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IN THE
COURT OF APPEALS OF INDIANA

DAVID JAYAKAR, M.D.,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 45A03-0906-CV-282
	)	
KIRK A. PINKERTON and	)	
PINKERTON & FRIEDMAN, P.C.,	)	
	)	
Appellees-Defendants.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Jeffery J. Dywan, Judge
Cause No. 45D11-0806-CT-75

December 18, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Plaintiff David Jayakar, M.D., appeals from the trial court's grant of summary judgment in favor of Appellees-Defendants Kirk A. Pinkerton and Pinkerton & Friedman, P.C. (collectively, "Pinkerton"). We affirm.

Issue[1]

Jayakar raises the issue of whether the trial court erred in granting summary judgment in favor of Pinkerton.

Facts and Procedural History

Between 1997 and 2000, Drs. Crisostomo Carlos, Felix Gozo and Erwin Gomez, all cardiovascular surgeons, became owners and members of the Cardiovascular Surgery Network ("CVSN"). Kirk Pinkerton, a lawyer at Pinkerton & Friedman, was the legal representative of CVSN from its inception. Jayakar became an equal member of CVSN in July of 2003. About that same time, CVSN entered into an agreement for cardiovascular services with various hospitals. As a part of that agreement, CVSN recommended Jayakar be appointed as the medical director of the cardiovascular services program for those hospitals, which came to fruition.

In 2004, Pinkerton was contacted by the provider of CVSN's malpractice insurance, noting a concern with the increase of the group's malpractice premiums. To address this issue and reduce the required premiums for CVSN, Pinkerton proposed a reorganization that would make Jayakar the only employee of CVSN and the other three physicians independent

[1] Because we affirm summary judgment on the basis of the language of the Mutual Release, we need not reach the argument based on issue preclusion.

contractors. This plan was adopted and involved, in part, the three physicians executing independent contractor agreements and selling their stock back to CVSN and the creation of a voting trust agreement whereby Carlos was the voting trustee of the shares that were owned by the sole CVSN employee and member, Jayakar. Pinkerton drafted the documents to accomplish this reorganization.

In November of 2005, CVSN and Drs. Gozo, Carlos and Gomez filed a complaint against Jayakar, seeking an accounting of the business records for CVSN, a preliminary injunction, a temporary restraining order and alleging conversion on the part of Jayakar. The complaint detailed that the plaintiffs had terminated Jayakar's employment the same day the complaint was filed. Shortly thereafter, Jayakar filed a counter-claim against the plaintiffs alleging counts of frivolous litigation, misrepresentation in stock purchase agreement, defamation, breach of fiduciary duty, tortious interference with a contract, and underpayment of compensation. Pinkerton was not joined as a counter-claim defendant. Pinkerton represented CVSN and Drs. Gozo, Carlos and Gomez in this lawsuit ("First Lawsuit"). On September 26, 2006, the parties resolved their disputes by entering into a Mutual Release, signed by CVSN, by way of an authorized officer, and Drs. Gozo, Carlos, Gomez and Jayakar. Pinkerton was not a party to the Mutual Release. The Mutual Release provided in part:

> KNOW ALL MEN BY THESE PRESENTS that David Jayakar, M.D. . . . and Cardiovascular Surgery Network, P.C., an Indiana Professional Medical Corporation, Crisostomo Carlos, M.D., Felix R. Gozo, M.D., and Erwin Gomez, M.D. (hereinafter collectively referred to as "CVSN"), for good and valuable consideration exchanged between them, . . ., each as "Releasor" hereby forever release and discharge the other, and in the case of Jayakar as

> Releasor, also forever release and discharge each of the CVSN officers, shareholders, employees, directors, independent contractors and representatives, and any CVSN successors in interest, (each person released is referred to as a "Released Party," which reference in the case of CVSN also includes individually and collectively the CVSN officers, shareholders, employees, directors, agents, independent contractors and representatives, and successors in interest [ )] from any and all claims, demands, damages, actions, causes of actions, . . . , including without limitation any claim arising out of or related to (1) any transaction or dealing between the Releasor and a Released Party, (2) any claim that was asserted or might have been asserted arising out of or are related to Jayakar's positions as an officer, director, shareholder, or employee of CVSN or as Medical Director of the Hospitals prior to the date hereof, or (3) which arise out of or are related to the Employment Agreement of other contractual arrangements between the Parties, excluding however (1) the representations, warranties, covenants, and obligations contained in the Disaffiliation Agreement entered into between the Parties this date; or (2) any and all claims and rights of contribution or subrogation related to or arising out of any medical malpractice, whether or not any such claim may be asserted against any malpractice insurer or any Jayakar Adverse Report or CVSN Adverse Report, as those terms are defined in the Disaffiliation Agreement.

Appellant's Appendix at 277.

On June 25, 2008, Jayakar filed a complaint, alleging claims of conspiracy to commit fraud and constructive fraud against Kirk A. Pinkerton and Pinkerton & Friedman, P.C. based on the preparation and execution of the Voting Trust Agreement and the manner in which Pinkerton represented CVSN while Jayakar was a shareholder. Pinkerton filed a motion to dismiss contending that Jayakar had released the defendants from any and all claims by signing the Mutual Release. As the motion relied on matters outside of the pleadings, the motion was converted to a motion for summary judgment. Noting the very broad language used in the Mutual Release, the trial court granted the motion. This appeal ensued.

Discussion and Decision

I. Standard of Review

A party seeking summary judgment bears the burden of making a prima facie demonstration that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. Warren v. IOOF Cemetery, 901 N.E.2d 615, 617 (Ind. Ct. App. 2009), trans. denied. Upon the satisfaction of this burden through evidence designated to the trial court pursuant to Indiana Trial Rule 56, the non-movant must designate specific facts demonstrating the existence of a genuine issue for trial. Id.

In reviewing the grant or denial of such motion, we apply the same standard as the trial court: whether there is a genuine issue of material fact that precludes summary judgment and whether the moving party is entitled to judgment as a matter of law. Ind. T.R. 56(C), (H). In our review, we only consider those portions of the pleadings, depositions and other matters specifically designated to the trial court for the purposes of the motion. Id. We accept as true those facts alleged by the non-moving party, which are supported by affidavit or other evidence, and resolve all doubts against the moving party. Cleary v. Manning, 884 N.E.2d 335, 337 (Ind. Ct. App. 2008). We will affirm summary judgment if it may be sustained on any legal theory or basis found in the record. Indianapolis Car Exch., Inc. v. Alderson, 910 N.E.2d 802, 804 (Ind. Ct. App. 2009).

II. Analysis

Jayakar asserts that there are genuine issues of material fact as to the intention of the parties to the Mutual Release regarding who was released and whether Pinkerton was acting

outside the scope of any agency relationship, precluding the application of the terms of the release. Summary judgment was granted based on application of the terms of the Mutual Release by a third party to the release, Pinkerton. Thus, we begin by discerning the language of the Mutual Release. "The goal of contract interpretation is to ascertain and give effect to the parties' intent as reasonably manifested by the language of the agreement." Reuille v. E.E. Brandenberger Const., Inc., 888 N.E.2d 770, 771 (Ind. 2008). "If the language is clear and unambiguous, it must be given its plain and ordinary meaning." Id. (quoting Cabanaw v. Cabanaw, 648 N.E.2d 694, 697 (Ind. Ct. App. 1995)).

Generally, only parties to a contract as well as their privities have rights under the contract. Evan v. Poe & Assocs., Inc., 873 N.E.2d 92, 98 (Ind. Ct. App. 2007). However,

> [o]ne not a party to an agreement may nonetheless enforce it by demonstrating that the parties intended to protect him under the agreement by the imposition of a duty in his favor. To be enforceable, it must clearly appear that it was the purpose or a purpose of the contract to impose an obligation on one of the contracting parties in favor of the third party. It is not enough that performance of the contract would be of benefit to the third party. It must appear that it was the intention of one of the parties to require performance of some part of it in favor of such third party and for his benefit, and that the other party to the agreement intended to assume the obligation thus imposed.

OEC-Diasonics, Inc. v. Major, 674 N.E.2d 1312, 1315 (Ind. 1996) (quoting Kirtley v. McClelland, 562 N.E.2d 27, 37 (Ind. Ct. App. 1990), trans. denied). "The intent of the contracting parties to bestow rights upon a third party 'must affirmatively appear from the language of the instrument when properly interpreted and construed.'" Id. (quoting Freigy v. Gargaro Co., 223 Ind. 342, 349, 60 N.E.2d 288, 291 (1945)). "However, it is not necessary that the intent to benefit a third party be demonstrated any more clearly than the parties'

intent regarding any other terms of the contract." Id.

Where a controversy exists between a third party and one of the parties to a release that is unambiguous, we need not look to any evidence other than the language within the four corners of the release to determine the intent of the parties. Evan, 873 N.E.2d at 104. When ascertaining the intent of the parties, a contract must be read as a whole, accepting an interpretation that harmonizes the provisions. OEC-Diasonics, 674 N.E.2d at 1315. Applying these rules of construction, we conclude that the Mutual Release unambiguously bestows the right upon Pinkerton to be protected by Jayakar's release of liability as to the officers, shareholders, employees, directors, independent contractors and representatives as to any claim arising out of Jayakar's position at CVSN.

The pertinent clauses of the Mutual Release that necessitate this conclusion are:

> Jayakar, as Releasor, also forever release[s] and discharge[s] each of the CVSN officers, shareholders, employees, directors, independent contractors and representatives . . . from any and all claims . . . arising out of or are related to . . . (2) any claim that was asserted or might have been asserted arising out of or are related to Jayakar's positions as an officer, director, shareholder, or employee of CVSN or as Medical Director of the Hospitals prior to the date hereof[.]

App. at 277. This language clearly and unambiguously intends to foreclose any action by Jayakar that relates to his experiences at CVSN that involve any of the individuals closely associated with CVSN. Such a group of individuals closely associated with a corporation would without question include the legal counsel of the corporation. Particularly, legal counsel of an entity is unquestionably encompassed in the term representative. Jayakar does not dispute the fact that Pinkerton served as legal counsel for CVSN. Jayakar also makes the

alternative argument that even if Pinkerton is considered an agent, independent contractor or a representative that Pinkerton was not acting in that capacity when committing the alleged tortious acts. However, this argument fails as the Mutual Release applies to the covered individuals or entities acting "in any capacity." App. at 277. Therefore, we conclude that the trial court properly granted Pinkerton summary judgment on the basis that the Mutual Release barred Jayakar's claims.

Affirmed.

BAKER, C.J., and ROBB, J., concur.