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Randall C. Labrum v. v. Durrell Chivers : Reply Brief of Respondent

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IN THE SUPREME COURT OF THE STATE OF UTAH

RANDALL C. LABRUM,)
Plaintiff/Respondent,)
vs.)
V. DURRELL CHIVERS,) No. 19296
Defendant/Appellant.)

REPLY BRIEF OF RESPONDENT

Appeal from a Judgment of the Seventh
District Court of Uintah County
Honorable David Sam, Judge

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REPLY BRIEF OF RESPONDENT

NATURE OF THE CASE

This is an action for specific performance of a contract, with appropriate injunctive relief.

STATEMENT OF FACTS

The parties are each duly licensed and practicing chiropractors in the State of Utah.

On August 11, 1978, plaintiff and defendant signed a valid and binding contract whereby defendant sold his chiropractic business, equipment, office and good will to plaintiff. (See Appendix 1). In paragraph 4 of Appendix 1, defendant agreed "not to open a chiropractic office or to engage in the practice of the profession of chiropractic with in Uintah County, State of Utah, for a period of ten (10) years."

On September 16, 1981, plaintiff sold his chiropractic business in the Vernal area to one Edwin J. Ruby. The contract

specifically stated that the good will of the business was also being sold, (See Record, p. 21, Section 2, paragraph 4). Also, plaintiff agreed not to compete with Ruby, (See Record, p. 22, Section 6).

In November, 1981, defendant commenced the practice of chiropractic medicine in Vernal, Utah, in direct derogation of the contract signed by him on August 11, 1978.

Plaintiff demanded that defendant cease his practice of chiropractic medicine in Vernal, but defendant refused to do so. In order to secure his contractual rights, and preserve the good will he had sold to Dr. Ruby, plaintiff filed this action seeking an injunction restraining defendant from further practice or performance of chiropractic services in Uintah County until August 1, 1989, as agreed by the parties in their contract, together with damages incurred by plaintiff as a result of defendant's breach.

DISPOSITION IN LOWER COURT

After a bench trial, District Judge David Sam found that defendant had breached a valid and binding agreement and enjoined defendant from further chiropractic practice in Uintah County until After August 1, 1989, leaving the matter of damages to a further hearing, (See Record, p. 35-38).

Defendant then filed this appeal from the injunction and ruling that the non-competitive covenant in the August 11, 1978 agreement was binding on defendant.

RELIEF SOUGHT ON APPEAL

Respondent seeks to have the lower court's ruling affirmed.

ARGUMENT

I. RESTRICTIVE COVENANTS ANCILLARY TO A SALE OF BUSINESS
ARE ENFORCEABLE SO LONG AS THEY ARE REASONABLE

Restrictive covenants will be upheld where they protect the business which they are meant to benefit and are no broader than necessary to afford that protection. There is greater reluctance to interfere when the covenant is connected to the sale of a business. Allen v. Rose Park Pharmacy, 120 Utah 608, 237 P.2d 823 (1951), Gann v. Morris, 122 Ariz. 517, 496 P.2d 43 (1979) Threlkeld v. Steward, 24 Okla. 403, 103 P. 630 (1909), Wood v. May, 73 Wash. 2d 307, 438 P.2d 587 (1968). Injunctive relief is appropriate where an established business is sold with its good will and there is a valid covenant not to compete within a defined territory. Valley Mortuary v. Fairbanks, 119 Utah 207, 225 P.2d 739 (1950).

"(I)t is well established that covenants not to compete are upheld when connected with the sale of a business and the result does not hinge upon any trade secrets or special business skills which the vendor-covenantor may be found to possess. . . when the individual responsible for creating the good will and the business to which it attached, become separated, it is necessary to preserve that good will to the business by a covenant on the part of the individual that he will not compete in an area where his personal reputation will detach the old customers from the old business." Allen v. Rose Park Pharmacy, 237 P.2d at

827.

The reasonableness of a covenant not to compete depends on the subject matter of the contract, kind and character of business, its location, the purpose to be accomplished by the restriction, the intentions of the parties, and the duration of and territory covered by the covenant. Gann v. Morris, op cit.

The medical profession is not exempt from restrictive covenants as there is a substantial risk of losing patients to their former doctor. Hansen v. Edwards, 83 Nev 189, 426 P.2d 792 (1967). In fact, businesses whose main commodity is personal services would seem to be particularly appropriate for a non-competitive covenant.

In this case, the business was a chiropractic practice in Vernal. As the business was one involving personal services, it was reasonable for plaintiff to believe that the patients would follow their chiropractic doctor if he remained in Uintah County, and therefore, it was proper to attempt to preserve the good will purchased with a non-competition covenant.

There is no indication that defendant did not read the contract or understand its terms, including the non-competition covenant or that there was any inequality in bargaining position. Defendant did not allege that he received inadequate consideration for the sale of his business and its good will or that plaintiff failed to perform his obligations under the contract.

What defendant does state is that because the Vernal area

has experienced considerable growth and plaintiff has since sold the chiropractic business and its good will to a third party, he (defendant) should be relieved of his obligations under an agreement in which he has received everything he bargained for. In other words, plaintiff had to give defendant everything defendant was to receive, but defendant does not have to so perform for plaintiff.

The good will of a business is ancillary to that business. It is not a personal obligation owed by defendant to plaintiff that disappears as soon as plaintiff no longer practices chiropractic medicine. The good will built up by defendant (and subsequently by plaintiff) is a valuable asset of the business which was sold to a third party. There is still a substantial risk that defendant's old patients would detach themselves from the old business if he is allowed to practice in Vernal. The rapid growth in Uintah County would have no bearing on this concern. Plaintiff contracted for an established chiropractic business and in order to ensure, as much as possible, that he would not have to find new patients to make his business profitable, he bargained for a non-competitive covenant. In order for plaintiff to receive the benefit of that bargain, the covenant must be enforced.

Defendant's argument that plaintiff received the benefit of his bargain when he sold the business to Ruby takes a very narrow look at the fact situation. Without defendant's covenant to not compete, the business would not be as valuable. In order for

plaintiff to realize the whole benefit of his bargain, he had to sell the good will along with the office furniture and building. Once plaintiff ceased to practice chiropractic medicine, all of these things would be of little value to him. Therefore, the only logical thing for plaintiff to do would be to sell all of them to someone who could make the fullest use of them, i.e., another chiropractor. In Allen v. Rose Park Pharmacy, 237 P.2d at 827, Chief Justice Wolfe quoted Vice Chancellor James and stated:

"On the other hand, public policy (emphasis added) requires that when a man has, by skill or by any other means, obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market."

When defendant entered into the contract with plaintiff, he assumed the risk that because of changes in Uintah County during the next ten (10) years, the chiropractic business would become more attractive, while plaintiff assumed the risk that it would become less attractive. Obviously, the tremendous growth in Uintah County was to plaintiff's advantage and defendant's disadvantage. But such are the risks undertaken in most contracts. Just because things did not turn out quite as defendant had anticipated is no reason to allow him to abrogate the covenant.

II. THE LAW OF MONOPOLY HAS NO APPLICATION TO THIS CASE

Defendant argues that the restrictive covenant should be void as against public policy because plaintiff was not simply

attempting to acquire defendant's business and good will, but was attempting to put defendant out of business so that plaintiff could have a more complete monopoly.

A monopoly is an exclusive right or power to carry on a particular trade or business, [Dattilo v. Tuscon General Hospital, 23 Ariz. App. 392, 533 P.2d 700 (1975)] control of the sale of the whole supply of a particular commodity, or the power to fix price and exclude actual or potential competitors from any part of a trade or business.

Defendant, in his argument (See Record, p. 33, paragraph 3), in the trial court admits that in 1979, there was at least one other practicing chiropractor in Vernal, and that in August 1982, that there were four. It would seem obvious that plaintiff did not have exclusive power over or control of the whole supply of chiropractic medicine in the Vernal area, nor was plaintiff excluding competitors. Therefore, the laws applying to monopolies are totally inapplicable in the present case.

Defendant was hardly precluded from practicing his skills as he was licensed to practice in the entire State of Utah and contractually, he was only precluded from practicing in Uintah County for ten (10) years. Furthermore, there is no indication that Uintah County's chiropractic needs would not be met if defendant is precluded from practicing there in accordance with the contract which he freely entered into, and for which he received good and valuable consideration.

CONCLUSION

By purchase from defendant, plaintiff owned the good will of the defendant's chiropractic business, including that portion protected by defendant's non-competitive covenant. Plaintiff should be free to sell that which he owns without losing that portion protected by the covenant.

A business providing personal services demands a non-competitive covenant to protect the good will ancillary to it when it is sold. This particular covenant is limited in scope to Uintah County and in time to ten (10) years. Neither are unreasonable in that they are meant to protect what defendant felt was a valuable chiropractic medicine practice located in Vernal, when he sold it to plaintiff.

As defendant received full and adequate consideration in exchange for his covenant to not operate a chiropractic practice in Uintah County, and there is no indication that he did not understand the covenant to not compete, he should not now be allowed to abrogate a contract, especially as plaintiff has fully performed all his obligations to defendant under that contract.

Therefore, District Judge Sam's judgment should be upheld by this court, and plaintiff should be allowed to proceed to prove the damages.

DATED this 23rd day of October, 1983.

GEORGE E. MANGAN, APC
Attorney for Plaintiff/Respondent

George E. Mangan

George E. Mangan
47 North Second East
Roosevelt, Utah 84066
801-722-2428

CERTIFICATE OF MAILING

I do hereby certify that on the 25th day of October, 1983, I mailed a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT, postage prepaid, to Alvin G. Nash, Attorney for Defendant/Appellant, P.O. Box 98, Vernal, Utah 84078, by depositing the same in the United States Post Office at Roosevelt, Utah.

Lucas Graws

Secretary

This Agreement, made and entered into this 11th day of August, 1978, by and between V. DURRELL CHIVERS of Vernal, Utah, hereinafter known as the Seller, and RANDALL C. LABRUM of Roosevelt, Utah, hereinafter known as the Buyer,

W I T N E S S E T H:

Whereas, the Seller is engaged in the practice of Chiropractic in the City of Vernal, Uintah County, State of Utah, and

Whereas, the Seller has agreed to sell to the Buyer all of his right, title and interest in such practice and of the good will therein, together with such equipment, office furniture and other property as is described and set forth in the attached Exhibit "A", and which Exhibit is made a part of this agreement by reference,

NOW THEREFORE, it is hereby mutually agreed as follows:

1. That the Seller hereby sells and the purchaser hereby purchases the Chiropractic practice of the Seller in Vernal, Utah, together with the good will thereof, the personal property as set forth in Exhibit "A", and including all patient records and other property that may be used in connection with the said practice.

2. That the Buyer hereby agrees to purchase the said practice and the personal property herein described and to pay to the Seller therefore the sum of \$20,000.00, said payment to be made as follows, to wit:

The sum of \$5,000, to be paid upon the execution of this agreement, the receipt of which is hereby acknowledged by the Seller.

The balance of the purchase price, the sum of \$15,000, is to be paid by the Buyer assuming and paying the indebtedness of the Seller to the Walker Bank and Trust Company, and which indebtedness is for purchase of the following equipment:

Universal X-Ray Machine
Zenith Hylo Hydro
Zenith Hylo Spring
Lindquist Chronowave, G-5.

3. That the Seller warrants that the property being conveyed hereby is free and clear of all liens and encumbrances, excepting as to the

Indebtedness set forth in paragraph 2 hereof.

4. That the Seller hereby agrees not to open a Chiropractic Office or to engage in the practice of the profession of Chiropractic within Uintah County, State of Utah, for a period of ten (10) years from the date hereof.

5. That the effective date of this agreement shall be the 12th day of August, 1978.

WITNESS, the hands of the parties hereto on this the 11th day of August, 1978.

V. Durrell Chivers, Jr
V. Durrell Chivers
Seller

Randall C. Labrum
Randall C. Labrum
Buyer

STATE OF UTAH)
COUNTY OF Uintah) ss.

On this the 11th day of August, 1978, personally appeared before me V. DURRELL CHIVERS and RANDALL C. LABRUM, signers of the foregoing instrument, who being by me first duly sworn, acknowledged to me that they executed the same.

[Signature]
Notary Public
Residing at
Verona Utah

My commission expires:
3/6/82