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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1907**

Cook Sign Company, a North Dakota corporation,
Respondent,

vs.

Daniel Combs, et al.,
Appellants.

**Filed August 26, 2008
Affirmed
Connolly, Judge**

Otter Tail County District Court
File No. 56-CV-07-869

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Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's grant of a temporary injunction prohibiting him from violating his noncompete agreement with respondent. Although the term of the agreement has now expired and the appeal is arguably moot, we will

nevertheless consider it in the interests of justice. Because we conclude that the noncompete agreement was supported by consideration, Minnesota law was the proper choice of law, and the district court did not abuse its discretion in granting the temporary injunction, we affirm.

FACTS

Respondent Cook Sign Company is in the business of designing, fabricating, installing, and servicing custom-manufactured signs. Appellant Daniel Combs was a custom salesman for Art-N-Sign, a Fergus Falls, Minnesota, sign-manufacturing company, for more than 10 years. In October 2006 respondent entered into a strategic alliance with Art-N-Sign, and in January 2007 respondent purchased Art-N-Sign's customer lists, files, quotes, photos, artwork, designs, sketches, sign-service histories and photos, marketing literature, and brand marks along with other various intellectual property.

On January 20, 2007, appellant met with respondent's CEO, Dave Walstad, to discuss appellant coming to work for respondent. Walstad stated in an affidavit that, after that meeting, "[appellant] knew that he would be required to sign the noncompete agreement as a condition of working at Cook."¹ Walstad admits, however, that the specific terms of the noncompete were not discussed.

¹ An e-mail from appellant to Walstad dated January 20, 2007, stated, with regard to the noncompete, "not explained, but understood after review. In negotiations."

Appellant arrived for work on January 22, 2007, at which time he signed the employment offer. The employment offer contained a clause referring to the noncompete agreement:

A signing bonus of \$2,500 will be paid during the first check run of your term of employment. In addition, if your annual income for 2007 is not greater than \$55,000, a second half payment of \$2,500 will be paid in January 2008.

In return for this income guarantee and signing bonus, we ask that you sign a 1 year [noncompete] agreement.

This employment agreement identifies North Dakota as the choice of law for resolution of disputes. Appellant signed the noncompete agreement on February 1, 2007.² This agreement identifies Minnesota as the choice of law for resolution of disputes.

On June 6, 2007, appellant provided respondent with a two-week notice of resignation. Thereafter, appellant accepted a sales position with Indigo SignWorks, a North Dakota company. Respondent initiated litigation, obtained a temporary restraining order, and then obtained a temporary injunction enjoining appellant from working for Indigo SignWorks. This appeal follows.³

DECISION

This appeal is arguably moot. “Mootness can be described as the doctrine of standing set in a time frame: the requisite personal interest that must exist at the

² There is some dispute as to when the noncompete agreement was given to respondent. He claims that it was given to him the same day that it is dated—February 1, 2007. Respondent’s CEO Walstad claims that he provided appellant with a copy on January 22, 2007, the first day of employment, but that the signed agreement was not returned until February 1. There is an e-mail dated January 23, 2007 that seems to support Walstad’s timeline.

³ The case was argued on June 19, 2008.

commencement of the litigation (standing) must continue throughout its existence.” *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007) (quotations omitted), *review denied* (Minn. Feb. 19, 2008). Appellant’s personal interest in lifting the temporary injunction has ceased to exist because the one-year term contemplated by the noncompete agreement is over. The agreement stated that appellant could not compete with respondent for one year after leaving respondent’s employ. That period ended on June 20, 2008. Therefore, the issue of the enforceability of the noncompete agreement appears to be moot. Nonetheless, this court has discretion to address any issue as justice requires. Minn. R. Civ. App. P. 103.04. In addition to injunctive relief, respondent seeks damages for violation of the noncompete agreement. Thus, the district court must still decide on the merits the validity of the noncompete agreement at a trial. Accordingly, we will address whether the district court abused its discretion in granting the temporary injunction.

I. The district court did not err in concluding that the choice-of-law analysis required application of Minnesota law.

Appellant argues that North Dakota law should be applied because it is the law that governs the employment agreement. Respondent asserts that the applicable law is that of Minnesota as explicitly stated by the noncompete agreement. After a careful and thorough analysis, the district court determined that Minnesota was the proper choice of law.

When confronted with a choice-of-law question, it must first be established that there is an actual conflict between the laws of the two states. *Medtronic, Inc. v.*

Advanced Bionics Corp., 630 N.W.2d 438, 454 (Minn. App. 2001). There is a clear conflict in this case because North Dakota does not recognize noncompete agreements,⁴ whereas Minnesota looks upon noncompete agreements with disfavor, but nonetheless, deems them “enforceable if they serve a legitimate employer interest and are not broader than necessary to protect this interest.” *Kallok v. Medtronic, Inc.*, 573 N.W.2d 356, 361 (Minn. 1998).

The next step is to balance guiding factors established by the Minnesota Supreme Court. These factors are: “(1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum’s governmental interest; and (5) application of the better rule of law.” *Advanced Bionics*, 630 N.W.2d at 454 (quoting *Jepson v. General Cas. Co.*, 513 N.W.2d 467, 470 (Minn. 1994)). This court treats choice-of-law issues as questions of law and reviews a district court’s decision de novo. *Danielson v. National Supply Co.*, 670 N.W.2d 1, 4 (Minn. App. 2003), *review denied* (Minn. Dec. 16, 2003).

A. Predictability of result

“The factor applies primarily to consensual transactions where the parties desire advance notice of which state law will govern in future disputes. It is intended to protect the justified expectations of the parties to the transaction.” *Advanced Bionics*, 630 N.W.2d at 454 (quotation and citation omitted). There is a clear choice-of-law provision in the noncompete agreement. It states: “Construction and interpretation of this

⁴ North Dakota Century Code § 9-08-06 (2006) states that “[e]very contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind is to that extent void” except selling the goodwill of a business and partnership relations.

Agreement shall at all times and in all respects be governed by the laws of the State of Minnesota.” The plain language of the agreement provides for the application of Minnesota law. This is what the parties bargained for, and their choice should not be altered without good reason.

Appellant argues that the employment agreement is governed by North Dakota law, but because respondent knew that North Dakota would not enforce a noncompete agreement, respondent chose Minnesota law for the noncompete agreement. Appellant argues that this type of forum shopping is disfavored. The district court dispatched this argument succinctly:

Even though the Employment Offer elects the laws of the State of North Dakota, the Agreement, not the Employment Offer, is the focus of this litigation. As such, in carefully construing the terms of the Agreement, the Court concludes that the language contained therein provides that the laws of the State of Minnesota shall govern and the Agreement itself provided the parties with notice of such.

This factor favors applying Minnesota law.

B. Maintenance of interstate and international order

The primary issue under this factor is whether applying Minnesota law would manifest disrespect for North Dakota’s sovereignty or impede interstate commerce. *See id.* at 455. “Evidence of forum shopping, or that application of Minnesota’s law would promote forum shopping, would indicate such disrespect.” *Id.*

Appellant claims that respondent was forum shopping because, as a North Dakota company, it knew that North Dakota would not enforce the noncompete agreement. Therefore, it chose Minnesota law to govern the noncompete agreement. Appellant

argues that this conduct manifests a lack of respect for the law and sovereignty of North Dakota. Respondent asserts that North Dakota has no interest in this case because appellant is a Minnesota resident who lives and works in Minnesota.

Once again, the district court correctly addressed this issue:

While [appellant] argues that [respondent] is forum shopping in its selection of Minnesota law, the Court again finds that the plain language of the agreement dictates that it is governed by the laws of the State of Minnesota. As such, applying Minnesota law is not evidence of forum shopping, nor would its application promote forum shopping—the application of Minnesota law was considered and agreed to by the parties.

Because the parties explicitly agreed to apply Minnesota law in the noncompete agreement, it is not disrespectful to North Dakota to apply Minnesota law to this dispute.

This factor favors applying Minnesota law.

C. Simplification of the judicial task

“This third factor is often considered insignificant because courts can as easily apply another state’s laws as their own. Although Minnesota courts are fully capable of applying the law of another state, the judicial task is obviously simplified when a Minnesota court applies Minnesota law.” *Id.* (quotations and citation omitted)

Although this is generally the case, it would have been equally, if not more, simple to apply North Dakota law to this case. This is true because North Dakota will not enforce a noncompete agreement. Therefore, had the district court applied North Dakota law, it would have been unnecessary to analyze the temporary-injunction issue because the case would have been dismissed. Therefore, this factor does not seem to significantly

favor application of either state's law, although North Dakota law might be slightly favored.

D. Advancement of the forum's governmental interest

The fourth factor involves inquiry into the choice of law that would most effectively advance a "significant interest of the forum state". *Id.* (quotation omitted) "Minnesota's governmental interests will most clearly be advanced by application of Minnesota law." *Hague v. Allstate Ins. Co.*, 289 N.W.2d 43, 49 (Minn. 1978).

Appellant admits that "[m]ost typically, Minnesota's interests would be advanced by application of its law." But he goes on to argue that because respondent engaged in forum shopping in its choice of Minnesota, this factor actually favors North Dakota. As previously discussed, both parties acknowledged the application of Minnesota law when they signed the agreement. Applying North Dakota law "would not advance Minnesota's interests and would reduce the protection afforded under Minnesota law to employers who enter into legal noncompete contracts." *Advanced Bionics*, 630 N.W.2d at 455. This factor favors applying Minnesota law.

E. Application of the better rule of law

This factor "should be applied only when the choice-of-law question remains unresolved after the other factors are considered." *Id.* Because three factors clearly favor Minnesota, and only one is neutral or slightly favors North Dakota, this factor is insignificant. The district court properly applied Minnesota law to this case.

II. The district court did not abuse its discretion by granting the temporary injunction.

Appellant argues that the district court abused its discretion by granting the temporary injunction. Respondent disagrees, stating that “[t]he status quo must be maintained until the case is adjudicated because of the substantial and irreparable harm that will flow to [respondent] if the temporary injunction is not upheld.”

“A temporary injunction may be granted if by affidavit, deposition testimony, or oral testimony in court, it appears that sufficient grounds exist therefor.” Minn. R. Civ. P. 65.02. The district court may issue a temporary injunction “if the party seeking it establishes that there is no adequate remedy at law and that denial of the injunction will result in irreparable injury. The purpose of a temporary injunction is to preserve the status quo until a trial can be held on the merits.” *Sanborn Mfg. Co. v. Currie*, 500 N.W.2d 161, 164 (Minn. App. 1993) (citation omitted).

A court must consider five factors when determining the appropriateness of a temporary injunction:

- (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
- (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
- (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.

(4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.

(5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dahlberg Bros., Inc. v. Ford Motor Co., 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965). “A decision on whether to grant a temporary injunction is left to the discretion of the trial court and will not be overturned on review absent a clear abuse of that discretion.” *Carl Bolander & Sons Co. v. City of Minneapolis*, 502 N.W.2d 203, 209 (Minn. 1993). A district court’s findings regarding entitlement to injunctive relief will not be set aside unless clearly erroneous. *LaValle v. Kulkay*, 277 N.W.2d 400, 402 (Minn. 1979).

A. Nature and relationship of the parties

Appellant was a salesman for respondent for approximately five months. Prior to that time, he worked for Art-N-Sign, another sign company based out of Fergus Falls, Minnesota. In 2007, respondent purchased the assets of Art-N-Sign and hired appellant.

Appellant argues that he was a short-term employee for respondent and that there was nothing unique about the relationship between the parties that would support the extraordinary remedy of injunctive relief. Respondent asserts that appellant had access to confidential, proprietary, and trade-secret information that could be extremely detrimental if accessed by competitors.

The district court determined that appellant is a seasoned salesman and a valuable employee in a specialized business, who had access to respondent’s confidential,

proprietary, and trade-secret information. The district court found that “[appellant] maintains a knowledge of [respondent’s] confidential, proprietary, and trade secret information that extends beyond gross margins and standard markups and would be harmful to [respondent] if disclosed to a competitor.” The district court found that this factor weighed in favor of granting the temporary injunction. This finding is not clearly erroneous.

B. Balance of relative harm

This factor focuses on the harm respondent may suffer if injunctive relief is denied, as compared to the harm suffered by appellant if the injunction is granted. *Advanced Bionics*, 630 N.W.2d at 451. The district court determined that the potential harm to respondent of having its confidential business information disseminated was greater than the harm to appellant caused by his inability to work for a competing business pending trial. This finding is not clearly erroneous.

The district court focused on the fact that appellant had been offered a position with three businesses, other than Indigo SignWorks, none of which competed with respondent. Furthermore, appellant had willingly signed the noncompete agreement and agreed to refrain from working for a competing business for one year. Respondent, on the other hand, had affirmatively acted to protect itself and prevent its confidential, proprietary, and trade-secret information from being circulated. Lastly, appellant was only prohibited from working for a competing company for one year and was therefore only harmed for that period. But if the trade-secret information were disseminated, respondent would likely suffer irreparable harm. Therefore, the district court did not

abuse its discretion in concluding that the harm to respondent would be greater if the temporary injunction was denied than the harm that appellant would suffer if the injunction was granted.

C. Likelihood of success on the merits

Appellant argues that respondent is unlikely to succeed on the merits because his knowledge of respondent's business does not rise to the level of proprietary information, the agreement lacks consideration, the agreement does not protect any legitimate interest of respondent, it is unreasonable in scope and duration, and respondent is unable to show irreparable harm. Respondent disagrees with each of these contentions.

1. Proprietary knowledge and protecting a legitimate interest

The district court determined that appellant has knowledge of respondent's proprietary information and respondent is therefore able to show that it is protecting a legitimate interest. The district court stated:

[Respondent] seeks to protect information about its sales, including volume, strategies, product components, gross margins, historical sales and pricing, and customer identity and characteristics. The Court finds that [appellant], through his employment with [respondent], was privy to this information about [respondent's] business, while individuals not employed by [respondent] are not. Further, this information would be of value to [respondent's] competitors, including [] Indigo SignWorks. It is clear [respondent] took steps to maintain the secrecy of this information by making [appellant's] offer of employment contingent upon his signing of the agreement. The agreement between [appellant] and [respondent] was a reasonable effort on [respondent's] behalf to protect its information. The Court further finds that the legitimate interest of [respondent] ties back to its proprietary information and expectation that said information would remain confidential.

This finding is not clearly erroneous.

2. Consideration

The district court determined that the noncompete agreement was valid because it was supported by consideration.

Contracts generally are valid only if they include consideration. *Franklin v. Carpenter*, 309 Minn. 419, 422, 244 N.W.2d 492, 495 (1976). Employment agreements are contracts. *Kvidera v. Rotation Eng'g & Mfg. Co.*, 705 N.W.2d 416, 420-21 (Minn. App. 2005). When an employment agreement includes a restrictive covenant, such as a clause prohibiting an employee from soliciting the employer's clients or competing with the employer's business, and the restrictive covenant is not ancillary to an employment agreement, there must be independent consideration for the covenant. *Sanborn Mfg. Co.*, 500 N.W.2d at 164. A restrictive covenant is not ancillary to an employment agreement when it is presented to an employee after the employee begins working. *Nat'l Recruiters, Inc. v. Cashman*, 323 N.W.2d 736, 740 (Minn. 1982).

It appears that this noncompete agreement was supported by independent consideration. The employment agreement clearly stated that in exchange for the \$2,500 signing bonus and the income guarantee, appellant needed to sign a noncompete agreement. Appellant claims that the signing bonus and the income guarantee were part of the original employment agreement and cannot be bootstrapped to the noncompete agreement. This argument ignores the plain language of the agreement. It stated that appellant would only receive those benefits *after* he *signed* a noncompete agreement.

This language indicates that there was a separate noncompete agreement that needed to be signed in exchange for the guarantee and the bonus. Had appellant decided not to sign the noncompete agreement, he would not have received the bonus or the guarantee. Therefore, independent consideration was provided to support the noncompete agreement such that the agreement is likely valid and enforceable.

3. Scope and duration

The district court further determined that the noncompete agreement was not unreasonable in geographical scope—Minnesota, North Dakota, and South Dakota—or duration—one year. This finding was not clearly erroneous. Respondent does business, and has customers, in each of those three states. “Courts generally uphold geographic limitations when they are limited to areas necessary to protect the employer’s interest.” *Overhold Crop Ins. Serv. Co., Inc. v. Bredeson*, 437 N.W.2d 698, 703 (Minn. App. 1989). Furthermore, the one-year restriction seems reasonable based on the importance of the salesman position in the sign business and the length of time that it would take respondent to hire and train a new employee. *See id.* (“The test employed to determine the reasonableness of a temporal restriction examines the nature of the employee’s work, the time necessary for the employer to train a new employee, and the time necessary for the customers to become familiar with the new employee.”).

4. Irreparable harm

Lastly, the district court concluded that respondent was able to show irreparable harm if the injunction was not granted. This irreparable injury was based on the

release and/or distribution of information that is highly sought after in the competitive marketplace which [respondent] and [] Indigo SignWorks are part ofThe threat of such a use of [respondent's] business information by [appellant] is real and substantial and cannot be adequately compensated for at a later date.

This finding was not clearly erroneous. Appellant has an insider's knowledge of respondent's business. If that knowledge were shared with a competitor, it could prove detrimental to respondent's business. Furthermore, once that information has been disseminated, the damage is done and cannot be satisfactorily remedied.

We agree with the district court that respondent demonstrated a likelihood of success on the merits.

D. Public policy considerations

“Minnesota courts do not favor noncompetition agreements because they are partial restraints on trade. But restrictive covenants are enforced to the extent reasonably necessary to protect legitimate business interests. Legitimate interests that may be protected include the company's goodwill, trade secrets, and confidential information.” *Advanced Bionics*, 630 N.W.2d at 456 (quotation and citations omitted).

The district court determined that granting the injunction supported public policy. It concluded that “[p]ublic policy is served by application of laws in a manner resulting in the enforcement of contractual terms that have been negotiated and agreed to in good faith. Each party to a contract should be able to rely on the reasonable enforcement of the terms of the agreement.” When a company is attempting to protect legitimate interests, it

is in the best interests of all parties to be confident in the enforcement of their agreements.

E. Administrative burden

The district court properly found that the granting of the temporary injunction would create administrative duties that are limited in nature. It thus found this to be a neutral factor. This conclusion is not clearly erroneous.

The district court thoroughly considered each of the *Dahlberg* factors and determined that the temporary injunction should be granted. In so doing, the district court did not abuse its discretion.

Affirmed.