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NO. COA05-298

NORTH CAROLINA COURT OF APPEALS

Filed: 20 December 2005

BOICE-WILLIS CLINIC, P.A.,  
Plaintiff,

v.

Nash County  
No. 04 CVS 2101

DAVID S. SEAMAN, M.D.,  
Defendant.

Appeal by plaintiff and defendant from an order entered 15 December 2004 by Judge John B. Lewis, Jr. in Nash County Superior Court. Heard in the Court of Appeals 2 November 2005.

*Ward & Smith, P.A., by John M. Martin, for defendant-appellant.*

*Smith Moore LLP, by Sidney Eagles, Jr., George J. Oliver, John W. Mann, and Montaye Sigmon McGee, for plaintiff-appellee.*

SMITH, Judge.

The parties appeal from an order granting in part and denying in part plaintiff's motion for a preliminary injunction. The facts pertinent to the appeal are as follows: Boice-Willis Clinic, P.A., ("plaintiff") is a multi-specialty, physician-owned medical practice with offices in Rocky Mount, Nashville, and Spring Hope, North Carolina. David S. Seaman, M.D. ("defendant") is a general and vascular surgeon who has special training and experience in surgical procedures involving the liver, bile duct and

gastrointestinal tract. On or about 10 December 2002, the parties entered into an employment agreement which contained a non-compete provision which is the subject of the underlying action. The non-compete provision reads, in pertinent part, as follows:

(a) While employed and for a period of twenty-four (24) months after termination of employment, voluntary or involuntary, Doctor shall not, directly or indirectly, as an individual practitioner or as a principal, partner, stockholder, director, officer, employee, member, or in any other capacity, engage, participate or become interested in, affiliated or connected with, or be employed by or have any beneficial or financial interest in, any corporation, partnership, clinic, firm, association, sole proprietorship, limited liability company, or any enterprise engaged in delivery of competitive medical or surgical services being located within (i) a twenty-five (25) mile radius of Nash General Hospital, and (ii) if the Clinic at the time of termination has satellite medical offices in other cities or towns which refer patients to the Rocky Mount office, a fifteen mile radius of the municipal limits of the towns and cities in which the Clinic maintains and operates satellite offices at time of termination of employment.

(b) During the Doctor's employment hereunder and for a period of twenty-four (24) months after Doctor ceases to be employed by the Clinic, Doctor shall not, directly or indirectly, solicit any patient of any other doctor of the Clinic with which Doctor has had any contact as a result of employment by the Clinic hereunder. For this purpose, "patient" shall mean any person in the primary care of another doctor of the Clinic during the preceding eighteen (18) month period prior to termination.

After entering into the agreement, defendant began employment with the plaintiff on 14 July 2003. By letter dated 15 September 2004, plaintiff gave defendant a ninety-day notice of termination of

employment pursuant to the employment agreement. On 1 December 2004, prior to the expiration of the ninety-day period, defendant left plaintiff and opened his general surgery practice known as Rocky Mount Surgical Associates, PLLC.

Plaintiff filed a complaint on 7 December 2004 for breach of contract, preliminary and permanent injunctive relief, and declaratory judgment. On 5 January 2005, the trial court entered an order enjoining defendant from: (1) advertising a medical or surgical practice within a twenty-five mile radius of Nash General Hospital; and (2) treating any persons who have been patients of plaintiff within eighteen months prior to 14 December 2004 except patients referred to him for a second opinion, who need surgical procedures involving his specialty, or who need treatment for life threatening or emergency situations. The order expressly permits defendant to practice at the LifeCare facility, a long-term care facility in Rocky Mount. The order also required plaintiff to post a bond in the amount of \$138,000.00. Plaintiff and defendant cross-appeal the order.

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On appeal, defendant contends the trial court erred in granting the preliminary injunction because the non-competition provision of the employment agreement violates public policy. We disagree.

"The purpose of a preliminary injunction is to preserve the status quo of the parties pending trial on the merits." *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 24, 373

S.E.2d 449, 451 (1988), *affirmed*, 324 N.C. 327, 377 S.E.2d 750 (1989). A preliminary injunction, however,

is an extraordinary measure, to be issued by the court, in the exercise of its sound discretion, only when plaintiff satisfies a two-pronged test: (1) that plaintiff is able to show likelihood of success on the merits and (2) that plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the court's opinion issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

*Id.* "[T]he scope of review is basically *de novo* and we are not bound by the trial court's findings, but may review and weigh the evidence and find facts for ourselves." *Nalle Clinic Co. v. Parker*, 101 N.C. App. 341, 344, 399 S.E.2d 363, 365, *review denied*, 329 N.C. 499, 407 S.E.2d 538 (1991) (quotations and citations omitted).

Covenants not to compete partially restrain trade and, therefore, are scrutinized strictly. *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 648, 370 S.E.2d 375, 379 (1988). "To be enforceable, covenants must be (1) in writing, (2) based upon valuable consideration, (3) reasonably necessary for the protection of legitimate business interests, (4) reasonable as to time and territory, and (5) not otherwise against public policy." *Jeffrey R. Kennedy, D.D.S., P.A. v. Kennedy*, 160 N.C. App. 1, 9, 584 S.E.2d 328, 333, *review dismissed*, 357 N.C. 658, 590 S.E.2d 268 (2003).

In the instant case, the parties do not dispute the first four requirements have been met. Defendant, however, contends the non-competition provision is against public policy because enforcement

would create a substantial question of potential harm to the public health. The trial court concluded the covenant is enforceable under North Carolina law, but also concluded "[e]nforcement of the non-compete provision of the Employment Agreement would violate public policy if the Defendant is prevented entirely from practicing his areas of specialty, general surgery, liver and bile duct procedures . . . ."

In *Petrozza*, this Court set forth the standard for determining whether a covenant not to compete is contrary to public policy.

A covenant not to compete between physicians is not contrary to public policy if it is intended to protect a legitimate interest of the covenantee and is not so broad as to be oppressive to the covenantor or the public. . . . If ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interests outweigh the contract interests of the covenantee, and the court will refuse to enforce the covenant. . . . But if ordering the covenantor to honor his agreement will merely inconvenience the public without causing substantial harm, then the covenantee is entitled to have his contract enforced.

92 N.C. App. at 27-28, 373 S.E.2d at 453. In order to determine whether there is a substantial question of potential harm to the public health, this Court examines: (1) the shortage of specialists in the field in the restricted area; (2) whether the enforcement of the covenant creates a monopoly in that specialty area, including the impact on fees and the availability of a doctor in times of emergency; and (3) the patients' interest in having a choice in the selection of a physician. *Statesville Medical Group*

*v. Dickey*, 106 N.C. App. 669, 673, 418 S.E.2d 256, 259, review denied, 333 N.C. 257, 424 S.E.2d 922 (1992).

After carefully reviewing the evidence of record, we conclude there is a likelihood of plaintiff's success on the merits in that the covenant at issue does not create a substantial question of potential harm to the public health.

Defendant's specialty is general surgery. Evidence of record indicates there were at least thirteen general surgeons practicing within the restricted area at the time of the filing of the complaint, only four of whom are employed by plaintiff. Consequently, there is no shortage of general surgeons within the restricted area and no potential for a monopoly by a single surgeon or medical practice within the restricted area. Likewise, patient choice is not adversely affected in that the covenant does not prevent defendant from treating patients residing in the restricted area -- the covenant only requires defendant's practice be located outside the restricted area.

Defendant argues this Court should consider only where the surgeons actually practice surgery, i.e., the hospital(s) where the surgeons have privileges, in determining whether there is a monopoly and a shortage in the specialty area. We do not find defendant's arguments persuasive. The standard previously established by this Court is the number of physicians practicing the specialty within *the restricted area*. *Dickey*, 106 N.C. App. at 673, 418 S.E.2d at 259; *Kennedy*, 160 N.C. App. at 11, 584 S.E.2d at 335; *Petrozza*, 92 N.C. App. at 30, 373 S.E.2d at 455. In this

case, the restricted area is defined in the employment agreement as "a twenty-five (25) mile radius of Nash General Hospital." Record evidence indicates a total of thirteen general surgeons practice at three hospitals within the restricted area in Rocky Mount, Wilson, and Tarboro. Only four of the general surgeons are employed by plaintiff and they practice at Nash General Hospital. Two other surgeons also practice at Nash General.

Based on the foregoing, we conclude that plaintiff would likely prevail at a trial on the merits as the non-competition provision of the employment agreement is not void as against public policy.

We next consider plaintiff's contention that the trial court improperly limited the preliminary injunction. We agree.

Generally, a preliminary injunction should issue if a plaintiff can show: (1) likelihood of success on the merits; and (2) either the likelihood that the plaintiff will sustain irreparable harm unless the injunction is issued or that issuance is necessary for the protection of the plaintiff's rights during the course of litigation. *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (1983). In *McClure*, our Supreme Court recognized that "in a noncompetition agreement, breach is the controlling factor and injunctive relief follows almost as a matter of course; damage from the breach is presumed to be irreparable." *Id.* at 406, 302 S.E.2d at 762. There is a presumption that a preliminary injunction should issue for the protection of plaintiff's rights during the course of litigation.

In the instant case, although the trial court found the employment agreement enforceable under North Carolina law, the court limited the scope of the preliminary injunction and thereby, "blue penciled" the parties' contract. The employment agreement provides defendant may not operate a practice within the restricted area for a period of twenty-four months after leaving the clinic. Under the terms of the preliminary injunction issued by the trial court, however, defendant was restricted only from advertising a medical practice within a twenty-five mile radius of Nash General Hospital. The trial court expressly permitted defendant to continue practicing within the restricted area in violation of the non-compete clause of the employment agreement. North Carolina courts may not rewrite or revise a covenant not to compete unless it is overbroad and the language is distinctly severable. See *Hartman v. Odell and Associates*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994). The covenant in the instant case is not overbroad. Thus, we hold the trial court impermissibly limited the scope of its preliminary injunction.

Plaintiff's last assignment of error contends that the trial court erred in requiring plaintiff to post a \$138,000.00 bond. We disagree.

Security for preliminary injunctions is governed by Rule 65(c) of the Rules of Civil Procedure and provides as follows:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by



any party who is found to have been wrongfully enjoined or restrained.

"The setting of bond is within the trial court's discretion." *Shultz and Assoc. v. Ingram*, 38 N.C. App. 422, 430, 248 S.E.2d 345, 352 (1978). "While the amount of the bond lies within the discretion of the trial court . . . we must determine whether the record contains evidence to support the trial court's decision." *Currituck Associates v. Hollowell*, \_\_\_\_ N.C. App. \_\_\_\_, \_\_\_\_, 612 S.E.2d 386, 388 (2005).

In the instant case, the preliminary injunction imposes restrictions upon defendant that affect his income production. The evidence of record indicates that had defendant continued employment with plaintiff, he would have earned a base salary of \$138,000.00. The trial court determined \$138,000.00 to be a sufficient amount "for the payment of such costs and damages as may be incurred or suffered by [defendant if he] is found to have been wrongfully enjoined." N.C.R. Civ. P. 65(c). We hold the trial court did not abuse its discretion in requiring plaintiff to post a \$138,000.00 bond.

Affirmed in part, reversed in part, and remanded.

Judges STEELMAN and JACKSON concur.

Report per Rule 30(e).