

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

DAVE ZYLSTRA AGENCY INC.,  
a Michigan corporation,

Plaintiff,

vs.

Case No. 14-00556-CZB

HON. CHRISTOPHER P. YATES

PETER SCHIPPER; DEBORAH F.  
JOHNSON; and WEST MICHIGAN  
INSURANCE ADVISORS, LLC, a  
Michigan limited liability company,

Defendants.

---

OPINION AND ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

In the insurance industry, an agent's decision to transfer from one agency to another can have a seismic impact, especially if the agent has a large and loyal client base. Plaintiff Dave Zylstra Agency Inc. ("DZA") lost two agents simultaneously when Defendants Peter Schipper and Deborah Johnson left DZA on December 30, 2013, to form their own agency, Defendant West Michigan Insurance Advisors, LLC ("WMIA"). Although Schipper and Johnson spent weeks planning their departure, DZA seems less concerned about those activities than the loss of well over 1,000 elderly clients in the Medicare Advantage Prescription Drug ("MAPD") program provided by Priority Health Insurance Company ("Priority Health"). Those clients were automatically transferred from DZA to WMIA with Schipper and Johnson because of a Priority Health directive governing agents of record, but DZA filed this action and an accompanying request for injunctive relief in an effort to reclaim those clients and their corresponding revenue stream for DZA. The Court concludes, however, that DZA has not made a sufficient showing to justify a preliminary injunction.

## I. Factual Background

Dave Zylstra founded DZA in 1955 and later groomed his sons, Jeff and Tim, to take over the family business. Tim Zylstra currently serves as the president of DZA and Jeff Zylstra serves as the vice president. Although Dave Zylstra continues to oversee operations of DZA to some degree, the two brothers are the sole officers, directors, and shareholders of DZA. In 1996, DZA hired Defendant Peter Schipper as a producer. In 1997, upon the recommendation of Schipper, DZA hired Defendant Deborah Johnson to assist him. This pair worked diligently for DZA for the next 15 years. During that time, Schipper became DZA's resident expert in health-insurance policies. See Hearing Tr at 26.

In 2006, Defendant Schipper became aware that certain insurance companies were beginning to offer new, zero-premium prescription drug plans, known as MAPD plans, to Medicare participants. After researching the various plans that were available to his clients, Schipper decided to emphasize enrollment in the Priority Health MAPD plans. Id. at 29-30. This push proved quite lucrative for DZA. Much of Schipper's client based enthusiastically enrolled in these new, zero-premium plans, and his clients began to refer other customers to DZA. See id. at 31. By the end of 2013, Schipper had a total of 1,674 participants enrolled in the MAPD plans, and his MAPD book of business made up roughly 95% of his commissions. See Hearing Ex 2.

Despite his success, Defendant Schipper was dissatisfied with his position at DZA, so he made the decision to leave the agency by the end of 2013. Schipper readily admitted that, prior to his departure from DZA, he formed his new agency, WMIA, and began taking steps to set up his new office. He also admitted that he recruited Defendant Johnson to join him and that he engaged in discussions with Priority Health regarding how his move would affect his accounts with Priority Health. Priority Health informed Schipper of the company practice that all group and individual policies would remain with DZA, but all MAPD plans would follow the individual agent of record. Consequently, Schipper and

Johnson took actions in early December 2013 to transfer their group and individual policies to DZA, but to carry their MAPD policies with them to WMIA. See Hearing Exs 3-5. With their ducks in a row, Schipper and Johnson announced their departure from DZA on December 30, 2013, and immediately began work at their new firm, WMIA.

As a result of the pre-departure preparations of Defendants Schipper and Johnson, WMIA received December commissions for their MAPD plans, totaling roughly \$53,000, on January 7, 2014. WMIA received January commissions for the MAPD plans, totaling roughly \$92,000, on February 7, 2014. Without the Court's intervention, WMIA will continue to receive monthly commissions on the MAPD book of business as long as the individual participants in the plans maintain their relationship with Schipper. DZA characterizes this as grossly unfair and demands protection in equity from this course of conduct. DZA requests that the Court issue a preliminary injunction that requires Schipper to assign the MAPD plans *en masse* to DZA and requests that the Court impose a constructive trust on any MAPD commissions that have already been distributed to WMIA until a final resolution of this matter.

## II. Legal Analysis

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 Fin Review Team, 296 Mich App 568, 613 (2012). Because Plaintiff DZA has requested injunctive relief, it bears “the burden of establishing that a preliminary injunction should be issued.” 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.

Davis, 296 Mich App at 613. In analyzing these four considerations, the Court must bear in mind that injunctive relief is only appropriate if “there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.” Id. at 614 (internal quotations omitted).

A. Likelihood of Success on the Merits.

DZA bases its request for a preliminary injunction on two theories. First, DZA contends that it entered into an oral agreement with Defendant Schipper whereby he agreed that, upon his departure from DZA, his entire book of business would remain with the agency. DZA does not assert that this oral contract rose to the level of a noncompetition agreement or that the oral contract precludes Schipper from attempting to win over his former clients one-by-one upon his departure. Rather, DZA merely contends that the oral contract prohibits Schipper from automatically taking the entire MAPD book of business from DZA upon his departure. On the witness stand, Schipper conceded that he had an oral understanding with DZA that the book of business he developed at DZA would stay with the agency upon his departure. Nevertheless, Schipper held steadfast to his position that, as the agent of record, he is entitled to retain the MAPD book of business based on Priority Health’s policy of allowing the MAPD plans to follow the agent of record, as opposed to the agency.

These competing contentions present obvious difficulties based upon evidence proffered by the parties’ own witnesses. On one hand, Defendant Schipper admitted that he entered into an oral agreement with DZA that the business that he developed at DZA would remain with the agency upon his departure. On other hand, DZA introduced an employee handbook that expressly states that no person has the “authority to create, modify, or enter into an agreement for employment or relating to terms and conditions of employment, including termination, except the Agency President through a written and signed amendment to this Handbook.” See Hearing Ex 1, Part V. Thus, even assuming that the parties had entered into an oral agreement, both parties understood that such an agreement was

unenforceable without the written assent of the president of DZA.<sup>1</sup> See Nieves v Bell Industries, Inc, 204 Mich App 459, 461, 463 (1994). Consequently, DZA is unlikely to succeed on the merits of its claim for breach of contract.

Second, DZA argues that Defendant Schipper breached his fiduciary duty to DZA by retaining the MAPD book of business. This argument proceeds from the assumption that Schipper owed a fiduciary duty to the agency. DZA is a small, family-owned insurance agency that employed 11 individuals prior to the departure of Schipper and Defendant Johnson. Although the agency was run exclusively by Jeff and Tim Zylstra, the sole officers, directors, and shareholders of the agency, Jeff Zylstra alleges that Schipper was a key employee who was the resident expert on health-insurance policies. See Hearing Tr at 26. Despite Jeff Zylstra's characterization of Schipper's status in the agency, Schipper testified that Jeff and Tim Zylstra had denied Schipper's request for an ownership interest in the agency. Thus, based upon the evidence presented so far, the Court finds that Schipper was merely an ordinary employee of DZA. And our Court of Appeals has concluded that an ordinary employee-employer relationship does not rise "to the level of a fiduciary relationship deserving of special protection by the law." Edwards Publications, Inc v Kasdorf, No 281499, slip op at 8 (Mich App Jan 20, 2009) (unpublished decision), citing Bradley v Gleason Works, 175 Mich App 459, 463 (1989) ("Plaintiff does not cite any authority for the proposition that an employer-employee relationship is fiduciary in nature[.]"). Thus, DZA has not shown that it is likely to establish a fiduciary relationship between Schipper and the agency.<sup>2</sup>

---

<sup>1</sup> Employers typically utilize such provisions as a shield to preclude at-will employees from later claiming an oral modification of their employment status, see e.g., Nieves v Bell Industries, Inc, 204 Mich App 459, 461, 463 (1994), and the Court cannot allow employers to ignore these clauses when they happen to undercut the employers' positions.

<sup>2</sup> DZA's reliance on Stephenson v Golden, 279 Mich 710 (1937), is misplaced because, in that case, the fiduciary was a real estate broker, not an employee. Id. at 735.

But even if Defendant Schipper owed a fiduciary duty to DZA, he did not breach that duty by setting up a competing insurance agency. A ““fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal’s expense during the course of his agency[,]”” see Silberstein v Pro-Golf of America, Inc, 278 Mich App 446, 458 (2008), but ““former officers or directors of a corporation, unless prohibited by contract, may compete against a former employer in the same business” and ““do not violate their duty of loyalty when they merely organize a corporation during their employment to carry on a rival business after the expiration of employment.”” See Quality Manufacturing, Inc v Mann, No 286491, slip op at 5 (Mich App Dec 15, 2009) (unpublished decision). Accordingly, Schipper did not breach a fiduciary duty to DZA when he formed WMIA while he was still employed by DZA. Similarly, Schipper is not likely breaching a fiduciary duty by competing with DZA subsequent to his departure, and he is not likely breaching a fiduciary duty by retaining the MAPD accounts. After all, Schipper had developed those accounts, and he was authorized by a non-party, *i.e.*, Priority Health, to retain those accounts as the agent of record following his departure from DZA. Thus, DZA is unlikely to succeed on its claim for breach of fiduciary duties.

B. Irreparable Harm.

Plaintiff DZA must also “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). Here, the harm DZA contends that it will suffer relates to the readily identifiable stream of commissions that Defendant Schipper is receiving from Priority Health in connection with the MAPD plans. Consequently, if the Court ultimately rules in favor of DZA, the Court can readily award monetary damages to make DZA whole. Further, the “relative deterioration of competitive position does not in itself suffice to establish irreparable injury[,]” Thermatool Corp v Borzym, 227 Mich App, 366, 377 (1998), so DZA cannot establish irreparable harm

by dint of Schipper's mere competition in the marketplace. Thus, DZA has failed to establish that it will be irreparably harmed if the Court does not enter an injunction.

C. Balance of Harms to Opposing Parties.

In weighing the relative harm to the opposing parties in the presence or absence of an injunctive order, see Davis, 296 Mich App at 613, the Court must be mindful of the consequences of its ruling. If the Court grants the injunctive relief sought by DZA, the stream of income flowing to WMIA will immediately cease, and WMIA may well be put out of business. Alternatively, if the Court denies injunctive relief, DZA will continue to operate, albeit with less revenue than it had previously received, but also with fewer expenses because it no longer must pay the salaries of Defendants Schipper and Johnson. In weighing these two alternatives, the Court finds that the balance of the harms clearly militates against injunctive relief.

D. Potential Harm to the Public Interest.

This is one case where the Court's decision could seriously affect the public interest. By all accounts, the customers who enroll in MAPD plans are primarily elderly individuals who rely heavily on their agent of record to explain their insurance coverage on a frequent basis, and the parties concede that these customers would be alarmed by a sudden change in their agent. Thus, to safeguard this client base and engender as much certainty as possible, the Court must refrain from altering the agent-client relationship. Thus, the public-interest factor disfavors injunctive relief.

III. Conclusion

For the time being, the core dispute in this case concerning Defendant Schipper's entitlement to the MAPD book of business has been essentially resolved by Priority Health's standard practices. DZA readily admits that Schipper was an at-will employee who could leave the agency at any time and set

up a completing business. DZA also readily acknowledges that Schipper can attempt to persuade his former clients to move to Defendant WMIA with him. Although DZA demands injunctive relief to counteract Priority Health's assignment of MAPD clients to the agent of record, DZA has thus far failed to establish a likelihood of success on the merits or a serious threat of irreparable harm if relief is not granted. Thus, the Court cannot provide injunctive relief to DZA.<sup>3</sup>

IT IS SO ORDERED.

Dated: February 14, 2013



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

---

<sup>3</sup> Although the Court notes that DZA is likely entitled to the January 7, 2014, commissions received by Defendant WMIA that were earned while Defendants Schipper and Johnson were still employed by DZA, the Court cannot enter a constructive trust over the funds received by WMIA from Priority Health absent a final judgment. See Irwin v VS Meese, 325 Mich 349, 351-352 (1949) (“Equity court is without jurisdiction to sequester defendant’s assets” when “claim has not been reduced to judgment at law, or to enjoin defendant from transferring such assets, in absence of authority of rule of court or statute.”).