

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)
)
Dr. Gregory A. May,)
)
)
Plaintiff,)
)
)
v.)
)
Advanced Cardiology Consultants, P.C.,)
Dr. Lew A. Rowe, and Theresa Rowe,)
)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT
Case No.: 2019-CP-21-00777

ORDER
RECEIVED
DEC 27 2019
SC Court of Appeals

This matter came before the Court on the Plaintiff's motion for a declaratory judgment that the restrictive covenant contained in his employment contract with the Defendant Advanced Cardiology Consultants, P.C. ("ACC") is over-broad and unenforceable. The Plaintiff also sought a declaration that the Defendants breached the contract between the parties and was thus unenforceable. The Defendants have also filed a Motion for Summary Judgment seeking dismissal of the entire matter based on their contention that the restrictive covenant is valid pursuant to South Carolina law and enforceable against the Plaintiff. A hearing was held on October 2, 2019. The record also contains the depositions of the parties as well as verified pleadings and affidavits. For the reasons stated herein, the Plaintiff's motion for a declaration that the covenant is unenforceable is granted. The Defendants' Motion for Summary Judgment is denied and the Plaintiff's motion with regards to the Defendants' alleged breach of contract is also denied.

The Plaintiff is a board-certified interventional cardiologist. He was employed by the Defendant ACC from 2007 until his resignation effective March 31, 2019. Upon his employment with the Defendants, he entered into an employment agreement which contained the restrictive covenant at issue in this litigation. The contract between the parties was renewed on several

occasions, most recently on March 30, 2018; and the terms of the restrictive covenant remained constant throughout the Plaintiff's employment with the Defendant.

The restrictive covenant reads as follows:

In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination.

Dr. Rowe, the sole owner of Advanced Cardiology Consultants and the founder and practice president, testified that his physician contracts had contained this exact restriction since his founding of the business in 1994. This is noteworthy because in the last five years both of the primary care hospitals which service the Florence market and which ACC provided services have purchased private cardiology practices. Both McLeod Regional Medical Center in Florence and Carolinas Hospital System (now MUSC) are now "engaged in the practice of cardiology." Dr. Rowe further testified that until approximately five years ago all of the cardiologists in Florence were engaged in private practice and not employees of the hospitals. At the current time, ACC is the only private cardiology practice in the Florence area.

Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer. *Rental Uniform Services of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983); see also *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutiques v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995). A restriction against competition must be narrowly drawn to protect the

legitimate interest of the employer. *Almers v. South Carolina National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

- (1) Necessary for the protection of the legitimate interest of the employer;
- (2) Reasonably limited in its operation with respect to time and place;
- (3) Not unduly harsh and oppressive in curtailing the legitimate efforts of the employee

to earn a livelihood;

- (4) Reasonable from the standpoint of sound public policy; and
- (5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

“If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved.” *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972). The court “cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally.” *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (“if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.”)

Dr. May is trained and practiced in the medical field for over 30 years. He is more than qualified to perform a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology. In this respect, the covenant not to compete cannot be upheld since it is not necessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals. Likewise, the restriction against competition is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.

The Defendants cite the case of *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013) as an example of South Carolina Appellate Courts upholding a similar covenant not to compete. This Court finds that the two covenants are clearly distinguishable. In *Baugh*, the sole prohibition was the physician continuing or commencing the active practice of medicine “in the field of cardiology”. The covenant at issue here involves a blanket prohibition for the physician becoming “employed by or associated in (with) ... another business entity, engaged in the practice of cardiology.” The restrictive covenant at issue here is similar to that found in *Faces Boutiques* which prohibited the employee from being connected “in any manner” with “any business in direct competition with the type of business conducted by [Faces].” *Faces Boutiques v. Gibbs*, 318 S.C. 39 - 41, 455 S.E.2d 707, 708 (S.C. App. 1995).

The Defendants also argue that Dr. May has essentially acquiesced in the Defendants’ interpretation of the covenant. The interpretation of the agreement is a legal matter and “[I]n South Carolina, [**325] the restrictions in a [**noncompete**] clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall on their own terms.”); *Stonhard*, 366 S.C. at 160, 621 S.E.2d at 354 (“The agreement fails to limit the covenant to a particular geographical area. To add and enforce such a term requires this [c]ourt to bind these parties to a term that does not reflect the parties’ original intention. Therefore, we hold that the covenant, despite any reformation, is void and unenforceable as a matter of public policy.”). *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 633, 799 S.E.2d 318, 324-325, 2017 S.C. App. LEXIS 25, *16, 2017 WL 798496.

NOW THEREFORE,

(1) The Court finds that the restrictive covenant between the parties is unenforceable; and

(2) The Court denies both the Plaintiff and Defendants' motions regarding breach of contract insofar as both of those motions involve disputed issues of material fact.

AND IT IS SO ORDERED.

MICHAEL G. NETTLES
CHIEF ADMINISTRATIVE JUDGE

_____, 2019
Florence, South Carolina



Florence Common Pleas

Case Caption: Gregory A May VS Advanced Cardiology Consultants , defendant,
et al
Case Number: 2019CP2100777
Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

Certificate of Electronic Notification

Recipients

Allan Holmes - Notification transmitted on 10-21-2019 12:54:31 PM.

Mark Buyck - Notification transmitted on 10-21-2019 12:54:31 PM.

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Official File Stamp: 10-21-2019 12:54:22 AM
Court: CIRCUIT COURT
Common Pleas
Florence
Case Caption: Gregory A May VS Advanced Cardiology
Consultants , defendant, et al
Document(s) Submitted: Order Denying Plaintiff and Defendants Motions
for Summary J Order/Summary Judgment
Filed by or on behalf of: Michael G. Nettles

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The following people were served electronically:

Rebecca Jane Wolfe for Advanced Cardiology
Consultants et al
Mark W. Buyck, III for Gregory A May
Allan R. Holmes, Sr. for Advanced Cardiology
Consultants et al

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means: