

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sean A. Stoner,	:	
Plaintiff-Appellant,	:	
v.	:	No. 11AP-838
Salon Lofts, LLC et al.,	:	(C.P.C. No. 10CVH-09-13904)
Defendants-Appellees.	:	(REGULAR CALENDAR)

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D E C I S I O N

Rendered on July 19, 2012

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*Cooper & Elliott, LLC, Charles H. Cooper, Jr., Rex H. Elliott and Adam P. Richards, for appellant.*

*Little Mendelson, Thomas M.L. Metzger and Brooke E. Niedecken, for appellees.*

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APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} Sean A. Stoner is appealing from the preliminary injunction granted against him on behalf of his former employer, Salon Lofts, LLC ("Salon Lofts") and a related entity Salon Lofts Franchising, LLC ("Salon Lofts Franchising"). He assigns two errors for our consideration:

[I.] The trial court erred in granting Salon Lofts Franchising, LLC's request for a preliminary injunction.

[II.] The trial court erred by arbitrarily setting a surety bond in an amount not supported by the record.

{¶ 2} Sean A. Stoner is an attorney working in the state of Ohio under a corporate registration.<sup>1</sup> From 2007 until 2010, he was general counsel and vice president of investor relations for Salon Lofts. Salon Lofts is in the business of leasing property to individuals in the hair and beauty industry to enable those individuals to operate their own businesses. Daniel Sadd, the owner of Salon Lofts, terminated Stoner's employment with Salon Lofts on August 24, 2010. On September 22, 2010, Stoner filed suit against his former employer and against Salon Lofts Franchising.

{¶ 3} The named defendants pursued a counterclaim in which they alleged that Stoner was violating the provisions of a covenant not to compete and was utilizing trade secrets he had acquired while employed by Salon Lofts. Salon Lofts and Salon Lofts Franchising requested injunctive relief against Stoner.

{¶ 4} The trial court conducted an evidentiary hearing, following which the judge assigned to the case granted the motion for a preliminary injunction in an entry journalized September 23, 2011. Stoner filed a notice of appeal to contest the terms of the preliminary injunction less than a week later.

{¶ 5} Counsel for Stoner makes several arguments as to why a preliminary injunction on behalf of Salon Lofts Franchising was and is inappropriate. Stated briefly, counsel argues that the preliminary injunction is too broad; that a contractual agreement between Stoner and Salon Lofts Franchising is unenforceable; that the agreement is, at least in part, unenforceable specifically because part of it is contrary to public policy and Ohio law; that disclosure of trade secrets has not been proven by clear and convincing evidence; and that Salon Lofts Franchising failed to prove irreparable harm by clear and convincing evidence.

{¶ 6} Counsel for Stoner has also argued that, even if a preliminary injunction was and is appropriate, the bond of \$95,000 does not come close to covering Stoner's potential losses if the injunction is overturned.

{¶ 7} We will address each of counsel's arguments below.

{¶ 8} The interpretation of a written contract is a matter of law, and as such is reviewed without deference to the trial court's determination. *Alexander v. Buckeye*

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<sup>1</sup> Corporate status is available to attorneys not admitted to practice law in Ohio who are employed full-time by a non-governmental Ohio employer. See Gov.Bar. R. VI, Sec. 3.

*Pipe Line Co.*, 53 Ohio St.2d 241 (1978), paragraph one of the syllabus. The goal of construing contract language is to effectuate the parties' intent. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Med. Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. Additionally, when the parties' agreement is integrated into an unambiguous, written contract, courts should give effect to the plain meaning of the parties' expressed intentions. *Aultman Hosp. Assn. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989), syllabus. The interpretation of a written agreement is a matter of law for the court. If a contract is clear and unambiguous, the court must give effect to the agreement's express terms and it need not go beyond the plain language of the agreement to determine the rights and obligations of the parties.

{¶ 9} However, the issuance of an injunction lies within the trial court's sound discretion and depends on the facts and circumstances surrounding the particular case. *LCD Videography, L.L.C. v. Finomore*, 11th Dist. No. 2009-L-147, 2010-Ohio-6571, ¶ 53, citing *Perkins v. Village of Quaker City*, 165 Ohio St. 120 (1956), syllabus. Thus, our standard of review for the trial court's factual determinations is whether there was an abuse of discretion.

{¶ 10} As additional factual background, Stoner not only served as an in-house counsel for Salon Lofts, but also sought and became the first franchisee with Salon Lofts Franchising. Specifically, he and a partner, Jeffrey Wilkins, entered into an Agreement of Owners of Franchise in order to pursue the development of opportunities in the area of Charlotte, North Carolina.

{¶ 11} As general counsel for Salon Lofts before Salon Lofts Franchising came into existence, Stoner was heavily involved in creating the new company and the various documents used by the new company when it signed up franchisees. One of those documents was the Agreement of Owners of Franchise, which Stoner signed in an individual capacity and upon which the trial court specifically relied in granting the preliminary injunction. The Agreement of Owners of Franchise contained a restrictive covenant Salon Lofts and Salon Lofts Franchising sought to enforce.

{¶ 12} In pertinent part, the agreement provides as follows:

### Confidentiality and Non-Competition

Each of you agrees that during the period that Franchisee owns one or more Salon Lofts stores or holds any rights to develop one or more such stores, and for a period of two years following the last date upon which Franchisee owns any such stores or holds the rights to develop any such stores, notwithstanding the reason for the termination of ownership (the "Restricted Period"), within a twenty (20) mile radius of any stores [sic] that was owned or operated, or in which Franchisee had any interest, or any location which Franchisee had the right to develop stores, you shall not, engage in the following activities:

(i) directly or indirectly enter into the employ of, render any service to, consult with or act in concert with any person, partnership, limited liability company, corporation or other entity of any kind, that owns, operates, manages, franchises, leases property to or licenses any business which offers the services of beauty enhancement professionals, including, but not limited to professionals such as hair stylists, aestheticians, nail technicians and massage therapists or similar ("Competitive Business") unless such Competitive Business is operated pursuant to a written license or other agreement with Salon Lofts.

(ii) directly or indirectly engage in any such Competitive Business on your own account; or

(iii) become interested in any such Competitive Business directly or indirectly as an individual, partner, member, shareholder, director, officer, principal, agent, employee, consultant, contributor of venture capital, guarantor, or in any other capacity or relationship.

{¶ 13} The record on appeal shows that Stoner fully intended to develop businesses like those owned and operated by Salon Lofts both before he executed the franchise document and after his time as general counsel for Salon Lofts ended. Counsel for Stoner does not argue otherwise. Instead, counsel for Stoner asserts that the agreement executed by Stoner in his individual capacity is not enforceable. This returns us to the issues for review on appeal set forth in appellant's brief and summarized above.

{¶ 14} Stoner's assertion that the preliminary injunction is too broad has no merit. A restrictive covenant must satisfy three requirements to be enforceable: (1) the covenant must relate to either a contract for the sale of goodwill or other subject property or to a contract for employment; (2) the covenant must be supported by adequate consideration; and (3) the application of the covenant must be reasonably limited in both time and territory. *84 Lumber Co., L.P. v. Houser*, 11th Dist. No. 2010-P-0074, 2011-Ohio-6852, ¶ 19.

{¶ 15} In general, most claims of overbreadth concern the size of the restricted territory and the duration of the restriction. *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21, 25 (1975). A non-compete agreement that restrains an employee from competing with a former employer must be reasonable to be enforceable. A non-compete agreement is reasonable if: (1) its restrictions are not greater than that which is required to protect the employer, (2) it does not impose an undue hardship on the employee, and (3) it is not injurious to the public. *Id.* at paragraph two of the syllabus.

{¶ 16} Here, the trial court did nothing but enforce the terms of the agreement signed by Stoner to block Stoner from opening competing businesses in nine counties in North Carolina and two counties in South Carolina. The territory covered in the preliminary injunction is specifically defined by county name. The period of time in which Stoner cannot compete is relatively narrow, namely two years. The terms are not overly broad.

{¶ 17} Stoner argues the preliminary injunction is too broad for another reason. He argues that it imposes restrictions on him beyond what the parties agreed to in the Agreement of Owners of Franchise. Stoner argues that the restrictions should apply only to Salon Lofts Franchising and that the trial court improperly extended the restrictions to cover Salon Lofts as well. Thus, he claims the restrictions contained in the preliminary injunction should be limited to Salon Lofts Franchising.

{¶ 18} Stoner had a separate employment agreement with Salon Lofts that contained additional non-compete restrictions for a two-year period. The trial court decided the preliminary injunction on the basis of the Agreement of Owners of Franchise and remarked that the record was not sufficiently developed to allow him to consider or take action regarding the separate employment agreement. Thus, the trial court stated

that it considered the franchise agreement as the basis for the preliminary injunction, and not Stoner's employment agreement with Salon Lofts.

{¶ 19} Salon Lofts owns and operates Salon Lofts Franchising. As a practical matter, one cannot separate the presence of Salon Lofts from Salon Lofts Franchising. Whether Salon Lofts opens a corporate store or a franchise, without the injunction Stoner would be in direct competition for store locations, and against the Salon Lofts business model and all it entails.

{¶ 20} There was conflicting testimony on the issue of whether Salon Lofts had abandoned franchising efforts in Charlotte, North Carolina. James Holland testified by way of deposition that he was hired by Salon Lofts in 2009 to establish the Salon Lofts franchise program. When Holland left Salon Lofts in December 2010, he testified that he had a conversation with Sadd in which Sadd told him he had made a deal with another financial partner, and he was going to abandon the franchise model to focus on the more profitable corporate stores. Sadd categorically denied having any such deal.

{¶ 21} There was testimony on the record that Salon Lofts never closed out the idea of franchising, and that Sadd continued to meet and go on trips with potential franchisees. He testified that he planned to open stores in Charlotte, and they could be corporate stores or they could be franchises. Thus, even if Salon Lofts is removed from the equation, Stoner is still restricted from competing with Salon Lofts Franchising. The trial court did not abuse its discretion in so ordering.

{¶ 22} Counsel for Stoner argues that the agreement is unenforceable for lack of consideration and a material breach of its obligations, especially an alleged failure of Salon Lofts and Salon Lofts Franchising to provide him an operations manual and training.

{¶ 23} The Supreme Court of Ohio has held that "[c]onsideration may consist of either a detriment to the promisee or a benefit to the promisor." *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786, ¶ 16. *See also Gates v. Praul*, 10th Dist. No. 10AP-784, 2011-Ohio-6230 (consideration is the bargained for legal benefit and/or detriment). Here, under the Agreement of Owners of Franchise, the franchisees received the right to develop and operate a number of Salon Lofts stores as set

forth in another document, the Development Schedule. Therefore, the agreement is not void for lack of consideration.

{¶ 24} More specifically with respect to the manual, the evidence presented at the hearings supported a finding that a web portal to a current draft of an operations manual was provided. A hardcopy was offered, also. Stoner was still general counsel for Salon Lofts at the time he signed the franchise agreements and, as such, had complete access to the company's documents. Much of the draft of the operations manual made available to him involved his particular areas of expertise, namely real estate matters. The trial court was well within its discretion to find no material breach of contract with respect to an operations manual. Further, the parties expressly agreed that a breach of one part of the franchising agreement did not make the other portions of the agreement unenforceable.

{¶ 25} Counsel for Stoner also argues that Salon Lofts and Salon Lofts Franchising failed to provide required training. Ironically, until his employment was terminated, Stoner was supposed to conduct a significant portion of the training, especially with respect to real estate matters and leases. More importantly, Jeffrey Wilkins, Stoner's partner with respect to the franchising through Buckheel Investments, LLC, expressly told personnel with Salon Lofts and Salon Lofts Franchising that all communication, including communication with respect to franchising, was to be put on hold. Wilkins expressed this in an e-mail to his sister Lisa Wilkins Doran, who was the director of operations at Salon Lofts. The fact Stoner and Wilkins did not receive training did not relieve them of the obligation to refrain from competing with Salon Lofts and Salon Lofts Franchising.

{¶ 26} Counsel for Stoner argues, under the heading of a violation of public policy and Ohio law that Section 2(K) in the Agreement of Owners of Franchise makes the agreement unenforceable. Section 2(K) referenced above reads:

The existence of any claim or cause of action which any party may have against Franchisor, whether based on this Agreement, its termination or any other cause, shall not constitute a defense against the enforcement by Franchisor of any of the covenants of this Section.

{¶ 27} Such a severability provision is common in contracts of all sorts and does not make such contracts illegal. *See e.g., Society Natl. Bank v. Duffy*, 8th Dist. No. 65246 (Apr. 21, 1994) (cognovits guaranty); *Woodhill Supply Co., Inc. v. Temple*, 8th Dist. No.

56119 (Nov. 16, 1989) (covenant not to compete); *Myers Servs., Inc. v. Costello*, 5th Dist. No. CA-917 (June 26, 1989) (covenant not to compete).

{¶ 28} Counsel for Stoner argues that even if the non-competition agreement is enforceable, Salon Lofts Franchising failed to establish actual or threatened irreparable harm. Stoner negotiated at least three leases for sites in Charlotte, North Carolina that would be Salon Lofts type facilities and in direct competition with Salon Lofts and Salon Lofts Franchising. Moreover, Stoner, as general counsel for Salon Lofts, was privy to all the confidences and secrets of the business and of Salon Lofts Franchising established while he served in that role. Barring Stoner from revealing those confidences and secrets was certainly a reasonable precaution for the trial court to take. The preliminary injunction was correct to include such a provision.

{¶ 29} Finally, counsel for Stoner argues that Salon Lofts and Salon Lofts Franchising had given up on efforts to develop the Charlotte, North Carolina area. As a result, counsel argues that Salon Lofts and Salon Lofts Franchising had no risk of irreparable harm if Stoner violated the terms of his agreement not to compete.

{¶ 30} Testimony presented at the evidentiary hearing indicated that both companies had an ongoing interest in developing the Charlotte, North Carolina area for Salon Lofts. The trial court could find such testimony credible, especially since Charlotte, North Carolina is a major metropolitan area. Any business could be seen as profiting from involvement in such a populous region. If Stoner opened Salon Lofts-type businesses and cornered the market before Salon Lofts and/or Salon Lofts Franchising could find a substitute for Stoner in developing the area, the Salon Lofts entities would be permanently damaged.

{¶ 31} On review, none of the issues submitted on Stoner's behalf for barring a preliminary injunction demonstrated that the trial court erred. The first assignment of error is overruled.

{¶ 32} We can find no basis for finding that the trial court erred in choosing the amount of the bond. In Ohio, the Supreme Court set forth the general test for the recovery of lost profits in *Charles R. Combs Trucking, Inc. v. Interntl. Harvester Co.* 12 Ohio St.3d 241 (1984), at paragraph two of the syllabus:



Lost profits may be recovered by the plaintiff in a breach of contract action if: (1) profits were within the contemplation of the parties at the time the contract was made, (2) the loss of profits is the probable result of the breach of contract, and (3) the profits are not remote and speculative and may be shown with reasonable certainty.

{¶ 33} In expounding upon the third prong of the test enunciated in *Combs*, the Supreme Court of Ohio held:

In order for a plaintiff to recover lost profits in a breach of contract action, the amount of the lost profits, as well as their existence, must be demonstrated with reasonable certainty.

*Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65 (1988), syllabus.

{¶ 34} Stoner's assertions that he has spent huge sums of money in preparation for entering the Charlotte market does not mean that those sums will ultimately go to waste. He is barred from competing for two years, not forever. Further, his prospects for a favorable result in overturning the trial court's rulings about his ability to compete are remote.

{¶ 35} The second assignment of error is overruled.

{¶ 36} Both assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

*Judgment affirmed.*

BRYANT and KLATT, JJ., concur.

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