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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AMD DIAGNOSTICS INC. v. NICK BOZZA

BEFORE: Justice D. M. Brown

COUNSEL: V. Kats, for the Plaintiff/Moving Party

N. Bozza, defendant in person

DATE HEARD: November 7, 2008

E N D O R S E M E N T

I. Nature of this motion for injunctive relief

[1] AMD Diagnostics Inc. operates a cardiac diagnostic service under which it provides general medical practitioners with diagnostic and cardiac interpretation services for their patients. Mr. Nick Bozza, the defendant, worked for AMD and a related company from March, 2007 until he gave notice of his resignation on August 19, 2008. There was no written contract of employment. Since January, 2008 Mr. Bozza had worked as AMD's Director of Operations for its two full-service clinics in the Hamilton area.

[2] Although in his resignation letter Mr. Bozza said that his resignation would be effective August 29, 2008, he did not return to work with AMD after the 19th. This September and October AMD learned that Mr. Bozza had set up a competing business and had secured diagnostic referral business from some of the general practitioners who had been clients of AMD. The plaintiff also learned that Mr. Bozza was sending an information package to some physicians advising them that one of the shareholders of AMD had pleaded guilty in May, 2008 to a charge of intent to defraud creditors. The charge was not connected with the operations or business of AMD.

[3] Contending that Mr. Bozza was a fiduciary of the company, AMD brought this motion seeking interlocutory orders restraining Mr. Bozza from (i) soliciting AMD's customers, including cardiologists, internists and general practitioners; (ii) from interfering with the business of AMD, including its relationship with suppliers; and (iii) disclosing the past criminal conviction of the shareholder.

[4] The motion originally came before me on October 23, 2008. Mr. Bozza had only recently been served. He indicated that he would be representing himself and requested an adjournment, which I granted on terms, including a timetable for steps to be taken leading up to the return of the motion on November 7, 2008. At that time Mr. Bozza undertook not to give anyone materials about the criminal conviction of the shareholder, Mr. Gurdzy, including materials similar to those dated September 2, 2008 which he sent to Dr. Oliverio. In light of that undertaking AMD did not pursue its claim for injunctive relief on that issue. Accordingly, I need not deal further with that issue, although the formal order disposing of this motion must refer to that undertaking in its recital. Breach of the undertaking by Mr. Bozza, of course, would be a serious matter and akin to the breach of a court order.

[5] At the hearing of the motion on November 7, 2008 Mr. Bozza stated that he was not interested in dealing with any of the cardiologists or internists with whom AMD has a relationship – the seven individuals are identified at Tab A of AMD's Supplementary Supplementary Motion Record: see Mr. Bozza's November 3, 2008 affidavit, para. 1. I understand Mr. Bozza's statement to be equivalent to an undertaking and it too shall be included in the recital to the formal order for this motion.

[6] As to AMD's request for an injunction restraining Mr. Bozza from dealing with any suppliers to AMD, the record before me does not contain any evidence upon which such an injunction could issue and I dismiss that part of AMD's motion claim.

[7] That leaves one issue for determination on this motion – should an interlocutory injunction issue restraining Mr. Bozza from soliciting, contacting, approaching, interfering with, or in any way seeking to induce AMD's general practitioner customers to terminate their relationship or contracts with AMD?

[8] For the reasons given below I am not prepared to grant the injunction sought, but I will impose a timetable that will see this proceeding tried in April, 2009.

II. Analysis

A. The test for injunctive relief

[9] The three-part test set in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 applies. In the context of requests for injunctions to restrain a former employee from soliciting customers, I observed in *Boehmer Box L.P. v. Ellis Packaging Ltd.*, [2007] O.J. No. 1694 (S.C.J.) at para. 39:

> 39 In *RJR-MacDonald Inc., supra.*, the Court noted that in cases where an interlocutory injunction would effectively put an end to the action, a court should consider more carefully the likelihood of whether the plaintiff will succeed at trial. In cases involving injunctions seeking to restrain a former employee from competing with, or soliciting customers of, his former employer, this principle operates to require a moving party to establish a strong *prima facie* case in order to meet the first branch of the *RJR-MacDonald* test: *Poppa Corn Corp. v. Collins*, [2005] O.J. No. 1440, 2005 WL

845527 (Ont. S.C.J.); *1259695 Ontario Inc. v. Guinchard*, [2005] O.J. No. 2049 (S.C.J.); *Jet Print Inc v. Cohen*, [1999] O.J. No. 2864; *Gerrard v. Century 21 Armour Real Estate Inc*., (1991), 4 O.R. (3d) 191 (Ont. Ct. Gen. Div.); *Sherwood Dash Inc. v. Woodview Products Inc*., [2005] O.J. No. 5298, at para 58. As explained by Nordheimer J. in *Jet Print Ink, supra.*, at para. 11:

> "... when the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the higher threshold of a strong *prima facie* case is the more appropriate test to be applied."

I will apply that analysis to this case.

B. Strength of AMD's case

[10] What is the strength of AMD's case that Mr. Bozza owed it fiduciary duties and breached them? In the employment context the category of fiduciary is not confined to the directors or officers of a company, but also includes senior level employees who form part of the management of a company and who have been impressed with fiduciary duties because such employees are in the position to unilaterally exercise their authority in a way that could affect their employer's legal and economic interests: *Boehmer Box, supra*., at para. 45. Non-management "key employees" may also stand in a fiduciary position. The analysis is very case-specific: *Boehmer Box, supra.*, at paras. 46 to 48.

[11] On one reading of the record the parties paint diametrically opposed pictures of Mr. Bozza's responsibilities at AMD. The company contends that he independently operated two of their six locations – those in the Hamilton area. He hired and fired personnel, ordered any necessary supplies, negotiated and set certain pricing with customers, and solicited new general practitioner customers. AMD stated that in the first eight months of 2008 Mr. Bozza generated 29% of the company's gross income and was the highest paid employee at AMD. The company had also given Mr. Bozza a confidential list of 360 general practitioner customers whom he was to service.

[12] In his evidence Mr. Bozza deposed that he was "simply a salesperson", was never privy to any confidential information, and had no managerial duties or responsibilities. As he put it in his second affidavit: "I had no more authority as it related to the offices or clinics than a stock boy/office boy."

[13] On motions such as this it is difficult for courts to determine matters of credibility. While Mr. Bozza conducted some cross-examination of AMD's deponent, he was not cross-examined in turn. However, in this case, I think the answer to the question of Mr. Bozza's status is found in the following passage in paragraph 10 of his affidavit sworn October 27, 2008:

> [10] …The business model was developed by the Defendant [Mr. Bozza] and even though the Defendant showed the Plaintiff how to template it to other geographical areas, the Plaintiff did not have capable or committed people to build the proper relationships

> within the medical community to benefit from the Defendants (sic) model. *Truly it was the skills of the Defendant which were developed in other industries prior to entering the Plaintiffs' employment which generated the sales.* (emphasis added)

As I read this evidence, Mr. Bozza is saying, in effect, that AMD owed its sales to Mr. Bozza's skills and business model. In my view, Mr. Bozza's own words powerfully portray him as standing in a fiduciary relationship with AMD. For the purposes of this motion, I conclude that AMD has shown a strong *prima facie* case that Mr. Bozza was a fiduciary of AMD.

[14] As a fiduciary Mr. Bozza's relationship with AMD betokened loyalty, good faith and avoidance of a conflict of duty and self-interest: *Canadian Aero Service Limited v. O'Malley*, [1974] S.C.R. 592, at p. 606. I summarized some of those fiduciary duties in *Boehmer Box* at paragraph 42:

> 42 The principles governing the obligations imposed by law on a departing employee who is a fiduciary were succinctly summarized by the Alberta Court of Appeal in *Anderson, Smyth & Kelly Customs Brokers v. World Wide Customs Brokers* (1996), 184 A.R. 81 (C.A.):
>
> > (i) Direct solicitation of the former employer's clients by the departing or departed employee is not acceptable where the employee is a fiduciary of the employer [para. 24];
> >
> > (ii) This obligation exists notwithstanding the absence of an agreement restraining solicitation following termination [para. 5];
> >
> > (iii) The law has moved away from the use of formal and recognized relationships as limiting the circumstances in which fiduciary obligations may be found. The substance of the relationship between the parties is critical, not the nomenclature used to describe it. There are now few obstacles to characterizing an employee as a fiduciary of his employer [para. 17];
> >
> > (iv) The fiduciary duty subsists for so long after his termination as is reasonable in the circumstances to enable the former employer to himself contact his clients and attempt to retain their loyalty. The employer should have the opportunity to solidify and secure its relationship with its clients and to compensate for any destabilizing effect the employee's departure may have had [paras. 32 and 34];
> >
> > (v) The length of that period will be affected by the nature of the position held by the departing employee: the higher the level of trust and confidence reposed in the employee, with a corresponding vulnerability of the employer, the longer the period will be [para. 32]; and,

> (vi) The inquiry into the nature of the position held by the employee will include examining the degree of personal loyalty to the individual employee by customers, in both the particular case and throughout the industry generally. [para. 34]
>
> 43 The case law recognizes that in some industries a company's trade attachment with its customers represents a substantial and vulnerable business asset since it constitutes the earning power of a company. Some employees know the entire details of the existence, nature and extent of the attachment between the company and each of its customers: *Edgar T. Alberts Ltd. v. Mountjoy* (1977), 16 O.R. (2d) 682 (H.C.J.), at pp. 690-691.

[15] Has Mr. Bozza solicited AMD's clients? In his affidavits he denied doing so. AMD, in paragraph 20 of Mr. Fanuzzi's affidavit sworn October 16, 2008, identified six doctors and one business associate whom it contends received solicitations from Mr. Bozza after he left AMD. Of the six physicians, three have stopped doing business with AMD and have admitted to AMD that they are working with Mr. Bozza. In its undertaking responses from the cross-examination of Mr. Fanuzzi AMD identified a fourth doctor whom Mr. Bozza had solicited and who had stopped dealing exclusively with AMD. In paragraph 26 of his October 27, 2008 affidavit Mr. Bozza explained his post-resignation contact with those eight people. He admits revealing to four of them the criminal conviction of one of AMD's shareholders. As to five of the doctors with whom he had contact, Mr. Bozza deposed that he could not control whom they wished to work for. I regard that explanation as highly ambiguous.

[16] To resolve this conflicting evidence, I again turn to Mr. Bozza's own writing. He admits to sending to one AMD client, Dr. Oliverio, a letter on September 2, 2008 which contained news releases about the shareholder's conviction and a transcript of the court proceedings in which the shareholder entered his plea. Let me reproduce Mr. Bozza's letter in full:

> Dear Dr. Oliverio,
>
> First and foremost, please do not interpret this letter as any attempt on my part to solicit your business.
>
> The reason why I am communicating to you is I believe that I am morally and legally obligated to alert you to the fact that the controlling mind of AMD [shareholder's name] following his plea of guilty was convicted on May 20, 2008 of the charge of "INTENT TO DEFRAUD HIS CREDITORS CONTRARY TO THE CRIMINAL CODE OF CANADA".
>
> Please find enclosed a package including the transcripts of the proceedings herein along with a police press release, Toronto star article highlighting his mention and other factual documents.

> I will leave up to you regarding any further dealings with AMD. As such I believe I have completed my full disclosure and due diligence in order to indemnify myself from any harm which may arise from your relationship with AMD."

[17] Although Dr. Oliverio continues to do business with AMD, I regard Mr. Bozza's letter as a none too transparent attempt to dissuade the doctor from continuing his relationship with AMD and, instead, develop one with Mr. Bozza. The shareholder was convicted in late May; if Mr. Bozza felt he truly laboured under some moral and legal obligation to disclose that fact to AMD customers, why did he wait until after he resigned before doing so? In my view, the letter was a clear attempt to solicit business and to damage the business relationship between the doctor and AMD by using highly questionable means.

[18] In his affidavit Mr. Fanuzzi identified three doctors – Pang, Taliano and Paolone – who have stopped working with AMD and have admitted to the company that they are dealing with Mr. Bozza. AMD's gross revenue derived from those three physicians was significant – approximately $231,000 from January to August, 2008, out of AMD's total gross revenues for that period of $2.11 million, or about 10%. In his affidavit Mr. Bozza does not expressly deny that he now has a business relationship with those three doctors.

[19] I therefore conclude that AMD has demonstrated a strong *prima facie* case that Mr. Bozza solicited business from AMD clients following his resignation and that those solicitations have resulted in some clients leaving AMD. The plaintiff therefore has established on the record a strong *prima facie* case that Mr. Bozza has breached his fiduciary duties to the company.

C. Irreparable Harm

[20] Irreparable harm is harm which either cannot be quantified in monetary terms or which cannot be cured. Examples include instances where a party will be put out of business by the court's decision, will suffer permanent loss or irrevocable damage to its business reputation, or where it would be very difficult to quantify the damages caused by the defendant's conduct: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R 311, at para. 59; *AC Tire v. Honeywood Tire Ltd.*, [1999] O.J. No. 4055, at para. 15; *Micropublishing Services Canada Ltd. v. Lee*, [1998] O.J. No. 5620 (Gen. Div.), at para. 68.

[21] A party seeking an interlocutory injunction must place sufficient evidence before the court on which a finding of irreparable harm can be made; a finding of irreparable harm must rest on more than mere speculation: *Jet Print Ink, supra*., at para. 21. I recognize that some Ontario cases dealing with requests for injunctive relief against departing employees have discussed the relationship between the demonstration of a strong *prima facie* case and the necessity of establishing irreparable harm and the balance of convenience: *Van Wagner Communications Co, Canada v. Penex Metropolis*, [2008] O.J. No. 190 (S.C.J.); *Stop 'N Cash 1000 Inc. v. 1553785 Ontario Ltd.* (unreported decision of the Divisional Court, September 28, 2006); *Industrial Rush Supply & Service Ltd. v. Faria*, [2003] O.J. No. 475 (S.C.J.); *Kohler Canada Co. v. Porter*, [2002] O.J. No. 2418 (S.C.J.). However, AMD did not raise the point in

argument and, as well, those cases involved attempts to enforce negative covenants against a departing employee, which is not a feature of this case.

[22] Turning, then, to the evidence about irreparable harm, AMD's evidence reveals that Mr. Bozza generated 29% of the company's gross revenue from January until August, 2008. With his departure, AMD contends, it risks losing that revenue if he solicits AMD clients. AMD's evidence shows that three general practitioners – Drs. Taliano, Pang and Paolone – have moved their business to Mr. Bozza, and their custom had constituted 10% of AMD's gross revenue in the first eight months of this year.

[23] For four reasons I am not persuaded that AMD's evidence has demonstrated that the company has suffered or will suffer irreparable harm should the court not grant an injunction. First, AMD's evidence indicates that to date most of its Hamilton-area general practitioner clients continue to do business with the company. While the loss of three doctors who represented 10% of gross revenue is not insignificant, on the evidence it does not approach the level of threatening the ability of the company to carry on its business.

[24] Second, I recognize that in considering the issue of irreparable harm some courts are prepared to take into account the difficulty a plaintiff may face in proving lost sales as a result of a defendant's conduct: *Micropublishing Services Canada Ltd. v. Lee*, [1998] O.J. No. 5620, at paras. 68, 72 and 73. Nonetheless, in the present case the quantification of damages by AMD may not be a difficult task. The evidence filed by AMD (November 5 undertaking response, second table) shows that it has kept historical gross revenue data by practitioner. I expect that such past sales could form the basis of projected lost sales, including a calculation of the lost net profit associated with such sales. At the same time, it should not be difficult to ascertain the amount of any new business generated by Mr. Bozza from such practitioners. Indeed, in paragraph 36 below I impose certain production obligations on Mr. Bozza to ensure AMD has access to relevant information in the possession of Mr. Bozza from which it can ascertain the amount of new business that he generates. I therefore am not persuaded that this is the type of case in which it would be very difficult to calculate damages.

[25] Third, AMD did not file adequate evidence to explain how the marketplace for its services works. Specifically, there is no evidence of whether general practitioners use multiple cardiologists for patient referrals, whether they use multiple diagnostic services for their patients, or regarding the ease of migration of general practitioners from one service provider to another. That is to say, is the market for the services AMD provides highly competitive, with client practitioners utilizing the services of multiple diagnostic firms, or one characterized by a few service providers and little mobility amongst providers by clients? The evidence does not say.

[26] Finally, although AMD argued that it risks losing market share to Mr. Bozza and that such a loss could constitute irreparable harm, AMD has not filed evidence that would permit me to assess such a claim. How many general practitioners are in the Hamilton area market? What share of their business did AMD have at the time of Mr. Bozza's departure? What other competitors exist in the market? AMD has not adduced any evidence to enable me to form a view of the market in which it provides services and the potential threat to AMD's share of the

market posed by Mr. Bozza's activities. This represents a significant weakness in AMD's evidence.

[27] For these reasons, on the evidence filed, I am not satisfied that AMD has demonstrated that it would suffer irreparable harm if the court did not enjoin Mr. Bozza's activities.

D. Balance of convenience

[28] Notwithstanding my conclusion on the issue of irreparable harm, I will consider the third factor in the *RJR-MacDonald* test – the balance of convenience or inconvenience. A broad factor, it calls for an examination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits: *RJR-MacDonald,*, at para. 62.

[29] Competing policy issues underpin this area of the law. On the one hand, the general public interest in free competition and the ability of persons to pursue new business opportunities requires courts to exercise caution in imposing restrictions on former employees in less than clear circumstances: *Barton Insurance Brokers Ltd. v. Irwin* (1999), 170 D.L.R. (4th) 69 (B.C.C.A.), para. 39. This factor favours former employees and militates against granting interlocutory injunctions against them from carrying on competing businesses.

[30] On the other hand, free competition must be fair competition. Former employees should not be permitted to compete in a manner that disregards their obligations to former employers which the law imposes upon them. If they do, their former employers may have a remedy against them in the courts and they may well have to compensate their former employers for any harm caused by their conduct. In this case, if AMD proves its claim at trial, Mr. Bozza may be subject to a significant damage award – that will be for the trial judge to consider.

[31] But, what will happen between now and the trial if I do not grant an injunction? The answer to this question is influenced strongly by my findings regarding irreparable harm. In my view, the evidence does not enable me to conclude that AMD's business will suffer a significant threat if Mr. Bozza is not restrained from competing against them. Although the issue of the balance of convenience is a close one, I conclude that in this case the consideration of permitting competition outweighs that of the potential harm AMD may suffer from that competition.

E. Conclusion

[32] For these reasons, I decline to grant the injunction requested by AMD to restrain Mr. Bozza from soliciting its customers.

F. Timetable

F.1 Trial Date – April 6, 2009

[33] That having been said, in exercising my discretion on this motion I have taken into account the availability of an early trial date. In my view it is important that this matter proceed quickly to trial. I therefore order that the trial of this action take place during the week of April 6, 2009. It shall be scheduled for 4 days.

[34] That trial date is peremptory to Mr. Bozza – that is to say, it is not open to Mr. Bozza to request a delay of the trial; he must be ready to proceed on April 6, 2009. If Mr. Bozza wants to have a lawyer represent him at trial, he should find one immediately. I strongly recommend to

the trial judge that no "last minute" request for an adjournment be granted to Mr. Bozza in order to find counsel. If he does not have a lawyer on April 6, 2009, I recommend that the trial proceed in any event. I make the date peremptory to Mr. Bozza because of my finding that AMD established a strong *prima facie* case of breach of fiduciary duty. Mr. Bozza should not be permitted to delay the trial.

F.2 Timing of pre-trial steps

[35] To ensure that the matter is ready for trial on April 6, 2009, I order that the parties comply with the following pre-trial timetable:

(i) AMD shall serve and file a Trial Record by Wednesday, November 26, 2008;

(ii) Any requirement for mediation is dispensed with;

(iii) The parties shall exchange sworn affidavits of documents and productions by December 5, 2008;

(iv) The parties shall complete their examinations for discoveries by January 30, 2009. The examinations of all parties shall take place in Toronto. Each party may examine the other for a maximum of two (2) days; and,

(v) If any party objects to answering a question posed on examination for discovery, the party shall answer the question pursuant to Rule 34.12(2) and a ruling shall be obtained from the trial judge before the evidence is used at the trial;

F.3 Specific production obligations of Mr. Bozza

[36] In addition, as part of his obligation to produce information relating to any matter in issue in this action, and in order to minimize disputes which may arise about the scope of Mr. Bozza's production obligations, I am requiring Mr. Bozza to provide to AMD, on an on-going basis until the trial of this action, the following detailed information about the monthly revenue generated by his new business, whether he operates that business personally, through some other legal entity, or through some joint arrangement or venture with another person:

(i) the name and address of each customer of his business;

(ii) the amount billed to each customer each month;

(iii) the amount of revenue received from each customer in each month; and,

(iv) details of the services and/or products sold or provided to each customer in each month.

Mr. Bozza shall provide AMD with such monthly information in accordance with the following timetable:

Date by which Mr. Bozza must deliver the information to AMD	Time period of Mr. Bozza's business which the information is to cover
November 28, 2008	August 19, 2008 – October 31, 2008
December 15, 2008	November, 2008
January 15, 2009	December, 2008
February 15, 2009	January, 2009
March 15, 2009	February, 2009
April 3, 2009	March, 2009

III. Costs

[37] At the conclusion of the hearing I stated that I would call for written cost submissions. I would encourage the parties to attempt to settle the costs of this motion. If they cannot, the parties may serve and file with my office written cost submissions, including Bills of Costs, on or before Wednesday, November 26, 2008. Each party may serve and file with my office responding cost submissions on or before Friday, December 5, 2008. I can say to the parties that at the present time my inclination is to fix costs in a specific amount for this motion, but make them payable in the cause – i.e. in accordance with the result at the trial.

IV. Summary of order

[38] By way of summary, I dispose of this motion on the following basis:

(i) The recital to the formal order shall include the undertaking given by Mr. Bozza not to give anyone materials about the criminal conviction of the shareholder, Mr. Gurdzy, including materials similar to those dated September 2, 2008 which he sent to Dr. Oliverio;

(ii) The recital to the formal order shall include the undertaking given by Mr. Bozza not to conduct any business with any of the cardiologists or internists with whom AMD has a relationship – the seven individuals are identified at Tab A of AMD's Supplementary Supplementary Motion Record;

(iii) I dismiss AMD's motion for an interlocutory injunction to restrain Mr. Bozza from dealing with any suppliers of AMD or from soliciting any general practitioner clients of AMD;

(iv) This matter shall proceed to trial on April 6, 2009, peremptory to Mr. Bozza;

(v) The parties shall complete pre-trial steps in accordance with the timetable set out in paragraphs 35 and 36 above; and,

(vi) The parties shall serve and file written cost submissions in accordance with paragraph 37.

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D. M. Brown J.

DATE: November 14, 2008