CITATION: Arvan Rehab Group Inc. v. Millea et al., 2023 ONSC 4213
COURT FILE NO.: CV-14-502676
DATE: 20230720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ARVAN REHAB GROUP INC.	)	
	)	*Pellegrino Capone*, for the Plaintiff
Plaintiff	)	
	)	
– and –	)	
	)	
RODERICK GRAHAM CHRISTIAN MILLEA, MILLEA PHSYIOTHERAPY PROFESSIONAL CORPORATION, NICOLE TWEEDIE AND RACHEL ERAUW	)	*Benjamin Miller-Waterman*, for the Defendants
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** May 29, 30, 31, June 1, 2 and 3, 2023

REASONS FOR JUDGMENT

MERRITT J.

[1] The plaintiff, Arvan Rehab Group ("Arvan"), alleges that the defendant, Roderick Millea ("Millea") breached both their contract and his fiduciary duty to Arvan and that, in doing so, Millea and his company Millea Physiotherapy Professional Corporation ("MPPC") engaged in a conspiracy. Arvan brings this action to recover damages for the loss of its contract with Norfolk County or disgorgement of profits from the bid that Arvan says the defendants improperly won. The action against Nicole Tweedie and Rachel Erauw was dismissed prior to the trial.

[2] Arvan provides physiotherapy services to long term care and retirement homes ("LTC Facilities") in Ontario. Millea is a licensed physiotherapist ("PT") who provided physiotherapy

services, either personally or through MPPC. Arvan and Millea had a contract whereby Millea provided services on behalf of Arvan (the "2007 Contract").

[3] This arrangement was mutually beneficial until the Government of Ontario changed the funding model for services in LTC Facilities, as described below. Because of changes to the funding model, Norview Lodge ("Norview"), one of Arvan's clients to which Millea provided services, issued a Request for Proposal ("RFP") for physiotherapy services.

[4] Both Arvan and Millea submitted bids. Millea won the bid; Arvan lost. Arvan claims that its contract with Millea prevented him from submitting a bid that, but for Millea's proposed bid, Arvan should have won. Arvan now seeks compensation for Millea's alleged breach.

[5] For the reasons that follow, the 2007 Contract between Arvan and Millea is binding and enforceable; therefore, Millea breached the non-solicitation provisions therein.

Factual Background

[6] Arvan provides physiotherapy services to LTC Facilities in Ontario. From 2004 to January 31, 2014, Arvan's clients included Norview Lodge ("Norview"), a LTC Facility in Simcoe, Ontario.

[7] Arvan has been providing physiotherapy services since 1999. Starting in 1999, Arvan held an Ontario Health Insurance Plan ("OHIP") Schedule 5 billing licence. These licenses were first granted in 1965 and were exclusive: there were only 130 of them. They were intended to facilitate the provision of clinic-based physiotherapy services billed through OHIP. They allowed home visits as well. Service providers who held Schedule 5 licences were able to provide physiotherapy services to residents in LTC Facilities.

[8] In 1999, OHIP paid $12.20 per treatment for a minimum of 15 minutes of treatment. At that rate, home visits were not economical; however, the business model was viable in LTC Facilities. The licence enabled providers, like Arvan, to provide physiotherapy services to seniors in LTC Facilities if they had an OHIP number, a referral from a doctor, and an assessment by a PT. A PT could direct a PTA to conduct treatments and document them. The PT would sign off on the treatment(s) provided and Arvan would then bill OHIP. Arvan provided services under this model from 1999 until August 21, 2013. LTC Facilities were not directly involved in the provision of services or the billing. Their involvement was to allow providers, such as Arvan, access to their residents.

[9] In the early years of Arvan's business, Bill Arvanitis ("Bill"), Arvan's principal, realized that there were many underserved LTC Facilities in rural areas. He targeted those areas for business. At that time, community care access centres provided some physiotherapy services to residents in LTC Facilities on a one-off basis. Bill's goal was to serve as many people as possible in these underserved areas.

[10] Arvan uses local PTs and PTAs to deliver physiotherapy services in LTC Facilities.

[11] Millea lives in Simcoe, Norfolk County and worked for Arvan from 2004 until January 2014, either through his professional services corporation MPPC or personally, providing physiotherapy services in Norfolk County at three LTC Facilities: Norview, Cedarwood, and Maple Lodge.

[12] Norview was the largest LTC facility with 179 beds. Cedarwood and Maple Lodge were smaller. Millea was the primary PT at these three locations. At Norview, two PTAs worked with Millea: Nicole Tweedie and Rachel Erauw.

[13] Millea did not work for Arvan exclusively. He also worked at the Canadian Back Institute and for private clients, but he did not compete with Arvan.

The 2004 Contract

[14] On November 9, 2004, Arvan contracted with MPPC. Millea provided physiotherapy services to Arvan through MPPC pursuant to this contract (the "2004 Contract") until 2007. The 2004 Contract allowed either party to terminate the contract on 60 days' written notice. The 2004 Contract had a non-competition provision as follows: "Roddy Millea or Millea PT Professional Corp may not provide physiotherapy services to Cedarwood LTC or Norview Lodge LTC for 1 year commencing the end of the contract or at any time during the contract" (the "Non-Competition Clause").

[15] The 2004 Contract also provided that it would "be null and void if [Arvan] no longer holds a contract to provide rehabilitation services to Cedarwood LTC and Norview Lodge LTC." Arvan drafted the 2004 Contract.

[16] From 2004 to 2007, services provided by MPPC to Arvan were provided by Millea personally. On occasion, when Millea was unavailable to work due to vacation or illness, another PT would fill in for him. This was rare; however, when it occurred, Arvan would have to approve the replacement PT.

[17] All of Arvan's dealings with MPPC were with Millea. Arvan considered Millea to be their key person onsite at the LTC Facilities. He was Arvan's "eyes and ears" in terms of the client relationship. Although Arvan contracted and paid the PTAs, Millea supervised them and they worked under his clinical direction.

[18] Millea had close relationships with the Norview staff. Millea maintained Arvan's relationship with the staff at the home including the clinical staff, medical staff, nursing staff and the administrator of the home. He attended or chaired meetings in the LTC Facilities, and he attended family care conferences. Millea also attended the quarterly meetings of the Professional Advisory Committee of the LTC Facilities, which included the administrator, the doctor, nursing staff and the pharmacist. Millea, as the PT, would prepare the physiotherapy report for these meetings. Occasionally, someone from Arvan's head office would attend a meeting if invited by Millea. Arvan relied on Millea to address any day-to-day and client satisfaction issues, as well as any issues that arose regarding quality of service or equipment needed. Millea was Arvan's key person in the home. The home administration staff knew he was the first line of contact. Arvan relied on Millea to be their link to the administration in the

LTC Facilities. For example, on one occasion, the Norview administrator was retiring and a going away party was being held. Millea advised head office that someone should attend the party and they did. Millea ensured the residents were getting good care and he maintained good relationships with staff and families on Arvan's behalf. For goodwill, Arvan also provided LTC facility staff educational programs and videos and provided Assistive Devices Program authorizations as value-added services.

[19] Arvan's business model depends on referrals. When a resident first comes into the facility there is an initial referral to physiotherapy. The PT reviews the medical record and background of the resident before completing a physical assessment. Then, a course of treatment is planned. Consent is obtained from the resident or their substitute decision maker. The PT directs the PTA to implement the treatment plan and complete the treatments. PTs also treat residents. If the PTA performs the treatment, they document it, and the PT signs off on it. The documents are sent to Arvan with the OHIP number and head office staff complete the billings.

[20] Arvan also provided group treatments for up to four residents at a time in the form of group exercise classes. The PTAs delivered these classes on the PT's recommendation. It was Millea's job to directly supervise the PTAs and direct their work depending on the clinical needs of the residents, the number of minutes of treatment required, and their priorities. He also ensured that treatments were properly documented, OHIP numbers were obtained, and physician referrals had been made as required.

The 2007 Contract

[21] In 2007, the Government of Ontario required that all PTs contract directly with the providers and not through professional services corporations. Arvan amended its contracts with PTs accordingly. On May 31, 2007, Millea signed a new contract in his personal capacity with Arvan. Arvan drafted the 2007 Contract. Arvan says that Millea requested that money owed to him personally continue to be paid to MPPC. Arvan complied with this request. Millea says there was no discussion abut the new contract when he was asked to sign it and that he overlooked the fact that the contract was between Arvan and him personally, as opposed to MPPC. He says the money owing under that contract continued to be paid to MPPC.

[22] From May 31, 2007 until August 2013, Millea worked for Arvan in his personal capacity as opposed to through MPPC, pursuant to the 2007 Contract. He worked as an independent contractor and not as an employee. Many of Arvan's PTs work as independent contractors at their request. This way, they may work for other providers. PTs can also choose to work as employees. The arrangement requiring Arvan's approval of other PTs filling in for Millea continued from 2007 to August 2013.

[23] The 2007 Contract contains non-solicitation clauses (the "Non-Solicitation Provisions") concerning both clients and employees of Arvan as follows:

1.4 Obligation of Professional

…

(vi) I agree that I will not, without prior written consent of ARVAN, during my contract assignment with ARVAN and for a period of twelve months after the date of the termination of my contract for whatever reason:

a. Directly or indirectly solicit, interfere with or endeavour to direct or entice away from ARVAN any client, or prospective client that I have dealt with while associated with ARVAN, for the purpose of offering that client services which are the same as or similar to any services offered by ARVAN; or

b. Directly or indirectly interfere with, hire, entice away or otherwise engage the services of any Professional or other service provider of ARVAN who was at any time during the 12 months prior to my termination of contract associated with or provided services to ARVAN.

[24] Arvan says these clauses are very important. Since the PT has the main relationship with the client, Arvan wanted to ensure that the PT did not contract directly with the client and exclude them. Arvan was protecting the business relationships it had built. The Non-Solicitation Provision regarding employees was also very important because it is difficult to find local PTAs who are trained or can be trained. Arvan spends a lot of time on training.

[25] The 2007 Contract also has a confidentiality clause. Arvan says that it is important for the PTs to keep Arvan's information confidential. It is also important for PTs to pass on any information they receive from clients, particularly any issues of concern. Arvan can only obtain such information through the PTs. Before the events leading to this matter, there were no issues with Millea providing information.

[26] Millea did not argue that the Non-Solicitation Provisions of the 2007 Contract were unreasonable or unenforceable as being too broad or unduly restricting his ability to compete.

The Funding Change

[27] In April 2013, the Government of Ontario announced a change to the funding model: going forward, funding for physiotherapy was cut by approximately 50 percent and provided directly to the LTC Facilities. As set out above, prior to 2013, physiotherapy services provided to residents in LTC Facilities were billed to OHIP. OHIP paid Arvan, and Arvan paid Millea and the PTAs on a fee-per-service basis. With the new model, Schedule 5 licenses were no longer used and funding was provided to the LTC Facilities on a per bed basis. The homes were then required to contract out the services. New contracts had to be entered into with all LTC Facilities going forward under the new model. The new model was to come into effect on July 31, 2013. On June 27, 2013, Arvan sent a standard form letter to all its workers giving them notice of the termination of their contracts effective July 31, 2013. Arvan was hopeful they would be able to continue to employ them but had to wait to see the new funding model. Arvan

entered into new employment contracts with the PTAs in July and changed their payment structure from a fee-per-service model to an hourly rate.

[28] On June 28, 2013, Millea sent an email to Bill summarizing his discussions over the previous weeks and his understanding of the status of Arvan's contracts with Norview, Cedarwood, and Maple Lodge. He told Bill that first the three LTC Facilities told him two weeks earlier that all three planned to extend their contracts with Arvan starting on August 1, 2013, and that he had phoned Arvan's Director of Client Relations Patrick Doherty and advised him of the same. Millea advised that while Maple Lodge and Cedarwood were disappointed about hours being cut, he had assured them it was not Arvan's fault. He went on to say that the following week Cedarwood and Maple Lodge changed their minds and said they wanted to contract with the PTs and PTAs directly. Millea assured Arvan that he was happy working for them and that he had not approached any of the homes to provide service directly and would not solicit them. The email continued on saying that on June 28, 2013, Cedarwood and Maple Lodge had made an offer to employ the PTs and PTAs directly and if Millea and the PTAs were not interested they would find others to replace them. Millea concluded his email by saying that Norview had confirmed that they would be continuing with Arvan.

[29] Bill responded by email the same day and told Millea that they wanted to continue to be the contracted provider for all three LTC Facilities.

[30] Subsequently, Arvan consented to waive its contractual rights with Millea and the PTAs so they could work directly with Maple Lodge and Cedarwood. Millea and the PTAs began working with these homes directly. Norwood issued the RFP.

[31] In the summer of 2013, Millea's compensation was changed because of the new funding model. Millea's compensation structure changed from a fee-per-service model to an hourly rate. On July 12, 2013, Arvan sent Millea an email confirming their discussion that he would continue as PT at Norview until September 30, 2013, until the RFP had been decided and that, as of August 1, 2013, he would work 18 hours per week at $50.00 per hour. The remaining terms of the existing contract between them would continue to be in effect. At trial, Millea said he did not know if this 2013 change from fee-per-service to an hourly rate amounted to a constructive dismissal. Counsel for Millea did not argue constructive dismissal and it was not pled. In any event, Millea accepted the change and continued to work from August 2013 to January 2014 without interruption or objection.

The RFP

[32] When Norview released its RFP, Arvan knew that continuity of care and staff was paramount for LTC Facilities. The LTC's Resident's Bill of Rights provides that care is to be given in a courteous manner by people *known* to the resident. Arvan knew that continuity of staff would be a major competitive advantage for their bid. Arvan had discussions with Millea concerning the RFP and he agreed that he would stay on working for Arvan at Norview. Bill and Millea met for a meal at a local restaurant in mid-September 2013 and discussed Arvan's response to the RFP. Arvan wanted to review the RFP with Millea to ensure they were successful. Bill and Millea discussed the fee structure for PTs and PTAs. Millea testified that

they only discussed how much he and the PTAs would be paid and not the financial proposal itself, i.e., the amounts Arvan would charge Norview. Regardless of whether they specifically discussed the financial proposal, the two are closely related because the amounts the PT and PTAs were to be paid would be a critical factor in determining the amounts in the financial proposal.

[33] Millea told Bill that he had already talked to Arvan's Director of Human Resources and told him that he would be staying on at Arvan. Millea admitted that he told Bill that Arvan could include his name in their bid. Millea did not advise Arvan of any concerns regarding the bid or any concerns about the services they were providing to Norview. Millea said that he was not interested in bidding on the RFP. He did not tell Bill that he had already spoken to the administrator at Norview, Bill Nolan ("Nolan"), about the RFP, met with Nolan to review Norview's RFP, and sent correspondence to Nolan with questions about the RFP. He asked Nolan about making changes to the RFP which he says were ultimately made and which made the RFP economically viable to him such that he decided to respond to it.

[34] Millea had input into Arvan's financial proposal. When Arvan's Director of Corporate Development John Arvanitis ("John") prepared Arvan's bid for the RFP, their Director of Human Resources assisted and called Millea to ask for CVs for all the staff. There were several calls between Arvan and Millea about Arvan's RFP response. Importantly, , most importantly during these calls, Arvan and Millea discussed the rates they included on the financial form. John reviewed an excel spread sheet containing Arvan's financial proposal with Millea. Arvan's RFP bid included Millea, the PTAs, Nicole Tweedy and Rachel Erauw, and the Occupational Therapist ("OT") Helen Di Folco. These were the same PTAs and OT as had worked at Norview all along.

[35] Norview released a second RFP. According to Arvan, the two RFPs were materially the same. Arvan made no changes to its bid for the second RFP. The date for responding to the RFP was then extended to October 29, 2013. There were no discussions between Millea and Arvan between the two RFPs. Millea testified that the second RFP was of more interest to him because of a change related to "deliverable" hours as opposed to working hours. Millea said the change made the second RFP more economically viable and attractive to him. Millea never told Arvan he had changed his mind and was going to submit his own bid in response to the second RFP. Nor did Millea tell Arvan that he planned to take PTAs with him and that Norview wanted an alternative to Arvan. When asked if this was valuable information that he kept to himself, he said "it makes no difference to my success or not in a bidding process". When asked about how it might impact Arvan's success he said he assumed Norview had explained their concerns to Arvan, but he never inquired of either Arvan or Norview as to whether Norview's concerns had been communicated to Arvan.

[36] At trial, Arvan read in from Millea's examination for discovery where Millea said that Nolan from Norview advised him that Norview would be doing an RFP and told him that Norview was unhappy with Arvan's service. Norview was happy with the physiotherapy services but the communication with Arvan was unsatisfactory.

[37] At trial, Millea added that Bill had been late to or cancelled meetings with Norview since 2004. Millea said he did not advise Bill or anyone at Arvan of what Nolan said. His explanation was that it was not his role to get involved. At the time of the conversation with Nolan, Millea was working for Arvan.

[38] Arvan says they were completely unaware of any concerns at Norview until well after the RFP process concluded. Arvan had no contractual obligation to attend meetings, although they had offered to attend meetings on occasion. Nolan was relatively new to Norview. Bill had met him at the retirement dinner for the previous administrator and the next time he spoke with him was when Nolan asked him for a precedent for an RFP. Bill says he expected that Millea would relay any concerns. It was very upsetting that Millea did not do so. Their business model was set up such that Millea was Arvan's eyes and ears at the LTC facility. Bill says had he known about Norview's dissatisfaction, he would have asked for a meeting with Nolan to address any concerns.

The MPPC Bid

[39] Unbeknownst to Arvan, Millea was making inquiries of Norview about the RFP in early to mid-September 2013. On September 14, 2013, Millea wrote to Nolan thanking him for the opportunity to review the RFP. The letter specifically addresses an item which Millea testified was of concern to him in the RFP, making it not financially viable to him. In October, Millea asked the PTAs for their CVs which made their way into the MPPC bid. Arvan had previously asked Millea for the CVs of the PTAs to submit with Arvan's bid.

[40] Millea's response to the RFP is somewhat misleading. The MPPC bid generally describes the tasks Millea completed while working for Arvan. Some of the items described in his RFP were done by Arvan not him such as recruitment, training videos, Olympic Games, the Norview Women's Auxiliary and to this extent Millea is misrepresenting that he or his company did these things. Some of the items were done by him personally and not by MPCC such as supervision of staff. All the services he describes having provided to Norview were provided while he was working for Arvan. The MPPC bid was basically a summary of services provided by Millea to Norview while he was working for Arvan with the addition of some things which were actually provided by Arvan not Millea or MPPC. The MPPC bid included the same PTAs who were still working for Arvan at the time the MPPC bid was submitted (Tweedie and Eruaw), Barb Desserano, who was previously the back up PT for Millea when he was on holiday or away sick and Pam Whalen, who was the speech language therapist previously used once or twice a year for feeding assessments. The only new team member was Millea's wife Tina Millea who was the new OT proposed.

[41] MPPC won the bid and Arvan was forced to terminate the employment of the PTAs. Nolan prepared a report on behalf of the Norfolk Department of Health and Social Service in support of the MPPC bid. The report emphasizes that continuity of care is key and says the administrative aspects of the current provider have been less than satisfactory. The Report recommends the MPPC bid, even though it is higher than others, to maintain continuity of care. It is more likely than not that had Millea not entered a competing bid, and had Arvan had an

opportunity to address Nolan's concerns regarding communication and submit the *only* bid that represented continuity of care, Arvan would have been successful.

Issues

[42] There are four issues in this case:

(1) Is the 2007 Contract binding and enforceable?

(2) Did Millea breach the 2007 Contract, specifically the non-solicitation provisions relating to clients and employees?

(3) Did Millea breach his fiduciary duty giving rise to damages for disgorgement?

(4) Did MPPC conspire with or induce Millea to breach his contractual and fiduciary duties?

Analysis

[43] Millea argues that he and MPPA were not subject to any contractual non-competition or non-solicitation provisions. He says the 2007 Contract was not binding and the 2004 Contact was null and void.

The 2004 Contract

[44] Millea argues that Arvan never gave notice of termination of the 2004 Contract. Therefore, it remained in effect and that the "null and void" clause found within the 2004 Contract would render the Non-Competition Clause "null and void" once Arvan lost the Norview contract.

[45] I find that the 2007 Contract replaced the 2004 Contract. The 2004 Contract and the 2007 Contract both relate to the provision of PT services to Arvan by Millea at the LTC Facilities. Millea was not paid under both contracts at the same time. The two contracts did not coexist or complement one another.

[46] It is unnecessary for me to determine whether the Non-Competition Clause would have been void because of the "null and void" clause; however, had the 2004 Contract not been superseded by the 2007 Contract, I would not have made this finding. Rather, to give effect to the clear intention of the parties which is apparent on the face of the 2004 Contract, I would find that the Non-Competition Clause would remain in effect for one year after Arvan no longer held a valid contract to provide rehabilitation services to Cedarwood and Norview.

The 2007 Contract

[47] Millea argues that the 2007 Contract is neither binding nor enforceable because it was not meant to alter the legal relationship between the parties. In support of this position, Millea points to the statements made by Bill and John that said the reason for creating the 2007 Contract was to present a document to OHIP and not to alter their legal relationship. This is not how I understood their evidence. They testified that OHIP required Arvan to contract

directly with their PT and PTAs and not through professional service corporations. Millea also submits that Arvan did not provide any documentary evidence to support their oral evidence in this regard. Regardless, I accept their oral evidence that the reason for entering into the 2007 Contract was to satisfy OHIP's requirement and to implement the stronger contractual Non-Solicitation Provisions.

[48] Millea says that he did not understand that he was personally contracting with Arvan. The 2007 Contract clearly has Millea's name at the top of the first page. Millea testified that he did not notice that his name, rather than MPPC, was on the contract. He said that he was focused on the content of the contract. Throughout the contract he is referred to as "The Professional" and "his/her" and "I". Millea presents as an articulate and intelligent individual. He has no difficulty reading or understanding English. Millea says that, had he realized this change, he would not have signed the 2007 Contract. He offered no explanation for this position.

[49] I do not accept his evidence in this regard. Given that it was a requirement of the Ministry of Health, it is highly unlikely he would have refused to personally contract with Arvan particularly since the requirement would have been the same with any provider.

[50] At trial, Millea testified that he decided to compete for the RFP and was not aware of any reason preventing him. Millea argues that the 2007 Contract never came into effect. Item 16 provides that "[t]his agreement shall be effective as of the first day of the Professional's employment with the companies, or any one of them." Millea says that because he was an independent contractor there was never any "employment" with Arvan and the contract never came into effect.

[51] This interpretation cannot be correct; it would make the entire contract meaningless. I do not accept Millea's suggestion that Arvan intentionally created a document with no effective date to have something to show the Ministry of Health. That would constitute fraudulent conduct towards the government and there is no evidence to support it. Rather "employment" in item 16 means working for or engaged by.

[52] Millea also says there was no consideration for the 2007 Contract. Generally, continued employment or engagement is not consideration for changes to a pre-existing contract. However, where there is evidence that the employer intended to dismiss the employee if the agreement was not executed, continued employment is sufficient: see *Techform Products Ltd. v. Wolda* (2001), 56 O.R. (3d) 1, at para. 20. In this case, there was evidence that MPPC's contract would not be continued unless Millea personally contracted with Arvan. Bill's evidence was that the Ministry of Health expressed concerns to Arvan that providers were hiring agencies to provide care, and, in such cases, there was no direct connection to the PT of record. This was a concern from both a continuity of care and a liability perspective. For providers to be paid under OHIP, the Ministry of Health required them to contract directly with PTs and that was the reason for the change to a contract with Millea personally. I find that in the circumstances of this case, continued engagement was sufficient consideration.

[53] Finally, Millea argues that he did not breach the Non-Solicitation Provisions because he submitted a bid in response to an RFP, an act that the Court of Appeal has held is not the same

as solicitation. Millea relies on *Veolia ES Industrial Services Inc. v. Brulé,* 2012 ONCA 173, 289 O.A.C. 207 for this proposition.

[54] That case is entirely distinguishable. In *Veolia*, the court found that the non-competition covenant was unenforceable. In considering whether the employee breached his fiduciary duties, the court found that the employee did not use confidential information and his competition with his former employer was not unfair because he responded to a tender by a new customer; he did not take advantage of a business opportunity developed during his employment and he did not solicit and hire his former employer's employees to be able to compete. While Millea may have been responding to an RFP, he also engaged in discussions with Norview in advance of submitting his bid, which he submitted while he was still working for Arvan and while Arvan still had a contract with Norview. Millea used Arvan's information in his bid, he took advantage of a business opportunity developed during his work for Arvan, and he solicited and hired Arvan's employees to compete with Arvan.

[55] Millea says he did not use any confidential information as Arvan's participation in the tender process was public information. Millea says he did not obtain confidential information about Arvan's participation in the tender process because it was public. I find that Millea obtained information about Arvan because he was their key person at Norview and offered the same services with the same PT and PTAs.

[56] I find that Millea breached both subparagraphs (a) and (b) of the Non-Solicitation Provisions. He was well aware of the significant impact of the government's funding changes in 2013 and the vulnerability it created for Arvan. By providing funding directly to the nursing homes, rather than via Schedule 5 license holders, the government opened the door for LTC Facilities to contract directly with PTs and PTAs and cut out service providers like Arvan. Millea knew Arvan wanted to maintain its contract with Norview, yet he kept the concerns Nolan expressed to himself. His explanation that he did not tell Bill or John of this potential obstacle to their continued relationship with Norview because it was not his place to do so is not credible. Instead, when Bill drove from Toronto to Simcoe to meet with him to discuss Arvan's bid, obtain his input, and secure his agreement to be part of their bid, Millea provided that input and assured Bill that Arvan could include him in their bid. He then used his knowledge of Arvan's business at Norview to his own advantage to submit a competing bid.

[57] In addition, Millea used Arvan's two main PTAs in his bid knowing that they, like him, were still under a contract with Arvan at the time. Millea was aware of the critical importance of continuity of care to the LTC Facilities. That theme runs throughout his bid. Whichever bid had Millea, Tweedie and Erauw had a distinct advantage over other bids. Millea submitted a competing bid without disclosing it to Arvan while he was still under a contract with them and while Arvan still had an existing contract with Norview. This conduct was a breach of both of subparagraphs (a) and (b) of the Non-Solicitation Provisions. There is no doubt that Millea was fully aware of his obligations under the 2007 Contract. He specifically sought and obtained Arvan's permission to contract directly with two other homes (Cedarwood and Maple Lodge) after they had declared that they intended to contract with PTs directly as opposed to using a provider such as Arvan.

Fiduciary Duty

[58] Arvan says that Millea stood in a fiduciary relationship with Arvan and therefore owed Arvan fiduciary duties that he breached by entering a competing bid in response to the Norview RFP. Millea disputes this and says he was an ordinary employee.

[59] Millea was not an officer or executive of Arvan and not a member of management. There is nothing in his contract which would elevate him to the status of a fiduciary or indicate that he owed a fiduciary duty to Arvan. I note that the PTAs signed contracts with similar wording, and it was not argued that they are fiduciaries. Millea was not specifically referred to as a fiduciary by the parties at any time.

[60] That said, a key employee can attract fiduciary duties despite not being an officer, executive, or member of management. In *GasTOPS Ltd. v. Forsyth*, 2009 CanLII 66153 (Ont. S.C.), at paras. 82-83, 85, Granger J., citing *M.E.P. Environmental Products Ltd. v. Hi Performance Coatings Co.*, 2006 MBQB 119, 204 Man. R. (2d) 40, at para. 18, aff'd 2007 MBCA 71, 214 Man. R. (2d) 212, set out the relevant law on when key employees will be found to owe fiduciary duties to employers:

> A key employee is one whose position and responsibilities are essential to the employer's business, making the employer particularly vulnerable to competition upon that employee's departure.
>
> …
>
> i. What were the employee's job duties with the former employer?
> ii. What was the extent or frequency of the contact between the employee and the former employer's customers and/or suppliers?
> iii. Was the employee the primary contact with the customers and (or) suppliers?
> iv. To what extent was the employee responsible for sales or revenue?
> v. To what extent did the employee have access to and make use of, or otherwise have knowledge of, the former employer's customers, their accounts, the former employer's pricing practices, and the pricing of products and services?
> vi. To what extent was the former employee's information as regards customers, suppliers, pricing, etc., confidential?
>
> …

The jurisprudence has imposed fiduciary obligations on employees in a number of different factual circumstances and in so doing have considered:

(a) whether the employee has scope for the exercise of some discretion or power, the employee can unilaterally exercise that power or discretion so as to effect the beneficiary is legal or practical interest and whether the beneficiary is vulnerable to or at the mercy of the fiduciary holding the discretion or power;

(b) knowledge of customer contact information, needs and preferences, and therefore, an ability to influence customers. An employee may be held to be a fiduciary if they are found to have "encyclopedic knowledge" of their employer's customers, unrestricted access to all customer lists and information concerning customers, privy to policy issues and personal contact with, and responsibility for, a large portion of customers: see *Smyth v. Undercover Wear Ltd.*, [1993] O.J. No. 2180 (Ont. Gen. Div.) at para. 32 citing *Hudson's Bay Co. v. McClocklin*, [1986] 5 W.W.R. 29 (Man. Q.B.);

(c) knowledge of the business and market opportunity of the employer or playing a role in the employer's strategic market development is a consideration in determining if the employees owed a fiduciary duty to the former employer. In *Scantron Corp. v. Bruce*, [1996] O.J. No. 2138 (Ont. Gen. Div.), Eberhard J. stated at paras. 19 and 20:

> A fiduciary duty owed by senior employees may co-exist with a contractual duty. *Wallace Welding Supplies Ltd. v. Wallace* (1986) 8 CPC (2d) 157 (HCJ)
>
> This issue calls into question the degree of trust and confidence placed by Scantron Canada in Bruce. A mere employee, absent contractual protections, can take with him the knowledge and skill attained during the employment and to use it to directly compete with the former employer. It is conceded that by joining Bruce in his new enterprise, Burrows becomes bound to the same duties. *Alberts v. Mountjoy*, (supra). It is also true that the freedom to compete refers to skill and knowledge, not confidential information. This information could include not only the special knowledge of the target customer but also knowledge of the employer's policies and procedures making it possible to undercut the former employer with a view to inducing the customer to change from its current supplier to the former employees.

(d) knowledge of and access to confidential information. It is not necessary for an employee to have access to corporate financial information to be found to be a fiduciary. It is the employee's access to information of which disclosure would make the employer vulnerable. In a sales environment, customer information is critical or in a technological environment, product specifications are critical. In *Scantron Corp.*, Eberhard J. stated at paras. 21 and 22:

> I am persuaded on the evidence before me that Bruce did have sufficient seniority in the corporate organization to impose upon him the duty not to unfairly compete with his former employers. I base this not on his formal status as officer and director but as the senior employee in charge of the day to day operations of the Canadian subsidiary. He may not have had access to corporate financial information but he had everything he needed to know to direct sales in Canada. He had the information that made the employer vulnerable. He knew the customer information. For a sales operation, that is obviously critical information.
>
> I am persuaded that he was under a duty not to exploit that information unfairly to his own advantage at the expense of his former employer.

(e) direct and trusted relationships with existing and potential customers, particularly where there is a "unique relationship with the clients personnel contacts and [the defendants] had direct access to confidential information as to the clients' needs, preferences and accepted rates": see *Quantum Management Services Ltd. v. Hann*, [1992] O.J. No. 2393 (Ont. C.A.);

(f) whether or not the employee's functions are essential to the employer's business, therefore rendering the employer vulnerable to the employee's departure: see J. Thorburn and K. Fairbairn, Law of Confidential Business Information, looseleaf, (Aurora, Ontario: Canada Law Book, 1998) at 4:5200 at 4-26.

Any one of these factors, or a combination of them, could result in a finding that an individual owes a fiduciary obligation to his employer.

[61] Fiduciary duties have also been imposed on dependant contractors: see *Ford v. Keegan*, 2014 ONSC 4989, 32 B.L.R. (5th) 56, at paras. 168-223. Millea was at the very least a dependant contractor, if not an employee. In determining whether someone is an independent contractor or employee, relevant factors include whether the worker provides their own equipment, the degree of risk and responsibility borne by the worker and the worker's opportunity for profit: see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at para. 47.

[62] Millea was required to deliver PT services personally (PTs who filled in when he was on vacation or ill had to be approved by Arvan), he had no financial risk or opportunity for profit and worked at fixed rates, his equipment was supplied by Arvan and Arvan hired his helpers (the PTAs).

[63] Millea was a key part of Arvan's operations at Norview. He was the face of Arvan at Norview and Arvan considered him to be their "eyes and ears." It was his responsibility to ensure that Arvan's contractual obligations at Norview were fulfilled. He had extensive, personal, and unique contact with the staff, residents, and families at Norview. He participated in committees and meetings at Norview on a much greater extent than did anyone from Arvan's head office. Millea had unique knowledge of the needs and preferences of Norview and its residents. He was essential to Arvan's business at Norview making Arvan particularly vulnerable to competition from him. He had extensive information about Norview's operations and needs and the ability to influence Norview's decision on the RFP.

[64] I find that Millea owed a fiduciary duty not to compete with Arvan in the RFP and that he breached that duty when he did so while still working for Arvan at Norview and by using Arvan's PTAs in his bid.

Conspiracy

[65] Millea argues that Arvan only sued him for breach of contract and breach of fiduciary duty but that it was MPPC that submitted the bid. MPPC is a professional services corporation. Millea was the sole incorporating officer, director, shareholder, and is the guiding mind of MPPC. Millea caused MPPC to submit the bid. Arvan pled that MPPC was liable for causing or inducing the breach or conspiring with Millea to breach his contractual and fiduciary obligations to reap the benefit of same.

[66] In *PMC York Properties Inc v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 69, the Court of Appeal for Ontario held that civil conspiracy in Canada has two related but distinct categories. The first category is "lawful means" or "simple motive" conspiracy. The second is the "unlawful means" or "unlawful conduct" conspiracy.

[67] The Court of Appeal in *Agribrands Purina Canada Inc v. Kasamekas*, 2011 ONCA 460, 106 O.R. (3d) 427, at paras. 24-29, held that to substantiate an unlawful means conspiracy, a victim is required to show that:

a. two or more people acted in concert, by agreement, or with a common design or intention;

b. the co-conspirators engaged in conduct that was unlawful, which can include the breach of a statute, the violation of a contract, or the carrying out of an underlying tort, such as misrepresentation or fraud;

c. the conduct was directed towards the plaintiff;

d. given the circumstances, the defendants should have known that injury was likely to result; and

e. injury or harm did result.

[68] In this case, Millea and MPPC acted in concert with a common design or intention and violated Millea's contract with Arvan by competing with Arvan. They knew Arvan would be injured and Arvan was injured when MPPC won the bid. Millea and MPPC are jointly and severally liable for Arvan's damages.

[69] Alternatively, MPPC induced Millea to breach his contract with, and fiduciary duty to, Arvan. There is no doubt that MPPC was aware of Millea's contract with Arvan. MPPC induced Millea to breach his contract so that MPPC would win the bid and gain the contract at Norview. Arvan suffered as a result: see *Correia v. Canac Kitchens*, 2008 ONCA 506, 91 O.R. (3d) 353, at para 93.

Damages

Causation

[70] Millea's position is that Arvan cannot prove it would have won the RFP but for Millea's breach because there were seven other bidders. This ignores the fact that only two bidders offered continuity of care: Millea and Arvan. Had Millea not submitted a bid on behalf of MPPC, the only way Norview could achieve continuity of care would have been to award the contract to Arvan. The report on the results of the RFP submitted by Nolan to Norfolk County mentions only Arvan and MPPC. It specifically says that a change of service provider can be traumatic for residents, that MPPC has hired the same certified professionals as Arvan, and that contracting with MPPC will ensure continuity of care for the residents. The report goes on to say that the professionals have been providing care for nine years, have proven themselves to be resident-focused, and have built a relationship of trust with the residents. The recommendation to go with MPPC is said to be consistent with the provincial initiative of "Resident First." The report recommends MPPC because of continuity of care even though an exception to the policy of accepting the lowest bid was required to achieve this outcome. Had Millea not bid, and had he told Arvan about Norview's concerns and given Arvan an opportunity to remedy any deficiencies in timely attendance at meetings and in its

communication, more likely than not, Arvan would have won the bid. I find that Millea's conduct caused MPPC to win the bid and, in turn, for Arvan to lose the bid.

Disgorgement

[71] There are two potential ways to calculate damages for breach of fiduciary duty in an employment context. One is a disgorgement of the profits made by the party who breached the duty, while the other method focuses on expectation damages or the loss suffered by the party which was owed the duty: see *McCormick Delisle & Thompson Inc. v. Ballantyne* (2001), 12 B.L.R. (3d) 257 (Ont. C.A.), at para. 26, citing *Canadian Industrial Distributors Inc. v. Dargue* (1994), 20 O.R. (3d) 574 (Gen. Div.), at p. 70. The plaintiff may elect which method to pursue: see *KJA Consultants Inc. v. Soberman* (2003), 36 B.L.R. (3d) 19 (Ont. S.C.), at para. 52.

[72] In this case, Arvan seeks disgorgement damages for the duration of the contract (five years) and one option to renew (three years). Millea submits that there should be a cut off equal to the expiry of the Non-Solicitation Provisions.

[73] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, at para. 90, the Supreme Court of Canada said that "[a]t some point, intervention of other events and actors (as well as the behaviour of the claimant) dissipates the effect of the breach". In this case, we know that MPPC has had the Norview contract from February 1, 2014 to January 31, 2022 (which represents the initial five-year term and the three-year option which was exercised) and there have been no intervening events. Given Norview's focus on continuity of care, the contract is likely to remain in place for the foreseeable future.

[74] Arvan is entitled to disgorgement damages based on MPPC's actual billings for Norview from February 1, 2014 to January 31, 2022 for the PT, PTAs, OT and exercise classes, less MPPC's actual expenses during the same period for the PTAs, OT (using 76.2 percent of OT billings as per both expert reports) and PT (using $50 per hour for 936 hours per year which is the amount Millea was paid by Arvan, adjusted at 2 percent annually for inflation). I am allowing deductions for expenses for services actually provided by Millea and his wife. There is no evidence that the OT services were not performed or that this was an income splitting scheme. To the contrary, Millea testified that his wife performed OT services and Norview was billed for same.

[75] Arvan argues that there should be no deduction for Millea's PT services provided, relying on *KJA*. In *KJA*, the court did not allow the defendant a deduction for a "notional salary" of $150,000 and said any monies he received because of his breaches were part of the gain for which he was liable to account. The court specifically referenced that fact that there would be a similar result if the plaintiff's loss were calculated because labour costs did not increase or decrease with each dollar of revenue earned or lost. That is not the case here. Here labour costs are directly related to the Norview contract and to not allow a deduction for the work performed by Millea would lead to an unfair result.

[76] In *McCormick*, the court deducted only those expenses which would reasonably have been incurred to earn income and not general head office costs when those costs would be fixed: see

paras. 28-29. Although in *McCormick* the plaintiff elected to pursue expectation damages, the same logic applies. This approach was also applied in *KJA* at para. 53. *KJA* is a case where disgorgement damages were awarded.

[77] I am not allowing general office expenses that are unrelated to the Norview contract. Millea's expert simply deducted 48 percent of such expenses based on Millea's advice to him that that was the amount attributable to the Norview contract. Some of the expenses deducted for office, telephone, supplies, etc. would have been incurred even without the Norview contract. There are also large expenses for travel, accounting, and equipment rental. Millea did not explain how these expenses related to Norview. I do not allow deductions for these other expenses, only the PT, PTAs, and OT.

[78] I cannot calculate the amounts for Millea's income or expenses related to the Norview contract as Arvan's expert report only has actual amounts up until 2019 and estimates thereafter and Millea's expert only has amounts up until January 31, 2019. If the parties cannot agree on damages based on my award, they may each provide calculations with back up documents for my review on or before **August 30, 2023**.

[79] The Plaintiff is entitled to costs. If the parties cannot agree on costs, they may make written submissions of no more than five pages in length, in addition to costs outline, to be submitted by **September 29, 2023.**

Merritt J.

Released: July 18, 2023

CITATION: Arvan Rehab Group Inc. v. Millea et al., 2023 ONSC 4213
COURT FILE NO.: CV-14-502676
DATE: 20230720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ARVAN REHAB GROUP INC.

Plaintiff

– and –

RODERICK GRAHAM CHRISTIAN MILLEA, MILLEA PHSYIOTHERAPY PROFESSIONAL CORPORATION, NICOLE TWEEDIE AND RACHEL ERAUW

Defendants

REASONS FOR JUDGMENT

Merritt J.

Released: July 20, 2023