IN THE COURT OF APPEALS OF IOWA

No. 7-744 / 96-2178

FILED
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CLERK SUPREME COURT

EDWARD N. PRIKASZCZIKOW, d/b/a COUNCIL BLUFFS FOOT AND ANKLE CENTER,

Plaintiff-Appellee,

vs.

INDERJIT S. PANESAR,

Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

Defendant appeals from a district court order enjoining him from practicing podiatric medicine within a thirty-mile radius of Council Bluffs, Iowa, for a period of twenty-four months. **AFFIRMED AS MODIFIED.**

John M. French of Willson & Pechacek, P.L.C., Council Bluffs, for appellant.

Michael A. Sciortino of Law Offices of Sciortino, Vannier & Rater, Council Bluffs, for appellee.

Heard by Cady, C.J., and Sackett and Mahan, JJ.

MAHAN, J.

Inderjit Panesar appeals the injunction restraining him from the practice of podiatry within a radius of thirty miles from Council Bluffs, Iowa, for a period of twenty-four months from November 30, 1995. Panesar contends the trial court erred because: (1) the employment agreement containing the covenant not to compete had expired and he was an at-will employee when he left the Council Bluffs Foot and Ankle Center (CBFA); and (2) enforcement of the covenant was not reasonably necessary for the protection of CBFA's business, was unreasonably restrictive of Panesar's rights, and was prejudicial to public interest. We affirm as modified.

Panesar was employed as a podiatrist in Council Bluffs by appellee Edward Prikaszczikow from July 1989 to November 1995. In 1989, Prikaszczikow, d/b/a CBFA, hired Panesar for a preceptorship, which is similar to a residency. Panesar worked in the preceptorship from 1989 through 1990, and then worked as an associate podiatrist through 1995. The parties had a written employment contract for Panesar's preceptorship. This contract ran from July 1, 1989 to June 30, 1990, and contained a covenant not to compete that specifically stated it was limited to the two years following Panesar's training period.

> THE PRECEPTOR AGREES:
>
> . . . .
>
> 7. Not to practice at any time during his training period or afterwards, in this same area (that being in a 50 mile radius) for a period of 2 years.

No further written agreements were entered into until the agreement at issue. Thus, Panesar worked without a contract and as an at-will employee from July 1, 1990 through August 31, 1994.

The parties entered into a written employment agreement on August 31, 1994, covering the period from September 1, 1994 through August 31, 1995. The agreement contained a covenant not to compete.

> The Employee agrees and covenants that if his employment with the Employer is terminated by him or by the Employer for any reason the Employee will not practice Podiatric medicine by himself, or directly or indirectly engage in or have an interest in any person, firm, corporation, or business practicing Podiatry (whether as an Employee, officer, director, independent contractor, consultant, or otherwise), or other similar business capacity, within a radius of thirty (30) miles from the city limits of Council Bluffs, Iowa for a period of twenty-four (24) months from the termination of his employment with the employer.

The covenant also allows Prikaszczikow to enjoin Panesar from continuing the practice and collect costs and attorney fees. Panesar reviewed the final contract with his attorney. Prikaszczikow testified he would not have allowed Panesar to continue working for him if Panesar had not signed the contract.

Panesar continued working for Prikaszczikow after the contract expired. Panesar gave notice in mid-November and left for a new job on November 30, 1995. Panesar's new office is in Bellevue, Nebraska, less than thirty miles from Council Bluffs. Panesar has also performed surgical procedures at Mercy Hospital and Jennie Edmundson Hospital, both in Council Bluffs.

Prikaszczikow filed a petition for injunction on May 26, 1996, and the matter went to trial in September 1996. The district court found Panesar was violating the covenant not to compete and issued the injunction for twenty-four months from November 30, 1995. The district court also awarded Prikaszczikow attorney fees in the sum of $5981.11. However, the district court specifically found Prikaszczikow had not suffered any monetary damage as the result of Panesar's actions. Specifically, the district court stated in its order of November 5, 1996, "Although evidence and testimony relating to a reduction of income was introduced, the court is not abidingly convinced that the reduction of gross income was directly attributable to Dr. Panesar leaving the Council Bluffs Foot and Ankle Center. Accordingly, damages will not be assessed on this issue."

Panesar requests the trial court be reversed and the injunction lifted. Prikaszczikow requests the permanent injunction be extended for a period at least equal to the stay that was granted and also requests appellate attorney fees.

I. STANDARD OF REVIEW. As this case was tried in equity, our review on appeal is de novo. *Lemmon v. Hendrickson*, 559 N.W.2d 278, 279 (Iowa 1997). We have a duty to examine the entire record and adjudicate anew rights on the issues properly presented. We give weight to the fact findings of the trial court, especially when considering the credibility of witnesses, but are not bound by them. Iowa R. App. P. 14(f)(7).

II. EXPIRATION OF THE WRITTEN AGREEMENT. Panesar contends the covenant not to compete in the written agreement expired on August 31, 1995, and was not a part of the parties' new oral agreement that Panesar would continue as an at-will employee. Prikaszczikow contends there was no new contract because the parties did not abandon the old agreement. According to Prikaszczikow, Panesar continued to draw his salary and benefits under the same terms as provided in the written agreement. At trial, Prikaszczikow testified Panesar continued to work under an oral agreement Panesar would be an at-will employee.

The generally accepted rule is that a servant remaining in his master's service is prima facie presumed to continue under the terms of the old contract. *Harper v. Cedar Rapids Television Co.*, 244 N.W.2d 782, 788 (Iowa 1976) (citations omitted).

> The inference arising from continued employment may be rebutted or overcome by evidence showing a change of the terms of the contract or by proof of fact and circumstances showing that the parties understood that the terms of the original contract were not applied to the continued service.

Id. at 789. The evidence in the record shows the parties intended to change the length of the term of employment. However, we find no evidence to rebut the presumption regarding any of the remaining terms of the contract. Surely, if Prikaszczikow had decided to pay Panesar $100 per week for his work and take away his benefits, Panesar would have balked and pointed to the contract to show the amount of pay to which he was entitled.

In the instant case, the covenant becomes enforceable if Panesar's employment is terminated by him or by Prikaszczikow for any reason, and the term extends for twenty-four months from the termination of his employment. It appears the only term of employment the parties agreed to change is the length of employment. We find the new oral agreement to be consistent with Prikaszczikow's desire to continue the covenant not to compete. Thus, if the covenant not to compete is valid, it applies from the date Panesar left CBFA.

III. VALIDITY OF THE COVENANT NOT TO COMPETE. While the supreme court has loosely generalized it does not favor contracts in restraint of trade, "there is no public policy or rule of law which condemns or holds in disfavor a fair and reasonable agreement of this character, and such a contract is entitled to the same reasonable construction . . . accorded to business obligations in general." *Dental Prosthetic Servs., Inc. v. Hurst*, 463 N.W.2d 36, 38-39 (Iowa 1990). However, a restrictive covenant, being in restraint of trade and personal liberty, should not be construed to extend beyond its fair import. *Id* at 39. Where the court finds a covenant unduly restrictive, the court has the authority to modify that covenant. *Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 449 (Iowa App. 1992).

> The privilege of a duly licensed physician to practice his chosen profession when and where he may wish is a right which the courts will zealously protect, but it is also a privilege which, by valid, voluntary contract, the physician may restrict; providing that such contractual restrictions are reasonable, and not contrary to public policy.

Cogley Clinic v. Martini, 253 Iowa 541, 548, 112 N.W.2d 678, 681 (1962).

In determining whether to enforce a noncompetitive provision in an employment contract, we consider whether the covenant: (1) is reasonably necessary for the protection of the employer's business; (2) is not unreasonably restrictive of the employee's rights; and (3) is not prejudicial to the public interest. *See Iowa Glass Depot, Inc. v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1983). We apply a reasonableness standard in maintaining a proper balance between the interest of the employer and the employee. *Id.* Although we must afford fair protection to the business interests of the employer, the restriction on the employee must be no greater than necessary to protect the employer. *See Lemmon*, 559 N.W.2d at 282. Further, the covenant must not be oppressive or create hardships on the employee out of proportion to the benefits gained by the employer. *See Iowa Glass*, 338 N.W.2d at 381.

A. Necessity of the Restrictive Covenant. The employer has the burden to show that enforcement of the covenant is reasonably necessary. *Dental East, P.C. v. Westercamp*, 423 N.W.2d 553, 555 (Iowa App. 1988). To meet this requirement there must be:

> [S]ome showing that defendant, when he left plaintiff's employment, pirated or had the chance to pirate part of plaintiff's business; took or had the opportunity of taking some part of the good will of the plaintiff's business, or it can reasonably be expected some of the patrons or customers he served while in plaintiff's employment will follow him to the new employment.

Id.

Panesar testified he instructed one of the office staff at CBFA to send letters to all of the patients he saw in 1995 and to all of the Council Bluffs physicians. Among other things in the letter, Panesar advised these people of his new location in Bellevue. We note CBFA's malpractice insurance carrier recommended the letter be sent to patients treated by Panesar who were in the post-operative state and also to patients who were in continuous treatment. However, the insurance carrier would surely have recommended these letters regardless of where Panesar had located. It was Panesar who chose to locate himself within the thirty-mile restricted area. Prikaszczikow was left with a lose-lose choice; either inform the patients of Panesar's new location in Bellevue and risk losing the patients, or risk a malpractice suit if he rejected his insurance carrier's recommendation. Further, Panesar sent out some of the letters before Prikaszczikow even knew about them.

Panesar admitted he had seen approximately fifty former patients of CBFA, charging approximately $30 to $40 dollars per visit. Panesar also admitted he performed six surgeries in Council Bluffs since he left CBFA, charging approximately $500 to $800 per surgery, with one patient being charged $3000.

We find Prikaszczikow has proved the covenant was reasonably necessary.

B. Reasonableness of Restrictions. In *Cogley Clinic*, the supreme court noted, "[s]everal orthopedic surgeons in Omaha are available to the Council Bluff's area. They have been doing orthopedic work in Council Bluffs for many years and

are available on call. They are not far away." *Cogley Clinic*, 253 Iowa at 545, 112 N.W.2d at 680. The supreme court went on to determine:

> He is a mature, highly educated man. There was no coercion or concealment. He was not misled. As far as his contract is concerned, he may practice his profession anywhere except within 25 miles of Council Bluffs. We cannot say that the withdrawal from his field of opportunity of one area with a radius of 25 miles for three years is so unduly harsh that we should place the stamp of judicial approval upon his open violation of a solemn agreement.

Id. 253 Iowa at 549, 112 N.W.2d at 682. The court also reasoned, "[i]n these days of good roads, rapid transportation and expanding perimeter for business and professional influence, 25 miles is not far for a client or patient to go to see a professional man of his choice." *Id.* 253 Iowa at 548, 112 N.W.2d at 681.

Panesar complains, if the covenant not to compete is enforced:

1. He will lose his extensive privileges at Iowa Mercy Hospital and Jennie Edmundson Hospital in Council Bluffs;

2. The staff privileges Panesar could get at other hospitals would be more restrictive than those at Mercy and Jennie Edmundson; and

3. He may lose his status in the United States under the immigration law and have a very short period of time to seek new employment.

While we find these are hardships, they are all things Panesar knew about when he took the job in Bellevue in clear violation of the agreement. Panesar was represented by an attorney when he signed the contract; he knew the requirements of

the contract. After August 31, 1995, Panesar could have searched for employment outside the Council Bluffs area and worked on gaining privileges at other hospitals. While these privileges may not have been as extensive as those at Mercy and Jennie Edmundson, he knew of this possibility when he agreed to the covenant.

However, on December 6, 1995, after Panesar had taken the job in Bellevue, Prikaszczikow's attorney wrote Panesar a letter. The letter informed Panesar:

> Even though Bellevue is clearly within 30 miles of the city limits of Council Bluffs, Dr. Ed is willing to let you continue to practice with Dr. Little in Nebraska, although he still reserves his right to enforce the covenant in Nebraska against you at a later time. However he wants to make it very clear that he does intend to enforce the provisions of the covenant not to compete against you in Iowa within the 30 mile limit for the 24 month period.
>
> This area includes the town of Glenwood and any areas within 30 miles in Iowa. The covenant precludes you from practicing in Council Bluffs or performing surgery at any of the hospitals in Council Bluffs. It also prohibits you from seeking out or soliciting patients within that area, and this would include any advertising in the Council Bluffs newspapers or telephone directories.

The covenant restricts Panesar from working within thirty miles of Council Bluffs for a period of two years. Though the letter is not a waiver of the terms of the covenant, we find equity warrants a modification of the agreement. We modify the terms of the restrictive covenant such that it applies only in Iowa.

C. Public Interest. In *Cogley Clinic*, the supreme court stated:

> Here there is no showing that the rights of the public are in danger. The public has no vested right to the services of Dr. Martini. He has always had the right to retire or to move from the community. No one could legally complain if he did. He agreed in writing to refrain from

> practice within 25 miles of Council Bluffs for three years. There are over 60 doctors in Council Bluffs and over 400 in Omaha, including specialists in orthopedic surgery. The public welfare is not seriously involved in this case.

Id. Like in *Cogley Clinic*, we find the public welfare is not harmed by this covenant.

IV. ATTORNEY FEES. A party generally has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award. *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993). In this instance, the contract specifically allows Prikaszczikow to collect all costs incurred, including reasonable attorney fees, in actions to enjoin Panesar from violating the terms of the agreement. Therefore, we award $2184 in appellate attorney fees as requested by Prikaszczikow.

For the reasons stated above, we find the terms of the employment contract continued until the time Panesar left CBFA. We modify the terms of the covenant not to compete such that the thirty-mile limit applies only in Iowa. As Panesar has been granted a stay of the enforcement of the district court's judgment, the two-year period shall begin on the filing of this opinion.

AFFIRMED AS MODIFIED.