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NO. COA14-602
NORTH CAROLINA COURT OF APPEALS

Filed: 31 December 2014

PREMIER RESOURCES OF NORTH CAROLINA, INC., D/B/A PREMIER RESOURCES,
Plaintiff,

v.

Mecklenburg County
No. 13 CVS 21279

CRYSTAL "CHRIS" KELLY,
Defendant.

Appeal by defendant from order entered 6 January 2014 by Judge Eric L. Levinson in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 October 2014.

Essex Richards, PA, by N. Renee Hughes, for Plaintiff.

McNair Law Firm, PA, by Samuel I. Moss and Jeremy A. Stephenson, for Defendant.

BELL, Judge.

Defendant Crystal Kelly appeals from an order granting Plaintiff Premier Resources of North Carolina, Inc.'s request for a preliminary injunction enjoining Defendant from breaching a non-competition and confidentiality agreement. On appeal, Defendant argues that (1) the trial court did not rely on competent evidence in entering its findings of fact; (2)

Plaintiff could not demonstrate a likelihood of success on the merits because the covenant was unreasonable as to territory; (3) the Plaintiff failed to demonstrate irreparable harm; and (4) the trial court improperly "blue-penciled" the agreement when it struck one of the counties listed in the restricted territory. After considering the parties' briefs in light of the record and applicable law, we conclude that the trial court, relying on competent evidence, properly concluded that the geographical scope of the restrictive covenant was reasonable and that there was a reasonable apprehension of irreparable harm to Plaintiff. We further conclude that the trial court permissibly struck a severable term from the covenant not to compete. Therefore, we affirm the trial court's order.

I. Factual Background

A. Substantive Facts

Plaintiff is in the business of providing direct hire, temporary/contract, and "temp-to-hire" staffing services to various businesses in North and South Carolina. Defendant began working for Plaintiff in April 2010. When she began her employment, Defendant signed an employment agreement that included a covenant not to compete ("the non-compete"). While working for Plaintiff, Defendant was responsible for managing

client accounts and developing business, which required direct interaction with clients. Defendant signed a second non-compete entitled "EMPLOYMENT NONCOMPETITION AND CONFIDENTIALITY AGREEMENT" on 1 November 2012. As consideration for signing the non-compete, Defendant received an increase in her hourly pay rate.

In early October 2013, a staffing recruiter contacted Defendant about a business development position with Beacon Hill Staffing Group, Inc. ("Beacon Hill"), one of Plaintiff's competitors. This position was "very similar" to Defendant's current employment position with Plaintiff. Defendant informed the recruiter and her prospective employers at Beacon Hill that she believed that her employment contract with Plaintiff had a non-compete provision, but that she was not certain because she did not have a copy of the agreement. Beacon Hill personnel told Plaintiff that they had experience dealing with similar non-competes and that the company would provide Defendant with legal representation if needed.

Defendant accepted a job offer from Beacon Hill in late October 2013. Beacon Hill recommended that Defendant not immediately resign from her job with Plaintiff and not provide Plaintiff with two weeks notice of her resignation. On 29

November 2013, Defendant resigned from her position with Plaintiff via an email and a text message sent to Angela Key ("Ms. Key"), Plaintiff's founder and president. According to Defendant, she continued working for Plaintiff after she accepted employment with Beacon Hill in order to receive her commission checks, which would not be issued until the end of the month.

One week prior to her resignation, Defendant compiled a list of client addresses taken from Plaintiff's client Christmas card list. She also gathered client telephone numbers from a company database. Soon after resigning, Defendant contacted several of Plaintiff's clients to inform them that she had changed her employment and to give them her new contact information so that she could continue providing them with her services.

B. Procedural Facts

Plaintiff initiated the present action by filing a verified complaint on 10 December 2013, asserting claims for (1) breach of contract; (2) libel and slander per se/commercial defamation; (3) tortious interference of existing and prospective business relations; and (4) unfair and deceptive trade practices.

Plaintiff sought monetary damages and requested a temporary restraining order and preliminary injunction.

Plaintiff's motion for a preliminary injunction was heard on 19 December 2013. That same day, the trial court informed the parties via email that it would issue the preliminary injunction. On 6 January 2014, the trial court signed an order granting Plaintiff a preliminary injunction enjoining Defendant from violating the provisions of the non-compete. Defendant gave timely notice of appeal to this Court.

II. Legal Analysis

A. Standard of Review

Preliminary injunctions are "interlocutory and thus generally not immediately reviewable. An appeal may be proper, however, in cases including those involving . . . non-compete agreements, where the denial of the injunction deprives the appellant of a substantial right which [s]he would lose absent review prior to final determination." *VisionAIR v. James*, 167 N.C. App 504, 507, 606 S.E.2d 359, 361 (2004) (citations and internal quotation marks omitted). "[O]n appeal from an order of superior court granting or denying 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.*

Indus., Inc. v. McClure, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983). However, "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." *Wrightsville Winds Townhouses Homeowners' Ass'n v. Miller*, 100 N.C. App. 531, 535, 397 S.E.2d 345, 346 (1990) (citation omitted), *disc. review denied*, 328 N.C. 275, 400 S.E.2d 463 (1991). "The burden is on the plaintiffs to establish their right to a preliminary injunction." *Pruitt v. Williams*, 288 N.C. 368, 372, 218 S.E.2d 348, 351 (1975) (citation omitted). This Court will not disturb the issuance of a preliminary injunction "(1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued." *Ridge Cmty. Investors, Inc.* v. *Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977).

B. Likelihood of Success on the Merits

In order for a non-compete agreement to be valid, it must be "(1) in writing; (2) reasonable as to time and territory; (3) made a part of the employment contract; (4) based on valuable consideration; and (5) designed to protect a legitimate business

interest of the employer." *Young v. Mastrom*, Inc., 99 N.C. App. 120, 122-23, 392 S.E.2d 446, 448 (citation omitted), *disc. review denied*, 327 N.C. 488, 397 S.E.2d 239 (1990). Covenants not to compete must "not impose unreasonable hardship on the covenantor." *Kadis v. Britt*, 224 N.C. 154, 161, 29 S.E.2d 543, 547 (1944). Further, "the territory [they] embrace[] shall be no greater than is reasonably necessary to secure the protection of the business or good will of the employer." *Asheville Assocs. v. Miller*, 255 N.C. 400, 404, 121 S.E.2d 593, 595 (1961) (citation and internal quotation marks omitted). In determining whether a particular geographical scope is reasonable, courts take the following factors into consideration:

> (1) the area, or scope, of the restriction; (2) the area assigned to the employee; (3) the area where the employee actually worked or was subject to work; (4) the area in which the employer operated; (5) the nature of the business involved; and (6) the nature of the employee's duty and his knowledge of the employer's business operation.

Hartman v. W.H. Odell & Assocs., 117 N.C. App. 307, 312, 450 S.E.2d 912, 917 (1994) (citation omitted).

Here, the non-compete agreement signed by Defendant provides, in pertinent part, as follows:

> Employee covenants and agrees that during employment and for a period of twenty-four (24) months following the termination of employment with Company for any reason,

> whether voluntary or involuntary, Employee will not Compete with the Company, on his/her own behalf or in the service of or on behalf of other persons or entities, in the Restricted Territory by performing the same or similar duties as those Employee performed for the Company while in the Company's employ — including, but not limited to, as a consultant, independent contractor, owner, partner, joint venturer or employee.

"Restricted Territory" as defined by the non-compete, includes the North Carolina counties of Mecklenburg, Iredell, Union, Gaston, Rowan, Davidson, and Cabarrus and the South Carolina counties of York and Lancaster. The non-compete defines "Compete" as "to work for any company or entity that is engaged in providing the same or substantially similar services" as those provided by Plaintiff. The non-compete further provides that, for two years subsequent to termination of her employment with Plaintiff, Defendant shall not solicit Plaintiff's clients or prospective clients to encourage them to transfer their business from Plaintiff. The non-compete defines "Client" to include any customer or client of Plaintiff with whom Defendant or her direct reports had contact during the twelve months preceding her termination.

On appeal, Defendant argues that the scope of the non-compete is overly broad because it includes (1) counties in which Plaintiff performed no work; and (2) areas where Defendant

did not work. However, the evidence on which the trial court relied in issuing its preliminary injunction refutes both of Defendant's contentions.

In its complaint, Plaintiff alleged that it maintained clients in all the restricted counties. Plaintiff's account manager and office manager provided sworn affidavit testimony that Plaintiff conducted business in the restricted counties. Ms. Key also provided sworn affidavit testimony that Plaintiff conducted business in the restricted counties. Defendant asserts that this testimony is "untenable" because none of the sample invoices attached to Ms. Key's affidavit were for clients in either Rowan or Davidson County. However, Ms. Key stated in her affidavit that the attached invoices only constituted a "*sampling* of invoices showing where *some* of Premier's customers are located." (emphasis added). In light of Ms. Key's affidavit and other evidence contradicting Defendant's assertion, we cannot agree that because this "sampling" fails to show clients in Rowan and Davidson counties, it establishes that the restricted territory included areas where Plaintiff did not conduct business.[1]

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[1] Plaintiff later admitted that it did not conduct business in Davidson County, a matter that this Court will discuss in greater detail later in this opinion.

Defendant's next argument on appeal is that the restriction is excessively broad in its geographic scope. Specifically, Defendant points to the fact that the evidence showed that she did not perform work for Plaintiff in Iredell, Union, Davidson, Rowan, or Lancaster counties. In support of this argument, Defendant attached to her affidavit a twelve-month commission report showing that in the last twelve months of her employment with Plaintiff, she was paid commissions for placements in only four of the nine restricted counties. However, Defendant also admitted in her affidavit that the report only highlighted "companies to which [she] successfully made placements." The report does not include instances in which Plaintiff performed job responsibilities, such as making client contacts, soliciting prospective customers, or working on client orders, but was ultimately unsuccessful in filling.[2]

Further, Plaintiff's complaint alleged that Defendant performed her job duties in the restricted counties during her

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[2] Defendant referenced a contact report in her brief that, according to her affidavit, showed all contacts "assigned within Premier" to her. This report lists numerous businesses in numerous states and counties but shows no contacts for Davidson or Rowan counties. We are unable to discuss the significance of this report as Defendant, in her affidavit, questions the validity of the report and no party provided this Court with the transcript of Ms. Key's deposition in which the document was produced.

employment. Plaintiff's account manager also submitted a sworn affidavit stating that Defendant performed work in the restricted counties during her employment. Her affidavit also stated that she and Defendant "would often discuss what [they] were doing in [their] respective jobs and . . . had regular staff meetings where [they] discussed what clients [they] were working with." As such, we cannot agree with Defendant that the restricted territory in the non-compete included areas in which she did no work for Plaintiff.

Defendant also argues that the trial court impermissibly blue-penciled the language regarding Davidson County out of the non-compete after Plaintiff admitted to not doing business there. Defendant contends that in light of this information, the trial court should have found the entire non-compete unenforceable. We do not agree.

This Court has stated the following regarding North Carolina's blue pencil rule:

> When the language of a covenant not to compete is overly broad, North Carolina's "blue pencil" rule severely limits what the court may do to alter the covenant. A court at most may choose not to enforce a distinctly separable part of a covenant in order to render the provision reasonable. It may not otherwise revise or rewrite the covenant.

Hartman, 117 N.C. App. at 317, 450 S.E.2d at 920. "This Court may not[, however,] resurrect, in whole cloth, a covenant not to compete by erasing and replacing offending, but key, portions of a contract." *Prof'l Liab. Consultants v. Todd*, 122 N.C. App. 212, 221, 468 S.E.2d 578, 584 (Smith, J., dissenting), *dissent adopted per curiam*, 345 N.C. 176, 478 S.E.2d 201 (1996).

During her deposition, Ms. Key admitted that the Davidson County restriction was intended to be written as the *town* of Davidson. The trial court struck "Davidson County" from the territorial restrictions of the non-compete. In doing so, the trial court did not "rewrite" the contract. We conclude that the court did not err when it blue-penciled a distinct, separable provision that, when removed, left the remainder of the non-compete intact and reasonable.

C. Potential Irreparable Harm

Defendant's final argument on appeal is that Plaintiff failed to show any likelihood of sustaining irreparable harm if a preliminary injunction were not issued. However, because Defendant confuses "likely" harm with "actual" harm, this argument is without merit.

"The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits." *A.E.P.*

Indus., 308 N.C. at 400, 302 S.E.2d at 759 (citations omitted). As a result, "[i]njunctive relief is granted only when irreparable injury is real and immediate." *Hall v. City of Morganton*, 268 N.C. 599, 600-01, 151 S.E.2d 201, 202 (1966). "This is especially true with reference to the issuance of a *preliminary* injunction." *Bd. of Elders v. Jones*, 273 N.C. 174, 183, 159 S.E.2d 545, 552 (1968) (emphasis added). Furthermore, "[a]n applicant for a preliminary injunction must do more than merely allege that irreparable injury will occur. The applicant is required to set out with particularity facts supporting such statements so the court can decide for itself if irreparable injury will occur." *United Tel. Co. v. Universal Plastics, Inc.*, 287 N.C. 232, 236, 214 S.E.2d 49, 52 (1975). We believe that Plaintiff has shown sufficient evidence to establish a reasonable apprehension of irreparable harm if an injunction were not issued.

Defendant's brief is replete with arguments that the record is devoid of "evidence that Premier has suffered irreparable harm," and that that there is "no evidence that Premier in fact lost a client because of [Defendant's] actions." However, issuing a preliminary injunction *after* actual harm occurred would defeat the purpose of such injunctive relief — to preserve

the status quo between the parties. *See A.E.P. Indus.*, 308 N.C. at 400, 302 S.E.2d at 759. A preliminary injunction is properly issued when there is "reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect the plaintiff's right until the controversy between him and defendant can be determined." *State ex rel. Edmisten v. Challenge, Inc.*, 54 N.C. App. 513, 516, 284 S.E.2d 333, 335 (1981) (citations omitted).

The trial court had before it evidence that (1) Defendant was trained by Plaintiff; (2) Defendant had worked for Plaintiff for three years; and (3) Defendant began soliciting Plaintiff's clients, with whom she had previously worked, immediately after resigning from her employment with Plaintiff and becoming employed by one of Plaintiff's competitors. This evidence sufficiently demonstrates that Plaintiff has shown it would have likely suffered irreparable harm if a preliminary injunction were not issued.

Defendant contends that the trial court failed to "engage in a balancing process, weighing potential harm to the plaintiff if the injunction is not issued against the potential harm to the defendant if injunctive relief is granted." *Williams v.*

Greene, 36 N.C. App. 80, 86, 243 S.E.2d 156, 160 (1978). According to Defendant, the trial court "failed to take into account any of the harm caused by prohibiting [her] from working in or around Charlotte." In her affidavit, Defendant testified that she was the sole wage earner in her home, her husband was awaiting a kidney transplant, and preventing her from continuing in her current capacity at Beacon Hill would "prevent [her] from earning a livelihood and supporting [her] family." We disagree. The record reflects that the trial court considered all of the evidence presented at the hearing, including Defendant's statements that she was employed with a direct competitor of Plaintiff, she had been engaged in competing against Plaintiff, and that she had been actively soliciting, diverting and taking away Plaintiff's customers. Our Supreme Court has held that "in a noncompetition agreement, breach is the controlling factor and injunctive relief follows almost as a matter of course." *A.E.P. Indus.*, 308 N.C. at 406, 302 S.E.2d at 762 (citation and quotation marks omitted). Therefore, we conclude that Plaintiff sufficiently established that it was likely to suffer irreparable harm if a preliminary injunction was not issued.

III. Conclusion

For the reasons set forth above, we conclude that the covenant not to compete is reasonable in its territorial scope and Plaintiff has shown a likelihood of success on the merits of its claim. We further conclude that Plaintiff has shown a likelihood of irreparable harm without the issuance of the preliminary injunction. Therefore, the trial court's order granting Plaintiff a preliminary injunction is affirmed.

AFFIRMED.

Judges GEER and STROUD concur.

Report per Rule 30(e).