2013 IL App (5th) 120233-U

NO. 5-12-0233

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

LEE PETER BEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Randolph County.
	)	
v.	)	No. 11-MR-100
	)	
SPARTA COMMUNITY HOSPITAL,	)	Honorable
	)	Richard A. Brown,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment in favor of the defendant, Sparta Community Hospital, was appropriate where no genuine issue of material fact existed as to the proper construction of a restrictive covenant in a physician employment agreement.

¶ 2 This is a declaratory judgment action to determine the proper construction of a restrictive covenant in a physician employment agreement. The plaintiff, Lee Peter Bee, D.O., appeals from an order of the circuit court of Randolph County denying his motion for summary judgment and granting summary judgment in favor of the defendant, Sparta Community Hospital. On appeal, the plaintiff argues that the trial court erred by granting summary judgment in favor of the defendant because the plain and unambiguous language of the restrictive covenant allowed him to either practice medicine within a 25-mile radius of Sparta, Illinois, *or* solicit any patient he treated while employed by the defendant within two years following the termination of the agreement, but not both. For the reasons that

follow, we affirm.

¶ 3 On December 19, 2011, the plaintiff filed a verified complaint for declaratory relief for the purpose of determining a controversy between the parties as to the legal reading and interpretation of a restrictive covenant in an employment contract. According to the complaint, the plaintiff, a licensed physician, began full-time employment with the defendant on June 14, 2010. As a result of this employment, the parties entered into a physician employment agreement. The employment agreement contained a restrictive covenant (provision 5.3), which stated as follows:

> "Upon the termination of this Agreement for any reason, Physician agrees that for a period of two (2) years thereafter (the 'Protected Period'), Physician shall not, without the written consent of the District, directly or indirectly, (a) engage in the practice of medicine in the City of Sparta, Illinois or in the City of Physician's then current practice site, or within a 25-mile radius of the outer physical limits of the City of Sparta or the location of such practice site, whether alone, in conjunction with or through any person, corporation, company, partnership or other entity, or as an employee or other capacity, and (b) solicit patients of the District to become the private patients of Physician."

¶ 4 The employment agreement was terminated effective July 30, 2011.

¶ 5 In the verified complaint, the plaintiff argued that the restrictive-covenant provision was clear and unambiguous to the extent that it allowed him to compete with the defendant by either practicing within the restricted area *or* soliciting former patients. The plaintiff argued that the provision prohibited him from doing both activities simultaneously, but allowed him to engage in one of the competition methods during the two-year period. The plaintiff filed this declaratory judgment action requesting the trial court determine the proper construction of the restrictive covenant because he desired to advertise his new practice,

which was located in Sesser, Illinois, in the Sparta, Illinois, newspaper or, alternatively, open a satellite medical clinic in Sparta, Illinois, without the risk of incurring injunctive relief and damages.

¶ 6 On February 8, 2012, the defendant filed a verified answer to the plaintiff's verified complaint for declaratory relief. On April 23, 2012, the plaintiff filed a motion for summary judgment, arguing that the trial court should grant summary judgment in his favor because the plain and unambiguous language of the restrictive covenant allowed him to either practice medicine within a 25-mile radius of Sparta, Illinois, *or* solicit any patient he treated while employed by the defendant. Therefore, the plaintiff argued that he could choose to either practice medicine within the restricted area or solicit former patients, but he could not engage in both activities simultaneously. On May 14, 2012, the defendant filed a response to the plaintiff's motion for summary judgment and a countermotion for summary judgment. In its motion, the defendant argued that the plain and unambiguous language of the restrictive covenant prohibited the plaintiff from practicing medicine within the restricted area for a period of two years *and* prohibited him from soliciting former patients that he treated while employed by the defendant during the same two-year period. Therefore, the defendant argued that the plaintiff was not allowed to choose his competition method because he was prohibited from engaging in either of the activities during the two-year period.

¶ 7 On May 18, 2012, the trial court held a hearing on the motions for summary judgment. The court determined that no ambiguity existed in the contract and the provision was clear that the plaintiff was prohibited from doing either of the restricted activities during the two-year period. The court concluded that the key sentence in the restrictive covenant was the introductory phrase, "physician shall not without the consent of the district." The court further concluded that it does not have to interpret "and" to be "or" because the provision contained two distinct unambiguous provisions. Therefore, the court concluded that the

plaintiff was prohibited from doing either of the activities set forth in sections (a) and (b) of the restrictive covenant and granted summary judgment in favor of the defendant. The plaintiff appeals.

¶ 8 The narrow question presented in this appeal is whether the restrictive covenant should be construed (1) to allow the plaintiff to either practice medicine within a 25-mile radius of Sparta, Illinois, *or* solicit any patient he treated while employed by the defendant or (2) to prohibit the plaintiff from engaging in both of these methods of competition within the two-year restriction period.

¶ 9 We initially note that the trial court's entry of summary judgment is subject to *de novo* review. *Virginia Surety Co. v. Northern Insurance Co. of New York*, 224 Ill. 2d 550, 556 (2007). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

¶ 10 Restrictive covenants are strictly construed and interpreted by the courts, and any doubts or ambiguities should be resolved against the restriction. *Hagerty, Lockenvitz, Ginzkey & Associates v. Ginzkey*, 85 Ill. App. 3d 640, 643-44 (1980). It is well settled that the primary objective in construing a contract is to give effect to the intent of the parties. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). The court must first look to the language of the contract itself as it is the best indication of the parties' intentions. *Id.* at 233. "[B]ecause words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others." *Id.* The parties' intent cannot be determined by looking at a contract clause or provision in isolation or in looking at detached portions of the contract. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). Contract language that is unambiguous should be given its plain and ordinary meaning. *Virginia Surety Co.*, 224 Ill. 2d at 556.

¶ 11 In the present case, the trial court concluded that the introductory phrase in the

restrictive covenant indicated that the plaintiff was prohibited from doing both competition methods identified in the restrictive covenant. The restrictive covenant contains an introductory clause stating that the "[p]hysician shall not, without the written consent of the District" before it identifies the two prohibited activities (labeled (a) and (b)). The trial court correctly concluded that the restrictive covenant contained two distinct provisions and the opening phrase applied equally to both provisions. The introductory phrase should be construed as an opening phrase for each provision and consequently the restrictive covenant prohibits the plaintiff from engaging in competition as defined by (a) and (b).

¶ 12 The plaintiff argues the word "or" used in the restrictive-covenant provision should not be substituted for the word "and." Specifically, the plaintiff argues that no strong reason exists for the court to make the substitution and the context of the restrictive covenant does not favor such a substitution.

¶ 13 Ordinarily, the word "and" should be read as conjunctive and "or" should be read as disjunctive. *Chicago Land Clearance Comm'n v. Jones*, 13 Ill. App. 2d 554, 559 (1957). However, "and" may be construed to mean "or" in order to effectuate the intention of the parties where that intention is evident. *Id.* "This construction *** is never resorted to except for strong reasons, and the words should never be so construed unless the context favors the substitution." *Id.*

¶ 14 Viewing the entire contract as a whole, we note that section 5.1 (titled acknowledgment) provides support for the construction that section 5.3 of the restrictive covenant prohibits the plaintiff from engaging in *both* of the prohibited activities. Section 5.1 of the employment contract states that the physician acknowledges that the defendant has made and will continue to make a substantial investment in developing the trust and confidence of its patients and their allegiance to the defendant and the physicians associated with the defendant *and* that if the physician terminated employment with the defendant and

established or joined a health care entity in competition with the defendant, the physician's departure would jeopardize the legitimate business interests of the defendant. This provision makes clear that the defendant would be harmed by the plaintiff engaging in either of the competitive activities identified in the restrictive covenant.

¶ 15 Under the plaintiff's construction of the restrictive covenant, he would be allowed to choose his method of competition. However, no provision in the employment contract suggests that this construction is proper. The employment contract does not contain a provision setting forth the procedure that the plaintiff would follow to elect a competition method, nor does it contain a provision on how the plaintiff would provide notice of such election to the defendant. Further, under the plaintiff's construction, he would be allowed to alternate between these two methods of competition within the two-year period as long as he only engaged in one competition method at a time. Therefore, we believe that the trial court correctly granted the defendant's motion for summary judgment and correctly denied the plaintiff's motion for summary judgment.

¶ 16 For the foregoing reasons, the judgment of the circuit court of Randolph County is hereby affirmed.

¶ 17 Affirmed.