IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-10

Filed: 5 November 2019

Buncombe County, No. 18 CVS 3120

ANDY-OXY CO., INC., Plaintiff,

v.

COLBY ROSS HARRIS, Defendant.

Appeal by Defendant from Preliminary Injunction entered 7 August 2018 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 9 May 2019.

Barbour, Searson, Jones & Cash, PLLC, by W. Scott Jones and Frederick S. Barbour, for plaintiff-appellee.

Littler Mendelson, P.C., by Stephen D. Dellinger and Elizabeth Howe Pratt, for defendant-appellant.

MURPHY, Judge.

A covenant not to compete must be no broader in scope than is necessary to protect a legitimate business interest. Where the language of such a covenant is overly broad, the courts will not rewrite or revise the covenant, but rather decline to enforce it. In this case, the non-compete and non-solicitation restrictive covenants are overbroad and unenforceable. Accordingly, the trial court erred in issuing a preliminary injunction.

BACKGROUND

Andy-Oxy Co., Inc. ("Andy-Oxy") is a corporation involved in the sale and distribution of welding supplies and gases with its principal place of business in Buncombe County. In 2014, Colby Ross Harris ("Harris") was hired by Andy-Oxy as a Cylinder Filler/Handler. When Harris began employment with Andy-Oxy in this role, he signed an employment agreement that contained the following provisions:

> 4. Non-Competition/Non-Solicitation. Employee covenants and agrees as follows:
>
> (a) While Company employs him and for a period of two (2) years following the termination of Employee's employment, for any reason whatsoever, the Employee shall not, directly or indirectly, on his account or in the service of others, be employed or otherwise participate in the field or area of supplying, retailing, wholesaling, or distributing compressed gases, welding products, or any other products sold by the company, within the restricted area. The restricted area shall include: (1) Avery County, North Carolina; (2) Buncombe County, North Carolina; (3) Cherokee, North Carolina; (4) Clay County, North Carolina; (5) Graham County, North Carolina; (6) Haywood County, North Carolina; (7) Henderson County, North Carolina; (8) Jackson County, North Carolina; (9) Macon County, North Carolina; (10) Madison County, North Carolina; (11) McDowell County, North Carolina; (12) Polk County, North Carolina; (13) Rutherford County, North Carolina; (14) Swain County, North Carolina; (15) Transylvania County, North Carolina; (16) Yancey County, North Carolina; (17) Mitchell County, North Carolina; (18) Watagua [sic] County, North Carolina; (19) Burke County, North Carolina; (20) Iredell County, North Carolina; (21) Catawba County, North Carolina; (22) Surry County, North Carolina; (23) Gaston County, North Carolina and (24) Cleveland County, North Carolina;

> (b) Employee will not, while Company employs him and for a period of two (2) years following the termination of Employee's employment for any reason whatsoever, directly or
>
> (c) indirectly, on his account or in service of others, solicit any customers of Company who were customers of Company during the one (1) year immediately proceeding [sic] the termination of Employee's employment with Company and which customers are located within the restricted area as defined in Paragraph 4(a).
>
> 5. Non-Disclosure; Non-Solicitation. Employee further covenants and agrees as follows:
>
> (a) Except in the good faith performance of his duties under this Agreement, the Employee shall not, at any time during or after his employment with Company, publish, disclose, or use any secret or confidential material or information relating to any aspect of the business or operations of Company.

After approximately two years in the position of Cylinder Filler/Handler, Harris was moved to an outside sales position, but he did not enter into a new employment agreement. In this position, Harris received "internal and external training in the business of selling and distributing welding supplies and gases" and was provided with "Andy-Oxy's proprietary information, including [its] pricing formulas and methodology." During his last year with Andy-Oxy, Harris had approximately 88 active client accounts, most of which were located in eight of the twenty-four counties listed in the restricted area, with the remainder in other areas, including South Carolina.

On 29 June 2018, Harris resigned from his position at Andy-Oxy and informed the company that he would be taking an account manager position with Airgas USA, LLC ("Airgas"). Airgas, also primarily located in Buncombe County, competes with Andy-Oxy "in the business of industrial gases distribution and services."

Andy-Oxy commenced a breach of contract action against Harris and filed a *Motion for Temporary Restraining Order*, seeking injunctive relief "prohibiting [Harris], and anyone acting in concert with him, from violating the terms of his employment contract with [Andy-Oxy], including the non-competition and non-solicitation provisions thereof[.]" The trial court issued a temporary restraining order and set a hearing on Andy-Oxy's motion for a preliminary injunction. Following the hearing, the trial court issued a preliminary injunction on 7 August 2018 enjoining Harris from the following:

> 1. For another, or acting on his own behalf, to supply, retail, wholesale, or distribute compressed gases and welding products, within the Restricted Area as defined in [Section 4(a) of the employment agreement], through 28 June 2020;
>
> 2. For another, or acting on his own behalf, to solicit any customers of Andy-Oxy who were customers of Andy-Oxy at any time between 30 June 2017 and 29 June 2018 and which customers are located within the Restricted Area . . ., through 28 June 2020; and
>
> 3. Publishing, disclosing, or using any secret or confidential material or information relating to any aspect of the business of operations of Andy-Oxy.

Harris timely appeals.

ANALYSIS

A. Appellate Jurisdiction

We must first determine whether we have jurisdiction over this appeal. "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578 (1999). "Interlocutory orders are those made during the pendency of an action which do not dispose of the case, but instead leave it for further action by the trial court to settle and determine the entire controversy." *Carriker v. Carriker*, 350 N.C. 71, 73, 511 S.E.2d 2, 4 (1999). "A preliminary injunction is interlocutory in nature, which means that an order issuing a preliminary injunction cannot be appealed prior to [a] final judgment absent a showing that the appellant has been deprived of a substantial right which will be lost should the order escape appellate review before final judgment." *Copypro, Inc. v. Musgrove*, 232 N.C. App. 194, 197, 754 S.E.2d 188, 191 (2014) (quoting *Clark v. Craven Regional Medical Authority*, 326 N.C. 15, 23, 387 S.E.2d 168, 173 (1990)). Our Supreme Court has stated,

> 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. Nevertheless, [where a] case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address these issues.

A.E.P. Indus., Inc. v. McClure, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983).

Following this precedent, we have concluded that an appellant has "succeeded in demonstrating how a substantial right may be lost without immediate appellate review" where non-compete agreements are implicated. *TSG Finishing, LLC v. Bollinger*, 238 N.C. App. 586, 590, 767 S.E.2d 870, 875 (2014); *Emp't Staffing Grp. v. Little*, 243 N.C. App. 266, 269, 777 S.E.2d 309, 311-12 (2015). We similarly conclude this case presents an important question as to the parties' rights under the employment agreement and has a substantial effect on the parties' rights. We thus possess jurisdiction over the appeal and address the merits.

B. Preliminary Injunctions

A preliminary injunction "is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation" and "will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his [or her] case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Cmty. Inv'rs, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (emphasis in original). "The standard of review from a preliminary injunction is essentially *de novo*. Nevertheless, a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous." *LMSP, LLC v.*

Town of Boone, 818 S.E.2d 314, 317-18 (N.C. Ct. App. 2018) (internal citations and quotation marks omitted). "We note that on 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.*, 308 N.C. at 402, 302 S.E.2d at 760.

C. Restrictive Covenants on Competition

A covenant not to compete made between an employer and employee is only valid and enforceable if it is: "(1) in writing; (2) part of an employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest." *Med. Staffing Network, Inc. v. Ridgway*, 194 N.C. App. 649, 655, 670 S.E.2d 321, 327 (2009). Thus, "[w]hen considering the enforceability of a covenant not to compete, a court examines the reasonableness of its time and geographic restrictions, balancing the substantial right of the employee to work with that of the employer to protect its legitimate business interests." *Okuma Am. Corp. v. Bowers*, 181 N.C. App. 85, 86, 638 S.E.2d 617, 618 (2007). The reasonableness of a covenant not to compete "is a matter of law for the court to decide." *Ridgway*, 194 N.C. App. at 655, 670 S.E.2d at 327. Moreover, it is well-established that such covenants not to compete are disfavored by the law. *Id.*

Our courts have held that "protection of customer relationships and goodwill against misappropriation by a departing employee is well recognized as a legitimate protectable interest of the employer." *United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 651, 370 S.E.2d 375, 381 (1988), *disc. review granted in part*, 330 N.C. 123, 409 S.E.2d 610 (1991), *aff'd*, 335 N.C. 183, 437 S.E.2d 374 (1993). However, a covenant not to compete restricting "the employee's future employability by others must be no wider in scope than is necessary to protect the business of the employer." *VisionAIR, Inc.*, 167 N.C. App. 504, 508, 606 S.E.2d 359, 362 (2004) (internal citation and quotation marks omitted). A non-compete covenant that is "too broad to be a reasonable protection" of the employer's legitimate business will be fatal to its enforceability, and a court cannot, and will not, rewrite the covenant to appropriately narrow its scope. *Id.*

Here, the first three elements of a valid and enforceable covenant not to compete are not at issue; the parties only dispute whether the non-compete and non-solicitation covenants are reasonable as to time and territory and designed to protect a legitimate business interest.[1]

1. Non-Compete Covenant

[1] We note that the employment agreement containing the non-compete covenants at issue in this case was for Harris's position as cylinder filler/handler in 2014, not his subsequent position as outside salesman to which he was accepted in 2016. Harris makes no argument as to whether his 2014 employment agreement was rendered void when he accepted his new position, so we do not address this issue.

We have "held that restrictions barring an employee from working in an identical position for a direct competitor are valid and enforceable." *Ridgway*, 194 N.C. App. at 656, 670 S.E.2d at 327. However, when a covenant restricts competitive employment, we have held the non-compete covenant's language to be overly broad when it would preclude a departed employee from having any association with a business providing similar services, including performing even wholly unrelated work. *Hartman v. W.H. Odell & Assoc., Inc.*, 117 N.C. App. 307, 317, 450 S.E.2d 912, 920 (1994); *VisionAIR*, 167 N.C. App. at 509, 606 S.E.2d at 362.

In *Hartman*, the original non-compete covenant precluded the departed employee from:

> either directly or indirectly, on his own account, or in the service of others, own, manage, lease, control, operate, participate, consult or assist any person or entity providing actuarial services or any other services of the same nature as the services currently offered by the Corporation to the insurance industry and others or otherwise compete against the Corporation in the actuarial or consulting business.

Hartman, 117 N.C. App. at 308, 450 S.E.2d at 914-15. We held this provision was "overly broad in that, rather than attempting to prevent plaintiff from competing for actuarial business, it requires plaintiff to have no association whatsoever with any business that provides actuarial services." *Id.* at 317, 450 S.E.2d at 920. We stated, "[s]uch a covenant would appear to prevent plaintiff from working as a custodian for

any 'entity' which provides 'actuarial services[,]'" and accordingly does not protect a legitimate business interest. *Id.*

In *VisionAIR*, the non-compete covenant stated the departed employee may not "'own, manage, be employed by or otherwise participate in, directly or indirectly, any business similar to Employer's . . . within the Southeast' for two years after the termination of his employ with VisionAIR." *VisionAIR*, 167 N.C. App. at 508, 606 S.E.2d at 362. We found this covenant to be fatally overbroad and stated:

> Under this covenant, James would not merely be prevented from engaging in work similar to that which he did for VisionAIR at VisionAIR competitors; James would be prevented from doing even wholly unrelated work at any firm similar to VisionAIR. Further, by preventing James from even "indirectly" owning any similar firm, James may, for example, even be prohibited from holding interest in a mutual fund invested in part in a firm engaged in business similar to VisionAIR. Such vast restrictions on James cannot be enforced.

Id. at 508-09, 606 S.E.2d at 362-63.

In the present case, the scope of the non-compete covenant is similarly overbroad and does not reasonably protect a legitimate business interest. The covenant states that Harris "shall not, directly or indirectly, on his account or in the service of others, be employed or otherwise participate in the field or area of supplying, retailing, wholesaling, or distributing compressed gases, welding products, or any other products sold by the company, within the restricted area" for a period of two years following termination. This covenant is not limited to a

restriction preventing Harris from working "in an identical position for a direct competitor[.]" *Ridgway*, 194 N.C. App. at 656, 670 S.E.2d at 327. Indeed, the language could not refer to Harris's position in outside sales, as he was not in this position when the employment agreement containing the covenant was effectuated. The language "the field or area of . . ." refers to the type of services that Andy-Oxy provides, not to a particular position.

By preventing Harris from directly or indirectly being employed or otherwise participating in the field of services that Andy-Oxy provides, the covenant effectually precludes Harris from having any association with a business in the same field, even future work distinct from his duties as an outside salesman. For example, consider the "custodian" analogy described in *Hartman*. *See Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920. Under the language of the non-compete covenant as written, Harris accepting a position as a custodian at a business operating in Andy-Oxy's field of services would be precluded by the covenant's provision that he not indirectly be employed or participate in this field of service. By preventing Harris from having any association with a business conducting similar services to Andy-Oxy, the scope of the non-compete agreement is impermissibly broad and goes beyond what is necessary to protect the legitimate business interests of Andy-Oxy.

"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." *Id.* at 317, 450 S.E.2d at 920. However, the court "may not otherwise revise or rewrite the covenant." *Id.* The overly broad language of the non-compete covenant discussed above is not a distinctly separable part of the covenant, rendering the entire covenant unenforceable. *See VisionAIR*, 167 N.C. App. at 508, 606 S.E.2d at 362 (quoting *Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 528, 379 S.E.2d 824, 828 (1989) ("The courts will not rewrite a contract if it is too broad but will simply not enforce it.")).

In granting the preliminary injunction, the trial court enjoined Harris from "[f]or another, or acting on his own behalf, to supply, retail, wholesale, or distribute compressed gases and welding products, within the Restricted Area as defined in Exhibit A to the Verified Complaint, through 28 June 2020[.]" In doing so, the trial court effectively struck the terms "directly or indirectly" and "employed or otherwise participate in the field or area . . . ." The terms rendering the non-compete covenant overly broad are not distinctly separable parts of the covenant. Accordingly, the covenant could not be revised or rewritten and is unenforceable. *See VisionAIR*, 167 N.C. App. at 508, 606 S.E.2d at 362.

2. Non-Solicitation Covenant

The non-solicitation covenant of Harris's employment agreement prohibits him from "directly or . . . indirectly, on his account or in service of others, *solicit*[*ing*] *any*

customers of Company who were customers of Company during the one (1) year immediately proceeding [sic] the termination of [Harris's] employment with Company and which customers are located within the restricted area . . . ." (emphasis added). The subjects of this prohibition are Andy-Oxy's customers. In other words, the non-solicitation covenant prohibits and restricts Harris's use of Andy-Oxy's client base. We have explicitly held that "a client-based limitation cannot extend beyond contacts made during the period of the employee's employment." *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 282, 530 S.E.2d 878, 883 (2000).

The non-solicitation covenant here impermissibly extends beyond contacts that Harris made during his employment with Andy-Oxy. The covenant limits its temporal scope to "customers of Company during the one (1) year immediately proceeding [sic] the termination of [Harris's] employment . . . and which customers are located within the restricted area[.]" The covenant, however, fails to define "customer" and in no way ties that term to Harris and the contacts he made in his position as outside salesman. That is, by broadly referring to "customers of Company[,]" the covenant prohibits Harris from soliciting *any* customer within the restricted territory, irrespective of whether Harris had contact with that customer during his employ or whether that customer was even known to Harris.

Moreover, the inclusion of the "restricted area" does not limit the scope of the covenant to Harris's contacts that he would have made in his position as outside

salesman. The trial court found that Harris was employed as an "outside salesman" and that "Andy-Oxy provided [ ] Harris with a sales territory encompassing western North Carolina, including those counties listed in Paragraph 4(a) of the Contract, and provided [ ] Harris with a customer base to service within that sales territory." The Record, however, contains no details about what this position entailed. Most importantly, Andy-Oxy did not demonstrate whether Harris sold all or only some of Andy-Oxy's products in this area or whether he serviced all or only certain types of customers within the restricted area. As such, we cannot conclude that the inclusion of the geographic area necessarily equates to customers with whom Harris had contact in his position as outside salesman.

Under certain circumstances, a non-solicitation provision covering customers in a geographic area with whom the departed employee had no actual contact may be enforceable. The non-solicitation covenant at issue in *Triangle Leasing Co., Inc. v. McMahon*, 327 N.C. 224, 393 S.E.2d 854 (1990), provided:

> Employee will not . . . within the State of North Carolina or any other state or territory in which the company conducts business, directly or indirectly solicit or attempt to procure the customers, accounts, or business of Company, or directly or indirectly make or attempt to make car or truck-van rental sales to the customers of Company.

Id. at 228, 393 S.E.2d at 857. Despite the departed employee's employment contacts being limited to the Wilmington area, our Supreme Court upheld the enforceability of the non-solicitation covenant. *Id.* at 229, 393 S.E.2d at 858. Central to its analysis,

however, was the presence of "ample evidence to support [the employer's] contention that [the departed employee's] access to customer lists, price sheets, and policies affecting company business outside of the Wilmington area would warrant a contractual prohibition against solicitation of [the employer's] customers regardless of their location." *Id.* Such evidence is absent from this case.

The trial court found that "Andy-Oxy provided [ ] Harris with Andy-Oxy's proprietary information, including Andy-Oxy's pricing formulas and methodology." However, again, the Record does not show that Harris served *all* of Andy-Oxy's customers within the restricted area in his position as "outside salesman"—only that he was assigned a sales territory that included that restricted area. Additionally, there is no evidence that Harris would have been privy to such proprietary information for customers he did not contact. Thus, based on the record before us, we conclude that Harris's position as outside salesman does not equate to the position described in *Triangle Leasing Co.* that justified a non-solicitation agreement that covered clients beyond those with whom the departed employee had contact.

By vaguely referring to all customers of Andy-Oxy within the restricted area without any limitations in scope to customers with whom Harris had material contact, the non-solicitation covenant was overly broad and did not protect a legitimate business interest, rendering it unenforceable.

CONCLUSION

For the reasons stated herein, the non-compete and non-solicitation provisions are overbroad and unenforceable. Because the covenants are unenforceable, Andy-Oxy is unable to show likelihood of success on the merits of its case. The trial court erred in issuing a preliminary injunction.

REVERSED AND REMANDED.

Judge DIETZ and COLLINS concur.

Reported per Rule 30(e).