NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 1640

GULF INDUSTRIES, INC.

VERSUS

QUIN J. BOYLAN

Judgment Rendered: June 6, 2014

* * * * * * * *

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Case No. 2013-11438

The Honorable Richard A. Swartz, Judge Presiding

* * * * * * * *

Richard A. Aguilar
Gabriel A. Crowson
New Orleans, Louisiana

Counsel for Plaintiff/Appellant
Gulf Industries, Inc.

H. Michael Bush
Sarah Voorhies Myers
Douglas L. Grundmeyer
Loretta O. Hoskins
New Orleans, Louisiana

Counsel for Defendant/Appellee
Quin J. Boylan

Higginbotham, J. concurs in the result.

* * * * * * * *

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

The plaintiff-appellant, Gulf Industries, Inc. (Gulf), seeks reversal of the Twenty-Second Judicial District Court's judgment, which denied its application for a preliminary injunction against the defendant-appellee, Quin J. Boylan. For the following reasons, we affirm.[1]

FACTS AND PROCEDURAL HISTORY

Gulf is a Louisiana corporation, specializing in the field of highway safety, highway construction, and other related fields. Mr. Boylan had been an employee of Gulf for twenty-five years, starting as a road crew member in 1987 and ending as Senior Vice President of Operations in 2012.[2] His job duties included maintaining good client relationships with state and local transportation officials, as well as private contractors and suppliers.

On July 14, 2009, although already employed by Gulf, Mr. Boylan entered into an employment agreement with Gulf for the purpose of securing his services for a term of one year. The term of employment under the agreement began August 1, 2009, and ended July 31, 2010, and is referred to in the agreement as the "Employment Period."

The employment agreement contained a non-compete clause, in which Mr. Boylan agreed not to "disparage, libel, slander, or defame" Gulf, nor "carry on or engage in a business similar" to the business Gulf engages in. The clause prohibited actions such as "ownership, management, operation, financing, or control of, being employed by, associated with, or in any manner connected with, rendering services or advice to, any business whose services, products or activities compete in whole or in part" with Gulf. The

[1] Gulf's verified petition for injunctive relief and other relief contains several other causes of action besides injunctive relief; however, those causes of action were not heard by the trial court at the time of the evidentiary hearing for the preliminary injunction. The judgment denying the preliminary injunction was not designated by the trial court as final or appealable pursuant to La. C.C.P. art 1915(B); however, an appeal may be taken as a matter of right from an order or judgment relating to a preliminary injunction. La. C.C.P. art. 3612(B).

[2] This is the job title Gulf had given Mr. Boylan. Mr. Boylan testified in the evidentiary hearing that he remembered his title as being "president of Jack P. Harper Contractor."

period of non-competition was to extend for two years beyond the date of Mr. Boylan's last services rendered on behalf of Gulf. In Exhibit A of the employment agreement, there are listed all parishes of Louisiana and counties in the states of Florida, Tennessee, Arkansas, Oklahoma, and Mississippi where the non-compete clause would be effective.

In 2010, to avoid filing bankruptcy, Gulf agreed to be purchased by Douglas Brooks. Mr. Brooks acquired a majority of Gulf's shares. Since Mr. Brooks was not experienced with the field of highway safety, he made the purchase dependant upon whether certain executive officers of Gulf, of which Mr. Boylan was included, would agree to remain employed by Gulf according to the terms of their employment agreements. On March 8, 2011, Mr. Boylan initialed each page of Exhibit A which lists the parishes and counties affected by the non-compete clause of his employment agreement, but he did not initial any pages of the employment agreement itself.

The purchase agreement was executed on March 28, 2011. Mr. Boylan signed the purchase agreement as a "key person." The second article of the purchase agreement pertains to "representations and warranties of corporation and key persons." In section 2.10 of the article, Gulf warrants that it is not a party to any employment agreement or contract other than those listed in schedule 2.10, which is attached to the purchase agreement. That schedule lists Mr. Boylan as one of Gulf's employees under "Employment Agreements (Incl. Non-Compete Agreements)," although the plain language of his employment agreement states his term expired on July 31, 2010.

In 2011, Mr. Boylan began planning a new highway safety business with Jeff Low of Ennis Traffic Safety Solutions, one of Gulf's major suppliers. Together they approached a company called Ozark Striping

(Ozark), a potential competitor of Gulf. Mr. Low informed Ozark through email that Mr. Boylan was under a non-compete agreement with Gulf until July 31, 2012. During that period, Mr. Boylan and Mr. Low had meetings with Ozark representatives and created a business plan, which was later authorized by Ozark.

Mr. Boylan tendered a letter of resignation dated August 31, 2012 to Mr. Brooks, then left Gulf permanently on September 11, 2012. On September 18, 2012, articles of organization for Ozark Distribution Services, L.L.C. (Ozark Distribution), the new business formed by Mr. Boylan, Mr. Low, and Ozark, were filed with the Louisiana Secretary of State. The articles describe the purpose of Ozark Distribution as "the sale and distribution of products to the highway construction industry[.]" Ozark became the majority owner of Ozark Distribution, with Mr. Boylan and Mr. Low as minority owners.

After its formation, Ozark Distribution began executing distributorship agreements with various manufacturers who also supplied Gulf and operated within the restricted areas of the non-compete agreement. As a result, Gulf filed its verified petition for injunctive and other relief against Mr. Boylan on March 28, 2013. Besides requesting injunctive relief, Gulf also requests relief for breach of contract, breach of fiduciary duty of loyalty, unfair trade practice, and sequestration, all against Mr. Boylan. Gulf requested a trial by jury for these matters.

The evidentiary hearing on the preliminary injunction was held May 15, 2013. Testifying at the hearing were Mr. Brooks, Gulf's corporate secretary Tara Millet, and Mr. Boylan. The parties filed post-trial memoranda with the trial court. Based on the evidence and testimony presented at the hearing, as well as the post-trial memoranda, the trial court

found that the non-compete agreement affecting Mr. Boylan expired on July 31, 2012, and that any actions by Mr. Boylan that could be considered to be in competition with Gulf occurred after that date. The trial court therefore denied Gulf's application for preliminary injunction. The trial court's judgment was rendered July 25, 2013, and Gulf's motion for appeal was granted on the same date.[3]

ASSIGNMENTS OF ERROR

Gulf cites two assignments of error:

1. The trial court erred as a matter of law when it decided that the term of Mr. Boylan's employment agreement, including the non-competition and non-solicitation provisions, had expired.

2. The trial court erred when it refused to enjoin Mr. Boylan from continuing to violate the non-competition and non-solicitation provisions of his employment agreement with Gulf.

STANDARD OF REVIEW

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601(A); *State Machinery & Equipment Sales, Inc. v. Iberville Parish Council,* 2005-2240 (La. App. 1 Cir. 12/28/06), 952 So.2d 77, 80-1. Generally, a party seeking issuance of a preliminary injunction bears the burden of establishing by a preponderance of the evidence a prima facie case. *Silliman Private School Corporation v. Shareholder Group,* 2000-0065 (La. App. 1 Cir. 2/16/01), 789 So.2d 20, 22-3, writ denied, 2001-0594 (La. 3/30/01), 788 So.2d 1194. The trial court has broad discretion in determining whether to grant or refuse a preliminary injunction and its decision will be disturbed only in cases where a clear abuse of discretion has been shown. *National Pacific Corporation v.*

[3] The judgment indicates it was filed into the record on July 24, 2013.

American Commonwealth Financial Corporation, 348 So.2d 735, 736-37 (La. App. 1 Cir. 1977).

DISCUSSION

The threshold of Gulf's prima facie case is whether the actions of Mr. Boylan in question occurred while the non-compete clause of the employment agreement was in effect. The employment agreement clearly states that Mr. Boylan's employment period lasted from August 1, 2009 until July 31, 2010. While Mr. Boylan continued working for Gulf after the expiration of that term, nothing in the record expressly indicates that he continued working under the extended terms of the employment agreement. Gulf contends that since Mr. Boylan's employment terminated on September 11, 2012, which was his last day of services rendered to Gulf, the non-compete period is effective until September 11, 2014.

This Court previously stated in *Brodhead v. Board of Trustees for State Colleges and Universities*, 588 So.2d 748, 752 (La. App. 1 Cir. 1991), writ denied, 590 So.2d 597 (La. 1992):

> The period of time which is to be the duration of the contract must be consented to by the parties. The party relying on an alleged contract of employment for a set duration of time has the burden of proof that there was a meeting of the minds on the length of time of the employment. Under facts showing no meeting of the minds, the contract of employment for a set duration of time is void for lack of consent.

Gulf contends that when Mr. Boylan initialed the pages of Exhibit A to the employment agreement on March 8, 2011, he had agreed to remain employed under those terms. Mr. Boylan testified at the evidentiary hearing that his reason for initialing Exhibit A on March 8, 2011 was that it was not originally presented to him with the employment agreement when he signed it in 2009. He did not testify that he was agreeing to extend the terms of the employment agreement with his initials on an attached exhibit. The

conflicting evidence and testimony presented at the hearing shows that there was no meeting of the minds between Gulf and Mr. Boylan in terms of extending the employment agreement. See *Wallace v. Lafourche Parish School Board,* 394 So.2d 1329, 1330 (La. App. 1 Cir. 1981).

Had Mr. Boylan intended to extend the employment period, the employment agreement contains a provision for that purpose. Paragraph 14 of the employment agreement states "[t]he provisions of this Agreement may be amended, modified, supplemented or otherwise altered only by an agreement, in writing, executed by [Gulf] and [Mr. Boylan]." Gulf attempts to use Mr. Boylan's initials on a document that is not part of the actual contract, as well as his being listed as an employee under contract and subject to a non-compete clause on schedule 2.10 of the purchase agreement, as proof that Mr. Boylan's employment period was extended. Neither of these writings comply with paragraph 14 of the employment agreement and therefore cannot serve as an amendment of its terms.

> Contracts have the effect of law for the parties and the interpretation of a contract is the determination of the common intent of the parties. The reasonable intention of the parties to a contract is to be sought by examining the words of the contract itself, and not assumed. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. Common intent is determined, therefore, in accordance with the general, ordinary, plain and popular meaning of the words used in the contract. Accordingly, when a clause in a contract is clear and unambiguous, the letter of that clause should not be disregarded under the pretext of pursuing its spirit, as it is not the duty of the courts to bend the meaning of the words of a contract into harmony with a supposed reasonable intention of the parties. However, even when the language of the contract is clear, courts should refrain from construing the contract in such a manner as to lead to absurd consequences. Most importantly, a contract must be interpreted in a common-sense fashion, according to the words of the contract their common and usual significance.

Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, 2012-2055 (La. 3/19/13), 112 So.3d 187, 192. (Quotation marks and footnotes omitted).

After a common-sense reading of the employment agreement, we find that its employment period was not extended beyond the original termination date. While Mr. Boylan continued to work for Gulf after July 31, 2010, he no longer worked under the terms of the employment agreement and was an at-will employee of Gulf. See *Brodhead,* 588 So.2d at 752. When the employment period under the employment agreement terminated on July 31, 2010, Mr. Boylan then became subject to its non-compete clause for two years. The effective period of the non-compete clause ended on July 31, 2012.

Prior to the expiration of the non-compete period, Mr. Boylan began planning a new business similar to Gulf (Ozark Distribution), which would be competitive with Gulf within the restricted area defined by Exhibit A of the employment agreement; however, Ozark Distribution was not formed until September 18, 2012. There is no evidence in the record that Mr. Boylan performed any of the prohibited actions of the non-compete clause before July 31, 2012. He did not invest, own, manage, operate, finance, control, or participate in any aspect of an existing business that was in competition with Gulf until after July 31, 2012. There was no solicitation of the distributors who did business with Gulf until after the termination of the non-compete period. The record indicates that Mr. Boylan was cognizant of the day on which the non-compete period would expire, which is why he took no direct action to compete against Gulf until after that date.

CONCLUSION

Gulf has failed to present a prima facie case that it will suffer irreparable injury should a preliminary injunction not be granted. By the

ordinary reading of the employment agreement, we find that Mr. Boylan has not violated its terms and did not compete against Gulf or solicit business in direct competition with Gulf until he was free to do so. Based on the evidence and testimony in the record, we find the trial court did not abuse its discretion in denying Gulf's application for a preliminary injunction.

DECREE

The ruling of the Twenty-Second Judicial District Court to deny the application by Gulf Industries, Inc., for a preliminary injunction against Quin J. Boylan is affirmed. All costs of this appeal are assessed to the appellant, Gulf Industries, Inc.

AFFIRMED.