

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

PENSACOLA RADIOLOGY
CONSULTANTS, P.A.,

Plaintiff,

v.

CASE NO. 01-1197-CA and
01-1228-CA
(Consolidated)

KARL E. WEINGARTEN, M.D.
and SAMUEL W. MIETLING, M.D.,

DIVISION: B

Defendants.

KARL E. WEINGARTEN, M.D.
and SAMUEL W. MIETLING, M.D.,

Counter-Plaintiffs,

v.

PENSACOLA RADIOLOGY
CONSULTANTS, P.A.,
a Florida corporation, et al.,

Counter-Defendants.

ORDER

THIS CAUSE came on to be heard on the plaintiff's request for a temporary injunction against each defendant in the aforementioned cases and the cases having been consolidated for the hearing on the request and the Court having received evidence, argument of counsel and being further advised in the premises,

FINDS AND ORDERS as follows:

1) Although these cases were consolidated for hearing pursuant to the Court's Order clarifying consolidation entered on October 5, 2001, each case is controlled by a different employment contract, which is in turn controlled by a different Florida Statute. Therefore, the Court has entered separate orders for each defendant. This order is applicable to the defendant, Dr. Karl Weingarten.

2) The Court conducted a three day hearing on the request for a temporary injunction, the length of which was made necessary by the myriad of issues involved. Each side was represented by highly skilled and diligent advocates. This case presents the sad dissolution of a professional relationship resulting in highly trained and skilled physicians expending their valuable time and energy in a conflict which highlights the fact that the practice of medicine, now more than ever, includes the reality of a highly competitive business. The facts of this case, while not overly complex, are involved enough to preclude a lengthy recitation, except as is necessary to set forth the required findings of fact.

3) The plaintiff in this action is Pensacola Radiology Consultants, P.A. (P.R.C.). P.R.C. is made up of physicians who practice in the field of medicine known as radiology. The field of radiology is made up of sub-specialties, one of which is known as interventional radiology. The defendant practices in the field of interventional radiology. The plaintiff and the defendant had a contractual relationship expressed through a written employment contract executed on September 24, 1999. The Court finds that, pursuant to the terms of the contract which provided for automatic renewal, it was in effect on March 9, 2001 when the plaintiff notified the defendant by

letter that his employment was terminated effective June 8, 2001.

4) The critical question to be resolved is whether the non-compete covenant of the contract is enforceable against the defendant under the facts of this case. The language in the covenant is found in section 13 of the contract and reads in relevant part as follows:

"In exchange for his employment by the Corporation, the Employee agrees that if his employment with the Corporation terminates, with or without cause, Employee will not for a period of two (2) years from the date of termination, engage in the practice of medicine within Escambia or Santa Rosa Counties in Florida, either directly or indirectly, for his own account or for others.

5) A significant argument has been made by the defendant that the covenant is not enforceable based on the authority of Kaye v. Orkin Exterminating Company, Inc., 472 F. 2nd 1213 (1973). At an earlier hearing this Court expressed its concern that the Kaye decision had a possible application to the instant case. Furthermore, the Court made the initial determination that the contract was ambiguous and as a result that parol evidence was admissible to further explicate on the intent of the parties. The Court acknowledges that it maintained a degree of uncertainty concerning its finding of ambiguity. After having further evaluated the language of the contract and considering the evidence presented concerning the termination of the defendant's employment by P.R.C., the Court finds that the issue of the viability of the covenant does not turn on the question of the existence of any ambiguity in the contract nor does it require extrinsic proof of the parties intentions. Therefore, the testimony of Mr. Stackhouse has been accepted by the Court solely for the purpose of establishing the circumstances of the defendant's termination.

Considering the evidence presented and the position advanced by defendant's counsel, the Court finds that the Kaye decision is not applicable. In Kaye, the non-competition clause, which was an integral part of the contract, was terminated when Orkin terminated the agreement, rather than, as pointed out by the Court, terminating Kaye's employment. In this case, as demonstrated by the Stackhouse letter of March 8, 2001 as well as the action taken by the directors of P.R.C., the plaintiff terminated the defendant's employment and not the contract. The defendant takes the position that the plaintiff had no right to terminate the defendant's employment, but only had the right to terminate the contract. This Court rejects that argument. Applying well recognized principles of contract construction, including a consideration of the contract as a whole, clearly the term of the employment relationship between the parties was discretionary for both sides. When the term of employment is discretionary with either party, then either party may terminate it at any time and no action may be maintained for a breach of contract. Jarvinen v. H.C.A. Allied Clinical Lab, 552 So. 2nd 241 (4th DCA 1989). The defendant cannot legitimately claim that the employment relationship between himself and the plaintiff was anything other than one which was at will. The fact that the contract spoke only as to the specific procedure for the termination of the contract does not alter the "at will" status of Dr. Weingarten's employment. The Court has previously explained on the record its rejection of the applicability of Sanz v. R.T. Aerospace Corporation, 650 So. 2nd 1057 (3rd DCA 1995) and Storz Broadcasting Company v. Courtney 178 So. 2nd 40 (3rd DCA 1965). Therefore, the non-compete covenant is legally binding on the defendant. The question then becomes whether it is enforceable by injunction.

6) The question of the enforceability vel non of the non-compete covenant against Dr. Weingarten is controlled by Section 542.335 Florida Statutes, as it has been interpreted by the

appellate courts. The Court does not have the time, nor the benefit of a law clerk, in order to set forth a historical review of the law regarding non-compete covenants. The parties can only take comfort in the Court's representation that it has read and reviewed every case it has been provided by the parties, or found in its independent research on the issue. Pursuant to the statute, the Court is required to determine whether or not P.R.C. has a "legitimate business interest" which the enforcement of the non-compete covenant by injunction serves to protect. In making its decision, the Court is mindful of the fact that enforcement of a non-compete covenant by injunction is discretionary. However, the Court's discretion is not boundless, but is guided by well established principles of law and equity. The Court must not abuse its discretion. Furthermore, the Court is also mindful of the fact that it is dealing with a contract, the duties and obligations of which are entitled to enforcement, unless otherwise dictated by law and equity.

7) In this case, the Court finds that P.R.C. has demonstrated a "legitimate business interest" worthy of protection. The Court recognizes that P.R.C. has a substantial relationship with a specific client, to-wit Sacred Heart Hospital (S.H.H.). The Court also finds that P.R.C. has significant client good will associated with P.R.C.'s professional practice within S.H.H. and its associated clinics.

8) Regarding P.R.C.'s legitimate business interest protected by the covenant, the Court found the testimony of Dr. Post, a founding member of P.R.C., to be particularly persuasive. The Court finds that the core philosophy of P.R.C. is to provide the entire range of radiological services to S.H.H. pursuant to its exclusive arrangement with the hospital. Through a policy of salary parity, P.R.C. has insured the availability of competent trained physicians in all specialities of radiology, including those that are not as lucrative as others. The evidence clearly

demonstrated that the specialty of interventional radiology is one of the highest, if not highest, paid fields in radiology. P.R.C. has an obligation in its contract with S.H.H. to provide the full range of radiological services on a 24 hour a day, 365 days a year basis to the patients who seek treatment at that hospital. Pursuant to the terms of the P.R.C./S.H.H. contract, the term diagnostic radiology covers procedures that involve invasive or interventional radiology. In order to fulfill its obligations, P.R.C. has successfully recruited two new interventional radiologists. However, their willingness to stay with P.R.C. is undermined by the presence of Dr. Weingarten's practice at S.H.H. The Court finds that the very existence of P.R.C., a diverse radiology group practice in existence for over 25 years, with a continuing series of exclusive contracts with S.H.H., is threatened in the event the non-compete covenant is not enforced. The Court finds the exclusive arrangement between P.R.C. and S.H.H. facilitates department efficiency, conflict reduction, uniformity of standards and has a positive effect on P.R.C.'s recruitment in a highly competitive marketplace. The marketplace is especially competitive in the area of interventional radiology. The exclusive relationship P.R.C. has had with S.H.H. is a discrete, recognizable business asset threatened by Dr. Weingarten's continuing practice in contravention of the covenant. The Court finds that Dr. Weingarten would not be in a position to have ever practiced at S.H.H. and demonstrated and improved his skills, but for his relationship with P.R.C. Dr. Weingarten has been violating the terms of the non-compete covenant and not only is there a presumption of irreparable injury to P.R.C., but this Court further finds from the evidence that P.R.C. will suffer irreparable injury and has no adequate remedy at law if the covenant is not enforced by an injunction.

9) The Court finds that the enforcement of the non-compete covenant is necessary to

protect P.R.C.'s legitimate business interests, but enforcement should only be to the degree necessary to protect those identified interests. Clearly, the evidence does not support the enforcement of the geographical limits reflected in the contract. The Court finds that P.R.C.'s interest can be sufficiently protected by an injunction which precludes Dr. Weingarten from working at S.H.H. or the ancillary clinics or facilities that are part of the S.H.H. operation.

10) Dr. Weingarten has also argued that the enforcement of this covenant violates public policy. Regardless of the fact that this Court finds Dr. Weingarten to be highly skilled and advanced in the field of interventional radiology, the Court finds that the enforcement of this covenant, in the manner indicated, does not violate to public policy. The public policy relevant to this case is one that requires the insurance of public health and welfare. The possible impact on one, or indeed several individuals who may benefit from a particular procedure that only Dr. Weingarten or Dr. Mietling have demonstrated proficiency in, does not amount to a violation of public policy. The testimony of Dr. Paul Baroco, who was one of the several physicians clearly uncomfortable with having to speak on the issues involved with this case, supports the Court's determination that an injunction is not violative of a public policy to insure public health or welfare. Dr. Baroco, as a representative of the medical community in general, and S.H.H. specifically, cannot welcome the thought of losing a physician of the caliber of Dr. Weingarten. Nonetheless, according to the testimony of Dr. Baroco, Dr. Weingarten's absence will not prevent the providing of necessary medical services to the citizens of Escambia County and its environs. In any case, the Court is limiting the geographical enforcement of the non-compete covenant and ultimately it will be Dr. Weingarten's choice to remain or leave this community.

11) The defendant has raised a number of equitable defenses to the enforcement of the

non-compete covenant including the clean hands doctrine. The defendant alleges that there have been a number of contractual breaches by P.R.C. as well as a breach of the implied covenant of fair dealing which, in equity, interferes with P.R.C.'s right to enforce the covenant by injunction. The defenses are varied and must be discussed separately.

12) The Court heard much testimony regarding the formation of a corporation known as Total Vascular Care, Inc. (T.V.C.) The testimony established what has been demonstrated as a "paradigm shift" in the practice of medicine. This "paradigm shift" basically involves the recognition of an overlap in the fields of medicine providing services and procedures for particular types of illnesses. In this case, the shift can be seen as it relates to interventional radiologists and surgeons. In recognition of this "paradigm shift", Dr. Weingarten and his compatriot Dr. Mietling were the champions of an effort to synthesize the relationship between interventional radiologists and surgeons, particularly in the area of vascular care and treatment. P.R.C. was initially behind this move, but ultimately soured because of its apparent concern over the "hemorrhage" of money necessary to establish and make viable this corporation known as T.V.C. Unfortunately, it is this souring that precipitated the litigation at hand. The Court finds that both Dr. Weingarten and Dr. Mietling had the strong desire to separate their practice of interventional radiology from the other forms of radiology practiced by the physicians of P.R.C. Regardless of any claim that P.R.C. was unfair or breached an agreement with Dr. Jasper or Dr. Harlin, the question for this Court is whether P.R.C. breached an agreement with Dr. Weingarten or violated the spirit of fair dealing with Dr. Weingarten so as to preclude, as a matter of equity, the enforcement of the non-compete covenant. The Court does not so find. P.R.C. had a right, regardless of its initial support of the development of T.V.C., to change its mind regarding its continued formation and existence, at

least vis-a-vis Dr. Weingarten. Whether P.R.C. had the right to change its position on the creation of T.V.C., in relation to Dr. Jasper or Dr. Harlin, is not determinative of its right to enforce the covenant with Dr. Weingarten. Dr. Weingarten and Dr. Mietling wished to separate from P.R.C. P.R.C. clearly had a business interest in that event not occurring. The Court finds that P.R.C. intended, if T.V.C. were to be developed, for P.R.C. to have governing control over T.V.C. Governance issues, along with financial issues, destroyed the viability of T.V.C. Dr. Weingarten's contract with P.R.C. placed a greater duty on him to protect the interests of P.R.C. than the interests of T.V.C. While there is much litigation to go in this case, the Court finds at this juncture that P.R.C. has demonstrated a substantial likelihood of success on the merits as it relates to this issue and its entitlement to injunctive relief.

13) Dr. Weingarten has alleged that there has been a breach of the contract concerning the distribution of bonuses. The Court finds that bonuses were discretionary, not mandatory. The Court further finds that P.R.C. was not unreasonable in the face of litigation, the required acquisition of new interventional radiologists, and the loss of income from Dr. Mietling and Dr. Weingarten to reduce bonuses as has been testified.

14) Dr. Weingarten has raised the issue that he is entitled to money for call coverage that he has provided to P.R.C. as a result of the absence of Dr. Cramer. Although evidence may ultimately show, through an accounting, that Dr. Weingarten is entitled to additional remuneration, it has not been demonstrated that P.R.C. materially breached the contract so as to give Dr. Weingarten cause for nonperformance of his covenant not to compete. The period of time for which Dr. Weingarten provided call coverage was during the volatile period involving negotiation and discussion of the separation of the interventional radiologist from P.R.C. Dr.

Weingarten did not begin the process of separating from P.R.C. because of compensation issues relating to call coverage. The Court finds it significant that Dr. Weingarten founded, along with Dr. Mietling, Interventional Services Unlimited, Inc. in January, 2001. The Court finds that this is not an issue, which in equity, deprives P.R.C. of their right to enforce the covenant.

15) The defendant argues that the non-compete covenant is unenforceable because it is in conflict with other provisions of the contract. Specifically, the contract provides that Dr. Weingarten was to engage in the practice of medicine in accordance with the principles of professional ethics of the American Medical Association (AMA). The Court allowed the proffer of the testimony of Dr. Ellis and it advised the parties that in its ruling it would identify whether it accepted any of his testimony and for what purpose. The Court has admitted and accepted Dr. Ellis' testimony solely for the purpose of establishing the plain language of the AMA, as it relates to its statement on non-compete covenants. The Court has not accepted any opinion testimony from Dr. Ellis. Clearly, the AMA does not suggest that it is unethical to enter into a non-compete covenant. While the AMA may discourage non-compete covenants, it recognizes as unethical only those covenants which are unreasonable. The Court recognizes that the question of reasonableness is ultimately one for a court to determine. The Court has determined that some form of restriction on the practice of medicine by Dr. Weingarten is warranted under the terms of the non-compete covenant and the circumstances of this case. Since the determination of reasonableness is fact specific, the Court finds that the facial terms of the contract are not ipso facto unreasonable so as to be unethical under the AMA guidelines. The Court having made such a determination does not find it necessary to analyze the question of whether or not there would exist an untenable conflict within the contract if the terms of the covenant were on the face

unreasonable.

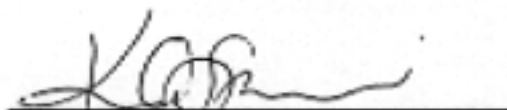
16) The Court has already determined that an injunction which prevents Dr. Weingarten from working at S.H.H. is reasonable to protect the legitimate business interests of P.R.C. The next question concerns the reasonableness of the duration of the injunction. The Court recognizes that this matter is before the Court for the purpose of a temporary injunction. Because the Court recognized that practically speaking, a temporary injunction is frequently the final call in such a case as this, the Court rejected the plaintiff's requests for an expedited, and in essence, truncated hearing. Instead, this Court insured a sufficient delay in order for the defendant to prepare to address these important issues and provided three days for a hearing to cover the many issues. This temporary injunction will be in effect until further order of the Court, but not to exceed a period of two (2) years. The Court finds that the period of two (2) years set forth in the contract is reasonable and sees no reason to interfere with the terms of the contract which Dr. Weingarten agreed to in exchange for his employment with P.R.C. In recognition that Dr. Weingarten may have patients on schedule and that a delay of the effects of this order is necessary to protect those patients' interests, this order will not take effect immediately.

Therefore, it is

ORDERED, ADJUDGED AND DECREED by the Court that Dr. Weingarten is restrained and enjoined, until further order of this Court, but not to exceed a period of two (2) years from November 15, 2001 from practicing medicine at Sacred Heart Hospital or any clinic owned and/or operated by Sacred Heart Hospital; provided this injunction shall not become effectual unless the plaintiff shall prior to November 15, 2001 execute and file with the Clerk of this Court a bond in the amount of \$500,000.00, with good sureties to be approved by the Clerk

of this Court, conditioned to pay the defendant all costs and damages which said defendant may sustain in consequence of this injunction being improperly issued. The Court reserves jurisdiction to award attorneys fees and costs to the plaintiff in this action.

DONE AND ORDERED in Chambers in Escambia County, Florida this 1st day of November, 2001.



KIM A. SKIEVASKI
CIRCUIT JUDGE

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