

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

UNLIMITED HOMECARE II,

Plaintiff,

vs.

Case No. 14-08572-CKB

HON. CHRISTOPHER P. YATES

LATRICIA LOMAX; and THE BUSINESS
EXCHANGE CENTER, LLC, also doing
business as EXCHANGE UR CARE, LLC,

Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

The federally subsidized home-healthcare industry burst onto the national stage this year in a major United States Supreme Court case, Harris v Quinn, 134 S Ct 2618 (2014). As the Supreme Court noted, “the federal Medicaid program funds state-run programs that provide in-home services to individuals whose conditions would otherwise require institutionalization.” Id. at 2623. Many patients in Michigan’s state-run program choose a family member or close friend to act as their care giver, but patients who cannot find their own care giver often turn to third-party agencies to locate a care giver. Plaintiff Unlimited Homecare II (“UH2”) operates such a third-party agency.

Defendant Latricia Lomax worked as an independent contractor for UH2 from June of 2012 until May 2014. She serviced UH2 patients in the Grand Rapids area until she voluntarily terminated her relationship with UH2, opened her own third-party agency, and convinced a host of UH2 patients to follow her. Because Lomax had signed a noncompete agreement with UH2, both Lomax and her business entity, Defendant The Business Exchange Center, LLC (“BEC”), found themselves on the receiving end of this suit by UH2 alleging breach of contract and tortious interference with business

expectancies. At the outset of this action, UH2 moved for a preliminary injunction obligating Lomax and BEC to cease doing business with the former UH2 patients and enjoining Lomax and BEC from competing against UH2 in the home-healthcare industry. The Court conducted a hearing regarding the motion for injunctive relief on September 24, 2014. Based upon the evidence presented at that hearing, the Court shall enter a preliminary injunction against Lomax and BEC that allows patients to maintain their relationships with their chosen third-party agencies, but prevents additional erosion of UH2's client base.

In 2012, Defendant Lomax began working as an account executive for Plaintiff UH2, where her primary duties involved servicing patient accounts in the Grand Rapids area. UH2 tasked Lomax with ensuring that care givers provided adequate services to patients, that care givers turned in time sheets to UH2, and that care givers received payments from UH2. Lomax increased UH2's client base in the Grand Rapids area, working with Lydia Smith on behalf of UH2 to build a network that included as many as 135 patients between June 2012 and May 2014. During those two years, none of the parties gave much thought to the noncompetition agreement that Lomax and BEC had signed, even though that agreement restricted Lomax and BEC from competing with UH2 during the course of their relationship with UH2 and for two years after that relationship ended. But the restrictions in that non-competition agreement came into focus shortly after Lomax voluntarily left UH2 in May of 2014 to run her own independent third-party agency.

Defendant Lomax contends that, in early 2014, Plaintiff UH2 began to encounter issues with remitting payment to its care givers in timely fashion, and Lomax therefore became dissatisfied with her relationship with UH2. Consequently, Lomax began the process of forming her own third-party agency under the auspices of BEC, see Hearing Exhibits 4 & 5, and she terminated her relationship

with UH2 in May of 2014. At that same time, Lomax recruited Lydia Smith – who had worked with Lomax at UH2 – to join BEC. Lomax sent a letter to UH2’s patients and care givers informing them that she no longer worked for UH2 and inviting them to transfer their business to BEC. See Hearing Exhibit B. Lomax’s efforts were remarkably fruitful in that only seven or eight clients chose to stay with UH2 while the rest migrated to Lomax’s new business. UH2 contends that the client base taken by Lomax accounted for nearly 80 percent of its revenue, and that it has been financially devastated by the mass migration of clients to BEC. Therefore, UH2 initiated this case against Lomax and BEC on September 12, 2014, alleging breach of the noncompetition agreement and tortious interference with business expectancies.

Concomitant with the filing of its complaint, Plaintiff UH2 obtained a temporary restraining order (“TRO”) from Kent County Circuit Judge George S. Buth, who enjoined Lomax and BEC from competing with UH2. But shortly thereafter, Kent County Chief Circuit Judge Donald A. Johnston, at the behest of Lomax and BEC, dissolved that TRO on September 16, 2014. With the slate wiped clean, UH2 now requests a preliminary injunction requiring Lomax and BEC to cease doing business with the former UH2 clients and enjoining Lomax and BEC from competing with UH2 in the home-healthcare industry.

An injunction “represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.” Davis v Detroit Financial Review Team, 296 Mich App 568, 613 (2012). Because Plaintiff UH2 requests injunctive relief, it must shoulder “the burden of establishing that a preliminary injunction should be issued.” See MCR 3.310(A)(4). Our Court of Appeals “has identified four factors to consider in determining whether to grant a preliminary injunction.” Davis, 296 Mich App at 613. Those four factors are as follows:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Id. In analyzing those factors, the Court must bear in mind that injunctive relief is appropriate only when “there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.” Id. at 614.

Here, Plaintiff UH2 has shown that it is likely to succeed on the merits of its claim for breach of contract. Defendants Lomax and BEC executed a noncompetition and non-solicitation agreement with UH2 at the inception of their relationship. See Hearing Exhibit 1. That agreement bars Lomax and BEC from competing with UH2 in the Detroit and Grand Rapids areas for a period of two years following the termination of their relationship with UH2. Id., ¶ 2. Further, that agreement prohibits Lomax and BEC from soliciting UH2 clients and employees to sever their relationships with UH2. Id., ¶ 3. Lomax and BEC offered no evidence to prove that the agreement is unenforceable, and the evidence clearly shows that they have been competing with UH2 in the Grand Rapids area. In fact, the evidence presented by Lomax and BEC confirms UH2’s allegations that Lomax solicited UH2’s patients and care givers to move to BEC, see Hearing Exhibit B, and persuaded Lydia Smith to end her relationship with UH2 in order to join BEC. Those activities plainly violated the agreement, so UH2 has shown a likelihood of success on the merits of its breach-of-contract claim.¹

¹ In contrast, Plaintiff UH2 seems unlikely to overcome the substantial threshold to succeed on its claim for tortious interference with business expectancies, which requires a showing ““that the interferer did something illegal, unethical or fraudulent.”” See Dalley v Dykema Gossett PLLC, 287 Mich App 296, 324 (2010). But this shortcoming does not doom UH2’s request for injunctive relief because the breach-of-contract claim can carry the day with respect to likelihood of success on the merits.

But Plaintiff UH2 also has to “make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.” Michigan Coalition of State Employee Unions v Civil Service Commission, 465 Mich 212, 225 (2001). Significantly, a “relative deterioration of competitive position does not in itself suffice to establish irreparable injury[.]” see Thermatool Corp v Borzym, 227 Mich App 366, 377 (1998), and injunctive relief can only be awarded if “there is no adequate remedy at law[.]” See Davis, 296 Mich App at 613. UH2 has only partially succeeded in establishing irreparable harm. On one hand, the harm has already been done with respect to the UH2 clients Lomax and BEC took when they started their competing venture, and UH2 offered evidence indicating that it could readily assign a monetary value to that harm. On the other hand, the evidence tends to indicate that UH2 will be irreparably harmed if the Court permits Lomax and BEC to freely compete for new business at the expense of UH2 in contravention of the noncompetition agreement. To be sure, the protection of the noncompetition agreement should assist UH2 in rebuilding a client base in the Grand Rapids area, and the damages resulting from unfettered competition from Lomax and BEC would be difficult to determine. Accordingly, the Court finds that UH2 will be irreparably harmed if the Court does not enjoin Lomax and BEC from recruiting new clients in violation of the noncompetition agreement.

In addition, the balance of the harms weighs in favor of entering a preliminary injunction that prohibits Defendants Lomax and BEC from engaging in any further competition with Plaintiff UH2. Lomax and Lydia Smith were the faces of UH2 in the Grand Rapids area, and UH2 lost 80 percent of its revenue stream when Lomax and BEC recruited Smith and took UH2’s Grand Rapids clients. Accordingly, UH2’s ability to survive will be jeopardized if the Court permits Lomax and BEC to continue competing with UH2 while UH2 tries to rebuild its clientele. In contrast, Lomax and BEC

will continue to receive revenue from the clients they took from UH2, so BEC will likely stay afloat even in the face of an order enjoining Lomax and BEC from recruiting new clients in contravention of the noncompetition agreement.

Finally, potential harm to the public interest plays a significant role in the Court's decision. The parties to this action provide necessary services to a vulnerable population, and a disruption in those services could impose significant harm upon those individuals who require in-home healthcare facilitated by Defendants Lomax and BEC. Thus, although Plaintiff UH2 is likely to succeed on the merits of its claim for breach of contract against Lomax and BEC, the Court harbors concerns about injunctive relief that might disrupt the services provided through Lomax and BEC, especially in light of the fact that those clients are now receiving satisfactory services and their care givers are receiving prompt payment for their services. Therefore, the public interest weighs heavily against prohibiting Lomax and BEC from servicing all former UH2 clients.

In sum, for all of the reasons set forth in this order, and based upon an analysis of the four factors that the Court must consider in determining whether injunctive relief is warranted, the Court concludes that it must grant, in limited fashion, Plaintiff UH2's request to enjoin Defendants Lomax and BEC from competing with UH2 in the home-healthcare industry. Accordingly, the Court hereby issues the following injunctive order:

IT IS ORDERED that Defendants Latricia Lomax and The Business Exchange Center, LLC d/b/a Exchange Ur Care, LLC, may continue to service any currently established clients, regardless of whether those clients previously had a relationship with Plaintiff Unlimited Homecare II. IT IS FURTHER ORDERED that Defendants Latricia Lomax and The Business Exchange Center, LLC d/b/a Exchange Ur Care, LLC, are prohibited and enjoined from soliciting or servicing any additional

clients in the home-healthcare industry in the Grand Rapids and Detroit areas,² and from soliciting UH2 employees to terminate their business relationships with UH2. IT IS FURTHER ORDERED that this injunctive order shall remain in effect until May 31, 2016, or until further order of the Court, whichever comes first.

IT IS SO ORDERED.

Dated: October 9, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

² This prohibition encompasses “[a]rranging, providing supervising, and/or handling billing and payment from home health care or in-home assistance[.]” See Hearing Exhibit 1.