

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000309-MR
AND
NO. 2004-CA-000310-MR

AHMAD H. AHMAD, M.D.

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM HARLAN CIRCUIT COURT
v. HONORABLE RON JOHNSON, JUDGE
ACTION NO. 99-CI-00229

APPALACHIAN REGIONAL
HEALTHCARE, INC.

APPELLEE/CROSS-APPELLANT

OPINION
AFFIRMING IN PART, AND REVERSING IN PART

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: Appalachian Regional Healthcare, Inc. (ARH) is a not-for-profit Kentucky corporation that operates several hospitals and medical clinics in Eastern Kentucky and West Virginia. In 1994, ARH recruited Dr. Ahmad to practice medicine at the Daniel Boone Clinic (DBC) in Harlan, Kentucky. ARH and Dr. Ahmad entered into an employment agreement that contained a restrictive covenant prohibiting Dr. Ahmad from practicing

medicine within a fifty-mile radius of Harlan for two years following the termination of the agreement. Additionally, the agreement contained a liquidated damages provision that required Dr. Ahmad to pay ARH \$125,000.00 if he breached the restrictive covenant.

In 1999, ARH terminated its employment relationship with Dr. Ahmad and informed him of its intent to enforce the restrictive covenant. On April 30, 1999, Dr. Ahmad filed a declaratory judgment action and a motion for a preliminary injunction in Harlan Circuit Court. The court granted Dr. Ahmad a temporary injunction and required that he post an injunction bond in the amount of \$160,000.00 pursuant to CR 65.05. The court eventually found the restrictive covenant void and unenforceable. Thereafter, Dr. Ahmad continued to practice medicine in Harlan.

On appeal, this Court reversed, holding that the restrictive covenant was valid and enforceable at the time ARH sought to enforce it. Appalachian Regional Healthcare, Inc. v. Ahmad, No. 1999-CA-002449-MR (Not-to-be-Published Opinion rendered February 2, 2001). This Court also stated that ARH was entitled to enforcement of the restrictive covenant even though some time had elapsed since Dr. Ahmad's employment was terminated and further directed the trial court to address the applicability of the liquidated damages provision.

Upon remand, the trial court issued an order prohibiting Dr. Ahmad from practicing medicine for two years beginning February 8, 2002. By separate order, the court overruled ARH's motion for a judgment entitling it to \$125,000.00 and instead the court limited ARH to \$51,231.20 in damages which represented the amount of ARH's attorney fees and costs. Dr. Ahmad appeals and ARH cross-appeals.

In its cross-appeal, ARH argues that it was entitled to the full \$125,000.00 as provided in the liquidated damages clause of the employment agreement. Paragraph 20 of the employment agreement provides that ARH would be entitled to liquidated damages of \$125,000.00 in the event of a breach of the restrictive covenant by Dr. Ahmad. In addition, that paragraph also allows ARH "to apply to any Court of competent jurisdiction for equitable relief." Consequently, ARH contends that it was entitled both to injunctive relief and to liquidated damages.

Generally, we would be inclined to agree. In Daniel Boone Clinic, P.S.C. v. Dahhan, 734 S.W.2d 488 (Ky.App. 1987), this Court approved the enforcement of a liquidated damages provision in an employment contract under two conditions: 1) where the actual damages sustained from a breach of contract would be very difficult to ascertain and 2) where, after the breach occurs, it appears that the amount fixed as liquidated

damages is not grossly disproportional to the damages actually sustained. Moreover, this Court held that the enforcement of a liquidated damages provision was "particularly appropriate" in the situation where a physician violated a restrictive covenant in an employment contract. Id. at 491.

But the facts in Dahhan differ significantly from those in the present case. In Dahhan, the physician breached the restrictive covenant and the former employer filed an action for injunctive relief and liquidated damages. By contrast in this case, Dr. Ahmad did not resume his medical practice in Harlan until after he had obtained an injunction enjoining enforcement of the restrictive covenant. In so doing, Dr. Ahmad took the risk that the injunction would be set aside on appeal. Furthermore, an appellate court ruling that an injunction was wrongfully issued is impliedly retroactive. Pharo Distributing Company v. Stahl, 782 S.W.2d 635, 637 (Ky.App. 1989).

In the prior opinion, this Court stated that "ARH is entitled to enforcement of the restrictive covenant even though some time has elapsed since [Dr.] Ahmad's employment with ARH was terminated", notwithstanding the express language of the agreement allowing ARH to enforce the restrictive covenant "for a period of two (2) years after the date of termination of [Dr. Ahmad's] employment." The two-year period under the contract began on March 29, 1999, and ended on March 29, 2001. But upon

remand of this action in February of 2002, ARH sought both prospective enforcement of the restrictive covenant and liquidated damages for the past violation. Dr. Ahmad closed his Harlan practice on February 8, 2002, and the trial court enjoined him from practicing medicine within fifty miles of Harlan for two years from that date.

While the contract allowed ARH to seek both injunctive relief and liquidated damages in the event of a breach, injunctive relief should only have been granted subject to the time limitations contained in the contract. The prior panel of this Court authorized ARH to obtain prospective enforcement of the restrictive covenant, and that determination is the law of this case. Thus, ARH would have been entitled to liquidated damages based upon Dr. Ahmad's breach of the restrictive covenant from 1999 to 2001, or to prospective enforcement of the covenant from the date of remand forward.

But ARH cannot have it both ways. By seeking and obtaining prospective enforcement of the covenant (from February 8, 2002 to February 8, 2004), ARH waived its right to retrospective enforcement of the covenant as set forth in the contract. Since there is no allegation that Dr. Ahmad breached the restrictive covenant during the two-year period set by the trial court, ARH is not entitled to liquidated damages under the contract.

In his appeal, Dr. Ahmad argues that the trial court erred by awarding ARH its attorney fees as damages in the absence of a contractual provision or statutory authority. As a general rule, attorneys fees cannot be recovered by the prevailing party except in those particular instances when such fees are expressly authorized by a statute or contract. White v. Sullivan, 667 S.W.2d 385, 389 (Ky.App. 1983). However, Kentucky recognizes an exception to this general rule in cases involving a wrongly-issued injunction.

As previously noted, the party seeking the injunction takes the chance that the injunctive relief was not properly granted. Pharo Distributing Co., 782 S.W.2d at 637. The purpose of the injunction bond is to ensure that the party seeking the injunction bears that risk. Id. Thus, where an injunction was wrongfully issued, the enjoined party may be allowed recovery for its pecuniary loss when the injunction is ancillary to the main cause of action. But when injunctive relief is the only relief sought, damages and attorney fees are not recoverable. Id.

In this case, Dr. Ahmad brought a declaratory judgment action seeking to prohibit enforcement of the restrictive covenant. He sought no other damages or relief. The injunction was the singular relief sought and was neither secondary nor collateral to any other relief. Accordingly, ARH was not

entitled to an award of attorney fees or damages incurred due to the improperly issued injunction.

Therefore, the order of the Harlan Circuit Court is affirmed to the extent that it granted injunctive relief to ARH and denied ARH's motion for an award of liquidated damages, but is reversed to the extent that it granted ARH's motion for attorney fees.

COMBS, CHIEF JUDGE, CONCURS.

DYCHE, JUDGE, DISSENTS.

DYCHE, JUDGE, DISSENTING. I would allow ARH its liquidated damages of \$125,000.00 and its attorney fees in defending the action filed by Dr. Ahmad against it. The majority opinion gives Dr. Ahmad a free pass for violating the covenant to which he agreed.

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