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.

PETITIONER'S BRIEF ON THE MERITS

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I N D E X

Citations of Authorities

Cases — Page(s)

Other Authorities

STATEMENT OF THE CASE AND FACTS

This action is before the Court pursuant to the Court's Order Accepting Jurisdiction dated November 4, 1994 and seeks review of the decision of the District Court of Appeal, Fifth District of Florida, in Village Key & Saw Shop, Inc. v. Gupton, 639 So.2d 101, 1994-1 Trade Cas. (CCH) p.70, 607, 19 F.L.W. (D) 1275 (Fla. 5th DCA 1994), decided June 10, 1994, rehearing den. July 14, 1994, as being in conflict with Hapney v. Central Garage, Inc., 579 So.2d 127 (Fla. 2d DCA 1991), rev. den. 591 So. 2d 180 (Fla. 1991).

The action below was one brought by the Respondent herein, VILLAGE KEY & SAW SHOP, INC., against the Petitioner herein, JOSEPH GUPTON.[1]

The Complaint (R-1), filed August 21, 1992 in the Circuit Court, Seventh Judicial Circuit, in and for St. Johns County, Florida, alleged, among other things, that Village Key and the former employee entered into an employment contract (A-1) on May 1, 1989. Paragraph 11 of the employment agreement provided, among other things:

> *"On termination of employment, whether by termination of this agreement, by wrongful discharge, or otherwise, the Employee shall not directly or indirectly engage in competition with the Employer in the territory and for the period specified in this paragraph. As used in this paragraph, "competition with the Employer" means entering or engaging in*

[1] As used herein the term "Village Key" will refer to the Plaintiff below, Respondent herein, Village Key & Saw Shop, Inc. The term "former employee" will refer to the Defendant below, Petitioner herein, Joseph Gupton. References to the Record on Appeal will be denoted "(R-)" and references to the Appendix to this Brief will be denoted "(A-)."

> *the business of locksmithing or alarm installation, service or monitoring, either individually, as a partner or joint venturer, as an employee or as an agent, officer, director, or shareholder of any entity or person. The Employee acknowledges that the Employer provides services for the residents of St. Johns County and accordingly agrees not to engage in competition with the Employer within the geographical boundaries of St. Johns County, Florida, for a period of five (5) years after the date of termination of his employment hereunder."*

In due course the former employee filed his Answer and Affirmative Defenses, raising as affirmative defenses that the non-competition contract was unenforceable in that it was for an unreasonable period of time; it was for an unreasonable geographic coverage; it was not supported by any consideration or adequate consideration and that it was separate and independent of other provisions of the employment agreement and was, thus, not supportable or valid under Florida law as a part of the employment agreement and that there was a lack of mutuality of contract.

On September 1, 1993, the matter came on for a non-jury trial before the Honorable Richard G. Weinberg, Circuit Judge. In the Final Judgment (A-4) the trial court found that the former employee left his employment on June 30, 1992 and

> "upon leaving the employment, he did not actively solicit the existing customers now being processed by Village Key (Plaintiff). However, a few left Village Key when Defendant left and sought him out for services which he undertook. He also entered into a competing business out of his home, which centered around working locally for a large company which nationally advertised the sale and installation of alarm systems."

The court further found, however,

> "this was not the type of business in direct conflict with Plaintiff. This is because the national company was advertising on their own for their own special security equipment. They only needed a local installer to put in the systems. Most of the Defendant's compensation resulted from this activity. Also, he was required to travel out of county for installations for this company, known as NATIONAL GUARDIAN."

The court further found "There is nothing unique or special about locksmith work" and concluded, based on Florida Statutes 542.33, that an injunction could be entered if "the restriction is against specific trade secrets, customer lists or direct solicitation of existing customers." The court also concluded, however, that "it should not create a restraint that would enjoin Defendant from earning a living. However, this should be fashioned to prevent Defendant from invading customer lists of Plaintiff." and determined that five years from separation from employment "is not unreasonable since the court has invaded (sic) many of the strict terms of the restriction to avoid Defendant from being deprived of a living."

Accordingly, the court adjudged that the former employee was enjoined from "direct solicitation of any of the customers or successors in ownership interest of all customers, firms, business or other entities listed on the Bill of Sale or other transfer documents effective May 1, 1989, signed May 28, 1989 until the termination of this Order."

From that Order Village Key appealed (R-125). In that appeal the District Court of Appeal, Fifth District, determined that because the contract was entered into in 1989, the 1990

amendment to Section 542.33 is not applicable and determined "because the parties failed to bring the pre-1990 version of the statute to the court's attention, the trial court applied the amended version when deciding the case."

The District Court further determined that the trial court "found the restriction generally unreasonable and decided to enjoin the Defendant only from further invading Village's customer lists. Under the 1989 statute "'[t]he only authority the court possesses over the terms of a non-competition agreement is to determine reasonableness of the time and area limitations.'"

Following entry of the District Court Opinion, the former employee moved for re-hearing on the grounds, among other things, that the District Court had misapprehended that the parties failed to bring the pre-1990 version of the statute to the court's attention in that "any error by the trial court in utilizing the post-1990 version of Section 542.33 was induced or invited by the Plaintiff/Appellant which had specifically argued to the trial court that this case was governed by Hapney v. Central Garage, Inc., and by Florida Statutes 542.33, as amended by Chapter 90-216."

Motion for Rehearing was denied and jurisdiction of this Court was timely invoked.

SUMMARY OF ARGUMENT

The 1990 amendments to Florida Statutes 542.33, as included within Chapter 90-216, Laws of Florida, are applicable to contracts entered into prior to their effective date in that (a) the amendments are procedural and relate to burden of proof and (b) amend a remedy not available at common law and, thus, may be amended at will by the Legislature.

In this case Village Key may not complain that the amendments are not retroactive in that it itself made that argument to the trial court and "invited" any error.

The trial court was correct in limiting its injunction to that necessary to protect Village Key's interest and at the same time having regard to the common law interests of the former employee.

POINT I

WHETHER THE 1990 AMENDMENTS TO FLORIDA STATUTES 542.33 SHOULD BE APPLIED RETROACTIVELY.

A review of the District Court decision in Village Key & Saw Shop, Inc. v. Gupton, 639 So.2d 102 (Fla. 5th DCA 1994.), reflects that its entire basis is the 1990 amendments to Section 542.33, Florida Statutes, may not be applied retroactively to non-compete agreements entered into prior to the effective date of the amendments and are not applicable to the present case. Nothing in the District Court decision indicates that the finding by the trial court that the restriction was "generally unreasonable" was in error.

In contrast in Hapney v. Central Garage, Inc., the Second District Court of Appeal determined that the amendments are applicable to contracts entered into before the effective date, holding:

> *"Remedial statutes, which do not create new or take away vested rights but only further existing rights, are to be applied retrospectively. Ziccardi v. Strother, 570 So.2d 1319 (Fla. 2d DCA 1990). Included in this category are statutes governing the burden of proof in civil actions. Walker & LaBerge, Inc. v. Halligan,* 344 So.2d 239 (Fla. 1977); Stein v. Miller Indus. Inc., 564 So.2d 539 (Fla. 4th DCA 1990); see also, Dep't of Agric. & Consumer Servcs. v. Bonanno, 568 So.2d 24 (Fla. 1990). The right created by section 542.12, and carried forward in section 542.33(2)(a) is to enter into a covenant not to compete in derogation of the common law. Procedurally the statute, from its inception, has provided that such contracts may me enforced by injunctive relief. Chapter 90-216 merely refines the relief available by categorizing the burden of proof in relation to the protectible interest at issue,and clarifies

> that the general principles of equity shall apply in this class of cases. The underlying substantive right is not affected. The statute is therefore remedial and may be applied retrospectively."

In addition to the reasons furnished in Hapney as to why the amendments are to be applied retrospectively; that is, that the amendments relate to the burden of proof in civil actions and, therefore, were regarded as procedural and, thus, to be applied retroactively, is the fact that the statute in question was one which created a remedy not known at common law and, thus, did not create a vested remedy but which was a remedy which could be amended by the legislature at will.

As this Court has noted in National Bank of Jacksonville v. Williams, 38 Fla. 305, 20 So. 931 (1896):

> *"This remedy, that the Legislature has created in derogation of the common law, it can take away, and no one can have a vested right to any particular remedy."*

See also Leland v. Andrews, 129 Fla. 429, 176 So. 418 (1937).

For further application of the rule see Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1977);and Kimble v. Jenkins, 11 Fla. 111 (1866). The remedy of negative injunctive relief for breach of contract, as opposed to the common law remedy of monetary damage, is strictly one which is a creation of statute in derogation of the common law.

As pointed out by this Court in Flammer v. Patton, 245 So.2d 854 (Fla. 1971):

> *"Under the common law, courts historically have been hostile to contracts of any nature which place restraints upon former employees.*

> *Contract provisions restraining or hindering a man's right to follow his calling were considered as void against public policy. See Standard Newspapers, Inc. v. Woods, 110 So.2d 397 (Fla. 1959); Capelouto v. Orkin Exterminating Co. of Fla., 183 So.2d 532 (Fla. 1966). Before enactment of Fla.Stat. § 542.12, F.S.A. in 1953, this Court consistently treated non-competition provisions harshly. Arond v. Grossman, 75 So.2d 593 (Fla.1954); Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32 (1934), aff'd on rehearing, 1935; Simms v. Burnett, 55 Fla. 702, 46 So. 90 (1908). Only when mutuality and fairness were demonstrated beyond peradventure of doubt, would non-competition provisions be enforced. See Thompson v. Shell Petroleum Corp., 130 Fla. 652, 178 So. 413 (1938)."*

It will be noted that the 1990 amendments to Florida Statutes 542.33 relate solely to the remedy and the burden of proof and are, thus, for the reasons discussed in Hapney to be applied retroactively for the reasons quoted above. Thus, in summary, the 1990 amendments should be applied retroactively to contracts which were entered into prior to its effective date. As pointed out below, statutes are to be read in light of the common law. Statutes in derogation of the common law are to be read strictly. As pointed out by Messrs. Rosen and Reimer in "Covenants Not to Compete: Current Conflicts and Emerging Issues Affecting Enforcement", 68 The Florida Bar Journal, November 1994, p. 71, the legislative history of the 1990 amendments "indicates that the purpose of the 1990 amendment was to overturn the majority's holding in Capraro [v. Lanier Business Products, Inc., 466 So.2d 212 (Fla. 1985)]." There this Court held that irreparable harm will be presumed where a covenant not to compete is violated. As is noted below, the presumption of irreparable harm where it is not

statutorily mandated goes against the grain of the common law. The amendment to Florida Statutes 542.33, thus, merely returns the law to its prior status which mandated injunctions only under certain limited circumstances. Thus, the amendments are remedial and should be applied retrospectively in addition to the reasons otherwise specified above.

Additionally, in this case the amendment should be applied retroactively or should be applied to this contract for the reason of "invited error." Having acquired jurisdiction of the case on the basis of conflict, this Court has appropriate authority to dispose of all contested issues. Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974). In its decision the District Court below held "Unfortunately, because the parties failed to bring the pre-1990 version of the statute to the Court's attention, the trial court applied the amended version when deciding the case." Should this Court determine that the amendments to Section 542.33 are not retroactive, any error by the trial court in that regard was induced or invited by Village Key which specifically argued to the trial court that this case was governed by Hapney v. Central Garage, Inc., supra, and by Florida Statutes 542.33, as amended by Chapter 90-216, Laws of Florida. See Memorandum in Support of Plaintiff's Motion for Summary Judgment (R-46). See also (T-116). Under the rule of "invited error" it is not grounds for reversal of decision of the trial court on the basis of an error which the appellant, himself, invited or induced since it would be unfair to the trial court and to the appellee. See National Automobile

Insurance Association v. Brumit, 98 So.2d 330 (Fla. 1957); Held v. Held, 617 So.2d 358 (Fla. 4th DCA 1993); Behar v. Southeast Banks Trust Company, 374 So.2d 572 (Fla. 3d DCA 1979); Public Health Trust of Dade County v. O'Neal, 348 So.2d 377 (Fla. 3d DCA 1977). Thus, since Village Key specifically argued that the amendments to the statute were retrospective (T-116), it is not grounds for reversal of the trial court.

POINT II

WHETHER THE TRIAL COURT ERRED IN LIMITING ITS INJUNCTION TO DIRECT SOLICITATION OF IDENTIFIABLE CUSTOMERS IN AN ACTION INVOLVING ENFORCEMENT OF A NON-COMPETITION AGREEMENT.

The Court explained its rationale in limiting the injunction that it entered at page 4 of its Final Judgment (A-7):

> *"[T]he Court is also faced with the conclusion it should not create a restraint that would enjoin Defendant from earning a living. However, this should be fashioned to prevent Defendant from further invading customer lists of the Plaintiff. The Court also concludes notwithstanding the strict wording of the contract which would effectively put the Defendant out of any ability to engage in locksmith or alarm system work, this is not to be enforced by the Court. Insofar as the time period is concerned, the Court concludes five (5) years from separation of employment is not unreasonable since the Court has invaded many of the strict terms of the restriction to avoid defendant from being deprived of a living.*
>
> *"The Court further finds there has been no overt or wilful effort on the part of Defendant to invade the customer lists sold by him to Plaintiff in 1989. A few customers have chosen to seek him out and one he solicited."*

The concern of the trial court in framing its injunction to merely restrain the former employee from invading customer lists and from direct competition echoes very much the expressions of this Court in Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32 (1934). There, this Court noted that the enforcement of the contract "may, and in all probability will, mean the contracting employee cannot procure other employment and that he, together with his family, will become a charge on the public." Mr. Justice Davis, in his dissent to Love, notes an annotation appearing at 9

A.L.R. 1468 which discusses the same distinctions ruled upon and utilized by the trial court in framing of its injunction; that is (1) the concern that an employee should be able to earn a living; (2) that the general reasonableness of the contract will be looked to and the injunction will be carefully framed so as (a) not to impose undue hardship upon the employee but (b) to preclude direct interference with the former employer's customers by direct solicitation. Other concerns expressed by the court include whether there is new or novel training provided by the former employer. In this specific case there was a holding by the trial court that the former employer did not provide such training. The trial court specifically upheld protection of the customer list and precluded direct solicitation.

Florida Statutes 543.23 provides in part that each contract by which any person is restrained from exercising a lawful profession, trade or business of any kind, except as provided in subsections 2 and 3 to that extent provided valid, and all other contracts and restraint of trade are void. Subsections 2 and 3 provide that one who sells the goodwill of a business and one who is employed as an employee may agree with an employer to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonable time and area. The statute further points out that the court shall not enter an injunction where the injunction enforces an unreasonable covenant not to compete or where there is no showing of irreparable injury. It further provides that the use of specific trade

secrets, customer lists, or direct solicitation customers shall be presumed to be an irreparable injury and may be specifically enjoined.

The Florida Statutes relating to non-competition clauses have been thoroughly reviewed in Hapney v. Central Garage Inc., 579 So.2d 127 (Fla. 2d DCA 1991), relied upon by Village Key in the trial court. Hapney reviews the historical perspective of non-competition clauses and holds that statutes authorizing non-competition clauses being in derogation of common law are to be strictly construed and will not be interpreted to displace the common law:

> *"further than is clearly necessary and will not be construed to make any alteration in the common law other than that which the statute specifically and plainly pronounces." (emphasis the Court's).*

Hapney holds that the threshold condition of the validity of a covenant not to compete by an employer is the existence of a legitimate interest of the employer to be protected and consists of three interests: (1) trade secrets and confidential business lists, records and information; (2) customer goodwill; and (3) to a limited degree, extraordinary or specialized training provided by the employer. Hapney points out that with regard to the third category, to constitute a protectable interest the providing of training or education must be extraordinary, that is, "that which goes beyond what is usual, regular, common, or customary in the industry in which the employee is employed." In the present instance the testimony was unequivocal that Mr. Gupton already had

received his training and, in fact, was employed because of the training, see Transcript pages 44 and 84, and did not receive any unusual or specialized training in the services of the Plaintiff.

With regard to the other two special interests which are recognized by Hapney, trade secrets and confidential business lists, records and information and customer goodwill, the only evidence adduced was that of the customer list which is attached to the Bill of Sale. In this regard it is to be noted that the non-competition agreement is contained in the employment agreement and not in any agreement for purchase or sale of the business.

As Hapney points out, the statute relied upon by the Plaintiff specifically authorizes an injunction against the use of "specific trade secrets, customer lists or direct solicitation of existing customers." (emphasis the Court's)

Under Florida Statutes non-competition agreements are valid only for "a reasonably limited time and area." Dorminy v. Frank B. Hall, 464 So.2d 154 (Fla. 5th DCA 1985), noted that if a term is found to be unreasonable under the particular circumstances of the parties and the business or employment opportunity being curtailed, the court may refuse to enforce the covenant. However, the Court noted that it has been suggested that the trial court "may fashion and apply a reasonable time or area of limitation," each case to be decided on its own facts and circumstances. The court noted:

> *"There is no set time limit for enforcement of covenants not to compete, although one to two years are the time limits which have been upheld in Florida against former employees*

competing with former employers."

See also McQuown v. Lakeland Window Cleaning Co., 136 So.2d 370 (Fla. 2d DCA 1962), enjoining the employee for a period of one year, notwithstanding the noncompetitive covenant of five years contained in the employment contract.

As noted above, the statute authorizes the injunction against the "direct" solicitation of customers and as noted in Hapney a general broad injunction, such as that sought by Village Key, against any competition is excessive. See in this regard also annotation "Enforceability of Contract Not to Compete" Section 37, 61 A.L.R.3d 397, holding that a non-competitive covenant is limited only to prohibiting the former employee from competing for the business of those customers of the former employer whom said employee had served in the course of his work. Thus, the trial court was correct in concluding that the injunction must be restricted to either the customer list or the customers actually served by the Defendant. Since the only evidence before the trial court as to the identity of the customers was the customer list attached to the Bill of Sale, the injunction was correctly limited to that list.

With regard to the customers excluded from the injunction, who are now presently being served by the former employee, the trial court found that there was no evidence that such customers were "directly" solicited by him, instead, the uncontradicted testimony is that each of the customers contacted the former employee because of unhappiness with Village Key's

services for whatever reason.[2] Additionally, it should be noted that any attempted injunction against continued service of such customers would have the effect of abrogating the contract with such customers and with their alarm servicing company, National Guardian. The individual customers and National Guardian were not made a party to the action and, accordingly, even assuming that the contracts were as a result of "direct" solicitation, an injunction could not have been entered which had the effect of invalidating such a contract because such parties would then be indispensable parties. See Lomayaktewa v. Hathaway, 520 F.2d 1324 (9th Cir. 1975), and Rule 1.140, Florida Rules of Civil Procedure, making the defense of failure to join indispensable parties one which may be made at any time. Accordingly, no injunction could have been entered restraining the Defendant for the continued servicing of the excluded customers, notwithstanding their inclusion within any customer list of Village Key. If there had been evidence of direct solicitation, damages might have been awarded if they had been prayed for and proven, but they were not.

In this case it will be noted that the court extended the time of the injunction beyond that which is normally permitted under Florida law in light of its limitation of the injunction to direct solicitation of customers. The set time limit has been

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[2] As to the one customer noted by the trial court in the Final Judgment to have been solicited, there is nothing in the record to indicate that he actually utilized the services of the Appellee and was not excluded from the injunction. See Transcript, page 108. As to evidence of non-solicitation, see Transcript, page 102. As to one reason for loss of accounts, see Transcript, page 81.

noted as one or two years. See Dorminy v. Frank B. Hall, 464 So.2d 154 (Fla. 5th DCA 1985). See also McQuown v. Lakeland Window Cleaning Co., 136 So.2d 370 (Fla. 2d DCA 1962). Thus, any revisiting of the extent of the injunction as to its being limited to the identified customers on the customer list and to the direct solicitation would also require a revisiting of the length of the injunction.

CONCLUSION

For the reasons indicated above, the trial court was correct in its determination that the injunction should be limited to direct solicitation of identified customers. It was correct in excluding therefrom certain customers who had not been directly solicited by the former employee and who had contracts with a third party, not a party to this action, particularly where such customers, themselves, were not included within this action.

DOBSON, CHRISTENSEN & BROWN, P.A.

By: _____

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66 Cuna Street, Suite B
St. Augustine, Florida 32084

VOICE: (904) 824-9032
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David M. Andrews, Esquire, P. O. Box 5358, St. Augustine, Florida 32085 by United States Postal Service, postage prepaid, this 30th day of November, A. D., 1994.

_____

INDEX TO APPENDIX TO BRIEF ON MERITS

MISC8-5/23/89
Village Key Emp/Agr

EMPLOYMENT AGREEMENT

THIS AGREEMENT, made and entered into as of the 1st day of May, 1989, by and between VILLAGE KEY & SAW SHOP, INC., a Florida Corporation, (hereinafter referred to as "Employer"), and JOSEPH GUPTON, (hereinafter referred to as the "Employee");

W I T N E S S E T H:

WHEREAS, Employer is a corporation authorized and existing under the laws of the State of Florida and engaged in the business of locksmithing, sales, installation and mounting of alarm systems and

WHEREAS, JOSEPH GUPTON is experienced and skilled in such areas; and

WHEREAS, Employer wishes to employ Employee and Employee wishes to be employed by Employer upon the terms and conditions hereinafter provided,

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, it is agreed:

1. EMPLOYMENT. Employer employs the Employee and the Employee accepts employment upon the terms and conditions of this Agreement.

2. TERM. The term of this Agreement shall begin on the 1st day of May, 1989, and shall terminate upon notice as provided hereafter.

3. SERVICES. Employee shall render his full time and best efforts to the rendering of the services to customers of the Employer. Employee shall abide by the reasonable rules, regulations and requirements of Employer with respect to availability, hours of service, billing, etc.

4. COMPENSATION. For all services rendered by the Employee, the Employer shall pay the Employee a starting salary of Three hundred twenty ($320.00) Dollars per week. Salary payments shall be subject to withholding and other applicable taxes.

5. INDEMNIFICATION. Employee agrees to defend, indemnify and save and hold Employer harmless from any and all claims, suits or losses suffered or potentially suffered by Employer due to any act or neglect of Employee.

6. TERMINATION. Employer or employee, may, for whatever cause, terminate this Agreement at any time upon fifteen (15) days' written notice.

7. ENFORCEMENT. Attorneys' fees in the event either party shall be required to retain the services of an attorney-at-law to enforce the terms or conditions of this Agreement, the prevailing party to such dispute shall be entitled to the recovery of reasonable attorneys' and costs, including on appeal.

8. WAIVER OF BREACH. The waiver by the Employer of a breach of any provision of this Agreement by the Employee shall

not operate or be construed as a waiver of any subsequent breach by the Employee. No waiver shall be valid unless in writing and signed by an authorized agent of the Employer.

9. ASSIGNMENT. The Employee acknowledges that the services to be rendered by him are unique and personal. Accordingly, the Employee may not assign any of his rights or delegate any of his duties or obligations under this Agreement.

10. ENTIRE AGREEMENT. This Agreement constitutes the entire understanding of the parties. It may not be changed orally but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension, or discharge is sought.

11. COVENANT NOT TO COMPETE: In consideration of the Employer employing the Employee in a position in which the Employee will gain specialized knowledge and experience and will establish personal relationships with the Employer's customers, suppliers, and other employees, the Employee covenants and agrees as follows:

On termination of employment, whether by termination of this agreement, by wrongful discharge, or otherwise, the Employee shall not directly or indirectly engage in competition with the Employer in the territory and for the period specified in this paragraph. As used in this paragraph, "competition with the Employer" means entering or engaging in the business of locksmithing or alarm installation, service or monitoring, either individually, as a partner or joint venturer, as an employee or as an agent, officer, director, or shareholder of any entity or person. The Employee acknowledges that the Employer provides services for the residents of St. Johns County and accordingly agrees not to engage in competition with the Employer within the geographical boundaries of St. Johns County, Florida, for a period of five (5) years after the date of termination of his employment hereunder. This covenant on the part of the Employee shall be construed as an agreement independent of any other provision of this Agreement; and the existence of any claim or cause of action of the Employee against the Employer, whether predicated on this Agreement or otherwise, shall not constitute a defense to the enforcement by the Employer of this covenant. In the event of a breach or threatened breach by the Employee of his obligations under this covenant, the Employee acknowledges that the Employer will not have an adequate remedy at law and the Employee agrees that the Employer shall be entitled to such equitable and injunctive relief without the requirement of the posting of a bond as security, as may be available to restrain the Employee from the violation of the provisions hereof. Nothing herein shall be construed as prohibiting the Employer from pursuing any other remedies available for such breach or threatened breach, including the recovery of damages from the Employee.

IN WITNESS HEREOF, the parties have executed this Agreement on the day and year first above written.

WITNESSES:

As to Employer

VILLAGE KEY & SAW SHOP, INC.

By: _____
Its President

(Corporate Seal)

Mary L DuSaye
As to Employee

Joseph Gupton (SEAL)
JOSEPH GUPTON

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: 92-1468CA
DIVISION: 56

VILLAGE KEY & SAW SHOP, INC.,

Plaintiff,

vs.

JOSEPH GUPTON,

Defendant.
_____/

FINAL JUDGMENT

THIS CAUSE, was before the Court September 1, 1993 on proceedings involving enforcement of a purported "non-complete" agreement arising out of a locksmith and alarm business. The Trial involved the testimony of the parties, the attorney who drafted the transfer of business. The facts were not in material dispute. The Defendant was originally the owner of a locksmith-alarm business known as J&M. It was individually owned by Defendant. Plaintiff at the same time was President and principal stockholder of Plaintiff, VILLAGE KEY & SAW SHOP, a Corportion.

During early and mid 1989, Defendant began to experience some cash flow and other financial problems. He was unable to fund new equipment in order to continue in the lucrative alarm monitoring systems. This results from a business selling and installment of security systems in home and business. After installation a monitoring system company is retained by the alarm installer. The central system bills the locksmith and the locksmith bills the home or business owner. This insures a recurring income after a security system is in place. The local locksmith also maintains and adjusts the system for the consumer. A key factor in the equation is to maintain customer lists so the periodic billings for the monitoring phase continues. If the user customer uses a different local locksmith business, the lucrative continuing revenue is lost.

In the instant case, Defendant had been engaging in this type of business most of his adult life. Because he had difficulty funding equipment and installation supplies he was in contact with the Plaintiff about a purchase-sale of his business; or as the Defendant put it, "a merger." The business effect was the same.

Documents including a Bill of Sale (Plaintiff's Exhibit 1); note for payment to the Defendant and related documents were exchanged. Much was made over the date, since they were apparently "back-dated" to be effective May 1, 1989, but were signed May 28, 1989.

A key instrument was that Defendant was to be an employee of the new owner, VILLAGE KEY (Plaintiff). He was to be hired at a salary of $320.00 per week. Although not stated in the document, he also received commissions of 5% for alarm systems sold and an additional 5% if Defendant obtained the contract for the installation as well. An employment agreement was simultaneously entered into between the parties. The agreement provided for a mutual ability of either to terminate the employment. However, the key point in the dispute arises out of the provision in this contract to the effect if Defendant terminates for any reason or is discharged for any reason, he will not compete for a period of five (5) years from TERMINATION, or cessation of employment.

The Court further found by the evidence a clear and unambiguous obligation on the part of the Plaintiff (Buyer) to take over certain bills and accounts of the Defendant's former business, as well as pay a note of $30,000.00 in installments with interest. At no time was there any evidence submitted that Plaintiff acted in bad faith or did anything to circumvent the obligations imposed by the transfer documents. Clearly, either party could end the employment at their own desire and for their own reason, requiring only a minimal 15 days notice. Much testimony was presented by Defendant that he was unhappy because about the time he quit, his brother who worked in the office was terminated because he could not keep up with the paper work of the business. Also, Defendant claimed Plaintiff hired a couple, the husband being a professional sales person who increased sales immediately. Defendant claimed he got into a dispute over this and a claim he was not paid sufficient commissions on a new-home subdivision (Island Hammock).

During the transition of ownership to Plaintiff, Plaintiff paid off the accounts of Defendant which were approximately between

$12,000.00 to $15,000.00. The note of $30,000.00 to Defendant was to pay for existing customer monitoring services. Plaintiff complied with all of its requirements.

However, because of the reasons mentioned, Defendant decided to leave the employment, which he did on June 30, 1992. He claimed no back pay, loss of commission or any financial debt owed him by Plaintiff. Upon leaving the employment, he did not actively solicit the existing customers now being processed by VILLAGE KEY (Plaintiff). However, a few left VILLAGE KEY when Defendant left and sought him out for services, which he undertook. He also entered into a competing business out of his home, which centered around working locally for a large company that nationally advertised the sale and installation of alarm systems. They sought contacts from consumers. They needed local services to install their equipment in order to establish a monitoring base. Defendant became the local agent to do the work. Although he worked out of his home, this was not the type of business in direct conflict with Plaintiff. This is because the national company was advertising on their own for their own special security equipment. They only needed a local installer to put in the systems. Most of Defendant's compensation resulted from this activity. Also, he was required to travel out of county for installations for this Company, known as NATIONAL GUARDIAN.

The Court concludes there was ample consideration for the enforcement of a valid covenant not to compete as enunciated in CRISS v. PRESSER, 494 So.2d 525 (Fl App 1DCA 1986). However, if the covenant not to compete deprived the Defendant of a right to earn a living and feed his family, Florida Courts have rejected such provisions as "unfair" and "overreaching," due to disparate financial positions of the parties. See SUN ELASTIC CORP. v. O. B. INDUSTRIES, 603 So.2d 516 (3 DCA 1992). However, as enunciated in SUN ELASTIC, id. the Courts ARE REQUIRED to enjoin violations of non-competitive agreements which are reasonable as to its duration and geographic limitation.

Further, the Court concludes there is nothing unique or special about locksmith work. Systems are generally of simple design, having "breaker locations" around entrances and windows to structures. When the contacts are broken, the wire or remote systems trips off the alarm, which is monitored through phone lines at a central location. Contact can be made at the business or residence through phone, or if necessary police can be dispatched. The Court finds nothing unusual

about the business activity of either Plaintiff or Defendant.

Florida law recognized this anamoly and has placed FLORIDA STATUTE 542.33 on the books to recognize Court decision in this area. Basically, the statute clearly permits injunction in non-compete clauses if the restriction is against specific trade secrets, customer lists, or direct solicitation of existing customers. This is presumed to constitute irreparable injury subject to injunctive relief. Plaintiff has urged that this be enforced. Defendant claims the entire restriction against Defendant be rejected.

Admittedly, Defendant sought out one customer on the customer lists made part of the Bill of Sale (Exhibit 1). A few other customers sought out the Defendant and he undertook to service them.

Plaintiff does not seek damages, but only an injunction to prevent Defendant from invading the customer lists transferred to Plaintiff by Defendant in 1989. It is clear to the Court that this request is fair and equitable. Plaintiff has complied with its bargain, and Defendant should also.

However, the Court is also faced with the conclusion it should not create a restraint that would enjoin Defendant from earning a living. However, this should be fashioned to prevent Defendant from further invading customer lists of the Plaintiff. The Court also concludes notwithstanding the strict wording of the contract which would effectively put the Defendant out of any ability to engage in locksmith or alarm system work, this is not to be enforced by the Court. Insofar as the time period is concerned, the Court concludes five (5) years from separation of employment is not unreasonable since the Court has invaded many of the strict terms of the restriction to avoid Defendant from being deprived of a living.

The Court further finds there has been no overt or wilful effort on the part of Defendant to invade the customer lists sold by him to Plaintiff in 1989. A few customers have chosen to seek him out and one he solicited.

Accordingly, it is ADJUDGED:

1. Plaintiff is entitled to limited relief by way of permanent injunction under the employment contract terminated at the option of Defendant on or about June 30, 1992.

2. The Court concludes that the effect of this Order shall not extend beyond June 30, 1997.

3. Defendant is permanently restrained and enjoined from

violating, attempting to violate, or in any way interfering with the following:

(a) Using any specific trade secrets developed by Plaintiff during the period of time from and after May 1, 1989 until the termination of this Order.

(b) Direct solicitation of any of the customers or successor in ownership interest of all customers, firms, business or other entitities listed on the Bill of Sale and other transfer documents effective May 1, 1989 signed May 28, 1989 until the termination of this Order.

(c) The restraint in (b) above shall pertain to any locksmith and alarm business, maintenance, servicing, installation repairs or related matters.

(d) Because the Defendant did not solicit the customers who transferred their business to the Defendant, this Order shall not be deemed to apply to them. Those are as listed as follows:

Rosemary Aeschbach
Allsafe Boat & RV
Richard Archer
Joan Broudy
City Gates Shop
Corpus Christi Parish & Rectory
Coral Landing
Robert Johnson
Jr. Department Store
Donna Katz
Lucille Shop
Mr. Migliaccioi
Lonnie Pomar
John Redmond
Runk Construction
Mrs. Stevens
Sunburst Trading
James Theodore
Keith Gibbs
Gudrun Hopfgartner

4. Each party shall bear their own legal fees since neither ead for the same. The Court retains jurisdiction to tax costs.

ORDERED in St. Augustine, St. Johns County, Florida this 20th y of September, 1993.

RICHARD G. WEINBERG, CIRCUIT JUDGE

opies to:

avid M. Andrews, Esquire
eoffrey B. Dobson, Jr., Esquire