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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-729 / 90-0834

DOUGLAS J. SPICER and LOIS JEAN SPICER,

Plaintiffs-Appellants,

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vs.

ATLANTIC DENTAL CENTER, P.C., CARROL C. TREWET and BETTY L. TREWET,

Defendants-Appellees.

Appeal from the Iowa District Court for Cass County, Leo F. Connolly, Judge.

Plaintiffs appeal and defendants cross-appeal the district court's assessment of damages and attorney fees in a breach of contract action. **AFFIRMED.**

Robert D. Nelson of Rasmussen & Nelson, Exira, for appellants.

Richard G. Howard and John M. Trewet of Howard, Rutherford & Mailander, Atlantic, for appellees.

Heard by Oxberger, C.J., and Schlegel and Sackett, JJ.

SACKETT, J.

This case concerns a dentist's covenant not to compete with his former dental practice. The trial court found the covenant had been violated and assessed actual but not punitive damages against the alleged violator. An appeal and cross-appeal followed. We affirm on both appeals.

Plaintiff-appellant Douglas J. Spicer and defendant-appellee Carrol C. Trewet practiced dentistry together as the Atlantic Dental Center, P.C., in Atlantic, Iowa. Plaintiff-appellant Lois Spicer is Douglas Spicer's wife. Betty L. Trewet is Carrol C. Trewet's wife. Neither wife is a dentist. For purposes of this appeal, we address the claims of the plaintiffs Spicers as the same claim and the defendants Trewets and Atlantic Dental Center as the same claim.

Plaintiff and defendant separated their dental practices in July of 1986. They entered into a contract for the sale of the practice. The contract included a provision for payment to plaintiff for the unrealized accounts receivable and plaintiff's agreement he would not treat patients he had treated at the dental clinic for five years ending July 1, 1991. The contract price for the sale of unrealized accounts receivable and plaintiff's dental practice was $54,000, to be paid at $900 per month for five years. The contract also provided:

> In the event that Douglas J. Spicer violates the above agreement, then all future payments for unrealized receivables and this non-compete

> agreement end and Dr. Spicer shall repay to the Dental Center all sums which have been paid to Douglas J. Spicer for his unrealized receivables and non-compete agreement.

Defendant made the $900 a month payments to plaintiff until November 1988 when defendant ceased making the payments, contending plaintiff was treating fifty patients he had treated at the Atlantic Dental Clinic. When the payments were stopped, plaintiff sued for the balance of the payments. Defendant counterclaimed for payments previously made, cancellation of future payments, punitive damages, and attorney fees.

The case was tried to the court. The trial court determined plaintiff violated the covenant and his action was deliberate and willful. The court terminated the contract.

The trial court found plaintiff had received $18,000 in payments after the breach, entered judgment for that amount against plaintiff, and canceled the balance of $28,800 due on the contract. Plaintiff was also ordered to pay $4,500 toward defendant's attorney fees and court costs. Plaintiff contends the trial court was wrong.

Plaintiff argues the trial court's decision is not fair because when the agreement was entered into defendant had a list of 1,820 patients to incorporate and continue in its dental practice. Plaintiff admits he did not follow the contract provision he request and receive specific permission before seeing the 48 patients. He argues he only

committed a partial breach that should not trigger the enforcement of the liquidated damages provision of the noncompete provision.

Plaintiff advances it is reasonable to interpret the contract to allow him to see forty-eight former patients without the prior permission of defendant. Plaintiff contends this is reasonable because defendant still has the 1,820 patients he incorporated into his practice, and plaintiff is not practicing dentistry in Cass County. Plaintiff had agreed not to practice in Cass County where Atlantic is located. He opened his practice in Elk Horn in Shelby County.

Plaintiff contends to enforce the provision in the contract for his violation of the noncompete clause under the facts of this case is to enforce a penalty clause.

A contract may be construed as providing for a penalty rather than for liquidated damages, in instances where it contains several stipulations of different degrees of importance; or where the damages resulting from the breach are readily ascertainable, and the amount stipulated to be paid is greatly in excess of the actual damages; or where a strict construction of the language used would work absurdity or oppression. McMurray v. Faust, 224 Iowa 50, 58, 276 N.W. 95, 100 (1937).

When the sum agreed upon is out of all proportion to the measure of liability which the law regards as compensation,

then such agreement is deemed to be in the nature of a penalty and cannot be enforced. Huntsman v. Eldon Miller, Inc., 251 Iowa 478, 481-82, 101 N.W.2d 531, 533 (1960).

Iowa Code section 554.2718(1) states:

> Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

Forfeiture provisions can be written into a contract by the parties, but it must be clear from the terms of the contract, and the law will scan it closely and look upon it with disfavor. See Van Hosen v. Bankers Trust Company, 200 N.W.2d 504, 507 (Iowa 1972).

A dentist may bind his or herself not to practice dentistry within a reasonable territorial extent for a reasonable period of time. See Cogley Clinic v. Martini, 253 Iowa 541, 550, 112 N.W.2d 678, 681 (1962); Federated Mutual, Etc. Ins. Co. v. Erickson, 252 Iowa 1208, 1213, 100 N.W.2d 264, 267 (1961); Larsen v. Burroughs, 224 Iowa 740, 743, 277 N.W. 463, 465 (1938); Dental East, P.C. v. Westercamp, 423 N.W.2d 553, 555 (Iowa App. 1988).

Plaintiff admittedly violated the letter of the contract. Therefore, plaintiff had the burden to plead and prove the clause was a penalty. See Gordon v. Pfab, 246 N.W.2d 283, 288 (Iowa 1976). To show the clause was a penalty, plaintiff had the burden to prove what actual

damages defendant sustained by virtue of plaintiff's breach and show the provision of the contract was not reasonable in light of the damages defendant actually sustained. See Korshoj v. Mills, 156 F. Supp. 138, 139 (S.D. Iowa 1957); Heaberlin v. Heaberlin, 255 Iowa 403, 409, 122 N.W.2d 841, 844 (1963); Pace v. Zellmer, 194 Iowa 516, 518, 86 N.W. 420, 421 (1922). Plaintiff introduced no evidence the contract provision was not reasonable. There is no evidence in the record of the revenue generated by an average dental patient. We affirm the trial court on this issue.

Plaintiff's last contention is the trial court erred in granting attorney fees to the dental center, denying attorney fees to him and assessing the costs of the action against him. The contract provides plaintiff shall be entitled to reasonable attorney fees if the dental center fails to make its monthly payments.

Plaintiff contends because defendant ceased making payments as required, he should be entitled to attorney fees. The trial court found the dental center committed no default. Plaintiff made no claim for attorney fees independent of the foregoing provision. Plaintiff was not entitled to attorney fees at the trial court level and there is no basis to award him attorney fees on appeal.

Plaintiff contends the trial court erred in awarding defendant attorney fees. The agreement provides:

> In the event that it is necessary for Carrol C. Trewet or Atlantic Dental Center to have legal counsel or enforce the rights under the laws of the State of Iowa, then Atlantic Dental Center and Carrol C. Trewet shall be entitled to reasonable attorney fees in connection with the enforcement of this agreement.

We find no error in the trial court awarding defendant attorney fees. We do not award defendant further attorney fees on appeal.

On cross-appeal, defendant contends the trial court erred in not awarding punitive damages against the plaintiff. Punitive damages are always discretionary and are not a matter of right. Berryhill v. Hatt, 428 N.W.2d 647, 656 (Iowa 1989); Rowen v. LeMars Mut. Ins. Co., 282 N.W.2d 639, 661 (Iowa 1979). A breach of contract alone, even if intentional, will not form the basis of punitive damages. Berryhill, 428 N.W.2d at 656. We find nothing in the record to indicate plaintiff acted with a willful or reckless disregard of plaintiffs' rights. See Suss v. Schmmel, 375 N.W.2d 252, 255 (Iowa 1985); Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 920 (Iowa 1979). We find no error here.

We affirm on both appeals. Costs on appeal are taxed three-fourths to plaintiff and one-fourth to defendant.

AFFIRMED.