IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

CIVIL TRIAL DIVISION

HOWARD B. KESSLER, M.D., et al.	: November Term, 2002
Plaintiffs / Appellees,	: No. 004183
v.	: (Commerce Program)
GEORGE J. BRODER, M.D., et al.	:
Defendants / Appellants.	: **Superior Court Docket No. 1726 EDA 2003**

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O P I N I O N

Albert W. Sheppard, Jr., J. ..... July 28, 2003

I. Introduction

On May 13, 2003, this court entered a mandatory, preliminary injunction requiring defendants to provide plaintiffs with one out of every three readings of certain magnetic resonance (radiologic) cases. On May 20, 2003, the defendants appealed seeking expedited relief. By Order dated July 10, 2003, the Superior Court granted the defendants' emergency application for supersedeas and directed this court to file its Opinion.

This Opinion is respectfully submitted pursuant to that directive and in support of this court's Order granting the preliminary injunction.

II. Background

This case involves a dispute among radiologists who co-own certain Magnetic Resonance Imaging ("MRI") centers and the entities which employ the radiologists to read MRI images. The defendants' appeal specifically relates to the distribution of MRI "reads" between the plaintiffs and defendants.

The plaintiffs, Howard B. Kessler, M.D., Andrew H. Shaer, M.D. and Lock W. Barber, D.O. (the "Kessler Group") are minority shareholders in the four defendant corporations, Delaware Open MRI Radiology Associates, P.A.[1], County Line Open MRI, Inc.[2], Andorra Open MRI, Inc.[3] and Jeanes Radiology Associates, P.C.[4] ("defendant corporations"). Also named as defendants are the majority shareholders of those defendant corporations, namely, George J. Broder, M.D., Michael R. Clair, M.D., William H. Hartz, M.D., Phillip J. Moldofsky, M.D. and Jay S. Rosenblum, M.D. (the "Broder Group").

The Kessler Group collectively owns approximately 37.5 percent of the shares of the defendant corporations. Complaint, ¶ 19. The Broder Group collectively owns approximately 62.5 percent of the shares of the defendant corporations. Complaint, ¶ 19. Prior to November 2002, the individuals comprising the Kessler Group and the Broder Group served as directors of the defendant corporations.

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[1] Delaware Open MRI Radiology Associates, P.A., a Delaware corporation, is the general partner of two Delaware limited liability companies, Delaware Open MRI, L.L.C. and Delaware Open MRI II, L.L.C. Complaint, ¶ 15. (Citations to the Complaint refer to the Amended Complaint.)

[2] County Line Open MRI, Inc., a Pennsylvania corporation, is the general partner of two Pennsylvania limited partnerships, Pennsylvania Open MRI at County Line Plaza, L.P. and Pennsylvania Open MRI at Roosevelt Plaza, L.P. Complaint, ¶ 16.

[3] Andorra Open MRI, Inc., a Pennsylvania corporation, is the general partner of a Pennsylvania limited partnership, Andorra Open MRI, L.P. Complaint, ¶ 17.

[4] Jeans Radiology Associates, P.C., a Pennsylvania corporation, has an unincorporated division named Pennsylvania Open MRI at Grant Plaza. Complaint, ¶ 18.

Complaint, ¶¶ 1-2.

The Kessler Group contends that it had an oral agreement with the Broder Group to allocate the MRI reads from the MRI centers in proportion to their ownership interests in the defendant corporations; approximately one-third of the reads were performed by the Kessler Group and two-third of the reads were performed by the Broder Group.[5] Complaint, ¶¶ 25, 43; See Appendix to Defendants'/Appellants' Emergency Application for a Supersedeas of Preliminary Injunction Pending Appeal ("Defs' App."), Ex. 6, p. 177. Plaintiffs have stipulated that the agreement regarding the allocation of reads was never reduced to a writing. Defs' App., Ex. 6, pp. 90, 93, 177. Dr. Kessler testified that in August 2002, the Broder Group reduced the number of reads assigned to the Kessler Group to approximately "10 to 12 to 15 percent" of all reads. Defs' App., Ex. 6, pp. 183-84, 188. Dr. Kessler further testified that since October or November 2002, the Broder Group has ceased assigning reads to the Kessler Group altogether. Defs' App., Ex. 6, pp. 204-05.

The Broder Group disputes that there was an agreement that the Kessler Group would receive one-third of the reads. Defs' App., Ex. 6, pp. 78-79, 119. In any event, however, Dr. Clair testified that for the period of time from January 2002 through July 2002, the Kessler Group received about thirty-three percent of the reads, and now, all of the reads are performed by the Broder Group. Defs' App., Ex. 6, pp. 20, 103, 111-12, 119-120.

[5] The actual ownership of the jointly-owned corporations is 5/8 and 3/8.

In addition, by way of background, prior to November 2002, the Broder Group, through an entity called Fox Chase Medical Center Radiology Associates, P.C., had a contract with Jeanes Hospital to provide radiology services. Complaint, ¶ 20. That contract terminated in 1997, and in November 2002, Jeanes Hospital contracted with the Kessler Group to provide radiology services. Complaint, ¶¶ 20, 36, 38-39; Defs' App., Ex. 6, pp. 178, 188-89, 201-02.

The Kessler Group asserts that the Broder Group has violated the terms of the shareholder agreements of the defendant corporations by, for example, refusing to schedule shareholder meetings, indefinitely postponing annual shareholder meetings, removing the Kessler Group from the boards of three of the four defendant corporations, withholding financial information, withholding distributions and diverting corporate assets and profits. Complaint, ¶¶ 3, 22-24, 27-30. Specifically, the Kessler Group contends that in August 2002, the Broder Group reduced the number of reads assigned to the Kessler Group to approximately ten to fifteen percent of the total number of reads, and around November 2002, stopped the assignment of reads completely. Complaint, ¶ 26; Defs' App., Ex. 6, p. 188, 204.

On November 27, 2003, the Kessler Group filed a Complaint and a Petition for an Injunction and Appointment of a Custodian ("Injunction Petition") against the Broder Group and the defendant corporations. The Complaint asserted causes of action for breach of fiduciary duty, interference with actual and prospective contractual relations, misappropriation of trade secrets, procurement of business information by improper means, conversion, unfair competition, fraud, unjust enrichment, civil conspiracy and declaratory judgment.

On January 3, 2003, this court held a hearing on the Injunction Petition. Defs' App., Ex. 6 (Notes of Testimony). On January 9, 2003, the court entered an Order which granted the Injunction Petition in part, and denied it in part. The court ordered, in relevant part, that the defendants make available to plaintiffs the corporate books and records and denied the request for a Custodian. The court held under advisement the request to enjoin the distribution of MRI reads inconsistent with the distribution prior to November 1, 2002, as well as the issue of the withholding of dividends or distributions until the results of the financial examinations were published. Defs' App., Ex. 8 (Order).

On May 13, 2003, this court held another hearing on the Injunction Petition and entered an Order requiring the defendants to assign one-third of the MRI reads to the plaintiffs commencing on June 2, 2003, and requiring the plaintiffs to post a bond for $70,000.00. See Defs' App., Ex. 12 (Notes of Testimony); Defs' App., Ex. 13 (Order); See also Order of Clarification dated May 20, 2003 (relating to the bond). By an Order dated June 19, 2003, this court denied the defendants' Petition for Reconsideration or a Stay of Preliminary Injunction Pending Appeal, and this appeal ensued.

III. Discussion

On appeal, defendants argue that the preliminary injunction should be vacated because the plaintiffs suffered only a loss of monetary income by not having the reads assigned to them, and an injunction is not justified based solely on the loss of monetary income. Defendants'/Appellants' Emergency Application for A Supersedeas of Preliminary Injunction Pending Appeal, pp. 2, 22.

"The purpose of a preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of, thereby preventing irreparable injury or gross injustice." Santoro v. Morse, 781 A.2d 1220, 1229 (Pa. Super. 2001). To establish the right to preliminary injunctive relief,

the moving party must show:

> (1) that relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages; (2) that greater injury will occur from refusing the injunction than from granting it; (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged conduct; (4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and (5) that the plaintiff's right to relief is clear.

Id. at 1229, *citing* Cappiello v. Duca, 449 Pa. Super. 100, 672 A.2d 1373, 1376 (1996), *quoting* Lewis v. City of Harrisburg, 158 Pa. Commw. 318, 631 A.2d 807, 810 (1993).

Our Superior Court has interpreted the standard for a preliminary injunction by stating that "[i]n the commercial context, the impending loss of a business opportunity or market advantage may aptly be characterized as an 'irreparable injury' for this purpose [of an injunction]." Santoro, 781 A.2d at 1228. Further, the Court provided examples of appropriate injunctive relief where there existed an impending loss of a business opportunity or market advantage:

> For example, in the case of John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc., [471 Pa. 1, 369 A.2d 1164 (1977)], our Supreme Court approved a preliminary injunction enforcing an anticompetitive employment covenant on the grounds that the alleged interference with customer relationships would be 'irreparable' because the extent of the injury was inherently unascertainable, and hence incapable of being fully compensated by money damages. Likewise in Courier Times, Inc. v. United Feature Syndicate, Inc., 300 Pa. Super. 40, 445 A.2d 1288 (1982), this court held that a newspaper would suffer irreparable injury by being deprived of a popular syndicated feature. The Superior Court found that loss of the "Peanuts" comic strip would hamper efforts to compete for the business of the customers of a defunct publication. The loss was considered irreparable as the number of lost customers could not be accurately tabulated.

Santoro, 781 A.2d at 1228 (citations omitted).

Here, the record reflects that the Broder Group's adjournment of assigning reads to the Kessler Group is likely to immediately harm the business opportunities of the radiologists in the Kessler Group who could not be compensated with money damages alone. Dr. Shaer testified that the Broder Group and Kessler Group receive reads because the "business comes to the hospital through referring physicians." Defs' App., Ex. 12, p. 39. Dr. Shaer further testified that he believes that the referrals for reads are made based on the continuity of having a particular radiologist perform the reads, the reputation of the radiologist to perform accurate reads, and the efficient, responsive service that the referring physicians can expect from a radiologist. Id. at 40-41. Since November 2002, when the Broder Group stopped assigning reads to the Kessler Group, the radiologists in the Kessler Group have not had an opportunity to perform the reads as they had previously (See Defs' App., Ex. 6, pp. 204-05, and Ex. 12, p. 45), and have not been able to provide the same continuous service for which referring physicians would make their referrals. The cessation of continuous service by the Kessler Group has not gone unnoticed by referring physicians. Dr. Shaer testified that he was asked by referring physicians "why he was doing so few reads when [he] was still [listed on correspondence as] the medical director [of Pennsylvania Open MRI at County Line Plaza]." Defs' App., Ex. 12, pp. 23-24 (injunction hearing testimony) and Ex. 9 (See Exhibit E to Pltfs' Supplemental Memorandum]. Although the business of the co-owned entities may not suffer from the change in reads assignments (Defs' App., Ex. 11, p. 6), there is sufficient evidence in the record that the business opportunities and market advantage of the radiologists in the Kessler Group will likely suffer. Because the influx of reads depend on the radiologists's relationships with referring physicians, the court also finds that the harm would be irreversible.

Further, the Kessler Group could not be compensated for this loss with money damages alone because it would be conjecture for the court to determine what business the radiologists in the Kessler Group will lose as a result of referring physicians not relying on them in the future or deciding not to refer reads to them in the first place. In addition, the record demonstrates that in the past, the Broder Group and the Kessler Group have competed for business at various hospitals even while co-owning the MRI centers (Defs' App., Ex. 6, pp. 6-11) , and the Kessler Group's inability to perform any of the reads could hinder its future capacity to compete in the market. It would be conjecture to establish what monetary damages the Kessler Group would be owed for harm to market advantage. Because the damage cannot be established by an "accurate pecuniary standard," the harm to the Kessler Group is irreparable. Santoro, 781 A.2d at 1227-28 (citations omitted); See also Summit Towne Centre, Inc. v. The Shoe Show of Rocky Mount, Inc., 786 A.2d 240, 245 (Pa. Super. 2001), *allocatur granted*, 569 Pa. 106, 801 A.2d 468 (2002).

Defendants argue that the opportunity to perform reads does not constitute a business opportunity because it is not an opportunity for the MRI centers. Defs' App. Ex. 11, pp. 7-8. The court disagrees because the legal standard for injunctive relief focuses on the harm to the plaintiffs, not the MRI centers. The reads comprise the substance of what certified radiologists are trained to do. Dr. Clair admitted that a reason for setting up the MRI centers was to allow the radiologists to perform reads. Defs' App., Ex. 12, p. 127. In addition, Dr. Shaer testified that the reads themselves constitute business opportunities because, as he stated: "We're all radiologists and we read X-rays and MRIs for a living. This is what we do. This is what we're trained to do. The fact that we have a business entity here is part of the equation. There's two pieces. One is the reading of the X-rays or MRIs, in this instance, and the other is the business

piece of it." Defs' App., Ex. 12, pp. 27-28. In addition, the fact that income is generated for each read performed points to the conclusion that the opportunity to perform reads constitutes a business opportunity. Defs' App., Ex. 12, pp. 16-17. Finally, as discussed, future referrals can be affected by not presently performing reads because referring physicians will not rely on radiologists who no longer handle reads. Therefore, this court finds that the reads are a business opportunity for the plaintiff radiologists, just like the maintenance of customer relationships for the plaintiff company in John G. Bryant Co., Inc. v. Sling Testing and Repair, Inc., *supra*, the ability to print the "Peanuts" comic strip for the plaintiff newspapers in Courier Times, Inc. v. United Feature Syndicate, Inc., *supra*, and the customers' business for the fifty percent owner of a cable television parts supplier in Santoro v. Morse, *supra*.

The court also finds that the injunction will restore the parties to the status quo as it existed immediately before the Broder Group ceased giving reads to the Kessler Group. The Order to assign one-third of the MRI reads to the Kessler Group reestablishes the allocation of approximately thirty-three percent of all reads to the Kessler Group that the Broder Group had made between January 2002 and August 2002. For this reason, and the reasons discussed above, the court finds that the Broder Group's action in not giving reads to the Kessler Group is manifest, the injunction is reasonably suited to abate it, and the Kessler Group's right to relief is clear. Further, the court finds that greater injury would occur from denying the injunction than from granting it. Even though the injunction will result in the Broder Group not receiving one hundred percent of the revenue derived from the reads, the Kessler Group will not suffer immediate and irreparable harm to its business opportunity and market advantage, the reads will be

performed competently and efficiently, and the co-owned entities will still derive income from the reads.[6]

IV. Conclusion

For the reasons discussed, this court respectfully submits that the Order granting the Preliminary Injunction should be affirmed.

BY THE COURT,

ALBERT W. SHEPPARD, JR., J.

[6] There is a further reason to consider in analyzing the propriety of the injunction. That is a pragmatic one -- it may help promote a reasonable settlement of the dispute. The conduct of the litigants and the tenor and atmosphere of the two hearings demonstrate that these doctors cannot work together in the future. This is a case that cries out for a timely and fair settlement. The injunction has the effect of maintaining a level playing field during the pendency of the ongoing settlement discussions.