2012 IL App (1st) 120758-U

Third Division
August 1, 2012

No. 1-12-0758

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

INVESTRX CORPORATION and REVENUE CYCLE SOLUTIONS, INC.,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	11 CH 39705
NICK DiGIOVANNI, JR., NICK DiGIOVANNI, III and REVMD PARTNERS, LLC,	)	
Defendants-Appellants,	)	Honorable
(Timothy McCarthy,	)	LeRoy K. Martin, Jr.,
Nominal Defendant).	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it entered an order for a preliminary injunction that required two former officers of a corporation to comply with restrictive covenants in agreements they made in connection with the sale of the corporation to a new owner.

¶ 2 Revenue Cycle Solutions (RCS) sued two of its former officers, seeking to enjoin them from doing business with certain clients of RCS. The trial court granted a preliminary injunction

in favor of RCS, and the former officers now appeal. We find that the trial court did not abuse its discretion when it awarded RCS the preliminary injunction.

¶ 3 BACKGROUND

¶ 4 In 2002, Nick DiGiovanni, Jr. (Nick Jr.) and Tim McCarthy formed RCS to provide collection services for hospitals. RCS hired Nick Jr.'s son, Nick DiGiovanni III (Nick III), in 2003. In 2005, Nick Jr. and McCarthy sold a controlling interest in RCS to InvestRx, and they agreed to continue working for RCS. In their employment contracts with InvestRx, Nick Jr. and McCarthy agreed that "[a]s a means reasonably designed to protect [RCS's] trade secrets, Proprietary Information, customer relationships and the goodwill value" of RCS, they would not "directly or indirectly[] engage in any activity that is competitive with [RCS's] healthcare accounts receivable business *** in any capacity" before January 1, 2010. Nick Jr. and McCarthy "acknowledge[d] and agree[d] that [RCS] ha[d] expended significant resources to develop its business goodwill, trade secrets, Proprietary Information and customer base, and that these constitute legitimate business interests requiring protection." They added that their "continued employment with [RCS] following the acquisition of RCS was a material inducement for [InvestRx's] acquisition of RCS."

¶ 5 In connection with the sale, Nick Jr. also signed an "Employee Proprietary Information and Inventions Agreement," in which he agreed that for 12 months after he left RCS, he would not either directly or indirectly interfere with RCS's customer relationships.

¶ 6 Nick III executed an employment agreement with RCS in 2007, and in that agreement he promised that "during his employment with [RCS] and for a period of two (2) years from the

date of termination of his employment with [RCS], [he would] not, directly or indirectly, *** solicit or accept from, or transact business of any nature related to accounts receivable management with, any past or present *** customer or account of [RCS]."

¶ 7 In 2009, InvestRx increased Nick Jr.'s and Nick III's interest in the success of InvestRx by granting them options to purchase up to 15,000 shares of InvestRx stock at 6 cents per share. In exchange for the option, Nick Jr. and Nick III agreed that during their employment and for 24 months thereafter, they would not directly or indirectly "solicit, divert, accept, service, transact, or attempt to solicit, divert, accept, service, or transact the business of managing accounts receivables for hospitals, medical centers, physician groups and other health care service providers, of any nature, from any customer, broker, account or active lead/prospect *** of InvestRx." The agreement defined "customer, broker, account or active lead/prospect" to include clients for whom Nick Jr. or Nick III or their departments in RCS provided accounts receivable management services or solicited for such business within the 24 month period before the termination of their employments with RCS.

¶ 8 In 2011, the owners of InvestRx sold the company to a venture capitalist. McCarthy resigned from RCS in February 2011 and Nick Jr. and Nick III resigned in April 2011. Nick Jr., Nick III and McCarthy formed RevMD Partners, LLC, in April 2011 to provide collection services for hospitals, in direct competition with RCS. Nick Jr. and Nick III solicited business from several of RCS's clients.

¶ 9 On November 10, 2011, InvestRx and RCS filed a complaint in which they sought an injunction to compel Nick Jr. and Nick III to comply with the restrictive covenants in their

contracts. The plaintiffs sought a preliminary injunction pending a determination of their right to a permanent injunction. The parties presented extensive documents concerning the negotiations for and the effects of the restrictive covenants. The court heard no testimony from any witnesses at the hearing on the motion for a preliminary injunction. Nick Jr. and Nick III emphasized the competitive nature of the business and the public availability of the list of *thousands of hospitals and physician groups* that could become clients. The defendants also showed that McCarthy's employment contract included no post-employment restrictions, and other high employees of InvestRx and RCS had lesser restrictions.

¶ 10 The plaintiffs presented an employment agreement between RevMD and one of its employees, and in the agreement the employee promised not to disclose confidential information about RevMD's "business, including cost information, profits, sales information, *** markets and marketing methods, customer lists and customer information *** [and] information submitted by [RevMD's] customers." They also presented RCS's lists of paying clients from 2009, 2010 and 2011, and those lists showed that RCS retained about 85% of the clients it listed at the start of 2009 for the three-year period ending at the end of 2011.

¶ 11 On March 14, 2012, the trial court entered a preliminary injunction, ordering Nick Jr. and Nick III to comply with the covenants in their 2009 stock option agreements and ordering Nick III to comply with his 2007 employment agreement. In the order the court quoted the language from the agreements with which it ordered the defendants to comply. The court expressly adopted the broad definition of customers to include any client for whom Nick Jr. or Nick III or their departments actually provided accounts management services in the two

years prior to their resignations from RCS, and any potential customer from whom Nick Jr. and Nick III solicited business in the same two year period. Nick Jr. and Nick III now appeal.

¶ 12 ANALYSIS

¶ 13 Standard of Review

¶ 14 Supreme Court Rule 307(a)(1) gives this court jurisdiction to review a trial court order granting a motion for a preliminary injunction. Ill. S. Ct. R. 307(a)(1) (eff. Feb. 26, 2010). The trial court has discretion to grant or deny the request for a preliminary injunction, and we limit our review to determining whether the court abused that discretion. *Save the Prairie Society v. Greene Development Group, Inc.,* 323 Ill. App. 3d 862, 867 (2001). A court may grant a preliminary injunction to compel compliance with a contract. *Gold v. Ziff Communications Co.,* 196 Ill. App. 3d 425, 432 (1989). To decide whether to enter a preliminary injunction, the court should consider (1) whether the plaintiff has a right in need of protection; (2) whether legal remedies will adequately protect the right; (3) whether the plaintiff will suffer irreparable harm without the injunction; and (4) whether the plaintiff will likely succeed on the merits. *Save the Prairie,* 323 Ill. App. 3d at 867. The plaintiff must establish a "fair question" as to each of the elements. *Clinton Landfill, Inc. v. Mahomet Valley Water Authority,* 406 Ill. App. 3d 374, 378 (2010). The court should also consider the balance of the equities. *Shodeen v. Chicago Title & Trust Co.,* 162 Ill. App. 3d 667, 673 (1987).

¶ 15 Nick Jr. and Nick III ask us to review the order *de novo* because the trial court based its

decision solely on documentary evidence. We review the trial court's findings of fact *de novo* when the court bases its findings solely on documents. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). However, our supreme court has clarified that the trial court deciding a motion for a preliminary injunction should not decide factual issues:

> "[A] hearing on a motion for a preliminary injunction does not determine any factual issue. A preliminary injunction is issued to preserve the *status quo* until the trial court may consider the merits of the case. In ruling on a motion for such relief, controverted facts or the merits of the case are not decided. In reviewing the discretion exercised by the trial court, an appellate court may decide only whether the petitioner has demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed; that the circumstances lead to a reasonable belief that they probably will be entitled to the relief sought, if the evidence sustains the allegations of the petition; and that matters should be kept in *status quo* until the case can be decided on its merits." *Dixon Association for Retarded Citizens v. Thompson*, 91 Ill.2d 518, 524-25 (1982).

¶ 16 The trial court must exercise its discretion when it balances the appropriate factors to decide whether to impose the preliminary injunction, and we will reverse the court's decision only if it abused that discretion. *Save the Prairie*, 323 Ill. App. 3d at 867. Insofar as the trial court ruled on any factual findings, we will review the findings *de novo*. See *Addison*, 232

Ill. 2d at 453. If the court ignored recognized legal principles or if the court failed to apply the correct legal test, it abused its discretion and we review its decision *de novo*. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871 ¶ 13.

¶ 17 The transcript of the hearing in this case shows that the trial court considered the correct factors to decide whether to impose a preliminary injunction. Thus, we will not reverse the decision unless the court abused its discretion. See *Save the Prairie*, 323 Ill. App. 3d at 867.

¶ 18 Right in Need of Protection

¶ 19 Nick Jr. and Nick III focus their argument on the issue of whether plaintiffs have shown they have a right, in need of protection, to have the court enforce the restrictive covenants in the contracts with Nick Jr. and Nick III. Whenever a party asks the court to enforce a restrictive covenant in an employment contract, the court must apply principles that to an extent conflict with each other.

¶ 20 On the one hand, courts have said that the law disfavors restrictive covenants as restraints on free trade. *Russell v. Jim Russell Supply, Inc.*, 200 Ill. App. 3d 855, 864-65 (1990); *Peterson-Jorwic Group, Inc. v. Pecora*, 224 Ill. App. 3d 460, 462 (1991). "[A] contract in total and general restraint of trade was 'undoubtedly' void because it 'necessarily' injures the public at large and the individual promisor. Such a contract deprives the public of the industry of the promisor, and deprives the promisor of the opportunity to pursue an occupation and thereby support his or her family." *Arredondo*, 2011 IL 111761 ¶ 16. Thus, in *Jefco Laboratories, Inc. v. Carroo*, 136 Ill. App. 3d 793 (1985), the trial court refused to

enter a preliminary injunction to enforce a restrictive covenant in an employment contract. The *Carroo* court said:

> "Six months after defendants began working for Jefco without any restrictive covenants, they were given the covenants to sign, with the implied threat that Jefco's financial support of their defense would be withdrawn if they did not sign.
>
> In sum, the record supports the inference that defendants had little bargaining power when they signed the covenants. We have held that a restrictive covenant that was signed after an employee relocated and started work was not enforceable because it was a contract of adhesion. [Citation.] Similarly, commentators have noted that sometimes an employee has no bargaining power because he must either sign the contract or be discharged. ***
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> *** [W]e find that the trial court did not abuse its discretion *** in refusing to issue the preliminary injunction." *Jefco Laboratories*, 136 Ill. App. 3d at 799-800.

¶ 21 Thus, in light of the public policy disfavoring restraints on trade, when a restrictive covenant appears in a contract between parties with unequal bargaining power, and where enforcement of the covenant would impose a hardship on the employee, courts have enforced the covenants narrowly, and only where the employer strictly showed that all the relevant factors

favored enforcement. See *Peterson-Jorwic*, 224 Ill. App. 3d at 462; *Jefco Laboratories*, 136 Ill. App. 3d at 797.

¶ 22 On the other hand, "[a]n equally important public policy in Illinois is the freedom to contract." *Prairie Eye Center, Ltd. v. Butler*, 305 Ill. App. 3d 442, 448 (1999). When a party freely agrees to a restriction on his right to compete with another, as an ancillary part of a legitimate business transaction, the court should not invalidate the contract unless it contravenes the law or public policy. *Prairie Eye Center*, 305 Ill. App. 3d at 448-49; Restatement (Second) of Contracts §188 (1981). One court explained the issues courts should consider when determining whether to enforce a restrictive covenant in a contract made in connection with the sale of a business as follows:

> "[T]he modern trend in the case law seems to be in favor of according such covenants full effect when they are not unduly burdensome, particularly in cases where the agreement in question is made in connection with the sale of a business and its accompanying 'good will.' ***
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> * * *
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> *** When the intangible asset of good will is sold along with the tangible assets of a business, the purchaser acquires the right to expect that the firm's established customers will continue to patronize the business [Citations.] The essence of the transaction is, in effect, an attempt to transfer the loyalties of the business' customers from the

> seller, who cultivated and created them, to the new proprietor. Of course, the attempted transfer may not be entirely successful, in that some of the firm's customers may choose to take their business elsewhere as a consequence of the change in ownership. ***
>
> It is quite another matter, however, when the seller actively interferes with the purchaser's relationship with his newly acquired customers by capitalizing upon their personal loyalties to him in an effort to recapture their patronage. When the seller conducts himself in such a manner, he is, in effect, directly impairing the very asset which he has purported to transfer — the 'good will' of his former business.
>
> It is to prevent such an eventuality that the law imposes upon the seller a specific duty to refrain from soliciting his former customers after he has sold his business and the accompanying 'good will' to another. " *Mohawk Maintenance Co. v. Kessler*, 52 N.Y.2d 276, 284-86 (1981).

¶ 23 Here, Nick Jr. has not shown that unequal bargaining power affected the sale of RCS to InvestRx and the accompanying agreements designed to protect the value of RCS, and he has not shown that we should view any of the contracts as contracts of adhesion. Nick Jr. and McCarthy expressly agreed to continue working for RCS to help preserve its value, and they

agreed that they would not compete against RCS before January 2010. In stock option agreements, negotiated in 2009, Nick Jr. and Nick III accepted increased compensation from RCS, in the form of options to purchase InvestRx stock at a minimal price, in exchange for their continued work for RCS and their promise not to solicit RCS's clients or pursue business opportunities with RCS customers for two years after Nick Jr. and Nick III left RCS. In light of the circumstances of this case, we view the restrictive covenants as part of a legitimate sale of an enterprise, and not as an improper restraint of trade. See *More v. Bennett*, 140 Ill. 69, 79-80 (1892); *Abel v. Fox*, 274 Ill. App. 3d 811, 819 (1995). Because the restrictive covenants resulted from free negotiations by persons with fairly equal bargaining power, as an ancillary part of the legitimate sale of a business, the public policy in favor of enforcing contracts predominates over the policy of opposing restraints on trade. See *McClure Engineering Associates, Inc. v. Reuben H. Donnelley Corp.*, 95 Ill. 2d 68, 72 (1983).

¶ 24 To determine whether a plaintiff has a right to enforce a restrictive covenant in an employment contract, the court should apply the test from sections 187 and 188 of the Restatement (Second) of Contracts §§187-88 (1981). "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." *Arredondo*, 2011 IL 111871 at ¶ 17.

¶ 25 Nick Jr. and Nick III have not suggested that the public will suffer due to the minor

restriction on their entry into the highly competitive market for collection services for hospitals. Even with the preliminary injunction in force, Nick Jr. and Nick III may represent RevMD as it actively competes with other collection services to serve almost all of the thousands of hospitals and physician groups nationwide that could become its customers. Nick Jr. and Nick III have not argued that the restrictive covenants, which they signed in exchange for benefits they realized from the sale of RCS, imposed on them undue hardships. Nick Jr. and Nick III focus their argument solely on the issue of whether the restrictive covenants protect RCS's legitimate business interests. Because this case arises on an appeal from an order granting a motion for a preliminary injunction, we must resolve the issue of whether the plaintiffs have raised a fair question of whether the covenants protect a legitimate business interest. See *Save the Prairie*, 323 Ill. App. 3d at 867.

¶ 26 The parties in the contract for sale of RCS to InvestRx asserted that RCS had a legitimate interest in protecting "its business goodwill, trade secrets, Proprietary Information and customer base." RevMD, in at least one contract with an employee, asserts that it has a similar business interest in protecting its secret knowledge about its customers, its pricing strategies, and its relationships with its customers. RCS showed that in the three years before the hearing, it retained more than 80% of its clients, and it gained several new clients. While the defendants have presented some evidence that might support the conclusion that neither RCS nor RevMD has any secret knowledge or any special client relationships to protect through restrictive covenants in their employment agreements, we agree with the trial court that RCS's evidence at least raises a fair question of whether it has such a protectable

legitimate business interest in enforcing the contractually agreed restrictive covenants preventing its former employees from competing against it for clients with which RCS had established relationships. Thus, RCS has sufficiently shown that it has a right in need of protection.

¶ 27 Other Factors

¶ 28 Nick Jr. and Nick III do not contest the sufficiency of RCS's showing concerning the other factors the court should consider to decide whether to enter a preliminary injunction. Nick Jr. and Nick III admitted that they have contacted some of RCS's clients to offer collection services through RevMD. The potential loss of clients and related injury to RCS's reputation and good will can constitute irreparable harm. See *Travelport, LP v. American Airlines, Inc.*, 2011 IL APP (1st) 111761 ¶ 38; *Falcon, Ltd. v. Corr's Natural Beverages, Inc.*, 165 Ill. App. 3d 815, 821 (1987). The admitted violations of the covenants give RCS a good chance of succeeding on the merits. The equities also favor the injunction, as the injunction helps protect the value of the investment InvestRx made in RCS without imposing an excessive hardship on the defendants.

¶ 29 Overbreadth

¶ 30 Defendants contend that the court imposed an injunction broader than necessary to protect RCS's legitimate business interests. In particular, defendants note that the injunction precludes them from soliciting business from hospitals that fired RCS, as long as RCS worked for them within two years of the date on which Nick Jr. and Nick III resigned from RCS. The injunction even forbids the defendants from accepting business from those former

clients, if the clients approach RevMD unsolicited. But InvestRx purchased RCS's good will and its relationships with its clients when it purchased RCS. To forestall defendants from covertly soliciting business for RevMD from the clients defendants served when they worked for RCS, InvestRx paid them for their agreements not to solicit business from, or accept business from, any client they served within the two year period before they terminated their employments with RCS. The customer relationships included in the sale and in the subsequent agreements between InvestRx and Nick Jr. and Nick III reasonably reflect InvestRx's legitimate business interest in maintaining the value of its purchase of RCS.

¶ 31 Bond

¶ 32 In the notice of appeal, defendants asserted that they would ask this court to "require plaintiffs-appellees to post an adequate injunction bond." Because defendants include no argument on the issue in their brief on appeal, they have waived the issue. *People v. Patterson*, 154 Ill. 2d 414, 455 (1992).

¶ 33 CONCLUSION

¶ 34 InvestRx has presented sufficient evidence to raise a fair question of whether it has a legitimate protectable business interest in requiring Nick Jr. and Nick III, former officers of RCS, to honor their commitments not to compete against RCS for business from a specific subset of available potential clients. The documentary evidence also raises a fair question of whether InvestRx will suffer harm legal remedies cannot correct, and whether InvestRx will likely succeed on the merits in its lawsuit to enforce its contracts with Nick Jr. and Nick III. Considering all appropriate factors, including the balance of the equities, we cannot say

that the trial court abused its discretion when it decided to preserve the status quo by entering a preliminary injunction requiring Nick Jr. and Nick III to comply with restrictive covenants in their employment contracts with RCS and InvestRx. Accordingly, we affirm the judgment of the trial court.

¶ 35 Affirmed.