NUMBER 13-14-00437-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

WHARTON PHYSICIAN SERVICES, P.A., **Appellant,**

v.

SIGNATURE GULF COAST HOSPITAL, L.P., **Appellee.**

On appeal from the 23rd District Court of Wharton County, Texas.

MEMORANDUM OPINION

Before Justices Benavides, Perkes, and Longoria
Memorandum Opinion by Justice Benavides

By two issues, appellant Wharton Physician Services ("Wharton") appeals the denial of its motion for summary judgment. Wharton argues that the trial court erred by: (1) granting summary judgment to appellee Signature Gulf Coast Hospital ("Gulf Coast");

and (2) denying summary judgment to Wharton. We affirm.

I. BACKGROUND

Wharton entered into a contract with Gulf Coast to provide hospitalist services and to coordinate the hiring of individual physicians for Gulf Coast.[1] The term of the contract was for two years, but included a clause which stated that either party could terminate the contract for any reason prior to the end of the term with a sixty-day notice to the other party. The contract also included a non-compete clause between the parties that allowed Wharton to seek liquidated damages if Gulf Coast violated the non-compete clause.

Prior to the end of the contract's term, Gulf Coast decided to terminate the contract with Wharton and gave the requisite sixty-day notice. Once the contract terminated, Gulf Coast entered into another hospitalist services agreement with Inpatient Services of Texas ("Inpatient Services"). Within six months of the termination of the Wharton-Gulf Coast agreement, two physicians previously employed by Gulf Coast signed new contracts with Inpatient Services. After learning of this new employment arrangement, Wharton sent Gulf Coast a notice of the intent to collect liquidated damages related to the physicians' new contracts.[2] When Gulf Coast refused to pay the liquidated damages, Wharton filed suit against Gulf Coast alleging breach of contract.

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[1] A hospitalist is a "physician who specializes in treating hospitalized patients of other physicians in order to minimize the number of hospital visits by other physicians." WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2009). Wharton handled the hiring and contract negotiations with the hospitalist physicians for Gulf Coast.

[2] Initially, Wharton sent a notice of intention to collect liquidated damages relating to four physicians. However, that demand was modified to two physicians after further discovery.

Wharton then filed a traditional motion for summary judgment and Gulf Coast filed a cross-motion for summary judgment. In its traditional motion for summary judgment, Wharton alleges that Gulf Coast breached the contract between the two parties by not complying with the liquidated damages provision of the non-compete clause, that the non-compete clause was valid and unambiguous, and that Wharton complied with its obligations under the contract. Gulf Coast responded in its cross-motion for summary judgement that the non-compete clause was unenforceable as a matter of law because it was not supported by independent consideration, it was not ancillary to a legitimate business interest of Wharton, and, in the alternative, the agreement cannot bind third parties who are not signatories.

Wharton responded to Gulf Coast's cross-motion for summary judgment stating that the affirmative defenses Gulf Coast relied on were not pled in its original answer. Gulf Coast filed an emergency motion for leave to file a first amended answer alleging its affirmative defenses, which the trial court granted. On the same day that Gulf Coast's first amended answer was filed, the trial court granted Gulf Coast's cross-motion for summary judgment and denied Wharton's motion for summary judgment. This appeal followed.

II. MOTION FOR SUMMARY JUDGMENT

By two issues, Wharton alleges the trial court erred in granting Gulf Coast's cross-motion for summary judgment and denying Wharton's motion for summary judgment.

A. Standard of Review

We review summary judgments de novo. *Guevara v. Lackner*, 447 S.W.3d 566, 571 (Tex. App.—Corpus Christi 2014, no pet). In a traditional motion for summary

judgment, the movant has the burden to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX R. CIV. P. 166a(c); *Provident Life & Acc. Ins. Co. v Knott*, 128 S.W.3d 211, 216 (Tex. 2003). We take as true all evidence that is favorable to the respondent, and indulge every reasonable inference and resolve any doubts in favor of the non-movant. *Knott*, 128 S.W.3d at 215. Once the movant shows that it is entitled to summary judgment, the burden shifts to the respondent to produce evidence that raises a genuine issue of material fact so as to avoid summary judgment. TEX. R. CIV. P. 166a(c); *Guevara*, 447 S.W.3d at 571. To conclusively establish a matter, the movant must show that reasonable minds could not differ as to the conclusion to be drawn from the evidence. *Henry v. Masson*, 333 S.W.3d 825, 843 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

"When both sides move for summary judgment, as they did here, and the trial court grants one motion and denies the other, reviewing courts consider both sides' summary-judgment evidence, determine all questions presented, and render the judgment the trial court should have entered." *Lazer Spot, Inc. v. Hiring Partners, Inc.*, 387 S.W.3d 40, 45 (Tex. App.—Texarkana 2012, pet. denied) (quoting *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 124 (Tex. 2010)). In order to "be considered by the trial or reviewing court, summary judgment evidence must be presented in a form that would be admissible at trial." *Gallagher Healthcare Ins. Services v. Vogelsang*, 312 S.W.3d 640, 652 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

B. Applicable Law

Under the Texas Business and Commerce Code, "every contract, combination, or conspiracy in restraint of trade or commerce is unlawful." TEX. BUS. & COM. CODE ANN. § 15.05(a) (West, Westlaw through 2015 R.S.). However, the Covenants Not to Compete Act states in relevant part:

> Notwithstanding Section 15.05 of this code, and subject to any applicable provision of Subsection (b), a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

TEX. BUS. & COM. CODE ANN. § 15.50(a) (West, Westlaw through 2015 R.S). "Covenants that place limits on former employees' professional mobility or restrict their solicitation of the former employers' customers and employees are restraints on trade and governed by the Act." *Marsh USA v. Cook*, 354 S.W.3d 764, 768 (Tex. 2011). "Entering a noncompete is a matter of consent; it is a voluntary act for both parties." *Id*. However, the objective of a non-compete should not be to "restrain competition," which "is the basis for the requirement that the covenant be ancillary to a valid contract or transaction having a primary purpose that is unrelated to restraining competition between parties." *Id*. at 771.

C. Discussion

1. Non-Compete Clause was Unenforceable

In order to make a proper determination of whether the trial court erred in denying Wharton's motion for summary judgment, we must determine if the non-compete clause was enforceable. When "determining whether an enforceable covenant not to compete

has been created under section 15.50, [we ask]: (1) is there is an 'otherwise enforceable agreement' and (2) was the covenant not to compete 'ancillary to or part of' that agreement at the time the otherwise enforceable agreement was made." *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009). "The common meaning of those words control; the covenant not to compete must be ancillary to (supplementary) or part of (one of several units of which something is composed) an otherwise enforceable agreement." *Marsh*, 354 S.W.3d at 775. The "'otherwise enforceable agreement' requirement is satisfied when the covenant is 'part of an agreement that contained mutual non-illusory promises.'" *Id*. at 773 (quoting *Alex Sheshunoff Mgmt. Svcs, L.P. v. Johnson*, 209 S.W.3d 644, 648–49 (Tex. 2006)).

In order to determine if a covenant is "ancillary to or part of" an otherwise enforceable agreement, we must take a two-prong approach: "(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer's interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee's consideration or return promise in the otherwise enforceable agreement." *Light v. Centel Cellular Co. of Texas*, 883 S.W.2d 642, 647 (Tex. 1994). "Unless both elements of the test are satisfied, the covenant is a naked restraint of trade and unenforceable." *Mann*, 289 S.W.3d at 849.

The agreement also "must give rise to an 'interest worthy of protection' by a covenant not to compete." *Id*. (quoting *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 682 (Tex. 1990)). "Consideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus. . . ." *Marsh*, 354 S.W.3d at 775. The court also held that

a promise for a company to disclose confidential information to its employees and the reciprocal promise from the employee to not disclose such information would meet the requirement for consideration for a non-compete provision. *See id*. at 649. "An agreement not to compete, like any other contract, must be supported by consideration." *Id*. at 651. "The covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer." *Id*.

a. Consideration

Wharton submitted the contract between the parties as summary judgment evidence. The non-compete clause included in the contract stated:

> **Section VII.F.3(i):**
>
> If this Agreement is terminated by either party for any reason, then HOSPITAL [Gulf Coast] shall have the right to contract directly with all or some of the Hospitalist Physicians retained by GROUP [Wharton] to perform the services required by the terms of this Agreement to enable HOSPITAL to continue the Hospitalist Program in a manner consistent with how it is being operated at the time the Agreement is terminated. In the event that HOSPITAL, or any individual or entity otherwise affiliated with HOSPITAL, for work or services that would be provided at HOSPITAL, desires to contract directly with one of more of the Hospitalist Physicians previously recruited, retained, and presented to HOSPITAL by GROUP for hospitalist services at any time during the six (6) months period following the termination of this Agreement, HOSPITAL shall pay to GROUP as liquidated damages an amount of $100,000 per physician.

We find that the contract itself was an enforceable agreement. However, Wharton must raise a fact issue showing the non-compete clause was "ancillary to or part of" that otherwise enforceable agreement and it must be based on additional consideration. *See Light*, 883 S.W.2d at 647. Based on the summary judgment evidence presented by both sides, we hold that there was no additional consideration given outside of the main contract for hospitalist services. Wharton and Gulf Coast had

entered into a contract for services to be provided by Wharton with a $375,000.00 flat fee paid by Gulf Coast to Wharton and a monthly fee of $31,250.00 for the first year and $315,000 flat fee and a monthly fee of $26,250.00 for the second year. The contract, submitted as evidence, does not show that non-compete clause provided Gulf Coast with any new consideration by Wharton aside from the fees paid for their services. Wharton agreed under the contract to provide services to Gulf Coast, and hence, provides no additional consideration to Gulf Coast required for the non-compete clause. Stated another way, Gulf Coast promised to pay Wharton for services and Wharton promised to perform those services; however, none of those obligations amounted to additional consideration for Gulf Coast's promise not to hire any physicians if the contract between Wharton and Gulf Coast was terminated. There must be additional consideration given by Wharton in order for the non-compete clause to be enforceable and it was not shown in the evidence before the trial court that any additional consideration was given.

b. Interest Worthy of Protection

Additionally, the non-compete clause can be "ancillary or part of an otherwise enforceable agreement" designed to protect an interest worthy of protection. *See Marsh*, 354 S.W.3d at 775. When "an effort is made to keep material important to a particular business from competitors, trade secret protection is warranted." *Vogelsang*, 312 S.W.3d at 652. A "covenant not to compete [can be] enforceable not only to protect trade secrets but also to protect proprietary and confidential information." *Id*.

Wharton alleges in its brief that the business interests that were protected by the non-compete clause were "confidential and propriety information implemented by the hospitalist physicians utilized by Wharton to fulfill its obligation to Gulf Coast under the

Agreement." Wharton states this "confidential and proprietary information includes strategic and operational information of Wharton, as well as Wharton's protocols, standards, policies, and procedures associated with implementing, operating, managing, and supervising the in-patient hospitalist services program instituted by Wharton at Gulf Coast Hospital." While "proprietary and confidential information" can be protected by a non-compete clause, based on the summary judgment evidence submitted by Wharton, we conclude that Wharton failed to create a genuine issue of material fact showing that the non-compete provision would keep this information protected. *See Marsh*, 354 S.W.3d at 772. Wharton does not show through its summary judgment evidence that this information "could not readily be identified by someone outside its employ, that such knowledge carried some competitive advantage," or that outside of the six-month period required under the non-compete clause, the information could not be shared with a competing corporation. *Vogelsang,* 312 S.W.3d at 653 (quoting *Wackenhut*, 793 S.W.2d at 684). Additionally, the non-compete clause was not accompanied by any provision requesting non-disclosure of this "confidential and proprietary information." *See Mann*, 289 S.W.3d at 844. Wharton did not conclusively establish how the non-compete clause would protect this information and such fails their burden on summary judgment.

c. Limitation of Competition

We construe the non-compete clause in this contract as a way to limit competition to Wharton from another company providing similar services. "Where the object of both parties in making such a contract 'is merely to restrain competition, and enhance or maintain prices,' there is no primary and lawful purpose of the relationship 'to justify or

excuse the restrain.'" *Marsh*, 354 S.W.3d at 770 (quoting *United States v. Addyston Pipe & Steel Co.,* 85 F. 271, 282–83 (6th Cir. 1898)) (internal cites omitted). "This is the basis for the requirement that the covenant be ancillary to a valid contract or transaction having a primary purpose that is unrelated to restraining competition between parties." *Id*. Although there is a restriction related to time, there is no reasonable restrictions as to geographical area or the scope of activity to be restrained, and the restrictions impose a greater restraint than is necessary to protect the goodwill or other business interest of Wharton. *See* TEX. BUS. & COM. CODE ANN. § 15.50(a). To enforce this non-compete clause would be an "unreasonable and unjust restraint of trade." *See id*. We agree with Gulf Coast that this non-compete clause is unenforceable as written as a matter of law.

2. Non-Compete Clause Cannot Bind Third Parties

Even assuming arguendo that the non-compete clause was enforceable as written, we conclude there was no breach on the part of Gulf Coast because the provision cannot bind a non-signatory third party as an "affiliated" party. As part of its argument regarding summary judgment, Wharton argues that Inpatient Services should be considered an "affiliated" entity of Gulf Coast. Gulf Coast counters stating that a third-party non-signatory cannot be considered to be "affiliated." The phrase at issue in this non-compete provision is "affiliated." Wharton argues that the term "affiliated" as used in the provision "contemplated the inclusion of entities contracted to Gulf Coast and entities owned and/or under the control of Gulf Coast." Gulf Coast argues Wharton's interpretation contradicts the definitions intended by the parties.

"In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself." *Italian Cowboy Partners, Ltd., v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 333 (Tex. 2011). "In identifying such intent, 'we must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.'" *Id*. (quoting *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003)). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." *Id*. (quoting *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). "'[I]f the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent.'" *Id*. (quoting *Davidson*, 128 S.W.3d at 229). "'Only where a contract is ambiguous may a court consider the parties' interpretation and admit extraneous evidence to determine the true meaning of the instrument.'" *Id*. at 333–34 (quoting *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450–51 (Tex. 2008)).

Texas case law holds that when "'affiliate' is not defined in the contract or in the report, its ordinary meaning is [to be] used." *Eckland Consultants, Inc. v. Ryder, Stilwell Inc.*, 176 S.W.3d 80, 88 (Tex. App.—Houston 1st Dist. 2004, no pet). "Affiliate" is defined as a "corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation." BLACK'S LAW DICTIONARY (10th ed. 2014). "Affiliated" is also defined more broadly as "closely associated with another typically in a dependent or subordinate position." WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2009).

The definition of "affiliated" in the contract is not ambiguous. It clearly means an "affiliated" company is a subsidiary component. Inpatient Services is not a subsidiary component of Gulf Coast and does not have any relation to Gulf Coast whatsoever, other than through the contract executed for services. We decline to interpret the non-compete clause as applying to any other corporation that signs a contract for services with Gulf Coast. Even if the non-compete clause was found to be "ancillary or part of an otherwise enforceable agreement," the liquidated damages provision would not have been triggered by the hiring of a third-party who was not a signatory to the agreement.

3. Summary

In order for Wharton to have prevailed on its claims raised in its traditional motion for summary judgment, it must have established as a matter of law that there was a (1) valid contract, (2) it was enforceable, and (3) there was a breach. *See Guevara*, 447 S.W.3d at 571 ("A motion for summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on these grounds alone."). Based on the evidence presented by the parties, we conclude that there was a valid contract between the parties, but that the non-compete clause was unenforceable as a matter of law due to the lack of consideration or information necessary to protect. Even if the provision was enforceable, Wharton's motion for summary judgment nevertheless fails because a fact issue was not raised by the evidence showing that Inpatient Services was an "affiliated" entity of Gulf Coast. Therefore, we find that there was no breach by Gulf Coast of the contract with Wharton. The trial court did not err by granting Gulf Coast's cross-motion for summary judgment and denying Wharton's motion for summary judgment. We overrule Wharton's two issues.

III. CONCLUSION

We affirm the judgment of the trial court.

GINA M. BENAVIDES,
Justice

Delivered and filed the
14th day of January, 2016.