An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-472

NORTH CAROLINA COURT OF APPEALS

Filed: 18 August 2009

UNITED STATES TRUST COMPANY, N.A.,
Plaintiff,

v.

Mecklenburg County
No. 07 CVS 14445

JOHN R. RICH, D. KENNETH DIMOCK, GLENDA R. BURKETT, ANTHONY P. MONFORTON, MARTHA JO BROOKS, WILLIAM W. WATSON, VIRGINIA B. SASLOW, SANDRA G. BOES, SUZANNE C. WILCOX, KIM M. VAN ZEE, and KIMBERLY LEMONS,
Defendants.

Appeal by plaintiff and defendants from order entered 28 January 2008 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2008.

McGuireWoods LLP, by Irving M. Brenner, John G. McDonald, and Makila Sands Scruggs, for plaintiff.

James, McElroy & Diehl, P.A., by John R. Buric and Preston O. Odom, III, for defendants.

PER CURIAM.

Plaintiff United States Trust Company, N.A. ("U.S. Trust") and defendants Glenda R. Burkett, Anthony P. Monforton, Martha Jo Brooks, William W. Watson, and Virginia B. Saslow all appeal from the trial court's order granting in part and denying in part U.S. Trust's motion for a preliminary injunction. U.S. Trust sought a

preliminary injunction requiring certain defendants, former employees of U.S. Trust, to comply with non-competition agreements that they allegedly entered into while employed by U.S. Trust. Because the preliminary injunction entered by the trial court has expired by its own terms, the issues raised by this appeal, with respect to all defendants except D. Kenneth Dimock, are moot. As for defendant Dimock, the trial court denied U.S. Trust's motion — a determination that is supported by ample evidence. Accordingly, we dismiss the appeals of U.S. Trust and defendants except as to the trial court's ruling regarding defendant Dimock. As for the latter decision, we affirm.

Facts

U.S. Trust is a financial services company that offers a variety of wealth management services to both individual and institutional clients. In 1998, defendants Burkett, Brooks, Watson, Saslow, and Monforton, while in U.S. Trust's employ, signed non-competition agreements. U.S. Trust presented parol evidence that defendant D. Kenneth Dimock signed a non-competition agreement, but it was unable to produce a copy of the agreement. On or about 1 July 2007, defendants voluntarily terminated their employment with U.S. Trust and opened a new office for Stanford Group Company, a company in direct competition with U.S. Trust.

U.S. Trust subsequently brought suit against defendants.[1] In an order entered 3 August 2007, the trial court denied U.S. Trust's

[1]On 21 November 2007, U.S. Trust voluntarily dismissed its claims against Stanford Group Company.

motion for a temporary restraining order enforcing the non-competition agreements. On 30 August 2007, defendants filed a motion to dismiss or, in the alternative, to compel arbitration. On 20 September 2007, the trial court denied the motion. Defendants timely appealed that order. It is the subject of a separate opinion in COA08-179.

On 4 January 2008, U.S. Trust filed a motion for a preliminary injunction enforcing employment agreements allegedly entered into by defendants Rich, Burkett, Dimock, Monforton, Brooks, Watson, Wilcox, and Saslow for a period of the earlier of one year from the date of a preliminary injunction order or until the matter was resolved by trial or otherwise. U.S. Trust did not seek relief as to defendants Boes, Van Zee, and Lemons and ultimately withdrew its request for relief as to defendant Wilcox. On 28 January 2008, the trial court entered an order denying U.S. Trust's motion for a preliminary injunction as to defendants Dimock and Rich, but granting it in part as to Burkett, Monforton, Brooks, Watson, and Saslow. U.S Trust and the five defendants subject to the injunction have appealed from that order to this Court.[2]

Discussion

"Appeal of a trial court's ruling on a motion for preliminary injunction is interlocutory." *QSP, Inc. v. Hair*, 152 N.C. App. 174, 175, 566 S.E.2d 851, 852 (2002). We have previously explained, however, that "[i]n cases involving an alleged breach of

[2]U.S. Trust has not challenged on appeal the trial court's denial of its motion as to defendant Rich.

a non-competition agreement . . . North Carolina appellate courts have routinely reviewed interlocutory court orders both granting and denying preliminary injunctions, holding that substantial rights have been affected." *Id.* Thus, the appeal of the trial court's order is properly before us.

In the decretal portion of the trial court's preliminary injunction order, the trial court stated that it was granting the motion for a preliminary injunction "for a period of one year from January 14, 2008, or until this matter is resolved by trial, *whichever comes first* . . . ." (Emphasis added.) At the close of the order, the trial court noted that "[d]efendants' oral Motion to stay the enforcement of this Order is DENIED." The record contains no indication that a written motion to stay was ever filed in the trial court by either party, and no motion for a temporary stay or petition for writ of supersedeas was ever filed with this Court. As a result, the preliminary injunction has since expired by its own terms.

This Court in *Artis & Assocs. v. Auditore*, 154 N.C. App. 508, 510, 572 S.E.2d 198, 199 (2002), held that "where the restrictions imposed by a preliminary injunction expire within the pendency of an appeal, issues concerning the propriety of the injunctive relief granted are rendered moot by the passage of time." *See also Redlee/SCS, Inc. v. Pieper*, 153 N.C. App. 421, 422, 571 S.E.2d 8, 11 (2002) (holding that because covenant not to compete had expired and preliminary injunction was no longer in effect, former employee's appeal of trial court's order imposing injunction was

moot); *Rug Doctor, L.P. v. Prate*, 143 N.C. App. 343, 346, 545 S.E.2d 766, 768 (2001) (dismissing appeal because covenant not to compete expired while appeal pending); *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 479, 241 S.E.2d 700, 702 (1978) (holding that because last date through which defendants could be restrained under covenant not to compete had "passed pending consideration of this appeal by this Court, the questions relating to the propriety of the injunctive relief granted below are not before us").

Thus, controlling authority requires us to conclude that the parties' appeal is now moot. As our Supreme Court has observed, "in a case such as the one now under consideration [relating to enforcement of non-competition agreements], although involving a substantive right of the appealing party, where time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983).

This analysis does not, however, apply to defendant Dimock. In its order, the trial court found that Dimock did not execute a non-competition agreement. The trial court's relevant finding of fact states:

> Although U.S. Trust presented some evidence to this Court that Dimock executed a similar employment agreement with a noncompetition provision, U.S. Trust failed to produce a written copy of that agreement, executed by Dimock. Dimock has no recollection of signing a noncompetition agreement. Based upon the evidence presented, the Court finds that

> Dimock did not execute a noncompetition agreement.

U.S. Trust challenges this finding of fact on appeal, contending that the parol evidence it presented that the agreement existed was enough to establish its existence.

This Court has explained the applicable standard of review:

> In reviewing a trial court's grant 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. However, while an appellate court is not bound by the findings or ruling of the lower court, there is a presumption that the lower court's decision was correct, and the burden is on the appellant to show error. *Thus, a decision by the trial court to issue or deny an injunction will be upheld if there is ample competent evidence to support the decision, even though the evidence may be conflicting and the appellate court could substitute its own findings*.

Precision Walls, Inc. v. Servie, 152 N.C. App. 630, 635-36, 568 S.E.2d 267, 271 (2002) (emphasis added) (internal quotation marks and citations omitted).

U.S. Trust argues that the trial court was bound to believe its version of the facts because its evidence was uncontroverted. U.S. Trust submitted an affidavit from Richard V. Michaels, its Director of Human Resources. Michaels asserted that Dimock held a position of a type that was required, in 1998, to enter into a non-competition agreement; that Michaels supervised an audit of the employees' personnel files in 2006 and, according to a report prepared following that audit, Dimock's file contained a non-competition agreement as of May 2006; that Dimock requested to see his file in 2007; and that a substantial portion of Dimock's

personnel file, including the 1998 non-competition agreement, is now missing.

We cannot, however, agree with U.S. Trust that this evidence was uncontroverted. In Dimock's own affidavit, submitted in opposition to the motion for a preliminary injunction, he stated: "I have not taken any documents out of my [U.S. Trust] employment file as suggested by Mr. Michaels in his affidavit. In particular, I did not remove any document concerning an agreement not to compete with [U.S. Trust], and do not recall even agreeing to be bound by a non-competition agreement." Dimock's affidavit constitutes "ample competent evidence" to support the trial court's finding of fact, even though U.S. Trust submitted conflicting evidence. Accordingly, under *Precision Walls*, we are obligated to affirm the trial court's denial of a preliminary injunction as to Dimock.

Moreover, as defendants point out, while U.S. Trust assigned error to the finding of fact quoted above, it did not assign error to the trial court's corresponding conclusion of law: "No enforceable noncompetition agreement exists as to Defendant Dimock, and therefore, U.S. Trust has failed to demonstrate a likelihood of success on the merits of its breach of contract claim against him, or that it will suffer immediate or irreparable harm absent entry of preliminary injunctive relief against him." Pursuant to Rule 10(a) of the North Carolina Rules of Appellate Procedure, "the scope of review on appeal is confined to a consideration of those

assignments of error set out in the record on appeal in accordance with this Rule 10."

In the absence of an assignment of error directed to the conclusion of law relating to defendant Dimock, U.S. Trust has waived its right to argue that the conclusion of law is not supported by the evidence. *See Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 112, 516 S.E.2d 647, 649 (1999) ("The appellant must assign error to each conclusion it believes is not supported by the evidence. N.C.R. App. P. 10. Failure to do so constitutes an acceptance of the conclusion and a waiver of the right to challenge said conclusion as unsupported by the facts."); *In re T.M.*, 180 N.C. App. 539, 544, 638 S.E.2d 236, 239 (2006) ("Notwithstanding her various challenges to the trial court's factual findings, failure to challenge any conclusion of law precludes this Court from overturning the trial court's judgment."). We note further that even after defendants, in their brief, pointed out the lack of an assignment of error, U.S. Trust did not move to amend the record on appeal to add an assignment of error and did not ask, in its reply brief, for this Court to apply N.C.R. App. P. 2.

We, therefore, affirm the trial court's refusal to enter a preliminary injunction against defendant Dimock. The remainder of defendants' appeal is dismissed as moot.

Affirmed in part; dismissed in part.

Panel Consisting of:

Judges ROBERT C. HUNTER, ELMORE and GEER.

Report per Rule 30(e).