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InterDent Service Corporation

U.S. DISTRICT COURT
U.S. DISTRICT COURT
JUN 2 - 2004
LOGGED

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

POCATELLO DENTAL GROUP, P.C., an
Idaho professional corporation,

Plaintiff,

v.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Defendant.

INTERDENT SERVICE CORPORATION, a
Washington corporation,

Third-Party Plaintiff,

v.

Case No. CV-03-450-E-LMB

DEFENDANT/THIRD-PARTY
PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION AND
APPLICATION FOR A TEMPORARY
RESTRAINING ORDER (Misner
Noncompete)

DEFENDANT/THIRD-PARTY PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION
AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER (MISNER
NONCOMPETE) - 1

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POCATELLO DENTAL GROUP, P.C., an Idaho professional corporation; DWIGHT G. ROMRIELL, individually; LARRY R. MISNER, JR., individually; PORTER SUTTON, individually; ERNEST SUTTON, individually; GREGORY ROMRIELL, individually; ERROL ORMOND, individually; and ARNOLD GOODLIFFE, individually,

Third-Party Defendants.

I. INTRODUCTION

Defendant and third party-plaintiff Interdent Service Corporation ("ISC") moves for a Temporary Restraining Order to stop third-party defendant Larry Misner, Jr. from the blatant disregard of Misner's obligations under a Noncompete Agreement (the "Agreement", attached as Exhibit 1 to the Affidavit of Kevin Webb ¶ 2) for which he received \$400,000 from ISC's predecessor in 1996. The Agreement prevents Misner from practicing dentistry within a twenty mile radius of ISC's office at 4155 Yellowstone Avenue in Pocatello, Idaho. (*Id.*) Misner, however, has decided to set up a rival practice *just down the street*, at 716 Yellowstone Avenue. (*Id.* ¶ 3, Ex. 2.) This location is a mere 2.1 miles and 3 minutes away. (Affidavit of Scott J. Kaplan ¶ 2, Ex. 1.)

By this motion, ISC seeks an order from the Court requiring Misner to honor his obligations under the Agreement. Absent this relief, ISC's Pocatello office will suffer irreparable harm through the loss of business and will likely have to close because other dentists presently employed with ISC will have no reason to honor their respective noncompete agreements. There is little question that ISC will prevail on the merits and that irreparable injury exists. ISC's motion should be granted.

II. FACTS

A. The Agreement

In October 1996, ISC's predecessor paid Pocatello Dental Group ("PDG")'s shareholders, including Misner, \$2.8 million for PDG's nonprofessional assets and the right to provide management services to PDG. Misner received \$400,000 in cash in the transaction. (Webb Aff. ¶ 6, Ex. 4.) ISC is in the business of providing or arranging for management services, facilities, equipment, and certain personnel necessary for the operation of dental practices.¹ PDG consists of a limited number of shareholder-dentists (Misner) and several "employee" dentists retained by the PDG.

As an essential component of the overall transaction between ISC's predecessor and PDG, various PDG dentists, including Misner, entered into noncompete agreements. The Agreement provides in relevant part:

"D. A condition to [ISC's parent]'s obligation to effect the Merger is the execution by [Misner] of a non-compete agreement with [ISC] effective as of the consummation of the Merger (the "Effective Time").

1. Term. Subject to and in consideration of the consummation of the Merger Agreement and the transactions contemplated thereby, [ISC] and [Misner] hereby enter into this Agreement commencing at the Effective Time. The term of this Agreement shall be *** two(2) years from the date of termination of Member's employment with Group ***.

2. Agreement Not to Compete. The parties agree that [Misner] has acquired *** valuable trade secrets possessed by [PDG]. It is acknowledged and agreed that such trade secrets have been developed at great expense to [PDG], and [ISC's parent] would not enter into the Merger Agreement unless [ISC's parent] is assured that all such information will be used for the exclusive benefit of [ISC's parent, ISC and PDG]. In recognition thereof, the parties agree that *** for the term of this Agreement, Misner shall not serve as an employee, independent

¹ This background information is contained in the Affidavit of Ivar Chhina in Opposition to Plaintiff's Motion for Preliminary Injunction dated October 31, 2003, already on file in this action.

contractor, consultant or otherwise, directly or indirectly, perform services for a person or entity or own or operate any entity engaged in the business of providing the professional services of dentistry, providing dental benefits or dental care *** within a twenty mile radius of the location of the facilities set forth in Schedule A hereto.

[Misner] further agrees that during the term of this Agreement he shall not, directly or indirectly, (a) solicit *** any patient, client, provider or customer being or having been solicited by [ISC or PDG] for the purpose of providing dental benefits or dental care either directly or indirectly, (b) solicit in any way or make offers of employment to, on behalf of himself or in conjunction with others, and person employed by [ISC or PDG]. (Webb Aff. ¶ 2, Ex. 1.)

B. Misner's Breach

It is indisputable that Misner is in breach of the Agreement. As of February 25, 2004, Misner resigned his employment with PDG's practice managed by ISC. (Webb Aff. ¶ 3.) On April 9, 2004, in response to a question from ISC about Misner's intent to abide by his noncompete agreement, Dr. Misner's counsel wrote ISC's counsel to state that "Dr. Misner is currently practicing in Burley Idaho." (Kaplan Aff. ¶ 3, Ex. 2.) However, on May 18, 2004, ISC received a number of "Request for the Release of Dental Records" forms that show the address of Misner's new practice, "Kidds Dental", as 716 Yellowstone Avenue in Pocatello. (Webb Aff. ¶ 3, Ex. 2.) And, on June 1, 2004, Misner's counsel told ISC's counsel that Misner was presently practicing in Pocatello and would continue to do so absent a court order. (Kaplan Aff. ¶ 3.) Working with Misner at Kidds Dental, is former PDG dentist Larry Bybee, who Misner apparently has hired and solicited to work for him--another breach of the Agreement by Misner.

Circumventing his noncompete obligation has apparently been Misner's plan for over a year and, indeed, this litigation was likely filed as a pretext by Misner, then the president of PDG, to find away to out of his noncompete. In the Spring of 2003, Misner received a letter from Porter Sutton, another PDG shareholder dentist. (Webb Aff. ¶ 5, Ex. 3.) Dr. Sutton indicates that this litigation and Misner's entire course of conduct throughout the parties' dispute

has been a scheme by Misner to try and evade his obligations under the Agreement. (*Id.*) Dr. Sutton himself has abided by his Noncompete Agreement since he left PDG in 2003. (*Id.*)

C. The Consequences of Misner's Actions

Misner's actions have resulted in considerable disruption to ISC's Pocatello office. (Webb Aff. ¶ 4.) Misner has taken a considerable amount of business from ISC to his new practice, resulting in financial detriment to ISC. If Misner is not forced to honor his contractual obligations, it is likely that a number of other dentists practicing at ISC's Pocatello office would also leave to set up their own practices in contravention of their respective non-compete agreements. (*Id.* ¶ 4 and ¶ 5, Ex. 3.) Employee dentists like Bybee could leave the PDG office to work with Misner or other PDG shareholders bound by noncompete obligations. This action would likely result in ISC having to close its Pocatello office and/or lay off some or all of the 89 employees in that office. (*Id.* ¶ 4.)

III. ARGUMENT

A party seeking a temporary restraining order or preliminary injunction must meet one of two tests, the traditional test or the alternative test. *Stanley v. University of Southern California*, 13 F.3d 1313, 1319 (9th Cir. 1994). The first, or "traditional," test requires the movant to establish (a) a fair chance of success on the merit, (b) a significant threat of irreparable injury if the injunctive relief is not granted, (c) at least a minimal tip of the balance of hardships the nonmovant will not be harmed more than the movant is helped by the injunction and (d) that the injunction will not harm the public interest. *Stanley*, 13 F.3d at 1319.

The second, or "alternative," test allows a district court to issue a preliminary injunction if it finds either (1) a combination of probable success on the merits and the possibility of irreparable injury or (b) serious questions are raised and the balance of hardships tilts sharply in

the movant's favor. *Johnson v. California State Board of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995).

These two tests are not inconsistent; rather, the two tests represent "a continuation of equitable discretion whereby the greater the relative hardship to the moving party, the less probability of success must be shown." *Regents of University of California v. ABA, Inc.*, 747 F.2d 511, 515 (9th Cir. 1984); *see also Westlands Water District v. Natural Resources Defense Council*, 43 F.3d 457 (9th Cir. 1994). Therefore, if the balance of harms strongly favors the movant, it need not make a robust showing on the likelihood of success on the merits; instead, it need only show that it has a "fair chance" of success. *Briggs v. Sullivan*, 886 F.2d 1132, 1143 (9th Cir. 1989).

Here ISC satisfies both the traditional and the alternative test.

A. Relief Should Be Granted Under the Traditional Test

1. Because Misner Is in Clear Breach of the Agreement, There Is a Substantial Likelihood ISC Will Succeed on the Merits

Only a reasonable probability of success, not an overwhelming likelihood, is all that ISC must demonstrate. *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991). Here, however, there is a substantial likelihood that ISC will prevail on the merits of its claim. All ISC is asking is that the plain language of the Agreement be enforced. *See Electrical Wholesale Supply Co., Inc. v. Nielson*, 136 Idaho 814, 822, 41 P.2d 242 (2002) (unambiguous contractual terms enforced as a matter of law).

Generally, Idaho will enforce noncompete agreements if they are (1) reasonable, (2) not against public policy and (3) the interest in preserving freedom of contract outweighs any harm from the injunction. *Dick v. Geist*, 107 Idaho 931, 693 P.2d 1133, 1135 (Ct. App. 1985), quoting *Marshall v. Covington*, 81 Idaho 199, 203, 339 P.2d 504, 506 (1959). Noncompete agreements

by physicians or other “member[s] of one of the learned professions” are enforceable.

Covington, 339 P.2d at 506, citing Annotation—Restriction on Practice of Physician, 58 A.L.R. 156 at 162.

a. The terms of the Agreement are reasonable

Here, the terms of the Agreement—2 years and a 20 mile radius—are reasonable. *Geist*, 693 P.2d at 1136 (accepting lower court’s conclusion that 2 year and 25 mile radius terms in physician’s noncompete were reasonable); *Covington*, 339 P.2d at 508 (3 year, 25 mile radius noncompete against physician reasonable).

b. The Agreement is consistent with public policy/preserving freedom of contract outweighs any harm from a temporary restraining order

The Agreement is also consistent with public policy. In *Covington*, the court upheld a 3 year, 25 mile radius noncompete agreement against a physician. In doing so, the court held:

“[The noncompete] is not against public policy. The detriment or inconvenience to the public which may be involved is not sufficient to justify denial to the plaintiffs of the legitimate protection provided for in their contract. *** As applied to [defendant] the limitations are not unreasonable nor unduly oppressive, and being supported by a consideration, he is bound by his contract to comply. Such a restrictive covenant in a contract between members of a learned profession may be regarded as distasteful and out of harmony with the dignity of professional men; but the courts must be guided by the overriding public interest in the preservation of the freedom of contract.” 339 P.2d at 508.

While *Geist* declined to enforce a noncompete against a physician valid for public policy reasons, such concerns are simply not present here. There are at least three other pediatric dentists available to service patients in the Pocatello area. (Webb Aff. ¶ 7.) Misner has an existing practice in Burley, Idaho, less than 1.5 hours away from Pocatello.

2. ISC Will Suffer Irreparable Harm Absent A Temporary Restraining Order

Where, as in the case here, there is a strong probability of success on the merits, the moving party satisfies the “irreparable injury” requirement by demonstrating only that it will

suffer a degree of hardship that outweighs the hardship facing the opposing party. *See Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1528 (9th Cir. 1993). Here, the irreparable injury to ISC is described above. If the misconduct continues, ISC will probably have to close the office. (Webb Aff. ¶ 5).

3. A Balancing of the Hardships Favors Granting Relief to ISC

In balancing the relative hardships, a court must consider the effect of the requested injunction on each party. *Amoco Production Co. v. Village of Ganbell, Alaska*, 480 U.S. 531 (1987). As detailed above, the balance tips in favor of issuance of the temporary restraining order.

4. There Will Not Be Any Injury to the Public if Relief Is Granted, Only if Relief Is Not Granted

No injury to the public would result if this Court entered the requested temporary restraining order. To the contrary, the public will be harmed if ISC is compelled to close its office. Further, in the case at hand, there is not truly any public interest at issue other than the public interest in requiring parties to honor their contractual obligations. *Cf. American Motorcyclist Ass'n v. Wyatt*, 714 F.2d 962, 965 (9th Cir. 1983).

As detailed above, this action merely results from Misner's scheme to avoid compliance with his obligations under the Agreement. (Webb Aff. ¶ 5, Ex. 3.) The public interest is not harmed by requiring him to comply—there are other pediatric dentists available in the Pocatello area. (Webb Aff. ¶ 7.) Moreover, Misner is not precluded from practicing—he is merely required to do so at least 20 miles from ISC's Pocatello office. According to Misner's attorney, Misner has already practiced or set up a practice in Burley, Idaho. During the pendency of the case, he could simply limit his practice to that location. (Kaplan Aff ¶ 3, Ex. 2.)

B. ISC Meets the Requirements of the Alternative Test

In the Ninth Circuit,

a party moving for a preliminary injunction may satisfy its burden by showing either (1) a combination of probably success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.

Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980). As discussed above, there is a strong likelihood of success on the merits and an equally strong probability that denial of a temporary restraining order would cause irreparable injury to ISC.

IV. CONCLUSION

The Court should issue a temporary restraining order requiring Misner to comply with his obligations under the Agreement .

DATED: June 2, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of June, 2004, I caused to be served a true copy of the foregoing **DEFENDANT/THIRD-PARTY PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION AND APPLICATION FOR A TEMPORARY RESTRAINING ORDER** upon the following:

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