STATE OF MICHIGAN

COURT OF APPEALS

VHC, P.C., Plaintiff-Appellant,	UNPUBLISHED June 16, 2011
v TAREK ELSHAARAWY, M.D., Defendant-Appellee.	No. 297625 Calhoun Circuit Court LC No. 2009-002852-CK

Before: MURRAY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116 (C)(10). We affirm.

I. FACTS AND PROCEEDINGS

This case revolves around the meaning of, and thus the applicability of, several sections of an employment agreement entered into between plaintiff and defendant. Specifically, on March 6, 2008, the parties executed a second employment agreement, the term of which was to "begin on July 01, 2008, and will continue for a period of one (1) year(s) or until terminated under the provisions of this Agreement."

Section 9 of the agreement was entitled "Termination." Section 9.1 provided, in pertinent part:

> Employment. The parties hereto understand and agree that the Physician is an "at will" employee and either party may cancel this Agreement upon ninety days notice to the other party. The parties hereto also understand and agree that the termination of the employment relationship will not extinguish any obligations created hereunder except the Physicians obligation to work for the PC and the PC's obligation to pay the Physician's salary and benefits. While this employment is at will, and no reason for termination is needed, the PC will terminate the employment upon the happening of any of the following at any time during the original term of this Agreement or any extension thereof.

The agreement then provided 11 examples of when plaintiff could terminate defendant's employment. Those examples included, for example, if defendant demonstrated unethical conduct, his professional license was revoked or suspended, he was no longer insurable, he was

convicted of a felony, he provided inadequate patient care, or as a result of his use of alcohol or controlled substances. At the end of section 9.1, the agreement provided:

> The PC agrees to notify Physician in writing of the basis for termination. If the Physician voluntarily terminates this Agreement or [sic] is terminated for any of the enumerated reasons, it will be the responsibility of the Physician to reimburse the PC any sums due any Hospital under a Hospital Recruiting Agreement and any Addendums thereto (the terms of said Agreement are/will be incorporated herein when signed). These provisions are deemed to survive the term or any extension of this Agreement. Physician hereby specifically acknowledges receipt and review of a proposed copy of the Hospital Recruiting Agreement, if one is in existence and agrees that any subsequent Agreement's terms will be incorporated herein.

> The agreement also provided:
> 9.1(a) Covenant not to Compete. Physician acknowledges that during the course of Physician's employment by PC, Physician will have acquired substantial knowledge of confidential and proprietary information together with the business plan and other secrets to the PC's business. Physician recognizes that this information is not readily available to the public, or any other physicians and therefore agrees that she [sic] will not use that information to compete with the PC.

> Therefore Physician hereby agrees that the following restrictions are reasonable for the protection of a legitimate business interest of the PC, that these restrictions are bargained for, that the[r]e are numerous other areas where the Physician may go to practice medicine in and out of the State of Michigan, and that PC may use these acknowledgements as an admission of Physician in any matter brought to enforce this covenant.

> (i) Restrictions. For twenty-four (24) months following the effective date of termination of employment, Physician will not directly or indirectly, render services of a professional nature to any person or firm for compensation, or otherwise engage in any business of the same or similar nature to that carried on by PC, within the counties of Calhoun, Kalamazoo, Van Buren, Branch, St. Joseph or Hillsdale.

The agreement then provided the remedy available to plaintiff if defendant refused to comply with the restrictions of the covenant not to compete, which consisted of an injunction or damages. At the end of section 9.1(a), the agreement provided that "[t]he obligations of Physician under this Section shall survive termination of this Agreement."

> Section 9 of the agreement further provided, in pertinent part:
> 9.1(b) Non-Solicitation Covenant. Physician agrees that after her [sic] employment terminates for any reason or in any manner, whether or not you practice within the restricted area as described above, you shall in no event knowingly (i) solicit for treatment to any former or existing patient (or member of

> any patient's household) of the practice corporation, (ii) induce or attempt to influence any employee or patient of the practice corporation to terminate his/her relationship with the practice corporation, (iii) induce or attempt to influence any hospital, any other health care facility, any physician or any other professional with a referring relationship with the practice corporation, or (iv) solicit any patient/service contractual arrangement of the practice corporation, all for a period of two (2) years immediately following the termination of your employment.
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> 9.5 Liquidated Damages. In the event that a court of competent jurisdiction fails [to] grant the PC's request for an injunction, or finds or determines that the covenant not to compete is unenforceable, for whatever reason [sic] Physician hereby agrees to pay to the PC the sum of $500,000.00 as liquidated damages. This sum will be due to the PC at the time the Physician commences practice in any of the restricted areas. The parties hereto understand and agree that the actual damages of the PC will be difficult to ascertain and therefore agree that this liquidated sum is the parties' value of the non-compete covenant. This provision will survive the term or terms of this Agreement.

The employment agreement expired on June 30, 2009. The record does not reflect that an extension of the agreement was executed. On July 10, 2009, plaintiff offered defendant a new employment agreement, but defendant declined to execute the agreement. Defendant left his employment with plaintiff on approximately July 15, 2009.

On August 31, 2009, defendant began employment with Battle Creek Health Systems, which is located in Calhoun County. Defendant's employment at Battle Creek Health Systems involved performing vascular services to patients. As a result, on September 1, 2009, plaintiff filed a four-count complaint which alleged that defendant violated the non-solicitation provision by soliciting plaintiff's patients and contacting plaintiff's referral physicians after defendant left his employment with plaintiff, and that defendant violated the non-compete provision by providing vascular surgeon services in Calhoun County.

Subsequently, each party moved for summary disposition, pursuant to MCR 2.116(C)(10). At the hearing on the motions, the trial court recognized that this case involves a matter of contract interpretation, and concluded that *Stahl v UP Digestive Disease Assoc, PC*, unpublished opinion per curiam of the Court of Appeals, issued March 24, 2009 (Docket No. 276882),[1] was a factually similar case involving a non-compete agreement containing the phrase

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[1] While unpublished opinions are not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), they may be viewed as persuasive. See *Steele v Dep't of Corrections,* 215 Mich App 710, 714 n 2; 546 NW2d 725 (1996).

"separates from employment service." The trial court noted that the phrase in *Stahl* was similar to that in this case, and so concluded that the clear and unambiguous terms of "the non-compete agreement would become effective only if [defendant] separated from employment," which could only occur during the term of the contract. And, because defendant "did not separate from his employment, rather his employment ended when the contract's term expired," the trial court held that "the language in the case at bar is essentially the same as that used in *Stahl*" and therefore granted defendant's motion for summary disposition.

II. ANALYSIS

Plaintiff argues that the trial court erred in determining that the expiration of the parties' employment agreement was not a form of termination that triggered the non-compete clause.

We review a trial court's ruling on a motion for summary disposition de novo. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568. Contract interpretation is a question of law, which we also review de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

As detailed in Section I of this opinion, the covenant not to compete provided that defendant could not compete with plaintiff for 24 months "following the effective date of termination of employment." Importantly, the covenant not to compete is contained in the termination section of the employment agreement, and those provisions relate to the termination of the agreement and defendant's employment occurring during the contract term. Moreover, because the parties contracted for defendant's employment to last only for a term of one year, at which time defendant's obligations and rights under the employment agreement would expire, it follows that the phrase "termination of employment" set forth in the covenant not to compete refers to defendant's employment being terminated during the term of the contract. Consequently, according to the plain and unambiguous language in the employment agreement, defendant would only be subject to the covenant not to compete if his employment was terminated by himself or by plaintiff during the contract term. *Id*. And, it is undisputed that defendant was not terminated during the contract term, as he instead simply left his employment with plaintiff after the contract with plaintiff expired. Accordingly, defendant was not subject to the terms of the covenant not to compete.[2]

We recognize that the termination section of the agreement provided that "[t]he parties hereto also understand and agree that the termination of the employment relationship will not extinguish any obligations created hereunder except the Physicians obligation to work for the PC

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[2] The parties recognized the difference between termination of employment or the agreement, and the term of the agreement ending, as the latter phrase was used in several sections of the agreement. It was not, however, utilized in addressing the covenant not to compete or non-solicitation agreement.

and the PC's obligation to pay the Physician's salary and benefits." However, as already stated, defendant's employment was not terminated. Thus, this provision does not affect defendant based on the circumstances of this case. It is equally true that at the end of the termination section, the agreement provided that "[t]hese provisions are deemed to survive the term or any extension of this Agreement." Based on the placement of the sentence, which was between two sentences referring to reimbursements to hospitals under the hospital recruiting agreement, we conclude that the sentence refers to reimbursements due hospitals under the hospital recruiting agreement and, thus, does not relate to the covenant not to compete.[3]

In addition,[4] plaintiff argues that the trial court erred when it applied the same standard to both the non-compete clause and the non-solicitation clause, because those two clauses are not identical and serve different purposes. However, it is important to note that the non-solicitation provision is—like the covenant not to compete—in the termination section of the employment agreement. Moreover, because the parties contracted for defendant's employment to last only for a term of one year, it follows that the phrases "employment terminates" and "termination of your employment," which are set forth in the non-solicitation provision, refer to defendant's employment being terminated during the term of the contract. Consequently, according to the plain and unambiguous language of the employment agreement, defendant would only be subject to the non-solicitation provision if his employment was terminated by himself or by plaintiff during the contract term, which did not occur. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664-665; 770 NW2d 902 (2009). Because the contractual language was plain and unambiguous, it reflected the intent of the parties and must be enforced as written. *Reicher,* 283 Mich App at 664. The trial court correctly determined that there was no genuine issue of material fact that defendant was entitled to judgment as a matter of law with regard to the covenant not to compete and the non-solicitation provision. *Coblentz*, 475 Mich at 567-568.

Finally, plaintiff argues that by finding that the non-compete clause was unenforceable, the trial court was required to enforce the liquidated damages clause. "The issue whether a liquidated damages provision is valid and enforceable is a matter of law that this Court reviews de novo." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 270; 715 NW2d 914 (2006). Importantly, "[a] contractual provision for liquidated damages is nothing more than an agreement by the parties fixing the amount of damages in the case of a breach of that contract." *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 294; 386 NW2d 177 (1986); see also *St Clair Med*, 270 Mich App at 270-271. Here, there was no breach of contract because the contract simply expired when its term ended.

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[3] Likewise, although at the end of covenant not to compete section the agreement provided that "[t]he obligations of Physician under this Section shall survive termination of this Agreement," since defendant's employment agreement was not terminated, this sentence does not result in the terms of the covenant not to compete applying to defendant.

[4] In making these arguments, both parties rely on unpublished decisions of this Court. These are non-binding decisions, and though at times they can be persuasive, we decline to apply them in this fact specific case.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens