

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

INTERIM HEALTHCARE OF PITTSBURGH,
INC.,

Appellant

v.

EMILY WALLACE, NOW BY MARRIAGE,
EMILY BLAKE,

Appellee

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 988 WDA 2012

Appeal from the Order Entered May 25, 2012
In the Court of Common Pleas of Erie County
Civil Division at No(s): 11703-2012

BEFORE: BENDER, GANTMAN AND OLSON, JJ.

MEMORANDUM BY OLSON, J.:

FILED DECEMBER 19, 2013

Appellant, Interim Healthcare of Pittsburgh, Inc., appeals from an order entered on May 25, 2012 that denied its petition for a preliminary injunction. We affirm.

The trial court summarized the factual history of this case as follows:

Emily Wallace, now by marriage Emily Blake (hereafter "Blake"), was employed by [Appellant] from May 12, 2008 until February 20, 2012. [Appellant] is a company engaged in the business of furnishing medical and nonmedical in-home healthcare and personal services throughout the United States, including in Erie and Crawford Counties in Western Pennsylvania. When Blake was hired by [Appellant], she signed an employment agreement that included a non-compete clause. The clause provided that if Blake were to leave the employ of [Appellant], she would not be permitted to work directly or indirectly for a competitor of [Appellant] for one year following termination of employment in the counties in which [Appellant] does business. [Blake also agreed not to disclose Appellant's confidential information and,

further, not to copy or use said material except to the extent required in the course of her employment with Appellant.]

While in the employ of [Appellant], Blake held the position of Client Service Supervisor. Blake's duties included processing and opening mail (time sheets), entering the information for visits by medical personnel, logging in [M]edicare logs, monitoring drugs.com for medication interactions on new clients, informing doctors of drug interaction results, typing client orders for medical personnel visits, and texting and calling medical personnel to give the visit information or to compel them to schedule visits with clients. Her duties usually applied only to Meadville staffing when another scheduler called off work.

Blake first approached her supervisor at [Appellant], Joe Kavlick, on February 9, 2012 about a job offer she was considering accepting with Senior Helpers. Senior Helpers is a company engaged in the business of providing non-medical in-home personal services to senior citizens. Despite the fact that Senior Helpers does not provide any medical services to its clients, [Appellant] considers Senior Helpers to be a direct competitor. Kavlick informed Blake that if she were to accept a position with Senior Helpers, [Appellant] would take steps to enforce the non-compete clause in her employment agreement. In her conversations with Kavlick between February 9th and February 20th, Blake vacillated between telling Kavlick she was staying with [Appellant] and that she was leaving to accept a job with Senior Helpers. On February 20, 2012, Blake told Kavlick that she was definitely going to leave [Appellant], citing as her reason that she could no longer take the pressures of her job, and she needed to take the summer off. Kavlick asked her to give two weeks' notice. Despite this agreement, she cleaned out her desk that day and left [Appellant] for good. In the week or two before leaving [Appellant], Blake [sent] from her [e-mail account with Appellant to her personal e-mail account Appellant's] Home Health Agency contact lists, [Appellant's] Home Health Agency Reports, and [Appellant's] financial weekly reports from April 8, 2011 through December 16, 2011.

Kavlick discovered on February 27, 2012 that Blake had accepted a position with Senior Helpers. Blake was hired by Senior Helpers to work as the Client Service Manager. This position includes duties such as payroll, direct supervision over all aides, client home assessments, background checks,

employee yearly evaluations, monitoring employee compliance with all state regulations, responding to employee and client complaints, and conducting new hire orientations.

[Appellant] filed a complaint in equity on May 9, 2012 to enforce the non-compete clause in Blake's employment agreement, and on the same day filed the instant petition for a preliminary injunction. [The trial court held a hearing on Appellant's petition on May 21, 2012. By opinion and order issued on May 25, 2012, the trial court denied Appellant's request for injunctive relief, concluding that Appellant failed to demonstrate irreparable harm and that greater injury would occur from refusing to grant the injunction than from granting it. This appeal followed.¹]

Trial Court Opinion, 5/25/12, at 1-3.

Appellant's brief raises the following questions for our review:

Whether the trial court erred in its denial of [Appellant's] petition for preliminary injunction, when the trial court decided that [Appellant] did not sustain irreparable harm to support the issuance of a preliminary injunction?

Whether the trial court erred in finding that enforcement of the non-competition clause in [Blake's] employment agreement with [Appellant] would prevent [Blake] from working in her chosen field, when there was evidence presented of numerous opportunities for employment [of Blake] in her chosen field with entities who were not in competition with [Appellant]?

Whether the trial court erred by denying [Appellant's] petition for a preliminary injunction when it failed to enforce the non-

¹ Pa.R.A.P. 311(a)(4) permits an appeal as of right from an interlocutory order denying a request for injunctive relief.

Appellant filed a timely notice of appeal on June 21, 2012 and the trial court ordered a concise statement pursuant to Pa.R.A.P. 1925(b) on June 25, 2012. Appellant filed a timely concise statement on July 24, 2012. On September 17, 2012, the trial court adopted its May 25, 2012 opinion as its statement of the reasons underlying its decision to deny Appellant's request for injunctive relief.

competition clause within [Blake's] employment agreement with [Appellant], when [Blake] who had been trained in the business by [Appellant], misappropriated [Appellant's] confidential business information, sought from and accepted employment with a competitor following its hiring of [Blake], participated in an interviewing process and obtained business from a client of [Appellant]?

Appellant's Brief at 4.²

Appellant's claims challenge the trial court's May 25, 2012 order that denied its request for a preliminary injunction. The standard and scope of review applicable to such claims is as follows:

To obtain a preliminary injunction, a petitioner must establish that: (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is likely to prevail on the merits; (5) the injunction is reasonably suited to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted. Appellate courts review a trial court order refusing or granting a preliminary injunction for an abuse of discretion. This standard is applied as follows:

On an appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the Chancellor.

An injunction can be either preventative or mandatory in nature. While the purpose of all injunctions is to preserve the *status quo*,

² We have re-ordered Appellant's issues for ease of discussion.

prohibitory injunctions do this by forbidding an act or acts while mandatory injunctions command the performance of some specific act that will maintain the relationship between the parties. Thus, preventative injunctions maintain the present status of the parties to the litigation by barring any action until the litigants' rights are adjudicated on the merits. Mandatory injunctions require the performance of a positive action to preserve the *status quo*, are subject to greater scrutiny, and must be issued more cautiously than preventative injunctions.

Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1241 (Pa. Super. 2011) (internal citations and quotations omitted). Since the present injunction requires a party to take an affirmative action, *ie*, termination of Appellant's employment with Senior Helpers, it is mandatory in nature and, therefore, subject to a heightened standard of review.

Appellant's first claim assails the trial court's determination that Appellant failed to demonstrate irreparable injury. In its brief, Appellant alleges that "Blake violated the provisions of her employment Agreement with respect to confidentiality and non-competition by misappropriating [Appellant's] confidential business information including customer, patient and client lists, sales data and reports, pricing information, referral sources, discounts, special pricing and business and growth trends and analysis." Appellant's Brief at 22. Appellant further maintains that Blake breached her employment contract when she "sought and accepted employment with a competitor, Senior Helpers[,] and that shortly after her employment with Senior Helpers, [Appellant] sustained the loss of new business from Independence Waiver Client, a business opportunity [with which Senior

Helpers was not previously involved].” **Id.** To support its claim that Blake’s violations caused Appellant to sustain irreparable harm, Appellant points to the training given to Blake during the course of her employment, Blake’s access to Appellant’s confidential information, and the competitive effect of Blake’s departure on Appellant’s established business relationships. **Id.** at 23 (citing “the circumstances and timing of Blake’s misappropriation of confidential information and Senior Helpers[’] involvement in the interviewing process of the Independence Waiver Client” as compelling evidence of irreparable injury) and 26. Appellant concludes that the trial court erred and abused its discretion in finding that these circumstances did not establish irreparable harm within the context of Blake’s departure and subsequent employment with Senior Helpers.

We have recognized that the purpose sought to be achieved by the issuance of a preliminary injunction is the avoidance of irreparable injury or gross injustice until the legality of the challenged action can be determined. An injury is regarded as ‘irreparable’ if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard. Our courts have held, accordingly, that it is not the initial breach of the covenant which necessarily establishes the existence of irreparable harm but rather the unbridled threat of the continuation of the violation, and incumbent disruption of the employer's customer relationships.

Thus, grounds for an injunction are established where the [petitioner’s] proof of injury, although small in monetary terms, foreshadows the disruption of established business relations which would result in incalculable damage should the competition continue in violation of the covenant. The effect of such disruption may manifest itself in a loss of new business not subject to documentation, the quantity and quality of which are inherently unascertainable. Consequently, the impending loss of

a business opportunity or market advantage [also] may be aptly characterized as an 'irreparable injury' " for purposes of equitable relief.

West Penn Specialty MSO, Inc. v. Nolan, 737 A.2d 295, 299 (Pa. Super. 1999).

The trial court considered and rejected each of Appellant's contentions advanced in support of a finding of irreparable harm. **See** Trial Court Opinion, 5/25/12, at 5-6. Initially, the court found that "any training [Appellant] provided to Blake [was not] of a character so unique that the sharing of such training with a competitor could put [Appellant] at a significant [competitive] disadvantage." **Id.** at 6. Our review of the hearing transcript confirms that Blake received routine training and experience to support her administrative and clerical duties as a client service supervisor. N.T., 5/21/12, at 14-20. Accordingly, we concur in the trial court's assessment.

Next, the trial court concluded that, although Blake's conduct in forwarding Appellant's confidential information to her personal electronic mail account did not constitute honest or forthright behavior, irreparable harm would not flow from Blake's mere possession of such information. Trial Court Opinion, 5/25/12, at 6. Blake testified that she forwarded this information because of a payment dispute with Appellant; she also testified that she did not share this information with anyone, including Senior Helpers. **See** N.T., 5/21/12, at 81-95. In addition, Blake's new employer

testified that she neither elicited nor employed any such information. **Id.** at 97-99. Lastly, the trial court found that Appellant offered no specific evidence that it lost business to Senior Helpers during the three months since Blake's departure from her employment with Appellant. This finding is supported by Kavlick's admission on cross-examination that Appellant lacked proof of any client discontinuing the use of Appellant's services because of Blake's departure. **Id.** at 56.

At the hearing on Appellant's request for a preliminary injunction, there was conflicting evidence on the issues of whether Blake would disclose Appellant's confidential information to her new employer and whether Appellant had lost business as a result of Blake's departure and the disclosure of its confidential data. The trial court credited the testimony showing that Blake would not reveal Appellant's confidential information and that Appellant had not suffered any loss of business because of Blake's departure. These credibility determinations find support in the record and, pursuant to our standard of review, we are compelled to accept them. **See Shepherd**, 25 A.3d at 1245. Accordingly, Appellant is not entitled to relief on its opening claim.

In its second claim, Appellant asserts that the trial court erred in finding that enforcement of the non-competition clause found in Blake's employment contract would prevent her from working in her chosen field. To advance this claim, Appellant alleges that the trial court overlooked

testimony introduced at the hearing which showed that Blake had employment opportunities with hospice organizations that did not compete with Appellant. Appellant's Brief at 27.

Our legal standard requires that a "party seeking to enjoin certain conduct must demonstrate that greater injury would result by refusing the injunction than by granting it." ***Pennsylvania Orthopaedic Soc. v. Independence Blue Cross***, 885 A.2d 542, 547 (Pa. Super. 2005). The trial court determined that Appellant failed to meet this prong of the test for issuing a preliminary injunction. It concluded, "[t]he breadth of the non[-]compete clause in Blake's employment contract would effectively prevent Blake from working at all in her chosen field for a whole year in Erie County or anywhere nearby if the [trial] court were to grant the injunction. In the economy we face today, such a result is too harsh when balanced against the reasonable business interests of [Appellant] and the unlikely harm that could result to such interests from Blake's conduct." Trial Court Opinion, 5/25/12, at 7. The record supports these determinations. Although Appellant asserts that Blake had employment opportunities with hospice organizations that did not compete with Appellant, our review of the hearing transcript reveals that Appellant never elicited specific testimony that identified those organizations and that Appellant never established specific opportunities that existed within any such entities. In addition, we agree with the trial court that Blake's departure caused minimal harm and

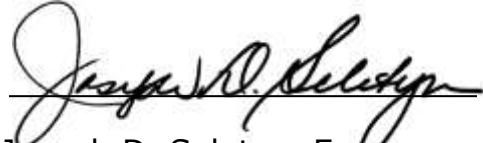
disruption to Appellant's legitimate business interests. We therefore conclude that the trial court properly weighed the consequences of granting, and refusing to grant, injunctive relief and correctly concluded that the prospect of disproportionate harm to Blake greatly outweighed any potential benefit to Appellant from issuing the injunction. Thus, the trial court acted within the scope of its discretion.

Appellant's third and final issue claims that the trial court erred in denying its petition for a preliminary injunction "when it failed to enforce the non-competition clause within [Blake's] employment agreement[.]" Appellant's Brief at 14. Because this claim relates to whether the restrictive covenant is valid and enforceable, it implicates the question of whether Appellant is likely to prevail on the merits. **See *Shepherd***, 25 A.3d at 1242. Here, however, the trial court did not consider whether Appellant was likely to prevail on the merits or whether the restrictive covenants in Blake's employment contract were valid and enforceable. Instead, as we have discussed above, the court denied relief because Appellant failed to demonstrate irreparable harm or that refusing the requested injunction would cause greater harm than granting it. **See** Trial Court Opinion, 5/25/12, at 5-7. As an appellate court, we are reluctant to pass in the first instance on an issue or issues that the trial court never addressed. Moreover, our review of Appellant's final claim is unnecessary since we have already concluded that Appellant has failed to demonstrate other elements

essential to its claim for injunctive relief. Accordingly, we decline to review Appellant's third issue and affirm the May 25, 2012 order that denied Appellant's request for a preliminary injunction.³

Order affirmed. Petition to dismiss appeal denied.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/19/2013

³ On April 26, 2013, Blake filed a petition to dismiss alleging that this appeal was moot because the non-competition covenant in her employment agreement expired on February 20, 2013. Appellant answered Blake's petition to dismiss on May 2, 2013. Appellant's answer pointed out that only the non-competition clause expired on February 20, 2013 and that the non-disclosure clause was of unlimited duration. We shall deny Blake's petition to dismiss.