

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	
	§	
PROMEDCO OF LAS CRUCES, INC., <i>et al.</i>, Debtors,	§	Case No. 00-46863-BJH-11
	§	Jointly Administered
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	§	
NAPLES MEDICAL CENTER, P.A., Plaintiff/Counter-Defendant	§	
v.	§	Adv. Pro. No. 01-4052
	§	
PROMEDCO MANAGEMENT COMPANY, PROMEDCO OF SOUTHWEST FLORIDA, INC.,	§	
Defendants/Counter-Plaintiffs,	§	
v.	§	
	§	
DALE B. ADAMSON, M.D., <i>et al.</i>	§	
Third Party Counter-Defendants	§	
	§	

MEMORANDUM OPINION

This Adversary Proceeding was tried to the Court on October 9 and 10, 2002. The Court has core jurisdiction over this Adversary Proceeding pursuant to 28 U.S.C. §§ 1334 and 157. This Memorandum Opinion constitutes the Court’s findings of fact and conclusions of law pursuant to Federal Rule of Procedure 52, made applicable here by Federal Rule of Bankruptcy Procedure 7052.

For the reasons explained below, and after careful consideration of the evidence admitted at trial and the arguments of counsel, the Court concludes that: (1) ProMedCo Management Company (“ProMedCo”) and ProMedCo of Southwest Florida, Inc. (“ProMedCo-SW”) (collectively, “PMC”) are entitled to the surrender of the life insurance policy owned by Third-Party Defendant David Buser, M.D. (“Buser”) and to receive the cash surrender value of that policy and

the monies remaining in the premium escrow; and (2) PMC is entitled to the surrender of the life insurance policy owned by Third-Party Defendant Wallace McLean, M.D. (“McLean”) and to receive the full cash surrender value of that policy (along with the monies advanced against or withdrawn from the cash surrender value of that policy) or to recover the total premiums it advanced for that policy.

I. Procedural Background

ProMedCo-SW is a physician practice management company and wholly-owned subsidiary of ProMedCo. Both entities are debtors in the jointly administered ProMedco of Las Cruces, Inc. bankruptcy case pending in this Court. Prior to the bankruptcy filings, PMC entered into a business transaction with the Naples Medical Center (“NMC”) and the individual physicians associated with NMC. Among the agreements signed in connection with this transaction were the so-called Split Dollar Agreements (“SDA”) and employment agreements with Buser and McLean at issue here.

On May 16, 2001, NMC filed this Adversary Proceeding against PMC. NMC’s complaint sought breach of contract damages as well as a declaratory judgment terminating its management services agreement with ProMedCo-SW. On June 20, 2001, PMC answered and counterclaimed against NMC and 41 individual physicians seeking a declaratory judgment regarding the service agreement’s termination fee, as well as a determination of rights under the SDAs and the employment agreements between and among PMC, NMC, and the individual physicians.

On April 30, 2002, this Court entered an order approving a settlement between NMC and PMC. Following this partial settlement of the Adversary Proceeding, PMC continued to settle with various of the individual physicians. At the time of this trial, only Buser, McLean, and a third

physician, Dr. Hussey, remained as Third Party Counter-Defendants.¹

II. Factual Background

ProMedCo and its subsidiaries, including ProMedCo-SW, are physician practice management companies that provide non-medical support services for physicians and physician practice groups. In 1997, PMC, NMC, and Naples Obstetrics & Gynecology, P.A. (“NOG”) negotiated asset purchase agreements pursuant to which NOG-associated physicians joined the NMC group and ProMedCo-SW acquired the assets of NMC. In connection with these transactions, ProMedCo-SW agreed to provide medical management services and NMC agreed to enter into five-year employment agreements with the associated physicians. As part of the consideration for the acquisition transaction, ProMedCo-SW and the individual physicians entered into the SDAs. ProMedCo guaranteed ProMedCo-SW’s obligations under the SDAs. Under the SDAs, ProMedCo-SW agreed to pay the first five years of premiums on a “split-dollar” life insurance policy that would be owned by each doctor. These premium payments were forwarded to a separate escrow account for each doctor (the “Premium Escrow”) and thereafter forwarded to the insurance company. In exchange for the SDAs (and other consideration), each doctor agreed to sign a five-year employment agreement with NMC.

Thus, in April of 1997, Buser and McLean signed five-year employment agreements with NMC. *See* PMC Exhibit 1F and PMC Exhibit 20F. Under his respective employment agreement, Buser and/or McLean breaches if he leaves NMC’s employ for any reason other than death, disability or retirement within the five-year term of that agreement. Moreover, ProMedCo-SW’s

¹Dr. Hussey did not file an answer and, upon PMC’s request, the clerk has entered a default on the docket. PMC has filed a motion for entry of default judgment against Dr. Hussey which is set for hearing on November 21, 2002.

obligations under the SDAs are conditioned upon the physician's compliance with the terms and conditions of his employment agreement. Thus, under the terms of the SDA, if a doctor breaches his employment agreement, ProMedCo-SW is entitled to surrender the policy and receive the cash surrender value of the policy along with any monies remaining in the Premium Escrow. The SDA also contains non-compete provisions pursuant to which the doctor agreed that if he competes with NMC during the five-year employment term plus an additional eighteen month period thereafter, ProMedCo-SW becomes entitled to recover the total premiums it advanced for the policy as liquidated damages.² Thus, any doctor that violates the non-compete is liable for any premiums advanced by ProMedCo-SW for the policy.

Although Buser and McLean each signed five-year employment agreements, neither remained employed by NMC for five years. Thus, this Court must decide whether either Buser or McLean: (i) forfeited the policy and its cash surrender value along with the remaining monies in the Premium Escrow, and/or (ii) is obligated to repay the total premiums advanced by ProMedCo-SW for the policy as a result of the early termination of employment with NMC and continued practice of medicine in Collier County, Florida.

III. Parties' Contentions

A. PMC's Contentions

As regards their claims against Buser, PMC contends that Buser voluntarily terminated his employment with NMC in the fall of 1997, less than six months after signing the employment agreement. Because his resignation was for a reason other than "death, disability or retirement,"

²At least the SDA signed by McLean contains non-compete provisions. Buser disputes signing the version of the SDA that contains non-compete provisions. The Court addresses which SDA is binding on Buser below. *See* pp. 8-9, *infra*.

ProMedCo-SW contends that it is entitled to the \$127,537.02 cash surrender value of Buser's policy and the \$3,652.67 remaining in the Premium Escrow. PMC also contends that Buser continued his medical practice within Collier County, Florida in breach of his covenant not to compete and, therefore, ProMedCo-SW is entitled to recover the \$191,616.00 it advanced for premiums as liquidated damages for this breach. Finally, PMC asks this Court to award them prejudgment interest.

As regards their claims against McLean, PMC contends that McLean announced his desire to separate from NMC in February 1998, and began to voluntarily terminate his employment relationship on or about May 20, 1998, prior to the end of the five-year term of his employment agreement. Thus, ProMedCo-SW claims its entitlement to: (i) the remaining \$8,035.70 cash surrender value of the policy, (ii) a recovery from McLean of the \$180,065.00 he borrowed against the cash surrender value of the policy, and (iii) a recovery from McLean of the \$88,000 he withdrew from the cash surrender value of the policy in accordance with the terms of the SDA.³ PMC also contends that McLean continued his medical practice within Collier County, Florida in breach of his covenant not to compete and, therefore, ProMedCo-SW is entitled to recover the \$327,354.00 it advanced for premiums as liquidated damages for this breach. Finally, PMC asks this Court to award them prejudgment interest.

B. Buser and McLean's Contentions

Buser and McLean agree that they signed a five-year employment agreement with NMC in April of 1997. *See* Joint Pretrial Order, p. 5, ¶ 8. However, Buser and McLean contend that they were either actually or constructively terminated by NMC without cause and thus, they are not liable

³No funds remain in McLean's Premium Escrow.

to ProMedCo-SW under the forfeiture provisions of the SDA.

As regards PMC's claims under the covenant not to compete, Buser contends that he never agreed to the non-compete provisions of the SDA. In short, Buser contends that he did not sign the version of the SDA that contains the non-compete provisions. *See* Buser's and McLean's Proposed Findings of Fact and Conclusions of Law ("Doctors' Proposed Findings"), p. 4, ¶ 15. Thus, Buser contends that he is not obligated to repay the premiums advanced by ProMedCo-SW as liquidated damages for his alleged breach of the non-compete.

In contrast, McLean does not dispute that he signed the version of the SDA that contained the non-compete provisions and that he has continued to practice medicine in Collier County, Florida since leaving NMC's employ. However, McLean contends that a proposed settlement agreement among PMC, NMC and him (which was never consummated) renders the non-compete unenforceable against him. *See* Joint Pre-Trial Order, p. 11, ¶ 6. Moreover, if the proposed settlement did not release him from his non-compete, McLean contends that it is unenforceable against him for public policy reasons. For either of these reasons, McLean contends that he is not obligated to repay the premiums advanced by ProMedCo-SW as liquidated damages for his alleged breach of the non-compete.

IV. Legal Analysis

As regards PMC's claims against Buser, the answer to three questions will control the outcome of the parties' dispute. First, did Buser sign the version of the SDA that contains the non-compete provisions? Second, if so, is the non-compete enforceable against him? Third, was Buser terminated by NMC "for any reason other than death, Total and Permanent Disability or retirement as provided in the Employment Agreement" or did Buser terminate his employment with NMC "for any reason other than death, Total and Permanent Disability or retirement as provided in the

Employment Agreement?” Defendants’ Exhibit 38, section 7(i) and (ii). Stated more simply, was Buser actually or constructively discharged by NMC without cause or did Buser voluntarily terminate his employment with NMC?

As regards PMC’s claims against McLean, the answer to two questions will control the outcome of the parties’ dispute. First, was McLean’s employment agreement terminated prior to the end of its five-year term “pursuant to Section 9 thereof by NMC for any reason other than death, Total and Permanent Disability as described in Section 9(e) thereof or retirement, as approved by the Policy Council,” or did McLean voluntarily terminate his employment with NMC “for any reason?” Defendants’ Exhibit 7, section 2, ¶ 2.2. Again, stated more simply, was McLean actually or constructively discharged by NMC without cause or did McLean voluntarily terminate his employment with NMC? Second, are the non-compete provisions of the SDA enforceable against him? *See id.*, section 3.

Thus, after determining which version of the SDA Buser signed, this Court must interpret the applicable SDA and employment agreement. The parties agree that Florida law governs the interpretation of these contracts and, under Florida law, where the contract is clear and definite, the Court must apply the contract’s plain language as a matter of law. *See Memorandum Opinion*⁴, June 18, 2002, p.10; *see also Maleki v. Hajianpour*, 772 So.2d 628, 631 (Fla. Dist. Ct. App. 2000). When the terms of the contract are unambiguous, the Court is to look within the four corners of the document, give reasonable meaning to all of its provisions, and construe the contract as a whole. *See Barakat v. Broward County Housing Authority*, 771 So.2d 1193, 1194 (Fla. Dist. Ct. App.

⁴ Prior to trial, ProMedCo-SW moved for partial summary judgment. ProMedCo-SW asked this Court to interpret the SDAs and enter an interlocutory, partial summary judgment against third party counter-defendants Drs. Cook, Courville and Wilson. This Court granted the motion and held that these SDAs were unambiguous and clearly provided for forfeiture upon the doctors’ voluntary termination of employment with NMC.

2000); *Hardwick Props., Inc. v. Newbern*, 711 So.2d 35, 40-41 (Fla. Dist. Ct. App. 1998); *McCarthur v. A.A. Green & Co. of Fl., Inc.*, 637 So.2d 311, 312 (Fla. Dist. Ct. App. 1994). In addition, Florida law follows the doctrine that “where two or more documents are executed by the same parties, at or near the same time, in the course of the same transaction, and concern the same subject matter, they will be read and construed together.” *Clayton v. Howard Johnson Franchise Sys.*, 954 F.2d 645, 648-49 (11th Cir. 1992) (applying Florida law); *see also Int’l Ship Repair & Marine Servs., Inc. v. Gen. Portland, Inc.*, 469 So.2d 817, 818 (Fla. Dist. Ct. App. 1985).

The Court will answer each of the questions set forth above as to each doctor separately.

A. Dr. Buser

1. Which version of the SDA controls here?

Buser signed a SDA with ProMedCo-SW and an employment agreement with NMC in April of 1997. The parties agree as to which document governs Buser’s employment, but the parties disagree as to which version of the SDA is legally operative. As relevant here, the only difference in the two versions of the SDA is that one contains the non-compete provisions and the other does not.⁵

PMC contends that PMC Exhibit 1A is the legally operative document. Conversely, Buser contends that Defendants’ Exhibit 38 is the version of the SDA he signed. Buser contends that he never signed the version of the SDA which contains the non-compete – *i.e.*, PMC Exhibit 1A.

Based on the evidence, the Court agrees with Buser – he never signed PMC Exhibit 1A.

⁵While Buser’s employment agreement, PMC Exhibit 1F, contains a “Non-Competition and Non-Solicitation” provision, its restrictions only apply during a “Renewal Term.” The employment agreement defines a “Renewal Term” as successive one year terms following the initial five-year term. The original agreement was signed in 1997 and Buser ceased to be affiliated with NMC in 1997. Thus, this non-compete provision is not relevant to this dispute.

Rather, Buser signed Defendants' Exhibit 38, the earlier version of the SDA which did not contain the non-compete provisions at issue here. While the SDA Buser signed had certain blanks (in which dollar amounts were to be filled in) and contained the notation on the first page that stated that the agreement was "[s]ubject to further changes from Mr. Griffith,"⁶ the Court cannot find that Buser agreed to the substantive revisions to the SDA that occurred after he signed it. It is obvious which agreement Buser signed because the signature page attached to PMC Exhibit 1A is actually the signature page from Defendants' Exhibit 38. Buser's signature page does not match the document number or typeset of PMC Exhibit 1A.

PMC did not offer any supporting evidence to connect Buser's signature on Defendants' Exhibit 38 to the later version of the SDA, PMC Exhibit 1A. Instead, PMC argues that the statement "subject to further changes from Mr. Griffith" covers the subsequent insertion of the non-compete provisions. The Court cannot agree. A statement conditioning the earlier version of the SDA to be "subject to further changes," does not render a new and material provision, such as a non-compete, effective against Buser. *See, e.g., Powertel, Inc. v. Bexley*, 743 So.2d 570 (Fla. Dist. Ct. App. 1999), *reh'g denied* (1999), *and review denied*, 763 So.2d 1044 (Fla. 2000) (arbitration clause added to telephone service contract as an insert to the monthly bill not made part of the contract because of lack of bargain).

For these reasons, the operative SDA is Defendants' Exhibit 38.⁷

2. Are the Later Non-Compete Provisions Binding on Buser?

⁶Neither party explained who Mr. Griffith is.

⁷All remaining references to Buser's SDA in this Memorandum Opinion are references to Defendants' Exhibit 38.

Because Buser never agreed to the non-compete provisions that were inserted into the SDA after he signed it, he is not bound by those provisions. Thus, ProMedCo-SW is not entitled to recover the total premiums it advanced on the life insurance policy it purchased for Buser as liquidated damages for Buser's alleged breach of the non-compete.

3. Was Buser Actually or Constructively Discharged by NMC Without Cause?

The SDA signed by Buser contains the following forfeiture provisions:

In the event of any of the following circumstances:

(i) Termination of the Employment Agreement during its Initial Term by NMC for any reason other than death, Total and Permanent Disability or retirement as provided in the Employment Agreement;

(ii) Termination of the Employment Agreement during its Initial Term by OWNER for any reason other than death, Total and Permanent Disability or retirement as provided in the Employment Agreement;

* * *

ProMedCo-SW shall have the right to . . . (2) surrender the Policy and receive the cash surrender value thereof and any remaining balance of the Premium Escrow in partial or full satisfaction, as the case may be, of ProMedCo-SW's rights under the Service Agreement and/or the Employment Agreement and will thereafter have no further obligations under the Note delivered pursuant to Section 4 hereof.

Defendants' Exhibit 38, section 7. Similarly, the employment agreement between NMC and Buser provides:

In the event that this Agreement is terminated prior to the end of the Initial Term (i) pursuant to Section 9 by NMC for any reason other than death, Total and Permanent Disability as described in Section 9(e) hereof or retirement, as approved by the Policy Council, of Employee or (ii) by Employee for any reason, Employee shall return (the "Refund") to NMC the Consideration received by that Employee . . . as a result of the sale of assets under the Asset Purchase Agreement, and NMC shall refund such amount to ProMedCo-SW which shall use such payments as reimbursement for all costs incurred by ProMedCo-SW in the enforcement of the this [sic] agreement and in recruiting a replacement physician for Employee.

PMC Exhibit 1F, section 11. Under the terms of Buser's employment agreement, NMC can terminate him, but only "for cause," as defined in section 9 of that agreement, and only with the consent of the Policy Council. *See id.*, section 9.

When read together, the SDA and the employment agreement provide that if the employment agreement is terminated pursuant to section 9 (the "for cause" provisions) by NMC (other than for Buser's death, total or permanent disability or retirement), or if Buser voluntarily terminates his employment for any reason (other than death, total or permanent disability or retirement), Buser forfeits his rights to the policy (and the cash surrender value of the policy) along with any monies in the Premium Escrow. However, neither agreement provides for a forfeiture of these benefits if NMC terminates Buser's employment other than "for cause." Accordingly, if NMC terminates Buser without cause, Buser is entitled to retain the policy and the monies in the Premium Escrow.⁸

Thus, the Court must decide if NMC terminated Buser (either actually or constructively) without cause or whether Buser voluntarily terminated his employment with NMC. The parties agree that Buser was not terminated by NMC "for cause."

The employment relationship between NMC and Buser formally ended in early November 1997. The events surrounding the end of this employment relationship are described below. According to Buser, on Thursday, October 16, 1997, Dr. Thompson ("Thompson"), the head of the obstetrics group at NMC, told Buser to remove his belongings and leave NMC. At that moment, Buser believed he had been fired by Thompson. However, Buser immediately called Dr. Buysee

⁸No provision of the SDA or the employment agreement protects PMC in the event NMC terminates a physician without cause.

(“Buysee”), the president of NMC, who suggested that he move his belongings to NMC-North⁹ while the apparent dispute was sorted out. Buser began to move his belongings to NMC-North. Buser also contacted his attorney who, after reading his employment agreement, assured him that Thompson was not authorized to fire him and that he remained an employee of NMC.

In fact, on October 21, 1997, Buser’s attorney sent a letter to Thompson in which she advised him that he had no authority to fire Buser, that “Buser considers himself to be a staff physician for NMC and intends to continue his practice with this organization,” and that “[i]ssues surrounding the location of his practice and the patients he will serve will be resolved directly with NMC.” PMC Exhibit 1G. Buysee was copied on this letter. Moreover, Buser’s attorney sent a separate letter to Buysee in which she advised that Buser considered NMC to be in breach of his employment agreement due, in part, to Thompson’s actions and requested that she be contacted to discuss a resolution of the matter. *See* PMC Exhibit 1H.

On October 22, 1997, Thompson advised Buser by letter that he had not told Buser to vacate the NMC offices on October 16. *See* Defendants’ Exhibit 55. In addition, on October 23, 1997, NMC held a Board meeting at which time the dispute between Thompson and Buser was discussed. Buser and his counsel participated in this Board meeting, as did Thompson. At the conclusion of the Board meeting, Buser was advised that he had not been fired by Thompson, that NMC considered him to be employed by NMC, and that NMC intended to continue to honor its obligations under his employment agreement.¹⁰ Notwithstanding Buser’s position in his counsel’s letter to

⁹NMC-North is located across the parking lot from NMC. Buser had previously had an office at NMC-North.

¹⁰This position was confirmed in a letter from Buysee to Buser dated October 27, 1997. NMC also reconfirmed its obligation to provide facilities and personnel to Buser and agreed to provide an accounting of revenues generated by Buser since January 1, 1997. *See* PMC Exhibit 2.

Thompson dated October 21, 1997 – *i.e.*, that Buser considers himself an employee of NMC and intends to continue his practice there, Buser’s counsel responded at the conclusion of the Board meeting that Buser did not consider continuing employment to be a satisfactory resolution of the dispute.¹¹

Thus, apparently beginning on Friday, October 17, 1997, Buser worked out of the NMC-North space and, at Buysee’s request on the following Monday, Kathy Phelps, NMC’s director of human resources, began to work to address Buser’s complaints about the adequacy of the facilities at NMC-North. However, on November 5, 1997, Buser’s attorney sent a letter to NMC stating that Buser would “cease to be its employee effective November 6, 1997” because “the facilities made available to him have been totally inadequate. He has had no phone line dedicated to his practice, but has had to use phones of neighboring doctors. His office has been the dumping ground for at least one other doctor who has moved into a neighboring office and he has had, at many times, only one examining room available for his use.” PMC Exhibit 4.

a. Constructive Discharge

To establish a constructive discharge the employee must prove, under an objective standard, that the employer created working conditions so intolerable to the employee that a reasonable person would have felt compelled to resign.¹² *Webb v. Florida Health Care Mgmt. Corp.*, 804 So. 2d 422,

¹¹This position was confirmed in a letter from Buser’s attorney dated October 29, 1997, which provides “[a]s I stated at the Board meeting of last week, in my subsequent conversation with Chuck McQueary [an officer of PMC] and then with you, Dr. Buser’s continuing employment with the Naples Medical Center (NMC) is not a satisfactory resolution of the dispute between these parties. Accordingly, the terms presented in Dr. Buysee’s letter are rejected by Dr. Buser. A more satisfactory resolution of the dispute is a severance of the relationship between he and NMC on terms acceptable to both parties.” PMC Exhibit 3.

¹² While Florida law applies to the constructive discharge claims asserted here, Buser and McLean cite the Court to Eleventh Circuit cases applying constructive discharge law in federal court. *See* Trial Brief of Buser and McLean, p. 1. Similarly, PMC cites the Court to various Eleventh Circuit decisions. *See* Debtors’ Response to Trial Brief of Defendants Buser and McLean, pp. 3-4. Florida courts also cite favorably to various Eleventh Circuit decisions. *See Webb v. Florida Health Care Mgmt. Corp.*, 804 So.2d 422, 424 (Fla. Dist. Ct. App. 2001) (quoting

424 (Fla. Dist. Ct. App. 2001) (quoting *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1314 (11th Cir. 1989)). The court must find “a high degree of deterioration in an employee’s working conditions.” *Hill v. Winn-Dixie Stores, Inc.*, 934 F.2d 1518, 1527 (11th Cir. 1991); *see also, e.g., Wardell v. School Bd. or Palm Beach County, Florida*, 786 F.2d 1554, 1557 (11th Cir. 1986) (change in workload and failure to promote coupled with embarrassment to employee did not rise to “intolerable” level required for constructive discharge). The employee’s “subjective feelings about his employer’s actions” are not considered in determining whether an employee was constructively discharged. *Doe v. DeKalb County School District*, 145 F.3d 1441, 1450 (11th Cir. 1998).

The employee bears the burden of proof and must convince the trier of fact that the ““working conditions would have been so difficult or unpleasant that a *reasonable* person in the employee’s shoes”” would leave. *Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987) (quoting *Bourque v. Powell Elec. Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980)). The employee bears a heavy burden because “[p]art of an employee’s obligation to be *reasonable* is an obligation not to assume the worst, and not to jump to conclusions too fast,” *id.*, and “[u]nless the employer is given sufficient time to remedy the situation, a constructive discharge will generally not be found to have occurred.” *Schwertfager v. City of Boynton Beach*, 42 F.Supp.2d 1347, 1367 (S.D. Fla. 1999) (citing *Kilgore v. Thompson & Brock Mgmt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996)).

Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1314 (11th Cir. 1989); *McCaw Cellular Communications of Florida, Inc. v. Kwiatek*, 763 So.2d 1063, 1066-67 (Fla. Dist. Ct. App. 1999) (citing *Steele*, 867 F.2d at 1317). Because the parties asserting a claim of constructive discharge rely on Eleventh Circuit law, and Florida courts look to Eleventh Circuit law, the Court will apply the Eleventh Circuit law cited by the parties. Moreover, the law of constructive discharge is substantially similar in the various federal circuits, as well as under state law. *See, e.g., Webb v. Florida Health Care Mgmt. Corp.*, 804 So.2d 422 (Fla. Dist. Ct. App. 2001); *Phillips v. Interstate Hotels Corp.*, 974 S.W.2d 680 (Tenn. 1998); *Henry v. Lennox Indus., Inc.*, 768 F.2d 746 (6th Cir. 1985); *Young v. Southwestern Savings and Loan Ass’n*, 509 F.2d 140 (5th Cir. 1975); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

For the reasons explained below, the Court concludes that Buser has failed to prove, by a preponderance of the evidence, that he was constructively discharged. First, Buser argues that NMC breached his employment agreement by taking him off the OB-call rotation and failing to adequately compensate him for his services.¹³ Even if true, that alone does not support a constructive discharge claim. None of the cases cited by Buser supports the contention that a simple breach of an employment agreement rises to the level of constructive discharge. *See, e.g., Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 95-96 (Tenn. 1999) (employer not entitled to remove all of contract employee's work duties under the contract, but the employer does have right to change or restrict work duties under employment contract).

However, Buser also testified regarding other adverse working conditions he faced while employed by NMC. In short, according to Buser, his work environment was intolerable and he was forced to leave. Based upon a review of the evidence, however, the Court concludes that it is insufficient to support Buser's claim of constructive discharge.

When Buser was first employed by NMC, his office was located at NMC-North, in the same space he returned to after the events of October 16, 1997. According to Buser, the NMC-North space was perfectly adequate when he first officed there. After the PMC transaction, however, Buser moved across the parking lot to the 11181 Health Park location and began practicing with the former NOG obstetricians who became associated with NMC as part of that transaction. According to Buser, disagreements arose between he and the former NOG obstetricians because of his

¹³Based on NMC's alleged breach of the employment agreement, Buser filed suit against NMC, NOG, and Drs. Buysee, Thompson, Collins, Beckett, and Adiutori in Florida state court. *See* PMC Exhibit 1 ("Dr. Buser's Affidavit"), p. 5, ¶ 17. In light of the pendency of this state court action, this Court will not decide whether NMC breached the Employment Agreement by taking Buser off the OB-call rotation.

involvement in an incontinence therapy program.¹⁴ While Buser's testimony was vague regarding when these disagreements began, he did testify that the other doctors were upset because they wanted to participate in the revenues generated by the incontinence therapy program. According to Buser,

Thompson and the other doctors retaliated by modifying Buser's duties with NMC (which would result in a reduction of the revenues Buser produced and which would, in turn, reduce Buser's income from NMC under the compensation formula provided in Buser's employment agreement). According to Buser, the dispute escalated on October 16, 1997 to the point where Thompson fired him.

Because Buser's testimony was vague on a specific time when these disputes arose and when the alleged retaliation began, the Court looked for more specific testimony. Buser had previously testified (by affidavit) in opposition to PMC's motion for partial summary judgment. That affidavit was admitted into evidence as PMC Exhibit 1. Of interest, there Buser testified that "[o]n or about October 16, 1997, . . . Thompson . . . informed me that I had been discharged from my employment with NMC He instructed me to vacate the offices and to take my belongings with me." PMC Exhibit 1, p. 2, ¶ 5. Significantly, however, Buser went on to state, "I was immediately removed from further participation in the OB call rotation and the treatment of NMC obstetrical patients. This denied me the ability to share in the obstetrical global billings (including prenatal visits, delivery revenues, post-partum visits, ultra-sounds, amniocentesis and nurse-practitioner revenues)

¹⁴Buser testified that this program was a non-NMC related medical venture exploring non-surgical treatment for patients with incontinence problems. Buysee authorized Buser to undertake this program individually by letter dated April 22, 1997 provided Buser agreed that "all revenues derived therefrom shall be treated as NMC revenues and thus be subject to the 15% management fee to [ProMedCo-SW]" and "all net revenues from this venture shall be credited to you for purposes of your compensation." Defendants' Exhibit 42.

and significantly reduced my income.” *Id.* This testimony is significant to the Court because it suggests that what was described as “retaliation” at trial really occurred on and after October 16, not before.

As noted previously, after Thompson told Buser to leave, Buser called Buysee who suggested that Buser move his things back to NMC-North while the dispute was sorted out. Buser did so. However, according to Buser, what was once adequate space at NMC-North was no longer adequate. Buser testified at length about the inadequacies of the NMC-North facility. In summary, Buser testified that: (i) he was not provided with a working telephone, (ii) his previous telephone number was not transferred to NMC-North so his patients could reach him, (iii) his patients were misinformed about his whereabouts – *i.e.*, they were told he “left town in the middle of the night” and that “they [NMC] didn’t know where he was,” (iv) he was not provided with receptionist, billing, or nurse assistance, and (v) two days later his new office was filled with another doctor’s furniture.¹⁵ Buser testified that he notified NMC of these problems.

While Buser did not present specific evidence as to the daily events between his return to the NMC-North space on October 16 and 17 and his “last day” on November 5, it is clear that he continued to believe that the facilities at NMC-North were inadequate for him to serve his patients’ needs properly during that entire time. Moreover, he remained concerned about the fact that he had not been paid since September 1997.¹⁶ *See* PMC Exhibit 1, p. 4, ¶ 13; *see also* PMC Exhibit 4.

¹⁵According to Buser’s affidavit, he found the furniture in his office at NMC-North two days after “moving into the new spaces.” PMC Exhibit 1, p. 3, ¶ 7. Thus, the furniture arrived in his office over the weekend. Buser testified at trial that he could not remember if Ms. Rypl or he had called Ms. Phelps to complain about the arrival of this second set of office furniture. Ms. Phelps testified that she did not remember getting any calls about this problem, but that it would have been easily resolved. She testified that NMC had offsite storage space and that the extra furniture could have been moved there.

¹⁶Counsel for PMC advised the Court that NMC did not compensate Buser after September because NMC contends that Buser’s expenses exceeded his individual contributions in October and the 5 days of November he was employed and thus, Buser was not entitled to any compensation under the terms of his employment agreement. This

Thus, this Court must address Buser's concerns about the adequacy of the NMC-North facilities and whether these inadequacies, coupled with Buser's other complaints, support a finding of constructive discharge. As noted previously, Buser testified that he did not have adequate office space or access to examination rooms, and that he was not able to post a receptionist at the front desk because of a lack of space. Buser also testified that during the days immediately following his move back to NMC-North, he personally hired Shirley Rypl to answer his NMC calls because NMC did not provide him with appropriate staff. Moreover, because he had no working phone at the NMC-North location, calls from his old office were forwarded to his home (where Ms. Rypl was working) and she would call him on his cell phone.¹⁷ *See* Defendants' Exhibit 47, pp. 10, 15. According to Buser, he was also denied access to his patients and his patients' charts and this caused problems both with servicing his patients and his professional image.¹⁸

There were clearly problems associated with Buser's return to NMC-North. However, the evidence is disputed with respect to the extent of those problems. For example, Buser initially testified that because two other doctors were officing in the NMC-North space when he returned, he only had access to one examining room and there was no room for his receptionist (if he had been provided one) at the front desk. However, Kathy Phelps, NMC director of human resources, testified to the contrary. Ms. Phelps testified that the NMC-North space was designed originally for

issue will be resolved by the Florida state court.

¹⁷According to Ms. Rypl's deposition testimony, she had previously worked for Buser and agreed to assist him during her maternity leave because he had no other help once he moved back to NMC-North. *See* Defendants' Exhibit 47, pp. 9-10.

¹⁸Ms. Rypl's deposition testimony sheds light on the information access problem. The NMC-North location had a different computer system than the other NMC location, so the patient's information and appointment times were inaccessible from the NMC-North location. However, contrary to Buser's testimony, Ms. Rypl testified that she had physical possession of his patient files. *See* Defendants' Exhibit 47, p. 25.

three doctors, the reception area had three spaces for receptionists, and there were six examination rooms. Moreover, she testified that while a second doctor was expected to work out of the NMC-North space beginning in mid-November and some of his belongings may have already been in the space, when Buser moved back to NMC-North, only one doctor, Dr. Drew, was actually working out of those offices.

After Ms. Phelps' testimony, Buser clarified his earlier testimony and explained that this was a difficult time for him, he was distraught and did not believe that waiting would be effective. Buser testified that while he didn't "leave" on October 23, he had decided that he did not want to remain an employee.

Obviously, Buser's complaints about the lack of a working phone at NMC-North are serious. Ms. Rypl testified in her deposition that she called Ms. Phelps regarding the phone problems. *See* Defendants' Exhibit 47, p. 14. Ms. Phelps' testimony, however, provides some context to this complaint. Ms. Phelps testified that she did not become aware of Buser's move back to NMC-North until October 20th, the following Monday. She further testified that she put a service request in with the phone company immediately to transfer Buser's phone number and line to the NMC-North space. While Ms. Phelps admitted that this transfer had not occurred by November 5, she also testified that it usually took the phone company at least two weeks to effect such a transfer.

Regarding Buser's other complaints – *i.e.*, inadequate staff and space, she testified that space was available to him at the NMC facility across the parking lot and that she had compiled a folio of potential candidates for Buser's staffing needs. Because Buser testified that he had never seen such a folio of candidates, she admitted on cross-examination that it was possible that she did not actually send the folio to him although she thought she had.

Finally, the evidence is disputed regarding what Buser's patients were told. Buser testified

that his patients were told he had “left town in the middle of the night.” However, Ms. Phelps testimony is to the contrary. For example, Ms. Phelps testified that a notice was posted and that the staff was instructed to tell patients that Buser had relocated to NMC-North. Defendants’ Exhibit 56 is the memo circulated to the staff asking the staff to inform “any patients, guests, pharmaceutical reps, etc.” that Buser had relocated to NMC-North. The memo also asked the staff to refrain from offering any negative comments. *See* Defendants’ Exhibit 56.

The Court has no way of knowing what Buser’s patients were actually told because no patient testified. On this record, however, it appears that the NMC staff was told to assist Buser and his patients during this time period. *See* Defendants’ Exhibit 56, 57.

Again, while there were problems associated with Buser’s move back to NMC-North and there were other problems in Buser’s working relationship with the former NOG obstetricians, NMC was not given adequate time to address these problems. Obviously, Buysee learned of the problems Buser was having with Thompson and the other obstetricians on October 16. The record is unclear if he knew of these problems, or the extent of these problems, prior to that time. On this record, NMC was given, at best, 20 days to “fix” these problems – *i.e.*, from October 16 to November 5. However, viewing the evidence in a less favorable light to Buser (because Buser bears the burden of proof on his constructive discharge claim), NMC was given 7 days to “fix” these problems – *i.e.*, from October 16 to October 23 when Buser announced after the Board meeting that continuing employment with NMC was not a satisfactory resolution of the dispute.

Moreover, the physical problems with the NMC-North space could have been resolved by Buser returning to the NMC space across the parking lot. By letter dated October 22, 1997, Thompson offered to re-situate Buser in his former space at NMC. *See* Defendants’ Exhibit 55. Buser did not accept this offer and testified that he would not return to the NMC space because he

was not personally invited back onto the call rotation. While unhappy about the change in his duties – *i.e.*, being taken off the call rotation, Buser failed to explain why a return to the NMC location would not remedy the facility problems.

For these reasons, the Court concludes that Buser failed to prove his constructive discharge claim. The evidence is insufficient to show that Buser’s working conditions were so intolerable, and with no chance of remediation, that a reasonable person would feel compelled to resign. *See Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1538-39 (11th Cir. 1987). In addition, “[p]art of an employee’s obligation to be *reasonable* is an obligation not to assume the worst, and not to jump to conclusions too fast.” *Id.* at 1539. While (i) it might have been uncomfortable for Buser to return to the NMC space, (ii) the problems were not immediately resolved at the NMC-North space, and (iii) Buser no longer trusted Buysee and Thompson, Buser decided, within four business days after his alleged firing and within two business days after his counsel’s letter to Thompson in which counsel stated that Buser “intends to continue his practice with [NMC],” that he wanted to end his employment relationship with NMC.

Florida law is clear. To prevail on a constructive discharge claim, “the employer must be given an opportunity to remedy the complaints of an employee before an employee can prevail on a constructive discharge claim.” *Webb v. Florida Health Care Mgmt. Corp.*, 804 So. 2d 422, 424 (Fla. Dist. Ct. App. 2001). While Buser did not formally sever his relationship with NMC until November 5, he made it clear that he no longer wanted to be employed on October 23 at the conclusion of the Board meeting. NMC was simply not given a reasonable opportunity to remedy Buser’s complaints.

b. Actual Termination Without Cause

Alternatively, Buser contends that Thompson fired him on October 16, 1997 and that this

act constitutes a termination of his employment by NMC without cause. Buser testified that he believed that Thompson had the authority to fire him when Thompson uttered the words.

However, as discussed above, Buysee told Buser to stay the same day that Thompson told him to leave. In addition, Buser's attorney told him that Thompson did not have the authority to fire him and she mailed a letter to Thompson and Buysee so stating. Moreover, after the October 23 Board meeting, Buser was told that he was not terminated and that NMC would continue to honor his employment agreement. It was Buser who rejected this offer both at the Board meeting and by letter following that meeting.

After considering the record as a whole, the Court finds that Buser's employment was not terminated by NMC. Rather, Buser voluntarily terminated his employment with NMC.

4. Forfeiture

As a result of Buser's voluntary termination of his employment with NMC, Buser breached his employment agreement and triggered the forfeiture provisions of the SDA. In accordance with section 7 of the SDA, ProMedCo-SW is entitled to "surrender the Policy and receive the cash surrender value thereof and any remaining balance of the Premium Escrow." Defendants' Exhibit 38, section 7. Thus, ProMedCo-SW is entitled to a judgment against Buser for the cash surrender value of the policy (the sum of \$127,537.02) and the monies remaining in the Premium Escrow (the sum of \$3,652.67).¹⁹

B. Dr. McLean

McLean also entered into a SDA with ProMedCo-SW and an employment agreement with NMC in April of 1997. The version of the SDA McLean signed contains the non-compete

¹⁹The dollar values are as of September 24, 2002. *See* PMC Exhibit 49A.

provisions. *See* Defendants' Exhibit 7, section 3.1. The parties agree that Defendants' Exhibit 7 is the legally operative document.

1. Was McLean Actually or Constructively Discharge By NMC Without Cause?

While there are minor language differences in the relevant agreements between and among McLean, NMC, and PMC, the substantive effect of these agreements is the same as that discussed above regarding Buser's agreements. When read together, McLean's SDA and employment agreement provide that if the employment agreement is terminated pursuant to section 9 (the "for cause" provisions) by NMC (other than for McLean's death, total or permanent disability or retirement) or if McLean voluntarily terminates his employment for any reason (other than death, total or permanent disability or retirement), McLean forfeits his rights to the policy (and the cash surrender value of the policy) along with any monies in the Premium Escrow. However, neither agreement provides for a forfeiture of these benefits if NMC terminates McLean's employment other than "for cause."

While McLean pled constructive discharge in his answer and in his proposed findings of fact and conclusions of law, he did not put on sufficient evidence to support this claim at trial. Thus, while the Court must decide if NMC terminated McLean (either actually or constructively) without cause or whether McLean voluntarily terminated his employment with NMC, on this record that is not a difficult decision.

McLean had certain disputes with his doctor colleagues. However, those disputes predate the business transaction between and among PMC, NMC, NOG, and McLean. A brief history is appropriate.

McLean had been a founding member of the NOG group and was now the senior obstetrician in that group. But, his younger colleagues were making decisions he disagreed with and he felt he

was being “shoved out” of his medical practice. These disagreements included disagreements as to call schedules and work load, which in turn affected his income. Notwithstanding these problems with his doctor colleagues, McLean signed the employment agreement with NMC in April 1997 (as part of the NMC-PMC transaction where the NOG physicians joined the NMC group) without attempting to negotiate a resolution of these problems.²⁰

No surprise, these problems continued after the NOG doctors became a part of NMC. As a result of the continuing problems between McLean and the other obstetricians, the Policy Council of NMC asked McLean to present potential alternatives to the NMC Board. McLean testified that he presented the Board with three alternatives at its May 20, 1998 meeting: (i) return him to full duties, (ii) let him build his own group of obstetricians, or (iii) allow him to leave without restriction.

After a discussion of these alternatives, the Board asked PMC “to coordinate a separation that would be agreeable to all parties involved.” PMC Exhibit 6. Negotiations began over such a separation agreement. Thereafter, an agreement in principal was reached pursuant to which, as relevant here, McLean would be released from his employment agreement and his covenant not to compete in exchange for a voluntary surrender of the policy (and the cash surrender value of the policy) along with the monies remaining in the Premium Escrow. In fact, a proposed settlement agreement containing these terms was drafted. McLean signed this draft settlement agreement on February 22, 1999.²¹ See PMC Exhibit 7. However, for reasons not fully explained to the Court,

²⁰This was the perfect time to resolve these problems because McLean did not have to join the PMC, NMC, NOG transaction. On this record, it appears McLean could have left his doctor colleagues at this time without any penalty or forfeiture.

²¹ However, on February 1, 1999, McLean borrowed \$180,065.00 against the cash surrender value of the policy. This loan transaction was not disclosed to PMC during the negotiations. McLean testified at trial that he had been prepared to repay the loan so that PMC would have received what he had agreed to in principal if the settlement had been consummated. Following the failed negotiations, in August of 2000, McLean withdrew \$88,000.00 more of the cash surrender value of the policy. See PMC Exhibit 49.

this settlement agreement was not executed by the other parties and was never consummated.

On this record, it appears that McLean voluntarily left NMC as part of what the parties thought would be an agreed separation. However, that agreement was never consummated. Notwithstanding the fact that McLean left NMC on the mistaken belief that a separation agreement would be reached among the parties, the fact remains that he decided to leave, he was not fired. There is simply no credible evidence to support McLean's pled claim of constructive discharge.

Enforcement of the forfeiture provisions of the SDA against McLean is appropriate here for either of two reasons: (i) he voluntarily left NMC's employ and thus he agreed to the forfeiture under the terms of the SDA and his employment agreement and/or (ii) he wants the benefit of the proposed settlement, without accepting the burdens it placed upon him. In the draft settlement agreement he signed, McLean agreed to the precise forfeiture at issue here – *i.e.*, the surrender of the policy (and its full cash surrender value) along with any monies in the Premium Escrow. This proposed settlement was advantageous to McLean because it allow him to compete in Collier County, Florida without risk of liability for a return of the total premiums advanced by ProMedCo-SW for the policy (a savings to him of approximately \$50,000.00). Now, McLean wants the benefit of that unconsummated agreement – *i.e.*, an agreed release from the SDA and his employment agreement, without performing the obligations that it imposed upon him. *See* PMC Exhibit 7, pp. 2-3. That is not appropriate. McLean is liable to ProMedCo-SW for the full cash surrender value of the policy in the amount of \$276,100.00.²²

²²This amount is calculated as follows: a current cash surrender value (as of September 24, 2002) of \$8,035.70; the \$88,000.00 withdrawal of the cash surrender value of the policy; and the \$180,065.00 borrowed against the cash surrender value of the policy. *See* PMC Exhibit 49A; *see also* Defendants' Exhibit 7, ¶ 1.5.2 (which makes McLean liable for monies borrowed against the cash surrender value of the policy).

2. Is the Covenant Not to Compete Enforceable Against McLean?

McLean does not dispute that he continues to practice medicine in Collier County, Florida. In fact, he testified as to the breadth of his medical practice in and around the Naples area, which includes servicing indigent patients, jail populations, and women affected with HIV or AIDS. McLean contends, however, that the non-compete provisions of the SDA are unenforceable against him because: (i) the unexecuted settlement agreement released him from the non-compete, (ii) PMC has not met its burden of proving a legitimate business purpose for those restrictions, and/or (iii) such provisions are against public policy.²³ *See Doctors' Proposed Findings*, p. 5, ¶ 16; *Dr. McLean's Post Trial Brief*, p. 2.

Addressing the easiest issue first, while McLean would have been released from his non-compete if the proposed settlement had been fully agreed to and consummated, it was not. Thus, the original documents are still legally operative.

Turning to McLean's remaining contentions – *i.e.*, that PMC has not met their burden of proof and is not entitled to enforce the non-compete provisions of the SDA, the Court disagrees. It is important to note that PMC is not trying to “enforce” the non-compete provisions of the SDA in the sense that they seek to prevent McLean from continuing his medical practice in Collier County. Rather, PMC is attempting to enforce their rights to recover the monies advanced to buy a life insurance policy for McLean. PMC agreed to provide this policy to McLean if McLean agreed to work for NMC for at least five years. Why? Because under the terms of the parties' various

²³Florida has addressed restrictive covenants by statute. Under Florida law, in any action “concerning the enforcement of a restrictive covenant” the party seeking enforcement must “plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant,” and “[a]ny restrictive covenant not supported by a legitimate business interest is unlawful and is void and unenforceable.” FLA. STAT. ch. 542.335(1)(a), (b). In determining the enforceability of a restrictive covenant, a court “[s]hall consider the effect of enforcement upon the public health, safety, and welfare.” FLA. STAT. ch. 542.335(1)(g).

agreements, PMC received a management fee driven by revenues produced by the doctors, including McLean. Thus, PMC made the business decision that it was in their economic interest to pay the premiums on a life insurance policy for McLean in exchange for their share of the revenues they expected him to generate over the term of his employment agreement. When McLean left NMC's employ, PMC did not get the benefit of their bargain with him. Thus, PMC wants to get the money they paid for premiums back. McLean agreed that this was an appropriate remedy in the SDA and that agreement remains enforceable against him.

This same reasoning applies to McLean's argument that public policy weighs against the enforcement of the non-compete provisions of the SDA. Again, because PMC is not seeking to prevent McLean from servicing the specialized populations he serves in his medical practice, his public policy argument is simply inapplicable.

Thus, in accordance with the terms of the SDA, because McLean voluntarily terminated his employment with NMC and continues to practice medicine in Naples, Collier County, Florida, ProMedCo-SW is entitled to recover, as liquidated damages, the premiums it paid for McLean's life insurance policy in the amount of \$327,354.00. *See* PMC Exhibit 49A.

C. Prejudgment Interest

In determining the applicable law regarding prejudgment interest, this Court applies the choice of law rules of the forum state. *See Jackson v. West Telemarketing Corp. Outbound*, 245 F.3d 518, 521-22 (5th Cir. 2001). Here, neither the employment agreement nor the SDA contains a choice of law or forum-selection clause. Thus, under Texas law, the "most significant relationship" test will apply to this breach of contract case. *See id.* (citing *Mitchell v. Lone Star Ammunition, Inc.*, 913 F.2d 242 (5th Cir. 1990); *see also Schneider Nat'l Transp. v. Ford Motor Co.*, 280 F.3d 532, 536 (5th Cir. 2002)). In this case, it is clear that Florida has the most significant

relationship to the issues before the Court. The contracts were executed in Florida and intended to be performed in Florida. All of the relevant conduct occurred in Florida. Thus, Florida law governs the award of prejudgment interest.

Florida law provides for prejudgment interest in breach of contract cases. *See Paoli v. Natherson*, 732 So.2d 486 (Fla. Dist. Ct. App. 1999) (citing *Lumberments Mut. Cas. Co. v. Percefull*, 653 So.2d 389, 390) (Fla. 1995)). Under Florida law, prejudgment interest is calculated from the date of breach or the date the debt is due. *See id.*; *Grossman Holdings, Ltc. v. Hourihan*, 414 So.2d 1037 (Fla. 1982). Under Florida law, interest is calculated based on the statutory rate in effect at the time interest begins to accrue. *See* FLA. STAT. ch. 55.03; *Argonnaut Ins. Co. v. May Plumbing Co.*, 474 So.2d 212, 215 (Fla. 1985). Thus, ProMedCo-SW is entitled to prejudgment interest at Florida's statutory rate.

V. Conclusion

Because Buser terminated his employment with NMC voluntarily, ProMedCo-SW is entitled to recover the full cash surrender value of the policy and any monies remaining in the Premium Escrow in accordance with the terms of the SDA and his employment agreement. Because McLean also terminated his employment with NMC voluntarily and he continues to practice medicine in Collier County, Florida in violation of his covenant not to compete, ProMedCo-SW is entitled to recover either the full cash surrender value of the policy or the total premiums it advanced for that policy. Additionally, ProMedCo-SW is entitled to prejudgment interest on both claims.

An appropriate judgment will be entered separately.

Signed: November __, 2002.

Barbara J. Houser
United States Bankruptcy Judge

