[Cite as *84 Lumber Co., L.P. v. Houser,* 2011-Ohio-6852.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

84 LUMBER COMPANY, L.P.,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0074**
- vs -	:	
CHARLES HOUSER, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2009 CV 0525.

Judgment: Affirmed.

Christopher J. Carney, Brouse & McDowell, 600 Superior Avenue, East, Suite 1600, Cleveland, OH 44114; and *Christopher F. Carino*, Brouse & McDowell, 500 First National Tower, 388 South Main Street, Akron, OH 44311 (For Plaintiff-Appellee).

Sidney N. Freeman and *John A. Daily*, Sidney N. Freeman Co., L.P.A., 2475 Massillon Road, Akron, OH 44312-5316 (For Defendants-Appellants).

TIMOTHY P. CANNON, P.J.

{¶1} Appellants, Charles Houser and Carter Lumber Co., appeal the judgment entered by the Portage County Court of Common Pleas. The trial court issued a permanent injunction against appellants, which prohibited them from violating the terms of a noncompete agreement. For the reasons that follow, we affirm the decision of the trial court.

{¶2} Charles Houser began working for appellee, 84 Lumber Company, L.P. ("84 Lumber"), in 1985. In 1998, Houser became an outside salesman with 84 Lumber,

and his compensation changed from a set salary to commission based on his sales. At that time, Houser signed a noncompete agreement, which prohibited him from engaging in sales activities with a competitor of 84 Lumber within a 25-mile radius of 84 Lumber's Macedonia store for a two-year period following the conclusion of his employment with 84 Lumber.

{¶3} In July 2006, Houser signed a contract with 84 Lumber that provided for weekly draws of $3,250 to be applied against his future commissions. If Houser's commissions did not equal or exceed the weekly draws, Houser was responsible for repaying the deficiency.

{¶4} In December 2006, Houser signed another contract providing for a weekly draw of $3,250 against future commissions. This agreement also required Houser to repay any deficiencies between his actual commission and the weekly draw amount, including an already-accrued deficit of over $19,000. Also, he signed another noncompete agreement at that time.

{¶5} In May 2007, Houser signed another contract, which provided a set weekly draw of $2,308 against his future commissions. 84 Lumber forgave Houser's past debt to that point. A new noncompete agreement was not signed at this time. Also, under this agreement, Houser was not responsible for future deficiencies.

{¶6} In June 2008, Houser signed a contract providing a set weekly draw of $1,153.84, but deficiencies were limited to $9,000. This agreement required Houser to sign another noncompete agreement, which Houser signed.

{¶7} In March 2009, Houser left 84 Lumber and, almost immediately thereafter, began working for Carter Lumber, a competitor of 84 Lumber.

{¶8} 84 Lumber initiated the underlying action by filing a complaint against Charles Houser, Chad McClain, and Carter Lumber in the Portage County Court of Common Pleas. 84 Lumber's claims against McClain proceeded separately at the trial court level and were the subject of a prior appeal to this court. See *84 Lumber Co., L.P. v. Houser*, 188 Ohio App.3d 581, 2010-Ohio-3683.

{¶9} 84 Lumber's claims against Houser and Carter Lumber included misappropriation of trade secrets, unfair competition, and unjust enrichment. In addition, 84 Lumber advanced claims against Houser for breach of contract and breach of duty of loyalty. Finally, 84 Lumber brought a claim for tortious interference with contract against Carter Lumber. In addition to damages, the complaint sought a temporary restraining order, a preliminary injunction, and a permanent injunction. Houser and Carter Lumber both filed answers, in which they denied the substantive allegations of the complaint.

{¶10} The matter proceeded to a two-day evidentiary hearing before a magistrate on 84 Lumber's request for a permanent injunction. In a lengthy decision, the magistrate concluded that the 2008 noncompete agreement was unenforceable. However, the magistrate held that the 1998 and 2006 noncompete agreements were enforceable. Also, the magistrate found that 84 Lumber had a protectable interest in Houser as an employee and that the noncompete restrictions were reasonable in time and area. The magistrate recommended enjoining Houser and Carter Lumber from further violations of the noncompete agreement for a period of two years. Appellants and 84 Lumber each filed objections to the magistrate's decision.

{¶11} Prior to the trial court ruling on the objections, this court issued its opinion in McClain's appeal. *84 Lumber Co., L.P. v. Houser*, 2010-Ohio-3683. That case did

not address the issues with respect to appellant herein. This court held that guaranteed weekly draws could constitute sufficient consideration to support a noncompete agreement. Id. at ¶44-46. However, this court ultimately concluded there was a genuine issue of material fact on the issue of whether the noncompete agreement was supported by sufficient consideration, due to the allegation that McClain's continued employment was conditioned on the signing of the noncompete agreement. Id. at ¶47.

{¶12} Here, the trial court sustained 84 Lumber's objection to the magistrate's decision on the issue of adequate consideration with regard to the 2008 contract. Citing this court's decision in McClain's appeal, the trial court ruled that "84 Lumber's granting Houser a consistent paycheck was sufficient consideration supporting the 2008 contract." The trial court also overruled appellants' objections to the magistrate's decision.

{¶13} Houser and Carter Lumber timely appealed the trial court's judgment.[1] Appellants raise two assignments of error, which will be addressed together.

{¶14} "[1.] The trial court erred, to the prejudice of Mr. Houser and Carter Lumber, by concluding that the non-competition agreement was supported by consideration under Pennsylvania law.

1. {**¶a**} While this appeal has been pending for some time, we have attempted to reconstruct the state of the record as efficiently as possible in the interest of judicial economy. First, appellants failed to file a transcript of the magistrate's hearing that occurred on October 1-2, 2009, as required by Civ.R. 53(D)(3)(b)(iii). Appellants subsequently filed a motion to supplement the record with the transcript, stating that the transcript was filed with the clerk of court in accordance with App.R. 9(E), though it did not become a part of the record through error or accident. This court granted the motion.

{**¶b**} Next, 84 Lumber presented claims in its original pleadings which appeared to remain pending at the time of this appeal. The issue was compounded by the notable absence of the requisite Civ.R. 54(B) language in the trial court's judgment making it a final, appealable order. This court, sua sponte, remanded the case to the trial court to ensure jurisdiction had been conferred. After the remaining matters in this case were dismissed without prejudice, the trial court established that there was no just reason for delay, allowing this court to proceed with the appeal.

{¶15} "[2.] The trial court erred, to the prejudice of Mr. Houser and Carter Lumber, when it overruled Mr. Houser and Carter Lumber's objections to the magistrate's decision."

{¶16} Initially, we must address the standard of review, which is debated by the parties. 84 Lumber contends that, since the decision to grant an injunction lies within the sound discretion of the trial court, the standard of review is abuse of discretion. Conversely, Houser and Carter Lumber argue that the standard of review is de novo because the issue involves the construction of a written contract, a matter of law for the court.

{¶17} This is a case involving the interpretation of a written contract. The court decided the issue of consideration and interpreted the terms of the covenant. The interpretation of a written contract is a question of law. *Internatl. Language Bank, Inc. v. Ryan*, 11th Dist. No. 2010-A-0018, 2010-Ohio-6060, at ¶14, citing *Alexander v. Buckeye Pipe Line Co*. (1977), 49 Ohio St.2d 158, paragraph one of the syllabus. Therefore, a trial court's interpretation of the legal impact of a contractual provision is subject to de novo review. Id., citing *Long Beach Assn., Inc. v. Jones* (1998), 82 Ohio St.3d 574, 576, and *Ohio Bell Tel. Co. v. Pub. Util. Comm*. (1992), 64 Ohio St.3d 145, 147.

{¶18} We recognize that "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, LLC v. Finomore*, 11th Dist. No. 2009-L-147, 2010-Ohio-6571, at ¶53, citing *Perkins v. Village of Quaker City* (1956), 165 Ohio St. 120, syllabus. However, the trial court first had to determine the validity of a written agreement before it could entertain injunctive relief. Thus, because the determination of

whether to grant an injunction or overrule appellants' objections first rested on the court's interpretation of the 2008 agreement, we proceed de novo.

{¶19} 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."'" *Houser*, 2010-Ohio-3683, at ¶40. (Citations omitted.)

{¶20} The first requirement is not at issue here; there is no question the covenant not to compete was directly related to Houser's employment contract.

{¶21} Turning to the second requirement (assignment of error one), the essential question is whether the 2008 noncompete agreement, which was to be governed by Pennsylvania law, was supported by adequate consideration. "[A] restrictive covenant is enforceable if supported by new consideration, either in the form of an initial employment contract or a change in the conditions of employment." *Maintenance Specialties, Inc. v. Gottus* (1974), 455 Pa. 327, 330. Thus, "'"[w]hen the restrictive covenant is contained in the initial contract of employment, consideration for the restrictive covenant is the job itself. When the restrictive covenant is added to an existing employment relationship, however, it is only enforceable when the employee who restricts himself receives a corresponding benefit or change in status."'" *Houser*, 2010-Ohio-3683, at ¶42, quoting *Cary Corp. v. Linder*, 8th Dist. No. 80589, 2002-Ohio-6483, at ¶18. (Citation omitted.)

{¶22} Since Houser was already employed with 84 Lumber when he signed the noncompete agreement, he needed to receive an additional benefit in exchange for

signing the 2008 noncompete agreement since continuation of the employment relationship alone is not sufficient consideration in Pennsylvania. See *Ruffing v. 84 Lumber Co.* (1991), 410 Pa. Super. 459, and *Cary Corp. v. Linder*, 2002-Ohio-6483, at ¶17, citing *George W. Kistler, Inc. v. O'Brien* (1975), 464 Pa. 475.

{¶23} In the case sub judice, we find there to be consideration. Houser received the benefit of consistent, bi-weekly payments in the form of draws, in exchange for agreeing to the 2008 noncompete agreement. These advances were to last for one year. As noted supra, this court previously held that the benefit of consistent, bi-weekly paychecks, as opposed to relying on variable income from commissions, serves as consideration in exchange for a noncompete agreement governed by Pennsylvania law. *Houser*, 2010-Ohio-3683, at ¶44. Thus, because one's commission can fluctuate dramatically in the face of turbulent economic climates, the conditional guarantee of consistent advances acts as consideration.

{¶24} Houser was not otherwise entitled to these draws by virtue of employment alone. Instead, these agreements were only offered to select employees. The agreements encapsulate a company's desire to entice a valuable employee by offering advancements. Houser was able to enjoy greater comfort by virtue of these benefits. Mr. Rory Leightner, area manager for 84 Lumber, testified that the company only offers draws to experienced salespeople who perform exceptionally well. Mr. Leightner further testified the company is willing to make a large investment in the employees who sign the noncompete agreements. Essentially, the company is conferring independence, responsibility, and benefit upon an employee. The relationship becomes more entrenched as the company invests in its valued employees in exchange for a promise not to betray the relationship by competing against the company. In this fashion, the

very essence of Houser's employment status not only changed, it developed to subtle, new echelons with each agreement. Because the 2008 agreement superseded previous agreements, the question of whether Houser can be bound by previous covenants not to compete is rendered moot.

{¶25} Turning to the third requirement (assignment of error two), the issue is whether the application of the covenant was reasonably limited in both time (two-year term) and territory (25-mile radius). This matter was initially presented as an objection to the magistrate's decision, which appellants claim the trial court erred in overruling. In evaluating this requirement, Pennsylvania courts require the application of a balancing test, "whereby the court balances the employer's protectable business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balances the result against the interest of the public." *Hess*, 570 Pa. 148, 163, citing *Sidco Paper Co. v. Aaron* (1976), 465 Pa. 586.

{¶26} On one side of this balancing test is 84 Lumber's protectable business interest. "Generally, interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills. *** If the covenant is inserted into the agreement for some other purpose, as for example, eliminating or repressing competition or to keep the employee from competing so that the employer can gain an economic advantage, the covenant will not be enforced." (Internal citation omitted.) *Hess*, 570 Pa. 148, 163.

{¶27} Appellants argue that 84 Lumber does not have a protectable interest in Houser's personal abilities. 84 Lumber's position is that its noncompete agreements were designed to protect the customer goodwill established by 84 Lumber through Houser. In addition, it is clear that an employee in Houser's position is privy to

information regarding the customer's needs, contact information, and pricing information that would not be readily available to members of the general public.

{¶28} Pennsylvania courts define goodwill as "that which 'represents a preexisting relationship arising from a continuous course of business [***].'" Id. at 165, quoting *Butler v. Butler* (1995), 541 Pa. 364, 373, fn. 9. "[G]oodwill is essentially the positive reputation that a particular business enjoys." Id., citing *Solomon v. Solomon* (1992), 531 Pa. 113, 124. "However, where good will is intrinsically tied to single individuals, as in sole proprietorships and the like, good will often does not survive the disassociation of those individuals from the business." Id. Thus, "[i]f the positive reputation is due only to the reputation of a single individual as opposed to the business entity in general, then the business has no good will ***." *Solomon v. Solomon*, 531 Pa. at 124.

{¶29} In this case, 84 Lumber has a legitimate protectable interest, not just in the personal skills of Houser, but in maintaining confidentiality of its business practices and its company reputation. As a result, Houser brought his skills into the employer-employee relationship, while 84 Lumber provided Houser with information and resources to develop his clientele and relationships. 84 Lumber therefore has a protectable interest in the goodwill it trains and hires its employees to foster.

{¶30} We must view this interest against the interest of the employee, Houser, in earning a living in the lumber profession. Houser is not precluded from working with Carter Lumber, or any other lumber company. He is only precluded from those competing entities within the prohibited territory for a limited duration. The noncompete covenant limits Houser's business to anywhere outside a 25-mile radius of his former site, and only for a two-year time frame. Appellants argue this limitation is an

oppressive blow, injurious to Houser's ability to earn a living in the only industry he knows. Appellants cite to testimony in the record indicating that the 25-mile area in question encompasses the largest lumber economy in Ohio, such that Houser would be forced to move to another city. However, evidence presented during the magistrate's hearing also illustrates the massive scope of the housing market and the plentiful opportunities throughout northeast Ohio.

{¶31} We find that the 25-mile area and the two-year time limit are reasonable, judged against the company's protectable business interest in the area. Immediate access to 84 Lumber's clients and goodwill justify the limitations imposed by the agreement. These limits are not unreasonable as to risk Houser's ability to earn a living in the lumber trade. Similarly, it cannot be concluded that the covenant was unduly burdensome or injurious to the public at large.

{¶32} Thus, the trial court did not err when it concluded that the noncompete agreement was supported by consideration under Pennsylvania law nor when it overruled appellant's objections to the magistrate's decision. Appellants' assignments of error lack merit.

{¶33} The decision of the Portage County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶34} Although I concur in the judgment ultimately reached by the majority, that the judgment of the trial court should be affirmed, I disagree with the majority's analysis under the first assignment of error, regarding consideration for the 2008 noncompetition agreement.

{¶35} Under Pennsylvania law, "a restrictive covenant is enforceable if supported by new consideration, either in the form of an initial employment contract or a change in the conditions of employment." *Maintenance Specialties, Inc. v. Gottus* (1974), 455 Pa. 327, 330.

{¶36} For example, nominal consideration such as $1.00 would be insufficient to support a restrictive covenant. *George W. Kistler, Inc. v. O'Brien* (1975), 464 Pa. 475, 485, fn. 5. Provisions requiring the employer to give the employee several weeks notice in the event of termination have been found insufficient to support a restrictive covenant. *Maintenance Specialties*, 455 Pa. at 330, fn. 1; *Capital Bakers, Inc. v. Townsend* (1967), 426 Pa. 188, 191. The change from "at will" employment to a week-to-week term of employment was insufficient to support a restrictive covenant. *Markson Bros. v. Redick* (1949), 164 Pa.Super. 499, 505.

{¶37} The majority, relying on this court's previous decision in *84 Lumber Co., L.P. v. Houser*, 188 Ohio App.3d 581, 2010-Ohio-3683, finds adequate consideration for the 2008 noncompetition agreement in the fact that Houser received "consistent, bi-weekly payments in the form of draws." Supra, at ¶23. These payments do not constitute a change in employment status or any corresponding benefit. Houser's salary remained a 20 percent commission on sales, regardless of the bi-weekly payments which were, in effect, cash advances on future commissions. There was no

substantive change in Houser's salary, merely the method of payment. Accordingly, these advances were not adequate consideration for the 2008 noncompetition agreement. *Houser*, 2010-Ohio-3683, at ¶79 (Grendell, J., dissenting).

{¶38} I concur in the ultimate judgment to affirm the trial court, however, because there was additional consideration to support the 2008 noncompetition agreement. As noted by the trial court, 84 Lumber forgave Houser approximately $9,000.00 of debt incurred as a result of his earned commissions not being sufficient to cover the amount drawn against them. The forgiveness of this deficit constituted a tangible benefit to Houser beyond the amount of compensation he would have been entitled to under his previous employment agreement. *Admiral Servs., Inc. v. Drebit* (E.D.Pa.1995), Dist. Case No. 95-1086, 1995 U.S. Dist. LEXIS 3897, at *11-*12 (corresponding benefits, such as a cash bonus, are sufficient to support a restrictive covenant).

{¶39} For the foregoing reasons, I concur, in judgment only, with this court's judgment.