w/o o/a or?

IN THE SUPREME COURT OF FLORIDA

THOMAS R. CAPRARO,

Defendant/Petitioner,

v.

LANIER BUSINESS PRODUCTS, INC.,

Plaintiff/Respondent.

CASE NO. 65,125

ON PETITION FOR DISCRETIONARY REVIEW OF THE DECISION OF THE FLORIDA FOURTH DISTRICT COURT OF APPEAL

ANSWER BRIEF ON THE MERITS OF PLAINTIFF/RESPONDENT, LANIER BUSINESS PRODUCTS, INC.

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STATEMENT OF FACT

Respondent disagrees with Petitioner's Statement of Facts and therefore submits its' own statement of facts.

Petitioner was employed by Respondent pursuant to a written employment agreement. The Employment Agreement contained a provision that Petitioner, for a period of one (1) year after termination of his employment, would not directly or indirectly, demonstrate or sell in the territory, products or services that were competitive with Respondent's products. The Contract defined "territory" as Broward, Palm Beach, Okeechobee, Martin and Indian River Counties. The "products" were defined in the Contract as text editing, dictating, telephone answering and computer products. (A 1-4)

The Petitioner resigned his employment with Respondent in August of 1983, and began working for Wang Laboratories, Inc. shortly thereafter. (A 46-55). The Petitioner worked out of an office in Palm Beach Gardens, Florida, in the same territory he had when he was employed by the Respondent. (A 46-55) The Petitioner was selling small, moderate and large data processing systems that competed directly with the products sold by the Respondent. Specifically, if a customer purchased the Wang equipment from the Petitioner, there would not be a need for the customer to purchase the Respondent's word processing equipment. (A 60-61)

The Petitioner, after he left Respondent's employ, began to call on customers that he solicited while he was employed by Respondent. Peter Vasil, the Director of Purchasing for Good Samaritan Hospital, testified that the Petitioner had originally attempted to sell him Lanier equipment. Later the Petitioner sent him a letter which stated he now sold Wang equipment, which was superior to the Lanier equipment and he now wanted an opportunity to demonstrate the Wang equipment. (A 26-32). The facts are undisputed that the Petitioner was contacting potential customers through leads he obtained while he worked for the Respondent for the purpose of selling equipment that competed with the Respondent's equipment and using as a sales technique a comparison in contrast between the Lanier equipment and Wang equipment.

The Respondent sent a letter to Petitioner demanding that he comply with the terms and conditions of his Employment Agreement and stop selling products which competed with the Respondent's equipment. (A 13). The Petitioner failed to comply with the Respondent's request and a complaint was filed seeking injunctive relief for damages. (A 1-4). The Petitioner was also served with a Notice of Application for Temporary Injunction, which set forth the date, time and place the Respondent would seek to obtain a temporary injunction enjoining Defendant from continuing to work for Wang Laboratories, Inc. or any other competitor of the Respondent. (A 5).

ARGUMENT

The Petitioner contends that the temporary injunction should not have been granted since there was no clear proof of resulting irreparable injury. The Fourth District Court of Appeal rejected this same argument and cited the case of Silvers v. Dis-Com Securities, Inc., 403 So.2d 1133 (4DCA, 1981) for the proposition that in cases involving actions for injunctive relief against one that violates a covenant not to compete, proof of irreparable injury is unnecessary because irreparable injury is presumed. Capraro v. Lanier Business Products, Inc., (4DCA, 1984) 445 So2d 719.

Petitioner relies on the case of Uni-Chem Corp. of Florida, Inc. v. Maret, (3DCA, 1976) 338 So.2d 885 to support his contention that proof of irreparable injury is required to support a claim for injunctive relief against one who violates a convenant not to compete. In Uni-Chem Corp. of Florida v. Maret, id. the Court's holding was that it would affirm the discretionary right of a chancellor to decline to enter a temporary injunction. The Court in dicta stated that upon proof of a valid covenant not to compete, the statutory provisions of Section 542.12 Fla. Stat. does not negate the necessity of a showing of irreparable harm as a prerequisite to the granting of a temporary injunction. The Court in Uni-Chem Corp. of Florida, Inc. v. Maret, id. cited as authority for the holding the case of Wilson v. Sandstrom (Fla, 1975) 317 So.2d 732 which did not

involve injunctive relief based on a covenant not to compete in an employment contract. Therefore, the holding in the case of Capraro v. Lanier, supra. does not conflict with the holding in Uni-Chem Corp. of Florida v. Maret, supra. The law in Florida is that proof of irreparable injury is unnecessary because irreparable injury is presumed in cases involving breach of convenants not to compete.

The Petitioner next argues that because he disputed the validity of the Contract in his pleadings and presented proof at the Evidenciary Hearing to support his affirmative defenses of fraudulent inducement, unclean hands, lack of equity, and lack of consideration the temporary injunction should have been denied. The Trial Court reviewed the pleadings and heard the testimony of the witnesses and in the Court's discretion, made a factual determination that the covenant not to compete should be enforced. Even where the validity of the Contract is placed in dispute, a Judge may at his discretion grant a temporary injunction. Hollender v. S.R.F., Inc., (4DCA, 1975) 321 So.2d 627. When a party alleges the existence of a Contract, the intentional, direct and material breach of that agreement, and the lack of an adequate remedy except by injunctive relief, and when these allegations are supported by evidence, they are sufficient to obtain a preliminary injunction. Sattellite Industries v. Grace Statz (4DCA, 1983) 437 So.2d 222.

Petitioner also argues because there was no showing of harm to Respondent, the Court failed to weigh the competing

interest of Petitioner and Respondent and for that reason the temporary injunction should not have been granted. Again, the rule of law in the state of Florida is that irreparable injury in an action for breach of a covenant not to compete is presumed and therefore it is not necessary to prove irreparable injury. Silvers v. Dis-Com Securities, Inc., supra.

Once the Court has determined the Contract of Employment to be valid, the Court must then determine if the non-compete provisions are reasonable. The Court employs a balancing test to weigh the employer's interest in preventing the competition against the oppressive effect on the employee. Miller Mechanical, Inc. v. Ruth (Fla, 1974) 300 So.2d 11. In the present case, while Petitioner worked for Respondent only in Palm Beach County, the clause prohibited him from competing in a five county area. The contract showed that this area was controlled by a central office in Fort Lauderdale. Petitioner, through this office, could have had access to information relevent to any of these counties. Thus, it was reasonable to exclude him from these counties. Furthermore, Petitioner's clause was limited to specific product lines. These lines were so closely related that Petitioner might have had access to information about any of them. Therefore, the trial court's implied ruling that the scope of the clause was reasonable should not be disburbed. The restrictive provisions were therefore reasonable and enforceable as to time, area and product line. Auto Club Affiliates, Inc. v. Donahey, (2DCA, 1973) 281 So.2d 239; Capelouto v. Orkin Exterminating Company of Florida, (Fla, 1966) 183 So.2d 532.

Petitioner next argues that the injunction does not comply with Florida Rules of Civil Procedure 1.610 (d). The Final Order describes in detail exactly what acts Petitioner is restrained from committing and also states that Petitioner was in violation of his Employment Agreement with Respondent because of his present employment. Therefore, the Final Order complies with Florida Rule of Civil Procedure 1.160 (d) because it states the reason for the entry of the order and the act or acts to be restrained. See Capraro v. Lanier Business Products, Inc. (4DCA, 1984) 445 So.2d 719; Silvers v. Dis-Com Securities, Inc. (4DCA, 1981) 403 So.2d 1133.

The final argument of the Petitioner is that the temporary injunction is over-broad as to time and territory. Covenants not to compete may be determined to be reasonable as it is necessary to protect the interest of the employer without doing harm to the public and without inflicting any unduly harsh or oppressive result on the employee. Auto Club Affiliates, Inc. v. Donahey (2DCA, 1973) 281 So.2d 239. The trial court after, after having heard argument and reviewd the testimony, made a determination that a restrictive covenant of one year for Broward, Palm Beach, Okeechobee, Martin or Indian River Counties for text editing, dictating, telephone answering or computer products was not unreasonable. This final order should not be disturbed because there has been no showing of an abuse of discretion by the trial court.

CONCLUSION

The Respondent alleged and proved the existence of an employment contract containing a covenant not to compete and the intentional, direct and material breach of that agreement by the Petitioner and the lack of an adequate remedy of law except by injunctive relief. Additionally, the time and area that the Respondent sought to enforce the covenant not to compete was reasonable and was necessary to protect its economic interest without doing undue hardship or burden to the petitioner.

It is therefore respectfully requested that the decision of the Appellate Court should be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to EDWARD A. MAROD, ESQ., Gunster, Yoakley, Criser & Stewart, P.A., Attorneys for Appellant, P. O. Box 71, Palm Beach, Florida, 33480, this 3RD day of December, 1984.

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By: _____
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