

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JERRY A. DANCIK, M.D.,

Plaintiff,

v

Case No. 13-136046-CK
Hon. Wendy Potts

MICHIGAN KIDNEY CONSULTANTS,
P.C.,

Defendant.

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

AND

DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION

At a session of Court
Held in Pontiac, Michigan

SEP 27 2013

Plaintiff Jerry Dancik, M.D. and Defendant Michigan Kidney Consultants, P.C. (MKC) both move the Court to grant them injunctive relief regarding a covenant not to compete in Dr. Dancik's employment agreement with MKC. Dancik was a founder of MKC in 1982 and a shareholder until July 2010 when MKC bought out his interest. At the time of the buyout, MKC agreed in writing to continue employing Dancik. The Amended and Restated Employment Agreement included a non-competition provision that barred Dancik from engaging in certain competitive practices "during the term of this Agreement and for a period of one (1) year commencing on the date of termination of the Agreement." The prohibited competition included opening an office or working at an office within ten miles of any MKC facility. Dancik was also barred from performing procedures or providing professional services at any facility within ten

miles of an MKC facility or at a hospital where he had privileges while employed by MKC. In addition, the Employment Agreement had a non-solicitation provision that barred Dancik from soliciting MKC's patients "during the term of this Agreement and, thereafter, for a period of two (2) years."

The Employment Agreement had a three-year term and, because the parties did not renew it, Dancik's employment with MKC ended on July 14, 2013. Sometime after his MKC employment ended, Dancik opened an office in Lake Orion. The parties' dispute whether this office is within ten miles of an MKC facility, although neither party presents any evidence on this point. Dancik claims that he may be called on to treat patients at facilities within ten miles of MKC's facilities or at hospitals where he had privileges when employed by MKC, although he denies that he has already done so.

On September 4, 2013, Dancik filed this action seeking injunctive and declaratory relief and money damages. Dancik claims that the non-competition provision in MKC's employment agreement is unenforceable and asks the Court to enter a declaratory judgment to that effect. Dancik also asks the Court to enter a preliminary injunction barring MKC from enforcing the non-competition provision, allowing Dancik to practice medicine without restriction, and ordering MKC to cease interfering with Dancik's patient relationships. MKC filed a counterclaim alleging that Dancik violated the employment agreement by treating patients and practicing medicine contrary to the restrictions in the non-competition provision. MKC also alleges that Dancik has solicited its patients contrary to the non-solicitation provision. MKC denies that it has tortiously interfered with Dancik's business expectancies, and asks the Court to enter an injunctive order barring Dancik from violating the non-competition and non-solicitation provisions of the employment agreement.

The issue now before the Court is whether either party is entitled to injunctive relief. When deciding a motion for injunctive relief, the Court considers (1) whether the applicant will suffer irreparable injury if the injunction is not granted; (2) the likelihood that the applicant will succeed on the merits; (3) whether harm to the applicant in the absence of relief outweighs the harm to the opposing party if the injunction is granted; and (4) the harm to the public if the injunction issues. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998). The Court also considers whether granting an injunction is necessary to preserve the status quo before a final hearing or whether doing so will grant one party final relief before a decision on the merits. *Thermatool, supra*.

Dancik claims that the non-competition provision in the Employment Agreement is unenforceable because it survives only the termination of Dancik's employment and not the expiration of the agreement. Dancik notes that the Employment Agreement uses the word "termination" and cites two unpublished Court of Appeals decisions holding that non-competition agreements referring to "termination" or "separation" of employment are inapplicable where the employment agreement simply expires. See *Stahl v UP Digestive Disease Assoc, PC*, unpublished opinion per curiam of the Court of Appeals, decided March 24, 2009 (Docket No. 276882); *VHC, PC v Elshaarawy*, unpublished opinion per curiam of the Court of Appeals, decided June 16, 2011 (Docket No. 297625). MKC correctly notes that these unpublished cases are not binding on this Court, however, they may provide guidance on how to interpret the agreement at issue. Nonetheless, both of these Court of Appeals' decisions are highly fact-specific and, at this early stage of the case, the Court cannot conclude that either case is persuasive authority for the meaning of "termination" in this agreement.

In addition, the meaning of the word “termination” in the noncompetition provision must be interpreted in the context of the entire agreement. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). MKC notes that Section 6E of the Employment Agreement states that “upon termination of this Agreement,” Dancik was required to return to MKC any patient records or charts. MKC argues that if the Court were to apply Dancik’s interpretation of “termination” to this provision, Dancik would be under no obligation to return patients records if the agreement merely “expires.” MKC asserts that the use of the word “termination” in this context suggests that the parties intended “termination” to refer to any circumstance in which the Employment Agreement ended, and not just a termination before the agreement expired.

At this point in the proceeding, the Court cannot conclude as a matter of law that the word “termination” in the non-competition provision of Dancik’s Employment Agreement does not apply where the agreement expires. The word “termination” may be ambiguous because it could be reasonably susceptible to more than one interpretation. *Cole v Ladbrooke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). If it is ambiguous, its interpretation would be a question of fact. *Klapp, supra* at 469. Even if the term is not ambiguous, factual development of the parties’ intent may be needed before the Court can interpret its meaning. Based on the limited evidence presented to date, neither party demonstrates that it is likely to prevail on the merits of its claims regarding the enforceability of non-competition provision.

MKC asks the Court to enter an injunctive order enforcing the non-solicitation provision in Dancik’s Employment Agreement and barring him from soliciting MKC’s patients. Although the non-competition provision is of questionable enforceability and applicability, Dancik concedes that the non-solicitation provision is enforceable. That provision is not dependent on

“termination” of the employment agreement and applies for two years after the term of the agreement. Thus, even if Dancik can show that the non-competition does not bar him from engaging in his current practice of medicine, Dancik would still be barred from soliciting MKC’s patients. However, Dancik denies that he has solicited any MKC patients, and MKC provides no admissible evidence to support its claim that he has. The Court denies MKC’s request for injunctive relief regarding the non-solicitation provision without prejudice. MKC can renew its request if it can produce admissible evidence that Dancik is soliciting its patients.

The Court further notes that neither side demonstrated irreparable harm. An injury is irreparable if it is a “noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty.” *Thermatool, supra* at 377. MKC notes that loss of its goodwill and patients could be an injury for which damages cannot be determined with a sufficient degree of certainty. *Basicomputer Corp v Scott*, 973 F2d 507, 512 (CA 6, 1992). However, MKC provides no evidence that it lost goodwill or patients because of Dancik’s alleged solicitation. Dancik provides no admissible evidence that he will suffer an irreparable injury if the Court does not declare the non-competition provision unenforceable. As for Dancik’s claims that MKC is interfering in his new practice, his only evidence of this is his verified complaint, which is countered by an affidavit of MKC’s principal Fahd Al-Sagher, M.D., who denies any interference. In addition, the fact that both sides are seeking money damages implies that it is possible to measure or compute their damages with sufficient certainty.

As for the balance of harms, the alleged harm appears to be equally distributed between the parties. Dancik alleges that the non-competition provision will effectively prevent him from practicing medicine, especially the prohibition against using hospitals where he has privileges.

However, MKC claims that it agreed to buyout Dancik's interest in exchange for preventing Dancik from unfairly competing, and if the non-competition and non-solicitation provisions are not enforced, it will lose the benefit of its bargain. Both parties have alleged harm that would result from enforcement or non-enforcement of the agreement. Although the public has an interest in allowing patients to seek treatment from the doctor of their choice, the public also has an interest in enforcing valid agreements and preventing unfair competition.

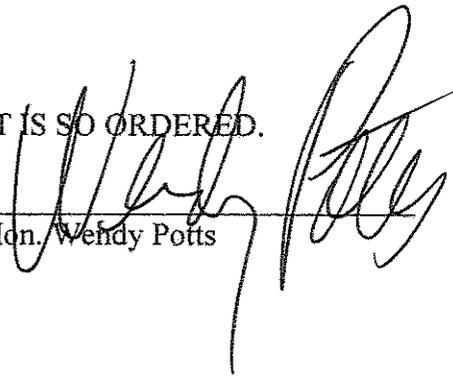
Considering all of the *Thermatool* factors, the Court concludes that neither side is entitled to injunctive relief based on the evidence presented, and the Court denies both motions without prejudice.

Dated:

SEP 27 2013

IT IS SO ORDERED.

Hon. Wendy Potts

A handwritten signature in black ink, appearing to read "Wendy Potts", is written over a horizontal line. The signature is stylized and cursive.