NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1961

GABRIEL CARE, LLC

vs.

BORDEN CARE, LLC, & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Gabriel Care, LLC (Gabriel Care), a Massachusetts adult foster care provider (AFC),[2] appeals from the summary judgment entered in favor of the defendants, Borden Care, LLC (Borden Care), also an AFC, and its principal, Tammy Pereira. We affirm in part and reverse in part.

1. Background. Gabriel Care operates an AFC headquartered in Fall River, with clients throughout Massachusetts. Pereira was employed by Gabriel Care as a registered nurse and care manager. On August 11, 2010, Pereira signed a document entitled

[1] Tammy Pereira.

[2] Adult foster care is defined in 130 Code Mass. Regs. § 408.402 (2007), as "services ordered by a physician delivered to a member in a qualified setting . . . by a multidisciplinary team and qualified AFC caregiver, that includes assistance with [activities of daily living and those incidental thereto], other personal care as needed, nursing services and oversight, and AFC care management."

"Employment, Non-Competition and Confidentiality Agreement" (the agreement). The agreement contains the following provisions:

par. 3 a "no-moonlighting" provision,

par. 4 a noncompetition provision,

par. 5 a nonsolicitation provision, and

par. 6 a confidentiality provision.

The noncompetition provision provides, in relevant part, that "during the term of Tammy Pereira's employment and for a period of (3) three years after (the non-competition period) Tammy Pereira will not directly or indirectly whether as owner, partner, shareholder, director, employee, agent or otherwise, or through any person or entity, engage in any employment, consulting or other activity which competes with the business of Gabriel [Care] in Massachusetts." Pereira added her own handwritten paragraph, at the end of the agreement, stating as follows:

> "I Tammy Pereira do not agree with section 3 and 4 of this agreement. I do however agree that in the event that I resign from Gabriel Care[,] any other facility that I may seek employment of will not have knowledge of any client data, information or any materials noted in section 6. I agree that under no circumstances will I in leaving Gabriel Care take any client load, information, knowledge or training specific to Gabriel Care and apply it to any other facility. I will not go to another AFC."

The agreement is signed by Pereira, but not by a representative of Gabriel Care.[3] Pereira also signed an "Agreement to Confidentiality" dated July 19, 2010. Pereira continued working at Gabriel Care until March 24, 2014, when her employment was terminated.

Pereira incorporated Borden Care on February 15, 2013, as an AFC; Pereira is listed as its manager, resident agent, and signatory, and Pereira's home address in Fall River is listed as the company's principal address.

On April 10, 2014, Gabriel Care filed a verified complaint in the Superior Court against Pereira and Borden Care claiming, inter alia, breach of the agreement, breach of the duty of loyalty, conversion, intentional interference with contract and/or advantageous relations, and a violation of G. L. c. 93A. The complaint alleges that Pereira, while still employed by Gabriel Care, opened Borden Care in the same geographical area and operated Borden Care in direct competition with Gabriel Care, soliciting Gabriel Care employees, clients, and potential clients during working hours.

The defendants moved to dismiss the complaint. The motion was filed with a detailed responsive affidavit, in which Pereira

---

[3] Dennis Etzkorn, Gabriel Care's manager, claims that he met with Pereira, agreed to her changes, and signed the agreement, but was unable to locate the signed copy.

denies that she used her position at Gabriel Care to profit Borden Care. Specifically, Pereira contends that, at the time she incorporated Borden Care, Gabriel Care was facing the possibility of criminal charges that could have resulted in its closing. Concerned about her nursing license and prospects for employment, Pereira claims that Borden Care served as a contingency plan for her if her employment with Gabriel Care ended. She also denies that she solicited Gabriel Care clients or used its confidential information.

Treating the motion as one for summary judgment,[4] the judge ruled in favor of the defendants and dismissed the complaint. As a basis for his decision, the judge cited G. L. c. 112, § 74D, which prohibits noncompetition agreements restraining licensed nurses in their practice as nurses. Further facts will be set forth as necessary.

2. Standard of review. On appeal, "[w]e review a grant of summary judgment de novo." Miller v. Cotter, 448 Mass. 671, 676 (2007). We look to the summary judgment record to determine

[4] The parties were given additional time to submit supplemental affidavits and memoranda. In its supplemental filing, Gabriel Care argues that if summary judgment were to enter in favor of Pereira, it should be entitled to conduct further discovery to verify the information contained in her affidavit. On appeal, Gabriel Care raises the discovery claim in a footnote. Even if the claim rose to the level of proper appellate argument, which it does not, we need not reach the issue in light of our disposition.

"whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991). See Mass.R.Civ.P. 56(c), as amended, 436 Mass. 1404 (2002).

3. Existence of an agreement. As a threshold matter, we agree with the motion judge that genuine issues of material fact exist as to whether a contract was formed between Gabriel Care and Pereira. "It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement." Situation Mgmt. Sys., Inc. v. Malouf, Inc., 430 Mass. 875, 878 (2000). The record here supports the motion judge's observation that genuine issues of material fact remain as to whether Pereira's offer of a modified contract was accepted by Gabriel Care and whether this acceptance was communicated to Pereira, such that both parties reached an agreement to be bound by the modified contract.

Furthermore, if a contract was formed, on the record before us, its meaning, as amended by Pereira's handwritten addition, is ambiguous. "Contract language is ambiguous 'where the phraseology can support a reasonable difference of opinion as to

the meaning of the words employed and the obligations undertaken.'" Bank v. Thermo Elemental Inc., 451 Mass. 638, 648 (2008) (citation omitted). The language of the modified contract is open to multiple interpretations, particularly in light of Pereira's concluding handwritten statement that she "will not go to another AFC." Accordingly, the formation and meaning of the agreement are issues not appropriate for summary judgment.

4. Terms of the agreement. Viewing the issues of contract formation and ambiguity in the light most favorable to Gabriel Care as the nonmoving party, with the understanding that these issues may be resolved in favor of Pereira in any subsequent proceedings, we turn to the analysis of the individual provisions of the agreement.

a. Noncompetition provision. General Laws c. 112, § 74D, inserted by St. 1983, c. 50, § 1, provides, in relevant part:

> "Any contract or agreement which creates or establishes the terms of a partnership, employment, or any other form of professional relationship with a nurse registered to practice as a registered nurse . . ., which includes any restriction of the right of such nurse to practice as a nurse in any geographical area for any period of time after the termination of such partnership, employment or professional relationship shall be void and unenforceable with respect to said restriction. Nothing in this section shall render void or unenforceable any other provision of any such contract or agreement."

Our case law has yet to examine this statute, and, specifically, the meaning of the phrase, relevant here, "restriction of the right of such nurse to practice as a nurse." A similar statute, however, prohibiting restrictions on the practice of physicians, G. L. c. 112, § 12X, was the subject of Falmouth Ob-Gyn Assocs. v. Abisla, 417 Mass. 176 (1994) (Falmouth Ob-Gyn). Like the nurse statute, G. L. c. 112, § 12X, inserted by St. 1977, c. 762, § 1, prohibits "any restriction of the right of such physician to practice medicine." In Falmouth Ob-Gyn, the Supreme Judicial Court held that a "compensation for competition clause" contained in an employment contract between a physician and a medical professional corporation was a covenant not to compete barred by § 12X. Id. at 182. The court observed that "[t]he statute favors '[t]he strong public interest in allowing [patients] to [consult the physician] of their choice,' Meehan v. Shaughnessy, 404 Mass. 419, 431 (1989), over any benefit to the medical profession or individuals of permitting noncompetition covenants." Ibid. A decision of the United States District Court for the District of Massachusetts, citing Falmouth Ob-Gyn, reached an analogous result. See Parikh v. Franklin Med. Center, 940 F. Supp. 395, 408 (D. Mass. 1996) ("forfeiture" and "resignation" clauses in partnership agreement barred by G. L. c. 112, § 12X).

In the physician cases, however, there was no issue concerning whether the physicians in those cases were "practic[ing] medicine" under the statute. Here, on the other hand, a threshold question must be answered concerning Pereira's role at Borden Care; namely, whether she is "practic[ing] as a nurse" at that job, and therefore protected by the provisions of § 74D. Under the governing regulations, an AFC program is required to have in place a "multidisciplinary professional team" that "must include a registered nurse and an AFC care manager, either of which may assume the role of program director." 130 Code Mass. Regs. § 408.433(B) (2007). Pereira, who worked as a registered nurse and care manager at Gabriel Care, is listed as the manager, resident agent, and signatory at Borden Care. A particular job title, however, without more supporting information, is not outcome determinative as to whether the protections afforded by § 74D are triggered. There is no record evidence as to Pereira's role and responsibilities in these various positions.[5] In the absence of such evidence,

[5] The regulations do provide some basic information about the duties of the required staff members of an AFC. A program director conducts administrative duties such as hiring, firing, training, and evaluating AFC employees, paying caregivers for their services, and "the fiscal administration of the AFC program including billing, budget preparation, and required program statistical and financial reports." 130 Code Mass. Regs. § 408.433(B)(1) (2007). The registered nurse oversees the medical component of the AFC program, including completion of nursing and clinical assessments, developing and reviewing each

summary judgment should not have entered as to par. 4 of the agreement, the noncompetition provision.

b. Confidentiality provision.[6] The evidence in the summary judgment record on Pereira's misappropriation of confidential information stands on a different footing. While the evidence shows that Gabriel Care took steps to protect its confidential client information and other records and business information, there is no evidence to indicate that Pereira took that information or used it for Borden Care's benefit. Her knowledge of the identity of Gabriel Care clients and potential clients, without more, does not support Gabriel Care's claim for misappropriation. See, e.g., Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835, 841 (1972), citing Woolley's Laundry, Inc. v. Silva, 304 Mass. 383, 390-391 (1939). Summary judgment

---

member's plan of care, monitoring the health status of each member, reporting any health status change to the member's physician, and selecting, training, evaluating, and supervising caregivers. 130 Code Mass. Regs. § 408.433(B)(2) (2007). The position of care manager requires a social worker license, or equivalent education and experience. The care manager conducts psychosocial assessments, selects, trains, evaluates, and supervises AFC caregivers in conjunction with the registered nurse, and conducts bimonthly on-site visits, alternating with the visits of the registered nurse. 130 Code Mass. Regs. § 408.433(B)(3) (2007). Nevertheless, the record is devoid of information about the specific duties that Pereira performed at Borden Care.

[6] Relying on the same facts, Gabriel Care also alleges that Pereira violated the terms of the signed "Agreement to Confidentiality."

thus properly entered in favor of Pereira on Gabriel Care's claims that she breached the agreement's confidentiality and nondisclosure provisions.

5. Duty of loyalty. We next examine whether there were facts in dispute as to whether Pereira breached her common-law duty of loyalty to Gabriel Care while she was employed there. A duty of loyalty is imposed on an employee who occupies a position of trust and confidence. Chelsea Indus., Inc. v. Gaffney, 389 Mass. 1, 11 (1983). The record suggests that Pereira occupied a position of trust and confidence at Gabriel Care by virtue of her role as an AFC registered nurse, her access to confidential client information, and the trust she was accorded in interfacing with Gabriel Care clients and caregivers. See Meehan v. Shaughnessy, 404 Mass. at 438. Gabriel Care argues that Pereira breached this duty of loyalty by pursuing the interests of Borden Care on Gabriel Care's time. See Chelsea Indus., Inc. v. Gaffney, supra at 12-13 (employer entitled to recover salary paid to trusted employee for breach of loyalty undertaken during working hours). See also Production Mach. Co. v. Howe, 327 Mass. 372, 379 (1951); BBF, Inc. v. Germanium Power Devices Corp., 13 Mass. App. Ct. 166, 177 (1982).

Once again, on the record before us, genuine issues of material fact remain as to whether Pereira was operating Borden

Care while still employed by Gabriel Care, and if so, whether it was with or without the permission of Gabriel Care. Construing the evidence in Gabriel Care's favor, the summary judgment record shows that Pereira attempted to solicit a potential Gabriel Care client and staff member for her own business during her working hours at Gabriel Care, and that she procured a client for Borden Care whom she had solicited prior to her termination from Gabriel Care. Although these facts are disputed, if credited, and subject to any defenses Pereira may have, Pereira's use of company time and resources may provide the requisite proof of breach of her duty of loyalty and harm caused thereby, if indeed such duty were found, thereby precluding summary judgment in Pereira's favor on this issue, as well.

6. Remaining claims. As to Gabriel Care's claims for conversion, intentional interference with contract and/or advantageous relations, and its claim against Borden Care for a violation of G. L. c. 93A, this is a closer call. Again, the summary judgment record suggests that there are genuine issues of material fact, albeit merely a few. Therefore, the entry of summary judgment was premature on these claims, as well.

7. Potential relief. While the evidence of damages suffered by Gabriel Care as a result of Pereira's conduct is admittedly thin, "[a] toehold . . . is enough to survive a

motion for summary judgment." Marr Equip. Corp. v. I.T.O. Corp. of New England, 14 Mass. App. Ct. 231, 235 (1982). We also note that Gabriel Care's complaint requested injunctive relief. Should Gabriel Care succeed in prosecuting its noncompetition claim, calculating the appropriate relief will be "particularly difficult and elusive," Kroeger v. Stop & Shop Cos., 13 Mass. App. Ct. 310, 322 (1982); hence the importance of injunctive relief in cases involving noncompetition agreements. See Lufkin's Real Estate, Inc. v. Aseph, 349 Mass. 343, 346 (1965) ("It is [the] practical difficulty of establishing monetary damages which is the basis for the equitable relief afforded by the specific enforcement of this type of contract"). See also Corporate Technologies, Inc. v. Harnett, 943 F. Supp. 2d 233, 243 (D. Mass. 2013) (employee soliciting former employer's clients can cause irreparable harm to goodwill).

8. Conclusion. Insofar as the judgment dismissed the claim of breach of the confidentiality provisions, it is affirmed. In all other respects, the judgment is reversed.

So ordered.

By the Court (Agnes, Sullivan & Blake, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: March 10, 2016.

---

[7] The panelists are listed in order of seniority.