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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

MONARCH HEALTHCARE, Plaintiff and Respondent, v. J. MARGO JAFFE ORR et al., Defendants and Appellants.	G050463 (Super. Ct. No. 30-2014-00714510) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Geoffrey T. Glass, Judge. Order granting preliminary injunction. Reversed. Order denying motion to compel arbitration. Affirmed.

Theodora Oringher and Anthony F. Witteman for Defendants and Appellants.

Dorsey & Whitney, John Baker and Lynnda A. McGlinn for Plaintiff and Respondent.

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INTRODUCTION

In this case, we address whether the trial court erred by granting a preliminary injunction to enforce a nonsolicitation clause and enjoining defendants and appellants J. Margo Jaffe Orr, M.D. (Dr. Orr), and J. Margo Jaffe Orr, M.D., Inc. (Orr Inc.), from soliciting the patients of plaintiff and respondent Monarch Healthcare (Monarch). The nonsolicitation clause was, along with a covenant not to compete, part of an agreement by which Dr. Orr sold the assets of her medical practice, including its goodwill, to Monarch.

Covenants not to compete and nonsolicitation clauses, though generally unenforceable under Business and Professions Code section 16600 (section 16600), may be enforced under Business and Professions Code section 16601 (section 16601) when made as part of a transaction for the sale of a business and the parties clearly indicated they valued goodwill as a component of the sales price. Although Dr. Orr sold the goodwill of her medical practice to Monarch, the asset purchase agreement expressly states that 100 percent of the purchase price of $34,725.43 was allocated to furniture, fixtures, equipment, and supplies. The parties allocated zero percent of the price to goodwill. Under well-established authority, because the parties did not value goodwill as a component of the sales price, the nonsolicitation clause is not enforceable. (*Hill Medical Corp. v. Wycoff* (2001) 86 Cal.App.4th 895, 901 (*Hill Medical*).) We therefore reverse the order granting a preliminary injunction.

Dr. Orr and Orr Inc. also challenge the trial court's order denying their motion to compel arbitration. We affirm that order. Dr. Orr sought to enforce an arbitration clause in an employment agreement with Monarch. The causes of action asserted in Monarch's complaint did not arise out of the employment agreement but out of the agreement by which the assets of Dr. Orr's medical practice were sold to Monarch.

FACTS

Dr. Orr is a physician. In late 2009, she looked for a buyer for her medical practice. Dr. Michael Weiss, who at the time was the medical director of Monarch, approached Dr. Orr about Monarch purchasing her medical practice, including a building and the practice itself.

Negotiations between Dr. Orr and Monarch ensued. An appraisal of the building came in at $1.7 million. An appraisal of the medical practice was not conducted. Monarch apparently told Dr. Orr that her medical practice had no monetary or goodwill value. In a letter to Monarch, dated January 20, 2010, Dr. Orr wrote, "I cannot feel comfortable with the concept that my business/practice has no value . . . [t]hus, I plan to continue as a solo independent physician in my current capacity."

Monarch and Dr. Orr continued negotiating. They reached an agreement by which Dr. Orr and Orr Inc. would sell the building and medical practice to Monarch and Dr. Orr would become Monarch's employee. The agreement was set forth in five written agreements: (1) medical practice asset purchase agreement dated April 9, 2010 (the Asset Purchase Agreement); (2) real property purchase agreement dated May 5, 2010 (the Real Property Purchase Agreement); (3) employment agreement dated May 1, 2010 (the Employment Agreement); (4) lease assignment and indemnity agreement dated April 22, 2010 (the Lease Assignment); and (5) sublease assignment and indemnity agreement dated April 22, 2010 (the Sublease Assignment).

The Real Property Purchase Agreement provided for the sale of Dr. Orr's medical building[1] to Monarch for a price of $1.7 million. Dr. Orr netted $200,000 from the sale of the building. The leases and subleases in the medical building were transferred to Monarch by the Lease Assignment and the Sublease Assignment.

[1] The seller of the building was J. Margo Jaffe Orr, Trustee of the J. Margo Jaffe Orr Living Trust established August 23, 2009.

Dr. Orr's medical practice was sold to Monarch through the Asset Purchase Agreement for a price of $34,725.43. The seller was identified as Orr Inc., and the buyer was identified as Monarch. The Asset Purchase Agreement states the assets being sold include "[a]ll of the goodwill of 'The Medical Practice'" and allocates 100 percent of the purchase price to "[f]urniture, fixtures, equipment and supplies."

Section 15 of the Asset Purchase Agreement is a covenant not to compete and nonsolicitation clause. Section 15(a) states: "a) SELLER agrees and covenants that during either the three (3) year period subsequent to the Closing Date or the three (3) year period subsequent to Dr. J. Margo Jaffe Orr ceasing to provide professional services on behalf of the BUYER, which ever [*sic*] is later, that Dr. J. Margo Jaffe Orr, will not perform professional services similar to those performed in conjunction with 'The Medical Practice' within a ten (10) mile radius of 29873 Santa Margarita Parkway in Rancho Santa Margarita, California 92688."

Section 15(b) of the Asset Purchase Agreement states: "b) SELLER agrees and covenants that subsequent to the Closing hereof, it/she will not for itself/herself or on behalf of any other parties (excepting BUYER), solicit any patients or former patients of 'The Medical Practice.'"

Following the sale of the medical practice, Dr. Orr dissolved Orr Inc. and worked for Monarch pursuant to the Employment Agreement. By letter dated March 19, 2013, Dr. Orr provided notice to Monarch of her termination of the Employment Agreement, effective June 21, 2013. The March 19 letter stated she planned to continue practicing internal medicine in the Orange County area. In a letter to Monarch, dated June 18, 2013, Dr. Orr announced her intent to take a three-month sabbatical, after which she planned to return to practicing medicine "in another capacity." Dr. Orr wrote that she had transferred her patients "to other physicians, the majority to Shaparak Kamarei, MD." Dr. Orr informed her patients by a form letter that their medical care would be handled by Dr. Kamarei.

In early 2014, Dr. Orr opened a new medial office at 27725 Santa Margarita Parkway in Mission Viejo. She reactivated Orr Inc. Dr. Orr's new medical practice was to be a smaller, "concierge-type practice" directed to patients who pay cash and have "PPO and Medicare plans." In contrast, her practice with Monarch had been based substantially on "receiving a capitated payment pursuant to Monarch contracted managed care plans with payors." Dr. Orr's new medical office is less than three miles from the location of her practice at Monarch. From March 20 through 26, 2014, Dr. Kamarei received 21 requests from Dr. Orr's medical office to transfer patient files.

PROCEEDINGS IN THE TRIAL COURT

In April 2014, Monarch filed a complaint against Dr. Orr and Orr Inc., asserting causes of action for breach of contract, interference with contract, unfair business practices, misappropriation of trade secrets, declaratory relief, and injunctive relief. Five days later, Monarch applied ex parte for a temporary restraining order and/or an order to show cause (OSC) regarding a preliminary injunction. Monarch sought to enjoin Dr. Orr and Orr Inc. from soliciting any of the patients identified in exhibit A to the Asset Purchase Agreement and from "providing professional internal medicine services within a ten mile radius of 29873 Santa Margarita Parkway, Rancho Santa Margarita." The trial court denied a temporary restraining order but set the matter for a hearing on an OSC regarding a preliminary injunction.

Dr. Orr and Orr Inc. filed opposition to the OSC. Monarch filed reply papers, which included several new declarations.

The trial court heard the OSC regarding a preliminary injunction and took the matter under submission. Three days later, the court issued a minute order granting the preliminary injunction in part and enjoining Dr. Orr and Orr Inc. from soliciting patients identified in the Asset Purchase Agreement. The court denied the preliminary

injunction insofar as it sought to enjoin Dr. Orr and Orr Inc. from engaging in the new medical practice.[2] A formal order was not issued.

Dr. Orr and Orr Inc. filed a motion to compel arbitration of the litigation based on an arbitration provision in the Employment Agreement. Monarch filed opposition. The trial court denied the motion to compel arbitration. The court reasoned that the "gravamen" of the claims alleged by Monarch in its complaint arose out of the Asset Purchase Agreement, which expressly provides that disputes are to be resolved in the courts of Orange County, California. Dr. Orr and Orr Inc. timely filed a notice of appeal from the order granting a preliminary injunction and from the order denying the motion to compel arbitration.

DISCUSSION

I.

Order Granting Preliminary Injunction

A. *Standard of Review*

"In deciding whether to issue a preliminary injunction, a trial court weighs two interrelated factors: the likelihood the moving party ultimately will prevail on the merits, and the relative interim harm to the parties from the issuance or nonissuance of the injunction." (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999.) "'Generally, the ruling on an application for a preliminary injunction rests in the sound discretion of the trial court. The exercise of that discretion will not be disturbed on appeal absent a showing that it has been abused. [Citations.]'" (*Ibid.*) Denial of a preliminary injunction will be upheld on appeal if the trial court did not abuse its discretion with respect to either the question of success on the merits or the question of irreparable harm. (*Cohen v. Board of Supervisors* (1985) 40 Cal.3d 277, 286-287.)

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[2] The covenant not to compete and nonsolicitation clause of the Asset Purchase Agreement will expire in June 2016, three years after Dr. Orr terminated her employment with Monarch.

"'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citation.] [¶] 'The abuse of discretion standard . . . measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria.'" (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1089.) The scope of the trial court's discretion is limited by law governing the subject of the action taken, and an action that transgresses the bounds of the applicable legal principles is deemed an abuse of discretion. (*Ibid.*) In applying the abuse of discretion standard, we determine whether the trial court's factual findings are supported by substantial evidence and independently review its legal conclusions. (*County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, 1230.)

B. *The Law Establishing the Scope of the Trial Court's Discretion*

Section 16600 prohibits covenants not to compete. It states: "Except 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." (*Ibid.*) "[T]his provision [is] an expression of public policy to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice." (*Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 859.)

Section 16601[3] creates one of the narrow exceptions to section 16600. (*Hill Medical, supra*, 86 Cal.App.4th at p. 901.) "Pursuant to section 16601, in certain defined

[3] The first paragraph of section 16601 reads: "Any person who sells the goodwill of a business, or any owner of a business entity selling or otherwise disposing of all of his or her ownership interest in the business entity, or any owner of a business entity that sells (a) all or substantially all of its operating assets together with the goodwill of the business entity, (b) all or substantially all of the operating assets of a division or a subsidiary of the business entity together with the goodwill of that division or subsidiary, or (c) all of the ownership interest of any subsidiary, may agree with the buyer to refrain from carrying on a similar business within a specified geographic area in which the business so sold, or

circumstances, persons who sell the goodwill of a business may agree to refrain from carrying on a similar business. Section 16601 reflects that when the goodwill of a business is sold, it would be '"unfair" for the seller to engage in competition which diminishes the value of the asset he [or she] sold.'" (*Id.* at pp. 901-902.) "The exception [of section 16601] is limited: '[I]n order to uphold a covenant not to compete pursuant to section 16601, the contract for sale of the corporate shares may not circumvent California's deeply rooted public policy favoring open competition. *The transaction must clearly establish that it falls within this limited exception*.' [Citation.]" (*Fillpoint, LLC v. Maas* (2012) 208 Cal.App.4th 1170, 1178, quoting *Hill Medical, supra,* at p. 903.)

To fall within the exception of section 16601, "there must be a clear indication that in the sales transaction, the parties valued or considered goodwill as a component of the sales price, and thus the . . . purchasers were entitled to protect themselves from 'competition from the seller which competition would have the effect of reducing the value of the property right that was acquired.'" (*Hill Medical, supra,* 86 Cal.App.4th at p. 903.)

C. *The Nonsolicitation Clause Was Unenforceable.*

To determine whether the parties valued the goodwill of Dr. Orr's medical practice or considered goodwill as a component of the purchase price, we look to the language of the Asset Purchase Agreement. "When a contract is reduced to writing, the parties' intention is determined from the writing alone, if possible." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.) "'The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.'" (*Id.* at p. 956.) Extrinsic evidence is admissible to prove a meaning to which a contract is reasonably

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that of the business entity, division, or subsidiary has been carried on, so long as the buyer, or any person deriving title to the goodwill or ownership interest from the buyer, carries on a like business therein."

susceptible. (*Id.* at p. 955.) "When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract." (*Ibid.*)

The Asset Purchase Agreement does include the goodwill of Dr. Orr's medical practice as an asset being sold to Monarch. However, the Asset Purchase Agreement allocates no part of the purchase price of $34,725.43 to that goodwill. The Asset Purchase Agreement expressly states: "The purchase price for the above Assets shall be allocated, as agreed upon by the parties, as follows: [¶] a) Furniture, fixtures, equipment and supplies *(100%)*." (Italics added.) The language of the Asset Purchase Agreement is clear and explicit: All of the consideration was allocated to "[f]urniture, fixtures, equipment and supplies," and none of the consideration was allocated to goodwill.

Exhibit B to the Asset Purchase Agreement is a valuation of the medical supplies, medical equipment, computer equipment, and furnishings/fixtures of Dr. Orr's medical practice. Exhibit B comes up with a total cost for each category, which is then multiplied by a percentage valuation. The valuations are 100 percent for medical supplies, 50 percent each for medical equipment and computer equipment, and 60 percent for furnishings/fixtures. The total cost times the respective percentages of valuation equals $34,725.43. Exhibit B establishes unequivocally that the parties arrived at the purchase price of $34,725.43 based only on the value of the medical supplies, medical equipment, computer equipment, and furnishings/fixtures of Dr. Orr's medical practice.

Thus, there was no clear indication the parties valued the goodwill as part of the sales price of the Asset Purchase Agreement. The parties expressly recited in the Asset Purchase Agreement that the entire purchase price was for furniture, fixtures, equipment, and supplies and, therefore, the parties did not "value[] or consider[] goodwill as a component of the sales price." (*Hill Medical*, *supra*, 86 Cal.App.4th at p. 903.) A covenant not to compete and nonsolicitation provision were neither necessary nor

enforceable to protect the value of the goodwill because the parties agreed the goodwill had no value.

Monarch argues that, when a covenant not to compete is part of an agreement to sell a business, an inference arises that the business has a goodwill that is being sold. (See *NewLife Sciences, LLC v. Weinstock* (2011) 197 Cal.App.4th 676, 688 [“‘Where a covenant not to compete is executed as an adjunct of a sale of a business there is an inference that the business had a “goodwill” and that it was transferred.’”].) The issue here is not whether goodwill was among the assets being sold to Monarch. The issue is the *value* placed on that goodwill. Monarch also argues a court does not inquire into the adequacy of the consideration paid for the goodwill. The Asset Purchase Agreement plainly allocated no consideration for goodwill.

In support of the request for a preliminary injunction, Monarch argued the Asset Purchase Agreement must be construed with the Real Property Purchase Agreement and the Employment Agreement as components of a single transaction. Monarch does not make this argument on appeal and instead asserts the parties entered into “a variety of agreements . . . in connection with Appellants’ sale of the Medical Practice.” In *Fillpoint, LLC v. Maas, supra,* 208 Cal.App.4th at pages 1178-1180, a panel of this court concluded a stock purchase agreement and an employment agreement had to be construed together as a single transaction to determine whether covenants not to compete in those agreements were enforceable.

Our conclusion here would be the same if we read the Asset Purchase Agreement, the Real Property Purchase Agreement, and the Employment Agreement together. The $1.7 million consideration in the Real Property Purchase Agreement was entirely for the building, which had been appraised precisely at that amount. Under the Employment Agreement, Orr was to receive a base annual salary of $165,000, a bonus of up to $25,000 each year, as well as benefits, as compensation for *services* she would provide pursuant to the agreement. None of the compensation paid Dr. Orr under the

Employment Agreement was in consideration of the goodwill of her medical practice sold to Monarch. The sale of the assets of Dr. Orr's medical practice was the subject of the Asset Purchase Agreement only, and it placed no value on goodwill.

Under the Employment Agreement, Dr. Orr was to receive a $100,000 signing bonus after 30 days of employment. According to Monarch, Dr. Orr admitted this signing bonus was, in effect, compensation for goodwill it was offered to her after she objected that Monarch had no value on the goodwill of her medical practice. In her declaration submitted in opposition to the OSC regarding a preliminary injunction, Dr. Orr stated she wrote to Dr. Weiss to decline Monarch's offer because it placed no value on the goodwill of her medical practice. Negotiations continued, and Monarch eventually agreed to increase "the amount of compensation for my agreement to become its employee." Dr. Orr did not state in her declaration the increase in employment compensation was offered as consideration for the assets of her medical practice. She declared that throughout the negotiations, "Monarch never increased its offer for my practice, and never moved off its position that there was no 'good will' value to the practice."

Because Monarch paid no consideration for the goodwill of Dr. Orr's medical practice, the covenant not to compete and nonsolicitation clause of the Asset Purchase Agreement do not fall within the limited exception of section 16601 and are not enforceable. Under the prevailing legal standards, which fix the limits of the trial court's discretion, Monarch likely cannot prevail on the merits of its claims based on enforcing the covenant not to compete and nonsolicitation clause of the Asset Purchase Agreement. The trial court therefore erred by granting the preliminary injunction.

II.

Order Denying Motion to Compel Arbitration

Dr. Orr and Orr Inc. also challenge the trial court's order denying their motion to compel arbitration. We review an order denying a motion to compel

arbitration under the substantial evidence standard unless the trial court considered no extrinsic evidence, in which case we review the order de novo. (*Lane v. Francis Capital Management LLC* (2014) 224 Cal.App.4th 676, 683.)

Dr. Orr and Orr Inc.'s motion to compel arbitration was based on article VIII of the Employment Agreement, which states, "[a]ny controversy, dispute or claim arising out of, in connection with, or related to the interpretation, performance or breach of this Agreement, or otherwise arising out of EMPLOYEE's employment or employment separation, shall be resolved by final and binding arbitration." In contrast, section 16 of the Asset Purchase Agreement provides that "the Courts of Orange County, California shall have jurisdiction and venue over any disputes." When, as in this case, there is no dispute concerning the language of the arbitration clause, the appellate court reviews de novo the applicability of that clause. (*Hong v. CJ CGV America Holdings, Inc.* (2013) 222 Cal.App.4th 240, 248.)

The claims asserted in Monarch's complaint do not arise out of the Employment Agreement. All of Monarch's causes of action—breach of contract, interference with contract, unfair business practices, and misappropriation of trade secrets—were based on Dr. Orr's alleged breaches of the covenant not to compete and the nonsolicitation clause of the Asset Purchase Agreement. Monarch did not allege Dr. Orr breached the Employment Agreement, and her alleged misconduct occurred several months after the Employment Agreement had been terminated.

Dr. Orr and Orr Inc. argue that by attaching the Employment Agreement to the complaint and characterizing it as one of the purchase documents, Monarch "made the Employment Agreement central to its case." In the complaint, Monarch alleged the existence of all five contracts made in connection with the sale of Dr. Orr's medical practice and attached the Asset Purchase Agreement and the Employment Agreement as exhibits. Monarch's complaint refers to the Asset Purchase Agreement as "*the* Agreement" (italics added) and alleged Dr. Orr and Orr Inc. breached section 15 of "the

Agreement" by opening a competing medical practice and soliciting Monarch patients. The complaint does not allege Dr. Orr breached the Employment Agreement.

Dr. Orr and Orr Inc. argue Monarch has taken inconsistent positions leading to a judicial estoppel barring it from opposing arbitration. In seeking a preliminary injunction, Monarch argued (1) the $100,000 signing bonus supplied the consideration for Monarch's purchase of the goodwill of Dr. Orr's medical practice and (2) the Employment Agreement and the Asset Purchase Agreement must be considered together as part of one transaction. Those arguments, Dr. Orr and Orr Inc. contend, are inconsistent with the position, taken by Monarch in opposing arbitration, that the claims alleged in the complaint arise out of the Asset Purchase Agreement, not out of the Employment Agreement.

Judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or an earlier proceeding. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 235.) To invoke judicial estoppel, it must be shown the party was successful in asserting the first position—that is, the trial court adopted the position or accepted it as true. (*Ibid.*) Here, the record does not show that the trial court accepted the argument the $100,000 signing bonus served as consideration for the covenant not to compete and nonsolicitation clause. In fact, at the hearing on the OSC regarding a preliminary injunction, the court expressed its belief that the amount of consideration paid for the goodwill did not matter. As to consideration for the goodwill, the court stated: "I don't care if it is a dollar. . . . [¶] . . . I don't care if it is a million seven [or] $35,000."

"Because arbitration is a contractual matter, a party that has not agreed to arbitrate a controversy cannot be compelled to do so." (*Sparks v. Vista Del Mar Child & Family Services* (2012) 207 Cal.App.4th 1511, 1518.) The parties here did not agree to arbitrate the claims asserted in Monarch's complaint but intended they be litigated in court in Orange County.

DISPOSITION

The order granting Monarch's request for a preliminary injunction is reversed. The order denying Dr. Orr and Orr Inc.'s motion to compel arbitration is affirmed. In the interest of justice, all parties shall bear their own costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.