

STATE OF MICHIGAN
COURT OF APPEALS

GREAT LAKES EYE INSTITUTE, P.C.,

Plaintiff-Appellant,

v

DAVID B. KREBS, M.D.,

Defendant-Appellee,

and

ENVISION EYE CARE, P.L.L.C.,

Defendant.

UNPUBLISHED

February 1, 2011

No. 294627

Saginaw Circuit Court

LC No. 08-002481-CK

GREAT LAKES EYE INSTITUTE, P.C.,

Plaintiff-Appellant,

v

DAVID B. KREBS, M.D., and ENVISION EYE
CARE, P.L.L.C.,

Defendants-Appellees.

No. 294628

Saginaw Circuit Court

LC No. 08-002481-CK

Before: HOEKSTRA, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

In these consolidated appeals, plaintiff appeals by leave granted two discovery orders. In Docket No. 294627, plaintiff appeals the order denying its motion for a protective order relating to questions about sexual relationships between plaintiff's president and employees. In Docket No. 294628, plaintiff appeals the order granting defendants' motion to compel discovery of its tax returns and financial records. We reverse and remand.

I. BASIC FACTS

In June 1999, plaintiff hired defendant David Krebs, M.D., an ophthalmologist. An employment agreement was signed. It included a restrictive covenant, which prohibited Krebs from engaging in the practice of ophthalmology within certain geographical areas for two years following his termination from plaintiff's employ. The employment agreement contained a liquidated damages clause, providing in pertinent part:

Instead of complying with the restriction . . . set forth above, Employee shall have the option of paying Corporation a sum equal to forty (40%) percent of the gross receipts attributable to Employee[']s professional services for the twelve (12) month period set forth below or the sum of Two Hundred Thousand Dollars (\$200,000), whichever is greater, as liquidated damages Gross receipts shall be the sum calculated for the twelve (12) month period of employment ending as of the month end coincident with or immediately preceding Employee's termination. . . .

Other provisions in the employment agreement required Krebs to hold plaintiff's patient information confidential and required plaintiff to offer Krebs, after he had worked for plaintiff for 24 months, an option to purchase stock in plaintiff.

In August 2008, Krebs resigned from plaintiff's employ. He then worked for defendant Envision Eye Care, a new ophthalmology practice, which was a professional limited liability company that he had formed earlier that year. Krebs sent a letter to patients he had seen while working for plaintiff, advising them of his new practice and soliciting their business.

Plaintiff sued Krebs for breach of contract for violating the restrictive covenant and the confidentiality clause in the employment agreement and for breach of fiduciary duty. It sued Krebs and Envision Eye Care for interference with business relationships and for a violation of the Uniform Trade Secrets Act (MUTSA), MCL 445.1901 *et seq.*

In their first request for production of documents, defendants requested plaintiff's federal tax returns and monthly and quarterly financial statements for years 2006, 2007, and 2008. Plaintiff refused to provide the documents, claiming that its tax returns and financial statements were not relevant to the damages it was seeking. It asserted that the only damages it was seeking were liquidated damages based on the employment agreement and damages based on the profits diverted to defendants by their wrongful acts. The trial court granted defendants' motion to compel.

At the deposition of Farhad Shokoohi, M.D., plaintiff's president, defense counsel asked Shokoohi if he had engaged in sexual relationships with members of plaintiff's staff. Plaintiff's counsel instructed Shokoohi not to answer and terminated the deposition. Plaintiff then sought a protective order, asking that defendants be prevented from asking Shokoohi any questions designed solely to "harass, embarrass, frustrate, or annoy" Shokoohi. The trial court denied plaintiff's motion and allowed defense counsel to conduct a "reasonable inquiry on the sensitive issue."

II. STANDARD OF REVIEW

We review a trial court's decision to grant discovery for an abuse of discretion. *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). A trial court abuses its discretion when its decision falls outside the range of principled and reasonable outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. DOCKET NO. 294627

Plaintiff argues that the trial court erred in ordering Shokoohi to answer questions about sexual relationships he had with members of its staff because the inquiries have no bearing on any issue in the case. Plaintiff disputes defendants' assertion that the inquiries are relevant to the defense that it "first breached" the employment agreement when it failed to maintain the value of its stock.

Our state has an open, broad discovery policy. *Cabrera v Ekema*, 265 Mich App 402, 406-407; 695 NW2d 78 (2005). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . ." MCR 2.302(B)(1). However, the court rules also ensure that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests. *Hamed v Wayne Co*, 271 Mich App 106, 110; 719 NW2d 612 (2006).

Section 20 of the employment agreement provided that after 24 months of employment, plaintiff would offer Krebs the option to purchase stock in it, "with the percentage of stock, the purchase price and the terms of payment to be mutually agreed by the parties at that time." Krebs averred that this stock option was an important inducement for him to work for plaintiff. He further averred that after he began working for plaintiff, he became aware of numerous situations involving sexual relationships between Shokoohi and members of plaintiff's staff. According to Krebs, the "potential liability" associated with those sexual relationships outweighed any value his stock option otherwise had. Thus, defendants assert that plaintiff was the first party to breach the employment agreement when it rendered Krebs's stock option worthless.

"The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994) (quotation omitted). Here, there was no first breach of the employment agreement by plaintiff. Defendants argue that plaintiff breached § 20 of the employment agreement. However, that section only required plaintiff, after it had employed Krebs for 24 months, to offer Krebs the option to purchase stock in plaintiff. There is no claim that Krebs was not given the option to purchase stock in plaintiff after 24 months of employment. Section 20 did not require plaintiff to maintain its stock at a certain value. In addition, no section of the employment agreement prohibited Shokoohi from engaging in sexual relationships with members of plaintiff's staff, nor did any section require that plaintiff be run in any particular manner.

Because there was no first breach of the employment agreement by plaintiff, Shokoohi's alleged sexual relationships with members of plaintiff's staff is not relevant to any issue in the case. Accordingly, the trial court abused its discretion in granting defense counsel permission to

question Shokoohi about past sexual relationships with plaintiff's employees. The trial court's order is reversed.

IV. DOCKET NO. 294628

Plaintiff argues that the trial court erred in ordering it to produce its tax returns and financial statements because the information has no bearing on any issue in the case. We agree that plaintiff's tax returns and financial statements are not relevant to a determination of the enforceability of the liquidated damages provision.

The trial court concluded that plaintiff's tax returns and financial statements were potentially relevant to determining the enforceability of the liquidated damages provision in the employment agreement. "A liquidated damages provision is simply an agreement by the parties fixing the amount of damages in the event of a breach and is enforceable if the amount is reasonable with relation to the possible injury suffered and not unconscionable or excessive." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 270-271; 715 NW2d 914 (2006). Liquidated damages provisions are appropriate where actual damages are uncertain and difficult to ascertain. *Id.* at 271.

The liquidated damages provision in the employment agreement provided that, if Krebs breached the restrictive covenant, plaintiff's damages would be an amount equal to 40 percent of the gross receipts attributable to Krebs's professional services for the twelve month period ending as of the month preceding Krebs's termination or \$200,000, whichever was greater. Because plaintiff was receiving between 70 and 100 percent of the fees brought in by Krebs before he resigned, the liquidated damages provision appears to be a reasonable approximation of the damages suffered by plaintiff and, therefore, it would be enforceable.¹

But we need not and do not decide that question. The trial court correctly pointed out that tax returns are generally subject to discovery. See *In re Pott*, 234 Mich App 369, 375; 593 NW2d 685 (1999). However, simply because tax returns are subject to discovery does not mean

¹ We reject defendants' argument that the liquidated damages provision was inoperable at the time Krebs resigned from plaintiff's employ in 2008 because the employment agreement expired after one year. First, this argument was not properly preserved because it was not raised before the trial court. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). Second, defendants have abandoned the argument by giving the issue cursory treatment with no citation to supporting authority. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Specifically, they have not attempted to reconcile the sentence they rely upon, which states that Krebs's employment "shall be from the 14th day of July, 1999 and continuing until July 13, 2000," with the restrictive covenant which states that Krebs shall not compete with plaintiff "for a period of two (2) years commencing on the date Employee's employment with Corporation terminates" and the binding effect provision which states that "[a]ll provisions of this Agreement requiring performance, payment, or restriction or authorization shall survive the termination of this Agreement" (emphases added).

they are discoverable in each and every case. To be discoverable in a particular case, the tax returns must be relevant to the subject matter of the case. MCR 2.302(B)(1). Certainly, where the reasonableness of a damages provision is considered in context of “the possible injury suffered,” the determination of lost income and revenue does seem relevant. However, because liquidated damages provisions are “particularly appropriate where ‘actual damages are uncertain and difficult to ascertain or are of a purely speculative nature,’” *St Clair Med, PC*, 270 Mich App at 271, quoting *Papo v Aglo Restaurants of San Jose, Inc*, 149 Mich App 285, 294; 386 NW2d 177 (1986), using such speculative numbers as a benchmark to ascertain reasonableness is incongruous. This is particularly true “[i]n a medical setting,” where restrictive covenants can protect against “unfair competition by preventing the loss of patients to departing physicians” and the unfair appropriation of the previous employer’s goodwill with respect to those patients, and protect “an employer’s investment in specialized training of a physician” and “an employer’s confidential business information or patient lists.” *Id.* at 266-268. Liquidated damage provisions are used in these situations because calculating actual damages to such business interests is difficult. Accordingly, we hold that plaintiff’s tax returns and financial statements for years 2006, 2007, and 2008 are not relevant to the determination whether the liquidated damages provision is reasonable and enforceable.

Plaintiff also claims that its tax returns and financial statements are not relevant to the amount of damages on their other claims against defendants. However, in ruling on defendants’ motion to compel and plaintiff’s motion for reconsideration, the trial court never articulated whether plaintiff’s tax returns and financial statements were relevant to plaintiff’s claims other than its claim for breach of contract based on Krebs’s violation of the restrictive covenant. Accordingly, we remand to the trial court for further proceedings to determine whether plaintiff’s tax returns and financial statements are relevant, and therefore discoverable, to the amount of damages on plaintiff’s other claims.

In Docket No. 294627, we reverse and remand for entry of an order granting plaintiff’s motion for a protective order. In Docket No. 294628, we reverse and remand for further proceedings not inconsistent with this opinion. We do not retain jurisdiction in either appeal. No taxable costs under MCR 7.219, neither party having prevailed in full.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens