

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HC CONSULTING INC.,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID GOODMAN,	:	
	:	
Defendant.	:	NO. 05-2249

FINDINGS OF FACT AND CONCLUSIONS OF LAW

STRAWBRIDGE, M.J.

August 31, 2006

This matter comes before the Court as a dispute between plaintiff, HC Consulting, Inc. (“HC”), a Delaware based corporation and defendant, David Goodman, M.D. (“Dr. Goodman”). In February 2004, the parties entered into a contractual relationship whereby HC agreed to serve as an “advisor and consultant” to Dr. Goodman for a period of three years. HC, through its principal, James McGonigle (“McGonigle”) was to help Dr. Goodman form his own company, Future Scan, Inc. (“Future Scan”), and proceed with the development of a business which would acquire and lease medical scanners to hospitals and other medical facilities. By late 2004, however, disputes had arisen between the parties that lead to this lawsuit.

In May 2005, plaintiff filed this diversity action for breach of contract seeking payment due under the contract. Defendant denied that there was a binding and enforceable contract, alleging among other things that a confidential relationship existed between Dr. Goodman and McGonigle, that McGonigle took advantage of that relationship, and that the contract was presumptively voidable and ultimately fraudulent.

A bench trial was held on March 8, 2006, during which time this Court had the opportunity to consider the documents presented and assess the credibility of the witnesses. Following upon the trial and after a review of the applicable law, we find that no confidential relationship existed and that HC and Dr. Goodman entered into a valid and enforceable contract. Furthermore, we find that Dr. Goodman breached the contract and that the breach was material. Accordingly, we enter judgment on the single count of the complaint in favor of plaintiff and against defendant.

FINDINGS OF FACT

1. HC is a Delaware sub-chapter “S” corporation with its principal place of business in Delaware. McGonigle is HC’s sole owner. (N.T. at 88). HC provided consulting and business advice to Dr. Goodman, a Pennsylvania citizen, for the purpose of forming his own company and then marketing medical scanners manufactured by Longport, a corporation with which McGonigle was previously associated. (N.T. at 7-8, 94-98, 116). The medical scanners use patented high resolution ultrasound to see below the surface of the body in great detail. (N.T. at 107).
2. In August 2001, McGonigle introduced Dr. Goodman to the scanner technology. (N.T. at 192). By the summer of 2003, after McGonigle had separated from Longport, they began discussing a consulting agreement. (N.T. at 195).
3. Dr. Goodman understood that McGonigle had successfully taken as many as six companies public and that he had the experience that would facilitate the development of this business. (N.T. at 5-6). Dr. Goodman had no previous experience in scanner technology. (N.T. at 6).

4. In or around August or September of 2003, McGonigle began to provide business advice to Dr. Goodman. He negotiated a purchase of 12 scanners by Dr. Goodman's existing company, DAG, MD, from Longport in exchange for Longport stock warrants. (N.T. at 77-78).
5. In or about November 2003, McGonigle formed Future Scan and "passed" it on to Dr. Goodman. (N.T. at 7, 97).
6. As part of a "handshake" arrangement for consulting services, Dr. Goodman paid McGonigle \$4,000 per month between October 2003 and February 2004. (N.T. at 32-33).
7. In or around February 2004, the parties sought to memorialize their existing relationship in writing. Dr. Goodman retained an attorney, who drafted a consulting agreement. (N.T. at 10, 34). The agreement was presented to McGonigle, who accepted the terms as drafted. (N.T. at 35, 102).
8. The agreement called for HC to act as an "advisor and consultant" to Dr. Goodman for a period of three years in consideration of monthly payments in the amount of \$6,500. (Ex. P-1). It contained the following relevant paragraphs:
 - 1.1 Engagement Goodman hereby engages Consultant and Consultant hereby accepts such engagement by Goodman, as an advisor and consultant with the duties described in Attachment "A", attached hereto and incorporated herein.
 - 2.1 Consulting Fee. Consultant shall be paid at the rate of \$6500.00 per month, which amount shall include all ordinary expenses incurred by Consultant. This amount shall be made on the first of each month, commencing on the first of the month after the Effective Date. All extraordinary expenses

will be reimbursed only to the extent Goodman has pre-approved, in writing, such expenses.

3.1 Term. Consultant's engagement hereunder shall commence as of the Effective Date and continue for a term of three years.

6.1 Entire Agreement. This Agreement contains the entire agreement between the parties hereto with respect to the matter contained herein. All prior negotiations, discussions, agreements by and between the parties hereto with respect of such matters agreed to herein which are not reflected or set forth in this Agreement, shall have no further force or effect.

6.2 Amendment and Waiver. Neither this Agreement nor any term, covenant, condition or other provision hereof may be amended, modified, supplemented or waived except by an instrument in writing signed by the parties hereto.

9. The agreement incorporated by reference attachment "A", which was to describe the duties to be undertaken by HC. Attachment "A" was never prepared. Nonetheless, the parties agreed to proceed and with an effective date of February 19, 2004, the contract was signed by both McGonigle and Dr. Goodman. (N.T. at 30-31, 63; Ex. P-1).
10. Prior to signing the agreement, the parties discussed HC's obligations as an advisor and consultant. Unfortunately, the testimony of the principal witnesses diverges on this critical body of evidence.
11. Dr. Goodman testified that HC's duties under the agreement generally were to give him business advice, to introduce him to people, and when the time came, to help Future Scan to go public. More specifically, Dr. Goodman testified that McGonigle was to "help place fifty to a hundred scanners in the Philadelphia area within a year's

time.” (N.T. at 39, 42). Dr. Goodman also testified that HC’s “duty of placing fifty to one hundred scanners in the Philadelphia market” was “the basis of the business” and that “the business plan was predicated on fifty to a hundred scanners to be placed within one year.” (N.T. at 42-43, 267). Dr. Goodman also testified that McGonigle insisted that he had the ability to fulfill that duty. (N.T. at 43).

12. McGonigle testified that HC’s duties under the contract were to use his contacts to introduce Dr. Goodman to people “that would have relevance to this Future Scan project,” “provide ongoing assistance to Dr. Goodman on the business and marketing plan,” and “if and when Future Scan was ready, to bring it public.” (N.T. at 98, 116).
13. McGonigle further testified that HC was never under an “obligation or duty” to place fifty to one hundred scanners in the Philadelphia market. (N.T. at 120). He stated that he and Dr. Goodman had discussed the placement of scanners both before and after they entered into the agreement, and both understood that HC’s ability to place the scanners would be contingent upon proof that physicians would be able to be reimbursed by their patients’ insurers for the use of the scanners. (N.T. at 103-05, 120-21). The ability to be reimbursed would also be aided by the designation of a unique billing code that would identify the use of scanners to the insurance providers. (N.T. at 65, 104).
14. To the extent that Dr. Goodman’s testimony is offered to support his argument that there was an “obligation or duty” to successfully place the scanners, we reject it. We find McGonigle’s testimony to be more credible. He provided a more commercially sensible and realistic explanation of HC’s obligations under the agreement. We also

note that, in contrast to his testimony at trial, Dr. Goodman stated in his deposition that the placement of scanners was contingent upon proof of reimbursement. (N.T. at 65). Craig Yris, an acquaintance of McGonigle and employee of Future Scan, also testified that it was always his understanding that HC would only be able to place scanners provided there was adequate proof of reimbursement for use of the scanners. (N.T. at 197, 199, 210, 212).

15. Despite repeated requests by McGonigle, Dr. Goodman did not provide sufficient proof that insurance companies would reimburse physicians for their use of the scanners. (N.T. at 104, 109, 121, 162, 202, 210).
16. As required under the agreement, Dr. Goodman paid HC \$6,500 per month from March through November of 2004. This totaled \$58,500. (N.T. at 21-22; Ex. P-6). HC fulfilled its obligations during this period by providing business consultation and advice, which Dr. Goodman found to be “invaluable.” (N.T. at 22- 23, 27-28). In March 2004, McGonigle also negotiated a deal between Future Scan and Longport whereby Future Scan agreed to acquire an additional 100 scanners from Longport. (N.T. at 43-46; Ex. D-4).
17. From May 2004 through July 2004, HC incurred an average of approximately \$963.00 per month in costs directly related to its performance under the contract with Dr. Goodman. Similar expenses were incurred from February 2004 through May 2004 and in July 2004 and August 2004. (N.T. at 100, 129-30; Ex. 4 of P-9).
18. In or about August 2004, Dr. Goodman stopped communicating with McGonigle apparently because Longport, who provided the scanners, told Dr. Goodman that they

would not “cooperate” with him if McGonigle was involved. (N.T. 176-77). Dr. Goodman did not speak with McGonigle from August 2004 until December 2004. (N.T. at 28, 153, 176).

19. In an effort to preserve their business relationship, McGonigle met with Dr. Goodman in December 2004. They agreed that payments to HC would be suspended for a period of six months and that, when resumed in July 2005, they would be reduced to \$4,000 per month. The contract was not extended past the original three year period. (N.T. at 133-35, 153-55).
20. McGonigle initially believed that the relationship between HC and Dr. Goodman would successfully resume in July 2005. (N.T. at 182).
21. On January 31, 2005, Dr. Goodman sent an e-mail to business associates of both he and McGonigle, stating that McGonigle did not represent Future Scan and that he did not want McGonigle interfering with his company. (N.T. at 157-58, 206).
22. In April 2005, McGonigle learned about Dr. Goodman’s January 31, 2005 e-mail. (N.T. at 189). He also heard that Dr. Goodman had been making derogatory remarks about him to mutual business contacts and that Dr. Goodman did not have sufficient funds to continue paying HC after the six month moratorium expired. (N.T. at 159-60).
23. McGonigle filed suit in May 2005 in order to get Dr. Goodman’s attention and find a way to salvage the relationship. (N.T. at 189).

24. After the suit was filed, Dr. Goodman contacted counsel for HC and indicated a willingness to open a dialogue with McGonigle. Despite this effort there was no further communication. (N.T. at 160-61).
25. Since the suit was filed, Dr. Goodman has refused to pay HC any more money due under the agreement. (N.T. at 155, 276).
26. During the time of the six month moratorium on payments and following the initiation of this lawsuit, McGonigle has supported himself by using his savings, receiving a commission on the sale of the 100 scanners from Longport to Dr. Goodman, and writing options on and selling stock. (N.T. at 182, 188).

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this case in that there is diversity of citizenship between the parties and the amount in controversy exceeds \$75,000. *See* 28 U.S.C. § 1332.
2. Plaintiff has failed to prove that a confidential relationship existed between HC and Dr. Goodman that would have created a presumption that the agreement was voidable.
3. Dr. Goodman and HC knowingly and intelligently entered into a valid partially integrated written contract pursuant to which HC would serve as an advisor and consultant to Dr. Goodman for a period of three years in consideration of payments in the amount of \$6,500 per month.

4. In its role as an advisor and consultant, HC agreed to introduce Dr. Goodman to persons who would help move the Future Scan project forward on the business and marketing plan, and, when ready, work to take Future Scan public. HC also agreed to undertake to place between 50 and 100 medical scanners within the Philadelphia area if and when Dr. Goodman could obtain sufficient proof that physicians would be reimbursed by their patients' insurers for use of the scanners.
5. In December 2004, the parties orally modified the contract, agreeing that Dr. Goodman would not be required to make any payments to HC for six months. Payments were to resume in July 2005 at the reduced rate of \$4,000 per month and continue through February 2007, when the remainder of the original 3 year period would expire.
6. Dr. Goodman materially breached the contract by refusing to communicate with McGonigle, making derogatory comments to third parties regarding McGonigle's professional competence, communicating a reluctance to resume payments, and ultimately failing and refusing to make any further payments.
7. HC remained willing to perform under the contract. It did not commit any material breach.
8. As a result of Dr. Goodman's breach, HC is entitled to expectancy damages under the terms of their agreement, which amounts to contract payments less the cost of performance. We find credible the testimony of McGonigle who agreed that HC incurred approximately \$963.00 per month in performance costs from May 2004 through July 2004 and that he incurred similar expenses both before May 2004 and

after July 2004. Given the lack of any other meaningful specific evidence on the cost of performance, we conclude that the \$963.00 per month figure represents a reasonable average sum for the cost of performance for the life of the contract.

9. Dr. Goodman has not presented sufficient evidence of any failure by HC to mitigate its damages such that the Court could reasonably reduce HC's award.

An appropriate Order follows.

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	:	
DAVID GOODMAN,	:	
	:	
Defendant.	:	NO. 05-2249

ORDER

AND NOW, this 31st day of August, 2006, following a bench trial and upon consideration of the record of that trial, together with the parties' Proposed Findings of Fact and Conclusions of Law, and for the reasons set out in the Court's Findings of Fact and Conclusions of Law:

1. The Court finds in favor of Plaintiff HC Consulting, Inc. ("HC") and against Defendant David Goodman, M.D. ("Dr. Goodman") on HC's cause of action for breach of contract.
2. HC suffered damages in the amount of \$4,000 per month for the twenty months remaining under the three year contract, covering the period from July 2005 through February 2007 for a total of \$80,000.
3. HC would have incurred approximately \$963.00 per month in costs to perform under the contract, resulting in a performance cost of \$19,260 during the twenty months

remaining under the contract. That sum must be deducted from the amount due under the contract to reach an award of damages in the amount of \$60,740.

4. HC's damages are discounted to present value at the rate of 6%, resulting in the sum of \$55,107.92. *See* IRS Rev. Rule 2006-35 Table 5.

It is therefore **ORDERED** that **JUDGMENT** be entered in favor of HC and against Dr. Goodman in the amount of \$55,107.92.

The Clerk is directed to close this matter for statistical purposes.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
United States Magistrate Judge