NO. 4-10-0966 Order Filed 4/7/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

INTERNATIONAL EYECARE CENTER, INC., an Illinois Corporation, Plaintiff-Appellee, v. DANIEL L. HAYDEN, Defendant-Appellant.	)	Appeal from Circuit Court of Adams County No. 09CH111 Honorable Scott H. Walden, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concur in the judgment.

ORDER

Held: Where a covenant not to compete was not ambiguous, the trial court did not err in denying defendant's motion for summary judgment and to dissolve the preliminary injunction.

In October 2009, plaintiff, International Eyecare Center, Inc. (IEC), filed a verified complaint for injunctive and other relief against defendant, Daniel L. Hayden (Dr. Hayden). The trial court entered a temporary restraining order (TRO). In November 2009, the court denied IEC's motion for preliminary injunction and dissolved the TRO. This court reversed the trial court's judgment and remanded for further proceedings. In July 2010, the trial court issued a preliminary injunction. In September 2010, Dr. Hayden filed a motion for summary judgment and to dissolve the preliminary injunction, which the court

denied.

On appeal, Dr. Hayden argues the trial court erred in denying his motion for summary judgment and to dissolve the preliminary injunction. We affirm.

I. BACKGROUND

IEC provides eyecare and eyewear services through licensed optometrists and other employees in several Illinois and Missouri locations. In 1999, IEC hired Dr. Hayden, a licensed optometrist, to work in its Quincy office.

In October 2009, IEC filed a verified complaint for injunctive and other relief and an emergency motion for a TRO and preliminary injunction against Dr. Hayden. IEC alleged Dr. Hayden signed a written employment agreement in January 2001, wherein Hayden would continue as a full-time optometrist in the Quincy office. The 2001 agreement also included a covenant not to compete within 10 miles of the Quincy office for one year from the end of employment. In July 2006, the parties entered into an addendum with a covenant not to compete within 20 miles from the Quincy office for three years from the end of employment.

IEC alleged the parties had various negotiations in July 2008 through February 2009 over the terms of Hayden's discretionary bonus. In February 2009, Hayden signed an employment agreement "under duress." The 2009 employment agreement also contained a covenant not to compete within 20 miles of

Quincy for three years from the end of employment.

IEC alleged Dr. Hayden submitted his letter of resignation on October 5, 2009, and stated he was going to start his own office in Quincy. Hayden sent e-mails to an IEC employee and patients informing them of his decision to open a new optometric office. IEC claimed Hayden's solicitation of patients and an employee and his stated intent to open an optometric office constituted a breach of his contractual duties. IEC also claimed that unless he was enjoined and prohibited from further continued breaches of his contractual duties, IEC would continue to suffer irreparable injuries. IEC sought a TRO, a preliminary injunction, and a permanent injunction.

Also in October 2009, the trial court conducted a hearing on the motion for a TRO. The court granted the motion, finding IEC had a clearly ascertainable right in need of protection, a fair question existed that IEC would succeed on the merits of its claim for breach of restrictive covenant, IEC had shown it would suffer irreparable harm if the injunction did not issue, and IEC had shown it had no adequate remedy at law. The court temporarily restrained and prohibited Dr. Hayden from practicing optometry in competition with IEC within 20 miles of IEC's Quincy facility and from soliciting any patients or employees of IEC.

In November 2009, the trial court held a hearing on the

preliminary injunction. The court found IEC failed to show a likelihood of success on the merits as to the 2009 agreement, finding a lack of consideration under the preexisting-duty rule. The court also found insufficient consideration in the noncompete provisions in the 2009 agreement, noting a "major change" had occurred in the elimination of language dismissing the restrictive covenant if IEC breached the contract or terminated Dr. Hayden's employment without cause.

Nonetheless, the trial court found IEC had made a *prima facie* showing of all four elements required for a preliminary injunction based on a violation of the restrictive covenant in the 2001 employment contract as amended by the 2006 addendum. The court continued the matter for further proceedings.

Dr. Hayden then filed a motion for summary determination of IEC's inability to demonstrate a likelihood of success on the merits under the 2001 agreement. He claimed IEC breached the 2001 agreement, which triggered a noncompete dismissal clause.

Following arguments by the parties, the trial court found IEC had not carried its burden to show it was likely to succeed on the merits. The court denied IEC's motion for a preliminary injunction and dissolved the TRO. In December 2009, IEC filed notice of interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Mar. 20, 2009)).

In May 2010, this court reversed the trial court's judgment. *International Eyecare Center, Inc. v. Hayden*, No. 4-09-0945 (2010) (unpublished order under Supreme Court Rule 23). We found IEC raised a fair question to preserve the status quo until the merits could be decided. We concluded the trial court had abused its discretion in denying the preliminary injunction and remanded for further proceedings.

In June 2010, IEC, based on this court's order, filed a motion for a preliminary injunction to restrain Dr. Hayden from engaging in the practice of optometry within 20 miles of its Quincy office and from soliciting IEC patients or interviewing and hiring IEC employees.

Following the hearing on IEC's motion, the trial court entered a TRO, restraining Dr. Hayden from competing with IEC within 20 miles of its Quincy office, from soliciting any IEC patients, and from interviewing or hiring any current IEC employees.

In July 2010, the trial court held a hearing on the preliminary injunction. In a brief filed prior to the hearing, Dr. Hayden argued the covenant not to compete in the 2009 agreement was ambiguous. The clause provided, in part, as follows:

> "*Non-Compete*: Covenant not-to-compete within 20 miles of the Quincy IEC office (or any IEC office where the doctor has practiced

> in excess of 13 weeks per year) for three years from end of employment with IEC. Covenant includes a prohibition on soliciting any patients of IEC and/or interviewing or hiring any current employees of IEC for the period of three years."

The court granted the preliminary injunction.

In September 2010, Dr. Hayden filed a motion for summary judgment and to dissolve the preliminary injunction. He argued the restrictive covenant in the 2009 agreement was ambiguous as a matter of law.

In November 2010, the trial court found the covenant-not-to-compete clause was not ambiguous and denied Dr. Hayden's motion. Thereafter, Dr. Hayden filed notice of interlocutory appeal pursuant to Supreme Court Rule 307(a)(1) (Ill. S. Ct. R. 307(a)(1) (eff. Mar. 20, 2009)).

II. ANALYSIS

A. Jurisdiction

IEC argues this court has no jurisdiction because Dr. Hayden seeks review of an order denying summary judgment. See *In re Estate of Funk*, 221 Ill. 2d 30, 85, 849 N.E.2d 366, 397 (2006) ("Ordinarily, the denial of summary judgment is not appealable"). However, Dr. Hayden's motion for summary judgment also sought to dissolve the preliminary injunction. Supreme Court Rule

307(a)(1) permits an appeal from an interlocutory order "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." Ill. S. Ct. R. 307(a)(1) (eff. Mar. 20, 2009). Since the trial court denied Dr. Hayden's motion, which, in part, sought to dissolve an injunction, we have jurisdiction under Rule 307(a)(1). See *Doe v. Department of Professional Regulation*, 341 Ill. App. 3d 1053, 1059, 793 N.E.2d 119, 124 (2003).

B. Standard of Review

Normally, we would review a trial court's decision to uphold or dissolve a preliminary injunction for an abuse of discretion. *Rochester Buckhart Action Group v. Young*, 379 Ill. App. 3d 1030, 1034, 887 N.E.2d 49, 53 (2008); see also *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 342 Ill. App. 3d 997, 1000-01, 796 N.E.2d 633, 636 (2003) (standard of review for appeal under Rule 307(a)(1) is whether the trial court abused its discretion). However, the issue presented to the trial court in this case centered on whether the restrictive covenant was enforceable, which is a question of law. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63, 866 N.E.2d 85, 91 (2006); see also *LAS*, 342 Ill. App. 3d at 1001, 796 N.E.2d at 636 (finding the proper standard of review is dictated by the question presented to the trial court). Accordingly, our review is *de novo*. *Mohanty*, 225 Ill. 2d at 63, 866 N.E.2d at 91.

C. Restrictive Covenant

Our supreme court has noted "covenants restricting the performance of medical professional services have been held valid and enforceable in Illinois as long as their durational and geographic scope are not unreasonable, taking into consideration the effect the public and any undue hardship on the parties to the agreement." *Mohanty*, 225 Ill. 2d at 67, 866 N.E.2d at 94. Dr. Hayden argues the covenant-not-to-compete clause at issue here is ambiguous as a matter of law.

Illinois adheres to the "four corners" rule of contract interpretation, which provides that "'[a]n agreement, when reduced to writing, must be presumed to speak the intention of the parties who signed it. It speaks for itself, and the intention with which it was executed must be determined from the language used. It is not to be changed by extrinsic evidence.'" *Air Safety, Inc. v. Teachers Realty Corp.*, 185 Ill. 2d 457, 462, 706 N.E.2d 882, 884 (1999) (quoting *Western Illinois Oil Co. v. Thompson*, 26 Ill. 2d 287, 291, 186 N.E.2d 285, 287 (1962)). The terms of a restrictive covenant "must be given their ordinary and natural meaning when they are clear and unambiguous. [Citation.] When there is no ambiguity, there is no need to inquire into the intention of the parties." *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1036, 821 N.E.2d 340, 346-47 (2004).

We note courts have called into question the strict

application of the "four corners" rule and advocated the provisional admission approach. See *Ahsan v. Eagle, Inc.*, 287 Ill. App. 3d 788, 790, 678 N.E.2d 1238, 1241 (1997) (finding the current trend in Illinois allows a court to provisionally consider parol evidence to determine if an agreement that appears clear on its face is actually ambiguous); *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 889, 652 N.E.2d 1233, 1238 (1995) (finding the weight of recent authority supports the provisional admission approach, which "allows the court to view the language of the document from the perspective of the parties at the time of its execution"); *URS Corp. v. Ash*, 101 Ill. App. 3d 229, 234-35, 427 N.E.2d 1295, 1299-1300 (1981).

> "Under the provisional admission approach, although the language of a contract is facially unambiguous, a party may still proffer parol evidence to the trial judge for the purpose of showing that an ambiguity exists which can be found only by looking beyond the clear language of the contract. [Citation.] Under this method, an extrinsic ambiguity exists 'when someone who knows the context of the contract would know if the contract actually means something other than what it seems to mean.' [Citation.] Conse-

quently, if after 'provisionally' reviewing the parol evidence, the trial judge finds that an 'extrinsic ambiguity' is present, then the parol evidence is admitted to aid the trier of fact in resolving the ambiguity.'" *Air Safety*, 185 Ill. 2d at 463, 706 N.E.2d at 885 (quoting *Ahsan*, 287 Ill. App. 3d at 790, 678 N.E.2d at 1241).

Dr. Hayden argues the 2009 restrictive covenant is ambiguous as a matter of law under both the "four corners" rule and the provisional admission approach. In the case *sub judice*, the restrictive covenant at issue provides, in part, as follows:

> "Non-Compete: Covenant not-to-compete within 20 miles of the Quincy IEC office (or any IEC office where the doctor has practiced in excess of 13 weeks per year) for three years from end of employment with IEC. Covenant includes a prohibition on soliciting any patients of IEC and/or interviewing or hiring any current employees of IEC for the period of three years."

In looking at the restrictive covenant, we must not lose sight of the 2009 agreement as a whole. See *Gallagher v. Lenart*, 226 Ill. 2d 208, 233, 874 N.E.2d 43, 58 (2007) ("a

contract must be construed as a whole, viewing each part in light of the others"). The parties agreed Dr. Hayden would work as a full-time optometrist in IEC's Quincy office. Dr. Hayden agreed to "render to the very best of his ability, on behalf of IEC, professional services to and for such persons as are accepted as patients and customers of IEC."

Based on the agreement as a whole and the language of the restrictive covenant, we find the covenant-not-to-compete clause is unambiguous. IEC is in the business of providing optometric services to patients. Dr. Hayden is an optometrist. The covenant clearly prohibits him from competing with IEC within 20 miles of Quincy for three years after the end of his employment. The restriction also prohibits him from soliciting IEC patients and/or interviewing or hiring current IEC employees for three years.

Dr. Hayden goes to great lengths to list different scenarios that purportedly show how specific phrases of the covenant are indefinite or could have multiple meanings. However, "[a] contract is not ambiguous merely because the parties disagree on its meaning." *Hot Light Brands, L.L.C. v. Harris Realty Inc.*, 392 Ill. App. 3d 493, 500, 912 N.E.2d 258, 264 (2009). The restrictive covenant here is clear. Dr. Hayden cannot work as an optometrist in competition with IEC within 20 miles of Quincy for a period of three years. The prohibition

also includes soliciting patients or employees from IEC. While the covenant not to compete could have been drafted to include every single scenario one could conjure up, the fact that it did not does not make it ambiguous. Moreover, Dr. Hayden cites no authority that the failure to specify every postemployment restriction gives rise to contract ambiguity.

Dr. Hayden then goes on to argue the 2009 restrictive covenant is ambiguous under the provisional admission approach, stating certain other evidence, namely the 1999 covenant not to compete the parties agreed to, shows an ambiguity. The covenant-not-to-compete provision of the 1999 employment agreement provides as follows:

> "Employee acknowledges that the services to be rendered by his to Employer are of a special and unique character. During Employee's employment with Employer hereunder and for a period of three (3) years after the termination of Employee's employment, Employee will not, within a 25 mile radius of the location, or within a 15 miles radius of any other business location of Employer or an affiliate of Employer as described in Schedule A hereto, directly or indirectly, except as specifically authorized in writing by Employer, for

himself, or on behalf of or in conjunction with another or others, as an individual or on his own account, or as an employee, agent, advisor, consultant, independent contractor, salesman, firm or corporation, or as a member of any partnership or joint venture, or as an officer or director of any corporation, or otherwise (i) engage in the practice of optometry, or (ii) sell, manufacture, prepare, adjust or dispense eyeglasses, spectacles, contact lenses of all types, lenses or appurtenances thereto, or measure adapt, fit or adjust such eyeglasses, spectacles, lenses or appurtenances for any patient or other customer, or (iii) manage, control, operate or participate in, directly or indirectly, the management, operation or control of any business that engages in the preparation, sale or other dispensation of eyeglasses, spectacles, lenses, contact lenses or appurtenances thereto."

Here, the 1999 covenant does not show the 2009 covenant "'means something other than what it seems to mean.'" *Air Safety*, 185 Ill. 2d at 463, 706 N.E.2d at 885 (quoting *Ahsan*, 287

Ill. App. 3d at 790, 678 N.E.2d at 1241. Parties are free to make changes in contractual language. That the parties went from a 10-page agreement with a detailed restrictive covenant in 1999 to a 2-page agreement with a less-detailed restrictive covenant in 2009 did not make the latter covenant ambiguous.

Dr. Hayden argues one cannot read into a restrictive covenant a term that is not expressly stated. He contends that since the 2009 restrictive covenant does not mention optometry or the operation of an optometric practice, he should not be prohibited from practicing within his field. However, this argument requires one to ignore not only Dr. Hayden's profession and IEC's business but also the contract as whole. The 2009 covenant not to compete unambiguously prohibits Dr. Hayden from competing against IEC within 20 miles for three years. Accordingly, we find the trial court did not err in denying Dr. Hayden's motion for summary judgment and to dissolve the preliminary injunction.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.