

STATE OF WISCONSIN

CIRCUIT COURT
CIVIL DIVISION

WAUKESHA COUNTY

Joseph Hemmer
Plaintiffs,

CASE NO. 18-CV-369

vs.

Precare Corporation et al
Defendants.

AMENDED DECISION AND ORDER

The above matter came on to be heard on August 13, 2018 before the Honorable William J. Domina on motions by the plaintiff and the defense. First considered was the plaintiff's motions for an injunction during the pendency of this litigation (Temporary Injunction) and for Expedited Hearing on Declaratory Judgment. The plaintiff appeared by Attorney Robert B. Corris of the law firm of Robert B. Corris, S.C. The plaintiff, Joseph Hemmer, was also present. Next considered was the defendant's motion to dismiss filed by the defendants. The defendants appeared by Attorney Richard L. Bolton of the law firm of Boardman & Clark, LLP.

BACKGROUND

Plaintiff Joseph Hemmer ("Hemmer") is a resident of Brookfield, Wisconsin and has been a Wisconsin resident for the vast majority of his life. He has over fifteen years of experience in the wet wipes industry and, in this time, has amassed considerable knowledge on developing a wet wipes business while holding offices critical to several Wisconsin companies. It was for this purpose that in July of 2012 Hemmer was hired by defendant Premier Care Industries (referred to collectively with the other named defendant, Precare Corporation, as "PCI").¹

¹ Defendants' attorney stated at the hearing that Precare Corporation was plaintiff's employer, doing business as Premier Care Industries.

Hemmer's employment agreement with PCI contained compensation provisions as well as certain non-competition and non-solicitation covenants. The agreement further contained choice of law and forum selection provisions establishing that any litigation would be conducted in New York (where PCI is located) and tried under New York law. In January, 2018 PCI terminated Hemmer's employment with the company. Afterward, when seeking employment in the wet wipes industry, Hemmer received notice from PCI that he was in violation of the non-competition clauses of his employment agreement. PCI expressed that they would defend their rights per the employment agreement and threatened legal action. Hemmer alleges that this threat of litigation is preventing him from being hired in the wet wipe industry, as prospective employers have commented that hiring him would expose them to litigation. Hemmer remained unemployed at the time of the hearing before the Court.

In this action Hemmer brings various claims of damages incurred as a result of his employment at PCI. PCI filed a motion to dismiss on the grounds that the forum selection clause requires this litigation to occur in New York, making this an improper venue. Concurrently, Hemmer has requested an injunction during the pendency of this litigation precluding PCI from commencing litigation against any employer who may hire Hemmer throughout the duration of this litigation, as well as an expedited hearing. Lastly, plaintiff sought a expedited hearing on the request for declaratory relief.

DISCUSSION

Wis. Stat. § 103.465 provides that an employee can make a valid and enforceable covenant not to compete with an employer within a specified territory and time after termination if the restrictions are reasonably necessary for the protection of the employer. The statute further provides that covenants that impose an unreasonable restraint are "illegal, void and unenforceable even as to any part of the covenant . . . that would be a reasonable restraint." Wis. Stat. § 103.465. Wisconsin courts have interpreted this statute to "[express] a strong public policy against the enforcement of unreasonable trade restraints on employees." H & R Block E. Enterprises, Inc. v. Swenson, 2008 WI App 3, ¶ 13, 307 Wis. 2d 390, 399, 745 N.W.2d 421, 426. Wis. Stat. § 103.465 intends to discourage employers from covenanting for unreasonable

restraints by providing that such agreements be struck down in their entirety. Streiff v. Am. Family Mut. Ins. Co., 118 Wis. 2d 602, 608–09, 348 N.W.2d 505, 509 (1984).

Thus, while Wisconsin law allows parties to covenant for choice of law provisions, Bush v. Nat'l Sch. Studios, Inc., 139 Wis. 2d 635, 642, 407 N.W.2d 883, 886 (1987), determining the validity of such provisions requires that we pay close attention to public policy considerations, Beilfuss v. Huffly Corp., 2004 WI App 118, ¶ 13, 274 Wis. 2d 500, 507, 685 N.W.2d 373, 377. An agreement governed by § 103.465 will not be enforceable if a provision is determined to be contrary to public policy. H & R Block, 2008 WI App 3 at ¶ 13. During the hearing, the defense conceded that Wisconsin law was the appropriate law to apply in this litigation despite the choice of law clause in the employment agreement. Nonetheless, the court provides a complete legal analysis regarding the choice of law provision, as it also relates to the court's holding on the forum selection provision.

In Beilfuss, plaintiff was a Wisconsin resident was hired to work for Huffly Corp., an Ohio corporation. Beilfuss, 2004 WI App 118 at ¶ 2. Beilfuss signed an employment agreement with Huffly that included a choice of law clause that required any dispute to be resolved by the application of Ohio law. Id. at ¶¶ 2-3. After several years Beilfuss took a position with a new company, at which point Huffly claimed Beilfuss to be in violation of the employment agreement. Id. at ¶ 2. The Wisconsin Court of Appeals reasoned that application of Ohio law—which permits selective enforcement and judicial modification of unreasonable covenants not to compete so as to make them enforceable—would be contrary to the Wisconsin public policy embodied in § 103.465, which establishes covenants not to compete that unreasonably restrain trade are unenforceable in their entirety. Id. at ¶ 15. Because the choice of law clause violated Wisconsin's public policy, the Court of Appeals held the clause to be unenforceable. Id. at ¶ 16.

Like the plaintiff in Beilfuss, Hemmer a Wisconsin resident who signed an employment agreement with an out of state company. The agreement authorized Hemmer to work from his home (which the employment agreement describes as a “satellite office”) in Brookfield, Wisconsin but contained a choice of law provision requiring any dispute to be resolved by the application of New York law. Just like the Ohio law at issue in Beilfuss, New York law allows

for the selective enforcement and judicial modification of unreasonable covenants not to compete so as to make them enforceable. Similarly, the choice of law clause at issue here violates Wisconsin public policy and is not enforceable. This conclusion is bolstered by the fact that it is Wisconsin companies that are being restrained from hiring Hemmer for threat of enforcement of the employment agreement by PCI.

PCI additionally contends that the employment agreement's forum selection provision, establishing that any disputes that arise are to be adjudicated in New York's judicial system, is valid regardless of the enforceability of the choice of law provision. One again, Beilfuss proves to be instructive, for it also dealt with a corresponding forum selection clause, Id. at ¶ 2. Citing the US Supreme Court, the Beilfuss court acknowledge that forum selection clauses are presumptively valid and should be enforced "unless enforcement is shown to be unreasonable under the circumstances." Id. at ¶ 17. The Court of Appeals found enforcement of the forum selection clause would be unreasonable because it would violate Wisconsin public policy for the reasons previously mention. Id. at ¶ 18. The court further cited practical considerations, stating that "[it] is logical to have a court familiar with Wisconsin's statutory and common law covering covenants not to compete apply the law rather than a court in another forum, which is unfamiliar with Wisconsin's law or public policy supporting the law." Id. The same considerations must be taken account here. Because enforcement of the choice of law clause would be unreasonable, so too would it be unreasonable to have New York courts apply Wisconsin law that it is not familiar with.

PCI also stated in its motion that the complaint should be dismissed pursuant to Wis. Stat. § 802.06(2)(a), failure to state a claim upon which relief can be granted. This claim was not discussed in the briefs filed by the Defendant for this motion, so it will be denied based on an undeveloped argument.

Finally, the plaintiff's motions for an injunction during the pendency of this litigation and expedited hearing were also addressed. At the hearing, both parties agreed to an injunction preventing PCI from seeking legal enforcement of the employment agreement against Hemmer or his prospective employers until the conclusion of this litigation. Should the conclusion of this

litigation be in favor of PCI, they maintain the ability to seek legal enforcement of their rights per the employment agreement. Additionally, plaintiff asked the Court to hold the motion for an expedited hearing in abeyance to allow the Court to issue a decision on the defendant's motion to dismiss.

ORDER

BASED UPON THE FOREGOING, IT IS HEREBY ORDERED that the defendants' motion to dismiss based on the choice of forum clause of the contract is hereby DENIED.

FURTHER, IT IS HEREBY ORDERED that The plaintiff's motion for injunction during the pendency of this litigation (Temporary Injunction) be, and hereby is GRANTED and that the defendants are ENJOINED during the pendency of this action from:

- a) Enforcing, or attempting to enforce, the restrictive covenant in Subparagraph 6.A.ii, of the Employment Agreement between Precare Corp. dba Premier Care Industries and Joseph J. Hemmer.
- b) Enforcing, or attempting to enforce, the restrictive covenant in Subparagraph 6.A.iii, of the Employment Agreement between Precare Corp. dba Premier Care Industries and Joseph J. Hemmer.
- c) Enforcing, or attempting to enforce, the restrictive covenant in Subparagraph 3g of the Employment Agreement between Precare Corp. dba Premier Care Industries and Joseph J. Hemmer.

FURTHER, IT IS ORDERED that the plaintiff's request to hold in abeyance the motion for expedited hearing on the request for declaratory relief is GRANTED.

FURTHER IT IS ORDERED that the Clerk shall schedule this matter for a scheduling/status conference and place the same on this Court's calendar.

Electronically signed by William J. Domina

Circuit Court Judge

08/27/2018