

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

BROTHERSTON HOMECARE, INC.,	:	NOVEMBER TERM, 2009
	:	
Plaintiffs,	:	NO. 03756
	:	
v.	:	COMMERCE PROGRAM
	:	
JOHN DAVIS and MONTGOMERY	:	Control No. 09112827
MEDICAL EQUIPMENT COMPANY,	:	
	:	
Defendants.	:	

ORDER

AND NOW, this 17th day of December, 2009, after a hearing in this matter and in accord with the Opinion issued simultaneously, it is **ORDERED** that plaintiff's Motion for Preliminary Injunction is **GRANTED**.

It is further **ORDERED** that defendant John Davis is **ENJOINED** from selling directly or indirectly, through a company, agent, individually or in any other manner, for defendant Montgomery Medical Equipment Company or any other entity, respiratory therapy services or equipment to patients of hospitals located in Philadelphia County, Pennsylvania for one (1) year from the date of entry of this Order.

BY THE COURT:

MARK I. BERNSTEIN, J.

indirectly, through a company, agent or in any other manner, Respiratory Therapy services or equipment in the Counties of Bucks, Montgomery, Delaware and Philadelphia in the State of Pennsylvania. All clients brought to [Brotherston] by John Davis, or acquired through him during his tenure with [Brotherston], shall remain with [Brotherston] and John Davis shall have no contact with those institutions or clients until or unless they leave [Brotherston] on their own accord or [Brotherston] ceases to operate.

The additional consideration promised to Mr. Davis in exchange for the one year Covenant was the right to solicit sales at other Philadelphia hospitals where Brotherston had contacts. Mr. Davis worked as a salesman for Brotherston for approximately one year, primarily at the Philadelphia branches of Temple and Einstein.

In September, 2009, Mr. Davis left Brotherston's employ and went to work as a salesman for defendant Montgomery Medical Equipment Company ("Montgomery Medical") selling respiratory therapy equipment and services at Temple and Einstein. Brotherston filed this action and a Motion for Preliminary Injunction to enforce Mr. Davis' one year Covenant Not To Compete. The court held a hearing on the Motion on December 14, 2009, at which the above facts were established.

At the hearing, Brotherston had to establish the following in order to obtain the injunction it sought:

The party must show: 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.³

³ Warehime v. Warehime, 580 Pa. 201, 209-210, 860 A.2d 41, 46-7 (2004).

In order to show that it is likely to prevail on the merits of its claim that Mr. Davis breached his Covenant Not to Compete, Brotherston also had to satisfy the following requirements:

In Pennsylvania, restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent. Our law permits equitable enforcement of employee covenants not to compete only so far as reasonably necessary for the protection of the employer.

* * *

Fundamental, then, to any enforcement determination is the threshold assessment that there is a legitimate interest of the employer to be protected as a condition precedent to the validity of a covenant not to compete. Generally, interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills.⁴

Brotherston has satisfied its burden of showing that Mr. Davis executed the Covenant and that it was supported by consideration. Brotherston has also shown that Mr. Davis' sales of respiratory therapy equipment and services at Temple, Einstein, and other Philadelphia County hospitals will destroy the goodwill⁵ that Brotherston has established at those hospitals. Brotherston conceded that Mr. Davis was not a threat to its goodwill at hospitals in the surrounding counties, so it does not need an injunction covering anything but Philadelphia.

Mr. Davis has failed to satisfy his burden of showing that his one year Covenant is unreasonable when limited to Philadelphia County. "The law is clear that the burden is on him who sets up unreasonableness as the basis of contractual illegality to show how and why it is unlawful."⁶ The court finds an injunction of one year to be a reasonable amount of time for

⁴ Hess v. Gebhard & Co., 570 Pa. 148, 157-163, 808 A.2d 912, 917-921(2002).

⁵"Goodwill represents a pre-existing relationship arising from a continuous course of business which is expected to continue indefinitely. A business' goodwill is considered a protectable interest even when the goodwill has been acquired through the efforts of an employee." *Id.*, 869 A.2d at 997.

⁶ John G. Bryant Co. v. Sling Testing & Repair, Inc., 471 Pa. 1, 12, 369 A.2d 1164, 1169 (1977).

Brotherston to try to repair any damage Mr. Davis has done to its goodwill in Philadelphia County.

BY THE COURT:

MARK I. BERNSTEIN, J.