STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

DELPHI HOSPITALIST SERVICES LLC.,
Plaintiff,

V. Index #:E2017-002036

EDWARD L. PATRICK,
Defendant.

Special Term
November 3, 2017

APPEARANCES

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DECISION

Rosenbaum, J.

Plaintiff by order to show cause seeks a preliminary injunction restraining defendant from providing medical services at Ira Davenport Hospital or any other hospital located in New York State that had a contract for services with Delphi Hostpitalist Services LLC.

Defendant opposes asserting the covenant is not enforceable.

Discussion:

Delphi is a medical staffing company founded in 2008 which in conjunction with its affiliates "provides a full range of emergency medicine and hospitalist services, including staffing and billing, to 7 hospitals and 2 nursing homes located throughout New York State including TLC Hospital (Irving, NY), Jones Memorial Hospital (Wellsville, NY), Bath VA Medical Centre (Bath, NY), St. Joseph's Hospital (Elmira, NY), Ira Davenport Hospital (Bath, NY), Lewis County General Hospital (Lowville, NY), and Gouverneur Hospital (Gouverneur, NY). (Dr. Ellie aff'd 9-18-17¶ 17,18).

Delphi's contractual relationship to provide emergency medicine and hospitalist services apparently began in March 2002 with Ira Davenport. (Id. ¶). The most recent agreement between plaintiff and the hospital was a one year contract from the effective date of August 1, 2016 which automatically renewed for an additional one year unless terminated pursuant to the contract terms. (Agreement Section 7). That agreement contained a restrictive covenant between the Ira Davenport (the hospital) and Delphi which is not an issue in this action since plaintiff has not sued the hospital. (Section 8). The covenant provided, in part:

> Hospital therefore agrees that, during the term of this Contract and for a period of three (3) years thereafter, Hospital shall not, without prior written consent of LLC, (i) solicit for employment or provision of contractual services, any current or past provider of LLC; (ii) assist or allow anyone else to solicit for employment or provision of contractual services, any current or past provider of LLC; or (iii) assist anyone else to hire to become employed or contracted with any business enterprise with which Hospital may be associated, affiliated, or connected, any current or past provider of LLC. This restriction shall not apply to any Physician/PA/NP that had been an active provider at the Hospital prior to commencement of this or any previous Agreement or Contract with Delphi or its affiliates. This restriction shall not apply to any Physician/PA/NP that was referred to LLC by Hospital.

Again, this has not been challenged since the hospital is not a party to this action.

Defendant, a physician's assistant entered into a written agreement with plaintiff in July 2013 and was initially assigned to St. Joseph's Hospital, but did not like engaging with the patient population as many were psychiatric and substance abuse patients. (Dr. Ellie aff'd 9-18-17 ¶21). Defendant was then transferred to Ira Davenport Hospital and on March 1, 2014 as a condition of continued employment entered into an employment agreement with plaintiff which replaced the original agreement. (Complaint and Ex. A, Ellie aff'd ¶22,23). Defendant generally agrees with the underlying facts as stated by plaintiff. (Patrick aff'd 10-25-17).

The employment agreement contains a restrictive covenant which provides:

> During the term of this Agreement and for the greater of: (a) a period of three (3) years after the termination hereof, or (b) a period of three (3) years after the termination of any agreement between Delphi and each Contracted Hospital; Provider shall not provide medical services at any Contracted Hospital at which provider provided medical services; except (i) under an agreement similar to this Agreement with an affiliate of Delphi; or (ii) with Delphi's written consent; or (iii) if Provider had been an active provider of similar services at the Contracted Hospital prior to commencement of any agreement with Delphi or its affiliates." (Comp. Ex. A ¶15).

The agreement also contains a Confidentiality /Non-Disclosure Clause, but there are no allegations that defendant violated that portion of the agreement. (¶14).

On June 21, 2017 Ira Davenport provided Delphi with notice that the contract would be terminated effective September 19, 2017. (Dr. Ellie aff'd Ex A). Dr. Ellie, the Managing Member of Delphi, submits that Ira Davenport chose NES Healthcare Group, Inc., despite NES not offering the "same value proposition." (Ellie ¶33). The contract

termination between Delphi and the hospital did not involve defendant. Delphi upon notice of termination immediately attempted to find hospital assignments for its employees and offered defendant the opportunity to work at either St. Joseph's or Jones Memorial. (Ellie ¶34,35). Although St. Joseph's Hospital was a shorter commute then the 2 ½ hour commute to Ira Davenport, defendant declined and accepted a position at Jones Memorial which was a longer commute. (Ellie ¶36). Plaintiff filled out the hospital's required paperwork which required a lengthy credentialing application which included a request to forward his malpractice insurance to Jones Memorial. (Ex. C. application). According to Dr. Ellie, defendant then abruptly on July 31, 2017 advised that he was terminating his employment and intended to stay at Ira Davenport by accepting a position with plaintiff's competitor NES. (Ellie ¶40-43). Delphi has not scheduled defendant at Ira Davenport since August 22, 2017, but understands that defendant will commence employment at Ira Davenport through NES on September 19, 2017, the contract termination date between plaintiff and Ira Davenport. (Ellie ¶44).

Plaintiff claims that "defendant's ability to terminate his contract without sufficient notice and circumvent his non-competition provision sets a dangerous precedent that will facilitate competitors like NES Healthcare poaching Delphi's employees like it has in the instant matter to take away more contracts from Defendant [plaintiff] –without significant initial recruitment and other investments Delphi has had to incur." (Ellie aff'd ¶12). "In sum, Delphi's professional staff are a precious resource who have been cultivated through great effort and expense due to the difficulty of staffing rural community hospitals, and Defendant's breach of his restrictive covenant jeopardizes Delphi's entire business model." (¶14).

Plaintiff filed its summons and complaint on September 19, 2017 alleging three causes of action against defendant Patrick; breach of contract, indemnification, and unfair competition.

Preliminary Injunction:

For a party to obtain a preliminary injunction, the party must establish that (1) there is a likelihood of ultimate success on the

merits, (2) that there is a prospect of irreparable harm if the relief is not granted, and (3) that the balance of equities favor the moving party. See Doe v. Axelrod, 73 N.Y.2d 748 (1988). A preliminary injunction is a drastic remedy and should be issued cautiously. See Uniformed Firefighters Assn. of Greater New York v. City of New York, 79 N.Y.2d 236 (1992). This relief "should be awarded sparingly, and only where the party seeking it has met its burden of providing both the clear right to the ultimate relief sought and the urgent necessity of preventing irreparable harm." City of Buffalo v. Mangan, 49 A.D.2d 697, 697 (4th Dept. 1975).

The sole remedy plaintiff seeks is to restrain defendant from providing medical services to Ira Davenport Hospital or any other hospital located in New York State that has a contract for services with Delphi, and defendant has provided medical services thereat. In fact, at the preliminary injunction conference, plaintiff advised that they would reduce their request to restrain defendant from providing services to Ira Davenport only. The first prong, "likelihood of success" is dependent upon the validity and enforceability of the restrictive covenants in the respective employment agreement.

Likelihood of Success:

Plaintiff must establish a likelihood of success. "[A] likelihood of ultimate success must not be equated with a final determination on the merits." Times Square Books, Inc. v. City of Rochester, 223 A.D.2d 270, 278 (4th Dept. 1996). A likelihood of success does, however, require demonstration of a prima facie case. See Invar Intern., Inc. v. Zorlu Enerji Elektrik Uretim Anonim Sirketi, 86 A.D.3d 404, 405 (1st Dept. 2011). "To sustain its burden of demonstrating a likelihood of success on the merits, the movant must demonstrate a clear right to relief which is plain from the undisputed facts." Related Prop., Inc. v. Town Bd. of Town/Village of Harrison, 22 A.D.3d 587, 590 (2d Dept. 2005).

Validity of the Employment Agreements:

Initially, it is important to consider plaintiff's own factual averments, admitting that the employment agreement containing the

restrictive covenant was signed as a condition of continued employment. (Ellie ¶23). There is no proof that the agreement was bargained for, or offered as a promotion or higher level of responsibility or as a "significant benefit beyond continued employment." (accord Scott, Stackrow & Co., C.P.A.'s, P.C., 9 AD3d at 807-08; Ashland Mgt. Inc. v Altair Investments NA, LLC, 59 AD3d 97, 114-15, 869 N.Y.S.2d 465 [1st Dept 2008] [dissent]; compare BDO Seidman v. Hirschberg, 93 NY2d 382, 395 (1999).

Assuming that the agreement was properly negotiated, despite defendant's claims otherwise, the Court must evaluate the enforceability of the restrictive covenant.

Enforcement of a Restrictive Covenant-Three Prong Test:

A restrictive covenant in an employment agreement is reasonable only if it: (1) is no greater than is required for the protection of the legitimate interests of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public. *See* BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 388-89 (1999). See also, D&W Diesel, Inc. v. McIntosh, 307 A.D.2d 750, 750-51 (4th Dept. 2003). "'In this context, a restrictive covenant will only be subject to specific enforcement to the extent that it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.'" Id. at 389, *quoting* Reed, Roberts Assoc., Inc. v. Strauman, 40 N.Y.2d 303, 307 (1976). A restriction is necessary to protect legitimate business interests if the employer demonstrates that the restriction is required: (1) to protect its trade secrets; (2) to protect other confidential information, or (3) because the employee's services are special or unique. See Reed, Roberts Assoc., Inc. v. Strauman, 40 N.Y.2d at 308; Sutherland Global Services, Inc., 73 A.D.3d at 1473.

As the Court of Appeals has observed, "in *Reed, Roberts Associates*, *supra*, we limited the cognizable employer interests under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee

whose services are unique or extraordinary." BDO Seidman, 93 N.Y.2d at 389. There is no allegation of misappropriation in this action, and thus this case relates only to plaintiff's interest in protecting itself from competition by a former employee whose professional services are claimed to be unique or extraordinary. Although the rule of reasonableness in cases involving professionals "giv[e] greater weight to the interests of the employer in restricting competition within a confined geographical area" because "professionals are deemed to provide 'unique or extraordinary' services," id., 93 N.Y.2d at 389 (*quoting* Reed, Roberts Assocs., 40 N.Y.2d at 308), it must first be determined whether defendant, a physician's assistant and not a doctor is a 'learned profession' as defined under the controlling case law. A Physician's Assistant must have formal training and education, must be licensed as a physician's assistant, certified as a Physician's Assistant and are regulated by the Education Department. (Education Law Article 131-B; Education Law §6542; 10 NYCRR§ 94.2); Orens v. Novello, 99 NY2d 180,186 (2002). Although there are no cases on point for a physician's assistant, the requirements to maintain licensing closely meet those criteria for a learned profession enumerated in BDO Seidman supra at 389, citing to Matter of Freeman, 34 NY2d 1, 7 (1974). (c.f. Matter of Vinluan, 60 AD3d 237, 249 (2nd Dept., 2009)- criminal context- specific nursing skills not so unique or specialized that they can not be readily performed by other qualified nurses—physician assistant closely resembles nursing). However, it is also plausible like a nurse, a physician's assistant's duties are not unique or extraordinary, as they can be performed by other qualified personnel, and they can only see patients under the supervision of a physician. Thus, unlike a physician, they do not have their own patients nor can they compete for patients. The Second Department in Tender Loving Care v. Franzese, without fully addressing whether nursing was a learned profession found issues of fact as to the enforceability of a restrictive covenant where a visiting nurse terminated his/her employment, and went to work for a competing company formed by the nurse's client–both in violation of agreements each had signed. (131 AD2d 74 (2nd Dept. 1987). Unlike this case, disputed issues were raised whether the nurses also misappropriated customer lists. (Id.). Here plaintiff does not allege any misappropriation claims.

Assuming that a physician's assistant is a learned profession, the Court of Appeals nevertheless requires strict scrutiny of "the particular facts and circumstances giving context to the agreement" in the learned profession cases. *Id*. 93 N.Y.2d at 390. See also, Gelder Medical Group v. Weber, 41 N.Y.2d 680, 683 (1977) ("[a]s with all restrictive covenants, if they [an agreement among physicians/[physician's assistant] are reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public, and not unduly burdensome, they will be enforced"); Karpinski v. Ingrasci, 28 N.Y.2d 45, 49 (1971)("in some instances, a restriction not to conduct a profession or business in two counties or even in one may exceed permissible limits").

The Court does not find as a matter of law the covenant at issue unreasonable in temporal scope, as the three year restriction, even with the additional time limitation of three years from contract termination with a hospital, is limited in scope to only those seven hospitals where plaintiff had a contract. Moreover, the Court interprets the language of the agreement to mean a maximum of six years at the limited hospitals, ie. if the hospital terminates the agreement with plaintiff on the last day of defendant's restriction, defendant would not be permitted to service that facility for an additional three years. See, e.g., Battenkill Veterinary Equine P.C. v. Cangelosi, 1 A.D.3d 856, 857 (3d Dept. 2003); Novendstern v. Mt. Kisco Med. Group, 177 A.D.2d 623 (2d Dept. 1991). Additionally, at the TRO conference plaintiff advised that it was seeking to limit the scope to Ira Davenport Hospital only.

Assuming that defendant's services are so unique or specialized to hold defendant to the restrictions enforced against a doctor, a statewide restriction limited only to those seven rural hospitals where plaintiff provides contractual services would not be unreasonable nor injurious to the public, even in a rural setting as defendant is not the only medical provider. (Gelder Medical Group, supra).

The Court must further assess whether the covenant, on the facts presented, is being employed to protect defendant's legitimate interests and would not be unduly burdensome to the defendant. See BDO Seidman, 93 N.Y.2d at 391 (the Karpinski and Gelder Medical

Group "precedents do not obviate the need for independent scrutiny of the anti-competitive provisions of the . . . [employment] agreement under the tripartite common-law standard"). "Covenants restricting a professional, and in particular physician (physician's assistant herein), from competing with a former employer or associate are common and generally acceptable." Gelder, 41 N.Y.2d at 683.

Thus, the Court must evaluate whether defendant is competing and if so, whether it is unfair competition. Because "the only justification for imposing an employee agreement not to compete is to forestall unfair competition," and because "a former employee may be capable of fairly competing for an employer's clients by refraining from use of unfair means to compete," where "the employee abstains from unfair means in competing for those clients, the employer's interest in preserving its client base against the competition of the former employee is no more legitimate and worthy of contractual protection than when it vies with unrelated competitors for those clients." BDO Seidman, 93 N.Y.2d at 391. To protect goodwill, an employer is allowed to restrict only the competitive use of client relationships that the employer assisted the employee in "develop[ing] through assignments to perform direct, substantive accounting services." Id. at 392. See also, Scott, Stackrow & Co., 9 A.D.3d at 806. A covenant is over broad "if it seeks to bar the employee from soliciting or providing services to clients with whom the employee never acquired a relationship through his or her employment or if the covenant extends to personal clients recruited through the employee's independent efforts." Id. at 806. See also, BDO Seidman, 93 N.Y.2d at 393 (covenant unenforceable to the extent it covered clients with whom the former employee never had a direct relationship).

Plaintiff relies heavily on a case Ippolito v. NEEMA Emergency Med., which involved a similar covenant restricting doctors who were employed through a hospital staffing agency. (127 AD2d 821, (2nd Dept., 1987). The Court held:

> Clearly, [the staffing company] has a legitimate interest in protecting its contractual relationship with its hospital clients, and thus remaining in business. Because the restrictive covenants in question tend to ensure to some

> extent that its contracts with hospitals will be renewed, enforcement of the covenants will protect a legitimate interest of [the staffing company]. Id.

Here, unlike the facts presented in Ippolito defendant is not a physician. Defendant can not maintain a patient base without the oversight of a doctor. Moreover, Defendant was not competing with plaintiff, but simply stayed at the hospital he had worked at for several years when plaintiff lost the contract through no involvement or fault of defendant.

The difficulty presented here, even giving the plaintiff the benefit of the doubt, that a physician's assistant is a learned profession, and the agreement is otherwise valid and enforceable, defendant is not competing with plaintiff for patients in the usual sense. Defendant was not involved in plaintiff's loss of the contract with the hospital. NES, a competitor, apparently offered a lower price or some other concessions for the hospital for reasons unknown, and the hospital decided to terminate the relationship with plaintiff. There are no claims that defendant subverted plaintiff, nor is there any claim that defendant misappropriated trade secrets, client lists and/or solicited clients or patients of plaintiff. The situation is unlike a doctor's office setting where the physician's assistant has a long term relationship with the patients and could possibly solicit those patients when he/she goes to another office. The nature of the hospital emergency department is more transient without the usual long term relationships which would form the basis of competition between the employer and former employee.

The hospital does not compete with plaintiff for patients, and neither does defendant. NES is the competitor for business through bidding against plaintiff for hospital and/or nursing home contracts. Defendant simple returned to the position he held at the hospital which is now managed through NES as the employment agency. The lost opportunity is a result of Delphi's own inability to retain the contract, and not a result of defendant's competition and/or misconduct. Moreover, there are no claims that defendant provided NES with confidential information to assist them in landing the contract with Ira Davenport or has otherwise assisted NES in competing with plaintiff on

other contracts. Defendant simply stayed at the hospital where he was assigned by plaintiff with another employment agency assuming the contract with the hospital.

The Court does not find that plaintiff has sufficiently met the likelihood of success burden to warrant imposition of a preliminary injunction.

Irreparable Harm:

Irreparable injury means "any injury for which money damages are insufficient." (McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., 114 A.D.2d 165, 174 (2d Dept. 1986). "[I]rreparable injury generally cannot be established where any damages sustained are calculable, because the plaintiff in such a case would have an adequate remedy in the form of monetary damages." (Destiny USA Holdings, LLC v. Citigroup Global Markets Realty Corp., 69 A.D.3d 212,220 (4th Dept. 2009).

Here, plaintiff's claim of irreparable injury fails since the damages are easily calculable as money damages. This is not the typical situation where defendant is competing with plaintiff for customers or damaging plaintiff's goodwill. Rather, defendant stayed at the hospital where he had previously been employed through an employment agreement with plaintiff who lost the contract through no fault or influence of defendant. There are no claims for misappropriation or disclosure of trade secrets, proprietary or confidential information.

Plaintiff has not detailed any good will, reputation or other damages not compensable through money damages. Consequently, money damages can be calculated on the basis of contractual services provided by defendant while employed by plaintiff and assigned to Ira Davenport. However, there may be no damages since plaintiff had already lost the contract, and defendant could have voluntarily terminated his employment with plaintiff.

Balancing of the Equities:

"[T]he 'balancing of the equities' usually simply requires the court to look to the relative prejudice to each party accruing from a grant or a denial of the requested relief." (Ma v. Lien, 198 A.D.2d 186,186-87 (1st Dept. 1993), *lv to app dismissed* 83 N.Y.2d 847 (1994). In so doing, a court must balance the relative hardship suffered by the parties in the event the relief is granted. (See Rockland Dev. Assoc. v. Village of Hillburn, 172 A.D.2d 978, 979 (3d Dept. 1991).

Here, the relative hardship to plaintiff is a result of its own failure to retain the hospital contract through no fault of defendant. Defendant should not be forced to leave the facility, move or travel greater distances to maintain his employment which has not been shown by plaintiff to be competitive.

Plaintiff has failed to establish by clear and convincing evidence either a likelihood of success on the merits or irreparable injury which can not be compensated through money damages. Plaintiff has failed to sufficiently establish that the restrictive covenants were necessary to "protect its legitimate business interest" or that defendants were a learned profession and/or provided "unique or extraordinary" services. (John G. Ullman & Assoc. v. BCK Partners, 139 AD3d 1358 (4th Dept. 2016).

Accordingly, plaintiff's motion seeking a preliminary injunction is denied.

This constitutes the opinion and decision of the Court pursuant to CPLR 4213. Any relief requested by the Parties, but not specifically granted herein is denied. Defendant's counsel shall submit the order on notice.

Dated: 11/5/17.

HON. MATTHEW A. ROSENBAUM
Supreme Court Justice