2011 IL App (4th) 100992-U

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NO. 4–10–0992

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

SAFEWORKS ILLINOIS OCCUPATIONAL HEALTH SERVICES, LTD., and DAVID J. FLETCHER, M.D., Plaintiffs-Appellants, v. ST. MARY'S HOSPITAL, DECATUR, OF THE HOSPITAL SISTERS OF THE THIRD ORDER OF ST. FRANCIS, d/b/a ST. MARY'S HOSPITAL; ANDREA D. HOWE; DAWN AUSTIN; DAVID C. JOHNSON; ELLEN DORAN; and GLEN GRIESHEIM, Defendants-Appellees.	)	Appeal from Circuit Court of Champaign County No. 10CH360 Honorable Charles McRae Leonhard, Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and McCullough concurred in the judgment.

ORDER

¶ *1* *Held*: The trial court erred in denying plaintiffs' request for a preliminary injunction to enforce a covenant not to compete as it applied the wrong standard, *i.e.*, for mandatory preliminary injunction (not preliminary injunction sought to enforce noncompete agreements), so this portion of judgment is reversed and remanded with directions. The trial court did not err in denying injunctive relief to keep St. Mary's from using plaintiff's medical provider number or Safeworks' trade name as it had stopped doing so, so nothing remained to be enjoined.

¶ 2 Plaintiffs, SafeWorks Illinois Occupational Health Services, Ltd. (Safeworks), and David J. Fletcher, M.D., entered into purchase agreements with defendant, St. Mary's Hospital, Decatur, of the Hospital Sisters of the Third Order of St. Francis, d/b/a St. Mary's Hospital (St. Mary's), to sell plaintiffs' occupational medicine practice located in Decatur, Illinois, as well as

two mobile medical units. Plaintiffs retained their medical practice in Champaign, Illinois. Four of plaintiffs' employees later hired by St. Mary's, defendants Andrea D. Howe, Dawn Austin, David C. Johnson and Ellen Doran, had noncompetition and confidentiality agreements with plaintiffs.

¶ 3 Plaintiffs brought suit against St. Mary's, the four employees, and Glen Griesheim, an administrator with St. Mary's. Plaintiffs also filed a motion for a preliminary injunction to enforce the noncompete agreements and to enjoin St. Mary's from improperly using SafeWorks' trade name and medical provider numbers. After a hearing, the trial court denied the request for an injunction. Plaintiffs appeal, contending the court erred in holding (1) the motion for a preliminary injunction was a request for a mandatory preliminary injunction and (2) because the former employees had accepted employment in violation of their noncompete agreements, grant of preliminary injunctive relief could not preserve the status quo. Further, plaintiffs contend the court abused its discretion by not making any findings in regard to their request to prevent St. Mary's from using their trade name or medical provider number. We affirm in part, reverse in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff SafeWorks is an Illinois corporation solely owned by plaintiff, David Fletcher, M.D., engaged in providing occupational health services, including orthopedic services, physical therapy, and rehabilitation, to employers either at its own facilities, an employer's facilities, or elsewhere. Prior to June 30, 2010, plaintiffs provided its services in Decatur and Champaign, Illinois, at permanent locations and, through the use of mobile facilities, other locations throughout Central Illinois. It also had a fledgling operation in Chicago, Illinois.

SafeWorks had numerous employees, most of whom were required to sign noncompete and confidentiality agreements as a condition of their employment.

¶ 6 Prior to June 30, 2010, St. Mary's, located in Decatur, did not have an occupational health services practice. SafeWorks provided those services in Decatur through a permanent location on St. Mary's property.

¶ 7 In early 2010, plaintiffs began negotiations with St. Mary's to sell SafeWorks' Decatur operations and two mobile medical units. On June 30, 2010, plaintiffs and St. Mary's entered into two asset purchase agreements to provide for the purchase of the Decatur occupational medicine practice in Decatur and the mobile medical units located in Mt. Zion. The asset purchase agreements contained lists of plaintiff's employees who were to become employees of St. Mary's for the purpose of continuing the operations of the occupational medicine practice in Decatur and the mobile units. In addition, the purchase agreements contained a subsidiary agreement, a practice operations agreement, under which a transition period was created whereby SafeWorks' name and SafeWorks'/Dr. Fletcher's medical provider number could be used by St. Mary's.

¶ 8 Howe, Austin, Johnson, and Doran were business and billing office employees of SafeWorks, and, although they worked in Mt. Zion, the same location as the mobile units being sold to St. Mary's, they performed their tasks for SafeWorks' operations as a whole, not just for Mt. Zion or Decatur. Howe, in fact, was the controller and Director of Human Resources for all units of SafeWorks, including Champaign and Chicago. Howe, Austin, Johnson and Doran were not on the list of employees whose employment contracts were being transferred by the purchase agreement to St. Mary's.

¶ 9 Shortly after signing the purchase agreements, plaintiffs became aware St. Mary's had extended employment offers to Howe, Austin, Johnson, and Doran, and they had accepted them. After being informed these four employees had signed noncompete agreements with SafeWorks, St. Mary's refused to rescind its offers of employment.

¶ 10 In addition, plaintiffs discovered St. Mary's was still using SafeWorks' name and SafeWorks'/Dr. Fletcher's medical provider number while engaged in its practice of occupational medicine. A dispute arose between plaintiffs and St. Mary's over whether the transition period allowing this use had terminated.

¶ 11 On August 26, 2010, plaintiffs brought suit against St. Mary's, Griesheim, and Howe, seeking, among other things, to enforce the noncompete and confidentiality agreements and to enjoin St. Mary's from using SafeWorks' name and SafeWorks'/Dr. Fletcher's medical provider numbers. On September 15, 2010, St. Mary's and Griesheim filed an answer and affirmative defenses against plaintiffs. In addition, St. Mary's filed counterclaims against plaintiffs.

¶ 12 On October 13, 2010, plaintiffs' complaint was amended to add Austin, Johnson, and Doran as defendants. That same day, plaintiffs filed a motion for a preliminary injunction to enforce the noncompete and confidentiality agreements of Howe, Austin, Johnson, and Doran and to enjoin St. Mary's from improperly using SafeWorks' trade name and SafeWorks'/Dr. Fletcher's medical provider numbers.

¶ 13 On November 15, 2010, and December 3, 2010, a hearing was held on plaintiffs' motion for a preliminary injunction. Howe, Austin, Johnson, and Doran all admitted signing the noncompete agreement with SafeWorks as a condition of their employment. Howe had, in fact,

been assigned the task of making any updates to the agreement and seeing all SafeWorks' employees signed the agreement, which was then kept in their personnel files. The agreement read in pertinent part:

> "While the EMPLOYEE is employed by SafeWorks Illinois, and for two years afterward, he/she will not directly or indirectly participate in an occupational health care business that is similar to a business now or later operated by SafeWorks Illinois in the same geographic area within 50 miles. This includes participating in his/her own business or as a co-owner, director, officer, consultant, independent contractor, employee or agent of another business."

¶ 14 After signing the asset purchase agreements, St. Mary's was a direct competitor of plaintiffs as St. Mary's offered the same occupational medical services SafeWorks had previously offered through its Decatur unit and the mobile medical units. Testimony at the hearing was, through the mobile medical units, St. Mary's had provided occupational health services less than one-half mile from plaintiffs' offices in Champaign. There was no testimony as to the exact distance between Decatur and Champaign, *i.e.*, whether they were within 50 miles of each other.

¶ 15 The purchase agreements listed the names of plaintiffs' employees who would be needed by St. Mary's to run the Decatur unit and the mobile medical units. These listed employees had responsibilities pertaining exclusively to the Decatur unit and the mobile medical units. Pursuant to the practice operations agreement, plaintiffs agreed to continue employing these employees at St. Mary's expense, until the expiration of the practice operations agreement,

in order to continue operating the Decatur and mobile medical units for the benefit of St. Mary's while St. Mary's prepared to take over these facilities.

¶ 16 When the agreement expired, SafeWorks agreed to terminate the employment of these named employees so St. Mary's could hire them, in effect agreeing to waive its noncompete agreement with respect to these specific employees.

¶ 17 The practice operating agreement also provided during the transition period, SafeWorks agreed to invoice the clients of the Decatur and mobile medical units using SafeWorks'/Dr. Fletcher's medical provider numbers. By their terms, these agreements ended at the earliest of (a) four months after the asset purchase agreements were signed (extendable by mutual agreement by two months); (b) 90-day written notice by either party; (c) St. Mary's employment of the personnel specifically identified in the purchase agreements; or (4) upon mutual agreement of both parties.

¶ 18 Howe, Austin, Johnson, and Doran were not included in the list in the purchase agreement and Dr. Fletcher expected them to work out of SafeWorks' Champaign office to handle the business affairs of the company after the sale to St. Mary's was consummated. All four of these employees lived closer to St. Mary's location in Decatur and their prior SafeWorks' office in Mt. Zion and none of them wanted either to commute daily to Champaign from their current homes or move there.

¶ 19 On June 29, 2010, one day prior to the execution of the purchase agreements, Howe communicated by e-mail with St. Mary's her concern her name was not included in the list of employees transferred to St. Mary's included in the purchase agreement. Sometime after the asset purchase agreements were signed, St. Mary's extended a job offer to Howe, who accepted

the offer. On August 9, 2010, Howe informed plaintiffs she was going to go work for St. Mary's. On or about August 11, 2010, Dr. Fletcher informed St. Mary's Howe had signed a noncompete agreement with SafeWorks, which would be breached by her acceptance of employment with St. Mary's.

¶ 20 At a meeting on August 16, 2010, between Dr. Fletcher, Griesheim, and Ron Braun, another representative of St. Mary's, it was confirmed St. Mary's had extended offers of employment to Howe, Austin, Johnson, and Doran and each had accepted the offer. Dr. Fletcher informed St. Mary's representatives, each of those employees had signed noncompete agreements with SafeWorks and their employment by St. Mary's violated those agreements. Dr. Fletcher demanded St. Mary's terminate its employment of all four of these employees. St. Mary's declined. Howe then contacted Austin, Johnson, and Doran and told them St. Mary's was giving them a choice as to where they were to work and if they wanted to work for St. Mary's in Decatur, they should report there on August 17, 2010. All four did.

¶ 21 In arguing against the issuance of a preliminary injunction, St. Mary's relies on evidence it was not told prior to entering into an employment relationship with Howe, Austin, Johnson, and Doran any of them had a noncompete agreement with SafeWorks. Further, based on the due diligence checklist provided by plaintiffs prior to consummation of the sale of SafeWorks' Decatur and mobile units where plaintiffs indicated no noncompetition agreements existed, it contends plaintiffs have waived enforcement of the noncompete agreements. Further support for St. Mary's and Howe's contentions plaintiffs waived enforcement of the noncompete agreements as to the four employees at issue are the comments of Archie Fletcher (Dr. Fletcher's father and the plaintiffs' chief negotiator of this sale) to both Ron Braun, St. Mary's negotiator,

and Howe that plaintiffs would not stand in the way of Howe's career advancement. Archie testified when he made these statements, he was not aware of the existence of any noncompete agreements plaintiffs had with any of their employees. Plaintiffs further note these statements were made prior to the execution of the final purchase agreements and the written contracts control over any prior oral statements made on behalf of any of the parties.

¶ 22 As noted above, the practice operating agreements provided for a transition period whereby the parties would be working together using plaintiffs' medical provider number and allowing for use of SafeWorks' trade name. Plaintiffs contend this use continued after the transition period expired. St. Mary's disagreed and contended the transition period had not expired. Evidence at the hearing indicated St. Mary's was no longer billing under plaintiffs' medical provider number and had rebilled and submitted corrected claims for any such disputed billings. Further, St. Mary's had removed the SafeWorks name from the side of the mobile medical vans it purchased from plaintiffs.

¶ 23 The trial court denied plaintiffs' petition for a preliminary injunction. In its written order, the court held the request for a preliminary injunction to enforce the noncompete agreements was a request for a mandatory preliminary injunction, not favored by Illinois courts, citing *Lumbermen's Mutual Casualty Co. v. Sykes*, 384 Ill. App. 3d 207, 230, 890 N.E.2d 1086, 1106 (2008). The court held because Howe, Austin, Johnson, and Doran had already begun their employment with St. Mary's, the preliminary injunction would require them to sever such employment which would be a change, not a preservation of the status quo until the case could be decided on the merits, the purpose of a preliminary injunctive relief, citing *Hensley Construction, LLC v. Pulte Home Corp.*, 399 Ill. App. 3d 184, 190, 926 N.E.2d 965, 971 (2010). ~~Further,~~

The court found the record did not support the necessity for such drastic relief as a mandatory preliminary injunction was not clearly established and free from doubt. The court found counsel for all parties had raised colorable competing arguments, and without forming an opinion on the merits of those claims, the court stated "their mere existence counsels forbearance in granting mandatory preliminary injunctive relief."

¶ 24 Plaintiffs have appealed pursuant to Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) allowing an interlocutory appeal from the refusal to grant an injunction.

¶ 25 II. ANALYSIS

¶ 26 A trial court's decision granting or denying a preliminary injunction is generally reviewed for abuse of discretion. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.,* 195 Ill. 2d 356, 366, 748 N.E.2d 153, 159 (2001). However, when injunctive relief is sought to enforce a restrictive covenant not to compete, the validity of the covenant is at issue, a question of law; therefore, the standard is *de novo* review. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62-63, 866 N.E.2d 85, 91 (2006).

¶ 27 Parties seeking a preliminary injunction are required to demonstrate (1) a clearly ascertainable 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. *Mohanty*, 225 Ill. 2d at 62, 866 N.E.2d at 91. Plaintiffs contend they are only required to make out a *prima facie* showing of these elements to obtain injunctive relief. *Id.* Plaintiffs contend they did so. This is sometimes called the fair-question standard, which queries "whether the party seeking the injunction has demonstrated a *prima facie* case that there is a fair question concerning the existence of the claimed rights." *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 177,

781 N.E.2d 223, 230 (2002).

¶ 28 The trial court declined to resolve any factual disputes, relying on the Illinois Supreme Court admonition in ruling on a motion for preliminary injunctive relief, controverted facts on the merits are not to be decided at that stage. See *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 156, 601 N.E.2d 720, 727 (1992). Plaintiffs argue the trial court abused its discretion by denying their request for injunctive relief without making findings of fact or law as to the requirements for preliminary injunctive relief or the validity of the noncompete agreements.

¶ 29 The language used by the trial court in its order denying the petition for a preliminary injunction did not track the language of case law as to the four elements needed to obtain injunctive relief. It could be argued the court found "no certain and clearly ascertainable right of plaintiffs" was shown that must be protected. Further, the court noted the evidence supported colorable claims of both plaintiffs and defendants as to plaintiffs' ability to enforce the noncompete agreement. The court may have determined it was unable to tell if plaintiffs are likely to be successful on the merits.

¶ 30 Those conclusions, to the extent they were reached, were grounded in the trial court's mistaken belief plaintiffs' were seeking a mandatory preliminary injunction. It appears the court raised this concern, and relied upon *Shodeen v. Chicago Title and Trust Company*, 162 Ill. App. 3d 667, 673, 515 N.E.2d 1339, 1344 (1987), in reaching its decision. The trial court wrote, in its opinion:

> In addition, borrowing from the language of the *Shodeen* court, the court is of the view that the record does not support the requisite finding that 'the necessity for such relief is clearly established and

> free from doubt.' In this respect the court notes that able counsel for the parties have mustered colorable competing positions relating not only to the appropriate construction of the noncompetition agreements but also relating to whether plaintiffs have either waived their application or are estopped from invoking them. Thus, although the court has formed no position on the merits of those competing claims, their mere existence counsels forbearance in granting mandatory preliminary injunctive relief."

¶ 31 The "clearly established" and "free from doubt" phrases from *Shodeen* are not found in *Mohanty*, nor are they found in any Illinois cases dealing with preliminary injunctions sought to enforce noncompete agreements. Such language is part of the standard applicable to the request for *mandatory* preliminary injunctions. The request of a preliminary injunction to enforce a noncompete agreement is not typically a mandatory preliminary injunction, nor is it one here.

¶ 32 Plaintiffs requested a preliminary injunction to maintain, or return to, the status quo until a decision on the merits. The status quo is "the last, actual, peaceable, uncontested status which preceded the pending controversy." *Postma v. Jack Brown Buick, Inc.,* 157 Ill. 2d 391, 397, 626 N.E.2d 199, 202 (1993).

¶ 33 The status quo here would be the time *before* the defendants allegedly began violating the noncompete agreement by hiring the employees at issue. Asking to maintain or return to that status does not require defendants to do an affirmative act. It is a request that defendants refrain from or cease violating the noncompete agreement.

¶ 34 The parties provided substantial evidence, and the trial court carefully considered that evidence, but the application of the wrong standard undermines the decision. The court made no finding as to the validity of the noncompete agreements, and the elements required to be shown for the issuance of a preliminary injunction were not clearly evaluated because of the application of the wrong standard.

¶ 35 The trial court should have the opportunity to make findings of fact and law using the correct standard.

¶ 36 Plaintiffs also assert the trial court abused its discretion in failing to make any findings, either of fact or law, concerning the issuance of an injunction against St. Mary's to keep it from using plaintiffs' medical provider numbers or SafeWorks' trade name. However, the uncontested evidence at the hearing was St. Mary's was no longer doing either of those things. Thus, no current behavior on the part of St. Mary's remained to enjoin as to that issue.

¶ 37 A trial court should not grant injunctive relief to prevent future conduct in good faith discontinued prior to the hearing on a request for injunctive relief unless there is evidence the offense is likely to be repeated. See *Bally Manufacturing Corp. v. JS&A Group, Inc.,* 88 Ill. App. 3d 87, 95, 410 N.E.2d 321, 327 (1980). Although the behavior sought to be enjoined had occurred, it no longer was occurring, and there was no evidence in the record it was likely to occur again. The court should have mentioned this in its order denying the request for a preliminary injunction against this conduct. Plaintiffs failed to show an immediate and irreparable injury if this portion of the requested injunction was denied.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated above, we find the trial court used the wrong standard in

deciding to deny plaintiffs' request for a preliminary injunction.

¶ 40 We conclude the trial court's judgment in denying plaintiffs' request for a preliminary injunction was erroneous insofar as it applied the incorrect standard in evaluating the request for injunctive relief on the noncompete covenants. We reverse and remand with directions on this portion of the judgment. We otherwise affirm.