2014 IL App (2d) 130745-U
No. 2-13-0745
Order filed February 18, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CRITICAL CARE SYSTEMS, INC.,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 12-CH-5715
	)	
DENNIS HEUER and IV SOLUTIONS,	)	
LLC,	)	Honorable
	)	Mitchell L. Hoffman,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court found that plaintiff had knowingly and intentionally waived its right to have Tennessee law govern the dispute. Further, the trial court properly determined that the restrictive covenant did not serve any legitimate business interest when it concluded that plaintiff failed to establish evidence of confidential information. Because defendant Heuer did not possess any proprietary or confidential information of plaintiff's, an employment restriction enjoining Heuer from employment with defendant IV Solutions did not serve any legitimate business needs of plaintiff. We concluded that no error occurred when the trial court determined that plaintiff's noncompetition agreement was unenforceable and that the trial court did not abuse its discretion in its refusal to enter a preliminary injunction against defendants. We affirmed the judgment of the trial court.

¶ 2 In November 2012, plaintiff, Critical Care Systems, Inc., filed a verified complaint against defendants, Dennis Heuer and IV Solutions, LLC, seeking injunctive relief, as well as compensatory and punitive damages. Plaintiff thereafter petitioned the trial court to enter a preliminary injunction, which the trial court denied. Plaintiff timely appeals this interlocutory order, challenging the trial court's ruling that plaintiff had waived the application of Tennessee as its choice of law and the trial court's refusal to enforce the restrictive covenant. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Plaintiff based its cause of action on Heuer's alleged breach of contract, IV Solutions' tortious interference of plaintiff's contract with Heuer and of plaintiff's contracts with its clients, and IV Solutions' misappropriation of plaintiff's confidential and trade secret information. Plaintiff alleged that Heuer was employed in May 2008 as one of its managing pharmacists ("Pharmacist in Charge") providing home infusion care services. At that time, plaintiff and Heuer entered into an April 2008 noncompetition agreement. As Pharmacist in Charge, Heuer oversaw and managed plaintiff's largest account at its Elmhurst office: Alexian Brothers Health System. Heuer oversaw the infusion pharmacy of four hospitals and a home health service entity, all run by Alexian. According to plaintiff, Heuer was so professionally intertwined with the Alexian account that "[he] was the face" of plaintiff for the Alexian account. In March 2011, plaintiff and Heuer entered into a noncompetition agreement, which, according to plaintiff's verified complaint, superseded the April 2008 noncompetition agreement. In October 2012 Heuer resigned his position with plaintiff and took a similar position with IV Solutions, a direct competitor of plaintiff. Plaintiff alleged that Heuer was servicing and soliciting medical institutions and plaintiff's clients, providing infusion care services and managing pharmaceutical needs of the same clients and in the same territory, all of which violated post-employment

restrictive covenants. Plaintiff relied on a March 2011 noncompetition agreement containing postemployment restrictions.

¶ 5 The March 2011 noncompetition agreement provided:

"During Employee's employment with Protected Parties and during the Restricted Period, the Employee agrees not to engage in any activities competitive with the Protected Party or its Affiliates, including any activities similar to those described in subsections (i) through (vi) below, except in furtherance of the Protected Parties' business. Furthermore, the Employee agrees that, except as otherwise approved in writing by the Protected parties, during the Restricted Period, the employee will not, directly or indirectly, alone or in conjunction with any other party:

(i) engage in the Business in the Territory or market, sell or provide Products and Services in the Territory;

(ii) encourage, induce or attempt to induce any Employee or Protected Parties to terminate his/her or her employment with the Protected Parties or its Affiliates or violate any agreement with the Protected Parties or its Affiliates;

(iii) call upon contact, solicit, divert, encourage or appropriate or attempt to call upon, contact, solicit, divert, encourage or appropriate any Customer, for purposes of marketing, selling, or providing Products and Services to such Customer or aiding any other Person or Representative in doing so;

(iv) accept as a customer any Customer of Protected Parties, for purposes of marketing, selling or providing Products and Services to such Customer;

(v) interfere with the business relationship between a Customer or, Employee of Protected Parties or its Affiliates;

(vi) be or become a Representative of any Person who engages in any of the foregoing activities.

¶ 6 With respect to the disclosure of confidential and proprietary information, the March 2011 noncompetition agreement provided:

"Employee acknowledges that the Confidential Information is owned or licensed to or by the Protected Parties, and is valuable, proprietary and confidential to Protected Parties, and that Protected Parties have paid substantial consideration and incurred substantial costs to acquire or develop, sort, assemble or maintain the Confidential Information. Employee agrees that the Confidential Information shall be treated as valuable, proprietary and confidential regardless of whether third parties would consider it valuable, proprietary and confidential. Employee agrees that Employee will not at any time, disclose, divulge, or make known to any person or entity, use, or otherwise appropriate for Employee's own benefit or the benefit of others any Confidential Information, or permit any person to examine or make copies of any documents or electronic records that contain or are derived from Confidential Information, without the prior written consent of the President of Protected Parties. The Employee hereby relinquishes, and agrees that he/she does not and will not at any time claim, any right or interest of any kind in or to any Confidential Information."

¶ 7 Plaintiff alleged that it had many long-standing client relationships and substantial good will with its customers, and Heuer gained access to customer-specific information relating to buying history and trends, cost information, pricing information, training materials, service reporting data, and strategic plans. Heuer also gained access to plaintiff's "most important information factors," i.e., doctor and nurse particularities, special requests, and hospital-specific intricacies.

¶ 8 Plaintiff alleged that Heuer's last day of employment was October 5, 2012; thereafter Heuer became employed by IV Solutions. Plaintiff alleged that IV Solutions was aware of Heuer's post-employment obligations and the March 2011 noncompetition agreement and took no steps to restrict Heuer's actions. In October 2012, Cindy Kunzendorf, general manager at plaintiff's Elmhurst office, learned from Linda Rose, the director of nursing at Alexian, that Alexian was seeking out other infusion providers. According to plaintiff, Rose admitted that Heuer had informed Alexian that he was employed at IV Solutions and that they could provide the support and services Alexian had received with plaintiff. Following Heuer's termination of employment, plaintiff began experiencing a decline in business with Alexian, and the only new Alexian account was "purely accidental."

¶ 9 Count I of plaintiff's complaint alleged a cause of action for breach of contract against Heuer; count II alleged tortious interference with contract against IV Solutions; count III alleged tortious interference with prospective business advantage against both defendants; and count IV alleged misappropriation of trade secrets against both defendants.

¶ 10 Plaintiff sought to enjoin Heuer from engaging in activities in breach of the restrictive covenants contained in the March 2011 noncompetition agreement; to enjoin IV Solutions from allowing Heuer to engage in such activities; to enjoin both defendants from misappropriating and using plaintiff's trade secret information; and to recover damages it suffered as a result of Heuer's breach of the March 2011 noncompetition agreement; IV Solutions' tortious interference with the March 2011 noncompetition agreement, and misappropriation by both defendants of plaintiff's confidential and trade secret information. Plaintiff alleged that, as a result of Heuer's employment with IV Solutions, it lost an important customer referral source, Alexian Brothers Home Health.

¶ 11 Plaintiff filed a memorandum in support of its motion for temporary restraining order and hearing on its request for a preliminary injunction. In its argument section, plaintiff relied on and urged the trial court to consider decisions, *e.g.*, from the Illinois Supreme Court (*Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871; *Mohanty v. St. John Heart Clinic*, 225 Ill. 2d 52 (2006)); the Illinois Appellate Court (*Capsonic Group v. Swick*, 181 Ill. App. 3d 988 (1989); *Retina Services, Ltd. v. Garoon*, 1989)); and the federal courts (*Meridian Mutual Insurance Co. v. Meridian Insurance Group, Inc.*, 128 F.3d 1111 (7th Cir. 1997) (on review from the District Court of the Northern District Court of Illinois)). Plaintiff also filed Kunzendorf's verification. On November 30, 2012, the trial court denied plaintiff's motion for a temporary restraining order. The trial court ordered expedited discovery to be conducted prior to the hearing on plaintiff's motion for a preliminary injunction and set the hearing for January 14, 2013.

¶ 12 Defendants filed a joint motion for judgment on the pleadings as to counts I, II, and III, which the trial court later denied. Plaintiff filed its response, and in it requested the trial court to consider "blue penciling" the scope of the geographic restrictions should it determine that the restrictions were overly broad. The trial court continued the hearing date. In March 2013, plaintiff filed a motion seeking leave to file a verified amended complaint. This amended complaint sought, *inter alia*, to include both the April 2008 and March 2011 noncompetition agreements independently and not as the latter superseding the former. Plaintiff also "elected to seek narrower enforcement of the injunctive relief—to Illinois only." Count I alleged breach of contract against Heuer; count II alleged tortious interference with contract against IV Solutions; count III alleged tortious interference with prospective business advantage with both defendants; count IV alleged misappropriation of trade secrets against both defendants; count V alleged breach of fiduciary duty against Heuer.

¶ 13 In May 2013, defendants filed their answer, affirmative defenses, and counterclaims. Defendants responded that plaintiff had no legitimate business interest in the referral sources that plaintiff was seeking to protect because (1) Heuer had a 14-year relationship with the referral sources prior to his four years of employment with plaintiff; (2) Heuer acquired no confidences or customers while employed by plaintiff; and (3) plaintiff's relationship with the referral sources was not long term or contractual. Defendants also responded that the restrictions in the covenants were unreasonable because they far exceeded what would have been required to protect plaintiff's interests. Defendants argued that the geographical restriction was overbroad because it extended to all of Illinois and contiguous states, which was beyond the territory in which Heuer worked. Also, the activity restrictions were overbroad because they extended to marketing and selling products, which were beyond Heuer's duties of delivering infusion pharmacy services and managing others in the process. Defendants argued that Heuer did not breach any nonsolicitation provision by interfering with a business relationship between plaintiff and Alexian Brothers Home Health because the relationship ended for reasons unrelated to his conduct. Defendants asserted that it was the long-standing relationships that IV Solutions had with the Alexian Brothers referral sources, including physicians and discharge planners, that caused Home Health to choose IV Solutions as its provider. With respect to judicial reformation, defendants argued that was not appropriate because there was no legitimate business interest, and the requested relief would require an impermissible rewriting of the restrictions.

¶ 14 On May 20, 2013, the trial court conducted a hearing on plaintiff's motion for preliminary injunction. The parties presented their opening statements, and plaintiff presented its case-in-chief. After plaintiff rested, defendants brought a motion for a directed finding, arguing that plaintiff failed to meet its burden of establishing a protectable interest and that the March

2011 agreement was overbroad. After defendants presented their argument, the trial court inquired, "Can I ask both sides, are you asking the Court to apply Illinois law to this contract?" Counsel for plaintiff responded, "That's what the Plaintiffs have asked for." Defense counsel responded, "We have been assuming that, your Honor." Counsel for plaintiff continued, "You know, we took a look at it. We are willing to go with Illinois law." The trial court again inquired of plaintiff's counsel: "Despite Paragraph 11 of the agreement?" Plaintiff's counsel responded, "we are comfortable." The trial court stated, "Both sides are asking the Court to apply Illinois law, then that's what the Court will do." The argument on defendant's motion continued, and the trial court thereafter denied the motion.

¶ 15 The parties also filed stipulations and exhibits. Among others, the parties stipulated that, prior to working for plaintiff, Heuer worked for Apria Healthcare for 14 years, from 1994 to 2008, first as a staff pharmacist and later as a branch infusion manager. While he was at Apria, Heuer worked with Alexian Brothers Home Health, a referral source of home infusion patients and part of the Alexian Brothers Health System. Two of Heuer's listed references on his resume, Dr. James O'Brien and Linda Romano, were from Alexian. In September 2009, Alexian began using the services of plaintiff for its home infusion pharmacy, and Heuer worked with Alexian while employed with plaintiff. In July 2012, Bill Honiotes from IV Solutions, contacted Heuer to recruit him to be the infusion pharmacist for IV Solutions. In September 2012, Heuer gave his notice of termination of employment to Kunzendorf; Heuer's last day of employment with plaintiff was October 5, 2012; and Heuer's first day of employment with IV Solutions was October 9, 2012. Following the hearing, the trial court ordered the parties to submit their briefs by June 7, 2013. The trial court also scheduled oral arguments for June 17, 2013.

¶ 16 On June 25, 2013, the parties appeared before the trial court for its ruling. The trial court denied plaintiff's motion for a preliminary injunction. The trial court began by discussing the purpose of a preliminary injunction and reciting the elements that plaintiff was required to demonstrate, as well as the trial court's balancing of the equities. The trial court next determined whether Illinois or Tennessee law should apply to its analysis of the restrictive covenant. The trial court noted that, despite the provision in the covenant stating that Tennessee law would apply, it had inquired of counsel for both plaintiff and defendants which law they were requesting the court to apply. The trial court stated, "Both counsel represented on the record that they were asking the Court to apply Illinois law." The trial court considered plaintiff's representation "to be a knowing and intentional waiver by plaintiff of the right to have Tennessee law govern this dispute." The trial court stated that the only reason it addressed the question at this stage was because plaintiff "has subsequently changed course" and "urged the Court to apply Tennessee law." The trial court determined, nevertheless, that despite waiver, it would have still applied Illinois law based on conflict-of-laws principles and there being no connection between plaintiff, Heuer, and Tennessee.

¶ 17 The trial court next considered the covenant at issue, guided by the standards the Illinois Supreme Court provided in *Reliable Fire Equipment*. The trial court found:

> "At the outset, this Court finds that the plaintiffs provided no evidence of any confidential information that *** Heuer obtained through his employment. Most references to confidential information in plaintiff's closing brief are vague and unsubstantiated. There was no evidence that any of the information which *** Heuer knew about Alexian Brothers Home Health Care was first learned at [plaintiff] or that [plaintiff] considered or treated that information as confidential."

¶ 18 The trial court then addressed defendants' claim that plaintiff had no legitimate protectable business interest in regard to its referral sources. The trial court found that the relationship that plaintiff had with Alexian was "merely a referral relationship." The trial court stated, assuming a non-customer referral relationship could be considered a legitimate business interest in Illinois, it would apply the traditional factors from *LSBZ, Inc. v. Brokis*, 237 Ill. App. 3d 415 (1992), to the evidence presented at the hearing. The trial court noted the key evidence came from Ben Maxson, who worked for plaintiff to obtain new referral sources and whom the trial court found credible. The trial court recounted Maxson's testimony regarding his efforts to meet referral sources at St. Alexius who were responsible for coordinating home infusion pharmacy services for patients at St. Alexius. The trial court noted that plaintiff did not present any evidence as to whether it had a contract with St. Alexius or whether they were the exclusive home infusion pharmacy used by St. Alexius. The trial court noted a 2005 or 2006 "accidental" meeting between Maxson and Mary Shuman, who was the director of social work at Alexian, at a vendors' fair. The trial court recounted that the meeting was not a byproduct of plaintiff's relationship with Alexian and noted that, at that time, Alexian had a contract with another provider. It was not until May 2009 when Shuman contacted Maxson to discuss a contract. Maxson met with Kathleen Gunderson, whom the trial court believed to be a senior vice president of outpatient services for Alexian, and Linda Rose. The trial court noted that plaintiff's purpose of the meeting was to obtain a referral contract with Alexian. The trial court stated that Heuer was not present at the meeting, but his name was brought up, "presumably by someone from [plaintiff]." The trial court noted that both Gunderson and Rose "indicated that they had worked with *** Heuer previously, before he was with [plaintiff], and would be happy to do so again." The trial court stated that, after this meeting, plaintiff began receiving referrals from

Alexian, but never obtained a contract. The trial court further noted that plaintiff lost the Alexian referrals shortly after Heuer left to work for IV Solutions, which does receive referrals from Alexian.

¶ 19 The trial court found as follows:

"What is evident from these facts is that for purposes of analyzing the near-performance factor, St. Alexius and Alexian Brothers Home Health Care cannot be considered a single entity or referral source. Although there was testimony that the two are part of the same hospital group, it is clear that the referral business [plaintiff] obtained from each was separated by both time and circumstances.

Turning to the specific factors, the length of time required to develop each referral source was minimal. In the case of St. Alexius, a phone call and two meetings. In the case of Alexian Brothers Home Health Care, one phone call and one meeting.

The second factor, the amount of money invested to obtain the referral sources, clearly favors the defendants here as there was no evidence of any money expended to acquire either source.

The third factor, the degree of difficulty in acquiring clients. While Mr. Maxson is certainly good at what he does and is diligent and persistent in obtaining referral sources for [plaintiff], the Court cannot say that the process is particularly complicated or difficult. The home infusion pharmacies basically provide identical products and services, and really the key to getting business appears to be having the right connections and making a good presentation.

The fourth factor, the extent of personal contact with the customer, is a somewhat mixed result. While *** Heuer had substantial contact with Alexian Brothers Home Health Care

> while with [plaintiff], it is likely that both Alexian Brothers Home Health Care and [plaintiff] felt comfortable with this relationship because *** Heuer had a preexisting relationship with Alexian Brothers Home Health which predated his employment with [plaintiff]. The same is true of the fifth factor, as *** Heuer's knowledge of Alexian Brothers Home Health Care predated his employment with [plaintiff].
>
> As to factors six and seven, it is evident that it is not unusual for hospitals to switch home infusion pharmacies. In this particular case, although other home infusion pharmacies such as RX Solutions were able to negotiate contracts with their referral sources, presumably adding some stability and permanency to the relationship, [plaintiff] was not able to obtain contracts with either St. Alexius or Alexian Brothers Home Health Care. Accordingly, the Court finds no near permanency in this case.
>
> The only additional factor argued by [plaintiff] *** in favor of a legitimate business interest is the personal nature of the contract between *** Heuer and Alexian Brothers Home Health Care. However, as previously discussed, this relationship predated *** Heuer's employment with [plaintiff].

The trial court held:

> "In sum, since the Court finds no legitimate business interest, the Court considers both the 2011 and 2008 restrictive covenants to be unenforceable."

¶ 20 The trial court denied plaintiff's motion for a preliminary injunction. In so holding, the trial court noted that, even if there was a legitimate business interest, the 2011 contract was geographically overbroad because it applied to all states contiguous to Illinois. The trial court noted that it was undisputed that plaintiff did no business in either Wisconsin or Kentucky. In light of its holding, the trial court declined to blue pencil the contract. The trial court further

determined that, as a result, it could not find that plaintiff "established a clearly ascertained right or a likelihood of success on the merits, even under the fair question formulation." The trial court noted that, had it found an enforceable covenant, it would have found irreparable harm and the lack of an adequate remedy at law. However, it also noted that the equities "clearly favor the defendants."

¶ 21 Plaintiff filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 Plaintiff contends that the trial court erred when it denied its motion for a preliminary injunction. Plaintiff argues that the trial court denied the motion solely because it concluded that plaintiff lacked a legitimate protectable interest in enforcement. Plaintiff argues that the trial court should have applied Tennessee law, but that under either Tennessee or Illinois law, it established a protectable interest. Plaintiff asserts that it had four bases upon which to find a protectable interest: the professional nature of its services; its loss of good will; customer relationships; and confidential information. Plaintiff further argues that, despite the trial court's ruling that the 2011 noncompete agreement was overly broad, it failed to "blue pencil" the agreement to render it enforceable.

¶ 24 We start by considering the trial court's decision to apply Illinois law. In Illinois courts, the laws of the state chosen by contracting parties will apply unless (1) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (2) its application would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue. *Old Republic Insurance Co. v. Ace Property & Casualty Insurance Co.*, 389 Ill. App. 3d 356, 363 (2009). In the present case, the March 2011 agreement reflected that Tennessee law

would govern. However, parties to a contract are not locked into its terms forever. Parties to a contract may competently modify or waive their rights under it. See *Urban Sites of Chicago, LLC v. Crown Castle USA*, 2012 IL App (1st) 111880, ¶ 37. Here, the trial court found that plaintiff had knowingly and intentionally waived its right to have Tennessee law govern the dispute. We agree with the trial court.

¶ 25 "Waiver" is the voluntary relinquishment of a known right. *Williams & Montgomery, Ltd. v. Stellato*, 195 Ill. App. 3d 544, 552 (1990) (citing *Vaughn v. Speaker*, 126 Ill. 2d 150, 161 (1988)). The trial court noted that counsel for both parties "represented on the record that they were asking the Court to apply Illinois law." In its brief, plaintiff responds that counsel "corrected himself the following morning, stating that he misspoke the prior day." Alternatively, plaintiff requests this court to consider the issue, as waiver "is an admonition to litigants, not a limitation upon the jurisdiction of a reviewing court."

¶ 26 Plaintiff explains, by using page numbers from the transcript of the report of proceedings, when the events occurred, *e.g.*, the first day of the hearing was 324 pages; the transcript of the hearing totaled 581 pages; the statement by counsel was on page 277; and corrected on page 325. The substance of the proceedings, however, reflects that plaintiff had completed its case-in-chief and rested its case on the first day of the hearing. After plaintiff rested, defendants orally moved for a directed finding. It was not until after defendants presented their argument when the trial court asked the parties which State's law should apply. The record reflects no equivocation on plaintiff's part, even after the trial court mentioned the specific paragraph of the agreement, with counsel for plaintiff stating, "You know, we took a look at it. We are willing to go with Illinois law." Defendants reflected their understanding of the application of Illinois law, stating, "We have been assuming that, your Honor." From the commencement of the litigation, the parties

have been applying Illinois law. We determine that no error occurred when the trial court decided to invoke waiver following plaintiff's change of position after it rested its case-in-chief.

¶ 27 Plaintiff is correct with respect to the general rule of law regarding waiver. However, reviewing courts have repeatedly explained that the reason we look beyond considerations of waiver is to maintain a sound and uniform body of precedent. See *Halpin v. Schultz*, 234 Ill. 2d 381, 390 (2009); *Harshman v. DePhillips*, 218 Ill. 2d 482, 514 (2006); *In re Madison H.*, 215 Ill. 2d 364, 371 (2005). In *Collins v. Lake Forest Hospital*, 213 Ill. 2d 234, 239 (2004), our supreme court stated:

> "This court has long held that waiver is a limitation on the parties, not on this court. *Hux v. Raben*, 38 Ill. 2d 223, 224 (1967). At this time we choose to address the issue of a health care provider's duty under the Act because it is critical to the development of a sound body of precedent concerning the proper interpretation, and thus implementation, of legislation concerning vital care and treatment decisions for patients lacking decisional capacity, including the termination of life-sustaining procedures."

¶ 28 Unlike those in *Collins*, plaintiff presents no interest at stake here that should command this court's attention. Further, plaintiff presents no body of precedent for this court's discussion. Rather, plaintiff merely asserts that "it would make sense for the reviewing court to consider the issue." Despite plaintiff's assertion, we decline to look beyond the trial court's invocation of waiver, and we will review the trial court's decision with an application of Illinois law.

¶ 29 We next consider the trial court's refusal to grant plaintiff a preliminary injunction. A preliminary injunction is an extraordinary remedy that is designed to preserve the status quo until the merits of the case are decided. *Clinton Landfill, Inc. v. Mahomet Valley Water Authority*, 406 Ill. App. 3d 374, 378 (2010). Trial courts should grant such an injunction only (1) in

emergencies or (2) in situations in which serious harm would result if the preliminary injunction is not issued. *Id.*

¶ 30 To obtain a preliminary injunction, the moving party is required to show "(1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case." *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006). "To obtain a preliminary injunction, the movant must raise a 'fair question' that each of these elements is satisfied." *Roxana Community Unit School District No. 1 v. WRB Refining, LP*, 2012 IL App (4th) 120331, ¶ 23. The court must also determine if the balance of hardships to the parties supports the grant of a preliminary injunction. *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill. App. 3d 163, 169 (2002). In doing so, we will reverse only where the trial court abused its discretion in holding as it did. *Mohanty*, 225 Ill. 2d at 63. Whether injunctive relief should be granted to enforce a restrictive covenant not to compete in an employment contract depends on the validity of the covenant, the determination of which is a question of law. *Id.* at 62 (citing *Retina Services, Ltd. v. Garoon*, 182 Ill. App. 3d 851, 856 (1989)).

¶ 31 Illinois courts carefully examine postemployment restrictive covenants because they operate as partial restrictions on trade. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 447 (2007). Although the lower court's judgment in granting or denying a preliminary injunction "is accorded great deference, it must still be exercised within the established legal framework for injunctive relief." *Kanter & Eisenberg v. Madison Associates*, 144 Ill. App. 3d 588, 591 (1986) (citing *Alexander v. Standard Oil Co.*, 53 Ill. App. 3d 690, 698 (1977)). "A restrictive covenant, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the

protection of a legitimate business interest of the employer-promisee, (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public." *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 17. The protection of the employer's legitimate business interest is a long-established component in this three-prong rule of reason. *Id.* ¶ 30. Each case must be determined on its own particular facts, and whether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. *Id.* ¶¶ 42-43. An employer seeking to enforce the restrictive covenant bears the burden of showing that the full extent of the restriction is necessary to protect its legitimate business needs. *Health Professionals, Ltd. v. Johnson*, 339 Ill. App. 3d 1021, 1034 (2003).

¶ 32 In the present case, plaintiff argues that it had four bases upon which the trial court should have found a protectable interest: the professional nature of its services; its loss of good will; customer relationships; and confidential information. Plaintiff asserts that the trial court denied the motion solely because it concluded that plaintiff lacked a legitimate protectable interest in enforcement. We disagree. The trial court properly analyzed the 2011 noncompete agreement at issue. See *Gastroenterology Consultants of North Shore, S.C. v. Meiselman*, 2013 IL App (1st) 123692, ¶ 10 (stating that the trial court considers the totality of the circumstances in determining whether a plaintiff established a legitimate business interest in need of protection). As detailed above, the trial court thoroughly considered the covenant at issue and all of the evidence presented, expressly stating that it was guided by the standards our supreme court provided in *Reliable Fire Equipment*. The trial court found that plaintiff's relationship with Alexian was "merely a referral relationship," and plaintiff has failed to persuade this court otherwise. See *Gastroenterology Consultants*, 2013 IL App (1st) 123692, ¶ 13 (stating that factual determinations made by a trial court sitting without a jury are entitled to great deference

and will be disturbed on review only when they are against the manifest weight of the evidence) (citing *Bazydlo v. Volant*, 164 Ill. 2d 207, 214-15 (1995)). The trial court concluded that plaintiffs presented no evidence of any confidential information that Heuer obtained through his employment. The trial court found that plaintiff's references to confidential information were vague and unsubstantiated, and further, that plaintiff presented no evidence reflecting that any of Heuer's knowledge regarding Alexian was first learned while he was employed with plaintiff or that plaintiff considered or treated the information as confidential. The record reflects that Heuer's employment responsibilities with plaintiff were essentially the same responsibilities he had with his prior employer, Apria Healthcare, for whom he worked for 14 years prior to his employment with plaintiff.

¶ 33 Moreover, the trial court properly determined that the covenant did not serve any legitimate business interest when it concluded that plaintiff failed to establish evidence of confidential information. Because Heuer did not possess any proprietary or confidential information of plaintiff's, an employment restriction enjoining Heuer from employment with IV Solutions did not serve any legitimate business needs of plaintiff. We hold that no error occurred when the trial court determined that plaintiff's noncompetition agreement was unenforceable and that the trial court did not abuse its discretion in its refusal to enter a preliminary injunction against defendants. See *Mohanty*, 225 Ill. 2d at 63.

¶ 34 Plaintiffs urge this court to blue pencil the covenant to render it enforceable; however, we decline to do so because that would be an impermissible rewriting of the covenant. See *Terry v. State Farm Mutual Automobile Insurance Co.*, 287 Ill. App. 3d 8, 14 (1997) ("It is the function and duty of the reviewing court to construe the contract and not to make a new contract under the guise of construction."). Thus, finding no proprietary or confidential information involved or

any other protectable interest, we cannot say that plaintiff has demonstrated a proprietary business interest such as to warrant an enforcement of a covenant not to compete. Plaintiff has failed to establish any confidential or proprietary information, and therefore, cannot establish the necessity of protecting such information. We, therefore, cannot say that the trial court's findings were contrary to the manifest weight of the evidence and, accordingly, affirm.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 37 Affirmed.