STATE OF MICHIGAN

COURT OF APPEALS

A COMPLETE HOME CARE AGENCY, INC., Plaintiff-Appellant, v THERESA GUTIERREZ and ATRIUM HOME AND HEALTH CARE SERVICES, INC., Defendants-Appellees.	UNPUBLISHED June 29, 2004 No. 246280 Macomb Circuit Court LC No. 02-001211-CK

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff A Complete Home Care Agency, Inc., appeals as of right the order granting defendants Theresa Gutierrez and Atrium Home and Health Care Services, Inc.'s ("Atrium"), motion for summary disposition regarding plaintiff's claims of breach of covenant not to compete and tortious interference with contractual relations pursuant to MCR 2.116(C)(10). We affirm.

I. Facts

Ms. Gutierrez began working for plaintiff in September of 2000, and additionally began working for Atrium on a part-time basis in July of 2001. As a condition of her employment with plaintiff, Ms. Gutierrez signed a covenant not to compete.[1] Through her work for plaintiff, Ms.

[1] The covenant was part of plaintiff's employment contracts and also appeared on employee time slips. It provided:

> I AGREE AND UNDERSTAND THAT I WILL NOT PERFORM ANY SERVICES FOR THE CLIENT DIRECTLY, OR INDIRECTLY, THROUGH ANOTHER AGENCY, INDIVIDUAL, ENTITY OTHER THAN "A COMPLETE HOME CARE" AGENCY, FOR A PERIOD OF SIX (6) MONTHS AFTER THE LAST DAY WORKED ON ANY OF YOUR ASSIGNMENTS. [Opinion and Order, January 9, 2003, p 3.]

(continued…)

Gutierrez provided nursing services in the home of Michael Boyagian. Mr. Boyagian required twenty-four hour nursing care, which was provided by employees of both plaintiff and Atrium. In January of 2002, Ms. Gutierrez left the employ of plaintiff to work for Atrium on a full-time basis in order to secure health insurance. At that time, Ms. Gutierrez began providing nursing services in Mr. Boyagian's home on a full-time basis in her capacity as an Atrium employee.

Plaintiff brought the instant lawsuit against defendants alleging that Ms. Gutierrez breached the covenant not to compete and that Atrium interfered with its contractual relationship with Ms. Gutierrez. Plaintiff also contended that Atrium had interfered with its contractual relationship with its client, Mr. Boyagian.[2] The trial court granted defendants' motion for summary disposition of all of plaintiff's claims. The trial court held that the covenant was too broad with regard to the type of employment restricted and was, therefore, unreasonable and invalid as a matter of law pursuant to MCL 445.774a. Plaintiff also failed to demonstrate wrongful conduct on the part of Atrium or conduct that was malicious and unjustified at law to support its claim of tortious interference.

II. Legal Analysis

We review a trial court's determination regarding a motion for summary disposition de novo.[3] A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.[4] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."[5] "Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."[6]

(…continued)

The covenant does not specifically limit the geographical area in which the employee's work is restricted.

[2] Plaintiff's president, Cynthia Pace, admitted in deposition, however, that it did not have a contract with Mr. Boyagian. [Deposition of Cynthia Pace, July 18, 2002, p 36.] The trial court found the issue abandoned as plaintiff failed to address it in response to defendants' motion for summary disposition. As plaintiff did not present evidence that a contractual relationship existed between plaintiff and Mr. Boyagian to counter Ms. Pace's statement, the trial court properly dismissed this claim.

[3] *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

[4] *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

[5] *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

[6] *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

A. Breach of Covenant Not to Compete

Plaintiff first argues that the trial court erred in finding that the covenant not to compete was legally invalid. We disagree. Plaintiff's covenant is unreasonably broad, and therefore, invalid pursuant to MCL 445.774a.

Agreements not to compete in an employment situation are allowable in Michigan only if they are reasonable.[7] However, courts are circumspect when considering non-compete clauses in employment contracts.[8] MCL 445.774a provides:

> An employer may obtain from an employee an agreement of covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.[9]

The six-month duration of a covenant not to compete has been found to be a reasonable time period.[10]

We must determine, however, whether the covenant which restricts Ms. Gutierrez from performing "any services for the client," is reasonable with regard to the type of employment or line of business restricted. Ms. Pace testified at her deposition that the purpose of the covenant is to prevent former employees from performing *any* service for a client for six months after the termination of her employment, including such services as haircutting, dogwalking or grocery shopping.[11] Because the covenant restricts Ms. Gutierrez from doing *any* kind of work after her termination from plaintiff's employ, the trial court properly found that the restriction is unreasonably broad, and therefore, invalid as a matter of law.

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[7] MCL 445.774a; *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998).

[8] See *In re Spradlin*, 274 BR 701, 708-709 (ED Mich, 2002), citing *Woodward v Cadillac Overall Supply Co*, 396 Mich 379, 392-393; 240 NW2d 710 (WILLIAMS, J, dissenting), *Bryan v Lincare, Inc*, 2000 US Dist LEXIS 1109 (ED Mich, 2000) (reasoning that Michigan courts are more hostile to employer/employee non-compete agreements than those involved in the sale of a business).

[9] MCL 445.774a(1).

[10] See *Superior Consulting Co v Walling*, 851 F Supp 839, 847 (ED Mich, 1994) (finding six-month duration reasonable); *Robert Half Internat'l, Inc v Van Steenis*, 784 F Supp 1263, 1274 (ED Mich, 1991) (finding one-year duration reasonable).

[11] Deposition of Cynthia Pace, July 18, 2002, pp 26-27.

Plaintiff contends that it would be reasonable, based on the facts of the case, to read the covenant to restrict Ms. Gutierrez from performing any *nursing* services for six months after her termination from plaintiff. We note, however, that MCL 445.774a provides that the court "*may* limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited."[12] The statute does not dictate that a court *must* limit the agreement. "In construing a statute, the words used by the Legislature must be given their common, ordinary meaning," and we must apply these unambiguous terms as written.[13] There is no indication in the statute that a trial court was required to reform an unreasonable covenant to "render it reasonable," and therefore, enforceable. Accordingly, the trial court did not err in failing to limit the covenant not to compete.

B. Tortious Interference with Contractual Relations

Plaintiff also contends that the trial court erred in finding that plaintiff failed to establish a prima facie case of tortious interference with contractual relations. We again disagree.

To establish tortious interference with a business relationship or contract, the plaintiff must prove that the interference was improper by showing that the defendant committed an intentional act which lacked justification and purposely interfered with the plaintiff's contractual rights or business relationship.[14] Improper interference can be established by: "(1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiff's contractual rights or business relationship."[15] In order to prove that a lawful act was done with malice and without justification, the plaintiff must demonstrate, with specificity, affirmative acts by the defendant that corroborate the improper motive of the interference.[16] Actions motivated by legitimate business reasons do not constitute improper motive or interference.[17]

Plaintiff failed to present evidence that Atrium committed an intentional act that was wrongful per se. Ms. Gutierrez testified at her deposition that she applied for work with Atrium, first to pick up additional hours, and then to gain health benefits.[18] Atrium did not solicit Ms. Gutierrez's application nor take improper actions to interfere with her contractual relationship with plaintiff. Accordingly, it was not wrongful per se for Atrium to employ Ms. Gutierrez.

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[12] MCL 445.774a (emphasis added).

[13] *Ligouri v Wyandotte Hosp & Med Ctr*, 253 Mich App 372, 376; 655 NW2d 592 (2002), quoting *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159-160; 645 NW2d 643 (2002).

[14] *AOPP v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003).

[15] *Id.*

[16] *CMI Internat'l, Inc v Intermet Internat'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002); *BPS Clinical Labs v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 699; 552 NW2d 919 (1996).

[17] *BPS Clinical Labs, supra* at 698-699.

[18] Deposition of Theresa Gutierrez, May 15, 2002, pp 12-14, 19-21.

Plaintiff also failed to create a genuine issue of material fact that Atrium intentionally committed a lawful act with malice or unjustified in law. Atrium's president, Lisa Mazur, admitted in her deposition in a separate, but similar, lawsuit that she assumed employees she hired who were already employed in the health care field were bound by covenants not to compete, but that she hired them anyway.[19] Plaintiff also sent Atrium a letter in February of 2002, informing Atrium of Ms. Gutierrez's covenant not to compete, but Atrium continued to employ Ms. Gutierrez. Even taking all of these allegations as true, plaintiff has not established an improper motive or malice. There is no evidence that Atrium hired Ms. Gutierrez for any reason other than the legitimate business reason of obtaining a qualified employee. Furthermore, as we find the covenant not to compete invalid as a matter of law, Atrium's disregard of the covenant does not amount to malicious or unjustified conduct. Accordingly, the trial court properly granted defendants' motion for summary disposition on this ground.

Affirmed.

/s/ William B. Murphy
/s/ Jessica R. Cooper

[19] Deposition of Lisa Mazur, January 30, 2002, pp 21-22. This testimony was given at the same time that Ms. Gutierrez began working for Atrium full-time.