THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ZA CONSULTING, L.L.C.,	:	April Term, 2001
Plaintiff	:	
	:	No. 3941
v.	:	
	:	Commerce Case Program
ANDREW J. WITTMAN,	:	
Defendant	:	Control No. 610326

OPINION

Defendant Andrew J. Wittman ("Wittman") has filed preliminary objections ("Objections") to the complaint ("Complaint") of Plaintiff ZA Consulting, L.L.C. ("ZA"). For the reasons set forth in this Opinion, the Court is issuing a contemporaneous Order sustaining the Objections in part and overruling the Objections in part.

BACKGROUND

ZA is, among other things, a provider of staffing and consulting services to nursing homes and long-term care facilities. Wittman began working with ZA on February 15, 1999 and entered into a Confidentiality, Non-Competition & Non-Solicitation Agreement with ZA ("Agreement"). Paragraph Two of the Agreement ("Non-Competition Provision") prohibits certain post-employment competition:

> 2. Non-Competition/Non-Solicitation Covenants. During the term of his/her employment with the Company, and for a period of three (3) years after the termination of such employment for any reason (the "Non-Competition Period"), Employee agrees that he/she will not perform, directly or indirectly, or solicit the performance of: (i) financial advisory services in connection with the financing and acquisition of various types of health care facilities, including without limitation, financial advisory services in connection with tax exempt bond financing for long term care, retirement housing and similar acquisitions and projects; (ii) consulting services to governmental entities in connection with their Medicaid programs; (iii) consulting services to long term care providers in connection with Medicare

> and Medicaid managed care programs; (iv) compliance consulting services to teaching hospitals, medical groups and others related to compliance enforcement efforts by governmental agencies; (v) consulting services to hospital systems in connection with the operation of physician-owned practices; and (vi) any other business or activity in which the Company or its affiliates are engaged during the Non-Competition Period for any person or entity that is or was a Client (as hereinafter defined) of the Company at any time during Employee's employment with the Company.

Complaint Ex. B at ¶ 2 (emphasis added). The Non-Competition Provision goes on to define "Client" as "a person or entity for which the Company or any of its affiliates performed services for which the Company or such affiliate has issued, or will within a reasonable time issue, a bill to the person or entity. . . ." Id. The Agreement also specifies liquidated damages to be paid in the event of a breach of the Non-Competition Provision and a payment schedule.[1]

On March 1, 2000, ZA entered into a consulting contract ("Contract") with Bala Nursing and Retirement Center ("Bala"). Under the terms of the Contract, ZA agreed to provide Bala with staffing and consulting services. On April 26, 2000, ZA began providing Wittman to act as Bala's Assistant Director of Nursing. This arrangement continued until February 9, 2001, when Wittman resigned from his position with ZA. ZA asserts that Wittman immediately commenced employment directly with Bala as its Director of Nursing.

On the basis of these allegations, ZA has filed suit against Wittman for breach of the Agreement, for which it requests liquidated damages of $1,683,884.94, and tortious interference with the Contract. Wittman has responded with the Objections, which assert legal insufficiency.

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[1] Under the liquidated damages provision of the Agreement, if Wittman breaches the Non-Solicitation Provision within two years after termination, he is responsible to ZA for "an amount equal to three (3) times the billings for the [C]lient during the twelve (12) calendar months immediately preceding Employee's performance or solicitation of services for such [C]lient." Agreement at ¶2(a).

DISCUSSION

The Non-Competition Provision prohibits Wittman from engaging only in those activities in which ZA itself is engaged. Because there is no allegation that ZA provides the same services that Wittman provides to Bala, i.e., medical and nursing services, the Complaint does not allege a breach of the Agreement. ZA's intentional interference claim is legally sufficient.

For the purposes of reviewing preliminary objections in the form of a demurrer, "all well-pleaded material, factual averments and all inferences fairly deducible therefrom" are presumed to be true. Tucker v. Philadelphia Daily News, 757 A.2d 938, 941-42 (Pa. Super. Ct. 2000). When presented with preliminary objections whose end result would be the dismissal of a cause of action, a court should sustain the objections only where "it is clear and free from doubt from all the facts pleaded that the pleader will be unable to prove facts legally sufficient to establish [its] right to relief." Bourke v. Kazaras, 746 A.2d 642, 643 (Pa. Super. Ct. 2000) (citation omitted). Furthermore,

> [I]t is essential that the face of the complaint indicate that its claims may not be sustained and that the law will not permit recovery. If there is any doubt, it should be resolved by the overruling of the demurrer. Put simply, the question presented by demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible.

Bailey v. Storlazzi, 729 A.2d 1206, 1211 (Pa. Super. Ct. 1999).

I. Count I - Breach of Contract/Liquidated Damages Is Legally Insufficient

To sustain a claim for breach of contract, a complaint must allege "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." CoreStates Bank, N.A. v. Cutillo, 723 A.2d 1059 (Pa. Super. Ct. 1999). Wittman contends that the Complaint does not allege a breach of the Agreement.

The Complaint clearly sets forth Wittman's conduct that supposedly violates the Non-Competition Provision: he accepted employment with Bala as Director of Nursing within three years after leaving ZA. Thus, ZA asserts that Wittman's work in a medical and nursing position with Bala, a ZA "Client," constitutes a breach of the Agreement.

What remains unclear, however, is how Wittman's current employment with Bala violates the Non-Competition Provision. ZA focuses the Court's attention on the portion of the Non-Competition Provision that prohibits Wittman from performing "business or activity in which the Company or its affiliates are engaged. . . ." Agreement at ¶ 2. While the Complaint asserts that ZA provides "staffing and consulting services," there is no indication that ZA itself provides or ever provided the medical or nursing services that Wittman currently does for Bala. Similarly, there are no allegations that Wittman has provided Bala with staffing or consulting services, which would constitute competition with ZA under the Non-Competition Provision's terms. This leaves the Court without any grounds to conclude that Wittman is engaged in the same business or activity as ZA.

In the Objections, ZA argues for a definition of its activity that would be sufficiently expansive to encompass the services Wittman currently provides to Bala. Based solely on the allegations in the Complaint, the Court finds no reason to do this. First, Pennsylvania courts have instructed that restrictive covenants are to be narrowly construed. All-Pak, Inc. v. Johnston, 694 A.2d 347, 351 (Pa. Super. Ct. 1997). See also Hess v. Gebhard & Co., 769 A.2d 1186, 1191 (Pa. Super. Ct. 2001) ("[g]iven that restrictive covenants have been held to impose a restraint on an employee's right to earn a livelihood, they should be construed narrowly"). This would support a narrow definition of the business in which ZA is engaged.

Moreover, it appears that ZA drafted the Agreement.[2] It is a basic principle of contract interpretation that agreements will be construed against the drafter when their terms are ambiguous. Smith v. The Windsor Group, 750 A.2d 304, 308 (Pa. Super. Ct. 2000); Dieter v. Fidelcor, Inc., 441 Pa. Super. 215, 221, 657 A.2d 27, 30 (1995). See also Rusiski v. Prebonic, 511 Pa. 383, 390, 515 A.2d 507, 510 (1986) ("doubtful language is construed most strongly against the drafter thereof"). If ZA had wanted the Non-Competition Provision to apply to medical or nursing services, it could easily have worded the Provision more broadly and explicitly to ensure that its intent was unambiguous and unmistakable. Because it did not, the Court cannot, by inference, extend ZA's staffing and consulting business to include medical or nursing activity.

Although the Complaint does not provide any reason to believe so, it may be that ZA does, in fact, provide medical and nursing services with which Wittman is competing. For this reason, the Court is directing ZA to file an amended complaint, in spite of the doubts and caveats expressed in this Opinion.[3] Cf. Harley Davidson Motor Co. v. Hartman, 296 Pa. Super. 37, 42, 442 A.2d 284, 286 (1982) ("[e]ven where a trial court sustains preliminary objections on their merits, it is generally an abuse of discretion to dismiss a complaint without leave to amend"). In the interim, the Objections to Count I in the Complaint are sustained, and Count I is stricken.[4]

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[2] The Agreement is titled "Zelenkofske Axelrod Consulting, L.L.C. Confidentiality, Non-Competition & Non-Solicitation Agreement" and includes repeated "he/she" and "him/her" references, allowing the Court to infer that the Agreement is a ZA form used generally for its employees.

[3] In the event that ZA cannot allege facts to support its breach of contract claim in light of the conclusions reached in this opinion, it may file an amended complaint that simply omits Count I entirely.

[4] Because Count I is legally insufficient, there is no need to consider Wittman's argument that ZA's request for liquidated damages is improper.

II. Count II - Intentional Interference with Contract Is Legally Sufficient

A successful claim for intentional interference with contractual relations must satisfy four elements:

> (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Strickland v. University of Scranton, 700 A.2d 979, 985 (Pa. Super. Ct. 1997) (citation omitted).

Wittman presents the argument that the interference he is accused of was done while he was ZA's agent, preventing ZA from asserting a claim against him. To advance this argument, Wittman cites several cases for the principle that a corporation's agent cannot interfere with the corporation's contractual relations. In each of those cases, however, the individual was acting in his or her capacity as a corporate agent on the corporation's behalf and not against the corporation's interest:

> We conclude, therefore, that where, as here, a plaintiff has entered into a contract with a corporation, and that contract is terminated by a corporate agent who has acted within the scope of his or her authority, the corporation and its agent are considered one so that there is no third party against whom a claim for contractual interference will lie.

Daniel Adams Assocs. v. Rimbach Publ'g, Inc., 360 Pa. Super. 72, 82, 519 A.2d 997, 1002 (1987) (emphasis added). See also Michelson v. Exxon Research & Eng'g Co., 808 F.2d 1005, 1007-08 (3rd Cir. 1987) (conditioning an employee's immunity from an intentional interference claim on whether the employee "was acting within the scope of his employment in allegedly interfering" with the contract at issue).

The allegations in the Complaint support the conclusion that Wittman was acting against ZA and not in his capacity as ZA's agent when he allegedly interfered with the Contract. This makes the instant dispute more similar to those cases in which courts have found the agent liable for his or her misdeeds. See Yaindl v. Ingersoll-Rand Co. Standard Pump-Aldrich Div., 281 Pa. Super. 560, 577 n.8, 422 A.2d 611, 619 n.8 (1980) ("an agent is liable if he intentionally and improperly induces his principal to break its contract with a third person"). See also American Trade Partners, L.P. v. A-1 Importing Enter., Ltd., 757 F. Supp. 545, 555 (E.D. Pa. 1991) ("[w]here it is alleged . . . that the corporate officer or employee was acting in a personal capacity or outside the scope of his authority, an intentional interference claim may be asserted against him"). As a result, Count II is legally sufficient, and the Objections thereto are overruled.[5]

[5] In the Objections, Wittman has also asserted that Count II is insufficiently specific. Because Wittman has failed to brief this argument, however, he has waived the right to have the Court consider it. See Stewart v. Pennsylvania Bd. of Probation & Parole, 714 A.2d 502, 504 (Pa. Commw. Ct. 1998) (respondents who failed to brief issues raised in preliminary objections had waived the right to have those issues considered). Cf. Statewide Bldg. Maintenance, Inc. v. Pennsylvania Convention Center Auth., 160 Pa. Commw. 544, 557 n.13, 635 A.2d 691, 698 n.13 (1993) (where the defendant "failed to raise standing as an issue in its preliminary objections, instead mentioning it for the first time in a brief footnote in its memorandum supporting the preliminary objections, it "waived its opportunity to contest standing").

CONCLUSION

ZA's claim for breach of contract is legally deficient, although its intentional interference with contractual relations claim is legally sufficient. ZA is directed to file an amended complaint within 20 days of the issuance of this Opinion.

BY THE COURT:

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JOHN W. HERRON, J.

Dated: August 28, 2001

THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

ZA CONSULTING, L.L.C.,	:	April Term, 2001
Plaintiff	:	
	:	No. 3941
v.	:	
	:	Commerce Case Program
ANDREW J. WITTMAN,	:	
Defendant	:	Control No. 610326

ORDER

AND NOW, this 28th day of August, 2001, upon consideration of the Preliminary Objections of Defendant Andrew J. Wittman to Plaintiff ZA Consulting, L.L.C.'s Complaint and the Plaintiff's response thereto and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED as follows:

1. The Preliminary Objections to Count I - Breach of Contract/Liquidated Damages are SUSTAINED, and Count I is STRICKEN;

2. The remaining Preliminary Objections are OVERRULED; and

3. The Plaintiff is directed to file an amended complaint within 20 days of this Order.

BY THE COURT:

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JOHN W. HERRON, J.