w/o o/a

IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,125

THOMAS R. CAPRARO,

Defendant/Petitioner,

vs.

LANIER BUSINESS PRODUCTS, INC.,

Plaintiff/Respondent.
_____/

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

REPLY BRIEF ON THE MERITS OF DEFENDANT/PETITIONER, THOMAS R. CAPRARO

EDWARD A. MAROD, ESQ.
GUNSTER, YOAKLEY, CRISER &
STEWART, P.A.
Counsel for Defendant/Petitioner
Post Office Box 71
Palm Beach, Florida 33480
(305) 650-0545

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Cases

Statutes and Rules

Secondary Authorities

ARGUMENT

The Answer Brief on the Merits of Plaintiff/Respondent, Lanier Business Products, Inc. ("Lanier") gives new vitality to the phrase "beg the question". As to each issue on appeal identified in the Initial Brief on the Merits of Defendant/Petitioner, Thomas R. Capraro ("Capraro"), Lanier merely recites or paraphrases the holding of the Fourth District Court of Appeal, sub judice. Presumably, Lanier has nothing to add to the reasoning of the Fourth District Court of Appeal. Thus, Capraro herein, only briefly replies to Lanier's Answer Brief.

I. LANIER FAILS TO JUSTIFY A PRESUMPTION OF IRREPARABLE HARM AND INADEQUATE REMEDY IN NON-COMPETE CASES

Lanier makes no argument which supports the holding of the Fourth District Court of Appeal that the time-honored rules of the courts of the State of Florida with respect to proof of irreparable harm and inadequate legal remedy in cases seeking temporary restraining orders, preliminary injunctions, or "temporary injunctions" should be suspended "in cases involving violation of a covenant not-to-compete or not to divulge trade secrets", as mandated by Silvers v. Dis-Com Securities, Inc., 403 So.2d 1133 (Fla. 4th D.C.A. 1981) at 1136. Lanier's failure to make any such argument supports by negative inference Capraro's argument that there is no legitimate reason for suspending the normal rules with respect to such cases. Capraro submits that not only is there no legitimate reason for suspending such rules, but also that cases involving valid covenants not-to-

compete and valid agreements not to disclose trade secrets are more amenable to proof of imminent irreparable harm and the absence of an adequate remedy at law than are most other injunction cases.

For example, an insurance agency which depends for its livelihood upon the development of good will between it and its customers and which must "resell" each of its customers on a relatively frequent periodic basis, and which must in the course of its business permit its agents to learn the identities of its customers, learn the needs of its customers, and share in the good will which it has developed with its customers, could by proof of those facts establish a bona fide interest in preventing its agents from going into competition with it after leaving the employment of the agency. By then establishing the fact that a former agent had executed an agreement not to compete with the insurance agency within the territory served by the insurance agency for a period sufficient to permit the agency to re-solidify its relationships with its existing customers and proof of the further fact of attempts by the agent to call upon those customers during the term of the non-competition agreement could establish a prima facie case of equities favoring the employer. Finally, by establishing that historically customers continue to deal with the agency unless lured away and that customers tend to do varying amounts of business with the agency each year depending upon their particular needs (hence rendering the prospective profits of the agency from any

particular customer incapable of accurate estimation) the agency could show the likelihood of irreparable injury and inadequate remedy at law from violation of the agreement.

Likewise, if the insurance agency could show that it had particular compilations of information which were for use, or used, in the operation of the agency business which provided the business with an advantage or an opportunity to obtain an advantage over those who do not know it or use it, which it took measures to prevent from becoming available to persons other than those selected by it to have access for limited purposes (including any list of suppliers, list of customers, business code, or improvement thereof), which information was made known to each of its agents to assist them in obtaining business for the agency, imminent irreparable harm and inadequate legal remedy could easily be found.

Proof of each of these facts would be uniquely available to the plaintiff seeking to enforce the covenant not-to-compete. Such would not be the case in many, if not most other sorts of injunctive proceedings where proof of the basis of the claim must necessarily come from a defendant or third party witnesses.

Thus, the holding of the Fourth District Court of Appeal, sub judice, and in Silvers v. Dis-Com Securities, Inc., supra, is unjustified. The effect of these holdings is to elevate the form of standard "boilerplate" non-competition agreements above the substance of the true employer/employee relationship. In other fields, the courts of Florida, including the Fourth District

Court of Appeal, uniformly refuse to elevate form over substance. This Court should not permit form to be elevated above substance in this type of case.

II. LANIER FAILS TO REBUT THE NECESSITY OF A CLEAR CASE IN INJUNCTION CASES

Lanier does not argue in opposition to Capraro's reliance upon Dade Enterprises, Inc. v. Wometco Theatres, Inc., 119 Fla. 70, 160 So. 209 (1935), except to cite Hollender v. S.R.F., Inc., 321 So.2d 627 (Fla. 4th D.C.A. 1975) and Sattellite Industries v. Grace Stutz, 437 So.2d 222 (Fla. 4th D.C.A. 1983). Neither case even purports to negate Dade Enterprises. Moreover, the holding in both cases are clearly distinguishable from the holding in Dade Enterprises, supra.

Neither the decision in Hollender, supra, nor the decision in Sattellite Industries, supra, discloses what was proven by the plaintiff at the hearing on the application for preliminary injunction which was the subject of the decision. However, the Hollender decision suggests the only defense raised was "no consideration for the execution of the restrictive agreement." 321 So.2d at 627. That is a substantially different situation from the situation presented in the Dade Enterprises holding where every matter raised was challenged both by pleading and proof. Moreover, as appears from the case of Tasty Box Lunch, Inc. v. Kennedy, 121 So.2d 52 (Fla. 3d D.C.A. 1960), consideration sufficient to support an agreement not-to-compete may be found from the mere continuation of employment of the former employee by the former employer after the execution of the

non-competition agreement. Thus, the difference between Dade Enterprises and Hollender is the difference between night and day.

Similarly, in Sattellite Industries, supra, the Court held:

> "... After a thorough review of the record in this case, we can find nothing to support the denial of the preliminary injunction, and appellee has failed to specifically point out the basis for the ruling. ..."

437 So.2d at 223. Again, this is hardly equivalent to the case described in Dade Enterprises, supra, where all claims were opposed by pleading and proof. Likewise, in the case at bar there is plenty to be found in the record of the hearing on the application for temporary injunction supporting a denial of the application and almost nothing supporting the granting of the application.

Furthermore, the Sattellite Industries case, supra, does nothing more than restate the position of the Fourth District Court of Appeal in Silvers v. Dis-Com Securities, Inc., supra, and Hunter v. North American Biologicals, Inc., 287 So.2d 726 (Fla. 4th D.C.A. 1974), which are the target of Capraro's first argument in this appeal. Obviously, if Silvers, supra, and Hunter, supra, are overruled, Sattellite Industries, supra, has no further precedential value in that regard.

The tension between Dade Enterprises, supra, and the case sub judice, on the one hand and Hollender and Sattellite

Industries, on the other, is found only if the decisions are misconstrued. The doctrine that each injunction case must stand on its own peculiar facts is common to all four cases. Dade Enterprises, supra, and the case at bar are representative of one extreme of the possible spectrum of combinations and permutations of facts which can be involved in an injunction case. Both present situations where each and every point made by the plaintiff was contested by the defendant by pleading and proof. Hollender, supra, and Sattellite Industries, supra, fall at almost the opposite end of the spectrum where one issue is contested by the defendant but little or no record evidence can be found contrary to the decision of the chancellor. Thus, Hollender, supra, and Sattellite Industries, Inc., supra, do not rebut Capraro's argument based upon Dade Enterprises, supra.

As an aside, Capraro notes that, although it is not obvious from the published decision of the Fourth District Court of Appeal in Silvers v. Dis-Com Securities, Inc., supra, that case, too, fell at the extreme opposite end of the spectrum from Dade Enterprises, supra, and the case sub judice. A review of the transcript of the hearing before the trial court in the Silvers case [which was part of the record on appeal in the Silvers case] shows that Dis-Com Securities, Inc., convincingly proved both imminent irreparable harm and the absence of an adequate remedy at law and there was no contrary proof. Rather, the defendant, Silvers, merely argued that it would not be fair

to her to enforce the covenant not-to-compete which she admittedly signed and did not challenge on contractual, statutory or common law grounds. Thus, the factual setting underlying the Silvers decision did not, in any way, support the published opinion. Rather the Silvers case could have been affirmed, per curiam, based upon the record evidence. Instead, however, the Fourth District Court of Appeal, for some reason not evident in the record or the decision in Silvers, decided to promulgate in its decision the new rules of "presumption of inadequate remedy" and "presumption of imminent irreparable harm" which formed the basis of the decision of the trial court, sub judice, and, probably, numerous other trial courts in the Fourth Appellate District of Florida since the date of its promulgation. It is this aberration which Capraro prays this Court will eliminate.

III. LANIER FAILS TO SHOW THE TRIAL COURT WEIGHED THE COMPETING INTERESTS

Lanier further fails to respond to Capraro's argument that the trial court, sub judice, could not have properly weighed the competing interests of Lanier, Capraro, and the public, because there was no evidence of any legitimate interest of Lanier which could be protected only by enforcement of the covenant not-to-compete. Rather, Lanier falls back upon the Silvers case and repeats its incantation that "it is not necessary to prove irreparable injury in non-compete cases." This argument

clearly misapprehends the thrust of Capraro's argument that there was no evidence whatever of any injury (much less irreparable injury) to Lanier.

Further, Lanier's reliance upon the stated rationale of the Fourth District Court of Appeal, sub judice, that the five county area described in the covenant not-to-compete "was controlled by a central office in Ft. Lauderdale" and that Capraro "through this office, could have had access to information relevant to any of these counties" thus rendering it reasonable to prevent him from competing in those counties, both misses the point and raises a "red herring". The citation of Miller Mechanical v. Ruth, 300 So.2d 11 (Fla. 1974) in connection with the absence of proof of any injury argument is not in support of an argument that the georgraphical scope of the non-compete covenant was unreasonable. Rather, that particular citation of the Miller Mechanical decision was and is in support of the proposition that the Court must weigh the employer's interest against the employee's interest in every non-compete case, thus, inferentially supporting the proposition that proof of the existence of an interest in the employer is necessary in every non-compete case. As discussed, supra, there was no such proof in this case. Rather, all of the proof suggested Lanier had no interest in preventing competition by Capraro other than spite or vindictiveness.

In addition, although the hypothesis of the Fourth District Court of Appeal, sub judice, to the effect that Capraro "could have had access to information relevant" to any of the five counties because of his work from a central office in Ft. Lauderdale appears facially reasonable, the fact of the matter is that Lanier's own representative testified that all information provided to Capraro during the course of his employment was intended by Lanier to be disclosed to the public. That being the case, whether Capraro learned information relevant to a five square block area, a five county area, a five state area, or a five country area, could not support the enforcement of the instant non-compete agreement against Capraro. The fact is that the evidence at the hearing, sub judice, established that Lanier had no interest whatever in enforcing the non-compete agreement, thus, rendering the order granting the application for temporary injunction wrongful.

IV. LANIER FAILS TO SHOW THE ORDER APPEALED SPECIFIES ITS REASONS FOR ENTRY

Lanier, likewise, does not rebut Capraro's arguments with respect to the failure of the order granting the application for temporary injunction to comply with Fla.R.Civ.P. Rule 1.610(d). Capraro does not contest the level of detail in the restraining portion of the temporary injunction, sub judice. Rather, only the level of detail of the reasons for entry is challenged. The rule requires the Court to "specify the reasons for entry".

Capraro submits, as argued in his initial brief on the merits in the instant appeal, that the "reasons for entry" contained in the order appealed from are not "specified". Capraro would merely note the word "specify" is defined as follows:

> "1. Intr. To speak or make relation of some matter fully or in detail. Obs.
>
> * * *
>
> 2. Trans. To mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate in detail. Usually said of persons, but sometimes of an act, document, etc." [emphasis added].

The Compact Edition of the Oxford English Dictionary, Oxford University Press, Walton Street, Oxford, England OX2 6DP (1980) at page 2950. Capraro submits the order appealed from does not meet even this commonly understood standard, much less the legal standard described in the initial brief. See also, P. Carrington, D. Meador, and M. Rosenberg, Justice on Appeal (1982) at 31-32; Reynolds & Richman, An Evaluation of Limited Publications in the United States Courts of Appeal, 48 U. Chi. L.Rev. 573 (1981) at 603.

V. LANIER FAILS TO SHOW THE SCOPE OF THE AGREEMENT WAS REASONABLE

Finally, Lanier does not rebut Capraro's arguments that the geographical and temporal scope of the covenant not-to-compete is unreasonable. Rather, Lanier merely restates the standard,

states that the trial court made a determination that a restrictive covenant of one year for Broward, Palm Beach, Okeechobee, Martin, and Indian River Counties for text editing, dictating, telephone answering, and computer products was not unreasonable, and asserts that this finding should not be disturbed because there has been no showing of an abuse of discretion by the trial court. Unfortunately, as noted above, there was no "determination" by the trial court that such a restrictive covenant was not unreasonable. This fact can be extracted both from the order itself and from the transcript of the hearing which resulted in the entry of the order. The order is silent on this question and the transcript shows that first, the trial court merely extracted the language from the contract without considering whether the provisions of the contract were "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" and second, that there was absolutely no evidence in the record that the Court could have relied upon in making such a determination. Capraro submits nothing further need be shown to justify reversal of the decision of the Fourth District Court of Appeal and the trial court, sub judice.

CONCLUSION

For the reasons set forth above and for the reasons set forth in the Initial Brief of Capraro in this appeal, the Court

should reverse the order granting the temporary injunction, quash the order of the Fourth District Court of Appeal affirming the order granting the temporary injunction, and remand the case for the sole purpose of proceedings with respect to the bond posted by Lanier as a condition of the temporary injunction order.

RESPECTFULLY SUBMITTED.

GUNSTER, YOAKLEY, CRISER & STEWART
Post Office Box 71
Palm Beach, Florida 33480
(305) 650-0545
Attorneys for Defendant/Petitioner

By: Edward A. Marod
EDWARD A. MAROD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to BRUCE ZEIDEL, ESQ., P.O. Box 13146, North Palm Beach, Florida 33480, this 7th day of December, 1984.

By: Edward A. Marod
EDWARD A. MAROD