

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

LEROY L. WILBERS,

Plaintiff,

vs.

ACRISURE WALLSTREET PARTNERS,
LLC; and ACRISURE, LLC,

Defendants

Case No. 20-08762-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING PLAINTIFF LEROY L.
WILBERS'S MOTION FOR PRELIMINARY INJUNCTION

Over the course of several decades, Plaintiff Leroy Wilbers built and nurtured an insurance agency in Missouri. In 2017, Defendant Acrisure, LLC (“Acrisure”) offered Wilbers and others in that agency a fortune for their business, and Wilbers made the decision to sell. In exchange, Wilbers received millions of dollars and the opportunity to continue running the business under the name of Acrisure Wallstreet Partners, LLC (“AWP”). Wilbers also agreed to a set of restrictive covenants set forth in an asset purchase agreement, see Hearing Exhibit 3, and an employment agreement. See Hearing Exhibit 2. Approximately three years later, on May 15, 2020, Acrisure terminated Wilbers’s employment in a letter that reminded him of the restrictive covenants. Frustrated by his termination and eager to return to the insurance industry, Wilbers filed this action seeking a declaratory judgment that the restrictive covenants are unenforceable. Wilbers also sought a preliminary injunction that would bar the defendants from enforcing the restrictive covenants against him. Although Wilbers may eventually convince the Court to afford him declaratory relief, the Court has no basis to grant the preliminary injunction that Wilbers seeks.

I. Factual Background

In response to Plaintiff Wilbers’s submission of a motion requesting preliminary injunctive relief, the Court conducted a three-day evidentiary hearing that involved testimony concerning all sorts of intrigue and conflict within the AWP office from 2017 through 2020, but nearly all of that evidence has no significant bearing upon the Court’s analysis.¹ The facts that bear directly upon the Court’s decision on Wilbers’s motion can be simply stated. Effective March 1, 2017, Wilbers and his partner, Randall Lueckenotte, sold their insurance business to Defendant Acrisure for millions of dollars.² See Hearing Exhibit 3. The asset purchase agreement included a collection of restrictive covenants set forth in section 5.1, such as a confidentiality requirement and broad noncompetition and non-solicitation obligations. See id. According to Exhibit A to the asset purchase agreement, the “restricted period” for noncompetition and non-solicitation obligations runs for “the five (5) year period immediately following the Effective Date[,]” *i.e.*, March 1, 2017, so the restrictive covenants challenged by Wilbers remain in force until February 28, 2022, under the terms of the asset purchase agreement.

Plaintiff Wilbers was not forced to the sidelines by the restrictive covenants, though, because Defendant Acrisure extended an employment offer to Wilbers that enabled him to run and work for the newly formed entity that took over his agency, *i.e.*, Defendant AWP. Wilbers not only agreed to accept that employment offer, but also signed an employment agreement that prescribed the terms

¹ The hearing was replete with discussions about Jay Higgins, who worked in the AWP office and became Plaintiff Wilbers’s nemesis. As the Court will explain, though, the treatment of Higgins does not figure into the calculus of Wilbers’s entitlement to injunctive relief.

² The Court does not yet know the precise amount of money that Defendant Wilbers was paid as part of the transaction, but the Court has been advised that it exceeded ten million dollars and that it took several forms, including a portion of the purchase price, other payments, and stock ownership.

of his employment. See Hearing Exhibit 2. Included in that employment agreement were restrictive covenants set forth in section 12. See id. Specifically, Wilbers agreed to a confidentiality provision as well as sweeping noncompetition and non-solicitation obligations, which extended for three years from his “Termination Date.” See id. When Wilbers signed that employment agreement in 2017, he anticipated remaining employed for as long as he chose to work. But on May 15, 2020, Acrisure gave Wilbers a letter terminating his employment, see Hearing Exhibit 1, and thereby commencing the three-year noncompetition and non-solicitation period prescribed by the employment agreement, which binds Wilbers to those obligations through May 14, 2023. See Hearing Exhibit 2.

After his termination, Plaintiff Wilbers wisely chose to seek a declaratory judgment before entering the insurance market on his own to compete against the defendants. He filed a complaint for declaratory and injunctive relief on November 19, 2020, and simultaneously submitted a motion for a preliminary injunction. Wilbers subsequently sharpened his theories by filing a first amended complaint, which contains counts requesting a declaratory judgment and injunctive relief. The Court conducted an evidentiary hearing on February 1, 23, and 24, 2021, where the competing parties had the opportunity to develop the factual record and present sophisticated legal arguments. As a result, the Court is now well-positioned to address Wilbers’s motion for preliminary injunctive relief.

II. Legal Analysis

An injunction “represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.” Davis v Detroit Financial Review Team, 296 Mich App 568, 613 (2012). Because Plaintiff Wilbers has requested injunctive relief, he must shoulder “the burden of establishing that a preliminary injunction should be issued.”

MCR 3.310(A)(4). Our Court of Appeals has cited four factors to consider in determining whether to grant a preliminary injunction. Davis, 296 Mich App at 613. Those four factors are as follows:

(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.

Davis, 296 Mich App at 613. Injunctive relief is only appropriate when “there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.” Id. at 614.

A. Likelihood of Success on the Merits.

Plaintiff Wilbers’s likelihood of success on the merits of his claim for a declaratory judgment depends upon his ability to convince the Court that neither his contractual noncompetition obligation nor his contractual non-solicitation requirement should be enforced. But those two obligations flow from two separate sources that the Court regards as materially distinct. First, those requirements are set forth in section 5.1(b) of the asset purchase agreement, see Hearing Exhibit 3, and consideration in the form of millions of dollars was paid by the defendants for those restrictions. Second, similar restrictive covenants are contained in section 12 of Wilbers’s employment agreement, see Hearing Exhibit 2, for which much less consideration was provided.³ Because the restrictive covenants set forth in the asset purchase agreement remain in effect until February 28, 2022, Wilbers must knock out those restrictions to obtain injunctive relief at this point.

³ The Court understands that the defendants regard the asset purchase agreement and Plaintiff Wilbers’s employment agreement as one contract with complementary and interlocking obligations, whereas Wilbers characterizes the two agreements as separate contracts. The Court need not choose a winner in that debate at this early stage of the proceedings because both agreements have restrictive covenants that are currently in effect.

Under Michigan law, the Court can modify a noncompetition provision in order to render the obligation “reasonable as to its duration, geographical area, and the type of employment or line of business.” See MCL 445.774a(1). In contrast, the Court lacks authority to rewrite a non-solicitation provision to achieve reasonableness. Total Quality, Inc v Fewless, No 346409, slip op at 9 (Mich App July 9, 2020) (**published** opinion). And even if the Court could cut back the non-solicitation obligation imposed upon Plaintiff Wilbers, the Court would be strongly disinclined to do so as long as that obligation emanates from the asset purchase agreement, which required the defendants to pay a fortune for the restrictive covenants. See Thermatool Corp v Borzym, 227 Mich App 366, 368-369 (1998). Allowing Wilbers to retain millions of dollars he received from the defendants while also permitting him to reenter the insurance market to compete against the defendants by soliciting clients of Defendant AWP during the restriction period imposed by the asset purchase agreement amounts to the antithesis of reasonableness. Thus, the Court concludes that Wilbers is not likely to succeed on the merits of his claim for declaratory relief so long as the restrictive covenants prescribed by the asset purchase agreement remain in force, *i.e.*, until February 28, 2022. After that date, Wilbers may have a viable argument for rewriting the restrictions that arise only from his employment agreement. But until February 28, 2022, Wilbers has no realistic chance of any success on the merits.

B. Irreparable Harm.

Under Michigan law, a movant must “make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.” Michigan Coalition of State Employee Unions v Civil Service Commission, 465 Mich 212, 225 (2001). “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.” Pontiac Fire Fighters Union Local 376

v City of Pontiac, 482 Mich 1, 9 (2008). Because the defendants paid Plaintiff Wilbers millions of dollars for his insurance agency, he will not suffer irreparable injury if he is kept out of the insurance industry for the five-year “restricted period” required by the asset purchase agreement. See Hearing Exhibit 3 (Asset Purchase Agreement, Exhibit A – definition of “Restricted Period”). To be sure, Wilbers may find it more challenging to reenter the insurance industry in March 2022 than he would if permitted to return today. But the defendants paid him a king’s ransom to ensure that they would not have to face him as a competitor for five years after he sold them his business, so Wilbers cannot complain now about irreparable harm flowing from a deal that he struck for enormous financial gain.

C. Balance of Harms to the Opposing Parties.

In balancing the harms to the opposing sides that might result from a preliminary injunction, the Court must draw a sharp distinction between Defendant Acrisure and Defendant AWP. Under Michigan law, a “relative deterioration of competitive position does not in itself suffice to establish irreparable injury.” Thermatool Corp, 227 Mich App at 377. But a loss of business, coupled with the prospect of catastrophic erosion of a client base, can support a finding of substantial harm. See Performance Unlimited, Inc v Questar Publishers, Inc, 52 F3d 1373, 1382 (6th Cir 1995). Plaintiff Wilbers plainly cannot cause substantial harm to Acrisure – which is a huge national operation – by competing in the insurance industry. But Wilbers most certainly can cause significant harm to AWP by actively soliciting AWP’s clients. After all, AWP is effectively just Wilbers’s old agency. Thus, the Court finds that excusing Wilbers from his restrictive covenants could very well cause harm to the defendants. In contrast, as the Court has already explained, Wilbers is unlikely to suffer serious harm in the absence of injunctive relief.

D. Potential Harm to the Public Interest.

In weighing “the harm to the public interest if [an] injunction is issued[.]” Davis, 296 Mich App at 613, the Court understands that the enforcement of contracts serves the public interest, Rory v Continental Ins Co, 473 Mich 457, 468 (2005), “[b]ut noncompetition agreements are disfavored as restraints on commerce[.]” Coates v Bastian Brothers, Inc, 276 Mich App 498, 507 (2007). These competing principles leave the analysis of the public interest in equipoise, so the Court finds that the final factor does not tip the scales in favor of either side in this dispute.

E. Consideration of Unclean Hands.

Noting that “[a] court’s issuance of a preliminary injunction is generally considered equitable relief[.]” Michigan AFSCME Council 25 v Woodhaven-Brownstone School District, 293 Mich App 143, 145 (2011), and “that one who seeks the aid of equity must come in with clean hands[.]” Rose v National Auction Group, 466 Mich 453, 463 (2002), Plaintiff Wilbers asserts that the Court must render its ruling on the motion for injunctive relief by considering whether the defendants have come to the Court with clean hands. The clean-hands doctrine “closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief,” Stachnik v Winkel, 394 Mich 375, 382 (1975), but the defendants are not the parties seeking equitable relief. Instead, the defendants have chosen to stand on their contractual rights in response to the plaintiff’s request for equitable relief in the form of a preliminary injunction. Consequently, the Court has no justification to consider whether the defendants have unclean hands. If the defendants seek any form of injunctive relief against Wilbers, the Court will consider whether the defendants have clean hands. But Wilbers’s motion for a preliminary injunction does not provide an occasion to do so.

III. Conclusion

For all of the reasons set forth in this opinion, the Court shall deny Plaintiff Wilbers's motion for a preliminary injunction. In the fullness of time, the Court may relieve Wilbers of his restrictive covenants by awarding him either a declaratory judgment or injunctive relief. But the Court has no inclination to lift any of those restrictions prior to February 28, 2022, when the obligations imposed by the asset purchase agreement expire by their own terms.

IT IS SO ORDERED.

Dated: March 4, 2021



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge