NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 0380

PROGRESSIVE WASTE SOLUTIONS OF LA, INC.

VERSUS

RODDIE MATHERNE

Judgment rendered NOV 12 2014

* * * * * *

Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 171006
Honorable David W. Arceneaux, Judge

* * * * * *

GUICE A. GIAMBRONE, III
CHRISTOPHER M. HATCHER
METAIRIE, LA

ATTORNEY FOR
PLAINTIFF-APPELLANT
PROGRESSIVE WASTE SOLUTIONS
OF LA, INC.

THOMAS J. CORTAZZO
NEW ORLEANS, LA

ATTORNEY FOR
DEFENDANT-APPELLEE
RODDIE MATHERNE

* * * * * *

BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

Welch J. dissents and assigns reasons

PETTIGREW, J.

In this litigation concerning the force and effect of a non-compete clause, the plaintiff, Progressive Waste Solutions of LA, Inc. (PWS), seeks reversal of the trial court's judgment which denied its application for a preliminary injunction that sought to enjoin the defendant, Roddie Matherne, from continued engagement in "the hauling, collecting, and disposing of municipal solid waste" in Terrebonne Parish, Louisiana. After a thorough review of the record, and for the following reasons, we affirm.[1]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The underlying facts are essentially undisputed; therefore, only those facts pertinent to the legal issues before us on appeal are stated herein. Matherne and IESI LA Corporation, which subsequently changed its name to PWS, entered into an employment agreement with an effective date of July 1, 2010. The term of employment is specified therein as a "period of twenty-four (24) months commencing as of the Effective Date."

The employment agreement includes a non-compete clause that prohibits Matherne: "while [he] continues to be employed by [PWS] pursuant to this Agreement, and for a period of two (2) years after the termination of [his] employment with [PWS] for any reason" from competing in any way -- within a specifically delineated restricted area -- "with any business of [PWS]."

Matherne resigned from PWS on September 23, 2013. On that same date, Pelican Waste and Debris, LLC (Pelican Waste) was formed and registered with the Louisiana Secretary of State Office. Pelican Waste is engaged in the business of collecting, hauling and disposing of commercial solid waste. Matherne is part-owner and an employee of Pelican Waste.

On November 20, 2013, PWS filed a verified petition for declaratory judgment, temporary restraining order, injunctive relief, breach of contract, and monetary damages.

---

[1]PWS's verified petition for injunctive relief contains several other causes of action besides injunctive relief. 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, pursuant to La. C.C.P. art. 3612(B). See **Gulf Industries v. Boylan**, 2013-1640 (La. App. 1 Cir. 6/6/14)(unpublished).

Among other things, PWS alleged that Pelican Waste was a direct competitor of PWS, and therefore, Matherne, who was employed by and listed as an officer of Pelican Waste, was in violation of the non-compete clause of his employment agreement with PWS.

A hearing on the preliminary injunction was held by the trial court on January 10, 2014, following which a judgment denying PWS's request for a preliminary injunction was signed on January 27, 2014. PWS appealed that judgment.

APPLICABLE LAW

Contract Interpretation

Interpretation of a contract is the determination of the common intent of the parties. La. C.C. art. 2045. When the words of the contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. La. C.C. art. 2046. The words of a contract must be given their generally prevailing meaning; however, words of art and technical terms must be given their technical meaning when the contract involves a technical matter. La. C.C. art. 2047. Words susceptible of different meanings must be interpreted as having the meaning that best conforms with the object of the contract. La. C.C. art. 2048. See also **Acadian Cypress & Hardwood Inc. v. Stewart**, 2012-1425 (La. App. 1 Cir. 3/22/13), 121 So.3d 667, 671.

Noncompetition Agreements

Historically, Louisiana has disfavored noncompetition agreements. **Swat 24 Shreveport Bossier, Inc. v. Bond**, 2000-1695, (La. 6/29/01), 808 So.2d 294, 298. Such agreements are deemed to be against public policy, except under the limited circumstances delineated by statute.[2] **J4H, L.L.C. v. Derouen**, 2010-0319 (La. App. 1 Cir. 9/10/10), 49 So.3d 10, 13. At all times pertinent to this matter, La. R.S. 23:921 provided, in part, as follows:

---

[2] Louisiana's strong public policy restricting these types of agreements is premised on an underlying state objective to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden. **Kimball v. Anesthesia Specialists of Baton Rouge, Inc.**, 2000-1954, (La. App. 1 Cir. 9/28/01), 809 So.2d 405, 410, writs denied, 2001-3316 & 2001-3355 (La. 3/8/02), 811 So.2d 883 & 886.

> A. (1) Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.
>
> . . .
>
> C. Any person, including a corporation and the individual shareholders of such corporation, who is employed as *an agent, servant, or employee* may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. [Emphasis added.]

Louisiana Revised Statutes 23:921(C) is an exception to Louisiana's public policy against noncompetition agreements and, as such, must be strictly construed. **J4H, L.L.C.**, 49 So.3d at 14.

Preliminary Injunction

Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury if the injunction does not issue and must show entitlement to the relief sought by making a prima facie showing that the party will prevail on the merits of the case. *Id.* However, where an obligor has failed to perform in accordance with the terms of a noncompetition agreement, the court shall order injunctive relief even without a showing of irreparable harm upon proof of the obligor's breach. *Id.;* see also La. R.S. 23:921 H.[3]

Even though La. R.S. 23:921 mandates the court to issue injunctive relief upon proof of the obligor's failure to perform, *the employer must still establish that it is entitled to relief.* **J4H, L.L.C.**, 49 So.3d at 14. Ordinarily, a trial court exercises great

[3] That provision provides, in pertinent part, "[a]ny agreement covered by Subsection B, C, E, F, G, J, K, or L of this Section shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived." In addition, upon proof of the obligor's failure to perform, and without the necessity of proving irreparable injury, a court of competent jurisdiction shall order injunctive relief enforcing the terms of the agreement.

discretion in granting or denying the requested relief. Absent a clear abuse of that discretion, the trial court's determination will not be disturbed on appeal. *Id.*

DISCUSSION/ANALYSIS

It is undisputed that Matherne, as part-owner and employee of Pelican Waste, was and is engaged in the business of commercial solid waste disposal. It is also undisputed that PWS was and is engaged in the business of residential, commercial, and industrial solid waste disposal.

The employment agreement between Matherne and PWS specifically defined the business of PWS as "the hauling, collecting, and disposing of ***municipal solid waste***." Therefore, the issue before the trial court and, now, before us on appeal is the meaning of the term "***municipal solid waste***" as used and contemplated in the agreement.

It is evident that the term "municipal solid waste" is susceptible of different meanings, even considering it a "technical term" within the "waste disposal" trade, as reflected in the differing opinions of the witnesses testifying, both of whom had worked in the industry their entire careers.

PWS argues that municipal solid waste is an industrial term of art that encompasses all solid waste, including residential, commercial, and industrial. According to PWS, this distinguishes "municipal solid waste" from the other two commonly known categories of waste; *i.e.,* construction and demolition waste, and hazardous waste.

Matherne maintains that as used and contemplated in the employment agreement, "municipal solid waste" is limited to residential solid waste, commonly the subject of a contract with a governmental agency such as a municipality, as found by the trial court. Therefore, because Pelican Waste is engaged only in the commercial aspect of the industry, there was no violation of the non-compete clause, and the preliminary injunction was properly denied.

As noted earlier, PWS bears the burden of making a *prima facie* showing that it would prevail on the merits of the case. The evidence presented at the hearing pertinent to the meaning of the term "municipal solid waste" as used in the employment agreement herein consisted of the following. Mr. Thomas Martyn, the South Louisiana-area manager

for PWS at the time of the hearing, who had previously worked as a district manager for PWS and in the waste industry for forty years, testified as to his understanding of the meaning of "municipal solid waste." He testified that he considered municipal solid waste to be a frequently used industry term that encompassed the collection, hauling, and disposal of waste from residential, commercial, and industrial customers. He also testified that his understanding of the meaning of the term encompassed the entirety of PWS's business; and according to him, by engaging in commercial solid waste disposal, Matherne and Pelican Waste were not in compliance with the language in the non-compete clause of the agreement at issue. Mr. Martyn testified that he considered there to be three different types of "solid waste," all of which are disposed of at a similar type municipal solid waste landfill: residential, commercial, and industrial. He further compared that category of waste (solid waste) with the other two categories of waste, construction/demolition and hazardous, which are disposed of at different type landfills.

Matherne, who also had worked in the waste disposal industry his entire career since the age of eighteen, testified at trial. In contrast with the three categories of "solid waste" used by Mr. Martyn (*i.e.,* solid [including residential, commercial, and industrial], construction/demolition, and hazardous), Matherne testified that in his experience, the three types of "solid waste" are: residential, commercial, and industrial. He did agree with Mr. Martyn that in the industry, these three subtypes of "waste" also fall into a separate category of "solid waste" other than the other two categories delineated by Mr. Martyn, construction/demolition and hazardous.

Thus, the disagreement between the two witnesses concerns the meaning of municipal solid waste, within the first category of waste in general, solid waste (as opposed to construction/demolition and hazardous.)

Matherne further testified that had PWS intended to prohibit him from engaging in *all solid waste* disposal, it easily could have left out the modifying term "municipal," which he interpreted to mean only the residential waste disposal aspect of PWS's business that at the time was under contract in Terrebonne Parish with the municipality. He further testified and presented evidence that, prior to signing the Employment Agreement at

issue herein, PWS proposed that he sign an agreement that prohibited him from engaging in any way with "any" of the business conducted by PWS. Because he knew PWS's business included residential, commercial, and industrial, he refused to sign said agreement because to do so would essentially leave him without any type of work in the only trade in which he had knowledge and experience. Matherne's testimony also delineated the numerous factors distinguishing residential (municipal) solid waste from commercial solid waste, including the clients or customers involved, the type of equipment used, the different driver certification needed to drive the trucks required, as well as insurance concerns and costs. Matherne candidly admitted that while some businesses in the waste disposal industry work with both residential and commercial waste (as does PWS), he testified that Pelican Waste's business was limited solely to commercial solid waste disposal. He testified that, for that reason, he did not consider himself or Pelican Waste to be in violation of the non-compete clause of the agreement between himself and PWS.

CONCLUSION

After hearing the evidence and argument from both parties, the trial court ruled that, within the meaning of that non-compete clause, the term municipal solid waste referred to residential solid waste, as opposed to commercial solid waste, which the trial court considered to be "two clearly different lines of business." Thus, the trial court held PWS failed to meet its burden of proof and denied the preliminary injunction. Our review of the record reveals that the trial court's conclusion is amply supported by the evidence and arguments presented. Accordingly, that judgment is affirmed. All costs of this appeal are assessed to Progressive Waste Solutions of LA, Inc.[4]

AFFIRMED.

[4] We note that, in supplemental brief to this court, Matherne presented an alternative argument that the entire employment agreement was no longer valid because it had expired, based on the analysis and holding in a decision rendered by this court during the pendency of this appeal: **Gulf Industries v. Boylan**, 2013-1640 (La. App. 1 Cir. 6/6/14)(unpublished), which held that an employment agreement with a two-year term was not automatically extended by the mere fact that the employee/party thereto continued under the employ of the employer. Inasmuch as this argument was neither presented to nor ruled on by the trial court, and because it is unnecessary in light of our affirming the judgment of the trial court, we need not address this argument. However, we note it may be appropriate for the trial court's consideration of the remaining causes of action in future proceedings before the trial court.

PROGRESSIVE WASTE SOLUTIONS OF LOUISIANA, INC.

VERSUS

RODDIE MATHERNE

2014 CA 0380

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

WELCH, J., dissents.

I respectfully dissent. The term "municipal solid waste" as used in the non-competition agreement is a term of art used in the waste disposal business. The term includes the collection, hauling, and disposal of trash from residential, commercial, and industrial customers. This is precisely the business that Progressive Waste Solutions was involved in and for which they sought to prohibit their employee, Roddie Matherne, from competing against them in. To hold that the term "municipal solid waste" includes only residential trash collection activities, but does not encompass commercial collection activities, is simply splitting hairs. Because I find the distinction made by the trial court is a distinction without a difference, I would reverse its determination that the noncompetition clause did not apply to Mr. Matherne's trash collection activities, and I would remand the matter to the trial court to address Progressive Waste Solution's breach of contract claims.