermore, plaintiff urges us to define "records" using its ordinary meaning.

Pursuant to the former Act, an LLC "is formed at the time of the filing of the initial certificate of formation in the office

[3] The Legislature corrected this oversight in the revised Act by defining a record as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." N.J.S.A. 42:2C-2.

of the Secretary of State or at any later date or time specified in the certificate of formation if, in either case, there has been substantial compliance with the requirements of" the statute. N.J.S.A. 42:2B-11(b). There is no dispute as to the date of formation; the record shows the date of filing was February 3, 2010. Nor do the parties dispute that the provisions of the Act would be applicable to CCUR until an operating agreement effected a contrary provision. See Kuhn v. Tumminelli, 366 N.J. Super. 431, 440 (App. Div.), certif. denied, 180 N.J. 354 (2004). Whether plaintiff was in compliance with the operating agreement is of no moment because the determinative questions are whether the items plaintiff has offered constitute the LLC's "records" and whether they establish plaintiff's admission.

"When called on to interpret a statute, courts must examine the plain language of the law and give effect to the words the Legislature used." Gilleran v. Bloomfield, 227 N.J. 159, 184 (2016) (citations omitted). We must "ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation as a whole[.]" DiProspero v. Penn, 183 N.J. 477, 492 (2005) (citations omitted). The former LLC Act "is to be liberally construed to give the maximum effect to the principle of freedom

of contract and to the enforceability of operating agreements." N.J.S.A. 42:2B-66.

There is no question that the former Act permitted an LLC to "maintain its records in other than a written form if such form is capable of conversion into written form within a reasonable time." N.J.S.A. 42:2B-25(d). The term "record" in this context can be defined through its ordinary meanings: "1. [a] documentary account of past events . . . designed to memorialize those events; 2. [i]nformation that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." Black's Law Dictionary 1387 (9th ed. 2009). We thus conclude the motion judge erred in declaring that the emails and the Statement of Intent did not constitute CCUR's "records[.]"

However, accepting these writings as "records" does not mean plaintiff was ultimately admitted as a member of CCUR. The emails show that membership in CCUR was an ongoing discussion until September 2010. The emails exchanged between CCUR members reference meetings involving the LLC's possible corporate structure. Some of the emails requested the requisite financial contributions and information from potential members. It was only in Dr. Ting's September 12, 2010 email that the final request for acceptance of the operating agreement's terms was offered to those

wishing to become members. At this critical point, the record shows plaintiff requested a number of material changes to the terms and withheld his unequivocal acceptance. In fact, it is uncontroverted that plaintiff did not accept the terms agreed upon by a majority who voted to form the company.

Because plaintiff failed to establish he was a member of CCUR, his arguments claiming he was wrongfully expelled from the company are rendered moot. Plaintiff's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Defendants were entitled to summary judgment as a matter of law.

Affirmed.