IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

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| **BOSLEY MEDICAL GROUP, S.C.,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **12 CH 10059** |
| | ) | |
| **WILLIAM D. YATES, M.D., et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**MEMORANDUM AND ORDER**

Defendants William D. Yates and Ziering Medical, P.C. filed Amended Motions to Dismiss pursuant to 735 ILCS /2-619.1.

**I. Verified Complaint**

Plaintiff Bosley Medical Group, S.C. ("Bosley") filed a Verified Complaint for Injunctive and Other Relief against Defendants William D. Yates, M.D. ("Dr. Yates"), William D. Yates, M.D., S.C. ("WDY") and Ziering Medical, P.C. ("Ziering"). Bosley is engaged in the "highly specialized medical practice of hair restoration . . . ." (Ver. Compl. ¶1).

On November 28, 2005, Dr. Yates and WDY entered into an Independent Contractor Agreement ("the Agreement") with Bosley. (Id. at ¶8 and Ex. A). Under the Agreement, Dr. Yates and WDY were to perform hair restoration procedures on an exclusive basis for Bosley's patients and prospective patients. (Id. at ¶10 and Ex. A, ¶20). The Agreement further provided that Dr. Yates and WDY had no experience in hair restoration and would receive specialized training from Bosley worth the sum of $200,000. (Id. at Ex A, ¶3).

Pursuant to the Agreement, Dr. Yates and WDY also acknowledged that Bosley had acquired its patients at great expense through advertising, direct contacts and referrals and other means. (Ver. Compl. ¶14 and Ex. A, ¶5). Dr. Yates and WDY further acknowledge that it would be difficult, if not impossible, for other physicians to discover the names of Bosley's patients and the patient acquisition strategies used by Bosley. (Id.). It would also be difficult, if not impossible, for other physicians to discover the techniques and procedures used by Bosley for hair restoration. (Id. at ¶16 and Ex. A, ¶7).

Dr. Yates and WDY agreed that upon the termination of their association with Bosley:

> [F]or a period of two years thereafter, [Dr. Yates and WDY] shall not directly or indirectly compete with BMG, or any of its affiliates . . . in hair restoration, including but not limited to hair transplantation and scalp reduction and related procedures, within the

> geographic marketing areas of [Bosley and its affiliates], namely any county (or counties, as defined below), in which [Bosley or its affiliates] then maintains an office.
>
> A. [Bosley] and its affiliates presently maintain surgical offices in . . . Chicago in the State of Illinois . . . .

(Id. at Ex. A, ¶32).[1] Dr. Yates and WDY also agreed that:

> [F]or two years after its termination, neither [Dr. Yates and WDY] shall directly or indirectly, on any basis, solicit, hire or engage, or attempt to hire or engage, or advise or recommend to any person that such other person solicit, hire or engage the employment of any person employed by or under contract with [Bosley] or its affiliates or subsidiaries . . . .

(Id. at Ex. A, ¶31).

In June of 2011, Dr. Yates gave Bosley notice of his intent to disassociate himself from Bosley. (Ver. Compl. ¶24). On June 24, 2011, Bosley employee Yolanda Ellitch gave Bosley notice that she had accepted a job with the Ziering office opening in Oak Brook, Illinois. (Id. at ¶24). On July 31, 2011, Dr. Yates and WDY disassociated from Bosley. (Id. at ¶28).

Beginning in August of 2011, Ziering began publishing a series of advertisements in the Chicago Tribune for "Ziering Medical Chicago." (Ver. Compl. ¶¶31-33). When Bosley learned of Dr. Yates' anticipated employment with Ziering, it sent him a cease and desist letter. (Id. at ¶34). Bosley asserts that Dr. Yates has continued to compete with Bosley in violation of the Agreement. (Id. at ¶35).

Count I of the Verified Complaint seeks a preliminary injunction against Dr. Yates and Ziering. Count II alleges breach of contract against Dr. Yates and WDY. Count III alleges tortious interference with contract against Ziering. All three counts are based on Dr. Yates alleged violation of Paragraphs 31 and 32 of the Agreement.

## II. Motions to Dismiss

Dr. Yates and Ziering are moving to dismiss the Verified Complaint pursuant to 735 ILCS 5/2-619.1.

[1] The Agreement also prohibits Yates from practicing hair restoration in numerous other identified cities and counties in the United States. The Agreement also purports to prohibit Yates from practicing hair restoration in unidentified cities in United States, Canada and Mexico. Given that Yates only worked for Bosley in Chicago, the geographic scope of the restrictive covenant is overbroad in the extreme and not enforceable. However, as the parties are focused on the Cook County restriction, and the restrictive covenant could easily be modified to apply only to Cook County, the discussion of the alleged breaches of the covenant will be limited to the restriction on competition in Cook County.

A. *Section 2-615*

Dr. Yates and Ziering argue that Paragraph 32 of the Agreement is unenforceable and Bosley's claims based on that Paragraph should be dismissed pursuant to §2-615. A §2-615 motion to dismiss "challenges the legal sufficiency of the complaint." Chicago City Day School v. Wade, 297 Ill. App. 3d 465, 469 (1st Dist. 1998). The relevant inquiry is whether sufficient facts are contained in the pleadings which, if proved, would entitle a plaintiff to relief. Id. "Such a motion does not raise affirmative factual defenses but alleges only defects on the face of the complaint." Id. "A section 2-615 motion admits as true all well-pleaded facts and reasonable inferences that can be drawn from those facts, but not conclusions of law or conclusions of fact unsupported by allegations of specific facts." Talbert v. Home Savings of America, 265 Ill. App. 3d 376, 379-80 (1st Dist. 1994). A section 2-615 motion will not be granted "unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery." Baird & Warner Res. Sales, Inc. v. Mazzone, 384 Ill. App. 3d 586, 590 (1st Dist. 2008).

"A restrictive covenant, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public." Reliable Fire Equip. Co. v. Arredondo, 2011 IL 111871, ¶17. [T]he extent of the employer's legitimate business interest may be limited by type of activity, geographical area, and time." Id.

"In the case of a postemployment restraint, where the employer-promisee exacts from the employee a promise not to compete after termination of the employment, the restraint is *usually* justified on the ground that the employer has a legitimate business interest in restraining the employee from appropriating the employer's (1) confidential trade information, or (2) customer relationships." Id. at ¶34. "[W]hether a legitimate business interest exists is based on the totality of the facts and circumstances of the individual case. Factors to be considered in this analysis include, but are not limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment, and time and place restrictions. No factor carries any more weight than any other, but rather its importance will depend on the specific facts and circumstances of the individual case." Id. at ¶43.

"Reasonableness of a restrictive covenant is to be decided by the judge as a matter of law." Cambridge Engineering Inc. v. Mercury Partners, 378 Ill. App. 3d 437, 447 (1st Dist. 2007). "Covenants not to compete must be strictly construed and interpreted and any doubts or ambiguities must be resolved in favor of natural rights and against restriction." Diepholz v. Rutledge, 276 Ill. App. 3d 1013, 1016 (4th Dist. 1995).

Ziering is located in DuPage County. Paragraph 32 of the Agreement does not prohibit Dr. Yates from providing hair restoration services in DuPage County. Bosley is located in Chicago. The Agreement is clear that this bars Dr. Yates from competing with Bosley in Cook County only. (Ver. Compl. Ex. A at ¶32).

Bosley does not allege that Dr. Yates has directly or indirectly provided hair restoration services in Cook County. Bosley could have also barred competition in the counties surrounding

Cook County, as it did for other metropolitan areas where it maintains surgical offices, but did not do so. Bosley also could have barred marketing to prospective customers in Cook County by Dr. Yates, but did not do so by the language of Paragraph 32. Bosley is asking this court to construe Paragraph 32 liberally in favor of restraint, but this court is required to construe Paragraph 32 narrowly in favor of natural rights.

Bosley's allegation of breach of Paragraph 32 of the Agreement is based solely on advertising by Ziering in the Chicago Tribune and on its website. (Ver. Compl. ¶¶29-33). Such advertisements are not a breach of Paragraph 32. In Diepholz v. Rutledge, 276 Ill. App. 3d 1013 (4th Dist. 1995), the defendant was prohibited by a restrictive covenant from engaging in the automobile dealership business in Coles County. Id. at 1014. The defendant started a new automobile dealership in Moultrie County, a county adjacent to Coles County. Id. The defendant advertised in newspapers reaching Coles County and advertised using a radio station in Coles County. Id. at 1015. The court held that the defendant had not violated the restrictive covenant stating that:

> an automobile dealer is not 'engaged in' business in every location his advertisements reach. Advertising in Coles County is not 'engaging in the automobile sales or service business as an individual or as an owner in Coles County.' Modern media advertisements normally cover a substantial area. It would have been nearly impossible for defendant to operate a dealership in Moultrie County without advertising in Coles County and other adjacent counties. Had the parties intended to prevent defendant from engaging in business in every adjacent county, the covenant should have so stated.

Id. at 1016.

Dr. Yates did not directly or indirectly provide hair restoration services in Cook County. Under Diepholz, the fact that Ziering advertised Dr. Yates's services in advertisements circulated in Cook County does not amount to a breach of the non-competition provision. If Bosley wanted to prevent Dr. Yates from providing services in adjacent counties, it could have done so.

Bosley cites to Jackson v. Hammer, 274 Ill. App. 3d 59, 64 (4th Dist. 1995), for the proposition that general advertising can amount to a breach of a covenant not to compete. Jackson, however, does not stand for this proposition. Rather, in Jackson, which involved a non-competition provision in connection with the sale of a business to the plaintiff, the defendant sent targeted advertisements to its former customers in the non-compete area. Id. Dr. Yates and Ziering did not send targeted advertisements to Bosley's existing customers in Cook County.

Bosley also cites to Mohanty v. St. John Heart Clinic, 225 Ill. 2d 52, 76 (2002), but that case is factually inapposite. In Mohanty, the court upheld restrictive covenants which prevented two physicians from practicing medicine within a two-mile and five-mile radius of their former employers' offices. The court found that the former employers had a legitimate business interest and that the geographic area was narrowly prescribed in a way which did not prevent the physicians from practicing medicine in the Chicago area. In this case, the non-competition provision only restricted Dr. Yates from practicing in Cook County, not DuPage County. Unlike the employers in Mohanty, Bosley is attempting to expand the scope of the non-competition

provision beyond its plain language which only prevents Dr. Yates from competing with Bosley in Cook County. This court must construe the non-competition provision narrowly, not broadly.

Bosley suggests that protection of its proprietary information provided to Dr. Yates during his training is a legitimate business reason for enforcing the restrictive covenant in the manner urged by Bosley. Bosley, however, has not pled any facts establishing the existence of such proprietary information. More importantly, the Agreement is clear that Dr. Yates only agreed to not use the training he received from Bosley – including Bosley's procedures, techniques and aesthetic guidelines – within Cook County. (Ver. Compl. Ex. A at ¶9). If Bosley wanted to bar Dr. Yates from using its alleged proprietary techniques in areas outside Cook County, it could have done so. Bosley is bound by the terms of the Agreement it entered, which cannot be rewritten to favor Bosley.

The allegations of the Verified Complaint and the terms of the Agreement establish that Dr. Yates did not directly or indirectly compete with Bosley in Cook County. Bosley alleges nothing more than the fact that Dr. Yates went to work for a hair restoration provider whose advertisements reach Cook County. This is not a breach of the restrictive covenants of the Agreement. Dr. Yates and Ziering are entitled to dismissal of all of Bosley's claims based on Paragraph 32 of the Agreement.

**B.** ***Section 2-619***

Dr. Yates and Ziering contend that Bosley's allegations of a breach of Paragraph 31 of the Agreement should be dismissed pursuant to §2-619. A §2-619 motion to dismiss "admits the legal sufficiency of the complaint and affirms all well-pled facts and their reasonable inferences, but raises defects or other matters either internal or external from the complaint that would defeat the cause of action." Cohen v. Compact Powers Sys., LLC, 382 Ill. App. 3d 104, 107 (1st Dist. 2008). A dismissal under §2-619 permits "the disposal of issues of law or easily proved facts early in the litigation process." Id. Section 2-619(a)(9) authorizes dismissal where "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9).

Bosley's allegations regarding Paragraph 31 are limited. Bosley alleges only that: (1) Yolanda Ellitch, a former Bosley employee, gave notice to Bosley that she leaving to work for Ziering one week after Dr. Yates gave his notice; and (2) on information and belief, Dr. Yates solicited Ellitch to leave her employment with Bosley or advised or recommended to Ziering that it hire Ellitch. (Ver. Compl. ¶¶24, 48(c) and 56(c)). Allegations made on information and belief may be contradicted by affidavit. Millsaps v. Bankers Life Co., 35 Ill. App. 3d 735, 741 (2d Dist. 1976).

After Dr. Yates and Ziering submitted affidavits from Dr. Yates and Ellitch in support of their original motions to dismiss, Bosley was granted leave to depose Dr. Yates and Ellitch as well as Mary Clemente, the practice administrator for Ziering. These depositions establish that Dr. Yates did not solicit Ellitch, or advise or recommend that Ziering hire Ellitch.

At her deposition, Ellitch testified that she was informed of job openings at Ziering by Scott Jones, a former Bosley employee, while he was visiting the Bosley office. (Ellitch's Dep. at 21-22). After Jones informed her of job openings at Ziering, she looked up the Craigslist advertisement on her home computer. (Id. at 24). She then called Ziering to arrange for an interview. (Id. at 24, 26).

When she arrived to interview, Ellitch was met by Jones and given an application. (Id. at 30-31). Ellitch then interviewed with Clemente. (Id. at 36 ). During the interview, Clemente asked Ellitch if she was familiar with Dr. Yates. (Id. at 39). This was the first knowledge Ellitch had that Dr. Yates was leaving Bosley to work for Ziering. (Id.).

Just after the interview, Ellitch had a brief conversation with Dr. Yates in the hallway at Bosley. (Id. at 46-47). Dr. Yates expressed surprise that she had applied for a job elsewhere. (Id. at 46-48). Dr. Yates never indicated to Ellitch that he wanted her to take the position with Ziering. (Id. at 49).

A week and a half after her interview, Ellitch was offered the position of surgical coordinator. (Id. at 41-42). Ellitch left Bosley to shorten her commute and spend more time with daughter. (Id. at 58).

At his deposition, Dr. Yates testified that when he first discussed coming to Ziering, he made it clear that under the Agreement, he could not have anything to do with anyone who came from Bosley. (Dr. Yates's Dep. at 18-19). About two months before he began working for Ziering, Clemente called him and asked him two questions about Ellitch: (1) had he ever worked with Ellitch; and (2) was she competent. (Id. at 25-26). He answered that he had worked with her and she was competent. (Id. at 26). That was the extent of their conversation about Ellitch. (Id.). During the same call, Clemente also asked him about the competence of other candidates that he had personally interviewed. (Id.).

The only conversation Dr. Yates had with Ellitch about her leaving Bosley was the brief conversation in the hallway at Bosley. (Id. at 30, 32-33). Dr. Yates expressed his surprise that Ellitch wanted to leave Bosley. (Id. at 30-31). Dr. Yates does not think Ellitch said anything in return, but just smiled. (Id. at 32). Dr. Yates did not express any opinion as to whether Ellitch should leave Bosley. (Id. at 33).

During the deposition, Dr. Yates was questioned about his relationship with Jones. Dr. Yates testified that after Jones left Bosley, Dr. Yates purchased a life insurance policy from him. (Id. at 33-34). Jones would also come to Bosley on occasion to visit and Dr. Yates would see him there, but most of his dealings with Jones were insurance dealings. (Id. at 34-35). Dr. Yates had a conversation with Jones about Ellitch after the filing of this lawsuit. (Id. at 36).

At her deposition, Clemente testified that Ziering placed a Craigslist advertisement for the job openings for the new office and also may have gotten some referrals from Jones. (Clemente's Dep. at 23). Clemente testified that Dr. Yates was not involved in any of the decision-making regarding hiring. (Clemente's Dep. at 19). She asked Dr. Yates's opinion as to whether the candidates were competent. (Id. at 19).

Dr. Yates did not participate in Ellitch's interview. (Id. at 20). On Clemente's interview notes, she noted that Ellitch was referred by Jones. (Id. at 29). Following the interview, Clemente had a brief conversation with Dr. Yates in which she asked him about Ellitch's competency. (Id. at 39). She called Dr. Yates rather than Ellitch's other references because she did not want to put Ellitch's job at risk. (Id.).

The only counter-evidence submitted by Bosley is the affidavit of Leyla Azizova, Bosley's office manager. (Response, Ex. 2). The affidavit establishes only that Jones visited the Bosley office four to five times a month from early-2011 to mid-2011, met privately with Dr. Yates, and visited with other Bosley employees. (Id.). Jones stopped visiting Bosley after Dr. Yates left. (Id.).

There is no genuine issue of fact as to Dr. Yates's alleged breach of Paragraph 31 of the Agreement. The deposition testimony of Dr. Yates, Ellitch and Clemente establishes that Dr. Yates did not "solicit, hire or engage, or attempt to hire or engage, or advise or recommend to any person that such other person solicit, hire or engage the employment" of Ellitch. Dr. Yates did nothing more than state that Ellitch was competent. This does not amount to advising or recommending her hiring. While Bosley suggests that Dr. Yates and Jones were discussing Ellitch in their meetings, Bosley has presented no evidence to support this speculation. Dr. Yates was clear in his deposition that he met with Jones about life insurance and never discussed Ellitch with Jones prior to the filing of this lawsuit.

Dr. Yates did not violate Paragraph 31 of the Agreement. Therefore, Dr. Yates and Ziering are entitled to dismissal of all Bosley's claims based on Paragraph 31 of the Agreement.

## III. Conclusion

Dr. Yates and Ziering's motions to dismiss the Verified Complaint are granted with prejudice. The status date of November 9, 2012 is stricken.

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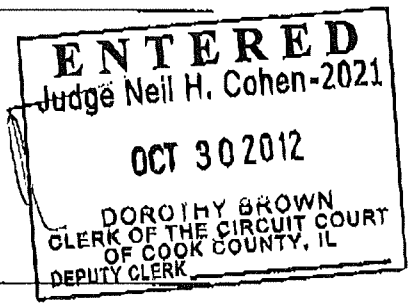


Judge Neil H. Cohen