

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VILLANOVA HEALTH CORP., : CIVIL ACTION  
Plaintiff, :  
 : NO. 98-4724  
v. :  
 :  
MARY ANNE HAWRYLAK, :  
VILLANOVA GROUP, INC., a/k/a :  
KINGSTREE GROUP, INC., :  
LISA STRACCIONE, CHRISTINE COX, :  
MAUREEN BAYLISS, GERRY HARKAVY, :  
JAMES BRODERICK and :  
MICHELLE ZURAWSKI, :  
Defendants. :

M E M O R A N D U M

BUCKWALTER, J.

December 15, 1998

A hearing on plaintiff's Motion for a Preliminary Injunction was held on November 9, 1998, after which counsel were directed to submit their proposed findings and any additional briefing by November 30, 1998.

My findings of fact and conclusions of law are as follows:

**I. FINDINGS OF FACT**

1. On February 1, 1998, MCN, a Seattle, Washington based company, purchased the assets of Villanova Rehab Consultants, Inc. (hereafter "VRC") for approximately \$6 million. (See Asset Purchase Agreement, plaintiff's exhibit 1).

2. VRC was founded and owned by Patricia Maloney, who is not a party to this action.

3. Most of the purchase price which MCN paid for VRC represented "Goodwill" according to Brian L. Grant, President of MCN. (N.T., Grant, at 12, lines 15-19). "Goodwill" includes the:

"...know how, experience, client lists, book of business, relationships that an organization has that creates the cash flow, creates the value, creates the ultimate profits."

N.T. 12 (Grant).

4. After the purchase, MCN named the local entity, Villanova Health Corporation (hereafter "VHC"), plaintiff herein.

5. VHC is in the business of reducing its customers' costs associated with workplace injuries. VHC provides rehabilitation case management services, telephonic and field management services, and services such as utilization reviews and peer reviews under applicable state workers' compensation laws.

6. The predecessor company, VRC, possessed employment agreements with all of its employees, with the exception of Mary Anne Hawrylak, and MCN was aware of the exception involving Hawrylak. (Id. at 15, lines 11-23).

7. Hawrylak was the highest level employee at both VRC and VHC, after Ms. Maloney. (Id. at 16, lines 14-22).

8. Hawrylak was the "heart and soul" of both VRC and VHC. (N.T. Chance, at 196, lines 15-21).

9. MCN never talked to Hawrylak about the possibility of her signing a non-compete. (N.T. Grant, at 23, lines 5-14).

10. Hawrylak resigned from VHC on July 24, 1998.

11. Hawrylak incorporated defendant, The Villanova Group, Inc. ("Villanova Group") on or about August 7, 1998. Plaintiff has alleged that this entity was intentionally named for the purpose of syphoning off VHC's customers, confusing them as to the source of services provided. In October, 1998, at the request of Hawrylak's current counsel, defendant Villanova Group changed its corporate name to Kingstree, Inc. (Defs. Answer to Plfs. Motion for Preliminary Injunction ¶ 2).

12. While the name has been changed, Kingstree is competing directly with VHC and has hired six former employees of VHC, all of whom signed non-competition agreements with VHC's predecessor, VRC. (See Finding No. 6). They are Lisa Straccione, Christine Cox, Maureen Bayliss, Gerry Harkavy, James Broderick and Michelle Zurawski.

13. With regard to the employment agreements, the Asset Purchase Agreement specifically states: "Seller acknowledges that the Employee Noncompetes are one of the most critical of the assets among the Acquired Assets, on the basis of which Buyer is agreeing to pay the Purchase Price and acquire the

Business as set forth in this Agreement." (P-1), § 3.20.2, p. 30).

14. MCN would not have purchased Villanova Rehabilitation without these non-competes. (N.T. Grant, 14-15).

15. VRC assigned all of the employee non-competes to MCN. Section 2.1 of the Agreement specifically states: "Seller will **sell, transfer, assign** and deliver to Buyer and Buyer will purchase and assume from Seller, all right, title and interest in and to all assets, properties, rights and interests of Seller as they exist as of the Closing Date...." (P-1), § 2.1 (emphasis supplied). This section then explicitly enumerates contracts purchased, including, without limitation: "...(ii) non-competition agreements and other contractual arrangements with employees, independent contractors, and consultants (the "Employee Contract").... (P-1), § 2.1(d)(ii). The closing date was February 1, 1998. (N.T. 9, line 24).

16. Each of the employees, in each of their employment contracts, expressly agreed that the agreements not to compete could be assigned. Each of the employment non-compete agreements unequivocally permits assignment:

This agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective heirs, **successors, administrators and assigns**. This agreement shall be governed by, and interpreted in accordance with, the laws of the Commonwealth of Pennsylvania.

**(P-2,-3,-4,-5,-6,-8 all at ¶ 9)** (emphasis added).

17. Interestingly, this language is identical to that agreed to by each of the defendants in his or her contract with Mary Anne Hawrylak's newly competing entity, Villanova/Kingstree. **(P-31)**; N.T. Hawrylak, 73-74.

18. Each of the restrictive covenants contains a twelve-month prohibition on competition, including employment with a competitor.

Employee agrees that for a period of twelve (12) months following the termination for any cause (including involuntary discharge) of his (or her) employment with Employer, he (or she) will not, in any area or territory in which Employer has rendered its services at anytime during the previous twelve (12) month period, accept employment or act as an agent, representative, partner, officer, employee or in any other capacity, or conduct any business, either directly or indirectly, as an individual, in any business or field of endeavor competitive with Employer's.

**(P-2,-3,-4,-5,-6,-8)**. This, too, is exactly the same language that each defendant has agreed to in his or her new contract with Mary Anne Hawrylak's newly competing entity, Villanova/Kingstree. **(P-31)**; N.T. Hawrylak, 73-74.

19. In the Asset Purchase Agreement, VRC made no representations or warranties concerning the enforceability of the employee non-competes, and MCN/VHC understood that feature of

the Agreement. (Id. at 27, lines 2-9) (Disclosure Schedule 3.14(i)).

20. Notwithstanding this understanding, MCN/VHC never sought employment agreements, to include non-compete covenants, and never sought the consent of any of the defendants, or any other employees of VRC, to consent to the VRC Employment Agreement non-compete provisions. (Id. at 27, lines 10-14).

21. When MCN purchased another company, just before the purchase of VRC, it entered into new non-competes with the predecessor's employees, even though the employees of the predecessor had non-competes with the predecessor (Id. at 27, line 22 to page 29, line 8).

22. Before the consummation of the APA, Dr. Grant of MCN came to the Wayne, Pennsylvania, to address VRC in January, 1998, and told the employees that their VRC employment "would be ended" and the employees "would be brought on" as MCN (VHC) employees. (N.T. Bayliss at 151, lines 7-20).

23. The Asset Purchase Agreement includes a provision drafted by MCN as follows:

    Seller acknowledges that, as a transaction structured as an asset transfer, the transition of such employees in connection with the transfer of the Business means that the employees technically (and legally) are to be terminated as employees of Seller, effective as of the end of the last business day prior to the Closing Date.

(N.T. Grant at 17, lines 10-16; and 2.11.1 of Asset Purchase Agreement at p. 15, 16).

24. Dr. Grant doesn't "recall" telling the VRC employees, in January of 1998, that they would be fired and rehired as part of the APA, but he thinks its "possible" he did. (Id. at 29, lines 15-23).

25. Dr. Grant and his attorneys wanted to make a "clean break" from the ERISA obligations of VRC to its employees, and that accounts for the language in the APA relating to termination of the VRC employment. (Id. at 30, lines 2-9).

26. The provision in the agreement, 2.11.1, which provided that the VRC employees would be terminated upon the execution of the APA, was drafted by MCN's attorneys. (Id. at 31, line 21 to page 32, line 21).

27. MCN's attorneys also acquired an agreement from Patricia Maloney that she had not offered or paid any consideration to any of the VRC employees to induce them to remain as employees with MCN/VHC, a provision which appears at 2.11.2 of the APA. (Id. at 32, lines 9-13).

28. None of the defendants were parties to the APA, and the APA intended no third party beneficiary: it was intended to bind only the seller and the buyer. (Id. at 30, lines 22-31; and page 31, lines 5-13).

29. Although Grant testified he would not have purchased VRC without the non-competes, none of the defendants

were paid any consideration for the continuation of the non-competes from VRC to MCN/VHC. (Id. at 41, line 25 to page 42, line 5).

30. The Asset Purchase Agreement clearly contemplates that MCN will determine which of VHR employees will be continued and that such employment shall be deemed "at will." (See sections 2.11.2 and 2.11.3).

31. While information acquired at Villanova Rehab and VRC was and is being used by defendants, there is no clear testimony that this information is a trade secret. This information includes primarily the details of customer relationships which defendants have used to their advantage.

32. Factors enunciated by this circuit in S.I. Handling Sys., Inc. v. Heisley, 753 F.2d 1244 (3d Cir. 1985) to determine whether information is a trade secret were not developed by plaintiff at the hearing in this matter.

## II. CONCLUSIONS OF LAW

The standards for determining whether injunctive relief is warranted

(1) The plaintiff is likely to succeed on the merits;

(2) Immediate and irreparable harm exists which cannot be compensated by damages;

- (3) Greater injury would result by refusing injunctive relief than by granting it;
- (4) If an injunction would be in the public interest

are well known.

In this case, the only claim on which plaintiff succeeds at this stage of the proceedings is that the individual defendants, except Hawrylak, violated the covenants not to compete.

As plaintiff has correctly pointed out, restrictive covenants are enforceable in Pennsylvania if they are

- (1) incident to an employment relation between the parties to the covenant;
- (2) supported by adequate consideration;
- (3) reasonably necessary for the protection of the employer; and
- (4) reasonably limited in duration and geographic extent.

Plaintiff has met all four tests in my judgment. The unresolved question, however, is the date from which the time should be computed in these covenants. It is not clear from the testimony on what day the defendants were no longer employed by plaintiff. If they were indeed terminated pursuant to the terms of the Asset Purchase Agreement, which defendant suggests, then the period during which the covenant runs would be from February 1, 1998 to January 31, 1999. The likelihood of success on the

merits of plaintiff's claim for the covenant to extend from one year from the date the six defendants actually were fired or left VHC is far from clear, and thus cannot be granted. The following order reflects the relief that will be granted, because at least with respect to the restrictive covenants, I am satisfied that plaintiff has met the remaining three standards for granting a preliminary injunction.

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Defendants. :

O R D E R

AND NOW, this 15th day of December, 1998, all defendants are prohibited from using the name "Villanova" in conjunction with the marketing or operation of any business similar to VHC.

With respect to defendants Lisa Straccione, Christine Cox, Maureen Bayliss, Gerry Harkavy, James Broderick and Michelle Zurawski, the court issues a Preliminary Injunction restraining them from directly or indirectly entering into or engaging in ownership, management, operation, or control of, or acting as an employee of, consultant, advisor, or independent contractor to any existing or proposed entity engaged or planning to be engaged in the same or similar business as VHC within the area described in their respective contracts until after January 31, 1999.

Defendant's outstanding Motion for Judgment on the Pleadings (Docket Nos. 9 and 17) are DENIED.

IT IS SO ORDERED.

BY THE COURT:

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RONALD L. BUCKWALTER, J.