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

ZA CONSULTING, LLC	:	
	:	April 2001
	:	
Plaintiff,	:	No. 03941
v.	:	
	:	Commerce Program
ANDREW J. WITTMAN	:	
	:	Control Nos. 090120
Defendant.	:	082305

ORDER

AND NOW, this 11th day of December, 2002, upon consideration of Andrew Wittman's Motion for Summary Judgment, any responses thereto, the respective memoranda, and in accordance with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that said Motion is **GRANTED** and the Amended Complaint of ZA Consulting, LLC is **DISMISSED**.

Further, upon consideration of the Motion for Summary Judgment of ZA Consulting, LLC, any responses thereto, the respective memoranda, and in accordance with the contemporaneous Memorandum Opinion, it hereby is **ORDERED** and **DECREED** that said Motion is **GRANTED** and Andrew Wittman's Counterclaim is **DISMISSED**.

BY THE COURT:

_____
GENE D. COHEN, J.

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

ZA CONSULTING, LLC	:	
	:	April 2001
	:	
Plaintiff,	:	No. 03941
v.	:	
	:	Commerce Program
ANDREW J. WITTMAN	:	
	:	Control Nos. 090120
Defendant.	:	082305

MEMORANDUM OPINION

GENE D. COHEN, J.

Before the Court are the Motions for Summary Judgment of Defendant/Counterclaim Plaintiff Andrew J. Wittman ("Wittman") and of Plaintiff/Counterclaim Defendant ZA Consulting, LLC ("ZAC"). For the reasons fully set forth below, both motions are **granted**; ZAC's Amended Complaint (the "Complaint") and Wittman's Amended Counterclaim (the "Counterclaim") hereby are **dismissed**.

BACKGROUND

Wittman is a former employee of ZAC. ZAC is a provider of staffing and consulting services to nursing homes and long-term care facilities. (Compl. ¶ 2). Wittman began working for ZAC on February 15, 1999 and, at that time, entered into a Confidentiality, Non-Competition & Non-Solicitation Agreement with ZAC (the "ZAC Agreement"). (Compl. ¶ 4). The ZAC Agreement, which was signed by Wittman, contains a Non-Competition/Non-Solicitation Covenant[1] (the "Non-Competition Provision") which prohibits Wittman from engaging in, *inter*

[1] **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

alia, "...any other business or activity in which [ZAC] or its affiliates are engaged during the Non-Competition Period for any person or entity that is or was a Client . . . of [ZAC] at any time during [Wittman's] employment with [ZAC]." (Compl. ¶ 4).

In March 2000, pursuant to a series of written agreements ("Bala Agreement"), ZAC began providing staffing and consulting services to Bala Nursing and Retirement Center ("Bala"), which operates a nursing home and long-term care facility. (Compl. Ex. B). Specifically, ZAC agreed to provide "clinical consulting" and "management advisory services" to Bala. (Wittman Mem. Ex. C). During the contract period and pursuant a written agreement dated May 26, 2000, ZAC agreed to provide Bala with two of its employees, Debra Sammarone as Interim Director of Nursing (IDON) and Wittman as Assistant Director of Nursing (ADON). (Compl. Ex. C). Although assigned to Bala as its ADON, Wittman remained employed by ZAC until February 2001, when he resigned from his position. Shortly thereafter, Wittman commenced employment directly with Bala as its Director of Nursing (DON).

Pursuant to the Bala Agreement, either ZAC or Bala expressly was permitted to terminate the Bala Agreement within thirty (30) days written notice to the other party. (Compl. Ex. B, Ex. C). On or about January 30, 2001, Bala advised ZAC that it would not need ZAC's services after

---

"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. (Compl. Ex. A at ¶ 2)(emphasis added).

February 9, 2001. (Comp. ¶ 32). Phillip Miller, the President of Ford Road Corp., the general partner of Bala, testified during his deposition that he terminated the Bala Agreement because of ZAC's failure to properly perform the contracted services in a timely manner. (Wittman Mem. Ex. E.)

Thereafter, ZAC filed the instant action against Wittman alleging that, by accepting the DON Position with Bala, Wittman: 1) breached of the Non-Competition Provision of the ZAC Agreement; and 2) tortiously interfered with ZAC's contractual relationship with Bala. (Compl. at 5-8). In response, Wittman filed an Amended Counterclaim against ZAC for tortious interference with existing contractual relations, alleging that ZAC commenced this litigation solely for the purpose of interfering with his employment with Bala. (Countercl. ¶ 47-48).

DISCUSSION

A. Wittman's Motion for Summary Judgment

1. ZAC's Breach of Contract Claim Fails As A Matter of Law

Wittman has moved for summary judgment as to Count I of the Complaint, arguing that ZAC's breach of contract claim fails because ZAC has failed to proffer any evidence that Wittman's employment with Bala constitutes a breach of the Non-Competition Provision of the ZAC Agreement. Wittman Mem. at 4. To sustain a claim for breach of contract, plaintiff must prove: (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, Nat'l Assn. v. Cutillo, 723 A.2d 1053 (Pa. Super. 1999). It is undisputed that a contract existed between ZAC and Wittman. It is likewise undisputed that Bala was a client of ZAC, as defined by the ZAC Agreement. Thus, the sole issue before this Court with respect to Count I is whether Wittman's

employment with Bala violates the Non-Competition Provision of the ZAC Agreement.

With respect to Bala, a client of ZAC, the Non-Competition Provision prohibits Wittman from performing "***any...business or activity in which [ZAC] or its affiliates are engaged***..." (Compl. Ex. A at ¶ 2). By its own admission, ZAC is in the business of providing "staffing and consulting services." (Comp. ¶ 1). ZAC further admits that it is "not in the business of providing medical or nursing care services" and that it is "not licenced in any manner by any state or other administrative agency to provide such services." (ZAC Resp. ¶ 12). The position Wittman ultimately accepted with Bala was that of Director of Nursing, which involves the provision of medical and nursing services, as well as overseeing the nursing department and regulatory compliance. (ZAC Resp. Mem. at 5).

In May 2000, ZAC provided one of its employees, Debra Sammarone, to act as Interim DON at Bala. (Compl. Ex. C). ZAC argues that, because Wittman was providing "exactly the same services to Bala as those previously provided by Sammarone", that this somehow demonstrates that Wittman violated the Non-Competition Provision. (ZAC Resp. Mem. at 11). However, this logic necessarily fails. The provision of staff to perform medical and nursing services is not the same thing as actually providing such services. ZAC has failed to set forth any facts which demonstrate that it provides or has ever provided the medical or nursing services that Wittman provided for Bala in his role as DON. Nor has there been proof that Wittman performed any staffing or consulting services for Bala during the Non-Competition Period. As such, ZAC can not establish Wittman's breach of the ZAC Agreement as a matter of law.

Moreover, there is a general presumption in Pennsylvania against restrictive covenants and such covenants will be narrowly construed. All-Pak, Inc. v. Johnston, 694 A.2d 347, 351 (Pa.

Super. 1997). As drafter of the ZAC Agreement, if ZAC had intended the Non-Competition Provision to apply to medical or nursing services, as well as staffing and consulting services, it could easily have worded it in such a manner to ensure such an interpretation. However, it did not. Moreover, if this Court were to adopt the interpretation advocated by ZAC, the Non-Competition provision would effectively have barred Wittman from performing not only staffing and consulting services, but ***any*** services for which ZAC provides staffing and/or consulting, including all medical and nursing services. Such a broad interpretation of the Non-Competition Provision would leave Wittman unable to earn his livelihood and would likely be rendered unenforceable absent appropriate modification.[2]

Even when viewing the record in a light most favorable to ZAC, ZAC can not prove any set of facts supporting its claim which will entitle it to relief. Accordingly, Count II of the Complaint is dismissed.

2. ZAC's Claim For Intentional Interference With Existing Contractual Relations Fails As A Matter of Law

In Count II of the Complaint, ZAC alleges that, by accepting the DON position with Bala, Wittman interfered with the Bala Agreement. (Compl. ¶ 35; ZAC Resp. Mem. 12-13). The elements of a cause of action for interference with contractual relations are as follows:

---

[2] Under Pennsylvania Law a covenant not to compete will be enforceable "so far as reasonably necessary for the protection of the employer." Sidco Paper Co. v. Aaron, 465 Pa. 586, 591, 351 A.2d 250, 252 (1976). In the context of an equitable remedy, such as a preliminary injunction, the Pennsylvania Supreme Court has stated that "where the covenant imposes restrictions broader than necessary to protect the employer, we have repeatedly held that a court of equity may grant enforcement limited to those portions of the restrictions which are reasonably necessary for the protection of the employer." Id. In determining whether to enforce a post-employment restrictive covenant, the court must balance the interest the employer seeks to protect against the important interest of the employee in being able to earn a living in his chosen profession." Thermo-Guard, Inc. v. Cochran, 596 A.2d 188, 193-94 (Pa. Super. 1991)(analyzing the availability of an injunction based upon a non-compete clause).

(1) the existence of a 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;

(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.

Al Hamilton Contracting Co. v. Cowder, 644 A.2d 188, 191 (Pa. Super. 1994); Strickland v. Univ. of Scranton, 700 A.2d 979 (Pa. Super. 1997).

Because this tort is an intentional one, in order to succeed on its claim, the plaintiff must prove that the defendant acted for the specific purpose of causing harm to the contractual relationship at issue. Glenn v. Point Park College, 441 Pa. 474, 477, 272 A.2d 895, 897 (1971). Here, ZAC has failed to demonstrate that Wittman "specifically intended to harm" its relationship with Bala. Al Hamilton, 644 A.2d at 191. ZAC's claim can not succeed absent any indication that Wittman intended to interfere with the Bala Agreement or any reasonable proof that Bala would have continued its contract with ZAC if Wittman did not accept the position as DON. *See, e.g.* Glenn, 441 Pa. at 477, 272 A.2d at 897; Small v. Juniata College, 682 A.2d 350, 354 (Pa. Super. 1996). The facts of record, particularly the testimony of Philip Miller, clearly demonstrates that Bala's termination of the Bala Agreement was for reasons unrelated to Wittman. (Wittman Mem. Ex. E). ZAC has failed to present sufficient evidence from which a reasonable jury could find otherwise. Moreover, the Bala Agreement was not limited solely to the staffing of the DON position, but rather to staffing the ADON position, as well as providing "clinical consulting" and "management advisory services" to Bala. (Wittman Mem. Ex. C). ZAC has failed to offer any credible evidence that Wittman acted with the intent to interfere with the ability of ZAC to

provide consulting services or staffing aside from the DON position to Bala, as called for by the Bala Agreement.

A court must grant a motion for summary judgment when a non-moving party fails to "adduce sufficient evidence on an issue essential to his case and on which he bears the burden of proof such that a jury could return a verdict in his favor." Ertel v. Patriot-News Co., 544 Pa. 93, 101-02, 674 A.2d 1038, 1042 (1996). Such is the case with respect to the Complaint. Accordingly, Wittman's Motion for Summary Judgment hereby is granted and the Complaint dismissed.

B. ZAC's Motion for Summary Judgment

1. Wittman's Claim For Interference With Existing Contractual Relations Fails As A Matter of Law

Wittman's Counterclaim sets forth a cause of action against ZAC for tortious interference with existing contractual relations, alleging that "ZAC commenced this action, without legal justification, and with the intention of causing Bala to terminate Wittman's employment." (Countercl. ¶ 48). However, as a matter of law, ZAC can not be liable to Wittman under such a cause of action because, at all times material hereto, Wittman was an at-will employee of Bala. (ZAC Mem. at 6, Ex. B at 110:18-111:112). Under Pennsylvania law, "an action for intentional interference with the performance of a contract in the employment context applies only to interference with a prospective employment relationship, whether at-will or not, not a presently existing at-will employment relationship." Hennessy v. Santiago, 708 A.2d 1269 (Pa. Super. 1998); Buckwalter v. Parker, 1998 WL 195701 (1998), *aff'd* 175 F.3d 1010 (3d Cir. 1999). Accordingly, Wittman's Counterclaim fails as a matter of law.

Even absent the Hennessey decision, Wittman has still failed to provide sufficient evidence from which a reasonable jury could find that ZAC interfered with Wittman's employment with Bala, particularly that ZAC engaged in any "purposeful action...specifically intended to harm the existing relation." Al Hamilton, 644 A.2d at 191. Wittman has presented no evidence which tends to demonstrate that ZAC lacked a good faith basis for filing the instant suit. The fact that ZAC's claim was dismissed on summary judgment is not determinative of this fact. *See, e.g.*, Glenn, 441 Pa. at 474, 272 A.2d at 895; People's Mortgage Co., Inc. v. Fed. Nat'l Mortgage Assn., 856 F.Supp. 910 (1994)(applying Pennsylvania law). Accordingly, ZAC's Motion for Summary Judgment hereby is granted and the Counterclaim dismissed.

CONCLUSION

For the above-stated reasons, this Court hereby finds as follows:

1. Wittman's Motion for Summary Judgment is **granted** and ZAC's Amended Complaint is **dismissed.**

2. ZAC's Motion for Summary Judgment is **granted** and Wittman's Amended Counterclaim is **dismissed**.

This Court will enter a contemporaneous Order consistent with this Opinion.

BY THE COURT:

_____

GENE D. COHEN, J.