

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AMERICAN HOMEPAIENT, INC.,)
)
Plaintiff,)
)
v.)
)
JOSEPH J. COLLIER)
and MED-EQUIP, INC.,)
)
Defendants.)

C.A. No. 274-N

MEMORANDUM OPINION

Date Submitted: March 21, 2006

Date Decided: April 19, 2006

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Attorney for Plaintiff.

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for Defendants.

CHANDLER, Chancellor

American Homepatient, Inc. (“AHOM”) brought this action to enforce the terms of a Confidentiality and Non-Compete Agreement (the “Non-Compete Agreement”) between AHOM and its former employee, defendant Joseph J. Collier, and a Settlement Agreement (the “Settlement Agreement” and, together with the Non-Compete Agreement, the “Agreements”) among AHOM, Collier, and Med-Equip, Inc. (“Med-Equip”), Collier’s present employer. AHOM alleges breach of contract and tortious interference with contract and prospective business relations. AHOM seeks damages and injunctive relief, including specific performance of a covenant not to compete.

This matter was tried over three days in August and September, 2005. The parties completed post-trial briefing on March 21, 2006. This Memorandum Opinion reflects the Court's post-trial findings of fact and conclusions of law. For the reasons set forth later, the Court concludes that the Agreements are valid and enforceable but were not breached by Collier and Med-Equip, and that Collier and Med-Equip did not tortiously interfere with AHOM’s contracts and prospective business relationships.

I. FACTUAL BACKGROUND

AHOM provides home respiratory and medical equipment services, focusing its business on in-home patient care, developed through referral sources such as hospitals, physicians and home health care agencies. Marketing efforts are not

directed towards individual patients because there is no effective means of identifying an individual who may need services or equipment, and presumably because the patient will oftentimes defer to a physician's recommendation. Therefore, targeting the physician, nurse, or other individual (the "referral source") empowered to place such an order is an integral part of AHOM's business.

Collier was employed by AHOM from 1996 to 2003, working principally from the company's Newark branch. The Newark branch provides durable medical equipment ("DME"), such as walkers, wheelchairs, hospital beds, and commodes; the branch also provided respiratory services, such as oxygen and related equipment.

Collier began his employment with AHOM as a respiratory therapist, but at his request in 2000 he began working as an account executive. Account executives develop relationships with referral sources that are invaluable to the success of the company; no different from any other account executive at AHOM, Collier executed a form Non-Compete Agreement on August 8, 2001. Once on the job, Collier soon discovered he was a natural born salesman. His forward manner of approaching potential referral sources apparently lacked inhibition. For example, patrolling the hallways of Christiana Hospital, where he served as AHOM's liaison, he would bluntly ask people he knew "Do you have anybody going home today? Do you have a patient for me?" and he was often rewarded with referrals.

Med-Equip is a competitor of AHOM, based in Folsom, Pennsylvania. Having attempted for some time to expand in the Delaware market, Med-Equip hired Collier as the branch manager of its Milford, Delaware location. AHOM quickly brought suit, and following initial discovery, a Settlement Agreement was agreed upon and signed on November 13, 2003. The Settlement Agreement effectively permitted Collier to work as a respiratory therapist, as defined in an exhibit to the Settlement Agreement, while maintaining the force and effect of the Non-Compete Agreement in all other respects.

Over the course of the period covered by the Non-Compete and Settlement Agreements, Collier was involved in the ordering or delivery of DME that was both respiratory and not respiratory in nature. Collier was also the recipient of a company Nextel cell phone that had the capability of receiving and sending direct communications from Med-Equip's office, including customer service, and the ability to be "tweaked" (*i.e.*, used as a walkie-talkie).

In his activity logs, Collier reported contacting referral sources for certificates of medical necessity ("CMN") on a number of occasions, when prior CMNs had gone stale, and a new CMN was required. Those CMNs were therefore obtained only in respect to patients who were already Med-Equip patients. Doctors who executed such stale CMNs were already referral sources of Med-Equip before Collier became employed.

II. ANALYSIS

A. *Breach of Contract*

Plaintiff alleges that Collier breached the Non-Compete Agreement and that both Collier and Med-Equip breached the Settlement Agreement. The Court must first determine whether AHOM had enforceable contracts with Collier and Med-Equip and, if so, whether they were breached.¹ Though the Agreements were enforceable, defendants did not breach the contracts.

1. Enforceability

To be enforceable, a covenant not to compete must (1) meet general contract law requirements, (2) be reasonable in scope and duration, both geographically and temporally, (3) advance a legitimate economic interest of the party enforcing the covenant, and (4) survive a balance of the equities.² When seeking specific performance of a covenant not to compete, the plaintiff has the burden of establishing her case by clear and convincing evidence.³

The Agreements satisfy the general requirements of a valid contract. Those requirements are mutual assent and consideration.⁴ AHOM offered Collier a new position and continued employment in consideration of the Non-Compete

¹ See *All Pro Maids, Inc. v. Layton*, 2004 Del. Ch. LEXIS 116 (Aug. 9, 2004).

² *TriState Courier & Carriage, Inc. v. Berryman*, 2004 Del. Ch. LEXIS 43, at *35 (Apr. 15, 2004).

³ *Id.*

Agreement, which Collier executed. Collier and Med-Equip executed the Settlement Agreement in consideration of AHOM dismissing the original lawsuit.

The Agreements are of reasonable scope and duration. They are limited to a duration of one year and a radius of fifty miles.⁵ Further, the Agreements advance the legitimate economic interest of AHOM to protect relationships cultivated by Collier while an AHOM employee, and survive a balance of the equities.

2. Alleged Breaches

Plaintiff has failed, however, to establish the breach of the Agreements. The Settlement Agreement clearly states that the Non-Compete Agreement would be subject to the express terms of the Settlement Agreement.⁶ The Settlement Agreement expressly permitted Collier to work for Med-Equip as a respiratory therapist. Collier's activities that have been challenged by AHOM were in fact permitted by this proviso of the Settlement Agreement. Descriptions of certain of these challenged activities follow, with an explanation of how Collier's credible trial testimony and other evidence in the record have cast sufficient doubt on

⁴ See *Research & Trading Corp. v. Pfuhl*, 1992 Del. Ch. LEXIS 234, at *16 (Nov. 19, 1992); *Delaware Express Shuttle, Inc. v. Older*, 2002 Del. Ch. LEXIS 124, at *40 (Oct. 23, 2002).

⁵ Non-compete agreements covering limited areas for two or fewer years generally have been held to be reasonable. See *All Pro Maids*, 2002 Del. Ch. LEXIS 116, at *18 (one year restriction found reasonable); *Delaware Express Shuttle*, 2002 Del. Ch. LEXIS 124, at *54 (finding three years unreasonable because of rapid customer turnover, and reducing duration of covenant to two years); *COPI of Delaware, Inc. v. Kelly*, 1996 Del. Ch. LEXIS 136, at *12 (Oct. 25, 1996) (two year restriction reasonable for company officers and sales personnel).

⁶ Settlement Agreement, ¶ 3.

Plaintiff's allegation that Collier was acting in capacities other than as a respiratory therapist.

a. The DME Deliveries

Plaintiff alleges that Collier's delivery of non-respiratory DME to Med-Equip patients alone constituted a breach of the Agreements. As mentioned above, however, the Settlement Agreement permits Collier to act as a respiratory therapist, and an attendant responsibility of a respiratory therapist is to deliver DME. The Settlement Agreement's Exhibit A does not specify that the equipment or services provided by the respiratory therapist must be respiratory in nature. Furthermore, there is no distinction between respiratory and non-respiratory DME recognized in the industry, and Med-Equip's practice has always been to require its full time respiratory therapists to deliver all DME. Finally, Collier testified that

there were only certain types of circumstances in which he delivered DME, all following Med-Equip's practice of having full time respiratory therapists deliver all DME.

b. Obtaining Execution of Stale CMNs

Plaintiff alleges that in obtaining the execution of stale CMNs, Collier breached the Agreements. Close examination of the circumstances of obtaining the CMNs casts sufficient doubt on plaintiff's claim, and demonstrates that Collier was only acting as a liaison between Med-Equip and a patient's doctor, as permitted by the Settlement Agreement's description of a respiratory therapist. As discussed above, all challenged CMNs dealt with existing patients of Med-Equip, most of whom suffered from chronic pulmonary problems. The doctors executing such stale CMNs were already referral sources of Med-Equip before Collier became employed. Although plaintiff points to one entry in Collier's daily worksheets dated December 2, 2003 relating to Dr. Valoria, Collier convincingly testified that he did not actually meet with Dr. Valoria on that occasion, but only wrote the doctor's name because he did not know the names of any of Dr. Valoria's office staff at the time of the visit. Furthermore, Collier was called upon to obtain execution of stale CMNs when he was already going to be in the geographical area for other job responsibilities unchallenged by AHOM, and Collier never met with an actual doctor in such circumstances. Finally, pursuit of executed CMNs is

viewed by the doctor's office as a nuisance or hindrance of their daily flow so such effort would do little to effectively solicit, market, or otherwise build goodwill. Collier's pursuit of a CMN as a respiratory therapist differed dramatically from AHOM account executives, who would host lunch meetings with doctors as part of their marketing presentation and only after would the doctor execute the CMN. Collier's obtaining the execution of stale CMNs was only the activity of a respiratory therapist and permitted by the Settlement Agreement.

c. Use of Cell Phone

Plaintiff alleges that Collier's use of the cell phone violated the Settlement Agreement's prohibitions on soliciting new business, and contacting physicians or other referral sources regarding new patients (*i.e.*, patients who aren't at that point existing patients of Med-Equip). Collier's use of the cell phone proved indispensable in responding to patients' needs, medical representatives' inquiries, and Med-Equip's customer service, all on a moment's notice. These general responsibilities of Collier as a respiratory therapist were clearly permitted by the Settlement Agreement.

Plaintiff points specifically to the Nextel records of the cell phone to attempt to demonstrate that certain communication exchanges and transactions were initiated by Collier. In its billing records, however, Nextel does not report tweaking and related incoming calls. Due to this lack of evidence, combined with

credible testimony by Collier, and Med-Equip's customer service department daily activities worksheet, I cannot find as plaintiff urges me that Collier placed a number of soliciting calls to Christiana Care between December 5 and 7; rather, these calls were more likely in response to questions regarding the care of Med-Equip patients at the hospital. Therefore, Collier's use of his cell phone did not violate the Settlement Agreement.

B. Tortious Interference with a Contractual Relationship

Plaintiff argues that Med-Equip's actions in hiring Collier in the face of knowledge that he was subject to the Non-Compete Agreement, as well as fostering Collier's breach of the Non-Compete Agreement, constitutes tortious interference. The elements of a claim of tortious interference with contract are: (i) the existence of a valid contract; (ii) the interferer's knowledge of the contract; (iii) intentional interference that induces or causes a breach of the contract; and (iv) damages.⁷ Without a breach of contract, there can be no tortious interference. As discussed above, the Settlement Agreement expressly permitted Collier to work for Med-Equip as a respiratory therapist. Because Collier's activities that have been challenged by AHOM were in fact permitted by this proviso of the Settlement Agreement, there was no breach of either agreement. In other words, because

⁷ *All Pro Maids*, 2002 Del. Ch. LEXIS 116, at *25.

plaintiff did not prove that Collier violated the terms of the Non-Compete Agreement, plaintiff has likewise failed in proving tortious interference.

C. Unfair Competition

Plaintiff alleges that by trading on the relationships that Collier developed while employed at AHOM in order to obtain new business for Med-Equip, defendants engaged in unfair competition. The elements of the tort of unfair competition are that plaintiff has a reasonable expectancy of entering a valid business relationship, with which defendant wrongfully interferes and, thereby, defeats plaintiff's legitimate expectancy and causes him harm.⁸ The home respiratory and medical equipment services industry enjoys robust competition, and any expectation of business relationships might be a bit unreasonable without a written contract with the customer. AHOM argues that past referrals of AHOM could be expected to continue to use the company in the future absent some outside interference; such argument, however, ignores the possibilities of price and service competition, and assumes that consumers base their choice of medical equipment provider solely on incumbency. Additionally, defendants could not have wrongly interfered with such relationships when Collier's activities were expressly permitted by the Settlement Agreement that plaintiff was a party to.

⁸ *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043 (Del. Super. 2001).

Finally, without delving into unnecessary detail, defendants failed to prove that their loss of business was proximately caused by Med-Equip, let alone by Collier's activities working for Med-Equip.

D. Interference with a Prospective Economic Advantage

Plaintiff alleges that Med-Equip's actions constituted tortious interference with AHOM's prospective business relationship with its referral sources. The elements of a claim of tortious interference with prospect business relation are: (i) the existence of a reasonable probability of a business expectancy; (ii) the interferer's knowledge of the expectancy; (iii) intentional interference that induces or causes termination of the business expectancy; and (iv) damages.⁹ Once again, AHOM's expectancy of maintained business from customers was not reasonable in light of the competitive market in which it operated. Plaintiff has failed to demonstrate any intentional interference by Collier or by Med-Equip that caused a termination of the business plaintiff had reasonably expected. Additionally, plaintiff did not demonstrate damages that were proximately caused by defendants.

III. CONCLUSION

Based on the findings of fact and conclusions of law made herein, judgment

⁹ *All Pro Maids*, 2002 Del. Ch. LEXIS 116, at *25.

is hereby entered in favor of the defendants on all counts. An Order has been entered consistent with this Memorandum Opinion.