[Cite as *Americare Healthcare Servs. v. Akabuaku,* 2010-Ohio-5631.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Americare Healthcare Services, Inc.,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-777 (C.P.C. No. 09CVH-11-17125)
Ngozi Akabuaku,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
Asha Hussein et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on November 18, 2010

Eva C. Gildee, Ltd., and *Eva C. Gildee*, for plaintiff-appellee.

Jacob A. Schlosser, LLC, and *Jacob A. Schlosser*, for defendant-appellant.

APPEAL from the Franklin County Court of Common Pleas.

FRENCH, J.

{¶1} Defendant-appellant, Ngozi Akabuaku ("appellant"), appeals the Franklin County Court of Common Pleas' issuance of a preliminary and permanent injunction in

favor of plaintiff-appellee, Americare Healthcare Services, Inc. ("Americare").[1] For the following reasons, we affirm.

{¶2} Americare is a home healthcare agency that provides nursing services and home health aid services. Prior to January 2010, Americare was legally structured as a limited liability company.[2] Appellant, an independent contractor, worked for Americare as a nurse from 2006 until December 2008 or January 2009.

{¶3} The crux of this case is the enforceability of a non-compete and non-disclosure agreement, which Americare required all of its employees and contractors to execute as a condition of continued employment or contracting. Appellant executed her non-compete and non-disclosure agreement (the "agreement" or "non-compete agreement") on January 5, 2007. Although Americare had not yet legally incorporated at that time, the agreement identifies the parties as appellant and Americare Inc. The agreement states that it is made "for valuable consideration paid, including continued and future engagement of Contractor by Company," and provides, in part, as follows:

> 2. **Covenants of Nondisclosure**. Contractor agrees that he/she will not use at any time whether during or subsequent to this Agreement any Confidential Information for his/her own purposes, other than in connection with his/her regular activities for or on behalf of the Company. Contractor further agrees to refrain from intentionally, directly or indirectly using, disclosing, disseminating, or publishing to or with any person, firm, company, organization or entity any Confidential Information. Contractor acknowledges and agrees that the sale, unauthorized use, disclosure or dissemination of the Company's Confidential Information

[1] Although the case caption on the trial court's decision identifies the plaintiff as "Americare Healthcare Services, LLC," an amended complaint changed the plaintiff's name to "Americare Healthcare Services, Inc." prior to the trial court's decision.

[2] When necessary to distinguish between Americare's legal statuses, we refer to "Americare LLC" and "Americare Inc." Otherwise, we refer to the entity simply as "Americare."

> obtained by the Agent during his/her relationship with the Company constitutes unfair competition and in violation of this Agreement.
>
> * * *
>
> 4. **Covenant Not To Compete**. **Contractor agrees that for a period of two (2) year[s] following the date of the termination of this Agreement, he/she will not solicit or have any contact with any of the Company's Clients, current Patients or Potential Client[s], whether or not such contact is initiated by a Client, Patient or Potential Client, to provide home health care services and/or ancillary or allied health services. Contractor further agrees that he/she will not, in any manner, assist any other person, entity or organization in soliciting or contacting, directly or indirectly, for his/her own benefit or that of any other person, entity or organization, any Client, Patient, or Potential Client of the Company.** Contractor acknowledges that any attempt to solicit, contact, call on or take away any of the Company's Clients or Potential Clients either for herself or for any person, entity or organization, is considered unfair competition and therefore in violation of this Agreement.

(Emphasis sic.) Americare terminated its relationship with appellant in December 2008 or January 2009.

{¶4} On November 16, 2009, Americare initiated this action by filing a verified complaint for injunctive relief and damages against appellant and additional defendants, Asha Hussein and Wilson Anosiekwu, along with a motion for a temporary restraining order and preliminary and permanent injunction. An amended complaint subsequently changed the plaintiff's name from Americare LLC to Americare Inc. after the company's conversion to an Ohio corporation on January 29, 2010. As pertinent to this appeal, Americare alleged that appellant violated her non-compete agreement and tortiously interfered with non-compete agreements signed by other Americare employees and

contractors. Specifically, it contends that appellant owned and worked for a competing home healthcare agency while working for Americare, solicited patients and employees from Americare, and now services at least five of Americare's former patients.

{¶5} On July 26, 2010, after an evidentiary hearing and post-hearing briefing, the trial court issued a decision granting the motion for injunctive relief against appellant. The trial court concluded that appellant's non-compete agreement is valid and enforceable and that appellant violated the agreement and was tortiously interfering with Americare's other non-compete agreements. The trial court found that the agreement's restraints are reasonable and do not exceed what is reasonably required for Americare's protection, that the agreement does not impose an undue hardship on appellant, and that the agreement's two-year period is typical. Accordingly, the trial court granted a preliminary and permanent injunction, prohibiting appellant from further breaches of the agreement.[3]

{¶6} Having filed a timely notice of appeal, appellant assigns the following as error:

> 1. The Trial Court Committed Prejudicial Error By Failing To Rule That The Non-Compete Agreement was void and Unenforceable Since It Lacked Mutuality Of Obligation.
>
> 2. The Trial Court Committed Prejudicial Error By Finding That Appellant Was An Employee Rather Than An Independent Contractor And Ruling That Even If Appellant Were An Independent Contractor Such Status Would Not Free Appellant From Being Bound By The Non-Competition Contract.

[3] The trial court denied the motion for injunctive relief with respect to Asha Hussein and did not consider the claims relating to Wilson Anosiekwu. Only the trial court's actions with respect to appellant are relevant to this appeal.

> 3. The Trial Court Committed Prejudicial Error In Finding The Non-Compete Agreement To Be Binding On Appellant When (1) The Party To Whom The Agreement Duties Were Owed Was Non-Existent (2) Enforcing The Agreement Would Violate Ohio Law And Public Policy With Respect To Use Of An Assumed Corporate Name.

{¶7} We review a trial court's granting of an injunction under an abuse of discretion standard. *Perkins v. Quaker City* (1956), 165 Ohio St. 120, 125. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} We begin our analysis with appellant's third assignment of error. There, appellant argues that the agreement is a nullity because Americare Inc. was a non-existent entity when the agreement was executed.

{¶9} Americare was formed in 2002 and registered as a Limited Liability Company with the Ohio Secretary of State. Prior to 2006, on the advice of its accountant, Americare attempted to convert its structure from an LLC to an Ohio corporation. Americare notified all entities that it worked with of the change to its structure and revised all of its forms to reflect the name "Americare Healthcare Services, Inc." After January 1, 2006, the company exclusively used the Americare Inc. moniker. After commencement of this action, however, Americare became aware that it had not legally converted from an LLC to a corporation with the Ohio Secretary of State. Thereafter, in January 2010, Americare filed the required documents with the Secretary of State and obtained a certificate of conversion.

{¶10} Appellant's non-compete agreement lists the company as Americare Inc., even though the company remained registered as an LLC when the agreement was executed. On that basis, appellant argues that one of the contracting parties did not exist and that the agreement is, therefore, void. Americare, on the other hand, argues that its use of the corporate name prior to its official conversion from an LLC does not invalidate the agreement. Appellant contends that either Americare Inc. was a de facto corporation until the conversion was effectuated or was a fictitious name under which Americare LLC operated. In either case, Americare contends that, having now registered with the Secretary of State as a corporation, it may enforce all contracts executed by the LLC prior to conversion, including contracts signed in the name of Americare Inc. The trial court concluded that the company's organizational structure was irrelevant here, where there was no evidence that appellant relied to her detriment on the company holding itself out as a corporation.

{¶11} Having properly converted from an LLC to a corporation, Americare may undisputedly enforce valid contracts executed prior to its conversion. R.C. 1705.391(A)(3) provides that, upon conversion, the converted entity possesses the assets, property, interests, rights, privileges, immunities, powers, franchises, and authority of the converting entity, as well as all obligations belonging or due to the converting entity. Appellant's contrary argument notwithstanding, the lack of allegations stating that Americare Inc. is asserting the rights of Americare LLC is not fatal to its claims. Although the conversation altered the company's corporate structure, rights held prior to the conversion continue thereafter in the converted entity "without any further act or deed." Id. Accordingly, we discern no basis for requiring a converted

entity to expressly plead its claim as one previously held by the converting entity. Because Americare may enforce contract rights held by Americare LLC prior to its conversion, the question resolves to whether Americare LLC, prior to its conversion, was entitled to enforce the non-compete agreement, executed in the name of Americare Inc.

{¶12} Americare Inc. was not a de facto corporation prior to its conversion from an LLC. To achieve the status of a de facto corporation, a business entity must have made a good-faith attempt to comply with the statutory provisions governing incorporation. *Jade Sterling Steel Co. v. Stacey*, 8th Dist. No. 88283, 2007-Ohio-532, ¶15. Where a business entity does not make a good-faith effort to incorporate or does not take necessary steps to complete incorporation, a court will not impose de facto corporate status. Id. Here, although Americare believed that it had taken the appropriate steps to incorporate in 2006, it did not file articles of incorporation with the Secretary of State, as required by R.C. 1701.04. Accordingly, Americare cannot be deemed to have made a good-faith attempt to comply with the statutory requirements for incorporation. See *Jade Sterling* (rejecting de facto corporation argument where business entity sent articles of incorporation to the Secretary of State, but failed to show any good-faith effort to verify or complete the incorporation); *Quality Interiors, Inc. v. Am. Mgt. & Dev. Corp.* (Dec. 7, 1990), 11th Dist. No. 89-T-4303 (no de facto corporation formed where articles of incorporation were not filed with the state).

{¶13} Although Americare did not qualify as a de facto corporation when the agreement was executed, a related doctrine precludes appellant from succeeding on her third assignment of error. "Traditionally, courts in this state have held that a person

who enters into a transaction and treats an organization as a corporation will be estopped from denying the existence of the corporation." Id., citing *Newburg Petroleum Co. v. Weare* (1875), 27 Ohio St. 343, and *Peckham Iron Co. v. Harper* (1884), 41 Ohio St. 100. Absent unfairness, one who transacts business with an entity and treats that entity as a corporation is estopped from denying the company's legal status as a corporation. *Quality Interiors.* The Supreme Court of Ohio implicitly recognized the estoppel doctrine in *Society Perun v. Cleveland* (1885), 43 Ohio St. 481, 490 ("[i]t is conceded by the city that parties who had recognized the existence of the society by their transactions with it as a supposed corporation are estopped to deny its corporate existence"); see also *Lowe v. Tire Clearing House Co.* (Nov. 3, 1924), 8th Dist. No. 5253 (affirming judgment where the trial court found that the defendant was estopped from denying the plaintiff's corporate existence, having contracted with the plaintiff; "[w]hen a contract has been made from which a party has derived benefits, estoppel applies").

{¶14} In *Quality Interiors*, the Eleventh District Court of Appeals concluded that it would be unfair to apply the generally applicable estoppel doctrine on the specific facts involved. In that case, a limited partnership instructed its attorney to form a corporation in which the sole general partner and a limited partner would be the directors. The general partner erroneously believed that the new corporation had been created, and contracts were executed between the unformed corporation and the plaintiff. After the plaintiff completed performance under the contracts, he sued the corporation for payment and subsequently added a claim for personal liability against the general partner. The trial court entered an individual judgment against the general partner, who,

on appeal, argued that the plaintiff believed he was contracting with a corporation and was, therefore, estopped from denying the corporation's legal existence. The appellate court held that it would be unfair to permit the plaintiff's reliance on the supposed corporate status to enable the general partner to escape liability resulting from the partnership's failure to form a corporation.

{¶15} In *Huntington Bank of Washington Court House v. Cartwright* (Oct. 6, 1982), 12th Dist. No. 79-CA-3, the Twelfth District Court of Appeals similarly refused to apply the estoppel doctrine on the basis of unfairness, under the specific facts of that case. In *Cartwright*, individuals who were engaged in an unincorporated business known as Energy Advisors, Inc., misrepresented the nature of the business to a bank and falsely represented the business' assets and liabilities. In exchange for a promissory note from the business for $97,000, the bank cancelled one officer's existing personal debt owed to the bank. After the business defaulted on the note, the bank successfully sued the individuals based on theories including fraud, contract, and unjust enrichment. On appeal, the individuals argued that, because the bank treated the business as a corporation, it was estopped from denying the corporate existence and obtaining judgment against the individuals. The appellate court rejected that argument, concluding that it would be unfair to allow the individuals to profit from their fraud against the bank.

{¶16} This case is distinguishable from both *Quality Interiors* and *Cartwright*. In those cases, the unfairness noted by the courts resulted from a party that failed to incorporate or misrepresented its corporate status and then attempted to profit from its shortcomings or misconduct. In both cases, the party that failed to incorporate

attempted to use the opposing party's misconception about its corporate status to avoid contractual obligations it assumed while holding itself out as a corporation. Here, by contrast, application of the estoppel doctrine neither results in unfairness nor permits Americare to benefit from fraud. First, there has been no allegation of fraud or intentional wrongdoing by Americare, which erroneously believed that it had undertaken the required steps to effectuate incorporation. Americare notified its business relations, employees, and contractors and amended all of its forms, including letterhead, time sheets, and tax documents, to indicate its supposed corporate status. Americare is not seeking to take advantage of its own failure to incorporate to profit or avoid liability. To the contrary, appellant seeks to avoid contractual obligations she willingly assumed and in exchange for which she continued to receive contract work.

{¶17} The record contains no evidence that appellant understood her non-compete agreement to be with any entity other than that for which she served as an independent contractor. Nor is there any indication that appellant has suffered a detriment as a result of the company's representation of itself as a corporation. Any unfairness in this situation would stem from a refusal to enforce the agreement, thus permitting appellant to profit at Americare's expense by avoiding the detriment of her bargain. Because appellant contracted with Americare, as Americare Inc., without objection and treated Americare as a corporation, and because it would not be unfair to hold appellant to her bargain, she is estopped from denying the existence of the corporation in an attempt to avoid her obligations under the agreement.

{¶18} Having concluded that appellant is estopped from denying Americare's corporate status to invalidate the agreement, we need not determine whether Americare

was entitled to use Americare Inc. as a fictitious name. For the foregoing reasons, we overrule appellant's third assignment of error.

{¶19} In her second assignment of error, appellant contends that the trial court erred by finding that she was an employee rather than an independent contractor and by holding that appellant would be bound by the agreement even if she were an independent contractor.

{¶20} Americare concedes that appellant was an independent contractor, and we agree that the trial court erred by concluding that appellant was an employee, in light of undisputed evidence to the contrary. Nevertheless, Americare argues that any error by the trial court in that regard was harmless because appellant's status was irrelevant to the enforceability of the agreement and because the trial court properly held that the agreement is equally enforceable, whether appellant was an employee or an independent contractor. We agree.

{¶21} Appellant erroneously states that this case is one of first impression as to the issue of whether a non-compete agreement is properly enforceable against an independent contractor. Ohio courts, including the Supreme Court of Ohio and this court, have enforced non-compete agreements executed by independent contractors. For example, in *Hamilton Ins. Serv., Inc. v. Nationwide Ins. Cos.*, 86 Ohio St.3d 270, 1999-Ohio-162, the Supreme Court held that a non-compete clause in a corporate agency agreement between Nationwide and its independent-contractor-agent was valid and enforceable. Similarly, in *Albert v. Shiells*, 10th Dist. No. 02AP-354, 2002-Ohio-7021, this court affirmed the trial court's grant of limited injunctive relief based on a non-compete clause between a beauty salon and its former independent contractor. See

also *Carl Ralston Ins. Agency, Inc. v. Nationwide Mut. Ins. Co.*, 9th Dist. No. 23336, 2007-Ohio-507; *SJA & Assoc., Inc. v. Gilder*, 8th Dist. No. 80181, 2002-Ohio-3545; *Burton Minnick Realty, Inc. v. Leffel* (Sept. 28, 1990), 2d Dist. No. 2680 (holding that a non-compete clause between a real estate broker and an independent contractor salesperson would be enforceable if the clause was determined to be reasonable on remand). Because the enforceability of the agreement does not depend on appellant's status as an employee or independent contractor, the trial court's erroneous finding that appellant was an employee is harmless. Accordingly, we overrule appellant's second assignment of error.

{¶22} In her first assignment of error, appellant asserts that the agreement is not supported by mutuality of obligation and that the trial court, therefore, erred by concluding that the agreement is enforceable. Mutuality of obligation expresses the concept that both parties to a contract must be bound or neither is bound. *Helle v. Landmark, Inc.* (1984), 15 Ohio App.3d 1, 12. Noting a modern tendency against courts defeating contracts on technical grounds of mutuality, the *Helle* court acknowledged the more recent approach that treats mutuality of obligation as requiring only a quid pro quo – that is, consideration. See Restatement (Second) of Contracts (1981), Formation of Contracts -- Consideration, Section 79 ("[i]f the requirement of consideration is met, there is no additional requirement of * * * 'mutuality of obligation' "). Appellant contends that the agreement is unenforceable, whether for lack of consideration or lack of mutuality of obligation, because it imposed no duty or obligation on Americare and, thus, offered no consideration to appellant. Americare, on the other hand, argues that

its continued use of appellant's services, i.e., appellant's continued employment, constituted sufficient consideration for the agreement.

{¶23} "[C]onsideration exists to support a noncompetition agreement when, in exchange for the assent of an at-will employee to a proffered noncompetition agreement, the employer continues an at-will employment relationship that could legally be terminated without cause." *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, ¶20. The employer's presentation of a non-competition agreement to an at-will employee constitutes a proposal to renegotiate the terms of the at-will employment relationship. When the employee assents to the non-competition agreement, thereby accepting continued employment on new terms, consideration supports the non-competition agreement. The employee's assent is given in exchange for the employer's forbearance from terminating the employment. Id. at ¶19. Mutual promises to employ and to be employed on an at-will basis are supported by consideration. Id. at ¶18.

{¶24} Appellant argues that *Lake Land* is inapplicable because that case involved an employer-employee relationship, whereas appellant was an independent contractor. This court, however, has recognized that employment with no specific term of duration gives rise to an employment-at-will relationship, regardless of whether the underlying relationship is one of employer-employee or employer-independent contractor. See *Andres v. Drug Emporium, Inc.* (Aug. 30, 2001), 10th Dist. No. 00AP-1214. Here, the agreement contains no duration term, but, instead, expressly provides that it "is not intended to create, no[r] should it be interpreted to constitute an employment contract for a specific length of time." The record contains no evidence of

any contract, written or oral, setting forth such a term of duration for appellant's services. Despite appellant's status as an independent contractor, the parties' relationship was at-will. Thus, appellant's independent contractor status does not diminish the applicability of the *Lake Land* holding.

{¶25} The First District Court of Appeals addressed an analogous situation in *Financial Dimensions, Inc. v. Zifer* (Dec. 10, 1999), 1st Dist. No. C-980960. There, the defendant, Zifer, worked as an independent contractor for the plaintiff, Financial Dimensions, Inc. ("Financial Dimensions"). Financial Dimensions supplied Zifer with the names of potential customers, and Zifer was responsible for selling insurance to those persons. Approximately 18 months into the parties' relationship, Financial Dimensions presented Zifer with a written independent contractor agreement, containing a non-competition clause, and informed Zifer that, if he did not sign the agreement, Financial Dimensions would no longer provide him with sales leads. Zifer executed the agreement. Several years later, believing that Zifer had violated the agreement, Financial Dimensions terminated Zifer's contract and filed suit against Zifer.

{¶26} Appealing the trial court's judgment in favor of Financial Dimensions, Zifer argued, in part, that the independent contractor agreement was not supported by consideration and was, therefore, invalid. The First District recognized that Zifer was an independent contractor rather than an employee, but stated that "the distinction is not relevant to the issue under consideration, and [found] the cases dealing with continued employment to be applicable to a relationship with an independent contractor." The court reasoned that, in an at-will relationship, neither employer nor employee is obligated to continue the relationship for any period of time. Therefore, continued

employment goes beyond what the employer and employee are already obligated to do and constitutes sufficient consideration. The court held as follows:

> * * * Ferris [the employer's representative] testified that he specifically informed the independent contractors that agreeing to the restrictive covenants was a condition of their receipt of further leads, or, in other words, the continuation of their contractual relationship. Such a continuation, when Ferris was under no obligation to continue the relationship, constituted consideration for Zifer's reciprocal promise to abide by the terms of the contract. We therefore hold that Ferris's continuation of the parties' relationship was sufficient consideration to support Zifer's agreement to the provisions in the covenant not to compete.

{¶27} Here, representatives of Americare testified that all employees and contractors were required to sign non-compete agreements and were informed that execution of a non-compete agreement was a condition of their continued employment or contracting relationship with Americare. It is undisputed that appellant executed the agreement and continued to perform services for Americare thereafter. Like the court in *Financial Dimensions*, we conclude that the facts of this case demonstrate sufficient consideration to enforce the agreement.

{¶28} Appellant argues that the agreement's integration clause, coupled with the parol evidence rule, precludes evidence of any promise of continued employment by Americare. The parol evidence rule is a substantive rule of law that prohibits the introduction of extrinsic evidence to alter or supplement the parties' final, complete expression of their agreement. *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶66. It has been held that parol or extrinsic evidence, however, is admissible on issues that go to the very existence of a contract, such as consideration, mutual mistake, and fraud. *Mangano v. Dawson* (June 13, 1995), 7th Dist. No. 93-C-72,

citing *Am. Gen. Fin. v. Beemer* (1991), 73 Ohio App.3d 684, and *Dlouhy v. Frymier* (1993), 92 Ohio App.3d 156. As long as it is not contradictory to the agreement, the parol evidence rule does not prevent showing by extrinsic evidence what the actual consideration was. *Ayers v. Cook* (1942), 140 Ohio St. 281, 284, overruled in part on other grounds by *Sherman v. Johnson* (1953), 159 Ohio St. 209. See also *McInnis v. Spin Cycle-Euclid, LLC*, 8th Dist. No. 91905, 2009-Ohio-2370, ¶12; *St. Andrews Condominium Assn. v. Glen Eagles Dev.* (Aug. 20, 1999), 11th Dist. No. 98-L-140; *Mabry v. Watkins* (Aug. 15, 1986), 3d Dist. No. 8-85-1.

{¶29} Here, the agreement specifically stated that it was made "for valuable consideration paid, including continued and future engagement of Contractor by Company." Appellant points to no evidence in the record contesting the recital of consideration, but argues, instead, that continued at-will employment cannot serve as consideration for the agreement. Based on the foregoing authorities, we reject appellant's position in that regard.

{¶30} Additionally, any suggestion that the agreement was not supported by consideration is negated by the undisputed fact that appellant continued to work for Americare after executing the agreement. The Eighth District Court of Appeals addressed a similar scenario in *SJA & Assoc.* There, the plaintiff, a mobile disc jockey business, sued one of its former subcontractors for breach of a subcontractor agreement, which contained a two-year non-compete clause. As here, the subcontractor executed the agreement and then continued to work for the plaintiff. The court stated, at ¶28, as follows:

> * * * [A]ppellee's acceptance and performance of the jobs offered by appellant constitute the bargained-for-consideration, rendering the agreement and its non-compete clause enforceable. * * * Appellee's performance establishes a binding unilateral contract. We must reject, therefore, appellee's argument that the agreement is unenforceable because appellant retained the right to employ him "to perform the Services from time to time, as requested by the [appellant] * * *." This is not an illusory promise because appellee did, in fact, perform the various engagements offered to him by appellant. * * *

Thus, the court held that the subcontractor's continued work for the plaintiff constituted performance under the new terms of employment and satisfied the requirements of consideration. The same rationale applies here.

{¶31} For these reasons, we conclude that the agreement does not fail for lack of consideration or for lack of mutuality of obligation. Accordingly, we overrule appellant's first assignment of error.

{¶32} Having overruled each of appellant's three assignments of error, and discerning no abuse of discretion in the trial court's grant of injunctive relief, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK, P.J., and BRYANT, J., concur.