

CITATION: Zachary Timoon Dentistry Professional Corporation v. Tonino Ciocca Dentistry Professional Corporation, 2014 ONSC 7171
NEWMARKET COURT FILE NO.: CV-14-118862-00
DATE: 20141210

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
ZACHARY TIMOON DENTISTRY)
PROFESSIONAL CORPORATION and) Michael Burgar, for the Applicants
DR. ZACHARY TIMOON)
)
Applicants)
- and -) William Fysh, for the Respondents
)
TONINI CIOCCA DENTISTRY)
PROFESSIONAL CORPORATION and)
DR. TONINO CIOCCA)
)
Respondents)
)
)
)
) **HEARD:** December 4, 2014

2014 ONSC 7171 (CanLII)

REASONS FOR DECISION ON APPLICATION

R. MacKINNON, J.

[1] The Applicants seek a declaration that the dental joint venture agreement between the parties be terminated effective June 30, 2014, together with related relief.

Background

[2] The two individual parties are dentists who have practiced together in Newmarket since 2003 – first pursuant to a general dentistry partnership agreement, and after September 1, 2005 pursuant to a joint venture general dentistry agreement through their respective professional corporations. They purchased two separate Newmarket dental practices with funding from loans. The loan interest was paid out of their shared dental practice and was treated as a straight line expense to the equal benefit of both professionals. From

2003 to 2007 both dentists contributed roughly equally to the production of revenue in the dental practice. They also bore expenses and shared profits equally.

- [3] From 2007 to 2010 the Respondent dentist (“Ciocca”) returned to school in New York to obtain his specialist qualification in prosthetic dentistry. His intention was always to establish himself in a separate location as a prosthodontic specialist. He swore on this application that he expected by the end of 2011 or early 2012 that he would sell to the Applicant. Dr. Timoon generally understood the same – that when Dr. Ciocca was established elsewhere as a specialist practicing full time, Dr. Ciocca would leave their joint venture general dentistry practice.
- [4] The joint venture agreement (“JVA”) provided for a right of termination on 90 days’ notice. While Dr. Ciocca never gave notice, Dr. Timoon eventually did so on March 29, 2014 in writing – to be effective June 30, 2014. Although it was unclear to me on reading the Respondent’s affidavit materials and factum on the hearing of this application his counsel clarified that Dr. Ciocca does not dispute that termination occurred as at June 30, 2014. An order will issue to that effect.
- [5] When Dr. Ciocca announced his intention to return to school, it was agreed that he would continue to work Saturdays and to receive a draw of \$10,000 per month to enable him to support himself and his family while at school. That resulted in an unequal contribution of work hours at the general dental practice. It is asserted that he contributed about 13 to 15 percent and Dr. Timoon and other staff billed the balance. From 2010 to June 2014 Dr. Ciocca continued to take his \$10,000 monthly draw while it is asserted he billed 13 to 21 percent while Dr. Timoon and other staff generated the balance. The dental practice continued to cover all joint expenses and liabilities during those years. The parties’ accountant allocated net income on a 70/30 basis in favour of Dr. Timoon for the 2007/08 to the 2012/13 financial years. While both parties alleged on this application that each “signed off” on the annual financial statements during those years, both dispute what was fair and whether there should now be an adjustment in the equity or ownership interest of Dr. Ciocca in the dental practice based on work inequality.
- [6] Dr. Timoon asserts Dr. Ciocca has drawn his equity down to or below zero. Dr. Ciocca, for his part, asserts that Dr. Timoon divided income with his spouse such that there should now be a recalculation between the dentists of the allocated financial statements figures and of their capital accounts – all retroactive to 2006. As I have noted, both parties reviewed and approved financial statements annually until 2014 – when the statements for 2012-13 were not approved by Dr. Ciocca because of his first time objection because of the income splitting issue to which I have referred.
- [7] Dr. Ciocca obtained his Ontario Specialist Certification in prosthodontic dentistry in September of 2011, purchased a building, and developed his own separate clinics for his new specialty. Due to construction delays, his new clinics did not open for business until September 2013. He swore on this application they are not yet busy and still have not yet turned a profit.

[8] The parties had many discussions since 2007 about nailing down an exact end date but no agreement was ever reached. Dr. Ciocca expressed no absolute end date in his materials or at the hearing of this application, preferring instead to remain in the joint venture practice for the present until his new business turns a profit – whenever that may be. He seems to understand, however, that he cannot stay in this joint general dental practice indefinitely.

Analysis

[9] The questions to be decided on this application include:

- (a) who is to run the practice until valuation and payout;
- (b) who should leave the practice, and when;
- (c) the balance of the money issues which I will detail later in these reasons.

[10] The JVA is plain and unambiguous that either party could terminate on 90 days. Dr. Timoon did so. The parties knew as early as 2007 that their ultimate joint intention was to separate. The termination notice letter in late March 2014 could not have been a surprise and was certainly not “an ambush”, to use the words of counsel. Dr. Ciocca announced his intention to withdraw in 2007 but Dr. Timoon argues a breach of good faith duty since Dr. Ciocca has done nothing to advance that process.

[11] Counsel for Dr. Timoon correctly notes that Dr. Ciocca has filed no cross application and has sought no relief in this proceeding. Rather Dr. Ciocca seeks a continuation of the status quo. Dr. Timoon’s counsel urges the court to now declare him to be the owner of the dental practice, subject to payment of such sums as are determined by the independent valuator and by accountants for both parties. The parties have agreed that the value of the practice will be determined by ROI Corp. which is acknowledged by both as a dental practice valuation expert. Counsel for Dr. Timoon expects that valuation report will be available by mid-January next and has retained an accountant to generate a report on what sums, if any, are outstanding to Dr. Ciocca from the practice. Dr. Ciocca intends to retain his own separate accountant. His counsel advised this is being done forthwith. Both are ordered to forthwith co-operate in the obtaining of all reports from their accountants and from ROI such that buyout and adjustment figures can be forthwith generated.

[12] The general understanding and agreement between the parties for over seven years has been that this general dentistry joint venture would terminate, the parties would finalize their financial dealings, and go their separate ways. From March 2014 to the date of hearing of this application Dr. Timoon’s attempts to terminate as at June 30, 2014 have been ineffective. Only on the day of hearing did it become clear for the first time that Dr. Ciocca accepted the June 30, 2014 termination date selected pursuant to the joint venture agreement to which his professional corporation was a party.

- [13] The parties have been unable to agree on the process of transfer of ownership. On this application record there is a strong demonstrated need for the court to set a timetable and to give directions, in the absence of agreement for further court process. For over seven years the parties' joint intention has been that Dr. Ciocca would withdraw from the practice. However, his counsel now argues that since he and/or his professional corporation have an ongoing existing ownership interest in the practice, he has a right to either buy Dr. Timoon's practice interest or sell to Dr. Timoon. I disagree. The effective intention and agreement between the parties for the last seven years has been that the joint dentistry venture would terminate reasonably, the parties would finalize their financial dealings, and Dr. Ciocca would sell and leave. He acknowledged on cross-examination that he cannot stay in the dental practice indefinitely and hopes to receive an offer from Dr. Timoon that would involve an equity payment to him on terms satisfactory to him. Then he said he would leave.
- [14] The joint venture agreement is silent on the specifics of termination, other than the right to terminate. Neither side can hold the other to be bound indefinitely at the sole discretion of only one side until that one side is ready to leave on his terms. By his conduct over the last seven years Dr. Ciocca substantially reduced the level of his general dentistry engagement in and dependency on the practice. The disruptive events of July 2014 demonstrate the parties' inability to civilly continue working together. Both dentists reasonably had and have a good faith obligation to complete the termination now.
- [15] Goodwill is in the process of being valued. It is unreasonable to value goodwill at the dental practice and build that into a buy-out or financial reconciliation analysis without there also be a corresponding term that Dr. Ciocca not accept current general dentistry patients from the general dental practice in his new speciality practices. The valuation effort is further complicated if the patient list is valued and then some of those patients follow Dr. Ciocca into his new businesses – even though he has sworn not to solicit them.
- [16] It is fair and reasonable that the court issue an interim order on the management and ownership of the practice so they can both proceed with the next steps to settle or litigate their outstanding financial issues in an efficient and cost effective way while enabling the business to be preserved and patients and staff to be served effectively.
- [17] Accordingly, an order will go as follows:
- (1) The termination date of June 30, 2014 shall be declared effective for the purpose of the end of the joint venture of the parties and their joint ownership and operation of the dental practice known as Newmarket Dental Group.
 - (2) Both parties shall forthwith fully co-operate with one another with respect to the transfer of all ownership interests, assets and liabilities related to the dental practice to Dr. Timoon, including the execution of any banking, lease, supplier contract, employment or payroll documents, or any other documents reasonably required for the purpose of the transmission of ownership solely to Dr. Timoon.

- (3) Effective January 15, 2015 at 5:00 p.m. Dr. Ciocca shall cease and desist from interfering with the management and operation of the dental practice. He shall, from that time, cease attending at the dental practice to treat patients, practice general dentistry, or perform any professional activity whatever at the premises of the dental practice.
- (4) Dr. Timoon shall be declared as the sole owner of the dental practice to the exclusion of Dr. Ciocca.
- (5) Dr. Timoon shall have the sole right, to the exclusion of Dr. Ciocca, to the use of the business name "Newmarket Dental Group".
- (6) Dr. Ciocca shall not solicit or accept any current patients from Newmarket Dental Group at any new or other locations of business, unless there is specific consent and approval in writing from Dr. Timoon, or alternatively a patient is referred to Dr. Ciocca's separate practices for specialist services and not for general dentistry services.
- (7) Both parties shall forthwith co-operate with each other to facilitate the production and delivery of all accounting and business valuation and adjustment reports relating to the general dentistry practice.
- (8) The parties' rights are reserved to proceed by further application, or other civil process, as agreed by the parties or directed by the court in relation to any and all outstanding financial disputes between them – pursuant to the *Rules of Civil Procedure*. Those outstanding financial disputes include, but are not limited to:
 - a. Calculation of the buy-out value amount payable by Dr. Timoon to Dr. Ciocca, based on the June 30, 2014 valuation date;
 - b. What past accounting adjustments, if any, would be fair or reasonable to deal with the past work inequality concerns raised by Dr. Timoon;
 - c. What past accounting adjustments, if any, would be fair or reasonable to deal with the income splitting issue raised by Dr. Ciocca?
 - d. What is the fair calculation of the financial loss to the practice as a result of the removal of the server by Dr. Ciocca and the cancellation of appointments by him in July 2014?
 - e. What is a fair calculation or adjustment to compensate Dr. Ciocca for the work he performed at the practice from June 30, 2014 to January 15, 2015?

[18] If the parties cannot agree on the issue of costs they shall, within 20 days of the release of these Reasons, deliver written submissions of no more than four pages, single spaced, together with a Bill of Costs. Responding submissions of no more than the same length

shall be delivered within a further ten days. Reply materials shall be delivered, if at all, within five days thereafter. All costs material shall be forwarded to me in care of my secretary at Barrie.

R. MacKINNON J.

Released: December 10, 2014