STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

CARDIOVASCULAR CLINICAL
ASSOCIATES, P.C.,

Plaintiff,

v

Case No. 14-141778-CK
Hon. Wendy Potts

DAVID GOWMAN, D.O.,

Defendant.
_____/

OPINION AND ORDER RE: PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

At a session of Court
Held in Pontiac, Michigan
On

AUG 01 2014

From October 2007 until June 2014, Plaintiff Cardiovascular Clinical Associates, P.C. (CCA) employed cardiologist Defendant David Gowman D.O. under a written agreement with restrictive covenants. In Section 6.2, titled "Covenant Not to Compete," Dr. Gowman agreed that for one year after his employment with CCA terminated, he would not "provide medical, surgical or consulting services within a one (1) mile radius from any location at which Corporation [CCA] is providing medical services as of the termination date of this Agreement." In Section 6.3, titled "Non-solicitation of Patients," Dr. Gowman agreed not to contact, solicit, or treat any patient or former patient of CCA "other than patients as to whom Physician [Dr. Gowman] was designated the primary treating physician on the patient's medical charts." Dr. Gowman voluntarily terminated his employment with CCA, effective June 30, 2014. Between July 1 and

9, Mark Rasak, D.O., a principal of CCA, claims that he saw Dr. Gowman providing medical, surgical, or consultation services at a Botsford facility within a one-mile radius of CCA's Botsford office. Dr. Rasak also claims he saw Dr. Gowman's name on a medical office sign in the same building as CCA's Botsford office and that Botsford's website lists that building as one of Dr. Gowman's practice locations. Dr. Gowman disputes this claiming that he has no office at Botsford Hospital or its medical building and he treats new patients at an office three miles from CCA's Botsford office. Dr. Gowman notes that his employment agreement with Botsford states that he will not provide medical, surgical, or consulting services within one-mile of CCA's offices. Dr. Gowman also claims he has not treated any patients within a one-mile radius of CCA's offices except for patients for whom he was the primary treating physician.

CCA now moves the Court to enjoin Gowman from violating his covenant not to compete. 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 (1998). The Court should also consider whether granting an injunction is necessary to preserve the status quo before a final hearing or whether it will grant one of the parties final relief before a decision on the merits. *Thermatool*, *supra.*

Although the parties dispute all of the injunctive relief factors, the primary dispute centers on the scope and application of the restrictive covenants in Dr. Gowman's agreement. As noted above, there are two provisions pertaining to Dr. Gowman's ability to treat patients and perform professional services after his termination from CCA. The first provision, Section 6.2,

has a broad restriction, barring Dr. Gowman from performing any professional services within a one-mile radius of any CCA office for one year after his termination. By contrast, Section 6.3 has a more narrow restriction barring Dr. Gowman from contacting, soliciting, or treating any CCA patient for one year after his termination unless he was the primary physician for the patient.

Dr. Gowman asserts that the "primary physician" exception of Section 6.3 creates a general carve-out of both the non-solicitation restriction of 6.3 and the non-compete restriction of 6.2. However, there is nothing within the plain language of the agreement supporting this interpretation. The primary-physician exception is a carve-out only to the restriction in 6.3 against contacting, soliciting, or treating patients. There is no exception in 6.2, and the exception of 6.3 does not state that it applies to any restrictive covenant other than 6.3. Thus, the one-mile radius restriction of 6.2 applies regardless whether Dr. Gowman is treating a new patient or a CCA patient for whom he was the primary physician. In other words, Dr. Gowman is entitled to treat CCA patients who fall within the primary-physician exception of 6.3 provided that he does so outside the one-mile radius restriction of 6.2.

Dr. Gowman also argues that the primary-physician exception creates an ambiguity. A contract is ambiguous if its language is reasonably susceptible to more than one interpretation. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000). However, for the reasons explained above, the only reasonable interpretation of the agreement is that the primary-physician exception is a carve-out only as to Dr. Gowman's restriction on contacting, soliciting, or treating CCA patients in Section 6.3. Dr. Gowman fails to demonstrate any ambiguity that would bar enforcement of the agreement.

Dr. Gowman also argues that the parties intended to create a carve-out of all restrictions for patients who fall within the primary-physician exception. However, the parties' intent would be relevant only if the language was ambiguous. Because this contract's language is unambiguous, the Court must apply the plain and ordinary meaning of the contract's terms. *City of Grosse Pointe Park v Michigan Municipal Liability and Property Pool*, 473 Mich 188, 197-198; 702 NW2d 106 (2005). Regardless of the subjective intent of the parties who executed the agreement, the plain language allows Dr. Gowman to treat CCA patients provided that he was the primary physician, but bars him from treating those patients or any other patients within a one-mile radius of CCA's offices.

Dr. Gowman further contends that even if the agreement bars him from treating any patients within a one-mile radius of CCA's offices, CCA should be estopped from enforcing the restrictive covenants because it agreed to waive enforcement. However, the agreement states that any waiver must be in writing and signed by the alleged waiving party. Because there is no evidence of a signed, written waiver, Dr. Gowman would have to present clear and convincing evidence that CCA agreed to waive not only the restrictive covenants, but the anti-waiver provision as well. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). However, the only evidence of waiver are affidavits claiming that Dr. Rasak stated that CCA was waiving enforcement, which Dr. Rasak denies through his own affidavit. Thus, Dr. Gowman fails to demonstrate clear and convincing evidence of a waiver.

In sum, Dr. Gowman's agreement is unambiguous and enforceable and imposes a one-year restriction on him performing medical, surgical or consulting services within a one-mile radius of CCA's offices. Further, the agreement appears to be a reasonable restriction given that it applies for only one year, extends for only one mile from CCA's offices, and does not preclude

Dr. Gowman from using his general knowledge or skill to practice his profession. *St Clair Medical, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006). Thus, CCA is likely to prevail on the merits of its claim that Dr. Gowman cannot treat any patient within one mile of a CCA office. Further, because there is evidence that Dr. Gowman has been treating patients at Botsford Hospital, which appears to fall within the one-mile radius of one of CCA's offices, CCA is likely to prevail on its claim that Dr. Gowman is violating the restrictive covenant of Section 6.2.

As for CCA's irreparable harm, CCA asserts that the loss of patients or goodwill is usually considered irreparable harm. See *St. Clair Medical, supra* at 267. To the extent that Dr. Gowman is treating patients within the restricted one-mile radius, he may be precluding CCA from maintaining important patient relationships or precluding CCA from pursuing new patient relationships through referrals. As CCA notes, it is difficult to calculate CCA's lost income or profit from the loss of a patient or a referral. 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. Thus, Dr. Gowman's apparent violation of the one-mile restriction is likely to cause CCA irreparable harm.

As for the balance of harms, this factor favors neither party. CCA would be harmed by the loss of patient relationships or referrals, and Dr. Gowman would be harmed if he is precluded from working at the primary location of his employer, Botsford Hospital. The public has some interest in this dispute because a patient's choice of physician should be respected and honored to the fullest extent possible. However, Dr. Gowman admits that he has an office outside the one-mile radius, and he is free to treat new patients or patients within the primary-physician

exception at that office. He is also free to treat patients at other hospitals outside the one-mile radius of CCA's offices.

Considering all of the injunctive factors, the Court concludes that CCA is entitled to entry of a preliminary injunction barring Dr. Gowman from performing any medical, surgical or consulting services for any patient within a one-mile radius of any CCA offices for one year from the date of this order.

IT IS SO ORDERED.

Dated: AUG 01 2014

Hon. Wendy Potts