IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

DONALD F. MANCHEL, ESQUIRE Individually and as a liquidating partner of MANCHEL, LUNDY & LESSIN	: DECEMBER TERM, 1999 : No. 1277
v.	:
ROBERT HOCHBERG, JOHN HAYMOND HAYMOND, NAPOLI & DIAMOND, P.C., and MARVIN LUNDY	: Superior Court Docket : No. 852EDA2000

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O P I N I O N

SHEPPARD, JR., J. …… March 31, 2000

This Opinion is submitted in support of this court's Order of February 23, 2000, denying the Preliminary Objections of defendant, Marvin Lundy. For the reasons stated, this court's Order should be affirmed.

Factual and Procedural History

Plaintiff, Donald Manchel ("Manchel"), and defendant, Marvin Lundy ("Lundy"), were partners in the law firm of Manchel, Lundy and Lessin ("ML&L"). The firm dissolved. The distribution of files and apportionment of fees are governed by a written dissolution agreement ("Agreement"). The Agreement provided for an arbitrator, Judge Leon Katz (Ret.), and gave him jurisdiction over disputes concerning the files and fees.

After the ML&L dissolution, Lundy formed a new law firm (Haymond & Lundy) with defendants Haymond and Hochberg and took with him some of the ML&L files. Manchel retained a financial interest in those files. Subsequently, the Haymond & Lundy firm also dissolved. That dissolution is the subject matter of a federal lawsuit in the Eastern District of Pennsylvania, presided over by Judge Norma Shapiro. Manchel is not a party in that federal lawsuit.

When Haymond & Lundy dissolved, Haymond took some of Lundy's ML&L files with him to his new firm, defendant Haymond, Napoli & Diamond.[1] Those files that Haymond, Napoli & Diamond, Haymond, and/or Hochberg (together, the "Haymond defendants") control -- and over which the arbitrator has no jurisdiction -- are the subject matter of this injunction action.

Manchel filed a complaint in equity and a Petition for Preliminary Injunction on December 13, 1999. Because the Haymond defendants are not signatories of the Agreement, Manchel alleges that he has no adequate legal remedy for protecting his interest in the former ML&L

[1]Apparently, defendant Hochberg is no longer practicing law or is practicing law in Connecticut.

files that the Haymond defendants now control. Manchel requested the following relief:

1. An accounting by all defendants as to status of the former ML&L files now controlled by the Haymond defendants, including fees, costs and litigation status.
2. A declaration that the arbitrator has jurisdiction over disputes concerning those files.
3. The imposition of a lien in favor of Manchel on those files.
4. The establishment of an escrow account for the deposit of all fees and costs collected on those files.

Since the arbitrator, Katz, has jurisdiction to determine the rights of Manchel and Lundy, only, with respect to the ML&L files, and Judge Shapiro has jurisdiction to determine the rights between Lundy and (at least some of) the Haymond defendants but has no jurisdiction over Manchel, Manchel argues that he has no way of protecting his rights in any ML&L files now controlled by the Haymond defendants. Subjecting the Haymond defendants to the arbitrator's jurisdiction would purportedly protect Manchel's rights as to any prior ML&L files now under the control of the Haymond defendants.

This court has not yet acted upon Manchel's Petition for a Preliminary Injunction.

On January 4, 2000, Lundy filed preliminary objections, raising three issues: (1) the existence of the Agreement, (2) a lack of subject matter jurisdiction based on the pending federal action, and (3) insufficient specificity of the pleading. On February 23, 2000, this court overruled the preliminary objections. On March 9, 2000, Lundy filed this appeal.

Discussion

Lundy asserts two bases for the Superior Court's jurisdiction.[2] First, it is the court's understanding that Lundy claims that he appeals as of right from the court's order granting or denying an injunction. Pa.R.App.P. 311(a)(4). Because this court has not acted upon Manchel's

[2]See cover letter, dated March 9, 2000 and attached as Appendix "A".

Petition for a Preliminary Injunction, Lundy's appeal on this ground is premature and of no consequence.

Second, Lundy asserts that he appeals as of right from the court's Order denying Lundy's right to arbitration. Pa.R.App.P. 311(a)(8) (orders made appealable as of right by statute); 42 Pa.C.S.A. § 7320(a) (making orders denying arbitration appealable as of right); Midomo Co. v. Presbyterian Housing Development Co., 739 A.2d 180, 184 (Pa. Super. 1999) (holding that an order denying a preliminary objection alleging alternative dispute resolution is an interlocutory order appealable as of right pursuant to Pa.R.App.P. 311(a)(8)).

In his preliminary objections, Lundy moved to dismiss the complaint under Rule 1028(a)(6) based on the existence of the Agreement between Lundy and Manchel. "'An agreement to arbitrate a dispute is an agreement to submit oneself as well as one's dispute to the arbitrator's jurisdiction.'" Midomo, 739 A.2d at 186, quoting Smith v. Cumberland Group. Ltd., 455 Pa. Super. 276, 687 A.2d 1167, 1171 (1997). Whether an arbitrator has jurisdiction over a particular dispute is a question for the trial court, and not for the arbitrator. Gaslin, Inc. v. L.G.C. Exports, Inc., 334 Pa.Super. 132, 482 A.2d 1121 (Pa.Super. 1984) (stating that whether a party consented to arbitrate a particular dispute is a jurisdictional question that must be decided by the trial court, not the arbitrator). Therefore, "'[w]hen one party seeks to prevent another from proceeding to arbitration, judicial inquiry is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration provision.'" Midomo Co., 739 A.2d at 186, quoting Smith, 455 A.2d at 1171. In Midomo, the Superior Court held that this inquiry applies to the consideration of a preliminary objection under Rule 1028(a)(6) alleging the existence of an agreement for alternative dispute resolution. Midomo, 739 A.2d at 184, 187.

Applying Midomo, this court submits that Lundy has failed to satisfy either prong of the test.

Initially, the court notes that Lundy has not provided the court with a copy of the Agreement -- it was not attached to the Objections nor was it marked at the pertinent hearings. Rule 1019(h) states that:

> A pleading shall state specifically whether any claim or defense set forth therein is based upon a writing. If so, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing.

Pa.R.Civ.P. 1019(h).

Lundy based his primary objection on the "written dissolution agreement" between Lundy and Manchel. Preliminary Objections, ¶ 8. Lundy neither attached the Agreement, nor alleged that the Agreement is not accessible to him. Instead, Lundy quoted selected provisions from that Agreement in his pleadings, and his counsel read from or described selected provisions of the Agreement at the January 4, 2000 hearing. At the hearing, counsel for Lundy stated that the Agreement was not attached to the pleadings because it is "confidential." (1/4/00, N.T. 7). The failure to attach the Agreement, in and of itself, is a sufficient basis for overruling the preliminary objections. Cooke v. Equitable Life Assur. Soc., 723 A.2d 723, 727 (Pa.Super. 1999).[3]

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[3]This court acknowledges that it did not insist upon the submission of a copy of the Agreement. Nonetheless, common sense and courtesy should dictate that if Lundy is relying on the Agreement to put Manchel out of court, a copy of the Agreement should have been made a part of the record. Indeed, as the Cooke court noted, "we are severely hampered in our analysis, however, by appellant's failure to place anywhere in the record a single copy of the document they so heavily rely on". Cooke, 723 A.2d at 727.

As to the "confidentiality" of the Agreement, there are ways of maintaining that condition with respect to materials submitted to a court during litigation.

However, this court need not rely on this prophylactic basis to justify its decision. The application of the Midomo test to the provisions of the Agreement, as described in the pleadings and at the hearings, demonstrates that Lundy has failed to satisfy either prong. First, there is no valid arbitration agreement between these parties as to these issues. "It is a well established principle of law that a contract cannot impose obligations upon one who is not a party to the contract." Juniata Valley Bank v. Martin Oil Co., 736 A.2d 650, 663 (Pa.Super. 1999); Marshall v. Port Authority of Allegheny County, 524 Pa. 1, 568 A.2d 931 (1990). The Haymond defendants have not agreed to submit themselves to arbitrator Katz's jurisdiction and cannot be made to do so. See Complaint, ¶ 8; Preliminary Objections, ¶ 9; Schoellhammer's Hatboro Manor, Inc. v. Local Joint Executive Bd. of Philadelphia, 426 Pa. 53, 231 A. 2d 160, 164 (1967) (holding "that arbitration, a matter of contract, should not be compelled of a party unless such party, by contract, has agreed to such arbitration . . ."); Cumberland-Perry Area Vocational Technical School Authority v. Bogar & Bink, 261 Pa. Super. 350; 396 A.2d 433, 435 (1978) (stating that "persons cannot compel arbitration of a disagreement between or among parties who have not contracted to arbitrate that disagreement between or among themselves.").

Requiring Manchel to arbitrate matters pertaining to the files under control of the Haymond defendants with Lundy alone would be pointless. The arbitrator cannot make determinations affecting the Haymond defendants' rights and cannot compel the Haymond defendants to submit to an accounting or to distribute funds to anyone, including Manchel. It is the arbitrator's inability to require anything of the Haymond defendants and his inability to focus any ruling on the files held by the Hammond defendants that has led to this action. See Framlau Corp. v. Kling, 233 Pa. Super. 175, 334 A.2d 780, 782 (1975) (holding that a defendant who is not a party to an arbitration agreement cannot be compelled to arbitrate under that agreement, and

that the only remedy against that defendant is a suit in a court of competent jurisdiction). See also School District of Philadelphia v. Livingston-Rosenwinkel, P.C., 690 A.2d 1321, 1323 (Pa.Cmwth. 1997) (overruling preliminary objections asserting the existence of an arbitration agreement where one of the three parties to the suit was not a party to the arbitration agreement, and the suit involved issues outside of the arbitration agreement).

Second, disputes between Manchel and the Haymond defendants with respect to files which Lundy originally controlled are not within the scope of the arbitration Agreement. Based on those excerpts from the Agreement that Lundy provided in his pleadings and at the hearings, the Agreement concerns only disputes between Manchel and Lundy. The Agreement does not extend to disputes between Manchel and the Haymond defendants or between Lundy and the Haymond defendants.

Counsel for Lundy acknowledged in court that the Agreement does not extend to the Haymond defendants or to any present or future disputes relative to the ML&L files that the Haymond defendants control. Discussions with this court at hearings on January 4 and January 18, 2000 centered on the arbitrator's lack of jurisdiction over the Haymond defendants, and what to do about that lack of jurisdiction. At the hearing on January 4, the parties discussed having the Haymond defendants sign onto the Agreement, such that the arbitrator would have jurisdiction over the Haymond defendants with regard to disputes arising from the ML&L files that the Haymond defendants control. The court's discussions with counsel for Lundy make clear their acknowledgment that the arbitrator has no jurisdiction over the Haymond defendants and the files at issue:

> MR. THALL: I have no objection to these gentleman joining in front of the proceedings in front of Judge Katz . . . . We would be thrilled and delighted were Judge Katz to have the same powers over Haymond, Napoli and Diamond that he

has over Mr. Manchel on the one hand and Mr. Lundy on the other hand with respect to those cases that each had on the dissolution of Manchel, Lundy and Lessin.

THE COURT: And that are now with these Haymond people.

MR. THALL: Sure. My only concern is the question of overlapping jurisdictions [of the federal and state courts], but that's not my problem. From a practical standpoint it matters not.

THE COURT: And Haymond, Napoli and Diamond just want the right to ask for the same accounting; is that correct?

MR. BERNSTEIN: Your Honor, here is the problem, if we can cut through all of this.

THE COURT: I think you should just go to Judge Katz with an agreed upon order that says, all parties, and counsel representing all parties, agree Judge Katz may focus on[,] or has jurisdiction over[,] or his binding right to be an arbitrator extends to[,] those files which were at one time Manchel, Lundy and Lessin files that are now Haymond, Napoli and Diamond files and there's a mutuality of obligation of rights ---

MR. THALL: And for the purposes of accounting. We're fine with that, Judge.

(1/4/00, N.T. 21, 26-28).

Two weeks later, however, counsel was unwilling to consent to extending the arbitrator's jurisdiction over the Haymond defendants:

THE COURT: If the Manchel attorney and Manchel and Haymond, Napoli, Diamond people and Mr. Bernstein work something out to make less apprehensive their future right as to all this money, are you going to agree or not?

MR. THALL: It depends what the agreement is, sir. If it's just here are the cases; here is a list of the cases.

THE COURT: No, no. It's probably going to be under Judge Katz, if that's what they get.

MR. THALL: I don't know what that means, sir. I do not believe that we ever agreed or nor would we agree that Judge Katz can issue orders on their behalf with respect to the monies.

THE COURT: If it has to do with their money.

MR. THALL: No. That they can have an accounting, the same accounting rights.

THE COURT: Suppose that accounting makes clear that they're due some money.

MR. PICKER: It can't.

THE COURT: Then you're safe aren't you?

MR. THALL: No.

THE COURT: If something is impossible to agree to, what do you give away?

MR. THALL: We give away the fact that we're in two forums when all of this is in front of Judge Shapiro. And I don't want, nor would you, sir --

THE COURT: You wouldn't have a third forum if you agree. I'm going to go away and do other work.

MR. THALL: No, we're in front of Judge Katz.

THE COURT: What?

MR. THALL: Then we're in front of Judge Katz with an issue that is not in front of him which is solely in front of Judge Shapiro.

> THE COURT: I thought you agreed last week that you just had to amend that one long paragraph [in the Agreement] so that he would be able to focus on those files also.
>
> MR. THALL: What I said was rights to an accounting, Your Honor. I did not say and I specifically refrained from saying or agreeing to any order from Judge Katz dealing with the distribution. What I said was, if you read the transcript I even quoted from the section of the agreement, Your Honor.

(1/18/00, N.T. 54-59).

Whatever the reason for counsel's change of heart, two basic understandings underlay both days' discussions: 1) that the arbitrator has no jurisdiction over the Haymond defendants and the ML&L files that they now control, and 2) that Lundy's consent is a prerequisite to the arbitrator's gaining that jurisdiction.

As acknowledged by counsel for Lundy, disputes involving the Haymond defendants and the ML&L files that they control are not within the scope of the arbitration agreement. And yet, this is the very subject matter of this lawsuit. This court questions the reasoning and motives implicated by Lundy's counsel when they acknowledge the arbitrator's lack of jurisdiction yet, at the same time, urge that the complaint be dismissed on the ground that a valid arbitration agreement exists.

Conclusion

In summary, based on the foregoing this court respectfully submits that its Order of February 23, 2000, denying Lundy's Preliminary Objections should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

MAURICE ROMY, M.D.,	:	DECEMBER TERM, 1999
RIVERSIDE MEDICAL CENTER, P.C.,	:	
ALLEGHENY PAIN INSTITUTE, P.C.,	:	
RMC NORTH ASSOCIATES, P.C.,	:	
SPINE CENTER-Northfield Division, P.C.,	:	
SPINE CENTER Lehigh Valley, P.C., and	:	
RIVERSIDE MEDICAL SERVICES CORPORATION	:	
Plaintiffs	:	
	:	
v.	:	NO. 0752
	:	
AMERICAN LIFE CARE, INC.,	:	
L-FOUR FIVE, LLC., TSC MANAGEMENT OF PENNSYLVANIA, INC.,	:	
WARREN H. HABER,	:	
JOHN L. TEEGER, and	:	
ERIC D. ROSENFELD	:	Control Number: 120723
Defendants	:	

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FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION IN SUPPORT OF ORDER DENYING THE PETITION FOR A PRELIMINARY INJUNCTION

Sheppard, Jr., J. ..... March 7, 2000

This court denies the Petition for a Preliminary Injunction, primarily on the ground that plaintiffs/petitioners have failed to demonstrate that such denial will result in immediate and irreparable harm.

The court submits the following Findings of Fact and Conclusions of Law in support of

its contemporaneous Order embodying the denial of the request for injunctive relief.

FINDINGS OF FACT

1. Plaintiffs, Maurice Romy, M.D. ("Dr. Romy") and Riverside Medical Center, P.C., Allegheny Pain Institute, P.C., RMC North Associates, P.C., Spine Center-Northfield Division, P.C., Spine Center Lehigh Valley, P.C. ("Romy PCs") and Riverside Medical Services Corporation ("RMSC"), filed a Petition seeking a Preliminary Injunction as a result of a dispute concerning a complex Asset Transfer Agreement.

2. Plaintiffs also filed a Complaint against Defendants American Life Care ("ALC"), L-Four Five, LLC ("LFFC"), TSC Management of Pennsylvania, Inc. ("TSC"), Warren Haber, John Teeger and Eric Rosenfeld, seeking monetary damages, rescission of their agreements and an order enjoining ALC from continuing to collect and retain the accounts receivable of the Romy PCs. Defendants Haber, Teeger and Rosenfeld are the officers of LFFC and the Founders' Group. (1/19/2000; N.T. 66 ("N.T.").

3. In their Petition for a Preliminary Injunction, Plaintiffs assert that Defendant ALC "continues to collect and disburse funds from liquidation of the accounts receivable of the Romy PCs despite the fact that said receivables are the lawful property of the Romy PCs and not ALC." (Petition at ¶ 2).

4. The specific relief that Plaintiffs seek in their proposed order[4] is:

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[4]In the "wherefore"clause of their Petition for Preliminary Injunction, Plaintiffs ask this court to enter the Order in the form proposed.

1. Defendant ALC is ordered immediately to cease and desist from disbursing any funds collected from liquidation of the accounts receivable of the Romy PCs;

2. Defendant ALC is ordered to make a written accounting of monies received by defendant ALC from the Romy PCs after May 1, 1998.

5. A hearing was conducted on January 19, 2000. The following facts were adduced at that hearing.

6. In May 1998, the Plaintiffs entered into an agreement, entitled the Amended and Restated Asset Transfer Agreement ("Second Agreement"), with Defendant ALC that replaced an earlier agreement entered into in April 1997.[5] (Plaintiffs' Exhibit P-1).

7. Pursuant to the Second Agreement, ALC was to purchase and lease certain assets of the Romy PCs. (See Complaint & Answer, ¶ 29). The Romy PCs and RMSC, [6] in exchange, would receive 15% of ALC's shares issued and outstanding of common stock. (P-1, ¶ 2.1(a)). The "Purchased Assets" were to be transferred subject to liens of the PNC Bank. (P-1, ¶ 1.1(b)). The Second Agreement also provided that Dr. Romy, as "Stockholder," would fund a "Stockholder Working Capital Loan" in an amount not to exceed $1,230,000 during the period between the May 1998 closing and the anticipated IPO. (P-1, ¶ 5.11(d)).

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[5]The Second Agreement closed by mail on May 29, 1998, but was effective as of May 1, 1998. (N.T. 28).

[6] The Second Agreement refers to the Spine Center-Northfield Division, P.C., Riverside Medical Center, P.C., Allegheny Pain Institute, P.C., RMC North Associates, P.C. and the Spine Center-Lehigh Valley, P.C. collectively as the "PCS"; it then refers to these entities and Riverside Medical Services Corporation ("RMSC") as the "SC Companies". (See P-1 at 1). In their Petition, however, Plaintiffs refer to the first five entities as the "Romy PCs" and their Complaint characterizes Riverside Medical Services as the management company for the "Romy PCs". (Complaint, ¶ 11). For consistency, therefore, references in the Second Agreement to the "SC Companies" will be presented in this opinion as the "Romy PCs and RMSC".

8. Various documents were presented at the time of the closing of the Second Agreement. Included among these documents were the Officer's Certificate by the Founders' Companies, the Billing and Collection Agreement and the Stockholders Agreement. (See Plaintiffs' Exhibits P-2, P-3, and P-4, respectively).

9. Pursuant to the Second Agreement, an initial public offering ("IPO") was contemplated to take place in May 1999. The Romy PCs were to receive $1,500,000 from the proceeds of the completed IPO. These proceeds were designated to satisfy and discharge all outstanding PNC Debt, and the Stockholders Working Capital Loan. (P-1, ¶¶ 1.1(a); 2.1(a); 5.9 and 5.11(e)). The IPO has not yet occurred, nor does the present record reflect when, if ever, it will take place. (N.T. 152).

10. Prior to May, 1998, Dr. Romy owned one hundred percent (100%) of RMSC which was the management company for the Romy PCs. (N.T. 38; Complaint at ¶¶ 11; 18-23). The Romy PCs are professional corporations engaged in the business of providing medical services to patients. (Complaint at ¶¶ 6-11).

11. Defendant ALC is a Delaware corporation with its principal place of business in Philadelphia. It is engaged in the business of owning, managing and financing medical practice centers within the Commonwealth of Pennsylvania. (Complaint & Answer at ¶¶ 5;12). Generally, ALC is not an operating company that would have bills to pay in its daily functions. (N.T. 31; 127-128).

12. Defendant TSC Management acts as the operating and management company of the new Spine Center PCs, which are, respectively, the Spine Center-Northfield Division, P.C. and the Spine Center Lehigh Valley, P.C. ("Spine Center PCs"). (Complaint & Answer at ¶ 14;

N.T. 60; 118; 128).

13. Defendant LFFC was to act as the venture capital entity and investment vehicle that would fund ALC's acquisition of Plaintiffs' assets. (Complaint at ¶ 13; N.T. 38).

14. The Second Agreement required LFFC to pay $1,000,000 to ALC for the remaining 85% of its common stock at the closing of the transactions contemplated by the agreement. The Officer's Certificate, signed on May 29, 1998, represents that the Founders Companies have complied in all material respects with all covenants and conditions required by that agreement. (See P-1, ¶ 5.8; P-2; N.T. 11). The parties disagree on whether LFFC paid $1,000,000 to ALC at the closing. (See Complaint & Answer, ¶ 75). This issue, however, is not dispositive in considering the Plaintiffs' requested relief involving the accounts receivable.[7]

15. The Second Agreement required Dr. Romy to keep the PNC Debt current pending the contemplated IPO in May of 1999. (P-1, ¶ 5.11(a); N.T. 15). Dr. Romy was also obligated to lend or cause the Romy PCs to lend from the proceeds of the accounts receivable up to

[7]The Plaintiffs contend that the $1,000,000 payment was never made while Defendants argue that the money was placed into an account used for the benefit of ALC. Defendant Teeger testified that $1,200,000 was raised and put into an escrow account. Approximately $908,000 after expenses was disbursed out of the $1,200,000 and placed into an account in LFFC's name. From May of 1998 until September of 1999, a certain percentage of the $908,000 was then split in various payments between an ALC account and an LFFC account; both accounts were located at Chase Manhattan Bank and were allegedly used as if one account. Defendants attribute the percentage split to certain monies going to merger and acquisition (M & A) and IPO expenses and certain monies going to the costs of the transaction. (N.T. 68-99). Under the Stockholders Agreement, negative covenants prohibited payment of compensation or advances to the Founders Group other than fees and reimbursements. (P-4, ¶ 2). By splitting the disbursements, Defendants contend they did not violate these covenants. (N.T. 91-99). See also Defendants' Exhibits 1-3c and Plaintiffs' Exhibits 6-7 (listing computer-generated statements that purport to show disbursements made out of 2 bank accounts, but are neither authentic bank statements nor canceled checks).

$1,230,000, which represented the Stockholder Working Capital Loan. (P-1, ¶ 5.11(d)).

16. The method of financing of this Working Capital Loan and the PNC Debt is set forth in the Billing and Collection Agreement. (See P-3, ¶ 3). It provides that money due on the accounts receivable of the SC Companies[8] would be collected by TSC[9] and deposited into a single joint account with a bank or other financial institution. The Billing and Collection Agreement provides that only Dr. Romy or his designee has authority to make withdrawals which were required to be applied to repayment of PNC debt until it had been paid in full. (Id). However, Plaintiffs' own witness, Aiden Flatley, who is an accountant employed by Dr. Romy, testified that despite this agreement (P-3) "there had always been a lock box system" in effect. (N.T. 116). An account was never established that only Dr. Romy could draw upon. (N.T. 129).

17. Under this lock box system, money was deposited into an account in the name of Riverside Medical Center, which was owned by Dr. Romy. (N.T. 129-131). TSC would write out the checks and pay off the PNC Debt; debt upon which only Dr. Romy was liable as the sole owner of Riverside Medical Center. (Id). The money in the account was partly derived from the older accounts receivable of the Romy PCs and partly from the new receivables of the Spine Center PCs. (Id). In his testimony, Mr. Flatley conceded that "the TSC Management controlled the checking account that was in the name of Riverside Medical Center." (N.T. 131). After making payments on the PNC debt, TSC would use a proportion of the monies to pay the

[8]"SC Companies" in the Billing and Collection Agreement refers to the Spine Center-Northfield Division, P.C.; Riverside Medical Center, P.C., Allegheny Pain Institute, P.C., RMC North Associates, P.C. and the Spine Center-Lehigh Valley, P.C.

[9]The Billing and Collection Agreement refers to the "Manager" which is TSC in this instance.

operational costs of TSC not to exceed the amount of the Stockholders Working Capital Loan, pursuant to the Second Agreement. (N.T. 131-132).

18. The parties eventually recognized that they could not complete the IPO before the one year anniversary of the closing date of the Second Agreement. Thus, in January 1999, they entered into a third agreement, entitled the Amendment to the Amended and Restated Asset Transfer Agreement ("Third Agreement"). Under the Third Agreement, Dr. Romy's obligation to fund the Working Capital Loan through the liquidated accounts receivable increased to $1,840,000.[10] (Plaintiffs' Exhibit P-5, ¶ B, amending subsection (d) of ¶ 5.11). In exchange, the Romy PCs and RMSC [11] would receive an additional 3% of the issued and outstanding shares of ALC's common stock. (Id. at ¶ 2). The Third Agreement also provided that if the new Spine Center PCs required additional working capital during the pre-IPO period, the PCs and ALC agreed that they would mutually be responsible for a certain proportion of the necessary advances. (Id. at ¶ B).

19. Under the Third Agreement, the PNC Debt was refinanced with the HCR Pool III Funding Corporation ("HCR") pursuant to a new Loan and Security Agreement. (P-5 at 1-2). The obligation of Dr. Romy on the PNC Debt was extinguished by the refinancing arrangement and transferred to HCR. (N.T. 135).

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[10]Although, the Agreement contains a typographical error where it lists the new figure as $1,480,000, Plaintiffs' Exhibit P-10, the Promissory Note, lists the correct amount of the loan.

[11] The Third Agreement refers to the "SC Companies," which represents the Romy PCs and RMSC. (P-5 at 1). See note 2, *supra*.

20. Under the new financing arrangement, the lock box system remained in place whereby TSC would collect the liquidated accounts receivable from both the old Romy PCs and the new Spine Center PCs and deposit them in the lock box. The funds would then be applied to two new loans. One loan was a term loan of $1,500,000, of which Dr. Romy through Riverside Medical Center and TSC are the borrowers.[12] (N.T. 133-135). The second loan is the revolving line of credit under which the bank decides to lend money to the new Spine Center PCs on a periodic (weekly) basis, depending upon a formula that consists of taking a percentage of the "eligible receivables," which are those receivables acquired within ninety days or less, along with the current financial stability of the company. (N.T. 137-141). The bank and TSC developed this formula. Dr. Romy had nothing to do with its computation. (N.T. 122).

21. As of December 1999, Dr. Romy had fully funded the Stockholder Working Capital Loan of $1,840,000 as required by the Third Agreement. (Plaintiffs' Exhibits P-8 and P-9; N.T. 111-112; 141-143). Plaintiffs' accountant, Aiden Flatley, calculated that Dr. Romy exceeded his obligation on the $1,840,000 Working Capital Loan by $517,000, while he interpreted documents produced by the defendant companies as calculating the excess to be $388,000. (N.T. 109-112; 115). The parties dispute the extent that Dr. Romy has exceeded his obligation on the Working Capital Loan. This amount has yet to be determined.

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[12]Both the accounts receivable of the old Romy PCs and the new Spine Center PCs would be applied to the term loan on a periodic basis. (See N.T.133-135). However, only the accounts receivable of the new Spine Center PCs are calculated in the formula for the revolving line of credit. (N.T. 137-141). The old Romy PCs serve as the guarantee or collateral for the line of credit. (N.T. 116-117, 133).

22. Despite having exceeded his obligation on the Working Capital Loan, Dr. Romy remains liable on the HCR debt, because he had pledged the receivables of the Romy PCs as collateral to guarantee the term loan and the revolving line of credit. Only Dr. Romy is personally liable on this debt. (N.T. 116-118).

23. Plaintiffs did not join the finance company and/or bank as parties to this action. The agreement with the bank that pledges the receivables as security for the new loans is also not before the Court.

24. Plaintiffs have failed to demonstrate that they are entitled to the liquidated accounts receivable of the Romy PCs, or that Defendants' collection of said receivables is clearly wrongful since these monies are pledged as collateral for separate loan obligations under the term loan and the revolving line of credit; loans upon which both Dr. Romy and TSC are obligated. (N.T. 133-135).

25. Plaintiffs have failed to demonstrate that any excess in the funding of the Stockholder Working Capital Loan to which they may be entitled could not be calculated in monetary terms.

26. Plaintiffs have also failed to demonstrate that the Defendants' use of the accounts receivable of the Romy PCs threatens the future existence of the Spine-Center PCs. Rather, the accounts receivable used in the weekly calculation of the revolving line of credit are those that are currently generated by the Spine-Center PCs under the management of TSC.

DISCUSSION

Plaintiffs' Petition for a Preliminary Injunction asks this court to enjoin the Defendant, ALC, from disbursing any of the funds collected from the liquidated accounts receivable of the Romy PCs and to order ALC to make a written accounting of any monies received by ALC from the Romy PCs after May 1, 1998. In support, Plaintiffs contend that ALC's continued collection and retention of the Romy PCs' accounts receivable threatens the future existence of the PCs and a preliminary injunction is necessary to avoid further immediate and irreparable harm to Plaintiffs' business. (Pl. Memorandum of Law in Support of their Petition, at 5-6).

This court denies the request for injunctive relief holding that plaintiffs have failed to demonstrate the requisite immediate and irreparable harm.

In determining whether a preliminary injunction should be granted, the court may rely on the averments of the pleadings or petition and may consider affidavits of the parties or any other proof which the court may require. Pa.R.Civ.P. 1531. A preliminary injunction is regarded as "a most extraordinary form of relief which is to be granted only in the most compelling cases." Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 597 A.2d 141, 144 (1991). See also Soja v. Factoryville Sportsmen's Club, 361 Pa.Super. 473, 522 A.2d 1129, 1131 (1987). Our Supreme Court recently noted that "[t]he purpose of a preliminary injunction is to preserve the status quo as it exists *or previously existed before the acts complained of*, thereby preventing irreparable injury or gross injustice." Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277, 1286 (1992) (citation omitted) (emphasis in original). The court may grant the preliminary

injunction only if the moving party has sufficiently established the following five elements:

> (1) that relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages;
> (2) that greater injury will occur from refusing the injunction than from granting it;
> (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
> (4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and
> (5) that the plaintiff's right to relief is clear.

Cappiello v. Duca, 449 Pa.Super. 100, 672 A.2d 1373, 1376 (1996) (citing Lewis v. City of Harrisburg, 158 Pa.Cmwlth. 318, 631 A.2d 807, 810 (1993)). See also Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1123, 1128 (1981). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted." Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, -- Pa.Cmwlth. --, 705 A.2d 509, 512 (1998).

Generally, Pennsylvania equity courts are authorized to enjoin wrongful breaches of contract where money damages are an inadequate remedy. See, e.g., Sovereign Bank v. Harper, 449 Pa.Super. 578, 674 A.2d 1085, 1093 (1996) (requiring mortgagor to withdraw recorded revocation of deed and prohibiting interference with sale of property to third party, finding irreparable harm in that the land suffered environmental problems, the Bank could not find another buyer, and the Bank would otherwise lose a business opportunity); Straup v. Times Herald, 283 Pa.Super. 58, 423 A.2d 713, 718 (1980) (enjoining newspaper from depriving plaintiffs of ownership of distributorships where owners had conditional property right from newspaper's actions that could not be terminated at will).

Here, the Plaintiffs' Complaint sets forth, essentially, a breach of contract claim and fraud allegations and seeks monetary damages, rescission of their agreements with Defendants and the same injunctive relief sought in the Petition that is presently before the Court. See Complaint, Counts I-V. The gravamen of the Complaint is that Defendant ALC breached its contractual obligations to provide evidence that LFFC paid $1,000,000 to ALC for 85% of its stock; that this payment was never made, and thus, Defendants obtained Plaintiffs' assets through fraud. See Complaint, Counts II-III. The parties dispute whether this payment was made and this issue will be determined at a later trial, but the issue is distinguishable from the present requested relief involving the accounts receivable. Rather, in Count I of the Complaint, the Plaintiffs allege that they have suffered monetary damages and that ALC has breached Section 5.11(d) of the Second Agreement, as amended by the Third Agreement, by retaining the Romy PCs' receivables despite the fact that Dr. Romy and the PCs have fully funded the Stockholders Working Capital Loan. See Complaint, ¶¶ 55-60. The present record reflects that Dr. Romy and the PCs have fulfilled their obligation on this loan. (N.T. 111-112; 141-143; P-8 & P-9). However, as noted below, the accounts receivable are pledged on other loan obligations, and thus, it is unclear that Plaintiffs would succeed on Count I of their Complaint.

Even assuming *arguendo* that Plaintiffs may prove some future right to relief on their allegations, the present inquiry turns on whether injunctive relief is necessary to thwart an immediate and irreparable harm which monetary damages could not remedy. Our Superior Court recently

reiterated the standard for irreparable harm, stating in pertinent part:

> "An injury is regarded as 'irreparable' if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." *Sovereign [Bank v. Harper]*, 674 A.2d at 1093 (citation omitted). The plaintiff must demonstrate the likelihood of a loss that is not entirely ascertainable and compensable by money damages. *John G. Bryant Co. v. Sling Testing and Repair, Inc.*, 471 Pa. 1, 369 A.2d 1164 (1977).

Sheridan Broadcasting Networks, Inc. v. NBN Broadcasting, Inc., -- Pa.Super. --, 693 A.2d 989, 995 (1997) (affirming preliminary injunction where defendants refused to compensate employees or permit them access to their offices in contravention of management committee's resolutions which threatened potential loss of business opportunities or market advantages). Harm must be irreversible before it will be deemed "irreparable". Sovereign, 674 A.2d at 1093 (citing *Boehm v. University of Pennsylvania School of Veterinary Medicine*, 392 Pa.Super. 502, 505-06, 573 A.2d 575, 586, *appeal denied* 527 Pa. 596, 589 A.2d 687 (1990)). Pennsylvania courts have repeatedly held that "irreparable injury" may be found in the commercial context where there is an impending loss of business opportunities or market advantage. See, e.g., John G. Bryant Co., 369 A.2d at 1167 (affirming a preliminary injunction to enforce a restrictive covenant where the unwarranted interference with customer relations from breach of covenant constitutes irreparable harm); Sheridan, 693 A.2d at 995; Sovereign, 674 A.2d at 1093; Three County Services, Inc. v. Philadelphia Inquirer, 337 Pa.Super. 241, 486 A.2d 997, 1003 (1985) (Beck, J., concurring).[13]

Moreover, even when monetary damages are fully calculable, a preliminary injunction may be granted "when there is proof that the threatened monetary loss is so great as to threaten the existence

[13]Both parties in the present case refer to Three County Services in their respective memoranda. However, this case more strongly supports the Defendants' position.

of the business." Three County Services, 486 A.2d at 1001. In that case, our Superior Court vacated a preliminary injunction where the plaintiff/delivery service did not present sufficient evidence to show that defendant's actions threatened the existence of its business, which involved primarily past harms that included establishing an alternate delivery system, soliciting plaintiff's customers and maligning plaintiff's name. Id. at 1000-02. In making this determination, the court reviewed the testimony of plaintiff's accountant and principal who examined profit and loss statements of the plaintiff's business, and determined that there were no sufficient explanations attributing plaintiff's losses to defendant's actions. See Id.

Applying these criteria here, this court finds that the Plaintiffs have failed to sustain their burden of proof that they will suffer irreparable harm if ALC is not enjoined from disbursing the Romy PC's accounts receivable. At the January 19th hearing, the testimony of Plaintiffs' witness, Aiden Flatley, who has been Dr. Romy's accountant throughout the transactions between him and the defendants, demonstrates this failure. Mr. Flatley testified that the amount of Dr. Romy's payments in excess of his obligation on the Stockholders Working Capital Loan is calculable, and thus compensable in monetary terms. (N.T. 111-115). In addition, Counts I-IV of the Complaint state specifically claims for monetary damages. Even if the parties dispute the excess amount of Dr. Romy's loan obligation, this dispute would not constitute irreparable injury but, rather, could be determined later.

Mr. Flatley also testified that despite the language in the Billing and Collection Agreement (P-3), Dr. Romy never had access to disbursement of his accounts receivable since they went into a lock box. (N.T. 116; 129). From this lock box, payments were made on the PNC debt, the subsequent HCR debt, and the Stockholders Working Capital Loan. (N.T. 131-133). Mr. Flatley further testified that Dr. Romy had guaranteed the PNC debt and subsequent HCR debt by pledging the accounts receivable of the

Romy PCs. (N.T.124; 133-135). Current disbursements on the revolving line of credit are based on a formula involving the most recent receivables generated by the new Spine Center PCs under the management of TSC and the current financial stability of the company. (N.T. 137-141). The bank and TSC devised this formula. Dr. Romy was not a party to this arrangement. (N.T. 121-122). Despite this testimony and the exhibits presented, the Plaintiffs did not adequately support their contention that Defendants' disbursements of the accounts receivable threaten the existence of the PCs. They, therefore fail to prove the threat of irreparable harm.

Moreover, Plaintiffs have failed to prove other requisite elements for an injunction. Specifically, they did not sufficiently show that they would be more greatly injured than Defendants, in that the requested relief would deprive the current Spine Center PCs of disbursements on the revolving line of credit. In addition, the status quo would not be restored since the accounts receivable of the Romy PCs are pledged to guarantee the HCR debt; debt that assumed the PNC debt, which predated the Second Agreement. Further, from the time of implementation of the Second Agreement, the accounts receivable were placed in a lock box. Payments on the debt were made by TSC in the name of Riverside Medical Center. Dr. Romy never had access to disbursement on his accounts receivable to pay off his debt. N.T. 116; 129-131. This debt would remain even if the court could order the requested relief. However, the court does not have jurisdiction over the bank nor the financing company, nor does the court have the power to rescind the debt arrangement through a preliminary injunction. Therefore, the requested injunction is not reasonably suited to abate the alleged wrong.

CONCLUSIONS OF LAW

For the foregoing reasons, the Plaintiffs have failed to satisfy the prerequisites of a preliminary injunction.

1. Plaintiffs have failed to show that they will suffer irreparable harm that could not be compensated by monetary damages if the liquidated accounts receivable continue to fund the working capital loan and to serve as collateral for the revolving line of credit.

2. Plaintiffs will not be more greatly injured if the injunction is denied.

3. Defendants will be injured if they are prevented from disbursing the liquidated accounts receivable which are partly pledged to fund the term loan and the revolving line of credit.

4. An injunction will not restore the parties to the status quo since the Court cannot negate the finance arrangement, under which the accounts receivable are pledged as collateral, where the Court does not have jurisdiction over the bank and/or the HCR Pool III Funding Corporation, which are not parties to the current action.

5. An injunction is not reasonably suited to provide relief in this instance.

6. On the basis of this record, this court will enter a contemporaneous Order Denying the Preliminary Injunction.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

MAURICE ROMY, M.D.,	:	DECEMBER TERM, 1999
RIVERSIDE MEDICAL CENTER, P.C.,	:	
ALLEGHENY PAIN INSTITUTE, P.C.,	:	
RMC NORTH ASSOCIATES, P.C.,	:	
SPINE CENTER-Northfield Division, P.C.,	:	
SPINE CENTER Lehigh Valley, P.C., and	:	
RIVERSIDE MEDICAL SERVICES CORPORATION	:	
Plaintiffs	:	
	:	
v.	:	NO. 0752
	:	
AMERICAN LIFE CARE, INC.,	:	
L-FOUR FIVE, LLC., TSC MANAGEMENT OF PENNSYLVANIA, INC.,	:	
WARREN H. HABER,	:	
JOHN L. TEEGER, and	:	
ERIC D. ROSENFELD	:	Control Number: 120723
Defendants	:	

O R D E R

AND NOW, this 7th day of March 2000, upon consideration of the Petition for a Preliminary Injunction, the Complaint in Equity and defendants' Answer to it, all other matters of record, after an evidentiary hearing on January 19, 2000, and based upon the Findings of Fact and Conclusions of Law filed contemporaneously with this Order, it is **ORDERED** that the Petition for a Preliminary Injunction is **Denied.**

BY THE COURT,

_____

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PHILADELPHIA EAR, NOSE & THROAT SURGICAL ASSOCIATES, P.C.	: JANUARY TERM, 2000
(Plaintiff)	: No. 2321
v.	
MAURICE ROTH, M.D.	:
(Defendant)	
	: Control No. 011291

.....

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION IN SUPPORT OF ORDER DENYING THE PETITION FOR A PRELIMINARY INJUNCTION

Sheppard, Jr., J. ..... March 13, 2000

This court denies the Petition for a Preliminary Injunction because plaintiff-petitioner has failed to prove that: (1) such a denial will result in immediate and irreparable harm that damages cannot adequately compensate, (2) the balancing of the harms favors granting the preliminary injunction, (3) the injunction requested is reasonably suited to abate the alleged harm, and (4) the plaintiff-petitioner has a clear right to relief.

The court submits the following Findings of Fact and Conclusions of Law in support of its contemporaneous Order denying the request for injunctive relief.

FINDINGS OF FACT

1. On January 20, 2000, plaintiff, Philadelphia Ear, Nose and Throat Surgical Associates, P.C. ("PENT"), filed a Complaint against defendant Maurice Roth, M.D. ("Dr. Roth"), seeking damages for breach of an employment contract and an order enjoining Dr. Roth from violating the restrictive covenant contained in that contract.

2. On the same date, PENT filed a Petition seeking a Temporary Restraining Order and Preliminary Injunction.

3. The court conducted hearings on the Petition for Preliminary Injunction on February 1 and 3, 2000. The court heard oral argument on February 28, 2000.

4. PENT is a Pennsylvania corporation. (Exhibit P-15). Lee M. Rowe, M.D. ("Dr. Rowe") is the President and sole shareholder of PENT. (2/1/00, N.T. 14).

5. Dr. Rowe is an ear, nose and throat ("ENT") physician (otolaryngologist).

6. In 1981, Dr. Rowe began work as a physician-employee of Atkins-Keane Otolaryngic Associates, Ltd. ("Atkins-Keane"), a medical practice owned and operated by Drs. Atkins and Keane. (2/1/00, N.T. 10).

7. When Dr. Rowe joined Atkins-Keane, Atkins-Keane had a limited ENT practice at Northeastern Hospital ("Northeastern"). (2/1/00, N.T. 39).

8. Dr. Rowe eventually became a shareholder of the practice. On April 1, 1988, Atkins-Keane changed its name to "Atkins-Keane-Rowe Otolaryngic Associates, Ltd." ("Atkins-Keane-Rowe"). (Exhibit P-14; 2/1/00, N.T. 10). On August 5, 1997, upon Dr. Keane's resignation from the practice, Atkins-Keane-Rowe changed its name to "Atkins-Rowe Otolaryngic Associates, Ltd." ("Atkins-Rowe"). (Exhibit P-14; 2/1/00, N.T. 11-13).

9. On February 16, 1999, upon Dr. Atkins' resignation from Atkins-Rowe, Atkins-Rowe changed its name to "Philadelphia Ear, Nose and Throat Surgical Associates, P.C." (Exhibit P-14; 2/1/00, N.T. 13-15). All three groups -- Atkins-Keane-Rowe, Atkins-Rowe and Philadelphia Ear, Nose and Throat Surgical Associates, P.C.-- are referred to in this document as PENT.[14]

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[14]Absent the consent of the employee or an express assignability clause in the employment contract a restrictive covenant is not assignable. All-Pak, Inc. v. Johnston, 694 A.2d 347, 351-52 (Pa.Super. 1997). In his Answer and at the hearing, Dr. Roth argued that Atkins-Keane-Rowe and PENT are different legal entities, and if so, the covenant would not be assignable to PENT. Thus, PENT would be unable to enforce the covenant against Dr. Roth. Because the evidence shows that Atkins-Keane-Rowe and Atkins-Rowe and PENT are the same legal entity, the court rejects this argument.

Corporate name changes do not affect the existing rights of persons other than shareholders. 15 Pa.C.S.A. § 1916(b). Dr. Roth was not a shareholder of PENT. Thus a simple change of the corporate name does not affect PENT's right to enforce the convenant against Dr. Roth. The Business Corporation Law allows a corporation to change its name by amending its certificate of incorporation. 15 Pa.C.S.A. § 1911(a)(1). An amendment changing the corporate name requires approval by the Board of Directors or by the shareholders. 15 Pa.C.S.A. § 1914(a) and (c)(2)(i). Upon adoption of an amendment changing a corporate name, the corporation shall execute articles of amendment and file them with the Department of State. 15 Pa.C.S.A. §§ 1915 and 1916. PENT has produced, under the seal of the Secretary of the Commonwealth, copies of the Articles of Incorporation and Articles of Amendment showing that the shareholders of the corporation duly adopted the two name changes at issue, and that the corporation filed the articles with the Department of State. (Exhibit P-14); see also Pa. R.E. 902(1) (setting forth self-authenticating nature of Domestic Public Documents Under Seal). The evidence produced by PENT demonstrates that the changes were, indeed, merely name changes and that these changes were duly authorized, executed and filed.

The court concludes that Atkins-Keane-Rowe and PENT are the same legal entity and that the change in corporate name, alone, does not affect PENT's right to enforce the covenant against Dr. Roth.

10. Dr. Rowe's practice is concentrated at Northeastern where he serves as Chairman of the Department of Surgery and Chief of Otolaryngology.[15] (2/1/00, N.T. 26, 84). Northeastern is a community hospital in the Port Richmond area of Philadelphia. (2/1/00, N.T. 51-52).[16] PENT has an office on Allegheny Avenue, across the street from Northeastern, and rents clinic space in Northeastern. (2/1/00, N.T. 51).

11. Dr. Rowe admits being one of the busiest ENT physicians in Philadelphia. (2/1/00, N.T. 83).

12. On June 30, 1995, defendant, Maurice Roth, M.D. ("Dr. Roth"), entered into an Employment Agreement ("Agreement") with Atkins-Keane-Rowe. (Exhibits P-3, D-5; 2/1/00, N.T. 18-20).

13. Dr. Roth is an ENT physician. (2/3/00, N.T. 9-10).

14. The Agreement provided that:

    a. Dr. Roth would receive an annual salary of $150,000, but that the salary was subject to revision by the Board of Directors of Atkins-Keane-Rowe (Exhibit P-3, ¶ 4);
    b. Atkins-Keane-Rowe would pay the cost of Dr. Roth's professional liability insurance during the term of the Agreement (Exhibit P-3, ¶ 5); and

[15] Dr. Rowe's former fellow-shareholders concentrated their practices at other hospitals. Dr. Atkins based his practice at Pennsylvania Hospital. (2/1/00, N.T. 11). Dr. Keane based his practice at Thomas Jefferson University Hospital and Pennsylvania Hospital. (2/1/00, N.T. 11-12).

[16] After an alignment with or acquisition by Temple University, Northeastern has apparently changed its name to "Temple East" or "Northeastern, a Division of Temple East." (2/1/00, N.T. 64-65). For the purposes of this document, the court treats "Northeastern", "Temple East" and "Northeastern, a Division of Temple East" as interchangeable words.

c. The Agreement was effective from July 5, 1995 until June 30, 1996, and was to continue from year to year unless terminated by either party upon ninety days written notice. (Exhibit P-3, ¶ 3).

15. The Agreement contained the following restrictive covenant:

> 10. Restrictive Covenant
>
> (a) . . . .Upon termination of Employee's employment hereunder, Employee agrees to resign his staff privileges at Pennsylvania Hospital, Northeastern Hospital, Wills Eye Hospital and Thomas Jefferson University Hospital and will not practice at such hospitals for a period of two (2) years after his termination of employment hereunder.
>
> (b) Employee acknowledges that the restrictions contained in the foregoing subparagraph (a) in view of the nature of the practice in which Corporation is engaged, are reasonable and necessary in order to protect the legitimate business interest of Corporation, and that any violation thereof would result in irreparable injuries to Corporation, and Employee therefore acknowledges that, in the event of his violation of any of these restrictions, Corporation shall be entitled to obtain from any court of competent jurisdiction preliminary and permanent injunctive relief as well as damages and an equitable accounting of all earnings, profits and other benefits arising from such violation, which rights shall be cumulative and in addition to any other rights or remedies to which Corporation may be entitled.
>
> (c) If the period of time or the area specified in subparagraph (a) above should be adjudged unreasonable in any proceeding, then the period of time shall be reduced by such number of months or the area shall be reduced by the elimination of such portion thereof or both so that such restrictions may be enforced in such area or for such time as is adjudged to be reasonable. If Employee violates any of the restrictions contained in the foregoing subparagraph (a), the restrictive period shall not run in favor of Employee from the time of the commencement of any such violation until such time as such violation shall be cured by Employee to the satisfaction of Corporation.

(Exhibit P-3).

16. The Agreement further provided that, "[u]pon termination of Employee's employment hereunder for any reason whatsoever, Employee agrees not to initiate contact or to solicit any patients of Corporation and agrees that all [patient] lists, records and information shall remain the sole and confidential property of Corporation." (Exhibit P-3, ¶ 12).

17. On November 20, 1995, the Board of Directors of Atkins-Keane-Rowe unanimously resolved to change Dr. Roth's compensation to $80,000 annually plus fifty percent of the actual amount collected by Atkins-Keane-Rowe exceeding $160,000 per contract year for professional services personally performed by Dr. Roth. (Exhibit P-4; 2/1/00, N.T. 19-21; 2/3/00, N.T. 11). That change was effective February 1, 1996. (Exhibit P-4). In a letter dated November 20, 1995, Dr. Rowe informed Dr. Roth of this salary change. (Exhibit P-4; 2/1/00, N.T. 21).

18. Dr. Roth admitted that he discussed the salary change with Dr. Rowe and acquiesced in the change. (2/3/00, N.T. 11-12, 49).

19. For the period February 1, 1996 through January 31, 1997, PENT deducted certain practice-related expenses from Dr. Roth's pay. (2/1/00, N.T. 97-100; 2/3/00, N.T. 10-16, 19-22, 36-43; Exhibits D-2, D-3, D-4). Those expenses included unemployment compensation taxes and worker's compensation taxes. (2/1/00, N.T. 97-100; 2/3/00, N.T. 10-16, 19-22, 36-43; Exhibits D-2, D-3, D-4). The deductions totaled $10,784. (Exhibit D-2; 2/3/00, N.T. 16). Dr. Roth thought that the deductions were not in accordance with the Agreement, and contacted the PENT accountant concerning those deductions. (2/3/00, N.T. 13-14, 93-94). Dr. Roth testified that the accountant told him that she could do nothing about the deductions. (2/3/00, N.T. 14).

20. For the period February 1, 1997 through January 31, 1998, PENT again deducted from Dr. Roth's salary the practice-related expenses and, for the first time, the cost of Dr. Roth's malpractice insurance premium. (Exhibits D-3, D-4; 2/1/00, N.T. 99, 100; 2/3/00 N.T. 20). These deductions totaled $34,217, including $21,685 for the malpractice

insurance premium. (Exhibit D-3; 2/3/00, N.T. 38). PENT had not deducted the cost of Dr. Roth's malpractice insurance premium from his salary before February 1, 1997. (Exhibit D-2; 2/1/00, N.T. 97; 2/3/00, N.T. 13).

21. Dr. Roth testified that he again contacted the PENT accountant regarding the deductions but that she again told him that she could do nothing about them. (2/3/00, N.T. 20, 93-94).

22. For the period February 1, 1998 through January 31, 1999, PENT again deducted from Dr. Roth's salary the practice-related expenses and the cost of the malpractice insurance premium. (Exhibits D-3, D-4; 2/1/00, N.T. 99, 100). The deductions totaled $43,535, including $26,426 for the malpractice insurance premium. (Exhibit D-4, 2/3/00, N.T. 38).

23. The Agreement and the amendment to that Agreement do not expressly allow or disallow deductions for unemployment compensation taxes, worker's compensation taxes or other practice-related expenses. (Exhibits P-3, P-4; 2/1/00, N.T. 97). Dr. Rowe testified that he does not know whether the deductions of unemployment compensation taxes and worker's compensation taxes were in accordance with the Agreement. (2/1/00, N.T. 98). Dr. Rowe admitted that the deductions of malpractice insurance premiums from Dr. Roth's pay were not in accordance with the Agreement. (2/1/00, N.T. 96).

24. In Summer 1998, Dr. Roth gave Dr. Rowe a proposed written employment contract for Dr. Rowe to consider. (2/1/00, N.T. 89). Dr. Rowe gave this proposed contract to his attorney. (2/1/00, N.T. 89-90, 91). Although Dr. Roth attempted to arrange meetings with Dr. Rowe to discuss the draft contract, Dr. Rowe never did discuss the proposed contract with Dr. Roth. (2/1/00, N.T. 89-91; 2/3/00, N.T. 89).

25. There is some evidence that Dr. Rowe thought that the breakup of the group and the departures of Drs. Atkins and Keane had altered the employment arrangement between PENT and Dr. Roth. James F. McDonald, Jr., M.D., testified that Dr. Rowe told him over a year ago that Dr. Rowe's practice was in a state of flux because of the departures, and that Dr. Roth's arrangement with PENT was undefined. (2/1/00, N.T. 179-182).

26. In Summer 1999, Dr. Roth prepared to leave PENT and start his own practice. The preparations included setting up his own S-corporation, hiring a billing service and searching for office space. (2/1/00, N.T. 134; 2/3/00, N.T. 42).

27. In Summer 1999, Dr. Roth engaged Little Data Centers ("Little Data") to help him with medical billing. (2/1/00, N.T. 134). Dr. Roth gave Little Data his provider numbers and a post office box address to which his mail was to be sent. (2/1/00, N.T. 135-138). On December 10, 1999, Little Data notified individual providers of Dr. Roth's provider numbers and change of address. (2/1/00, N.T. 135-137; Exhibit P-8).

28. In December 1999, US Healthcare sent a reimbursement check directly to Dr. Roth's post office box. (Exhibit P-9, p. 2; 2/1/00, N.T. 137-138). The reimbursement was for services that Dr. Roth had rendered while an employee of PENT. (Exhibit P-9, p.2). There is no evidence that Dr. Roth or Little Data intentionally diverted to Dr. Roth funds due and owing to PENT. (2/1/00, N.T. 137-138; 2/3/00, N.T. 51). There is no evidence that Dr. Roth cashed any check for funds rightfully owed to PENT. (2/3/00, N.T. 51). This incident has not been shown to be anything other than a mistake.

29. On or about December 13, 1999, Dr. Rowe and Dr. Roth met in the cafeteria at Northeastern. (2/1/00, N.T. 23). Dr. Roth told Dr. Rowe that he was resigning from

PENT, and that Dr. Rowe would receive a letter confirming his resignation. (2/1/00, N.T. 23). At that meeting, Dr. Roth gave no specific date of his leaving, but said only that he could provide coverage in some manner. (2/1/00, N.T. 23).

30. Sometime after that meeting, Dr. Rowe received Dr. Roth's resignation letter by certified mail. (Exhibit P-6). The resignation letter was dated November 24, 1999 but postmarked December 13, 1999. (Exhibits P-6, P-7). The resignation letter gave January 17, 2000, as Dr. Roth's last day, and proposed a transition period after that date, during which Dr. Roth would "provide reasonable coverage." (Exhibit P-6).

31. On December 21, 1999, Dr. Rowe confronted Dr. Roth about the PENT reimbursement check that was forwarded to Dr. Roth's post office box. (2/1/00, N.T. 32-33).

32. In a hand-delivered letter dated January 7, 2000, Dr. Rowe gave Dr. Roth notice of his immediate termination. (Exhibit P-9; 2/1/00, N.T. 38).

33. Before his termination, Dr. Roth submitted to Little Data certain medical bills for services that Dr. Roth rendered while employed by PENT. (2/1/00, N.T. 146; 2/3/00, N.T. 52). The total amount collectable under those bills was approximately $3,300. (2/1/00, N.T. 151-152). Dr. Roth testified that he had first submitted these bills to Rose Ellen Tomczak, PENT's office manager, and that Ms. Tomczak had informed him that the bills were not collectable. (2/3/00, N.T. 52). He then submitted the bills to Little Data for analysis. (2/3/00, N.T. 52). The bills were never submitted for collection. (2/1/00, N.T. 158-159). After learning that PENT reimbursements were sent to his post office box, Dr. Roth instructed Little Data to stop working on the bills. (2/1/00, N.T. 158-159; 2/3/00, N.T. 54-55).

34. Before leaving PENT, Dr. Roth had leased two offices spaces. One is in Northeast Philadelphia at 9150 Marshall Street. (2/3/00, N.T. 59-61). The second is at 3370 Memphis Street near Northeastern. (2/3/00, N.T. 61).

35. On January 10 or 11, 2000, Dr. Roth faxed a typewritten notice of his new addresses and phone numbers to area physicians who might have referrals or consultations for him. (2/3/00, N.T. 76).

36. There are five ENT physicians on staff at Northeastern: Dr. Rowe, Dr. Roth, Dr. Banks, Dr. Granoff and Dr. Rosen. (2/1/00, N.T. 79-80). However, only Dr. Rowe and Dr. Roth practice regularly at Northeastern. (2/1/00, N.T. 116). Dr. Granoff, Dr. Banks and Dr. Rosen have full-time practices at other hospitals and provide almost no services to Northeastern patients. (2/1/00, N.T. 80, 167, 172).

37. Dr. Rowe testified that, by continuing to practice at Northeastern, Dr. Roth has caused a schism in the staff at Northeastern. (2/1/00, N.T. 59-60).

38. In his nineteen years practicing ENT medicine at Northeastern, Dr. Rowe has developed referral relationships with other physicians. (2/3/00, N.T. 82.)

39. Some of these referrals come from the Northeastern emergency room. The emergency room uses ENT physicians on an on-call basis for emergencies, and on a consulting basis for non emergencies. (2/1/00, N.T. 163). As Chairman of the Department of Surgery, Dr. Rowe provides the Emergency Department with the call schedule. (2/1/00, N.T. 166). The ENT physician on-call at Northeastern has historically been, and continues to be, Dr. Rowe. (2/1/00; N.T. 164-166). When Dr. Roth was a PENT employee, he and Dr. Rowe shared the emergency room call equally through Dr. Rowe's call service. (2/1/00, N.T.

165). Since Dr. Roth's departure from PENT, Dr. Rowe is the only ENT physician on-call at Northeastern's emergency room. (2/1/00, N.T. 166).

40. PENT also receives consultations from family practitioners, internists, cardiologists, specialists and pediatricians. (2/1/00, N.T. 40-41). Historically, PENT has received consultations primarily from Dr. Nesbitt's group, and Dr. Steinbach, Dr. Vile and Dr. Solon. (2/1/00, N.T. 41-50).

41. Dr. Rowe testified that in the past PENT received 60-70 referrals per month from Dr. Nesbitt's group (2/1/00, N.T. 41-42, 48, 49-50), and eight referrals per month each from Dr. Steinbach, Dr. Vile and Dr. Solon. (2/1/00, N.T. 48).

42. Dr. Rowe testified that, from January 7, 2000, through February 1, 2000, PENT received no referrals from Dr. Nesbitt's group, or Dr. Steinbach, Dr. Vile or Dr. Solon. (2/1/00, N.T. 41-42, 47-48, 49-50). Dr. Rowe continues to receive consultations from other physicians. (2/1/00, N.T. 114-115).

43. On the other hand, Dr. Rowe testified that in that same period (January 7 through February 1, 2000) neither the number of surgeries that he has performed nor the number of his patient visits has decreased. (2/1/00, N.T. 106).

44. Dr. James F. McDonald, Jr., M.D. ("Dr. McDonald") is an employee and shareholder of Dr. Nesbitt's group and a member of the executive committee of Northeastern. (2/1/00, N.T. 177, 184). Dr. McDonald testified that there had been no conscious decision by Dr. Nesbitt's group to not refer patients to Dr. Rowe. (2/1/00, N.T. 177). Dr. McDonald testified that the Nesbitt group would like to continue to refer patients to both Dr. Roth and Dr. Rowe. (2/1/00, N.T. 177-178).

45. Dr. Roth testified that from January 7, 2000 through February 3, 2000, Dr. Nesbitt's group sent him three or four patients and Drs. Vile, Solon and Goldstein sent him two or three patients. (2/3/00, N.T. 83-84). Dr. Roth admitted that, under ordinary circumstances, these patients would have gone to PENT. (2/3/00, N.T. 84). Dr. Rowe testified that he knew of one referral by Dr. Steinbach to Dr. Roth. (2/1/00, N.T. 44-47).

46. On January 10, 2000, Dr. Roth performed three surgeries at Northeastern. (2/3/00, N.T. 84-86). Dr. Roth had scheduled these three surgeries before PENT terminated him. (2/3/00, N.T. 84). By the terms of the January 7, 2000 termination letter, PENT permitted Dr. Roth to perform these previously-scheduled surgeries. (Exhibit P-5; 2/3/00, N.T. 86).

47. After January 10, 2000, Dr. Roth performed three surgeries at Northeastern Hospital. (2/3/00, N.T. 85).

48. The number of patients at Northeastern has increased since 1995 -- the date of the original Agreement -- as a result of the "downsizing" at nearby hospitals. (2/1/00, N.T. 77-78, 169). In Winter 1999, the average daily census was about eighty patients. (2/1/00, N.T. 169). Today, the daily census is between 110 and 150 patients. (2/1/00, N.T. 169-170).

49. There is no shortage of ENT patients at Northeastern. (2/1/00, N.T. 169). Dennis M. Guest, D.O. ("Dr. Guest"), Chairman of the Emergency Medicine Department and the Chairman of the Utilization Committee at Northeastern, testified that there is enough work at Northeastern to keep two or more ENT physicians busy. (2/1/00, N.T. 168-169). Northeastern seems to *need* at least two ENT physicians. Dr. Guest said that if only one ENT physician were serving the hospital and were that ENT physician to be in surgery, on vacation or otherwise unavailable he would be concerned. (2/1/00, N.T. 168).

50. Dr. Rowe testified that hiring another physician-employee will be difficult. (2/1/00, N.T. 36). Residents nationwide traditionally end their residency training on June 30 and begin private practice on July 1. (2/1/00, N.T. 35). Dr. Rowe testified that the vast majority of residents who will become available on July 1, 2000 have already committed to fellowships or practices elsewhere. (2/1/00, N.T. 36). As of February 1, 2000, Dr. Rowe had not placed a printed advertisement for a new physician. (2/1/00, N.T. 109-110). He had, however, called the chiefs of the residency programs at Temple and Jefferson to ask about residents who will become available, but found none. (2/1/00, N.T. 107-109).

51. Dr. Rowe testified that he will not use Dr. Banks or Dr. Granoff for backup. (2/1/00, N.T. 120). Should the need for a backup arise, Dr. Rowe intends to use Dr. Rosen or Dr. Keane. (2/1/00, N.T. 61). Although Dr. Rosen is on staff at Northeastern, Dr. Rosen's full-time responsibilities at Jefferson Hospital limit his ability to cover Dr. Rowe. (2/1/00, N.T. 80). Dr. Keane is not currently on staff at Northeastern. (2/1/00, N.T. 61).

52. Dr. Roth claims that PENT owes him $73,000 arising from the salary deductions he claims were improper. (2/3/00, N.T. 77-79). As of February 3, 1999, PENT had not reimbursed Dr. Roth for either the malpractice insurance premiums or other deductions. (2/3/00, N.T. 79).

53. Both Dr. Rowe and Dr. Roth hold staff privileges at other Philadelphia hospitals. (2/1/00, N.T. 75; 2/3/00, N.T. 62). Both physicians practice full-time at Northeastern, and use other hospitals primarily when a patient requires treatment that is not available at Northeastern. (2/1/00, N.T. 75; 2/3/00, N.T. 62, 63).

54. Should Dr. Roth be ordered not to practice at Northeastern for two years without having to resign his staff privileges, the hospital would likely permit him to retain those privileges. (2/1/00. N.T. 173-174).

DISCUSSION

PENT asks this court to order Dr. Roth to resign his staff privileges at Northeastern and to not practice at Northeastern for two years.[17] In support of its position, PENT relies on the Agreement between the parties containing the restrictive covenant.

First, PENT has not convinced the court that the Agreement is enforceable by PENT. Second, even if the Agreement were enforceable, PENT has not shown that any alleged unlawful conduct by Dr. Roth will cause PENT immediate and irreparable harm that monetary damages cannot compensate.

In determining whether to grant a preliminary injunction, a court may consider the averments of the pleadings and petition, affidavits of the parties or third parties, or any other proof. Pa.R.Civ.P. 1531. A preliminary injunction is "a most extraordinary form of relief which is to be granted only in the most compelling cases." Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa.Super. 495, 597 A.2d 141, 144 (1991). "The purpose of a preliminary injunction is to preserve the status quo as it exists *or previously existed before the acts complained of, thereby preventing irreparable injury or gross injustice*." Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277, 1286 (1992). A preliminary injunction should issue only

[17] PENT does not seek to enforce the portion of the restrictive covenant which would bar Dr. Roth from practicing at Pennsylvania Hospital, Wills Eye Hospital or Jefferson Hospital.

where there is urgent necessity to avoid injury for which damages cannot compensate. Id.

The court may grant the injunction only if the moving party has sufficiently established the following five elements:

> (1) that relief is necessary to prevent immediate and irreparable harm that damages cannot compensate;
> (2) that greater injury will occur from refusing the injunction than by granting it;
> (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
> (4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and
> (5) that the plaintiff's right to relief is clear.

Cappiello v. Duca, 449 Pa.Super. 100, 672 A.2d 1373, 1376 (1996); see also School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 (1995) and New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 464, 392 A.2d 1383, 1385 (1978). "Additionally, the concern of the courts for the public welfare results in a close judicial scrutiny of restraints on physicians because of the value of their services to the community . . . ." New Castle Orthopedic Associates, 392 A.2d at 1385; West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295 (Pa.Super. 1999). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted." Norristown Mun. Waste Authority v. West Norriton Twp. Mun. Authority, 705 A.2d 509, 512 (Pa.Cmwlth. 1998).

PENT has failed to sufficiently establish the requisite elements for injunctive relief. First, PENT has failed to establish immediate and irreparable harm that damages cannot compensate. A Pennsylvania court sitting in equity may enjoin a breach of a contract -- including a breach of a restrictive covenant contained in an employment agreement -- where money damages are an inadequate remedy. John G. Bryant Co. v. Sling Testing & Repair, Inc., 471 Pa. 1, 369 A.2d

1164 (1977). Here, the covenant requires Dr. Roth resign his Northeastern staff privileges upon termination from PENT and refrain from practicing at Northeastern for two years. (Exhibit P-3). Dr. Roth has not resigned those staff privileges. He continues to practice at Northeastern. If the covenant is enforceable, Dr. Roth is in breach. But Dr. Roth's breach of covenant (if assumed), alone, does not entitle PENT to preliminary injunctive relief. New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 392 A.2d 1383, 1386 (1978); Herman v. Dixon, 393 Pa. 33, 141 A.2d 576 (1958); Rollins Protective Services Co. v. Shaffer, 383 Pa.Super. 598, 557 A.2d 413, 415 (1989). PENT must show irreparable harm. PENT could do so by showing that Dr. Roth has stolen patients, taken patient lists or other confidential information, or that PENT has lost patients or income or has otherwise suffered damage as a result of the alleged violation of the covenant. New Castle Orthopedic Associates, 392 A.2d at 1386 (reversing issuance of preliminary injunction enforcing a restrictive covenant contained in the physician's employment agreement where the plaintiff failed to show that defendant had stolen patients, taken patient lists or that defendant had lost patients or income); Herman, 393 A.2d at 578 (reversing issuance of preliminary injunction enforcing a restrictive covenant contained in physician's employment contract where trial court refused to permit defendant to cross-examine plaintiff as to whether the plaintiff's income had decreased, whether plaintiff's practice had been damaged, or whether the defendant had used plaintiff's confidential information or solicited plaintiff's patients); West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d at 295 (affirming issuance of preliminary injunction enforcing restrictive covenant contained in contract for the sale of defendant's medical practice to plaintiff, where defendant set up a competing practice treating 125 of her prior patients).

Paragraph 10(b) of the Agreement -- in which the parties agreed that a violation of the restrictive covenant would constitute irreparable harm and entitle PENT to an injunction -- is not binding on the court. The parties to a contract cannot, by including certain language in that contract, create a right to injunctive relief where an injunction would otherwise be inappropriate. See Dice v. Clinicorp, Inc., 887 F.Supp. 803, 1995 (W.D.Pa. 1995).

The record fails to demonstrate that PENT will suffer irreparable injury as a result of Dr. Roth's practicing at Northeastern. There is no evidence that Dr. Roth took PENT patient lists or stole PENT's former patients in violation of the anti-solicitation covenant. (Exhibit P-3, ¶12). There is no evidence that Dr. Roth's practicing at Northeastern has caused PENT financial injury or has damaged the good will that Dr. Rowe has established during his many years at Northeastern. Dr. Roth and Dr. Rowe are the only ENT physicians practicing full-time at Northeastern. (2/1/00, N.T. 116). Dr. Guest testified that there is "plenty of work" at Northeastern for two or more ENT physicians. (2/1/00, N.T. 168-169). Dr. Rowe testified that he is one of the busiest ENT physicians in the city. (2/1/00, N.T. 83). With Dr. Roth's departure from PENT, Dr. Rowe is shorthanded.[18] Dr. McDonald -- a principal in PENT's largest source

[18] Counsel for PENT urged that, because Dr. Roth's actions have left Dr. Rowe shorthanded, equity should preclude Dr. Roth from asserting Dr. Rowe's shorthandedness as a reason for denying the injunction. Counsel's argument ignores the fact that, even if the ninety day notice provision is enforceable and even had Dr. Roth given ninety days notice, PENT still would be left with a single physician and, by Dr. Rowe's own admission, little hope of hiring another for some time. (2/1/00, N.T. 36).

A contrary view is suggested by the decision in Robert Clifton Associates v. O'Connor, 338 Pa.Super. 246, 487 A.2d 947 (1985). In reversing the trial court's limitation of a covenant to four months our Superior Court held that a one-year restriction period was reasonable based on the time it would take plaintiff, employment agency, to put a new man on the job and for that new-employee to have a reasonable opportunity to demonstrate his effectiveness to his customers. Id., 487 A.2d at 952.

of physician referrals -- expressed a desire to refer patients to both Dr. Roth and Dr. Rowe. (2/1/00, N.T. 177-178). Dr. Rowe has a full work load. He is doubtful that he can hire another physician-employee in the near future to help share that workload. Confronted with a similar situation in New Castle Orthopedic Associates, our Supreme Court stated:

> This is quite unlike the normal commercial situation in which there are only a limited number of prospective clients and the alleged breach significantly affects the share of the former employer. Here, the potential pool of clients far exceeds the appellee's ability to serve them. Under these circumstances it is difficult to find any irreparable injury wrought upon the appellee by the appellant.

New Castle Orthopedic Associates, 392 A.2d at 1387. (dissolving preliminary injunction).

As in New Castle Orthopedic Associates, there are more potential ENT patients at Northeastern than Dr. Rowe is able to serve. Id. No immediate harm results from Dr. Roth's treating patients that Dr. Rowe could not treat in any event. Id. Under these circumstances, the court cannot find that Dr. Roth's presence at Northeastern will irreparably harm PENT.[19] [20] Id.; Herman, 141 A.2d at 578.

Second, PENT has not established that greater injury would result by refusing the injunction than by granting it. Allowing Dr. Roth to continue practicing at Northeastern will cause no immediate and irreparable injury to PENT. However, to prohibit Dr. Roth from practicing at Northeastern will cause Dr. Roth to lose his primary source of income and would decrease access

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[19] The court does not now decide if PENT is entitled to damages for lost profits for those patients that Dr. Roth would have treated on PENT's behalf during the ninety days following his notice of resignation. Since those damages would be temporary and calculable, they do not constitute irreparable harm.

[20] Although it may be beyond the parameters of the proceedings at this stage, this court strongly suggests that Dr. Roth not solicit any of Dr. Rowe's current patients.

to ENT treatment in the community that Northeastern serves. Dr. Rowe testified that the "real issue" behind barring Dr. Roth from Northeastern is to get "rid of a schism in the institution which will not serve it well." (2/1/00, N.T. 72). Yet, Dr. Guest's testimony was the opposite: that the hospital will not be harmed, and can only benefit, by the presence of Dr. Roth. (2/1/00, N.T. 49). The balancing of the harms favors denying the injunction. New Castle Orthopedic Associates, 392 A.2d at 1388 (dissolving preliminary injunction where the plaintiff had shown no irreparable harm caused by its former employee's continuing to practice medicine in the restricted area, and where the harm flowing from granting the preliminary injunction would have decreased public access to medical treatment in the area).

Third, an injunction barring Dr. Roth from practicing at Northeastern is not reasonably suited to abate that harm against which the original covenant was meant to protect. In 1995, when Dr. Roth signed the Agreement, the number of patients coming through Northeastern was substantially less than it is today. Given the smaller patient population and the availability, if necessary, of Dr. Atkins and Dr. Keane when Dr. Roth began his employment, perhaps an injunction would have been reasonably suited to protect PENT's practice at that time. But today, the patient population has grown to where Dr. Roth's presence at Northeastern can do little immediate and irreparable harm to PENT. Hence, the requested injunction is not reasonably suited to abate the alleged wrong.

Fourth, PENT has failed to establish a clear right to relief. Over the course of Dr. Roth's employment with PENT, PENT deducted from Dr. Roth's pay certain disputed expenses, including malpractice insurance premiums, unemployment compensation taxes and worker's compensation taxes. (Exhibits D-2, D-3 and D-4). The deductions exceed $75,000. Although

Dr. Roth complained to the PENT accountant about these deductions, the deductions continued. (2/3/00, N.T. 13-14, 93-94). At the hearing Dr. Rowe admitted that the deductions of malpractice insurance premiums -- which, alone, exceeded $48,000 -- were not in accordance with the Agreement. (2/1/00, N.T. 96). Dr. Rowe admitted that he was unsure whether the remaining deductions were proper under the Agreement. (2/1/00, N.T. 98).

Under Pennsylvania law, when a party materially breaches a contract, the non-breaching party is not required to fulfill its duties under the contract. Ott v. Buehler Lumber Co., 373 Pa.Super. 515, 541 A.2d 1143, 1145 (1988); Oak Ridge Const. Co. v. Tolley, 351 Pa.Super. 32, 504 A.2d 1343, 1348 (1985); Restatement (Second) of Contracts § 369. This court does not now decide whether the deductions were improper and, if improper, whether taking them resulting in a decrease in Dr. Roth's net pay, constituted a material breach of the Agreement. See Forest City Grant Liberty Associates v. Genro II, Inc., 438 Pa.Super. 553, 652 A.2d 948, 951 (1995) (stating that the materiality of a breach is a question of fact). The court concludes, however, that on this record it may be argued that PENT materially breached the Agreement.[21]

[21]Dr. Roth also argues that PENT breached the employment agreement by forcing Dr. Roth to see a disproportionate share of Medicaid and uninsured patients. (Answer ¶¶ 89-95). Tomczak testified that Medicaid reimburses at a somewhat lower rate than private insurance. (2/3/00, N.T. 98, 166). Because Dr. Roth's salary was linked in part to his collections, Dr. Roth argues that it was unfair under his employment contract to force him to see a disproportionate share of Medicaid and indigent patients. Dr. Roth produced some evidence that he had seen a disproportionate number of Medicaid patients in October 1999: in eight selected days in October 1999, Dr. Roth saw 60 Medicaid patients, while Dr. Rowe saw only three. (Exhibit D-6; 2/3/00, N.T. 55-58). But additional evidence shows that in 1997, 1998 and 1999, Dr. Roth and Dr. Rowe's collection percentages were about equal. (Exhibit P-16; 2/1/00, N.T. 52-59; 2/3/00, N.T. 154-155). The court cannot find on the record that PENT's allocation of Medicaid and indigent patients was in violation of any contract that existed between PENT and Dr. Roth. Furthermore, the court is not convinced that PENT's allocation of a larger percentage of Medicaid and indigent patients to Dr. Roth -- who was the junior physician -- would have violated the employment contract.

Consequently, PENT has not shown that its right to enforce that Agreement against Dr. Roth is clear.[22]

CONCLUSIONS OF LAW

1. PENT has failed to establish that it will suffer imminent, irreparable harm not compensable by monetary damages if Dr. Roth retains his staff privileges at Northeastern and continues to practice there.

2. PENT has failed to show that greater injury will occur from denying the injunction than from granting it.

3. PENT has failed to show that the requested injunction is reasonably calculated to abate the alleged harm to PENT.

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[22]Furthermore, the court is not convinced that the Agreement was in effect when Dr. Roth resigned. Mutual assent to abandon a contract may be inferred from the attendant circumstances and the acts and declarations of the parties, even where the contract prohibits non-written modification. Kirk v. Brentwood Manor Homes, Inc., 191 Pa.Super. 488, 159 A.2d 48, 50-51 (1960); John E. Murray, Jr., Contracts, § 143 at 838 (3d Ed. 1990). The focus of the abandonment inquiry is the intent of the parties, which is a generally a question for the fact finder. Kirk, 159 A.2d at 51. The record indicates that PENT and Dr. Roth may have abandoned the Agreement. Even though Dr. Roth's employer remained the same legal entity throughout the period of his employment, the substance of that entity changed. Two of the three shareholders left. The patient population served by the remaining shareholder, Dr. Rowe, grew significantly. (2/1/00, N.T. 77-78, 169). As Dr. Roth's practice evolved, so did Dr. Roth's compensation plan. Dr. Roth came to be paid in a manner which was not in accordance with the Agreement. Statements to another physician suggest that Dr. Rowe believed the Agreement was then problematical. Dr. McDonald testified that Dr. Rowe told him that PENT was in a state of flux, and that, because of the changes that PENT was undergoing, the arrangement with Dr. Roth was not defined. (2/1/00, N.T. 181-184). In an effort to resolve these problems and clarify his relationship with PENT, Dr. Roth presented Dr. Rowe with a proposed new employment agreement over a year prior to the termination. (Exhibit D-5; 2/1/00, N.T. 89-91; 2/3/00, N.T. 89). The acts and statements of the parties suggest to this court that the effectiveness of the original Agreement is susceptible to question.

4. PENT has failed to show that its right to relief is clear.

5. The lack of each of these elements requires that the court deny PENT's Petition for a Preliminary Injunction.

Based on the foregoing, this court will enter a contemporaneous Order Denying the Petition for Preliminary Injunction.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

PHILADELPHIA EAR, NOSE & THROAT SURGICAL ASSOCIATES, P.C.	: JANUARY TERM, 2000
(Plaintiff)	: No. 2321
v.	
MAURICE ROTH, M.D.	:
(Defendant)	
	: Control No. 011291

O R D E R

AND NOW, this 13 day of March 2000, upon consideration of the Petition for a Preliminary Injunction and the response to it, the Complaint in Equity and the Answer, all other matters of record and after a Hearing and based upon the Findings of Fact and Conclusions of Law being filed contemporaneously with this Order, it is **ORDERED** that the Petition for a Preliminary Injunction is **Denied.**

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.