STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

OAK ORCHARD COMMUNITY HEALTH CENTER,

Plaintiff,

v.

ELIZABETH BLASCO, M.D.,

Defendant.

DECISION AND ORDER

Index # 2005/04658

Plaintiff, Oak Orchard Community Health Center, Inc., has moved by order to show cause for a preliminary injunction enjoining defendant from establishing a pediatric medical practice at 21 Union Hill Drive, Spencerport, N.Y., or anywhere within a ten mile radius of plaintiff's health centers in Brockport, N.Y. and Albion, N.Y., and from advertising any such practice in said locations. A TRO was issued by the court on April 26, 2005, granting that same relief pending the hearing of this motion. Defendant, Elizabeth Blasco, M.D., has cross moved to vacate the TRO.

Plaintiff is a community health center created in the mid-1970s to serve the migrant population in Western Monroe and Orleans Counties. Plaintiff's principal office is in Brockport, New York, but it also maintains an additional center in Albion, New York. In May 2000, defendant, fresh off her residency at Strong Memorial Hospital, sought employment with plaintiff. She

sought a short term contract; plaintiff wanted a long term contract. They settled on a one year contract. Plaintiff offered defendant employment at the Brockport office as a pediatrician via an offer letter, which, when signed and accepted by defendant became defendant's employment agreement. The agreement contains a restrictive covenant which reads as follows at Paragraph 17:

> If, for any reason, the relationship between you and Oak Orchard Community Health Center, Inc. is terminated, you will not establish a practice for a radius of ten miles from either site for a period of two years from the last day of employment with Oak Orchard Community Health Center, Inc. This clause is necessary to protect the investment of Oak Orchard Community Health Center will make in establishing and developing the practice. This clause as written, is intended to protect the interests of Oak Orchard Community Health Center. This clause may be waived at the sole discretion of Oak Orchard Community Health Center. For example, if Oak Orchard were unable to continue the operation of the practice, the Board of Directors could consider waiving this provision.

Defendant commenced employment with plaintiff on September 5, 2000, and continued full time employment until the fall of 2003, when she requested and received a reduced work schedule. After what she claims were some substantial disagreements with plaintiff's chief pediatrician, defendant gave notice, in October, 2003, of her intent to resign. Defendant's last day of employment with plaintiff was in January, 2004. She became employed by Strong Memorial Hospital.

Over a year later, in March 2005, defendant met with David Fisher, president of plaintiff, and James Goetz, M.D., plaintiff's medical director, in an effort to obtain some forbearance of her non-compete agreement. During the course of that meeting, defendant informed Fisher and Goetz that she planned to open a primary care pediatric practice in Spencerport, New York, in an office that plaintiff alleges is 9.76 miles from plaintiff's Brockport office.[1] Upon presentation of this issue, plaintiff's board of directors refused to waive the covenant contained in defendant's employment agreement. Plaintiff alleges that irreparable damage would be caused if defendant is allowed to violate the terms of the employment agreement and open a practice within the ten mile radius, because plaintiff would lose patients to her new practice.

Defendant states that she is willing to stipulate that she will not advertise in the Brockport area "at all prior to the expiration of the non-compete." Affidavit of E. Blasco, ¶8. Defendant has further represented that she has "no intention of attempting to draw any former patients away" from plaintiff. Id. at ¶9. To this end, defendant is also willing to stipulate that she will not "accept any referrals of Oak Orchard patients for

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[1] Defendant concedes that this was calculated over road. Plaintiff contends that the proposed Spencerport office is under eight miles from the Brockport office of plaintiff, calculated as the crow flies. See Affidavit of D. Fisher, ¶22.

the duration of the non-compete." Id. Moreover, defendant alleges that Spencerport does not currently have a pediatrician practicing within its community. Id. at ¶10. Thus, defendant alleges that strictly enforcing this covenant "would serve to reduce patient access to convenient medical care in the Spencerport area, rather than protecting Oak Orchard from 'unfair' competition." Id. As her proposed Spencerport office is "virtually" ten miles away from Brockport, and allegedly over 20 miles away from Albion, defendant seeks vacatur of the TRO and denial of plaintiff's motion.

In order for a party to obtain a preliminary injunction, the party must establish that (1) there is a likelihood of ultimate success on the merits, (2) that there is a prospect of irreparable harm if the relief is not granted, and (3) that the balance of equities favor the moving party. Doe v. Axelrod, 73 N.Y.2d 748 (1988). It is also a general rule that a preliminary injunction is a drastic remedy and should be issued cautiously. Uniformed Firefighters Assn. of Greater New York v. City of New York, 79 N.Y.2d 236 (1992). The loss of patients has been deemed to constitute an irreparable injury. See Albany Med. College v. Lobel, 296 A.D.2d 701, 703 (3d Dept. 2002); NYSARC v. Syed, 192 Misc.2d 772, 774 (Sup. Ct. Chautauqua Co. 2002).[2]

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[2] Compare, outside the context of medical services, D&W Diesel, Inc. v. McIntosh, 307 A.D.2d 750, 751 (4th Dept. 2003)("because the non-competition agreement is for a finite

Accordingly, I turn to the likelihood of success issue. "[A] likelihood of ultimate success must not be equated with a final determination on the merits." Times Square Books, Inc. v. City of Rochester, 223 A.D.2d 270, 278 (4th Dept. 1996). See also, Bingham v. Struve, 184 A.D.2d 85 (1st Dept. 1992). Here, plaintiff must establish a likelihood that it will ultimately prevail on its claim that the employment agreement containing the restrictive covenant is enforceable.

Under New York law, "negative covenants restricting competition are enforceable only to the extent that they satisfy the overriding requirement of reasonableness." Reed, Roberts Assoc. v. Strauman, 40 N.Y.2d 303, 307 (1976). "An employee agreement not to compete will be enforced only if 'it is reasonable in time and area, necessary to protect the employer's legitimate interests, not harmful to the general public and not unreasonably burdensome to the employee.'" Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina, 9 A.D.3d 805, 806 (3d Dept. 2004). This general limitation of reasonableness "applies equally" to a "covenant given by an employee . . . where he quits his employ." Purchasing Assoc., Inc. v. Weitz, 13 N.Y.2d 267, 272 (1963).

As the Court of Appeals has observed, "in Reed, Roberts Associates, supra, we limited the cognizable employer interests

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period, i.e., 18 months, any loss of sales occasioned by the allegedly improper conduct of defendant can be calculated").

under the first prong of the common-law rule to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary." BDO Seidman v. Hirshberg, 93 N.Y.2d 382, 389 (1999). Because there is no allegation of misappropriation, we are dealing in this case only with plaintiff's interest in protecting itself from competition by a former employee whose services are claimed to be unique or extraordinary. Although the rule of reasonableness in cases involving professionals "giv[e] greater weight to the interests of the employer in restricting competition within a confined geographical area" because "professionals are deemed to provide 'unique or extraordinary' services," id., 93 N.Y.2d at 389 (quoting Reed, Roberts Assocs., 40 N.Y.2d at 308), the Court of Appeals nevertheless requires strict scrutiny of "the particular facts and circumstances giving context to the agreement" in the learned profession cases. Id. 93 N.Y.2d at 390. See Gelder Medical Group v. Weber, 41 N.Y.2d 680, 683 (1977)("[a]s with all restrictive covenants, if they [an agreement among physicians] are reasonable as to time and area, necessary to protect legitimate interests, not harmful to the public, and not unduly burdensome, they will be enforced"); Karpinski v. Ingrasci, 28 N.Y.2d 45, 49 (1971)("in some instances, a restriction not to conduct a profession or business

in two counties or even in one may exceed permissible limits"). Accordingly, even though an agreement is reasonable as to time and area, as assuredly this one is, there is no per se rule of reasonableness arising just because it is a physician's unique or extraordinary services that is involved; a court must still scrutinize whether the covenant, on the facts presented, is being legitimately employed to protect plaintiff's legitimate interests, would not be harmful to the public, and would not be unduly burdensome to the defendant. BDO Seidman, 93 N.Y.2d at 391(the Karpinski and Gelder Medical Group "precedents do not obviate the need for independent scrutiny of the anti-competitive provisions of the . . . [employment] agreement under the tripartite common-law standard").[3]

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[3] It would be odd if Karpinski and Gelder Medical Group were read otherwise, i.e., to give non-competition agreements otherwise reasonable in time and geographical scope broad deference. The cases in the learned profession context draw upon, for example, professional ethics codes for guidance. BDO Seidman, 93 N.Y.2d at 390 n.1. Non-compete agreements among lawyers are prohibited by DR-108(A); 22 N.Y.C.R.R. §1200.13(a), and the courts apply a per se rule of *non* - enforcement. Cohen v. Lord, Day & Lord, 75 N.Y.2d 95, 98-99 (1989). The American Medical Association "discourages any agreement between physicians which restricts the right of a physician to practice medicine for a specified period of time or in a specified area upon termination of employment or a partnership or a corporate agreement." AMA Opinions of the Council on Ethical and Judicial Affairs E-9.02 ("Restrictive Covenants and the Practice of Medicine"). The "virtually unanimous view of the courts respecting the validity of covenants between or among physicians" is that these agreements are not "per se unlawful" and that courts should not "elevate the American Medical Association's 'discouragement' of such covenants to the same level as the outright ban that exists respecting such covenants between

Accordingly, because "the only justification for imposing an employee agreement not to compete is to forestall unfair competition," and because "a former employee may be capable of fairly competing for an employer's clients by refraining from use of unfair means to compete," where "the employee abstains from unfair means in competing for those clients, the employer's interest in preserving its client base against the competition of the former employe[e][4] is no more legitimate and worthy of contractual protection than when it vies with unrelated competitors for those clients." Id. 93 N.Y.2d at 391.

With this in mind, I turn to whether, on the facts presented, enforcement of the agreement will serve the legitimate interests of the plaintiff. No one suggests that defendant acquired any confidential or proprietary information while

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attorneys." 6 Richard A. Lord, Williston on Contracts §13.6, at 369-70 (4th ed. 1995). Unlike the accountant situation in BDO Seidman, which had no ethical guidelines on the subject, id., 93 N.Y.2d at 390 n.1, the AMA's ethical discouragement of such agreements is only one step away from the proscription of DR 2-108(A) in the attorney context. BDO Seidman makes clear, therefore, that strict scrutiny of such contracts is required, notwithstanding the "deference" accorded to them by Karpinski and Gelder Medical Group.

[4] In the Official Reports the word is "employer," but does not make sense thus written. The sentence in the court's opinion quoted above has been quoted elsewhere using the word "employee." David L. Gregory, Courts in New York Will Enforce Non-Compete Clauses in Contracts Only if They are Carefully Contured, 72 N.Y.S. Bar. J. 27, 32 (2000); Joseph E. Bachelder, III, Executive Compensation: Restrictive Covenants: 'BDO Seidman' Case, N.Y.L.J. Vol. 222, No. 43, p. 3, col. 1 (August 30, 1999). It makes no sense otherwise.

employed at Oak Orchard which might aid her or give her a competitive advantage in the proposed Spencerport practice, nor is it alleged that defendant has any information or peculiar relationships acquired during the course of her few years of employment with plaintiff which defendant appropriated and might exploit to unfair advantage in her proposed pediatric practice. BDO Seidman, 93 N.Y.2d at 391-92 & n.2 (whether the "employee has been enabled to share in the good will of a client or customer which the employer's over-all efforts and expenditures created"). Nor does it appear (at least plaintiff does not allege) that defendant will share in any customer (i.e., patient) supply network peculiarly developed or enjoyed by plaintiff in its practice akin to the small referral networks from primary health providers which motivated the Court of Appeals' rulings in Karpinski and Gelder Medical Group.

It is to be emphasized that the "contexts of the agreements not to compete [upheld] in Karpinski and Gelder Medical Group" was that "the former associate [physician] would have been in direct competition with the promisee-practitioner for referrals from a narrow group of primary health providers in a rural geographical market for their medical or dental practice specialty." BDO Seidman, 93 N.Y.2d at 390-91 (emphasis supplied). In this case, the plaintiff's general practice, and defendant's proposed pediatric practice, are not alleged to

depend upon referrals from a narrow group of primary health providers, nor does it appear that they depend in Spencerport or Brockport on a strictly rural patient base, those communities having rapidly expanded in recent years as part of metropolitan Rochester-suburbia. Thus, both plaintiff's general practice, which it asserts is geared to a specialized migrant population, and defendant's proposed pediatric practice (which is not stated to be specialized to a particular population base), both draw (or will draw) upon the general public and referrals from a plethora of primary care and family care practices in the area (if plaintiff's own submissions on the point are credited). Accordingly, extending the anti-competition agreement to clients or patients drawn to defendant's proposed pediatric practice in Spencerport, particularly given the assurances defendant has given concerning plaintiff's existing patients, whether served by her or not, and her promise not to advertise in Brockport, "would constitute a restraint 'greater than is needed to protect' th[e] legitimate interests" of plaintiff. BDO Seidman, 93 N.Y.2d at 392 (quoting Restatement [Second] of Contracts §188[1][a]).

Finally, defendant establishes by admissible evidence, i.e., physician affidavits based on personal knowledge, that she would be the only pediatrician in Spencerport. Plaintiff's proof to the contrary pointed to the availability in the area of a great many "family practices," but ultimately left defendant's proof on

the point unimpeached. In such circumstances, the "third prong of the common-law test, injury to public interest," BDO Seidman, 93 N.Y.2d at 393-94, is implicated. Ultimately, this consideration should prevent enforcement of the restrictive covenant on the authority of Lowe v. Reynolds, 75 A.D.2d 967 (3d Dept. 1980); Prime Medical Associates, P.C. v. Ramani, MD, 5 Misc.3d 311, 314 (Sup. Ct. Green Co. 2004); Primary Care of E.N.Y., M.D., P.C. v. Goodin, N.Y.L.J. vol. 215, no.70, p. 29 col. 5 (April 11, 1996) (Sup. Ct. Kings Co.); cf., Gelder Medical Group, 41 N.Y.2d at 685; Albany Medical College v. Lobel, 296 A.D.2d 701, 702 (3d Dept. 2002); Bollengier v. Gulati, 233 A.D.2d 721 (3d Dept. 1996). In any event, the proof presented on this motion concerning the shortage of pediatricians in Spencerport on the public interest issue militates strongly in favor of denying the requested preliminary injunction. Lowe v. Reynolds, supra.

One other factor militating in favor of not enforcing this agreement is that "plaintiff, from superior bargaining position, required defendant to sign the employment agreement upon hiring her and thereafter as a condition of continued employment." Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina, 9 A.D.3d at 807. "There has been no showing that, in exchange for her signing the agreement, defendant enjoyed a fiduciary relationship, a position of increased responsibility within the firm or any other significant benefit beyond continued

employment." Id. 9 A.D.3d at 807-08. For these reasons, even partial enforcement would be inappropriate. Cf., BDO Seidman, 93 N.Y.2d at 394-95.

CONCLUSION

On the papers submitted the court concludes that plaintiff has not shown that, in the circumstances, defendant will "use unfair means to compete" by opening her pediatric practice in Spencerport. BDO Seidman, 93 N.Y.2d at 391. Because plaintiff fails to show that plaintiff is in a position to use any means of unfair competition described in the cases as worthy of protection, id., 93 N.Y.2d at 391-92, and because the contexts of this agreement is considerably different than those upheld in Karpinski and Gelder Medical Group, plaintiff's "interest in preserving its client base against the competition of the former employe[e] is no more legitimate and worthy of contractual protection than when it vies with unrelated competitors for those clients." Id., 93 N.Y.2d at 391.

Accordingly, the motion is denied. "However, in view of the actual competition which does result from the denial of the preliminary injunction, . . . [the case] is ordered . . . to trial as a preferred matter." Seaman v. Gines, 83 N.Y.2d 667 (3d Dept. 1981).

SO ORDERED.

KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: May 31, 2005
Rochester, New York