

RENDERED: December 30, 1999; 10:00 a.m.
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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000422-MR

JOANNE TINSLEY

APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE THOMAS R. LEWIS, JUDGE
ACTION NO. 98-CI-01275

D & R PHARMACEUTICAL SERVICES,
INC. D/B/A D & R PHARMACARE
AND OMNICARE, INC.

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: DYCHE, MCANULTY, AND SCHRODER, JUDGES.

DYCHE, JUDGE: Joanne Tinsley appeals from a judgment of the Warren Circuit Court dismissing her claim against D & R Pharmaceutical Services, Inc., for the wrongful use of a civil proceeding. After reviewing the facts and applicable law, we determine that the forum selection clause is not applicable and reverse.

Tinsley was employed by D & R Pharmaceutical Services, Inc., d/b/a D & R Pharmacare and Omnicare, Inc., until she resigned in September, 1995. Tinsley worked for Omnicare in Warren County, Kentucky, during her entire tenure with the company. In June of 1995, she was required to sign a

"Nondisclosure, Nonsolicitation Agreement" as a condition of her employment with Omnicare. Among the clauses contained in the agreement was the following forum selection clause:

This Agreement shall be governed by Ohio law. You acknowledge that a violation of this agreement will cause irreparable harm to the Company, which will be entitled to injunctive and other equitable relief in addition to compensation and punitive damages for the breach thereof. You agree that any action relating to this Agreement or to your relationship with the Company must be pursued in federal or state court located in Hamilton County, Ohio and you specifically consent to the jurisdiction of the courts in Hamilton County, Ohio.

Omnicare filed suit against Tinsley in September, 1996, in Hamilton County, Ohio, alleging that she had violated the agreement not to compete against Omnicare and had solicited customers away from Omnicare. In April, 1998, Omnicare voluntarily dismissed its complaint against Tinsley. She subsequently filed the instant action against Omnicare in Warren County. The Warren Circuit Court dismissed Tinsley's suit as improper under the forum selection clause. This appeal ensued.

The "Nondisclosure, Nonsolicitation Agreement" is not applicable to this lawsuit. By its terms, it provides that "any action relating to this Agreement or [Tinsley's] relationship with" Omnicare is required to be brought in Hamilton County, Ohio. The underlying action here does not fall within that category. Tinsley's claim of wrongful use of a civil proceeding is a tort action that is separate and distinct from either the agreement or her employment relationship with Omnicare. She initiated this action only in response to the suit filed against

her and voluntarily dismissed by Omnicare. The claim that this suit relates to her employment stretches the bounds of the agreement beyond what can be construed as reasonable limitations on her interaction with Omnicare after leaving its employ. If we were to accept Omnicare's argument that the entire agreement is binding on the parties for an indefinite period after the termination of Tinsley's employment, then any subsequent tort action – even, for example, a slip-and-fall action that may later arise if Tinsley has an accident while shopping at an Omnicare subsidiary – would be required to be filed in Hamilton County. Such interpretation would fail to give the agreement its intended effect.

Portions of the agreement, such as the nondisclosure of trade secrets, remain binding on Tinsley. However, the action filed against Tinsley related to a breach of the agreement not to solicit customers away from Omnicare. The nonsolicitation clause was binding for only two years after the termination of her employment. Omnicare is no longer asserting that Tinsley attempted to solicit customers, and Tinsley is not claiming in this suit that she did not violate the agreement. The only allegation is that Omnicare abused the civil process in Ohio. That relates neither to the agreement nor to Tinsley's employment with Omnicare. As such, the suit is not governed by the "Nondisclosure, Nonsolicitation Agreement," and Tinsley should be given her day in the courts of Kentucky.

Because this case does not fall within the provisions of the agreement, we do not address whether a forum selection clause in an employment contract is enforceable in Kentucky.

The judgment of the Warren Circuit Court is reversed and remanded for further proceedings.

ALL CONCUR.

BRIEF FOR APPELLANT:

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