NO. COA01-94

NORTH CAROLINA COURT OF APPEALS

Filed: 7 May 2002

DALE K. CLINE, CPA, PLLC,
Plaintiff-Appellant,
Cross-Appellee,

v.

Catawba County
No. 00-CVS-2114

PEGGY R. DAHLE,
Defendant-Appellee,
Cross-Appellant.

Appeal by plaintiff and defendant from order entered 1 November 2000 by Judge Claude S. Sitton in Catawba County Superior Court. Heard in the Court of Appeals 7 January 2002.

Tate, Young, Morphis, Bach & Taylor, LLP, by Thomas C. Morphis and Valeree R. Adams for plaintiff appellant-appellee.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Warren A. Hutton, for defendant appellant-appellee.

McCULLOUGH, Judge.

Plaintiff Dale K. Cline, CPA, PLLC (Cline) and defendant Peggy R. Dahle appeal from an order granting summary judgment in favor of defendant on plaintiff's claims, granting summary judgment in favor of plaintiff on defendant's counterclaims, and denying plaintiff's motion for injunctive relief. The pertinent facts are as follows: Plaintiff is a North Carolina professional limited liability company with its principal place of business in Catawba County,

North Carolina. Cline provides certified public accounting services to the general public.

On 3 January 1983, plaintiff and defendant entered into an employment agreement which contained a non-competition provision. Over the next several years, the business entity headed by plaintiff changed forms several times -- from proprietorship, to partnership, to proprietorship, to professional limited liability company. Despite these organizational changes, Ms. Dahle remained continuously employed with the different entities from 1983 until she was terminated on 5 April 2000. Ms. Dahle re-signed employment agreements with plaintiff on 1 November 1993, 1 May 1995, and 1 August 1999; each employment agreement contained a non-competition provision. The non-competition provision from the 1999 employment agreement stated that:

> The parties acknowledge the importance to Employer of his clients and knowledge of his clients' business obtained by doing work for particular clients. To that end, Employee agrees that for a period of two (2) years from the date of leaving the employment of Employer, and within a geographic radius of fifty (50) miles of the Employer's office ... the Employee will not directly or indirectly, either as an Employee, Officer, Director, Agent, Stockholder, Partner, Self-employed Individual, Contractor, Consultant, or otherwise accept any accounting work for any clients of Employer which were clients of Employer during any time Employee worked for Employer up to the time of termination of this Agreement.
>
> The parties acknowledge that in the event of a breach of this covenant not to compete, and even though injunctive relief may be had by Employer, that in the event a client is lost due to Employee's breach of this article,

> that a valuable loss will have been sustained by Employer and that the true value of said loss would be difficult to ascertain by a court or a jury. To that end, the parties agree that in the event Employee breaches this covenant and Employer loses a client, then and in that event Employee shall pay to Employer the greater of Thirty-seven Percent (37%) of the fees paid by the client to the Employer over the most recent thirty-six (36) month period prior to the Employee's termination of employment with the Employer or One Hundred Percent (100%) of the fees billed to the client by the Employer in the most recent twelve (12) month period prior [to] the Employee's termination of employment with the Employer. The parties agree that said sum is not a penalty but a good faith effort of the parties to agree in advance on the value of Employer's damage claim against Employee in the event of breach of this contract. Said sum if not voluntarily paid by Employee to Employer, shall be reduced to a judgment against Employee. The parties agree and acknowledge that the existence of damages shall not effect [sic] Employer's right to obtain an injunction to restrain and enjoin Employee from violating the provisions of this Agreement.

The 1999 employment agreement and its non-competition provision remained in effect until 5 April 2000, when Ms. Dahle's employment with plaintiff was terminated without notice. After she was fired, plaintiff learned that Ms. Dahle was actively soliciting and performing accounting services for plaintiff's clients, allegedly in violation of the non-competition provision. Plaintiff also learned that Ms. Dahle used business cards indicating that her office was located in Lake Lure, North Carolina, over 50 miles from plaintiff's place of business (and therefore not in violation of the non-competition provision.) However, Ms. Dahle listed a

Hickory, North Carolina, facsimile number on her business cards and admitted that she performed services at her clients' places of business, some of which were located within 50 miles of plaintiff's place of business.

On 16 June 2000, plaintiff, through his attorney, sent Ms. Dahle a letter demanding that she stop violating the non-competition provision and pay him a portion of the fees she collected from his clients. Ms. Dahle did not respond. Thereafter, on 7 July 2000, plaintiff filed a complaint which alleged breach of contract, breach of the Trade Secrets Protection Act, and Unfair and Deceptive Trade Practices (UDTP). Plaintiff also sought a temporary restraining order (TRO) and a preliminary injunction. On 15 September 2000, Ms. Dahle filed her answer, motions, and counterclaims alleging breach of contract, intentional infliction of emotional distress, bad faith termination, and wrongful discharge; she also sought punitive damages. Defendant amended her answer on 19 September 2000. On 19 October 2000, plaintiff filed a reply to Ms. Dahle's counterclaim and filed motions to dismiss based upon N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999) and the statute of limitations. On 6 October 2000, plaintiff filed a motion for summary judgment.

A hearing on plaintiff's summary judgment motion took place during the 23 October 2000 Civil Session of Catawba County Superior Court. On 1 November 2000, the trial court entered an order granting summary judgment in favor of plaintiff as to defendant's counterclaims, denying plaintiff's motion for preliminary and

permanent injunctions, and granting summary judgment in favor of defendant as to plaintiff's remaining claims and motion for injunctive relief. Both parties appealed.

On appeal, plaintiff argues the trial court erred by (I) including the unsigned affidavit of defendant in the record on appeal; (II) granting summary judgment in favor of defendant with respect to the employment agreement; (III) granting summary judgment in favor of defendant with respect to plaintiff's unfair and deceptive trade practices claim; (IV) granting summary judgment in favor of defendant with respect to plaintiff's claim that defendant violated the North Carolina Trade Secrets Act; and (V) denying plaintiff's motion for a TRO and a preliminary injunction.

On appeal, defendant argues the trial court erred by (I) dismissing her counterclaims on the basis that there was no genuine issue of material fact with respect thereto. After careful consideration of all the arguments presented by the parties, we affirm the actions of the trial court in all respects.

We first note that this appeal arises from summary judgment. On appeal, the standard of review from the trial court's grant or denial of summary judgment is as follows:

> This Court's standard of review on appeal from summary judgment requires a two-step analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56(c) (1999). Once the movant makes the required showing, the burden shifts to the

> non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, establishing at least a prima facie case at trial.

Stephenson v. Warren, 136 N.C. App. 768, 771-72, 525 S.E.2d 809, 811-12, *disc. review denied*, 351 N.C. 646, 543 S.E.2d 883 (2000).

We further note that denial of a preliminary injunction is also before us on this appeal. On appeal from the trial court's grant or denial of a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Industries v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983). *See also NovaCare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 475, 528 S.E.2d 918, 920-21 (2000). With these principles in mind, we turn to the arguments presented by the parties.

I. Plaintiff Cline's Appeal

(a) The Unsigned Affidavit

By his first assignment of error, plaintiff argues the trial court erred by including defendant's unsigned affidavit as part of the final record on appeal. We disagree.

Plaintiff objected to the inclusion of Ms. Dahle's unsigned affidavit in the record on appeal because he believed it was nothing more than an unsigned, unsealed, unauthenticated letter, which does not fit the definition of an "affidavit" and is, therefore, inadmissible. *See Ogburn v. Sterchi Brothers Stores, Inc.*, 218 N.C. 507, 11 S.E.2d 460 (1940) (defining an affidavit as "'[a] written or printed declaration or statement of facts, made

voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath.'") *Id.* at 508, 11 S.E.2d at 461 (citation omitted). On 12 January 2001, the trial court entered an order settling the record on appeal. The order stated that "[t]he Record on Appeal shall also include the Affidavit of Peggy Dahle .... An unexecuted copy of [Dahle's affidavit] shall be transmitted to the Court of Appeals as if in fact it were a signed Affidavit due to the fact that the original executed Affidavit was filed but through inadvertence or mistake is not now contained within the Court file and cannot be located[.]"

To properly preserve his argument, plaintiff had to appeal the trial court's order settling the record on appeal. *See Penland v. Harris*, 135 N.C. App. 359, 363, 520 S.E.2d 105, 108 (1999). Since plaintiff did not proceed with such an appeal, he has waived this assignment of error, and it is therefore overruled.

(b) The Employment Agreement

By his second assignment of error, plaintiff argues the trial court erred in granting summary judgment in favor of defendant with respect to the Employment Agreement. We disagree.

In North Carolina, non-competition provisions between employers and employees are valid and enforceable "if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable both as to time and territory; and (5) not against public policy." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 649-50, 370 S.E.2d

375, 380 (1988). "The reasonableness of a non-compete agreement is a matter of law for the court to decide." *Farr Assocs. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000).

It is undisputed that the non-competition provision was in writing and was part of the employment contract. However, Ms. Dahle contends the Employment Agreement was not supported by valid consideration because the changes in her employment were implemented before she signed the renewal contract in August 1999. If an employment agreement is entered into after the employment relationship has begun, new and different consideration -- beyond mere continuation of employment -- must be present for the agreement to be enforceable. *Machinery Co. v. Milholen*, 27 N.C. App. 678, 686-87, 220 S.E.2d 190, 196 (1975). Furthermore,

> [w]here a contract's validity is challenged on the basis of a failure of consideration, the contract may stand or fall depending on whether the parties actually bargained for an exchange of promises or performances. A court will intrude into a private matter and enforce such a transaction precisely because our law deems it important to protect expectations arising from the bargaining process.
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> Thus, a consideration analysis focuses on the dynamic of the parties' transaction. Where it is claimed that a contract exists between *A* and *B*, the question is whether *A's* promise induced *B* to make a counter-promise or to begin performance of some act or to forbear from taking some action. The flip side to this question is whether *A* was induced to make his promise in exchange for *B's* promise or performance. Without this reciprocity of inducements -- characterized as a "bargained-for exchange" -- no consideration exists to support the contract.

J. Hutson and S. Miskimon, *North Carolina Contract Law* § 3-6 (2001).

Here, the purported new consideration described in the Employment Agreement was "the mutual covenants and promises of the parties plus the employment by Employer of Employee which constitutes a substantial and material change of circumstances in employment compared with that of the prior employment relationship of the parties." In actuality, Ms. Dahle changed from a full-time employee to a part-time employee, her hours were reduced, she went from salaried pay to hourly wages, and she was no longer required to train other staff. However, the only changes beneficial to Ms. Dahle were implemented before the new employment contract was signed on 1 August 1999; thus, there was no bargained-for exchange.

Because of the lack of consideration (a bargained-for exchange), the non-competition provision was unenforceable as a matter of law. *See Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 30, 351 S.E.2d 786, 788 (1987) (stating that consideration must be present for a contract to be enforceable). Therefore, the trial court correctly granted summary judgment in favor of Ms. Dahle on this point. Finally, because the non-competition provision fails for lack of consideration, we need not examine whether it was reasonable as to time and territory, nor whether it was against public policy. Plaintiff's second assignment of error is overruled.

(c) Unfair and Deceptive Trade Practices (UDTP)

By his third assignment of error, plaintiff contends the trial

court erred in finding there was no genuine issue of material fact regarding unfair and deceptive trade practices. Plaintiff urges this Court to examine Ms. Dahle's behavior and conclude it qualified as unfair and deceptive trade practices. Specifically, plaintiff argues Ms. Dahle's listing of her place of business as Lake Lure, her use of a Hickory fax number, and her conduct of business within 50 miles of plaintiff's place of business were misleading and amounted to unfair and deceptive trade practices.

Despite plaintiff's characterization of Ms. Dahle's actions in this manner, we do not believe that plaintiff has shown as a matter of law that Ms. Dahle was engaged in unfair and deceptive trade practices. *See Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 551, 503 S.E.2d 401, 408 (1998). Ms. Dahle asserts her right to compete with plaintiff and argues that none of her actions fall under the definition of unfair and deceptive trade practices, as defined by N.C. Gen. Stat. § 75-1 (1999). As we have already determined that the non-competition provision was unenforceable, it follows that plaintiff cannot rely upon the non-competition provision as the basis for finding a violation of N.C. Gen. Stat. § 75-1.1 (1999). Plaintiff's third assignment of error is therefore overruled.

(d) Trade Secrets

By his fourth assignment of error, plaintiff argues the trial court erred in finding there was no genuine issue of material fact concerning trade secrets. Specifically, plaintiff maintains the client list was a trade secret. We do not agree.

A trade secret is business or technical information that "[d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development ... [and] [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy." N.C. Gen. Stat. § 66-152(3)(a)-(b) (1999). N.C. Gen. Stat. § 66-152(1) states that "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent[]" is misappropriation. Confidential customer lists and pricing information have been found to constitute trade secrets. *Drouillard v. Keister Williams Newspaper Services*, 108 N.C. App. 169, 173, 423 S.E.2d 324, 327 (1992). Injunctions have been approved when such items are improperly used. *Id.* at 174, 423 S.E.2d at 327.

Proper factors to consider when determining whether an item is a trade secret are:

> (1) the extent to which information is known outside the business;
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> (2) the extent to which it is known to employees and others involved in the business;
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> (3) the extent of measures taken to guard secrecy of the information;
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> (4) the value of information to business and its competitors;
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> (5) the amount of effort or money expended in developing the information; and
>
> (6) the ease or difficulty with which the information could properly be acquired or duplicated by others.

State ex rel. Utilities Comm'n v. MCI, 132 N.C. App. 625, 634, 514 S.E.2d 276, 282 (1999). Here, the record and the depositions of the parties indicate that the client list was distributed throughout the office with no instructions regarding its secrecy, propriety, or dissemination. As plaintiff presented no evidence to the contrary, we conclude the trial court properly granted summary judgment in favor of defendant on this point. Plaintiff's fourth assignment of error is overruled.

(e) Injunctive Relief

By his fifth assignment of error, plaintiff asserts the trial court erred in denying him injunctive relief. The employment agreement provided that injunctive relief was proper if breach occurred. In a non-competition provision, "'breach is the controlling factor and injunctive relief follows almost as a matter of course; damage from the breach is presumed to be irreparable and the remedy at law is considered inadequate.'" *A.E.P. Industries*, 308 N.C. at 406, 302 S.E.2d at 762 (quoting 43A C.J.S. Injunctions § 95). However, a preliminary injunction should not issue unless the plaintiff has shown that adequate relief is not possible and plaintiff is likely to succeed on the merits of the case. *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975). As plaintiff had no reasonable expectation of success, denial of injunctive relief was appropriate. Moreover, a non-competition provision must be reasonable and valid before the trial court should enter a preliminary injunction. "In every case where the covenant not to compete is found to be reasonable and valid ... the

plaintiff is entitled to a remedy; either the agreement must be enforced or the court must find that plaintiff has an adequate remedy at law for money damages." *A.E.P. Industries*, 308 N.C. at 404, 302 S.E.2d at 761. As we have already concluded that the non-competition provision is unenforceable, it follows that plaintiff was unable to show that he is entitled to injunctive relief. His final assignment of error is therefore overruled.

II. Defendant Dahle's Appeal

(a) Defendant's Counterclaims

Defendant asserted claims for breach of contract, intentional infliction of emotional distress, bad faith termination, wrongful discharge, and punitive damages. On appeal, she contends plaintiff failed to offer evidence to defeat her claims. After careful examination of the record and the arguments of the parties, we affirm the trial court's grant of summary judgment in favor of plaintiff.

Our state has adopted the Equal Employment Practices Act (NCEEPA), N.C. Gen. Stat. §§ 143-422.1 to -422.3 (1999). The NCEEPA states:

> It is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen. Stat. § 143-422.2. Though this statute exists, our courts have never found that violation of the NCEEPA creates a

private right of action. *Mullis v. Mechanics and Farmers Bank*, 994 F.Supp. 680, 687 (M.D.N.C. 1997). Therefore, in order to preserve a cause of action for wrongful discharge, plaintiff had to file a complaint with the EEOC within 180 days from the date of the alleged violations by the employer. *See Morse v. The Daily Press, Inc.*, 826 F.2d 1351 (4th Cir. 1987).

In the present case, Ms. Dahle was fired from her job on 5 April 2000. She therefore had until 6 October 2000 to file a complaint with the EEOC. Because Ms. Dahle failed to file such a complaint, her EEOC-based claim fails.

Ms. Dahle's claims for breach of contract, bad faith termination, and wrongful discharge also fail because she was an employee-at-will, and plaintiff was therefore entitled to discharge her with or without cause at any time, provided the discharge was not expressly prohibited by statute. *See Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 497, 340 S.E.2d 116, 125 (1986).

Ms. Dahle's claim for intentional infliction of emotional distress likewise fails because Ms. Dahle was unable to prove the essential elements of her claim -- namely, extreme and outrageous conduct which was intended to cause, and did cause, severe emotional distress. *See Hogan*, 79 N.C. App. at 487-88, 340 S.E.2d at 119; and *Watson v. Dixon*, 130 N.C. App. 47, 502 S.E.2d 15 (1998) (explaining that claims for intentional infliction of emotional distress exist when an individual's conduct exceeds all bounds tolerated by society, and the conduct caused mental distress of a very serious kind).

Thus, we conclude that the trial court correctly granted summary judgment in favor of defendant on plaintiff's claims, correctly granted summary judgment in favor of plaintiff on defendant's counterclaims, and properly denied plaintiff's motion for injunctive relief. Having found for Ms. Dahle on the merits of Cline's non-competition claim, we further uphold the trial court's denial of Cline's motion for preliminary injunction. *See Farr*, 138 N.C. App. 276, 530 S.E.2d 878.

Affirmed.

Chief Judge EAGLES and Judge CAMPBELL concur.

Report per Rule 30(e).