

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

Gilly Goose, LLC and Goose Creek Family
Dentistry, LLC,

Plaintiffs,

v.

Acuity Orthodontics, PC a/k/a Acuity
Dentistry and Orthodontics, and Acuity
Dental, PC a/k/a Acuity
Dentistry and Orthodontics,

Defendants.

) IN THE COURT OF COMMON PLEAS

) IN THE NINTH JUDICIAL CIRCUIT

) CASE NO.: 2017-CP-08-2505

MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

2018 MAR 19 PM 2:00

FILED

ORDER

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SC Court of Appeals

The matter came before the court on the Plaintiffs' Motion for a Preliminary Injunction.

gcn After hearing argument and reviewing written memoranda, the court grants the Motion for Preliminary Injunction in part, and denies it in part, as set forth herein. Plaintiffs moved for an Order to enjoin the Defendants from conducting general dentistry in the Shopping Center, from advertising that it performs general dentistry, and from any related activities or statements in which Acuity holds itself out to the public as performing anything other than dental specialties at the Goose Creek location. Based on the foregoing, the court is enjoining the Defendants from advertising that it performs general dentistry, or anything other than the dental specialties described herein, is enjoining the Defendants from holding itself out to the public, in any other way, that it provides anything other than dental specialties at the Goose Creek location. The

remaining relief sought is denied.

FACTUAL BACKGROUND

Plaintiffs own and operate a general and family dentistry practice. Defendants lease and operate a dental specialty practice in the same Shopping Center. In 2009, Dr. Ryan Gilreath became part owner with Dr. Marshall Miller in Goose Creek Family Dentistry, and by 2011 Dr. Gilreath took over all ownership of the dental practice and purchased Unit A in the Shopping Center from Dr. Miller.

Defendant Acuity Orthodontics leases a Unit in the Shopping Center. In April 2010, Dr. Miller, a member of 52 Properties, LLC, executed a Commercial Lease between 52 Properties, LLC and Acuity Orthodontics. Said Lease restricted use of the Unit to that of orthodontics generally. On or about February 10, 2016, the Acuity Lease was amended to allow Acuity to perform "dental specialties," which includes orthodontics in his Unit.

JM The Shopping Center and its Units are also subject to a Master Deed of Covenants and Restrictions. The original Master Deed restricted use of all Units to professional offices. On or about March 1, 2017, the Property Owners Association, which includes Plaintiff Gilly Goose, LLC, two other unit owners, and 52 Properties, LLC (owned in part by Dr. Miller and the landlord to Acuity) voted to amend the Master Deed to include additional use restrictions on the units in the Shopping Center. The Amendment further restricted the use of the Unit A to that of general and cosmetic dentistry, Unit B to that of an integrated medical office, and Unit C to law office, as long as the current owners and operators of those units remained the same. This amendment preserved the current professional uses in the Shopping Center – General Dentist, Chiropractor, and Lawyer. While it did not directly address the Acuity Unit, the amendment is not inconsistent with the use restrictions in the Amended Lease.

Plaintiff has alleged, thereafter, that Acuity began conducting and heavily advertising general dentistry services, in addition to certain dental specialties, at the Goose Creek location.¹ Plaintiffs presented multiple examples of Acuity's print, social media, video, and digital advertising, along with patient affidavits to support this allegation. Acuity advertises and conducts dental cleanings, cavity fillings, and other general-type dentistry services. In 2017, Acuity Orthodontics removed its Acuity Orthodontics sign, and then after demand to rehang the Orthodontics sign, it put up a second unapproved sign for Acuity Dentistry. Acuity's website includes a general dentist and Acuity submitted an Affidavit from a dentist working there who said he was a general dentist working at the Goose Creek location. According to the Affidavits of patients, Acuity conducts those general dentistry services at the Goose Creek office, but gives Goose Creek patients receipts that indicate the dentistry work was performed at the Summerville Acuity location, when it was not. Plaintiffs have submitted evidence that Goose Creek Family patients are confused and moving their dental care to Defendants.

In addition to the use restrictions, the Acuity Lease states that Acuity agreed to be subject to the covenants and restrictions in the Master Deed. Lease Paragraph 47 entitled Master Deed, Covenants and Restrictions expressly states that Tenant acknowledges that the premises is subject to a Master Deed, and that covenants, conditions or other restrictions of the Master Deed apply to the premises without any notice or consent of Tenant. And, the Master Deed states that Tenants are subject to the covenants and restrictions in the Master Deed: Master Deed Art. XVI, section 15 provides that "Tenants shall abide by the Association's rules and regulations and failure to do so shall result in the immediate eviction of the offending tenant or tenants. Art. XXIV, section 1 states that "[P]resent and future Co-Owners, Co-Owners, tenants of Co-Owners, employees of Co-

¹ Acuity claims it has at least three (3) locations in the Charleston area.

Owners and tenants, agents, servants or occupants, or any other person that may in any manner use the Property or any part thereof shall be subject to the Act and to this Master Deed and the By-laws." (Ex. A, p. 27, 38)

Plaintiffs have brought this action against Acuity for declaratory judgment, breach of the Lease and the Master Deed, and related fraud claims as a result of the operation of its business outside of the use restrictions in the lease and master deed, and seeks a preliminary injunction to enjoin Defendants from providing any other services besides that of the dental specialties at the Goose Creek location.

LEGAL ANALYSIS

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"An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). County of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. Scratch Golf Co., 361 S.C. at 121, 603 S.E.2d at 908; Peek v. Spartanburg Reg'l Healthcare Sys., 367 S.C. 450, 454-55, 626 S.E.2d 34, 36 (Ct.App.2005). "Before granting an injunction, the trial court should balance the equities: the court should look at the particular facts of each case and the equities of each party and determine which side, if any, is more entitled to equitable relief." Peek, 367 S.C. at 455, 626 S.E.2d at 36-37. The plaintiff is not required to prove an absolute legal right when seeking a preliminary injunction, but the plaintiff must present a reasonable question as to the existence of such a right. Id. at 456, 626 S.E.2d at 37.

PLAINTIFFS HAVE SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS

Both the terms of the Amended Lease and Master Deed are plain and unambiguous. "To discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC 374 S.C. 483, 498, 649 S.E.2d 494, 501 (Ct. App. 2007). It is the court's duty to enforce an unambiguous contract according to its terms "regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully". Ellis v. Taylor, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

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With respect to the covenants and restrictions in particular, in order to enforce a restrictive covenant, "a party must show that the restriction applies *to the property* either by the covenant's express language or by a plain and unmistakable implication." Buffington v. T.O.E. Enters., 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009). Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.' " Kinard v. Richardson, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct.App.2014). They are contractual in nature, so that "the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (1985). See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006), Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998).

It is undisputed that both the Amended Lease and the Master Deed apply to this Unit -- the property. Plaintiffs are not seeking to prevent Defendants from performing orthodontics or any

other "dental specialty." They are only seeking to stop Defendants from performing other general dental services outside of those specialties at the Goose Creek location.

Dental "specialty" is defined in S.C. Code. Ann. § 40-15-220 in the context of licensure requirements: "A special license shall be required for the practice of each special area of dentistry recognized by the American Dental Association, in order for a dentist to hold himself out to the public as limiting his practice to, being a specialist in, or giving special attention to any special area of dentistry." The American Dental Association has clearly defined and posts nine dental specialties: Dental Public Health, Endodontics, Oral and Maxillofacial Pathology, Oral and Maxillofacial Radiology, Oral and Maxillofacial Surgery, Orthodontics and Dentofacial Orthopedics, Pediatric Dentistry, Periodontics, and Prosthodontics

 (<http://www.ada.org/en/education-careers/careers-in-dentistry/dental-specialties/specialty-definitions>) (12/29/2017).² General dentistry is not listed as a "dental specialty."

Acuity's lease, as amended, provides the following provision:

Tenant shall use and occupy the premises for orthodontics practice and supporting office, dental assistant training facility and any clinical and administrative functions, or any other dental specialty that may include but not be limited to endodontics, oral surgery, pediatric dentistry, periodontics, etc. in compliance with all applicable laws.

2 General dentistry is defined as

the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent and associated structures and their impact on the human body; provided by a dentist, within the scope of his/her education, training and experience, in accordance with the ethics of the profession and applicable law.

(<http://www.ada.org/en/education-careers/careers-in-dentistry/general-dentistry>) (12/27/2017).

Lease Amendment, Para. 7. (See Ex. B to Complaint).

Plaintiff Goose Creek Family Dentistry, LLC asserts it can enforce the Acuity lease as a third-party beneficiary of the lease because the use restriction was intended to benefit Goose Creek Family Dentistry at the time it was made. The shared ownership of Dr. Miller in Goose Creek Family Dentistry prior to 2011 and the landlord 52 Properties, LLC, and the timing of the Acuity lease and use restrictions create a reasonable question and likelihood that Plaintiff is an intended beneficiary of the Lease. Alternatively, the Acuity Defendants are required by statute to comply with the commercial lease use restriction. S.C. Code Ann. § 27-35-75 provides that

(A) Unless otherwise agreed to in a commercial lease agreement or a security agreement, this section applies to all leases on commercial units located in South Carolina.

(B) A lessee must: . . .

(4) comply with the commercial lease agreement or security agreement.

Plaintiffs have met the requirement that they put forth evidence sufficient to support a "reasonable question" as to the merits of their claims.

IRREPARABLE HARM/BALANCE OF THE EQUITIES

The irreparable harm is that the Plaintiffs are losing the benefit of the use restriction specific for their benefit. Use restrictions in commercial leases and shopping centers are not uncommon, and in this instance, the terms of the lease, the lease amendment, and the master deed are plain and unambiguous. Furthermore, Plaintiffs have presented several Affidavits from patients illustrating that there is confusion of patients, and that Goose Creek Family Dentistry patients are having their general dentistry services done while at Acuity's dental specialty office. Plaintiffs have shown that they are at substantial risk of suffering irreparable harm, loss of customers, and related business revenues should the Defendants be allowed to continue disregarding what appears to be the plain language of their lease and the Master Deed governing

the Shopping Center.

When looking at the harm to the Defendants should the injunction be granted, the court does not consider Defendants' alleged loss of revenue from practice of general dentistry since the Defendants were on notice of the lease restriction, and are charged with notice of the Master Deed Amendment, prior to offering and advertising general dentistry services in the Shopping Center. See Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 S.E.2d 289 (2009). In Buffington, the Supreme Court affirmed the enforcement of restrictive covenants which prevented the owner of a Toyota dealership from using his own lot for commercial purposes because the lot was located within a residential subdivision subject to residential use restriction, even though it was also across the street from the dealership. Buffington v. T.O.E. Enterprises, 383 S.C. 388, 390-91, 680 S.E.2d 289, 290 (2009). The court concluded it would be inequitable to consider the dealership operators' financial loss in purchasing and improving their land because they were on notice of the subdivision's restriction prohibiting any use other than residential when they purchased it. Id. at 393, 680 S.E.2d at 291. The Buffington court further found that to ignore the restriction, in the absence of evidence to support lifting the restriction based on equitable doctrines, "would eliminate a homeowner's justified reliance on property restrictions." Id. at 393-94, 680 S.E.2d at 291-92.

In Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014), the Court of Appeals reversed the lower court's denial of permanent injunction in a case where the plaintiffs were seeking enforcement of restrictive covenants. Citing Buffington, in balancing the equities, the court too found that because the party being enjoined was on notice of the requirements for how to amend the restrictive covenants that weighed in favor of the injunction. The court also rejected a standing objection stating that no privity is required to enforce restrictive covenants that

run with the land. Restrictive covenants are enforceable "by and against later grantees." Id. at 262, 754 S.E. at 896.

Here, the same reasoning applies. Defendants should not be able to argue that they will suffer loss of revenue and business opportunity if they are enjoined from performing services which their lease and Master Deed appear plainly to prohibit. The balance of the equities favors the Plaintiff and supports the issuance of a preliminary injunction as to marketing or advertising activities. However, the court finds that the balance of the equities favors Acuity with regard to the request that the court enjoin the actual conduct of general dentistry at its Goose Creek location. The court is not willing to restrict the public's access to these services at this early stage. Those services may be conducted as to existing patients and to those walk-ins who seek those services.

NO ADEQUATE REMEDY AT LAW

A declaratory judgment claim to enforce restrictive covenants is an equitable claim, therefore there is no legal remedy available. While there may be legal remedies available to the Plaintiffs should they prevail on certain of the legal claims they have pled, none substitute for the declaration that the lease restriction and the Master Deed restriction are valid, not against public policy, and apply to the property at issue.

BOND

The court is directing the Plaintiff to post a \$5,000 bond with the clerk prior to this order taking effect. The court finds that this amount is sufficient to protect Acuity in the event the injunction is ultimately deemed improper. Acuity has four (4) locations for its various dentistry services in the Charleston area, and the owner of Acuity represented to the court that it had 2 chairs for general dentists at the Goose Creek location. And, this injunction does not enjoin Acuity from serving those who come to their door requesting general dentistry services. The modification of

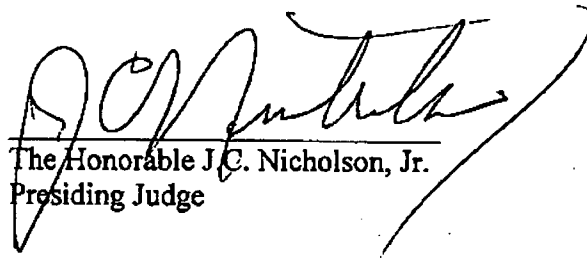
existing advertising and marketing materials to state clearly that only dental specialties are being performed at the Goose Creek location, and the implicit order to include that notice in future marketing communications should only require edits to marketing and advertising mediums, including but not limited to websites, social media, Facebook and Youtube sites or channels. Pre-existing paid print advertising, ie magazine or newspaper, does not have to be retroactively modified due to the risk of a high costs in doing so. The Order applies only to future print advertising.

CONCLUSION

Based on the above, the court GRANTS THE MOTION, IN PART, and ORDERS that the Defendants are enjoined from:

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- a. the marketing of dentistry services for the Goose Creek location outside of those listed in the lease agreement namely: "the tenant shall use and occupy the premises for an orthodontics practice and supporting office, a dental assistant training facility and clinical and administrative functions, or any other dental specialty that may include but not limited to endodontics, oral surgery, pediatric dentistry, periodontics, etc. in compliance with all applicable laws;" and
 - b. holding itself out to the public as providing any dental services other than what is contained in the lease at the Goose Creek location; and
 - c. Acuity is ordered to modify any and all marketing or advertising materials, including but not limited to social media; Facebook, and youtube channels, to conspicuously and in bold type, reflect that Acuity exclusively provides only those services contained in the lease at its Goose Creek location.

IT IS SO ORDERED.



The Honorable J.C. Nicholson, Jr.
Presiding Judge

March 13, 2018
Moncks Corner, South Carolina