2013 ONSC 278
Ontario Superior Court of Justice

1003126 Ontario Ltd. v. DiCarlo

2013 CarswellOnt 1874, 2013 ONSC 278, 10 C.C.E.L. (4th) 1, 226 A.C.W.S. (3d) 117

1003126 Ontario Ltd., operating as Skin Vitality Medical Clinic Plaintiff and Caterina DiCarlo Defendant

M.L. Edwards J.

Heard: December 20, 2012
Judgment: February 22, 2013
Docket: CV-12-111785-00

Counsel: Elizabeth Bennett-Martin for Plaintiff
Timothy M. **Duggan** for Defendant

Subject: Employment; Public; Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Labour and employment law

II Employment law
II.3 Interpretation of employment contract
II.3.j Particular covenants
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Remedies

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Remedies

II Injunctions
II.2 Availability of injunctions
II.2.f Injunctions in specific contexts
II.2.f.vi Restrictive covenants
II.2.f.vi.A Employment contract

Headnote

Labour and employment law --- Employment law — Interpretation of employment contract — Particular covenants — Restrictive covenants — Whether covenant reasonable

Plaintiff was former employer of defendant employee — Employer noted employee in default — Employer brought motion seeking injunction restraining employee from engaging in or being employed by another employer engaged in spa business within twenty mile radius of any medical spa or weight loss centre owned and operated by employer, for two years commencing October 12, 2012 — Motion dismissed — Employer failed to establish strong prima facie case for enforcing non-competition agreement, where temporal restriction had been deemed unreasonable — Employer also failed to provide evidence to establish irreparable harm — Employee gave evidence that if injunctive relief were granted it would be financially ruinou for her as her only job experience and training related to working in medical spa — Balance of convenience favoured employee.

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Table of Authorities

Cases considered by *M.L. Edwards J.*:

Brar v. Zellers Inc. (2012), 2012 ONSC 2546, 2012 CarswellOnt 5723, 3 B.L.R. (5th) 302 (Ont. S.C.J.) — referred to

Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc. (2011), 83 B.L.R. (4th) 11, 2011 ONSC 1456, 2011 CarswellOnt 1464 (Ont. S.C.J. [Commercial List]) — followed

Hennigar v. Target Corp. (2011), 2011 CarswellOnt 2532, 2011 ONSC 2271 (Ont. S.C.J.) — referred to

Jet Print Inc. v. Cohen (1999), 43 C.P.C. (4th) 123, 1999 CarswellOnt 2357 (Ont. S.C.J.) — referred to

Statutes considered:

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 19.05 — pursuant to

R. 40.03 — considered

MOTION by employer seeking injunction restraining employee from engaging in or being employed by another employer engaged in spa business within twenty mile radius of any spa owned and operated by employer, for two years commencing October 12, 2012.

***M.L. Edwards J.*:**

Overview

1 The plaintiff having noted the defendant in default moves under Rule 19.05 of the *Rules of Civil Procedure* (the "Rules") for judgment. The primary relief sought by the plaintiff before this court was an injunction "restraining the defendant from engaging in or being employed by another employer engaged in a *medical spa or weight loss centre* business within a twenty mile radius of any medical spa or weight loss centre owned and operated by the plaintiff, for two years commencing October 12, 2012, terminating on October 11, 2014." (my emphasis) Further injunctive relief was also sought in relation to allegations that the defendant had breached her employment contract with the plaintiff by entering into a contract of employment with Renew Medical Spa ("Renew") at a location within nine miles of where the defendant had worked with the plaintiff.

The Facts

2 The plaintiff carries on business as a medical spa and has clinics in six locations in the Greater Toronto Area ("GTA").

3 The defendant commenced her employment with the plaintiff on January 15, 2007. The defendant was required to enter into an employment agreement, the terms of which are in dispute.

4 In the plaintiff's motion material, appended to the affidavit of Tara Lee Rowsell, is a copy of an employment agreement which appears to have been signed by the parties on January 15, 2007. The employment agreement is referred to as a "subcontract agreement" and in paragraph 4 is contained a non-competition agreement, which the plaintiff seeks to enforce. The non-competition agreement provides:

> The subcontractor agrees that in the event of her contract being terminated for any reason, the subcontractor will not for a period of twenty-four (24) months after leaving the contract, engage or be employed by another employer engaged ***in a medical spa or weight loss centre business*** in a position the duties of which are the same or similar to those duties performed for the employer pursuant to this agreement, or otherwise have a direct or indirect interest, whether as a proprietor, partner, co-venturer, financier, investor, or stockholder, director, officer, employer, employee, servant, agent, representative or otherwise, in a weight loss centre within a twenty (40) mile radius of any medical spa or weight loss centre then owned or operated by the employer or one of its franchisees. (emphasis added.}

5 I will refer throughout these reasons to the non-competition clause contained in the subcontract agreement contained in the plaintiff's motion materials as the non-competition agreement.

6 In addition to the non-competition agreement, a number of other paragraphs in the subcontract agreement are of significance. In paragraph 1 of the subcontract agreement, is contained the following representation and warranty made by the subcontractor who is identified as the defendant.

7 Paragraph 1 provides:

> The subcontractor represents and warrants to the employer that she has the required skills and experience to perform the duties and exercise the responsibilities required of the subcontractor as a sales person...

8 The subcontract agreement also contained provisions with respect to termination. The subcontractor (i.e., the defendant), pursuant to paragraph 6(1)(a) of the subcontract agreement was required to provide thirty days advance notice in writing to the employer should the subcontractor choose to terminate the agreement. It is particularly noteworthy that the employer (i.e., the plaintiff), pursuant to paragraph 6(1)(c) was only required to provide one week's notice of termination if the subcontractor's position of employment was terminated without cause.

9 Finally, the subcontract agreement has a provision with respect to independent legal advice contained at paragraph 15 in which the subcontractor acknowledges that she has read and that she understood the agreement and further acknowledged that she has had the opportunity to obtain legal advice. The subcontract agreement further provides that the subcontractor waived her right to use "not getting legal advice" as grounds to set aside the agreement. The evidence would appear to support the conclusion that the subcontract agreement was signed on January 15, 2007, which is also the same day when the plaintiff commenced her employment. It is highly unlikely, therefore, that the plaintiff had any opportunity to obtain legal advice prior to signing the subcontract agreement.

10 Contained within the defendant's motion materials is a copy of what is described as the "sales staff employment agreement". I will refer to this agreement as the "employment agreement". The employment agreement is signed by the defendant but not signed by the plaintiff. The employment agreement is made as of the day _____ of January, 2007 and is entered into, purportedly, between 1003126 Ontario Ltd., operating as a *NATURAL ADVANTAGE WEIGHT LOSS CENTRE AND HEALTH SPA* and Caterina DiCarlo.

11 The employment agreement, like the subcontract agreement, contains within it a non-competition clause which provides:

> The employee agrees that at in the event of her employment being terminated for any reason, the employee will not for a period of twenty-four (24) months after leaving the employment, engage in or be employed by another employer engaged in a weight loss centre business in a position the duties of which are the same or similar to those duties performed for the employer pursuant to this agreement, or otherwise have a direct or indirect interest whether as a proprietor...representative or otherwise, ***in a weight loss centre***, within a twenty (40) mile radius of any weight loss centre then owned and operated by the employer or one of its franchisees.
>
> (emphasis added.)

12 As with the subcontract agreement, the employment agreement also contained a termination clause which required the employee to give thirty days notice in writing to the employer, while the employer again could terminate the employment agreement without cause upon providing the employee with one week's notice of termination. Noteworthy in the employment agreement is a provision which also required the employer to provide pay in lieu of notice, plus all minimum payments or entitlements to which the employee was entitled pursuant to the *Employment Standards Act*, including notice of termination or at the employer's option, pay in lieu of notice and severance pay, if applicable, and employee benefits. There is no reference in the subcontract agreement to the requirement for the employer to provide the minimum payments required by the Ontario *Employment Standards Act*.

13 There is a factual dispute as to which of the agreements between the parties is the operative agreement. The plaintiff maintains that the subcontract agreement is the only agreement that is actually signed by both parties. While the subcontract agreement purportedly contains the defendant's signature, the defendant swore an affidavit which indicates that she does not ever recall having seen the subcontract agreement, prior to being provided a copy contained within the plaintiff's motion record and further she swears that she doesn't believe she ever signed it.

14 At the time the motion was heard before me, neither of the parties who swore affidavits had been cross-examined. This court is not in position on the basis of the evidence before it to come to any conclusion as to which of the agreements filed as an exhibit to the various affidavits filed on this motion is the binding operative agreement. This is a factual dispute that will have to be dealt with by the trial judge.

15 The plaintiff maintains that there was a significant investment incurred by the plaintiff to train the defendant, which together with the fact that the defendant had unfettered access to the plaintiff's confidential information, required the necessity for the non-competition agreement contained in the subcontract agreement. The statement that a significant investment was required to train the defendant would appear to be somewhat at odds with the very first paragraph of the subcontract agreement, which contained a representation and warranty by the defendant that "she has the required skills and experience to perform the duties and exercise the responsibilities required of the subcontractor as a sales person." Other than the bald statement in the plaintiff's affidavit material that there was a significant investment required to train the defendant, no further particulars were provided as to the costs and expense actually incurred in the so-called training.

16 The defendant advised the plaintiff that she was resigning her position of employment on September 27, 2012, effective October 12, 2012. After terminating her employment, the defendant commenced employment with Renew, which is described by the plaintiff as a competing medical spa. The defendant deposes in her affidavit that Renew operates a medical spa but not a weight loss centre. She also deposes in her affidavit that her position with Renew is as the director of business development and not as a sales person. As such, the defendant states that she does not have the same or similar duties with Renew that she had with the plaintiff when she terminated her employment with the plaintiff in September 2012.

17 The plaintiff alleges, as with so many of these types of cases alleging breaches of an employment agreement, that the defendant, since leaving her employment, has solicited business from the plaintiff's clients and customers and that she has also induced employees of the plaintiff to breach their respective employment agreements with the plaintiff and to commence work with Renew. These allegations are denied by the defendant.

18 Other than the bald assertion in the plaintiff's affidavit that employees of the plaintiff have been solicited by the defendant, what is particularly noteworthy is that there is no evidence from any of those employees, or customers for that matter, to support the assertion of such solicitation. It is particularly noteworthy that on October 23, 2012, Eleanor Welch, who is identified as the founder and chief executive officer of the plaintiff, sent an email to the defendant in which she states:

> Currently I have five staff members that are in agreement to testify in regards to the conversations that involved you attempting to convince them to leave their employment with Skin Vitality.

19 This court would have expected that if, in fact, the plaintiff did have five staff members who were in agreement to testify with respect to conversations concerning an attempt to convince them to leave their employment with the plaintiff, that affidavit evidence of the five staff members would have been filed with the court supporting this assertion. No such affidavit evidence having been filed causes this court to reject the assertion made in the plaintiff's motion materials suggesting that, in fact, such solicitation of employees had taken place.

The Law

20 The plaintiff seeks injunctive relief to enforce the non-competition agreement contained in the subcontract agreement. As I have already indicated, there is a factual dispute as to which, if any agreement, is the operative agreement between the parties. For the purposes of any appeal in this matter, I will however deal with the plaintiff's argument as to whether or not the non-competition agreement contained in the subcontract agreement is enforceable.

21 In order to obtain the type of injunctive relief sought, the plaintiff must demonstrate that it has a strong *prima facie* case for enforcing the non-competition agreement; that the plaintiff will suffer irreparable harm if the injunction

is not granted; and that the balance of convenience favours the granting of the injunction. See *Jet Print Inc. v. Cohen*, 1999 CarswellOnt 2357 (Ont. S.C.J.) at para. 10.

22 It is well established that covenants in restraint of trade generally speaking are considered unenforceable as being contrary to the public interest. It has equally been well accepted in the jurisprudence that reasonable restraints of trade may be enforceable in certain circumstances. In that regard, restrictive covenants entered into between an employee and an employer will be enforced, provided the employer can establish that the restrictive covenant or the non-competition agreement is reasonable as between the parties. In determining the reasonableness of a restrictive covenant contained within a non-competition clause, the court will generally consider the extent of the activity sought to be prohibited and the extent of the temporal and spacial scopes of the prohibition. In that regard, as D.M. Brown J. noted in *Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc.*, 2011 CarswellOnt 1464 (Ont. S.C.J. [Commercial List]):

> ...A court should ask: (i) did the employer have a proprietary interest entitled to protection? (ii) are either the temporal or spacial features of the clause too broad? (iii) does the covenant seek to restrict competition generally or is it limited to proscribing solicitation of the clients of the former employer?

23 D.M. Brown J. went on to provide further assistance with respect to the enforceability of a restrictive covenant at paragraph 18, as follows:

> To be enforceable a restrictive covenant must be no wider than reasonably required to afford adequate protection to the employer. Our Court of Appeal has observed that a non-solicitation clause, suitably restrained in temporal and spatial terms, is more likely to represent a reasonable balance of competing interests than is a non-competition clause. Employee restraint covenants may be held invalid because of their unreasonable duration or because of their unreasonable territorial ambit, having regard in each respect to the range of business or activities covered by the restraining covenants.
>
> (19) In ascertaining the reasonableness of the geographic scope of a restrictive covenant, a court will assess the geographic extent of the employer's "protectable business operations". In terms of the reasonableness of the duration of the restrictive covenant, a court will assess "what is a reasonable time within which the respondent should be expected to put someone else in the employee's place to deal with the clients' accounts and with prospective clients in order to protect the respondent's business interests...

24 The non-competition agreement contained within the subcontract agreement contains both a time limitation and a geographic limitation. The time limitation is for twenty-four months precluding the defendant from being employed with a medical spa or weight loss centre. The geographic limitation is ambiguous as it provides for a "twenty (40) mile" radius. Clearly, the reference to twenty and 40 mile radius is a typographical error. This court cannot, however, resolve whether or not the geographic limitation is twenty miles or 40 miles. Regardless of whether or not the geographic radius is reasonable, the real determining question that this court must answer is whether or not a twenty-four month limitation on the defendant's ability to work in a medical spa or weight loss centre is reasonable.

25 While undoubtedly there will be cases where a twenty-four month limitation on an employee's ability to work in a competing business may be found reasonable, those types of cases will be the exception and not the rule. It is difficult to envision why, given the nature of the plaintiff's business, the plaintiff would require two years to deal with client's accounts and prospective clients in order to protect its business interests. Nor is it conceivable that the plaintiff would require two years to find a suitable candidate to fill the plaintiff's position which, on all accounts, would appear to be as a sales type person. This court does not therefore find that the non-competition agreement contained in the subcontract agreement is reasonable taking into account the twenty-four months, during which period of time the defendant could not work in a competing type business with the plaintiff.

Irreparable Harm

26 If this court has come to the incorrect conclusion with respect to the enforceability of the non-competition agreement contained in the subcontract agreement, I will nonetheless deal with the question of irreparable harm. The question of irreparable harm is dealt with in a very cursory fashion in the plaintiff's affidavit evidence. At paragraph 35 of the affidavit of Tara Lee Rowsell, is found the following bald statement:

> As a result of the defendant's conduct, Skin Vitality has and will continue to suffer damage and irreparable harm to its business, including loss of clients.

27 The plaintiff has the onus in establishing that it will suffer irreparable harm. Irreparable harm cannot be inferred or founded on "mere speculation". The bald assertion of irreparable harm contained in the plaintiff's motion materials does not come remotely close to meeting the onus on the plaintiff of establishing irreparable harm. The plaintiff therefore fails on the second part of the test required for injunctive relief.

The Balance of Convenience

28 The plaintiff has failed to establish a strong *prima facie* case for enforcing the non-competition agreement, where the temporal restriction has been deemed unreasonable. The plaintiff has also failed to put before the court evidence to establish irreparable harm. The defendant, not surprisingly, suggests that if injunctive relief is granted it would be "financially ruinous" for her as her only job experience and training relates to working in a medical spa. The defendant's sworn evidence in this regard was not subject to cross-examination and as it relates to the issue of balance of convenience, this court accepts that the balance of convenience favours the defendant.

Undertaking as to Damages

29 The plaintiff, in accordance with Rule 40.03 of the Rules is required to give an undertaking in damages. This court brought this issue to the attention of counsel for the plaintiff, who indicated a willingness on her part to provide the undertaking on behalf of her client. While this willingness on the part of plaintiff's counsel to provide such an undertaking may be seen as laudatory, this court nonetheless must be satisfied that an undertaking in damages can, in fact, be fulfilled by the plaintiff. The court does have discretion to exempt seeking injunctive relief from providing an undertaking in damages but such discretion should be exercised infrequently. See *Hennigar v. Target Corp.*, 2011 CarswellOnt 2532 (Ont. S.C.J.) at paras. 45-46 and *Brar v. Zellers Inc.*, 2012 CarswellOnt 5723 (Ont. S.C.J.) at para. 38.

30 Before this court can exempt the plaintiff from providing an undertaking in damages, the plaintiff has an obligation to put before the court "real financial information" with respect to the plaintiff's wherewithal. This court has virtually no evidence with respect to the plaintiff's financial status and despite the willingness of plaintiff's counsel to provide her own undertaking with respect to the obligation of the plaintiff concerning damages, this court is not prepared to waive the requirements of Rule 40.03 of the Rules.

Conclusion

31 For the reasons set forth above, the plaintiff's motion seeking injunctive relief is denied. The defendant has been noted in default. While there is no motion before this court with respect to the noting in default, given the affidavit evidence filed by the defendant, it would seem appropriate for the plaintiff to give consideration for an order setting aside the noting in default with a requirement that the defendant file a statement of defence within twenty days. If the parties cannot agree on terms with respect to the noting in default, the defendant shall bring a motion forthwith with respect to the issue of the noting of default so that this matter can be properly regularized from a pleadings perspective.

32 If the parties cannot agree upon costs, the parties can arrange a date with the trial co-ordinator to provide brief oral submissions with respect to costs to be preceded by written submissions, limited to three pages in length.

Motion dismissed.

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