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SUPREME COURT
STATE OF FLORIDA

CASE NO. 84,184

On Appeal from District Court of Appeal, Fifth District of Florida L.T. Case No. 93-02461

JOSEPH GUPTON,

Petitioner

vs.

VILLAGE KEY AND SAW SHOP, INC.

Respondent.

~~AMENDED~~ ANSWER BRIEF

DAVID M. ANDREWS
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FLA BAR #0141061

The Respondent hereby amends its answer brief by appending hereto Appellants Initial Brief (App. A) and Appellants Reply Brief (App. B) filed by the Respondent in the Fifth District Court Appeal. This amendment is pursuant to directions of the Supreme Court dated February 16, 1995.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Geoffrey B. Dobson, Esquire, 66 Cuna Street, St. Augustine, Florida 32084, by U.S. Mail, this 2nd day of March, 1995.

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A

IN THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT, STATE OF FLORIDA

CASE NO: 92-1468-CA

VILLAGE KEY & SAW SHOP, INC.,

Plaintiff/Appellant,

vs.

JOSEPH GUPTON,

Defendant/Appellee.

An Appeal from the Probate Court for St. Johns County

APPELLANT'S INITITAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

PREFACE

Plaintiff/appellant shall be referred to as Buyer.

Defendant/appellee shall be referred to as Seller.

Record on Appeal = (R-)

Transcript = (T-)

POINT ON APPEAL

THE TRIAL COURT ERRED BY FAILING TO FULLY ENFORCE THE PLAINTIFFS INJUNCTIVE RELIEF

STATEMENT OF CASE

This is an appeal from a final judgement entered in the Seventh Judicial Circuit by the Honorable Richard G. Weinberg. The BUYER filed a complaint (R-1) in the lower court seeking enforcement of a covenant not to compete by way of injunction.

After a trial on this issue, the lower court entered a final judgement finding that the BUYER was entitled "... to limited relief by way of a permanent injunction under the employment contract ..." (R-119), however the court allowed the SELLER to continue to do business in St. John's County and to retain as clients all the people listed in paragraph D of the final judgement.(R-119, page 3) These were clients that were included in a "customer list" conveyed by SELLER TO BUYER and that were continuing to do business with BUYER prior to SELLER's departure. After SELLER voluntarily terminated his employment with BUYER a number of those clients then became clients or customers of SELLER.

The issue for the Appellate Court to consider is whether the trial court aired in granting "... limited relief by way of permanent injunction..." which in effect was not a full and complete enforcement of the agreements signed by BUYER and SELLER when BUYER purchased SELLER's locksmith and alarm business. At that time SELLER entered into an employment agreement which included a valid enforceable non-compete provision.

STATEMENT OF FACTS:

In May of 1989, BUYER and SELLER agreed that BUYER would purchase SELLER's alarm and locksmith business . (T-15, Line 24 et seq.)

BUYER subsequently retained the services of an attorney to prepare (T-16, Line 22,23) the appropriate documents which were the bill of sale, promissory note, and employment agreement copies of which were attached to the complaint as exhibits (R-1), and were entered into evidence at trial.(R-79, Plaintiff's composite Exhibit #1). No contract for sale and purchase was ever signed.

The basic terms of the agreement were that BUYER would (1) pay off outstanding debts of SELLER's,(T-48, Line 13-21) (2)execute a promissory note to SELLER in the amount of $30,000,(T-48, Line 13-21) and (3)place SELLER on it's staff pursuant to the terms of the employment agreement.(T-55, Line 1,2)

SELLER would (1) convey all of its assets,(T-50, Line 19 thru Line 1 on Page T-51) (2) become an employee of BUYER and (3) provide a non-compete provision for St. Johns County for a period of five(5) years. The SELLER acknowledged the execution and understanding of the non-compete provision while trying to restrict its time limitation to three years.(T-93, Line 15)

SELLER conveyed to BUYER a list of it's accounts(T-19,Line 1-8), as well as a list of it's liabilities(R-93), copies of which are also attached to the complaint (R-1), and which were admitted into evidence as Plaintiff's composite Exhibit #1.(R-79)

After the execution of all the necessary documents BUYER immediately began satisfying SELLER's outstanding liabilities and servicing the accounts that were sold to BUYER.(T-48, Line 13 et seq.). The contract of employment included a non-compete provision whereby SELLER agreed "...Not directly or indirectly engage in competition with the employer...in St. John's County Florida for a period of five years after the date of termination of his employment." The agreement further provided that "...the employer shall be entitled to such equitable and injunctive relief...as may be available to restrain the employee from the violation of the provision here of."(R-79)

SELLER voluntarily terminated his employment with BUYER in June of 1992. (T-62, Line 15). SELLER began engaging in direct and indirect competition with BUYER, in St. John's County, Florida, either individually through solicitation of prior customers, or as a employee or agent of National Guardian Alarm Company. The fact of this competition and solicitation is evidenced by the SELLER'S response to the BUYER'S interrogatories admitted to evidence(R-100). The SELLER admitted he was in business in St. Johns County(Question #2), servicing customers that were conveyed to BUYER(Question #4 & 15), admitted execution of the employment agreement with the non-compete

provision(Question #8), admitted the existence of the accounts payable paid by BUYER(Question #11), admitted solicitations of old customers(Question #16). The SELLER also admits doing work in St. Johns County, which was by definition in competition with BUYER'S business(T-104. Line 12, "...I did First Union here") and reconfirmed solicitations by SELLERS testimony(T-108, Line 5 thru 9). After SELLER left BUYER, the BUYER began to lose accounts for which it had paid as well as accounts through direct competition, to SELLER. (T-62 thru t-74) As a result of these actions BUYER was irrefutably damaged and harmed because of the loss of income (T-74-76). BUYER filed his statement of claim seeking an injunction to enforce the non-compete provisions of the employment agreement against SELLER.

As a result of the courts final judgement the plaintiff has been left in the position of:

1) satisfying SELLER's liabilities

2) employing SELLER for a period of approximately three years and there-by providing employment to SELLER

3) having continuing liability on the promissory note.

SELLER is now allowed to continue to compete with BUYER in St. John's County, taking back accounts that were on SELLER's original customer list as well as providing additional competition to BUYER in obtaining new business.

The judgement of the trial court is correct in its reporting of the facts <u>except</u> the appellant believes that the SELLER did directly solicit former customers and does compete with BUYER in

St. Johns County Florida as previously shown.

SUMMARY OF ARGUMENT:

BUYER has met all of the elements necessary to enforce an injunction pursuant to the statutory requirements spelled out in Fla. Statute Section 542.33. These elements were examined and carefully defined in the case of HAPNEY v. THE CENTRAL GARAGE , INC. 579 So.2d 127(Fla. 2d D.C.A. 1990).

The trial court has not the right to partially enforce the injunction and is required to fully enforce the provision when the court has made the determination as to the reasonableness of the time and space restrictions.

STATEMENT OF THE ARGUMENT:

It is BUYER's position that the lower court erred in failing to fully enforce, by way of injunction, the non-compete provisions of the employment agreement entered into by SELLER in 1989. The final judgement said that it was granting a permanent injunction by way of limited enforcement. However, in effect, there is no permanent injunction because SELLER has been allowed to enter into lock smithing and alarm business, in competition with BUYER, with the benefit of customers sold by SELLER to BUYER in violation of the parties negotiated agreement. Hence even though the court said it was entering a permanent

injunction, in effect it did not.

The Second District examined this matter in great depth in the Hapney case previously referred to and quoted the Supreme Court of Tennessee for the following rule:

> "In order for an employer to be entitled to protection, there must be special facts present over and above ordinary competition. These special facts must be such that without the covenant not to compete, the employee would gain an unfair advantage in future competition with the employer." (at page 130).

The Second District said "we have no reason to doubt and so determine that the general rule stated above is an integral part of our law which is implied in Section 542.33(2)(a), Fla. Statutes 1989."

The Court then found that there are three existences of legitimate interests of the employer which must be protected and they are:

> "(1) Trade secrets and confidential business lists, records and information; (2) customer good will; (3) to a limited degree, extraordinary or specialized training provided

by the employer."

The Court then found that Statute 542.33 had been amended in chapter 90-216 of the Laws of Florida. At page 134, the Court stated:

"The Statute is therefore remedial and may be applied retrospectively."

Finally, the Court, at page 134, concluded as follows:

"CONCLUSION

We hold (1) a covenant not to compete which prohibits competition per se violates public policy and is void; (2) a condition precedent to the validity of a covenant not to compete entered into by an agent, independent contractor or employee is the existence of a legitimate business interest of the employer to be protected; (3) it is the employer's burden to plead and prove the underlying protectible interest; (4) trade secrets, customer lists, and the right to prevent direct solicitation of existing customers are, per se, legitimate business interests subject to protection; (5) other business interests, such as, but not limited to, extraordinary training or

education, may constitute protectible interests depending upon the proof adduced; and (6) chapter 90-216, section 1, Laws of Florida, shall apply to and control all actions now pending or hereafter commenced."

The BUYER purchased customer business lists, paid a valuable consideration therefore, the SELLER violated the terms of the non-compete agreement by directly soliciting former customers and by negotiating with other similar business in St. Johns County.

Florida statute 542.33 provides that non-compete agreements are valid under certain circumstances. One of those circumstances is when a seller sells the good will of a business and contracts not to compete therewith then a non-competition agreement is enforceable. Under that statute an employee, who was also the seller of a business may be prevented from engaging in a similar business and from soliciting old customers of such employers within a reasonably limited time and area.

The trial court erred by failing to fully enforce the terms of the non-compete agreement the SELLER had entered into. As has been confirmed by several appellate decisions the law in the State of Florida was stated as follows:

"The only authority the court possesses over the terms of a non-competition agreement is to determine reasonableness of the time and

area of limitations." XEROGRAPHICS INC. v. THOMAS, 537 So.2d 140(Fla. 2d DCA 1988)

The principle quoted above has been confirmed in the following cases. HAPNEY v. CENTRAL GARAGE., TWENTY-FOUR COLLECTION INC. v Keller, 389 So.2d 1062 (3rd DCA, 1980), ROLLINGS PROTECTIVE SERVICES, INC. v. LAMMONS,472 So.2d 812(5th DCA,1985) SUN ELASTIC CORPORATION v O.B. INDUSTRIES 603 So.2d 516(3rd DCA, 1992).

The trial court recognized this obligation by quoting SUN ELASTIC CORP. v. O. B. INDUSTRIES. However, by partially enforcing the injunction, the trial court did specifically find the time limitation reasonable and did, by implication(since it did not do so specifically) find the area of the non-compete agreement was reasonable.

The court did not find that the agreement threatened the public health, safety, or welfare.(R-119, Last pagraph of page 3).

It is clear from the reading of this record that when SELLER terminated his employment he engaged in the following actions in violation of the employment agreement: 1) he engaged in the lock-smithing and alarm business in direct competition with BUYER 2) he solicited and obtained business from clients that had been previously sold to BUYER. He engaged in direct competition with BUYER as far as attempting to secure new

business.

Additionally, this was a reasonable covenant in that BUYER paid valuable consideration in the form of a $30,000 promissory note, as well as satisfying outstanding liabilities of SELLER, and providing SELLER with employment for several years. The trial court so found.(R-119) Would BUYER have entered into this transaction if he had known that the SELLER would be soliciting the customer list purchased, or would be in direct competition with the BUYER? I think not. It has been shown time and time again in this particular area, as codified by Statute that when a "deal" meets certain parameters it is an enforcable "deal" and if reasonable, is not to be judged as to whether or not it was a "good deal". Decreasing the number of your competitors through the purchase of a business and its customer lists in conjunction with the execution of a non-compete agreement is a legitimate interest of BUYER and he has and is suffering an ongoing injury caused by competition in violation of a reasonable non-compete covenant. Partial enforcement has provided the SELLER with an unfair advantage.

CONCLUSION

The parties entered into a valid enforceable non-compete agreement, within the statutory parameters, for which valuable consideration was paid. The court failed to fully

enforce said injunction and the trial court should be directed to fully enforce said injunction in full compliance with the agreement.

/s/

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DISTRICT COURT OF APPEAL
FIFTH DISTRICT

300 South Beach Street
Daytona Beach, FL 32114

CASE NO.: 93-02461

VILLAGE KEY AND SAW SHOP, INC.,

Plaintiff/Appellant,

vs.

JOSEPH GUPTON,

Defendant/Appellee.

APPEALED FROM PROCEEDINGS
IN THE CIRCUIT COURT, SEVENTH
JUDICIAL CIRCUIT, IN AND FOR
ST. JOHNS COUNTY, FLORIDA
CIRCUIT COURT CASE NO.: 92-1468 CA

APPELLANT'S REPLY BRIEF

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B

TABLE OF CONTENTS

TABLE OF CITATIONS

DISTRICT COURT OF APPEAL
FIFTH DISTRICT

300 South Beach Street
Daytona Beach, FL 32114

CASE NO.: 93-02461

VILLAGE KEY AND SAW SHOP, INC.,

Plaintiff/Appellant,

vs.

JOSEPH GUPTON,

Defendant/Appellee.

REPLY BRIEF

STATEMENT OF FACTS:

No additional Statement of Facts is required.

SUMMARY OF ARGUMENT:

The Appellee implies that the Appellant received what it asked for. This is not correct. The injunction issued was clearly limited in scope and was not commensurate with the written agreement of the parties. The trial court does not have the authority to rewrite the contract between the parties, but to enforce or deny the agreement between the parties.

As stated in Sun Elastic Corporation vs. O.B. Industries, 603 So. 2d 516 (Fla. 3rd DCA 1992), the Court stated " . . . the cases holding that a trial court is required to enjoin the violation of a non-competitive agreement which is reasonable as to duration and geographical limitations, remains directly applicable and controlling." (Court's emphasis). In support of

that position, the Court then cites twelve (12) cases.

ARGUMENT:

The Appellee's phrasing of the point involved on appeal, could be rewritten as follows:

CAN THE TRIAL COURT REWRITE A NON-COMPETE AGREEMENT?

In Florida Pest Control and Chemical Company vs. Thomas, 520 So. 2d 669 (Fla. 1st DCA, 1998), the Court stated at page 671, "However, when a contract is clear and unambiguous, the Court cannot give it the meaning other than that expressed in it, and cannot rewrite the contract for the parties."

As noted in the Sun Elastic case, the Court has clearly shown that many cases have required the Court to enforce non-compete agreements.

The Appellee, in his discussion of Hapney v. Central Garage, Inc., 579 So.2d 127(Fla. 2d DCA, 1991) implies that all three categories of employer business interests must be present to be protected. This is not correct. The Court stated in the Hapney case at page 131 that there must be " . . . existence of a legitimate interest of the employer to be protected . . ." And, then the Court continues to say, "Generally, three such interests are recognized:"; nowhere does the Court state that all three of those interests must be evident. Any one of the three will sustain a non-competition provision. The fact that the Appellee received his training somewhere else is not denied, it is simply not relevant. The Appellant relies on the fact that its purchase of the Appellee's business included business lists and good will.

Appellee's discussion of the Dorminy vs. Frank B. Hall, Inc. 464 So. 2d 154 (5th DCA 1985) case has no application here. I would point out in the Dorminy case at page 157 the Court said, "Once a covenant not to compete gains the protection of Section 542.33, it is generally enforced as written unless the time and area limitations are found to be unreasonable". Those are the only terms that the Court implies are rewriteable. The court does have the right to examine the reasonableness of the time and distance limitations. That is not the issue here.

The Appellee's statement (Page 6, Line 5) that the Appellant's seeking of a ". . . general broad injunction, . . is excessive." is not applicable. The Appellant has sought the injunction that the parties agreed to in their written documents. The court is required to enforce the terms of that agreement when it finds the time and distance constraints to be reasonable, Sun Elastic.

The Appellee's relegation of the fact that the Appellee "solicited" customers to a footnote certainly attempts to trivialize the fact that the Appellee breached the terms of the employment agreement. This is not an argument over how thoroughly the Appellee reached the agreement, simply that it was a breach.

The Appellee cannot raise the issue of failure to join indispensable parties having not made that an issue on appeal by filing a cross appeal. In addition, the Appellant is attempting to enforce a contract between the parties, and if the court

elects to enforce the provisions thereof, then the breach of the agreement by the defaulting party and its implications to his contractual obligations to third parties is of no consequence to the trial court. The Appellee's position would require, in any contract litigation, after discovery, to include every party that the Defendant had contracted with and presumably would not have contracted with if he had not breached the agreement. I believe that the ultimate outcome thereof is ludicrous.

The term of the injunction is dependent upon the facts and circumstances of each case and there is no case law establishing a "...set time limit...". Appellee's brief, page 7, last paragraph.

The Appellant never sought damages. It is true that there are references in the record and that the trial court made statements to the fact that damages were waived, but the Appellant never asked for damages and so instructed the Court. It is not in the complaint and was never asked for (R-1).

CONCLUSION:

The Appellant, in the purchase of the Appellee's business, granted to the Appellee a Promissory Note which it continues to pay to this date. The Appellant has been ready, willing and able to comply with all of the terms of its commitments, requesting nothing more than an injunction to prevent the Appellee from having his cake and eating it, too.

DAVID M. ANDREWS
Attorney for Plaintiff/
Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Geoffrey B. Dobson, Esquire, 66 Cuna Street, St. Augustine, Florida 32084, by U.S. Mail, this 2nd day of February, 1994.

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