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NO. COA08-418

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

MSC INDUSTRIAL DIRECT CO., INC.,

Plaintiff,

v. Union County
No. 07 CVS 2847

JAMES GREGORY STEELE,

Defendant.

Appeal by plaintiff from an order entered 30 January 2008 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 22 October 2008.

Jackson Lewis, LLP, by Paul H. Derrick, for plaintiff-appellant.

Black Ruth Grossman & Cain, P.A., by Aimee E. Cain and Lucas T. Baker, for defendant-appellee.

JACKSON, Judge.

MSC Industrial Direct Co., Inc. ("plaintiff") appeals the 30 January 2008 denial of a preliminary injunction and dissolution of a temporary restraining order. For the reasons stated below, we affirm.

Plaintiff, a direct marketer of industrial products, hired James Gregory Steele ("defendant") on 17 October 1994 as an Outside

Sales Associate. He was promoted to the position of Senior Account Executive in 1999. On 19 August 2005, defendant signed an Associate Confidentiality, Non-Solicitation and Non-Competition Agreement in connection with his having been given the use of a company car.

On 19 February 2006, defendant signed a second Associate Confidentiality, Non-Solicitation and Non-Competition Agreement ("the Agreement") which, pursuant to its terms, superceded "any and all prior agreements or understandings" between the parties. The Agreement stated that defendant signed it in exchange for (1) restricted shares of plaintiff's stock, (2) his continued employment, (3) his compensation, and (4) plaintiff's entrustment to him of confidential information related to its business. Plaintiff terminated defendant's employment on 11 May 2007 for alleged violations of the Agreement. In August 2007, defendant began working for Hagemeyer North America, one of plaintiff's competitors.

On 10 October 2007, plaintiff filed a complaint in Union County Superior Court seeking a temporary restraining order ("TRO") and preliminary injunction, enjoining and restraining defendant from engaging in allegedly restricted activity. Also on that date, plaintiff filed a motion seeking the same relief. An order granting a TRO in favor of plaintiff was filed 11 October 2007. Defendant's deposition was taken on the morning of 21 December 2007, and a Consent Temporary Restraining Order was filed later that afternoon. Plaintiff's motion for a preliminary injunction

was heard 14 January 2008. The trial court denied the motion and dissolved the TRO. Plaintiff appeals.

As a preliminary matter, we must determine if this appeal has been brought prematurely. "A preliminary injunction is interlocutory in nature and therefore not immediately appealable unless it deprives the appellant of a substantial right that he would lose absent immediate review." *Redlee/SCS Inc. v. Pieper*, 153 N.C. App. 421, 423, 571 S.E.2d 8, 11 (2002) (citing *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 466, 556 S.E.2d 331, 334 (2001)).

In *QSP, Inc. v. Hair*, 152 N.C. App. 174, 566 S.E.2d 851 (2002), this Court noted that "[i]n cases involving an alleged breach of a non-competition agreement and an agreement prohibiting disclosure of confidential information, North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions holding that substantial rights have been affected." *Id.* at 175, 566 S.E.2d at 852. *QSP* went on to hold that the denial of a preliminary injunction "(1) prohibiting defendant from using or disclosing QSP's confidential information and trade secrets and (2) prohibiting defendant from soliciting for one year the same customers defendant solicited while working for QSP" would deprive the plaintiff of a substantial right absent a review prior to a final determination. *Id.* at 176, 566 S.E.2d at 852. As plaintiff in the case *sub judice* sought a similar preliminary injunction,

which was denied, the appeal is appropriate for our review at this time.

We first address defendant's contention that the issue is moot because the period covered by the Agreement has passed. We disagree.

"Whenever, during the course of litigation it develops that . . . the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978) (citations omitted), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).

Pursuant to the terms of the Agreement, if valid, defendant is prohibited from (1) using or disclosing confidential information for so long as the information generally is not known to the public, (2) competing with plaintiff while employed there and for one year after the termination of his employment, and (3) soliciting its customers while employed there and for one year after the termination of his employment. However, in the event it is determined that defendant violated the Agreement, the duration of the second and third restrictions would be extended for an amount of time equal to the period during which such violations occurred.

Clearly, with respect to the first restriction, the restrictive period could extend indefinitely. With respect to the second and third restrictions, because defendant was terminated on

11 May 2007, with no other facts appearing, the applicable period would expire 10 May 2008, which has passed. However, it is alleged that defendant violated the Agreement. Therefore, pursuant to the Agreement the restricted period would extend for an amount of time equal to the period during which the violations occurred, if such violations are found to have occurred.

A TRO was ordered on 11 October 2007 and was to "remain in full force and effect until such time as this [c]ourt specifically orders otherwise[.]" The 11 October order also set a hearing on plaintiff's motion for 17 October 2007. It appears from defendant's deposition testimony that a hearing was held on that date and that the TRO remained in effect from that point in time. However, there is no direct evidence in the record with respect to a hearing on 17 October 2007 or at any other time prior to the deposition. The 21 December 2007 consent order does not purport to extend an existing TRO. It orders that a TRO "issue immediately" and that plaintiff post bond. This implies that an existing TRO was not in effect at that time. In any event, a TRO finally was dissolved on 14 January 2008, by order filed 30 January 2008.

With the exception of the three-month period during which a TRO was in place, defendant is alleged to have been in violation of the terms of the Agreement. As of the date of this opinion, if a court were to determine that defendant was, in fact, in violation of the Agreement, his business activities would be restricted by the Agreement's terms for a period of time equal to at least an additional twenty-four months beyond the one-year post-separation

period, or at least 10 May 2010 which has not passed yet. Because the question originally in controversy between the parties – whether defendant's activities are restricted, and if so, for how long – has not been resolved, the issue is not moot.

Therefore, we consider the merits of the appeal. Plaintiff argues that the trial court erred in failing to grant a preliminary injunction because it demonstrated a substantial likelihood of success on the merits. We disagree.

The scope of appellate review of a trial court's grant or denial of a preliminary injunction is essentially *de novo* because the appellate court "is not bound by the [trial court's] findings [of fact], 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) (citations omitted).

> In considering the propriety of a preliminary injunction, this Court does not determine whether a confidentiality, no-solicitation, and non-competition agreement is in fact enforceable, but reviews the evidence and determines (1) whether plaintiff has met its burden of showing a likelihood of success on the merits and (2) whether plaintiff is likely to sustain irreparable loss unless the injunction is issued.

QSP, 152 N.C. App. at 176, 566 S.E.2d at 853 (citing *A.E.P. Industries*, 308 N.C. at 401, 302 S.E.2d at 759). However, "[w]here a preliminary injunction is sought to enforce a non[-]competition clause in an employment contract, [the Supreme] Court has held that the employment agreement itself must be valid and enforceable in order for the employer to be able to show the requisite likelihood of success on the merits." *Triangle Leasing Co. v. McMahon*, 327

N.C. 224, 227-28, 393 S.E.2d 854, 857 (1990) (citing *A.E.P. Industries*, 308 N.C. 393, 302 S.E.2d 754).

Although both parties discussed in their briefs the issue of choice of law – the Agreement called for New York law to apply – plaintiff did not assign error to the trial court's determination that North Carolina law governs the enforceability of the Agreement. "[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal[.]" N.C. R. App. P. 10(a) (2007). Because no assignment of error addresses choice of law, the issue is not within the scope of our review. Therefore, we apply the same law the trial court did – North Carolina law.

"Under North Carolina law, covenants not to compete are valid and enforceable if: '(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.'" *Calhoun v. WHA Med. Clinic, PLLC*, 178 N.C. App. 585, 597, 632 S.E.2d 563, 571 (2006) (quoting *QSP*, 152 N.C. App. at 176, 566 S.E.2d at 852), *disc. rev. denied*, 361 N.C. 350, 644 S.E.2d 5 (2007). Defendant contends that plaintiff was not likely to succeed on the merits because the Agreement was unenforceable due to a lack of valuable consideration.

As stated above, there were four bases for defendant's agreeing to be bound by the Agreement's restrictive covenants. First, defendant received eighty-five "MSC Restricted Shares effective January 10, 2006, with a price of $42.86" ("the Grant")

as stated consideration for entering into the Agreement. Pursuant to *Kinesis Adver., Inc. v. Hill*, 187 N.C. App. 1, 652 S.E.2d 284 (2007), *disc. rev. denied*, *appeal dismissed*, 362 N.C. 177, 658 S.E.2d 485 (2008), uncertificated shares of stock are valuable consideration to support a non-compete agreement entered during the course of an existing employment relationship. *Id.* at 11-12, 652 S.E.2d at 292-93. In *Kinesis*, upon our review of summary judgment, this Court determined that there was a genuine issue of material fact as to whether the shares actually had been issued. *Id.* at 13, 652 S.E.2d at 293. That is not the issue before us in the instant case. Although uncertificated shares of stock can be valuable consideration, here, the evidence of record makes clear that the stock at issue was not.

On 19 February 2006, defendant signed the Agreement as well as a Restricted Stock Award ("the Award") pursuant to plaintiff's 2005 Omnibus Equity Plan ("the Plan"). Pursuant to the Award, the terms and conditions of the Grant were controlled in all respects by the Award, the Agreement, and the Plan. The Award, signed 19 February 2006, states that the "Award Date" is 10 January 2006. The Grant was transferred into an account in defendant's name on 10 January 2006 – more than thirty days *before* either the Award or the Agreement was signed.

Pursuant to the Award, fifty percent of the shares would vest on 10 January 2009, seventy-five percent would vest on 10 January 2010, and the remaining shares would vest on 10 January 2011. If defendant's employment ended due to death, disability, or

retirement, any unvested shares would become vested. If his employment terminated by any other means – involuntary discharge for cause, involuntary discharge without cause, or resignation – any unvested shares were to be redelivered to plaintiff. Until they vested, defendant had no right to vote the shares, no right to receive dividends, and no right of alienation.

The Award stated that it was not an employment contract. It conferred no right to continued employment and did not interfere with plaintiff's right to discharge defendant. It further stated that the Plan was discretionary on plaintiff's part and participation was voluntary on defendant's part. The Award was not to be considered as a part of defendant's salary.

Keeping in mind the terms of the Award, we see no valuable consideration for the Agreement. The Grant was made more than thirty days *before* defendant entered into the Agreement. At the time the Grant was given, defendant had no rights to the shares, merely an expectation of rights in the future. Pursuant to the terms of the Award, plaintiff retained the right to discharge defendant at any time without cause, including the right to discharge him only moments after signing the Award and the Agreement. Any value in the Grant was illusory. This Court has held that a non-compete agreement may be set aside for lack of consideration when the stated consideration is illusory. *Milner Airco, Inc. v. Morris*, 111 N.C. App. 866, 870, 433 S.E.2d 811, 814 (1993). In *Milner*, as in the case *sub judice*, the agreement

recited consideration but did not actually bind the employer to any promise. *Id.*

Having determined that the stock does not constitute valid consideration, we consider the promise of continued employment and defendant's compensation as stated consideration for entering into the Agreement. Defendant had been employed by plaintiff for over ten years when he signed the Agreement. When the employer-employee relationship exists already without a restrictive covenant, any new agreement not to compete must be in the nature of a new contract based upon new consideration. *Engineering Associates v. Pankow*, 268 N.C. 137, 139, 150 S.E.2d 56, 58 (1966); *Kadis v. Britt*, 224 N.C. 154, 163, 29 S.E.2d 543, 548 (1944).

"[C]ontinued employment is insufficient consideration to support a covenant not to compete where the employee receives 'no change in compensation, commission, duties, nature of employment or other consideration in exchange for signing the agreement[.]'" *Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 121, 516 S.E.2d 879, 882 (quoting *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 356, *disc. rev. denied*, 349 N.C. 355, 525 S.E.2d 449 (1998)), *disc. rev. denied*, 350 N.C. 832, 539 S.E.2d 288 (1999), *cert. denied*, 528 U.S. 1155, 145 L. Ed. 2d 1072 (2000). However, continued employment for a specified period of time constitutes consideration to support a non-compete agreement when an employment relationship already exists. *See Amdar, Inc. v. Satterwhite*, 37 N.C. App. 410, 414, 246 S.E.2d 165, 167 (new

contract of employment bound the employer for an additional year), *disc. rev. denied*, 295 N.C. 645, 248 S.E.2d 249 (1978).

Here, there was no change in defendant's "compensation, commission, duties, or nature of employment" which could be consideration for the restrictive covenants. Further, as determined above, the Grant is not "other consideration" for the restrictive covenants. Plaintiff was not bound to employ defendant for any specified period of time, remaining free to terminate the relationship with or without cause at any time. Accordingly, defendant's continued employment and associated salary does not constitute valid consideration to support the Agreement.

Finally, the Agreement stated that plaintiff entrusted defendant with confidential information relating to its business as consideration. However, it appears clear that such information had been entrusted to defendant for a number of years prior to the signing of the Agreement. There was no new information entrusted to defendant, therefore, this does not constitute valid consideration.

Because pursuant to North Carolina law no valuable consideration was given in exchange for defendant's entering into the Agreement, the Agreement was not enforceable. Therefore, plaintiff was not likely to succeed on the merits and the trial court did not err in denying a preliminary injunction and dissolving the TRO.

Affirmed.

Judges STEELMAN and STROUD concur.

Report per Rule 30(e).