Filed 12/28/07 Radiological Physics v. Hanford Community Hospital CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

RADIOLOGICAL PHYSICS, INC., Plaintiff and Appellant, v. HANFORD COMMUNITY HOSPITAL, INC. et al., Defendants and Respondents.	F051734 (Super. Ct. No. 05C0225) **OPINION**

APPEAL from a judgment of the Superior Court of Kings County. James LaPorte, Judge.

Ronald Talmo; Beatificato & Associates, Mary Helen Beatificato, for Plaintiff and Appellant.

Latham & Watkins, Susan S. Azad, Jennifer T. Barnett, and Gene Chang, for Defendants and Respondents.

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PROCEDURAL AND FACTUAL SUMMARIES

Appellant Radiological Physics, Inc. (RPI), a close corporation owned by Fook Kheong Chan, Ph.D., and his wife, entered into a contractual relationship with Hanford Community Hospital (HCH) between 1986 and 1987. HCH is a nonprofit organization

operating a 62-bed hospital in Hanford. Pursuant to the terms of the contract, RPI built and opened a radiation therapy center adjacent to HCH on land owned by HCH. Fred Manchur, who was then-president of HCH, entered into negotiations with Dr. Chan, who was acting on behalf of RPI, in an attempt to bring a radiation therapy center to Hanford. None existed at the time. A radiation therapy center provides a specific type of radiation treatment for cancer patients.

On December 4, 1986, RPI and HCH executed a written contract entitled "Ground Lease" (lease). The lease's term is 40 years, with a 10-year renewal option held by RPI. The lease states that HCH owned what is described as the "Medical Park Site" and that RPI desired to lease a portion of the property in order to construct a building. The lease required RPI to construct an "office building" to be used by "members of the organized medical staff of [HCH]." The building was to be designed, approved, and constructed by HCH as part of its plans for the medical park site it was developing. During the term of the lease, the building was to be used as a medical office building and occupancy was required to be by persons or entities with active medical staff membership in HCH. There is no mention in the lease of the type of medical services to be provided.

According to Dr. Chan, during the negotiation of the lease, and after its execution, he continued to be concerned about the possibility of HCH opening its own radiation therapy clinic in direct competition with RPI. As a result, a second agreement was negotiated and executed on March 27, 1987. Entitled "Radiation Therapy Services Agreement," (services agreement) the recitals of the document identify its purpose as enhancing and improving the radiation therapy services available to Hanford community members. The services agreement also refers to the lease and states HCH's desire to provide financial assistance for the construction of the building. According to the terms of the services agreement, in return for HCH's financial assistance, RPI was to use its best efforts to develop and expand its radiation therapy clinic. It was also to be available to participate in preferred provider plans, health maintenance organization plans, and

other similar types of plans at HCH's request "so long [as] such participation is consistent with the operation of the clinic and determined by [RPI] to be in its best interests." In addition, RPI was obligated to "cause its radiation therapy clinic to utilize [HCH] as the primary care hospital for the purpose of inpatient, outpatient or emergency hospital and medical care, any diagnostic or therapeutic procedure not offered at the radiation therapy practice, or examinations or treatment by physicians or practitioners specializing in a particular field or area of medicine or health care not practiced by [RPI]." This restriction was applicable only when the listed services were available at HCH, when the patient had not requested that another facility provide the services, and when it was consistent with "the exercise of sound medical judgment by the treating physician." The term of the services agreement was 36 months.

According to Dr. Chan, he was still not satisfied that RPI was protected by the services agreement from possible direct competition from HCH or Adventist Health Systems/West (Adventist West). Further negotiations occurred with Manchur and, on June 19, 1987, an addendum to the services agreement (addendum) was executed. The addendum states that, during the term of the lease:

> "(a.) [HCH], [its] heirs[,] representatives, successors, assignee, affiliated group, or any other entity in which the Hospital is a part of, … will not directly or indirectly enter into any agreement with any individual or individuals, group or groups, physician or physicians or entity for the purpose of participating in or owning a Radiation Therapy practice/service on Hospital owned or Hospital leased property within a radius of 25 miles from the Hospital's present location.
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> "(b.) 'HCH' will not allow any individual or individuals, group or groups, physician or physicians, or entity to operate any Radiation Therapy practice/service on Hospital owned or Hospital leased property within a radius of 25 miles from the Hospital's present location."

The addendum also restricts RPI and prohibits it from entering into any agreement with any entity to perform or participate in diagnostic radiology within 25 miles of HCH. The addendum provides for liquidated damages in an amount equal to the remaining

years on the lease multiplied by an average of the last three years' gross revenue billed by the physician operating the center established by RPI on the leased property. Currently there are two centers providing these services in the south valley, both 20 to 30 miles from HCH. At the time of the negotiations, there was only one operating in Visalia.

RPI's radiation therapy center was run by Vincent Cheng, M.D. Pursuant to the terms of the agreement with HCH, Dr. Cheng was a member of HCH's medical staff. RPI and Dr. Cheng had a fairly informal agreement. Although initially a written agreement, over the years the agreement became verbal and was based on Dr. Cheng's conclusion about what was a fair split of the profits as rent for the facility and compensation for services provided by Dr. Chan to the radiation therapy center. According to Dr. Cheng, the center paid the overhead expenses and rent on the HCH lease, and Drs. Cheng and Chan would share the remaining profits (a 40-to-50 percent split). The amount paid varied significantly over the years, ranging from $2,000 to $99,000.

In May 2005, the Sequoia Regional Cancer Center (SRCC) opened a Hanford campus on property owned by Adventist West and leased to an entity of which HCH owns 25 percent. HCH is owned by Adventist West. Adventist West is a nonprofit organization operating a number of regional medical centers across the western states. The two have overlapping legal boards of directors. Adventist West approves all major capital expenditures of HCH and its annual budget. HCH has a local governing board that does not have overlapping members, but the governing board's authority is limited.

SRCC effectively put RPI's radiation therapy center out of business. The facility closed in 2005. RPI filed an action in Kings County Superior Court seeking damages for breach of contract, tortious interference with a contract, and ultimately a number of other related causes of action, including fraud, unjust enrichment, and breach of the duty of good faith and fair dealing. RPI alleged that HCH and Adventist West violated the

noncompetition clause found in the addendum by allowing SRCC to be built on land it owned.

After the trial court sustained a demurrer to the fifth cause of action to the third amended complaint (unjust enrichment), with leave to amend, and overruled the demurrer with respect to all remaining causes of action to the third amended complaint, HCH and Adventist West filed a motion for summary judgment asserting that the noncompete and liquidated-damage provisions of the contract were unenforceable as a matter of law because the noncompete provision violated Business and Professions Code section 16660,[1] and the liquidated-damage provision was unenforceable as an illegal-penalty provision.

The trial court agreed and granted summary adjudication on the causes of action dependent upon the contract provision (the first, second, third, sixth, and seventh). The court also dismissed the fraud cause of action (fourth) because RPI could offer no evidence that HCH had a secret intent not to comply with the agreements. The only remaining cause of action (fifth, unjust enrichment) was dismissed because RPI had failed to amend its complaint after an earlier order sustaining a demurrer with leave to amend. Notice of entry of judgment was entered on September 27, 2006.

DISCUSSION

I. Noncompete clause

RPI argues that the trial court erred in granting the motion for summary judgment. It argues that the noncompete provision is enforceable because 1) it is part of a lease agreement; 2) it is only a partial restraint on trade; and 3) a hospital does not violate public policy by entering into exclusive contracts. There is no dispute over the terms of

[1]All further references are to the Business and Professions Code unless stated otherwise.

the agreements; the only dispute is with respect to the meaning and application of the noncompete provision in view of section 16600. Both are questions of law.

A. Standard of review

On appellate review of an order granting summary judgment, "we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action. [Citation.]" (*Wiener v. Southcoast Childcare Centers, Inc*. (2004) 32 Cal.4th 1138, 1142; see also, Code Civ. Proc., § 437c, subd. (c).) In reviewing a grant of summary judgment, we determine de novo whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law. (*Brantley v. Pisaro* (1996) 42 Cal.App.4th 1591, 1598.) In applying the same standards as those applied by the trial court, we must determine whether HCH has met its burden to disprove at least one essential element of each of RPI's causes of action or show that an element of each cause of action cannot be established. (*Sanchez v. Swinerton & Walberg Co*. (1996) 47 Cal.App.4th 1461, 1465.) In conducting our review, we are limited to the facts shown by the evidentiary materials submitted (i.e., declarations and deposition testimony), as well as those facts admitted or uncontested in the pleadings and moving and opposing papers. (*Sacks v. FSR Brokerage, Inc.* (1992) 7 Cal.App.4th 950, 962.) Where the papers and pleadings show there is no triable issue of material fact in the action (i.e., where the evidence demonstrates that the claims of the opposing party are entirely without merit on any legal theory), the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); see *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 35-36.)

In this case, whether HCH is entitled to summary judgment rests on the interpretation of a contract, which we review de novo. (*Paralift, Inc. v. Superior Court* (1993) 23 Cal.App.4th 748, 754; see also *Hulett v. Farmers Ins. Exchange* (1992) 10 Cal.App.4th 1051, 1058 [review requires reassessment of legal significance of documents upon which trial court relied].)

B. Section 16600

Section 16600 provides, "[e]xcept as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." The provision generally proscribes agreements to restrict a party's activity in the marketplace. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 328; *Scott v. Snelling and Snelling, Inc.* (1990) 732 F.Supp. 1034, 1040 [simple reading of statute demonstrates Cal. Leg. intended section 16600 to apply to any contract which contains covenant restraining competition].) There are two statutory exceptions to the general rule. Section 16601 permits trade restriction where there is a sale of stock or goodwill of a business, and section 16602 permits trade restriction when negotiating the dissolution of a partnership. (*Swenson v. File* (1970) 3 Cal.3d 389, 392; *Bosley Medical Group v. Abramson* (1984) 161 Cal.App.3d 284, 288.) There is also a recognized exception where a noncompetition agreement is necessary to protect trade secrets or confidential or proprietary information. (*Thompson v. Impaxx, Inc.* (2003) 113 Cal.App.4th 1425, 1429-1430.) None of these exceptions are relevant here.

There is currently a split of authority on whether California courts will interpret section 16600, 1) narrowly as a per se rule, rendering any restraint on business or trade automatically unenforceable unless it falls within one of the recognized exceptions, or 2) whether there is a reasonableness standard built into the statute leading to a balancing of interests. The conflict appears to arise from a disagreement over whether the California Legislature, in adopting section 16600, intended to codify the common-law rule, containing a reasonableness standard, or to reject it, eliminating the reasonableness standard. (See, e.g., *South Bay Radiology Medical Associates v. Asher* (1990) 220 Cal.App.3d 1074, 1080 [§ 16600 is codification of common-law rule]; *Webb v. West Side District Hospital* (1983) 144 Cal.App.3d 946, 951 [whether contract is illegal under § 16600 is determined not by precise standard but by balancing public policy against

rights of contracting parties], overruled on other grounds in *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 32, fn. 14; *KGB, Inc. v. Giannoulas* (1980) 104 Cal.App.3d 844, 848 [issue is reasonableness of restraint]; *Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, 69 [§ 16600 basically codification of common-law rule, noting Cal. decisions consistent only by applying balancing test under reasonableness standard]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 122-123 [statute allows reasonableness inquiry]; contra, *Hill Medical Corp. v. Wycoff* (2001) 86 Cal.App.4th 895, 901 [Cal. has rejected common-law rule of reasonableness]; *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 407 [noncompete provisions in contracts other than for sale of goodwill or dissolution of partnership are void, citing statutory exceptions]; *Bosley Medical Group v. Abramson, supra*, 161 Cal.App.3d at p. 289 [Cal. rejected reasonableness approach]; *Campbell v. Trustees of Leland Stanford Jr. Univ.* (9th Cir. 1987) 817 F.2d 499, 502-503 [even though Cal. rejected common-law rule that reasonable restraints of trade are generally unenforceable, reasonable restraints have been upheld].) The issue is currently pending before the California Supreme Court in *Edwards v. Arthur Andersen LLP* (2006) 142 Cal.App.4th 603, 619-620, review granted November 29, 2006, S147190.

Despite the split regarding whether a restraint on trade may in limited situations be permissible, courts have consistently held that section 16600 is an expression of a strong public policy of open competition and the right of California's citizens to pursue a trade or profession of their own choosing. (*Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 946; *Hill Medical Corp. v. Wycoff, supra,* 86 Cal.App.4th at pp. 900-901.) Even where courts applying California law have permitted a limited trade restraint under one theory or another, to be valid, the restraint must be limited in geographical scope and time and may not preclude an individual from pursing his or her business or profession. (*Webb v. West Side District Hospital, supra,* 144 Cal.App.3d 946 [valid restraint requiring hospital to pay when it employed physicians originally recruited by Webb, a former hospital employee]; *Boughton v. Socony Mobil Oil Co*. (1964) 231 Cal.App.2d 188 [valid

restraint on operating gas station on particular parcel of property leased from plaintiff]; *King v. Gerold* (1952) 109 Cal.App.2d 316 [valid restraint on manufacturing and selling patented trailer after license expired]; *General Commercial Packaging v. TPS Package* (9th Cir. 1997) 126 F.3d 1131 [valid restraint on conducting business with narrow segment of packing and crating market]; *Campbell v. Trustees of Leland Stanford Jr. Univ., supra,* 817 F.2d 499 [valid restraint on developing competing career counseling test].)

We need not resolve the split in authority because, under either standard, RPI does not prevail. Under the strict statutory interpretation standard, the addendum[2] would unquestionably be found illegal and the contract void. The noncompete provision is a restraint on trade that falls outside the recognized exceptions to section 16600. It is not a sale of goodwill or a dissolution of partnership, nor does it address the protection of trade secrets or proprietary information. Further, even if we were to agree that a reasonableness standard is implicit in section 16600, we would conclude that the noncompete provision is unreasonable as a matter of law in its scope and duration.

"The reasonableness of contracts which tend to restrain trade is measured by a number of factors, including the appropriateness of the restraint to advancing the interests to be protected; the availability of less harmful alternatives; the nature of the interest interfered with; the intent of the parties or the tendency of the restraint to create a

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[2]RPI argues that the addendum must be considered a part of the lease and services agreement. It contends that the three documents memorialize the complete agreement of the parties. We find nothing in the record to suggest that the trial court did not view all three documents as part of the agreement between RPI and HCH related to the radiation therapy center. In any event, we look to the substance of an agreement, rather than its form, when determining whether it operates as a restraint of trade. (See *Chamberlain v. Augustine* (1916) 172 Cal. 285, 288 ["the form in which [the restraint of a substantial character] is cast does not make it less a restraint"].) Consequently, we read the three agreements together in order to determine the operative effect of the noncompete provision.

monopoly; and the social or economic justification for any monopoly, if it does result." (*Webb v. West Side District Hospital, supra,* 144 Cal.App.3d 946, 953.) Applying these factors, we conclude that the right of the contracting parties to construct their own agreement is outweighed by California's strong public policy in favor of open competition. The express purpose of the addendum's provisions was to protect RPI from possible direct competition from HCH and/or Adventist West for a period of 50 years. This is a significant and unreasonable period of time. We have located no cases supporting a 50-year limitation.

The addendum limited not only HCH and/or Adventist West from opening a competing radiation therapy center, but prevented anyone else from opening a radiation center on land owned or leased by HCH and/or Adventist West within a 25-mile radius of RPI. This geographical scope embraced the entire Hanford community and, consequently, is an unreasonable limitation. In contrast, consider *Brown v. Kling* (1894) 101 Cal. 295 (contract not to engage in retail butcher business upon sale of business and goodwill within five-mile radius of city for three years) and *Boughton v. Socony Mobil Oil Co., supra,* 231 Cal.App.2d 188 (purchaser of land contractually barred from using parcel purchased as gasoline service station for 20 years; valid as narrowly drawn restraint on trade because limited time to property subject of the agreement and landowner not prevented from operating service station at another location).

Further, the undisputed testimony is that the 25-mile radius was adopted because RPI believed the community of Hanford could only support one center. Dr. Chan admitted that the purpose of the addendum was to prevent competition from HCH and/or Adventist West. This is monopolistic thinking; survival is based not on providing better services than a competitor, but on being the only game in town. (See *Rolley, Inc. v. Merle Norman Cosmetics* (1954) 129 Cal.App.2d 844 [preventing competition as business strategy is contrary to goal of competition which is to force businesses to "build a better mousetrap"]; see also *Monogram Industries, Inc. v. Sar Industries, Inc.* (1976) 64

Cal.App.3d 692, 697 [covenants designed simply to prevent competition are unenforceable].) RPI argues that the services agreement's provision, which limits the exclusivity agreement between HCH and RPI to the wishes of the patient and the judgment of the treating physician, dilutes the clear intention of the addendum to eliminate direct competition from HCH and/or Adventist West. We do not follow this argument. Limiting the exclusivity provision may render it more reasonable, but it does nothing to address the broad reach of the restraint-on-trade provision in the addendum. The addendum is not an exclusivity provision between RPI and HCH, but reaches to all others who might wish to build on land leased or owned by HCH. If the provision was limited to preventing HCH from renting to similar tenants in the medical office complex, this exclusivity provision might be relevant to the inquiry here and might present a closer question. As it stands, the addendum is much broader than an exclusivity services agreement between RPI and HCH.

Further, the addendum precludes HCH and/or Adventist West from pursuing an entire trade or profession, that of radiation therapy. RPI argues that the addendum is only a partial restraint on trade because HCH is a hospital offering a variety of medical services. However, the other activities of HCH are not the issue; the issue is whether the restraint precludes an entire trade or business. In contrast, consider the facts in *King v. Gerold, supra,* 109 Cal.App.2d 316 (Gerold not prohibited from manufacturing trailers but barred only from manufacturing single design and style of trailer invented by King who had licensed Gerold to use such design for a limited time) and *General Commercial Packaging v. TPS Package, supra,* 126 F.3d at pp. 1132-1134 (contract valid because it did not restrain TPS from doing business but only from soliciting or accepting business from particular clients of company for which it had subcontracted, and only for one year following termination of contract). Radiation therapy is unquestionably an entire trade or business—it is the only business RPI engages in. (See also *Scott v. Snelling and Snelling, Inc., supra,* 732 F.Supp. at pp. 1042-1043 ["while the California courts may, in some

circumstances apply a 'rule of reason' to only partial restrictions on competition, they have not recognized geographical and temporal restrictions on competition to be merely partial restrictions"].) Provisions that preclude an entire trade or business are unenforceable. (*Centeno v. Roseville Community Hospital, supra*, 107 Cal.App.3d at p. 69, fn. 2, citing *Overland Pub. Co. v. H. S. Crocker Co.* (1924) 193 Cal. 109, 112.)

RPI also argues that the addendum is an expressed restrictive covenant of the lease and that these restrictions have been upheld in the context of commercial leases, citing a number of cases, including *Edmond's of Fresno v. MacDonald Group, Ltd.* (1985) 171 Cal.App.3d 598, an opinion of this court. We agree that restrictive covenants running with the land have been enforced where limited in scope and duration. (See *Stockton Dry Goods Co. v. Girsh* (1951) 36 Cal.2d 677, 680 [prohibition does not invalidate express restrictive covenants as to use of retained premises incorporated in leases].) However, most of the cases cited involve restrictions on use of the land leased or land immediately adjacent to the land leased.

In *Edmonds*, the lease limited the number of jewelry stores permitted in a mall. (*Edmond's of Fresno v. MacDonald Group, Ltd., supra*, 171 Cal.App.3d at p. 601.) The lawsuit arose when the lessor expanded the existing mall and leased part of the expansion to another jewelry store, beyond the maximum allowed under the lease. (*Id.* at p. 602.) The issue presented in *Edmond's* was whether the restrictive covenant applied to the mall's expansion. The restriction was limited to land adjacent to or part of the property subject to the lease. In *Hildebrand v. Stonecrest Corp.* (1959) 174 Cal.App.2d 158, 164, the lessor promised not to permit the sale of drugs, medicines, or cosmetics in the supermarket adjacent to the leased property, but the supermarket began selling nonprescription drugs anyway. The court enforced the restrictive covenant. In *Kulawitz v. Pacific etc. Paper Co.* (1944) 25 Cal.2d 664, 667, the lease of a store located in a larger building in Oakland included a term promising that the landlord would not permit

any other space in the same building to operate as a furniture store. It ultimately leased to a carpet store. The court found a breach of contract.

In *Medico-Dental etc. Co. v. Horton & Converse* (1942) 21 Cal.2d 411, 419, the lease was drafted to prevent the landlord from leasing any other part of the building to any other person for use as a drug store or for the sale of drugs. The lessee's primary source of business was the doctors who were the building's other tenants. When a group of doctors decided to obtain a license so that the doctors could sell drugs to their own patients, the lessee sued to enforce the contract. The court upheld the contract's restrictive covenant. Last, in *Pappadatos v. Market Street Bldg. Corp*. (1933) 130 Cal.App. 62, 64-65, the lease prohibited the use of any other store in a large building in San Francisco for a candy business. Another store began selling fruit juices and this was determined to be an essential component of a candy store. The court found the lease's terms had been violated.

These cases support RPI's proposition that restrictive covenants are enforceable in California, but they do not support enforcement of its noncompete provision. First, none of these cases addressed whether the restrictions violated section 16600's prohibition against trade restraint. Second, in every one of the cited cases, the restraint in the lease was limited to use in adjacent space. The addendum does not, however, limit itself to the medical park site subject of the lease, but to *all* property owned or leased by HCH and/or Adventist West within 25 miles of the leased property. RPI has cited no authority to support its contention that a restrictive covenant this broad should be enforced under the restrictive-covenant exception it has identified.

Since the noncompete provision of the agreements between the parties is unenforceable as a matter of law, the causes of action that rest upon the contract fall. The trial court correctly granted summary adjudication with respect to the first, second, third, sixth, and seventh causes of action because each relies upon the existence of a valid contract and an enforceable noncompete provision. RPI does not challenge on appeal the

dismissal of the fifth cause of action for unjust enrichment, nor does it challenge the grant of summary adjudication on the fraud (fourth) cause of action. All causes of action having been defeated, the trial court properly entered judgment in favor of HCH and Adventist West.

Since we have concluded that the contract is void, we need not address RPI's argument regarding the liquidated-damage provision or its contention that HCH breached the contract's noncompete provision.

DISPOSITION

The judgment is affirmed. Costs are awarded to HCH and Adventist West.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Levy, J.