IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

COLTON HEALTH, LLC, an Arizona limited liability company,
Plaintiff/Counterdefendant/Appellant,

v.

ARTHRITIS HEALTH, LTD, an Arizona professional corporation; PAUL F. HOWARD, M.D., an individual; *Defendants/Counterclaimants/Appellees*.

ARTHRITIS HEALTH, LTD, an Arizona professional corporation; PAUL F. HOWARD, M.D., an individual; *Third-Party Plaintiffs/Appellees,*

v.

SUKHJIT SINGH GHUMAN and KIRANJIT GHUMAN, husband and wife, *Third-Party Defendants/Appellants*.[1]

No. 1 CA-CV 22-0041
FILED 3-14-2023

Appeal from the Superior Court in Maricopa County
No. CV2020-095041
The Honorable Stephen M. Hopkins, Judge, (*Retired*)

AFFIRMED

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[1] We amend the above caption to reflect the counterclaim and third-party action. We also order the above caption be used on all future documents filed in this matter.

COUNSEL

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By Randy Nussbaum, Michael L. Kitchen, Patrick J. VanZanen
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MEMORANDUM DECISION

Vice Chief Judge David B. Gass delivered the decision of the court, in which Presiding Judge Samuel A. Thumma and Judge Cynthia J. Bailey joined.

G A S S, Vice Chief Judge:

¶1 Colton Health, LLC, Sukhjit Singh Ghuman, and Kiranjit Ghuman appeal the superior court's grant of summary judgment to Paul F. Howard, M.D. and Arthritis Health, LTD. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 This case involves agreements covering two pertinent time periods—the latter half of 2018 and the middle of 2020.

I. The 2018 Sale and Related Documents, Including the Physician Employment Agreement

¶3 Effective November 1, 2018, rheumatologist Paul Howard and his company, Arthritis Health, agreed to sell his medical practice to Colton Arthritis Health in exchange for $500,000. The purchase price allocated $300,000 for Howard's goodwill and $200,000 for equipment. Colton signed two promissory notes: (1) $300,000 in Howard's favor, with payments of $5,000 per month; and (2) $200,000 in Arthritis Health's favor, with payments of $3,333.33 per month. At clause 9, both notes state Colton would be in default "if any payment under this Note is not paid when due." Sukhjit Ghuman, Colton's manager and principal, and his wife, Kiranjit Ghuman, signed a single personal guaranty for both notes.

¶4 Clause 17 of the sale agreement, titled "Consultation Services," states, for 12 months beginning on April 30, 2019, Howard would provide services as an independent contractor "regarding the operation of the Practice on an as needed basis" for $140 per hour. Paragraph 17 does not mention any separate physician employment agreement. Neither the sale agreement, the promissory notes, nor the personal guaranty included any noncompete clauses. Each, however, includes an integration provision.

¶5 At the same time as the sale, Howard entered a six-month physician employment agreement with Colton. The employment agreement included an integration clause, and, unlike the other 2018 agreements, it included a noncompete clause. The noncompete clause stated (1) Howard could not "[s]olicit or divert patients with whom [Howard] had personal contact during such employment"; and (2) with certain limitations, Howard could not have a financial interest in any competitor. The noncompete clause applied during the term of the employment agreement and for one year after it expired.

¶6 The employment agreement identified how long it would stay in effect and provided for extending that term, saying:

> The initial term of this Agreement ("Initial Term") shall be for a period of six (6) calendar months, commencing as of the "Commencement Date." . . . The Initial Term may be extended by mutual agreement of the Parties. Any extension shall be for one (1) calendar month increments ("Extension Term") with either Party having the right to cancel at the expiration of any one Extension Term by giving notice to the other Party of their intent to cancel no less than fifteen (15) calendar days prior to the expiration of the Extension Term.

¶7 Under the six-month Initial Term of the employment agreement, Howard received compensation based on a $350,000 annual salary, or $29,166.67 per month. During any "Extension Term," Howard was to receive compensation based on a $400,000 annual salary, or $33,333.33 per month. The parties did not extend the employment agreement's Initial Term, meaning it expired given the passage of time on May 1, 2019. The noncompete clause of the employment agreement, in turn, expired given the passage of time on May 1, 2020.

II. The Subsequent Consulting Agreements

¶8 Instead of extending the employment agreement, the parties entered a five-month physician consulting agreement, effective May 1, 2019. The parties then entered two successive six-month consulting agreements, one effective October 1, 2019, and one effective April 1, 2020. The only differences between the three consulting agreements were the dates they were in force. The consulting agreements lacked an equivalent of the employment agreement's "Extension Term."

¶9 Under the consulting agreements, Howard agreed to provide medical services to Colton and its patients for $34,500 per month. Payment was due on the last day of the month "in arrears," meaning payment was for services already provided during that month.

¶10 The consulting agreements each contained a noncompete clause different from the noncompete clause in the employment agreement. Under clause 16 of each of the consulting agreements, Howard agreed not to "directly or indirectly engage in any self-employed or paid/unpaid work or employment with any [Colton] client or customer or potential client or customer" for 12 months after the consulting agreement ended without Colton's written consent.

¶11 The consulting agreements' noncompete clauses also said if Howard received

> an offer to be employed or engaged in any capacity from any existing client or potential client of [Colton] . . ., [Howard] shall give the person/company making the offer a copy of this clause 16 and shall tell [Colton] the identity of that person/company as soon as possible, whether [Howard] has accepted the offer or not.

Those noncompete clauses in the consulting agreements also addressed damages: "Should any of the restrictions in this clause 16 be breached, [Colton] reserves the right to claim 50% of the Consultant's monthly pay and/or injunctive relief."

¶12 For the last of these three consulting agreements (effective on April 1, 2020), the 12-month noncompete period would expire on September 30, 2021. The consulting agreements allowed Howard to terminate them for cause if Colton "fail[ed] to pay any payment due to [Howard] hereunder and such failure continues for more than five (5) days after the scheduled due date of such payment."

¶13 None of the consulting agreements reference the sale agreement, the other 2018 agreements or other documents. Each consulting agreement includes an integration clause.

III. The Dispute

¶14 During summer 2020, Howard and Ghuman discussed Howard's ongoing relationship with Colton and Arthritis Health. The dispute underlying the present appeal started in August 2020.

¶15 On August 13, 2020, Howard emailed a proposal to Ghuman to sublease space within the practice property to provide rheumatology services to his own patients beginning October 1, 2020. Colton rejected Howard's proposal. On August 16, 2020, Howard emailed Ghuman he would be setting up a limited practice to see patients not covered by insurance as of October 1, 2020, if they could not agree on a sublease. Howard also asked for input on what he should tell existing patients about his departure and noted "the number of patients wishing to see me under the program of no insurance and high hourly cost will be minimal." The record shows no further written communications between Howard and Ghuman.

¶16 Howard provided services under the April 1, 2020 consulting agreement through August 31, 2020. At that point, Colton did not pay Howard the $34,500 for the services Howard provided in August and locked Howard out of the facility. Colton also did not pay Howard the $34,500 September payment and stopped making payments to Howard and Arthritis Health on the promissory notes beginning with the monthly payment due on September 1, 2020. The Ghumans made no payments under the personal guaranty.

¶17 On September 10, 2020, Howard formed Howard Rheumatology, PLLC with the Arizona Corporation Commission. Beginning September 30, 2020, Howard received and responded to communications from several of Colton's patients asking Howard about providing future medical treatment. On October 19, 2020, Howard opened his own rheumatology practice. Colton sued Howard and Arthritis Health alleging breach of contract (the 2018 purchase contract and the April 1, 2020 consulting agreement), breach of the implied covenant of good faith and fair dealing, tortious interference with contract, and common law fraud. Howard and Arthritis Health counterclaimed against Colton—and added the Ghumans as third-party defendants—for breach of contract, declaratory judgment, and breach of personal guaranty.

IV. The Summary Judgment Proceedings

¶18 While discovery was ongoing, the parties filed competing motions for summary judgment. Howard and Arthritis Health argued Colton failed to pay on the promissory notes, for which the Ghumans were liable under the personal guaranty. Howard and Arthritis Health also asserted Colton failed to pay $69,000 due under the April 1, 2020 consulting agreement. Colton countered, arguing Howard materially breached the parties' agreements first by soliciting and having contact with Colton's patients despite the earlier sale of goodwill. Colton also argued Howard and Arthritis Health breached the implied covenant of good faith and fair dealing by threatening to open, and then opening, a competing practice.

¶19 The superior court granted summary judgment for Howard and Arthritis Health and against Colton and the Ghumans on all claims. The superior court noted the Ghumans failed "to identify which part of which contract" they alleged Howard and Arthritis Health breached. The superior court found Colton still owed Howard $190,000 and Arthritis Health $126,666.64 under the promissory notes. It also found Colton failed to pay Howard $69,000 due under the April 1, 2020 consulting agreement. The superior court found "no reasonable juror could conclude these breaches were not 'material.'" And it found the Ghumans liable under their personal guaranty. The superior court dismissed Colton's complaint with prejudice and entered judgment for Howard and Arthritis Health.

¶20 This court has jurisdiction over Colton's timely appeal under article VI, section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21.A.1, -2101.A.2.

DISCUSSION

¶21 This court reviews *de novo* a grant of summary judgment to determine whether the superior court properly applied the law and whether any genuine issues of material fact exist. Ariz. R. Civ. P. 56(a); *Dinsmoor v. City of Phoenix*, 251 Ariz. 370, 373, ¶ 13 (2021). This court will "affirm the judgment if it is correct for any reason." *Rosenberg v. Sanders*, 253 Ariz. 279, ¶ 13 (App. 2022) (citation omitted). Additionally, this court views the record in the light most favorable to Colton. *See Dinsmoor*, 251 Ariz. at 373, ¶ 13.

¶22 Colton makes no argument about its tortious interference or fraud claims. Though Colton's brief mentions its good faith and fair dealing claim, Colton does not develop that argument and provides no supporting authority. Colton, thus, waived those claims. *See State v. Carver*, 160 Ariz.

167, 175 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

¶23 Colton preserved its argument Howard and Arthritis Health breached their obligations under the 2018 purchase contract because Howard solicited Colton's patients and improperly interfered with the "transfer" of goodwill. Colton argues that alleged breach relieved it of the obligation to pay under the promissory notes and the April 1, 2020 consulting agreement. And by extension, the same argument would apply to the Ghumans on their guaranty.

I. The covenants not to compete in the consulting agreements are unenforceable.

¶24 Colton argues Howard's August 2020 communications with Ghuman materially breached—in fact or anticipatorily—the covenants not to compete in the consulting agreements. As quoted in paragraph 11 above, the restrictions in the three consulting agreements remained in place in August 2020 and, by their terms, prohibited Howard from engaging in any work, whether paid or unpaid, with any Colton "client or customer or potential client or customer" for 12 months after each agreement ended, without Colton's written consent. And if any of Colton's existing or potential clients extended Howard an employment or engagement offer in any capacity during the restrictive period, Howard had to give the offering person or company a copy of clause 16 and tell Colton as soon as possible.

¶25 Howard argues the covenants not to compete are unenforceable under *Valley Medical Specialists v. Farber*, 194 Ariz. 363 (1999). In *Farber*, the Arizona Supreme Court held "[w]e stop short of holding that restrictive covenants between physicians will never be enforced, but caution that such restrictions will be strictly construed." *Id.* at 372. "The burden is on the party wishing to enforce the covenant to demonstrate that the restraint is no greater than necessary to protect the employer's legitimate interest" and such interest "is not outweighed by the . . . likely injury to the public." *Id.* Colton has not met that burden.

¶26 In *Farber*, the court determined the restrictive covenant was too broad because: (1) a three-year duration was unreasonable; (2) the restricted activity was too broad because it did not limit the restraint to the physician's specialty; and (3) the restricted area covered 235 square miles. *Id.* at 372, ¶ 26–27, 29. Here, the restrictive covenants in the consulting

agreements prevent Howard from providing any kind of service—medical or otherwise—for a fee or for free, to any current Colton "client or customer or potential client or customer" anywhere in the world for a twelve-month period after each consulting agreement ends. The covenants not to compete in the consulting agreements, thus, are unenforceable. Though shorter than the three-year restriction in *Farber*, they are materially broader in scope in that they go far beyond Howard's specialty—indeed beyond the practice of medicine—and far beyond the 235 square miles in *Farber*. The restrictive covenants also would take the patient's choice of physician and put it in the hands of Colton, a medical practice. Colton cited no support for such a restriction, and this court found none.

II. The sale agreement, the promissory notes, and the personal guaranty do not create an implied covenant not to compete.

¶27 Colton argues *Farber* does not apply to the consulting agreements because this case involves the sale of a business as the consulting agreements are separate from the sale of the practice. Colton's argument is unavailing.

¶28 Colton cites cases from other jurisdictions holding a seller has a permanent, implied covenant or duty, to refrain from soliciting former customers with the sale of goodwill. *See, e.g.*, *Bessemer Tr. Co., N.A. v. Branin*, 16 N.Y.3d 549 (2011); *J. L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wash. 2d 45 (1941). Arizona has not adopted such a duty. To be sure, a "restraint accompanying the sale of a business is necessary for the buyer to get the full goodwill value for which it has paid." *Farber*, 194 Ariz. at 368, ¶ 14. But once the restraint's terms expire, no mechanism can ensure the permanent transfer of goodwill. *See id.* Rather than applying the expansive duty Colton advocates, Arizona courts strictly construe covenants not to compete involving physicians. *Id*. at 372, ¶ 33.

¶29 Here, the sale agreement, employment agreement, promissory notes, and personal guaranty are independent and not contractually tied to the consulting agreements. The 2018 sale agreement, the promissory notes, and the personal guaranty include no terms restricting solicitation or competition. The contemporaneously signed employment agreement does include a noncompete clause, but the employment agreement terminated on April 30, 2019 and the employment agreement's 12-month restriction period ended six months before Howard communicated with any patients about his intended move. The parties had not executed the consulting agreements at the time of the sale agreement or the guaranty. The consulting agreements do not refer to those earlier

documents. And all the earlier documents and the consulting agreements include integration clauses. The terms of the consulting agreements, thus, are irrelevant to the sale of the goodwill and are only relevant to Colton's obligation to pay Howard $34,500 monthly for his consulting services.

¶30 To tie the sale of goodwill in the sale agreement to the consulting agreements, Colton argues clause 17 of the sale agreement addressed consulting services, and the later consulting agreement manifested a continuation of that provision. The sale agreement, however, specifically called for Howard to provide consulting services "regarding the operation of the Practice on an as needed basis at the rate of . . . $140" per hour.

¶31 In contrast, the employment agreement and the later consulting agreements required Howard to provide services as a physician practicing medicine and treating patients. And rather than providing services as needed, the employment and consulting agreements required Howard to work 40 hours a week, Monday through Friday. And the compensation was markedly different for the two types of work. Using the base pay, 52 weeks per year, and 40 hours per week, the employment agreement provided for $168.27 per hour for providing physician services during its "Initial Term" and $192.31 per hour under any "Extension Term." Under the later consulting agreements, the hourly rate increased to $348.32 for providing physician services. And the employment agreement, which the parties executed when they agreed to the sale, lapsed long before any alleged breach. And that lapse includes the noncompete provisions in the employment agreement.

¶32 Last, Colton argues Howard expressed an intent to retire when he sold his goodwill and Howard's failure to do so is evidence of a prior material breach. Nothing in any of the agreements condition Howard's duties on retirement. Indeed, to the contrary, Colton continued to enter contracts so Howard could keep working. This argument also fails.

¶33 In summary, the covenants not to compete in the consulting agreements violate *Farber* and are not enforceable. On the record presented, Colton stopped making payments under the consulting agreement based on these unenforceable noncompete clauses. In doing so, Colton relieved Howard of any ongoing obligations under the consulting agreements. Moreover, Howard and Arthritis Health could not breach the sale agreement, employment agreement, promissory notes, or personal guaranty because they had no ongoing obligations under those contracts.

Colton, thus, cannot rely on alleged breaches by Howard and Arthritis Health.

III. Colton and the Ghumans materially breached when they failed to make the payments due on September 1, 2020, under the promissory notes and the personal guaranty.

¶34 "[A]n uncured material breach of contract relieves the non-breaching party from the duty to perform and can discharge that party from the contract." *ABCDW LLC v. Banning*, 241 Ariz. 427, 439, ¶ 55 (App. 2016) (citation omitted). A material breach occurs "when a party fails to perform a substantial part of the contract or one or more of its essential terms or conditions," or fails to do something required by the contract that is so important to the contract that the breach defeats the very purpose of the contract. *Ry-Tan Constr., Inc. v. Washington Elementary Sch. Dist. No. 6*, 208 Ariz. 379, 399–401, ¶¶ 73–76 (App. 2004) (citing Rev. Ariz. Jury Instr. (Civil) Contract 9 (5th ed. 2015), *vacated on other grounds by* 210 Ariz. 419 (2005)).

¶35 Generally, when a court considers whether a breach is material, relevant factors can include the "extent to which the injured party will be deprived of the benefit . . . reasonably expected." *See Maleki v. Desert Palms Pro. Props., L.L.C.*, 222 Ariz. 327, 332, ¶ 25 n.2 (App. 2009). A contract establishes conduct as a material breach if it expressly does so in its terms, such as providing such conduct is grounds for termination. *Cf. Mining Inv. Grp., LLC v. Roberts*, 217 Ariz. 635, 639, ¶ 15 (App. 2008) (declining to apply Restatement (Second) of Contracts § 241 when affirming summary judgment on whether a party materially breached the contract given the contact terms). To do otherwise, this court would have "to ignore the express terms that the parties contracted for and essentially rewrite the contract." *Id.*

¶36 The promissory notes here, like the contract in *Mining*, specified grounds for material breach. *See id.* at 639, ¶ 17. The promissory notes say Colton will be in default "if any payment under this Note is not paid when due" and included an acceleration clause upon the event of Colton's default. *See id.* at 639–40, ¶¶ 17–18. And as discussed above, Howard and Arthritis Health did not commit any breach.

¶37 The Ghumans breached the personal guaranty when they failed to pay on the promissory notes upon Colton's material breach. *See Mill Alley Partners v. Wallace*, 236 Ariz. 420, 423–24, ¶¶ 12–14 (App. 2014) (holding a material breach of the underlying obligation immediately triggers the obligor's obligation). The Ghumans' personal guaranty

included the obligation to pay if Colton failed to do so. And the personal guaranty provided Ghumans' obligations "shall be a primary obligation and shall not be subject to any counterclaim, set-off, recoupment, abatement, deferment, or defense [the Ghumans] may have against Arthritis Health and Howard." Generally, a claim against a guarantor "accrues when the principal defaults unless the parties agree to a notice or cure provision." *Id.* Because the personal guaranty here included no notice or cure provisions, Ghumans' personal guaranty obligations arose immediately upon Colton's failure to pay. *See id.*

¶38 As to the guaranty claim, the Ghumans argue the superior court failed to address citations to the record establishing Howard's earlier material breaches, excusing them from their obligation to perform under the guaranty. This defense hinges on the premise the superior court incorrectly entered summary judgment against Colton. But as discussed above, the Ghumans do not establish Howard or Arthritis Health breached either the employment agreement, the consulting agreements, or the personal guaranty. The superior court, therefore, properly granted summary judgment against Colton because it committed the first material breach of the promissory notes. Moreover, the superior court must enforce the guaranty as written. *See Pi'Ikea, LLC v. Williamson*, 234 Ariz. 284, 287, ¶ 10 (App. 2014). Accordingly, the superior court properly granted summary judgment against the Ghumans on the guaranty. *See id.*

ATTORNEY FEES

¶39 Colton and the Ghumans ask for an award of attorney fees under A.R.S. § 12-341.01.A. Because Colton and the Ghumans did not succeed on their claims, we deny their request. Howard and Arthritis Health similarly request an award. In our discretion, we grant the request for an award to Howard and Arthritis Health as the successful parties and will award them reasonable attorney fees and costs upon compliance with ARCAP 21.

CONCLUSION

¶40 We affirm.

AMY M. WOOD • Clerk of the Court
FILED: AA