

STATE OF SOUTH CAROLINA  
COUNTY OF CHESTER

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

Civil Action No.: 2019-CP-12-00308

Terry D. Sims.

Plaintiff,

**ORDER DENYING PRELIMINARY  
INJUNCTION**

v.

Carolina Primary Care Physicians, LLC d/b/a  
MUSC Health

Defendant.

**RECEIVED**  
SEP 09 2019  
SC Court of Appeals

This matter is before the Court on Defendant Carolina Primary Care Physicians, LLC d/b/a MUSC Health's Motions for Preliminary Injunction and Expedited Discovery. The parties provided memorandums of law setting forth their positions and oral arguments were heard on June 26, 2019. The parties consented to expedited discovery during oral arguments leaving the court to consider Defendant's Motion for Preliminary Injunction. This motion is DENIED.

**PROCEDURAL POSTURE**

Plaintiff filed an action on May 29, 2019 alleging defamation, breach of contract, and tortious interference with contractual relations against the Medical University of South Carolina. After conversations with Defendant's counsel, Plaintiff amended his complaint as a matter of course to reflect the appropriate defendant – Carolina Primary Care Physicians, LLC d/b/a MUSC Health. Defendant filed its Answer, Counterclaims, and Motion for Preliminary Injunction and Expedited Discovery on June 18, 2019.

**a) Defendant's Counterclaims**

Defendant's allegations in its counterclaims include:

- Plaintiff has solicited CPCP employees to leave CPCP to join him at SFM.
- Plaintiff is actively soliciting patients from CPCP. Plaintiff and/or his agents are actively contacting CPCP's patients and telling them that their appointment location has changed to the location of SFM.
- Plaintiff and/or his agents are using CPCP's Confidential Information and trade secrets, including but not limited to patient lists, patient contact information, patient schedules, and/or patient's electronic medical records to solicit the patients on his own behalf and on behalf of SFM.
- Plaintiff has contacted GiTi Tire to solicit referrals of its employees to SFM.
- Plaintiff intentionally interfered with CPCP's employment relationship with Joyce Wright and Pamela Rape by inducing, aiding, abetting, encouraging, or assisting Wright and/or Rape in breaching the terms of their employment with CPCP, including but not limited to their breach of their duties of loyalty to CPCP.
- Plaintiff has misappropriated CPCP's trade secrets, including but not limited to CPCP's confidential patient lists, patient appointment schedules, and patient contact information.
- By virtue of his conduct alleged herein, Sims is in violation of the implied covenant of good faith and fair dealing implicit in the Contract and Non-Solicitation and Non-Compete Agreement.
- Defendant is also requesting a declaration that the Non-Solicitation and Non-Compete Agreement is enforceable.

**b) Defendant's Motion for Injunction**

Defendant filed this motion to: (i) enjoin Plaintiff from engaging in advanced practice registered nursing within twenty (20) miles of 308 Chester Avenue in Great Falls, South Carolina, for a period of eighteen (18) months from the time he comes into compliance with the Contract; (ii) enjoin Plaintiff from soliciting any MUSC Health physician or non-physician to terminate their employment with MUSC Health for any employment or personal services arrangement other than with MUSC Health; (iii) enjoin Plaintiff from soliciting any patient to whom he provided clinical services on behalf of MUSC Health during the 18-month period immediately prior to May 1, 2019; (iv) enjoin Plaintiff from soliciting any referral source on whose behalf he provided clinical

services during the 18-month period immediately prior to May 1, 2019, for the purpose of providing clinical services; (v) enjoin Plaintiff and SFM from using any of MUSC Health's Confidential Information and trade secrets—including patients lists, contact information, and/or patient appointment schedules—for any purpose and enjoining him from disclosing Confidential Information and trade secrets to any other person or entity, except as required by law or professional ethics; (vi) require Plaintiff to identify and immediately return to CPCP the same Confidential Information and trade secrets; (vii) enjoin Plaintiff from taking any action that would interfere with, diminish, or impair the valuable relationships that MUSC Health has with referral sources, patients, hospitals, or health care providers.

### **FACTS**

Many of the facts before the Court are not in dispute.

### **The Parties**

The Medical University of South Carolina and its affiliated health system entities (collectively, "MUSC") employ physicians, advanced practice providers (e.g., nurse practitioners and physician assistants) and other medical professionals throughout the state of South Carolina. CPCP is the employer of the MUSC Health system community-based practices. In March of 2019, Community Health Systems, Inc. ("CHS") transferred substantially all of the assets of four regional hospital systems and their affiliated practices to MUSC. Among the assets acquired were those owned by Chester Medical Group, LLC, including Great Falls Family Medicine, a family practice clinic located at 308 Chester Avenue, Great Falls, South Carolina.

Sims is a nurse practitioner who was employed by Chester Medical Group, LLC and worked at Great Falls Family Medicine until it was acquired.<sup>1</sup> Sims was employed by Chester Medical Group pursuant to an Advanced Practice Provider Employment Agreement which contained restrictive covenants.

### **Contract and Restrictive Covenants**

On February 19, 2019, CPCP offered Sims employment at the facility then-known as Great Falls Family Medicine.<sup>2</sup> Sims' employment with CPCP was contingent on Sims executing a "Consent to Assignment and Amendment" ("the Contract"). The Contract assigned Sims' employment agreement with Chester Medical Group to CPCP and made several substantive modifications to that agreement. Sims signed and executed the Contract and each of the attached exhibits prior to, and as a condition of, beginning his employment with CPCP. Exhibit B of Sims' Contract with CPCP contained two separate restrictive covenants (the non-solicitation agreement and the non-competition agreement) similar to, but less restrictive than, the restrictive covenants in his employment agreement with Chester Medical Group.<sup>3</sup>

The non-competition agreement states in pertinent part:

I will not, directly or indirectly, on my own behalf or on behalf of any physician or clinical practice, hospital, health care provider or facility, or third party other than MUSC Health, and regardless of whether I am acting as a private practitioner, shareholder, director, officer, employee, consultant, agent, or contractor:

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<sup>1</sup> An "advanced practice registered nurse" is defined under South Carolina law as a registered nurse who is prepared for an advanced practice registered nursing role by virtue of additional knowledge and skills gained through an advanced formal education program of nursing in a specialty area that is approved by the Board of Nursing. S.C. Code Ann. § 44-33-20(5). A nurse practitioner is a subset within the professional license category of advanced practice registered nurse. *Id.*

<sup>2</sup> After the acquisition was complete, the name of the facility was changed to MUSC Health-Great Falls Primary Care.

<sup>3</sup> Sims' restrictive covenant agreement with CHS included a two year non-compete period without any buyout provision. Sims' agreement with CPCP included an eighteen-month non-compete period with a buyout provision.

- (i) Engage in advanced practice registered nursing within the “Restricted Area” (as such terms are defined below);

The “Restricted Area” is defined as “the geographic area within a twenty (20) mile radius of the MUSC Health facility/location where [Sims] provided the majority of [his] services . . . during the 18-month period immediately preceding Termination.” The Contract contains a provision automatically tolling the 18 month period for any time Sims is in breach of the Contract.

The non-solicitation agreement states in pertinent part that Sims will not:

- (iii) Solicit any patient to whom I provided clinical services on behalf of MUSC Health during the 18-month period Immediately prior to termination of my employment by MUSC Health, for the purpose of providing clinical services; however, it is understood that nothing in this agreement shall limit any patient’s rights to select a practitioner of their choosing, including the undersigned, to provide clinical services, or limit any patients ability to obtain their medical records from MUSC Health as provided for pursuant to applicable state law,

In addition, Sims agreed not to take or use Confidential Information. In exchange for his covenants in the Contract, Sims was offered employment with CPCP. As the parties acknowledged in the Agreement, Sims would not have received employment with CPCP but for agreeing to the restrictive covenants. The Contract specifically provides for injunctive relief in the event of breach of the restrictive covenants.

#### **Sims’ Resignation and Breach of Non-Competition Agreement**

On May 1, 2019, Sims resigned from CPCP. On May 2, 2019, Sims registered “Great Falls Family Medicine, LLC” with the South Carolina Secretary of State. Great Falls Family Medicine was the trade name used by CHS/Chester Medical Group at the facility where Sims worked when it was purchased by MUSC. The trade name was among the assets purchased by MUSC. Sims posted a sign on the front of a building at 503 Chester Avenue in Great Falls announcing that

“Great Falls Family Medicine, LLC” was opening at that location on Monday, May 13, 2019. On Monday, May 13, 2019, Sims amended the Articles of Organization filed with the South Carolina Secretary of State for “Great Falls Family Medicine, LLC” to change the name to “Sims Family Medicine, LLC” after CPCP contacted him regarding use of the trade name.

The parties agree that Sims began practicing advanced practice registered nursing at 503 Chester Avenue in Great Falls on May 13, 2019 under the name Sims Family Medicine, LLC (“SFM”). SFM is located within the “Restricted Territory.” In fact, it is two-tenths (2/10) of a mile from 308 Chester Avenue, where CPCP continues to operate the clinic where Plaintiff was previously employed. Shortly after opening his practice, two CPCP employees who had worked at Great Falls Family Medicine with Sims, Pamela Rape, a Licensed Practical Nurse, and Joyce Wright, a Medical Assistant, resigned from CPCP and began working for SFM.

The parties agree that approximately 400 patients have left CPCP for SFM. The parties dispute whether there has been solicitation of those patients and further dispute whether any confidential information has been taken or used. For his part, Sims denies ever soliciting any CPCP patients or that he is in possession of any trade secrets including patient lists, contact information, or appointment schedules.

## **STANDARD OF REVIEW**

### **I. Injunction**

Due to its drastic and extraordinary nature, courts should issue injunctions with caution and only where no adequate remedy exists at law. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). A plaintiff's entitlement to an injunction requires the complaint to allege facts sufficient to constitute a cause of action for an injunction while

establishing that an injunction is reasonably necessary to protect the legal rights of the plaintiff during the litigation. *Transcontinental Gas Pipe Line Corp. v. Porter*, 252 S.C. 478, 480-81, 167 S.E.2d 313, 315 (1969). *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 574 S.E.2d 228, 352 S.C. 408 (Ct.App. 2002) (citation in original).

Generally, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law. *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct.App.1986). *Id.* (citation in original). An injunction is a drastic equitable remedy courts may use in their discretion in order to prevent irreparable harm to a party. *Denman v. City of Columbia*, 387 S.C. 131, 140-41, 691 S.E.2d 465, 470 (2010). “[T]he sole purpose of a temporary injunction is to preserve the status quo....” *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). The decision to grant or deny temporary injunctive relief is within the sound discretion of the trial judge and will not be overturned absent an abuse of discretion. *City of Columbia v. Pic-A-Flick Video, Inc.*, 340 S.C. 278, 282, 531 S.E.2d 518, 520 (2000). *FOC Lawshe Ltd. Partnership v. International Paper Co.*, 574 S.E.2d 228, 352 S.C. 408 (Ct.App. 2002) (citation in original). An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 601, 553 S.E.2d 110, 121 (2001). *Id.* (citation in original).<sup>4</sup>

### LEGAL ANALYSIS

The Defendant is not entitled to injunctive relief in this matter. The Defendant cannot establish any of the elements necessary to obtain injunctive relief.<sup>5</sup>

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<sup>4</sup> Defendant filed a Motion for Expedited Discovery along with its Motion for Preliminary Injunction. Based on the parties' consent, Defendant's Motion for Expedited Discovery need not be addressed at this time.

<sup>5</sup> Plaintiff also raised a public policy issue with regard to Plaintiff's non-compete agreement which need not be addressed at this time.

Furthermore, the Defendant has not submitted any non-speculative evidence that Plaintiff actually solicited patients, employees, or took, or is in possession of, any trade secrets. The Plaintiff, in contrast, affirmatively testifies via his affidavit that he did not solicit patients or take, or is in possession of, any trade secrets. This is further evidenced by the numerous affidavits before the court from patients affirming that Plaintiff did not solicit their business and they actively were searching for Plaintiff and the affidavits of the two current employees Plaintiff hired. There is, therefore, a substantial factual dispute which warrants against this Court issuing such a drastic remedy as an injunction.

## **I. Injunction**

### **1. Defendant Cannot Demonstrate Irreparable Harm**

Defendant cannot demonstrate that it would suffer irreparable harm if the injunction were not granted. Whether "a wrong is irreparable, in the sense that equity may intervene, and whether there is an adequate remedy at law, are questions that are not decided by narrow and artificial rules." *Kirk v. Clark*, 191 S.C. 205, 211, 4 S.E.2d 13, 16 (1939). "Generally, pure economic loss is not sufficient to satisfy the requirement of showing an irreparable harm where an adequate remedy is available at law." *Professional Wiring Installers, Inc. v. Thomas Sims, III*, Opinion No. 2008-UP-173, 2008 WL 9840409, at \*3 (Ct. App. 2008) (citation in original); citing, *MailSource, LLC v. M.A. Bailey & Assocs.*, 356 S.C. 363, 368, 588 S.E.2d 635, 638 (Ct. App. 2003 (emphasis added)).

In its Motion for Preliminary Injunction, Defendant has simply alleged monetary damages and loss of goodwill. Defendant has failed to adequately to show that it would suffer irreparable harm absent an injunction. Roughly eighty-eight percent (88%) of Plaintiff's active patients have submitted affidavits stating they voluntarily sought out Plaintiff and were in fact not solicited.

Because Defendant has only alleged a monetary loss and an allegation of loss of goodwill which is a factual issue yet to be determined, Defendant's argument that it will suffer irreparable harm absent an injunction is without merit. *See, Profl Wiring Installers, Inc. v. Sims*, No. 2008-UP-173, 2008 WL 9840409, at \*3 (S.C. Ct. App. Mar. 12, 2008).

## **2. Defendant Arguably Does Not Have A Likelihood Of Success On The Merits**

As set forth above, to obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and an inadequate remedy at law. *Roach v. Combined Util. Comm'n*, 290 S.C. 437, 442, 351 S.E.2d 168, 170 (Ct.App.1986). It is the opinion of this Court that this factor cannot be weighed for the Defendant so as to warrant an injunction at this stage in litigation.

Defendant has alleged breach of contract, tortious interference, trade secret violation, breach of implied covenant of good faith and fair dealing, in addition to injunctive relief and request for a declaratory judgment.

### **A. Breach of Contract**

Generally, to establish a breach of contract, a party must show: (1) a binding contract entered into by the parties, (2) breach or unjustifiable failure to perform the contract, and (3) damages suffered by the plaintiff as a direct and proximate result of the breach. *Fuller v. Eastern Fire & Casualty Insurance Co.*, 240 S.C. 75, 123 S.E.2d 602, 610 (1962). "A party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third party." *V.E. Amick & Assocs., LLC v. Palmetto Envtl. Group, Inc.*, 394 S.C. 538, 546, 716 S.E.2d 295, 299, (Ct. App. 2011).

Here, Plaintiff stipulates that he entered into an employment contract with Defendant and that he left employment with Defendant. As a defense, Plaintiff argues that he left his employment

as a result of fraudulent inducement into his contract and the impossibility to engage in his job duties due to a hostile work environment. Plaintiff has made specific allegations regarding his contract with the defendant, which when developed and considered by the trier of fact, could be valid defenses and could arguably support his causes of action.

As such, the Court cannot weigh this factor in favor of the Defendant on the narrow issue of granting a preliminary injunction.

### **B. Trade Secrets Violation**

As to the alleged violation of the non-solicitation provision and SCTSA, the Court finds that Defendant has not made a *prima facie* showing that Sims has actually solicited any patients or taken any trade secret or confidential information. As such, Defendant has not shown irreparable harm, a likelihood of success on the merits, or the inadequacy of monetary relief as to these claims. Therefore, the Court finds that no injunction should be entered as to the solicitation of patients or violation of SCTSA.

### **3. Defendant Has An Adequate Remedy At Law**

This Court is also of the opinion that Defendant is not entitled to injunctive relief in this matter because it has an adequate remedy at law – its counterclaims against Plaintiff. As a general rule, injunctive relief is not available when an individual seeks money damages. *See MailSource, LLC v. M.A. Bailey & Associates*, 588 S.E.2d 635, 356 S.C. 363 (S.C.App. 2003) (In upholding the denial of the temporary restraining order, the Court of Appeals stated that the trial court's denial of the temporary restraining order was buttressed by the fact that the acquiring company sought, and should be able to prove, money damages resulting from any breach); *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 603 S.E.2d 905, 361 S.C. 117 (2004).

The Defendant in the present case is seeking a preliminary injunction to enjoin the Plaintiff from practicing medicine because it is allegedly causing them financial harm. Analyzing the present facts against the law set forth above, Defendant has an adequate remedy under the law to recoup any alleged monetary damages should it prevail in its counterclaims.

In addition to its monetary damages, Defendant alleges that Plaintiff's alleged breach and interference have resulted in a loss of goodwill and impaired the relationships between CPCP and its patients. Again, the Court is of the opinion that this allegation is not fully enough developed to warrant an injunction.

The numerous patient affidavits testify that they were seeking out Plaintiff after he terminated his employment with the Defendant. The patients' actions arguably do not undermine their relationship with CPCP and instead simply show that the Plaintiff is their preferred medical provider. As such, Defendant has an adequate remedy to obtain monetary damages in the event it is successful on its counterclaims.

In summary, Defendant has an adequate remedy at law, the pending counterclaims against Plaintiff. Defendant seeks money damages in its lawsuit which it may recover if it prevails. Thus, an injunction is not necessitated.

### **CONCLUSION**

THEREFORE, considering the drastic remedy of a preliminary injunction and the appearance of an adequate remedy at law as applied to the standard of review, Defendant's Motion for a Preliminary Injunction is DENIED. In acknowledgement of the consent of the parties, Defendant's Motion for Expedited Discovery is GRANTED.

**IT IS SO ORDERED.**

\_\_\_\_\_, 2019

\_\_\_\_\_, South Carolina

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The Honorable Brian M. Gibbons  
Circuit Court Judge, Sixth Judicial Circuit



Chester Common Pleas

**Case Caption:** Terry D. Sims VS Medical University Of South Carolina

**Case Number:** 2019CP1200308

**Type:** Order/Temporary Injunction

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge