CITATION: Dentalcorp Health Services v. Poorsina, 2023 ONSC 3531
COURT FILE NO.: CV-22-691615
DATE: 20230615

ONTARIO SUPERIOR COURT OF JUSTICE

BETWEEN: DENTALCORP HEALTH SERVICES LTD., DENTALCORP HOLDINGS LTD., LARRY PODOLSKY and DR. LARRY PODOLSKY DENISTRY PROFESSIONAL CORPORATION, Plaintiffs

AND:

ARSALAN POORSINA, POORSINA DENISTRY PROFESSIONAL CORPORATION, POORSINA, A. DENISTRY PROFESSIONAL CORPORATION and POORSINA, DR. A. DENISTRY PROFESSIONAL CORPORATION, Defendants

BEFORE: Justice A.P. Ramsay

COUNSEL: *Paul Fruitman and Aly Haji,* for the Plaintiffs

Robert S. Choi and Hayden Trbizan, for the Defendants

HEARD: February 14 and March 13, 2023

ENDORSEMENT

A. Overview

[1] In June 2016, the plaintiffs purchased five dental clinics located in Ontario from a professional dental corporation controlled by the defendant, Dr. Arsalan Poorsina. As part of the sale transaction, Dr. Poorsina and the corporation entered into a non-competition and non-solicitation agreement, amended from time to time, the last being h a termination agreement which included the restrictions. Less than a year before the termination agreement was to end, the plaintiffs discovered that Dr. Poorsina had opened two dental clinics.

B. Nature of the Motion

[2] The plaintiffs seek an interim, interlocutory and permanent injunction restraining the defendants from continuing to operate the two dental clinics located at Square One Mall in Mississauga and Union Station in Toronto for two years from the date of any order or, in the alternative, until April 26, 2023, on the basis of alleged breach of a non-competition clause. They further seek an order restraining Dr. Poorsina from practicing dentistry at these clinics on the same basis.

C. The Parties

[3] The plaintiff, Dentalcorp Health Services Ltd. ("Dentalcorp"), is a corporation incorporated pursuant to the laws of British Columbia. Dentalcorp carries on business as a network of dental practices located throughout Canada and provides resources, support and technology to clinics in Canada.

[4] The plaintiff, Dentalcorp Holdings Ltd., is a corporation incorporated pursuant to the laws of British Columbia. Dentalcorp Holdings is a publicly traded company. Dentalcorp is a fully owned subsidiary of Dentalcorp Holdings.

[5] The plaintiff, Larry Podolsky ("Dr. Podolsky"), is a dentist who is licensed to practice dentistry in the province of Ontario. He practices out of the Dr. Larry Podolsky Dentistry Professional Corporation ("Podolsky DPC").

[6] The defendant, Dr. Poorsina, is a dentist licensed to practice dentistry in the province of Ontario.

[7] The defendant, Poorsina DPC is a corporation incorporated pursuant to the laws of Ontario and provides dental services to individuals.

[8] The defendants, Poorsina A. Dentistry Professional Corporation ("Poorsina A. DPC") and Poorsina, Dr. A. Dentistry Professional Corporation (collectively, "the competing clinics") are both dentistry professional corporations. Dr. Poorsina is alleged to provide dental professional services at the two competing dental clinics.

D. Background

[9] On June 28, 2016, Dentalcorp as purchaser, and Poorsina DPC, as vendor, entered into an Asset Purchase Agreement whereby Dentalcorp purchased five dental clinics. Dr. Poorsina agreed to guarantee the obligations of the professional corporation. Dr. Poorsina sold five dental practices to Dentalcorp for $11.35 million. Dr. Poorsina received 17,152 Class A shares and 17,152 Class C shares as part of the transaction. Approximately $3,238,500 of the purchase price went towards purchasing the professional goodwill to operate the clinics. As part of the agreement, Dr. Poorsina agreed to provide services to Dentalcorp through 2023.

[10] The agreement provided that Dr. Poorsina would not compete with Dentalcorp for three years after the termination of the agreement. The non-competition covenants prohibited Dr. Poorsina from practicing within 10 kilometers of the clinics that he sold and from owning a competing business in Ontario. As part of the transaction, Poorsina DPC and Dr. Poorsina agreed to continue to provide professional dental services and health care services, as defined under the agreement, in conjunction with others as an independent contractor. The agreement was formalized on June 29, 2016, when Poorsina DPC, Dr. Poorsina and Dentalcorp signed the first Service Agreement.

[11] On July 29, 2016, Dentalcorp, Poorsina DPC and Dr. Poorsina entered into an asset purchase agreement whereby Dentalcorp purchased all issued and outstanding shares in relation to a clinic located at 5000 Yonge Street, Toronto (the "Rouah Clinic"). On or about November 1, 2016, the same parties entered into another share purchase agreement whereby Dentalcorp purchased all issued and outstanding shares of another practice located at 4450 Highway 7 in Woodbridge. Dr. Poorsina also agreed to provide services to the clinic by signing an acknowledgement. There are other amending agreements which are not relevant to this motion.

[12] In May 2020, Dr. Poorsina advised Dentalcorp he wanted to withdraw from the agreement. The parties negotiated for over a year.

[13] On April 26, 2021, Dr. Poorsina and Poorsina DPC, and Dentalcorp and its affiliates, entered into a Termination and Transition Agreement (the "Termination Agreement). Dr. Poorsina was represented by counsel. The parties agreed to terminate Dr. Poorsina's Services Agreement and any amendments and agreed to a 26-month early termination and a reduced period of time that the non-competition clause would apply. The restrictive covenant, which applies to this case, stipulated that Poorsina DPC was prohibiting from, *inter alia*,

a) Acquiring, managing or consolidating any Competitive Business, defined to include without limitation: the practice of dentistry, dental hygiene, denture therapy or any specialty of the practice of dentistry, and from advising, investing in, lending money to, guaranteeing the debts or obligations of, or otherwise having any other financial interest in any person that carries on a Competitive Business in Ontario ("Ownership Covenant"); and providing

b) Professional Services or Health Care Services (as defined in the Termination Agreement, and including services those common to the practice of dentistry) to (A) any person anywhere within a 10 kilometer radius of any Dental Endeavour clinic, or (B) any patient/client of the Dental Endeavour, except as may be required by law or without consent ("Practice Covenant").

[14] Dr. Poorsina is alleged to have signed a lease in 2021 and 2022. In May of 2022, the plaintiffs learned of the two clinics being operated. In house counsel for the plaintiffs sent a notice letter, dated May 19, 2022, to Dr. Poorsina reminding him of the non-competition agreement which remained in force for a period of two years after the termination of their partnership and giving him a deadline to comply. The defendants did not comply with the plaintiffs' demand.

E. Analysis

[15] The test for interim injunction, is articulated in *RJR-Macdonald Inc. v Canada (AG)*, [1994] 1 S.C.R. 311 at p. 334. The moving party must establish that:

i. there is a serious issue to be tried, or there is a strong *prima facie* case;
ii. the moving party will suffer irreparable harm if the injunction is not granted; and
iii. the balance of convenience favours granting the injunction

i. *There is a strong prima facie case*

[16] On the evidence before me, the plaintiffs have a strong *prima facie* case that Dr. Poorsina breached the non-competition covenant. If the restrictive covenants are enforceable, there is a strong likelihood that the plaintiffs will ultimately be successful in proving their case. Dr. Poorsina suggests that the restrictive covenants are unreasonable and, consequently, unenforceable, but does not deny that the defendants breached them. The plaintiffs argue that he admitted his breach on cross-examination. Certainly, the defendants acknowledge the breaches in their factum by stating that Dr. Poorsina detrimentally relied on Dentalcorp's inaction assuming, "(D)entalcorp's overall complacency with respect to such breaches" and "the observation that other dentists had breached restrictive covenants with no consequence".

[17] The plaintiffs argue that the restrictive covenants are enforceable and reasonable, and as the restrictive covenants are in connection with the purchase and sale of a business, the onus is on the defendants to show that the covenants are unreasonable. I agree with the plaintiffs that the non-competition agreement with respect to practicing dentistry only prevents Dr. Poorsina from practicing dentistry within a 10 km radius of the clinics which were the subject of the sale, and only for a period of time, which was re-negotiated to be two years following the Termination Agreement entered into in April 2021. The Asset Purchase Agreement and subsequent amendments, Service Agreements, standalone non-competition and non-solicitation Agreements were negotiated by sophisticated individuals, at times, represented by counsel.

[18] As for the restrictive covenant relating to acquisition or interest in any competing clinics within Ontario, similar restrictions have been held to be enforceable in the context of the sale of a business or technology. In *Martinrea International Inc. v. Canadian Hydrogen Energy Company Co*. (2005), 9 B.L.R. (4th) 11 (C.A.), the Ontario Court of Appeal upheld a five year worldwide restrictive covenant given the nature of the technology involved and to protect the purchaser's proprietary interest. The goodwill of a business, which has been purchased, is a legitimate proprietary interest, which will entitle a party to the contract to enforce a restrictive covenant: *Tank Lining Corp. v. Dunlop Industrial Ltd*. (1982), 40 O.R. (2d) 219 (C.A.).

[19] In *Shafron v. KRG Insurance Brokers (Western) Inc*., 2009 SCC 6, [2009] 1 S.C.R. 157, the Supreme Court observed, at para. 21 that a sale of a business involves a sale of goodwill, which can only be protected by a restrictive covenant. In *Elsey, et al. v. J.G. Collins Insurance Agencies Ltd.*, [1978] 2 S.C.R. 916, the Supreme Court underscored the rationale for such restrictions, observing, at para. 15 that:

> A person seeking to sell his business might find himself with an unsaleable commodity if denied the right to ensure the purchases that he, the vendor, would not later enter into competition.

[20] In *Guay inc. c. Payette*, 2013 SCC 45, [2013] 3 SCR 95, at para. 45, the Supreme Court sets out the key questions to be asked by the court in assessing whether a restrictive covenant was made in the context of a sale or an employment relationship. The Court states:

> To determine whether a restrictive covenant is linked to a contract for the sale of assets or to a contract of employment, it is, in my view, important to clearly identify the reason why the covenant was entered into. The "bargain" negotiated by the parties must be considered in light of the wording of the obligations and the circumstances in which they were agreed upon. The goal of the analysis is to identify the nature of the principal obligations under the master agreement and to determine why and for what purpose the accessory obligations of non-competition and non-solicitation were assumed.

[21] On the evidence, Dr. Poorsina and his professional corporation entered into the restrictive covenants in the context of the sale of assets. In *Tank Lining*, the Ontario Court of Appeal stated, at pp. 666:

> Reasonableness should be determined by evaluating whether the covenant is no more than adequate for its intended purpose; the [covenantee] should be able to establish that the ratio between the restraint and the interest is reasonable.

[22] In *Tank Lining,* the Ontario Court of Appeal also articulated other factors for the court to considering in evaluating the reasonableness of the restrictive covenant which include:

i. whether a benefit has issued to both sides;
ii. whether the covenantee has made a substantial investment worthy of protection;
iii. whether there was negotiation between parties of equal bargaining strength;
iv. whether the parties received legal advice;
v. and whether the covenantor has expressly acknowledged the importance of the covenant in question

[23] In this case, Dentalcorp paid over three million dollars for the purchase of the professional goodwill of the defendants' clinics, which was a benefit to both sides. Dentalcorp paid over 11 million dollars for the clinics, which is a substantial investment, worthy of protection. Both sides had the benefit of legal advice and were fully aware of the business context in which the restrictive covenants were being agreed to and the commercial reality at the time. Dr. Poorsina and Poorsina DPC have implicitly acknowledged the importance of restrictive covenants to the extent that in May 2020, the defendants sought to be relieved of their agreement and negotiated a new Termination Agreement. As noted in *Tank Lining*, in such a case, regarding these restrictive covenants, it should only be in exceptional cases that the court should overrule the judgment of the parties, where the parties were advised, with equal bargaining power and enter into the business agreement.

ii. *Will the plaintiffs suffer irreparable harm if the injunction were not granted?*

[24] The plaintiffs argue that irreparable harm and balance of convenience are of less relevance in light of Dr. Poorsina's breaches of negative covenants. The plaintiffs maintain, however, that the breaches caused irreparable harm to the goodwill of the acquired clinics and to Dentalcorp more generally. Specifically, the goodwill associated with each dental clinic (patients, staff, referral) and the violation of non-competition clauses has been found to cause irreparable harm in

this context. The plaintiffs further argue that the irreparable harm includes a loss of market share (i.e., patients), as well as to the equity of the DentalHouse brand that Dr. Poorsina sold to Dentalcorp enterprise brand, and the latter related to Dentalcorp's ability to create build a network and create synergies to build its brand. The plaintiffs further argue that Dr. Poorsina was the "face" of the DentalHouse brand and is now the public "face" of Studio Dental. The plaintiffs argue the establishment of the Studio Dental brand at the Union Station Clinic and the Square One Clinic – branded "Studio Dental at Union Station" and "Studio Dental at Square One", respectively, in direct competition against the Joe Shuster DentalHouse clinic, has caused Dentalcorp irreparable harm.

[25] In the circumstances where the vendor knew all the customers and the business in the eyes of the public, the Supreme Court has held that allowing the vendor to compete could be "dangerous" for the purchaser: *Doerner v. Bliss & Laughlin Industries Inc*., [1980] 2 S.C.R. 865. In some cases, unfair competition may constitute irreparable harm*: Precision Fine Papers Inc. v. Durkin*, 2008 CanLII 6871 (Ont. S.C.). But, as noted by the British Columbia Court of Appeal in *Belron Canada Inc. v. TCG International Inc*., 2009 BCCA 577, 65 B.L.R. (4th) 110, there are cases where courts have determined that the loss of goodwill could be calculated and did not constitute irreparable harm: see for example *472448 B.C. Ltd. v. 343554 B.C. Ltd*., 2006 BCSC 1075, at para. 22; *Capital Direct Lending Corp. v. Blanchette*, 2019 BCSC 1068, 56 C.C.E.L. (4th) 149, at para. 71. Dr. Poorsina disputes that he was ever "face" of the clinics, claiming that he reported to Dentalcorp personnel who managed the clinics, attended each clinic one to three times a month, and was not otherwise known to patients. The two versions cannot be resolved on the evidentiary record.

[26] The Supreme Court of Canada identified what may constitute irreparable harm in *RJR-MacDonald* at p. 341, stating:

> [Irreparable harm] is harm which … cannot be quantified in monetary terms …. Examples … include instances where one party will be put out of business by the court's decision; where one party will suffer permanent market loss or irrevocable damage to its business reputation; or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined

[27] Dr. Poorsina argues that despite having received the full benefit of the sale transaction, Dentalcorp has brought this belated motion in the most unfair circumstances. I am less persuaded by Dr. Poorsina's argument that the patients' fundamental right to medical treatment and continued care by the practitioner is paramount. He knew this when he decided to set up competing dental practices, supposedly in breach of the restrictive covenants. The patients' rights do not trump the right of the parties to be held to their bargain.

[28] It is well established that one of the purposes for resort to the extraordinary remedy of an injunction before an adjudication of the party's rights at trial, is to prevent irreparable harm. I do not accept the plaintiffs' argument which suggests that there is a hard and fast rule that where there is a breach of a restrictive covenant in the context of a commercial sale, and the moving party establishes a strong *prima facie* case, then the court need not consider irreparable harm or the balance of convenience. The appellate authority in British Columbia has noted that an injunction

does not follow the breach of a negative covenant as a matter of course or as a general rule: *Belron Canada Inc.*; *Li v. Rao*, 2019 BCCA 264, 27 R.F.L. (8th) 34, at para. 67. As explained by Savage J.A. in *Li*, at para. 67:

> The preceding authorities lead me to conclude that where a party breaches a negative covenant, an injunction enforcing this negative covenant will be regularly granted. This outcome has the benefit of ensuring parties are held to commitments they entered into freely. An injunction does not, however, follow the breach of a negative covenant as a matter of course or as a general rule. A judge should consider each prong of the three-part test from *RJR-MacDonald* (or the two-part test *from British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.)). However, irreparable harm typically will be a subordinate consideration in determining whether to grant an injunction to enforce a negative covenant.

[29] The authorities make it clear that it depends on the facts of the case. In this case, the parties are almost seven years post the sale of the business. There is some truth to the defendants' argument that the plaintiffs have had the benefit of the bargain at this stage, though I take issue with the use of the word "full". On the evidence before me, in May 2020, Dr. Poorsina wanted to terminate the agreement, which could only occur if the parties mutually agreed. The parties subsequently negotiated a new Termination Agreement in April 2021, with a two-year term. It was therefore within the expectation of the parties that the Dr. Poorsina and Poorsina DPC would no longer be bound by the restrictive covenants after April 2023. The breach occurred towards the end of the term of the restrictive covenant, as opposed to early on. And, though I agree that the parties ought to be held to their bargain, the harm, if any, has already been done and is calculable. Since the term would have ended in April 2023, and the basis to extend the term of the restrictive covenants for a further two years, beyond that, is as a result of the breach, and has nothing to do with the plaintiffs acquiring the professional and technical goodwill of the clinics sold in 2016, in my view, the damages are calculable.

[30] In the circumstances, I am not satisfied those damages may not adequately compensate the plaintiffs for the loss suffered due to any breach of the restrictive covenants. Dr. Poorsina is obliged to maintain records of patients and has dental management software that tracks all metrics relating to previous, current, and new patients. There are accepted methods by the court to calculate damages for the loss or diminution of goodwill and business revenue: *Belron Canada Inc.*; *Berkeley v. Miller*, 2018 ONSC 3645, 48 C.C.E.L. (4th) 264, at para. 23. The difficulty in calculating damages is not a bar to awarding damages. Courts have repeatedly been tasked to calculate damages even the face of a claim of irreparable harm: *Belron Canada Inc*., at para. 17; *Edward Jones v. Voldeng*, 2012 BCCA 295, 351 D.L.R. (4th) 749, at para. 40. There is no evidence that the plaintiffs will suffer permanent market loss or irrevocable damage to its reputation as a result of the alleged breach at this stage. Further, there is no evidence that the plaintiffs will be put out of business as a result of the breach of the restrictive covenants.

[31] Finally, I am also persuaded by the defendants' argument of the delay by the plaintiffs in bringing the motion for injunctive relief. The plaintiffs were aware, by at least May of 2022 as evidenced by the demand letter of their in-house counsel to the defendants putting them on notice,

that they were "in clear breach of the terms of the Termination and Transition Agreement" and made the demand that the defendants comply with the restrictive covenants by no later than May 25, 2022. The defendants failed to do so. The plaintiffs could have brought an urgent motion for injunctive relief at that time. Urgent motion dates for injunctive relief are available in Toronto. I agree with the defendants that the failure to move right away may have been tantamount to condonation of the defendants' conduct.

iii. *The balance of convenience*

[32] The balance of convenience does not favour granting the injunction. In my view, the defendants will suffer the greater harm from the granting of an interlocutory injunction pending a determination of the case on the merits. In balancing the convenience between the parties, I take into account the benefit of the five or six years that the plaintiffs had of the restrictive covenant. And there is more to consider. On the evidence before me, there is dispute as to the level of Dr. Poorsina's involvement with the new clinics. There is the fact that the new termination agreement contemplated an end date of April 26, 2023. As well, the plaintiffs have sought, as an alternative time frame, that the injunction extend to April 26, 2023 (which has since passed). And finally, the defendants' two clinics are now operating, and there are over 478 patients and thirty employees who will be affected by the injunction.

[33] I also take into consideration that the first lease was entered into in 2021 and the second in 2022, and upon learning of the leases, the plaintiffs did not bring an urgent motion for injunctive relief which would, in essence, extend restrictive covenant during the plaintiffs' delay, to the detriment of the defendants. That is to say, the plaintiffs should not benefit from the delay in seeking an urgent motion for injunctive relief.

[34] Finally, though this should not trump the bargain agreed to by the parties, on the facts before me I take into consideration, though of lesser importance, the acknowledgment made by Dentalcorp's senior executives on cross-examinations that a patients' right to choose both the location and the dental practitioner of their choice must be respected.

[35] For the reasons above, the plaintiffs' motion is dismissed.

[36] If the parties are not able to resolve the issue of costs, the defendants may deliver their Costs Submissions to Ms. Diamante within 15 days of the date of this endorsement, and the plaintiff, within 15 days thereafter. There shall be no reply submissions.

A.P. Ramsay J.

Date: June 15, 2023