[Cite as *Capital City Mechanical, Inc. v. Bartoe*, 2024-Ohio-4550.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Capital City Mechanical, Inc.,	:	
Plaintiff-Appellee,	:	No. 23AP-672 (C.P.C. No. 21CV-2482)
v.	:	(REGULAR CALENDAR)
Michael Bartoe,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 17, 2024

On brief: *Amundsen Davis*, *LLC*, *Steven E. Miller*, and *Marissa R. Borschke*, for appellee. **Argued:** *Steven E. Miller*.

On brief: *Law Office of Josh Brown LLC*, and *Joshua J. Brown*, for appellant. **Argued:** *Joshua J. Brown*.

APPEAL from the Franklin County Court of Common Pleas

JAMISON, J.

{¶ 1} Defendant-appellant, Michael Bartoe, appeals the decision of the Franklin County Court of Common Pleas granting summary judgment and awarding damages in favor of plaintiff-appellee, Capital City Mechanical, Inc. ("CCM").

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} CCM provides mechanical and plumbing services to residential, commercial, and industrial customers in central Ohio. Andy Morbitzer started CCM in 2001.

{¶ 3} Bartoe is a former employee of CCM and started working there in August 2001. Bartoe served as department head of the special projects division, and was responsible for submitting bids for work, procuring equipment, material, supplies, and

managing the work. Bartoe, a key employee, had access to confidential information relating to company operations, strategy, logistics, trade secrets, customer lists, pricing, and margin information. Prior to joining CCM, Bartoe had no experience in the plumbing trade.

{¶ 4} On December 19, 2019, Bartoe and CCM entered into a salary incentive agreement with post-employment restrictive covenants regarding trade secrets, solicitation of customers, and non-competition. The parties had executed three similar employment agreements over the years without issue.

{¶ 5} On October 22, 2020, Bartoe was contacted by Warren Correctional Institution ("WCI"), and instructed CCM to bid on backflow work for a project involving buildings 1, 2, 3, and 4 at WCI. CCM was asked to inform Custom Control Group ("CCG"), the general contractor for the project, that CCM would be performing the backflow work and submitting an invoice. CCG and CCM had a sub-contractor agreement.

{¶ 6} On October 26, 2020, Bartoe formed his own company, Priority Plumbing & Mechanical, LLC ("Priority"), which performed the same services as CCM. On January 15, 2021, Bartoe resigned from his position at CCM and began operating Priority. Priority operates as a one-man operation and will be referred to as Bartoe.

{¶ 7} On February 25, 2021, Bartoe submitted a bid to CCG and performed plumbing work at WCI building 4, the same WCI project he had bid on behalf of CCM in October 2020.

{¶ 8} CCM became aware of Bartoe's work only when contacted by WCI about a warranty letter, and filed a lawsuit against Bartoe on April 21, 2021, alleging breach of contract and requesting injunctive relief. Bartoe answered and asserted counterclaims of tortious and intentional interference with prospective contractual relations or business relationship and fraud.

{¶ 9} A temporary restraining order was issued against Bartoe on April 28, 2021. On December 15, 2021, the trial court issued a preliminary injunction against Bartoe precluding contact with CCM customers.

{¶ 10} On October 31, 2022, CCM filed a motion for summary judgment, and on November 29, 2022, Bartoe filed a response to CCM's motion as well as his motion for partial summary judgment or sanctions in the alternative. On March 27, 2023, the court granted summary judgment in favor of CCM, finding that the agreement was enforceable

and reasonable. Bartoe's summary judgment motion was denied. The trial court required additional information regarding damages and whether sanctions against CCM were warranted.

{¶ 11} On April 19, 2023, the court conducted a damages hearing on CCM's breach of contract claim and Bartoe's motion for sanctions. The trial court awarded CCM $15,720.14 in damages and denied Bartoe's motion for sanctions.

{¶ 12} Bartoe now brings the instant appeal.

II. ASSIGNMENTS OF ERROR

{¶ 13} Appellant assigns the following as trial court errors:

> 1. The Trial Court Erred When it Found That Bartoe Breached the Noncompete Agreement[.]
>
> 2. The Trial Court Errored in Failing to Find the Term "Customer" Ambiguous, and Thus Construing it in Favor of Appellant Bartoe[.]
>
> 3. The Trial Court Errored in Not Finding that Bartoe Entered Into the Contract With Grossly Inferior Bargaining Power[.]
>
> 4. The Trial Court Errored in Not Finding that the Temporal Restrictions of the Noncompete Agreement were Unreasonable[.]
>
> 5. The Trial Court Errored In Not Finding that CCM Engaged in Tortious Interference with Business Relationships[.]
>
> 6. The Trial Court Errored in Finding that CCM Did Not Engage in Frivolous Conduct[.]
>
> 7. The Trial Court Errored in its Calculation of Damages[.]

(Sic passim.)

III. STANDARD OF REVIEW

{¶ 14} An appellate court reviews the decision granting or denying a party's motion for summary judgment using a de novo standard of review. *Premier Radio Networks, Inc. v. Sandblast, L.P.*, 10th Dist. No. 18AP-736, 2019-Ohio-4015. This standard requires us to independently review the record and afford no deference to the trial court. *Paulsen v. Dennis*, 4th Dist. No. 09CA25, 2010-Ohio-4579.

{¶ 15} The issue of whether a non-compete agreement is enforceable is a matter of law that we review de novo. *UZ Engineered Prods. Co. v. Midwest Motor Supply Co., Inc.*, 147 Ohio App.3d 382 (10th Dist.2001).

{¶ 16} CCM sought and obtained a preliminary injunction in this matter. A preliminary injunction preserves the status quo until a case can be adjudicated on its merits. *Steeplechase Village, Ltd. v. Columbus*, 10th Dist. No. 19AP-736, 2020-Ohio-7012. A trial court must consider whether: "(1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) no third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by the injunction." *Vineyard Christian Fellowship of Columbus v. Anderson*, 10th Dist. No. 15AP-151, 2015-Ohio-5083, ¶ 11.

{¶ 17} A party seeking a preliminary injunction must establish each element by clear and convincing evidence, and no single factor is dispositive. *DK Prods., Inc. v. Miller*, 12th Dist. No. CA2008-05-060, 2009-Ohio-436. A trial court's judgment granting a preliminary injunction will not be disturbed absent an abuse of discretion. *Danis Clarkco Landfill Co. v. Clark Co. Solid Waste Mgt. Dist.*, 73 Ohio St.3d 590 (1995).

IV. LEGAL ANALYSIS

{¶ 18} The posture of this case requires us to first address whether Bartoe's appeal is moot. The record indicates the agreement expired in 2023.

{¶ 19} The mootness doctrine "is rooted in the 'case' or 'controversy' language of Section 2, Article III of the United States Constitution and in the general notion of judicial restraint." (Further quotation and citation omitted.) *State v. Jama*, 10th Dist. No. 17AP-569, 2018-Ohio-1274, ¶ 9, citing *Bradley v. Ohio State Dept. of Job & Family Servs.*, 10th Dist. No. 10AP-567, 2011-Ohio-1388, ¶ 11. Ohio does not have a similar constitutional counterpart, but "the courts of Ohio have long recognized that a court cannot entertain jurisdiction over a moot question." (Quotation and citation omitted.) *Id.* " 'Courts generally exercise jurisdictional restraint in cases that do not present actual controversies, and we will dismiss an appeal when, absent fault of the parties, circumstances preclude us from granting effective relief.' " *A.F. v. R.A.T.*, 10th Dist. No. 20AP-23, 2021-Ohio-2568, ¶ 4, quoting *Foster v. Foster*, 10th Dist. No. 11AP-371, 2011-Ohio-6460, ¶ 3. " 'Actions become moot when resolution of the issues presented is purely academic and will have no

practical effect on the legal relations between the parties.' " *Foster* at ¶ 3, quoting *Saffold v. Saffold*, 8th Dist. No. 72937, 1999 Ohio App. LEXIS 2146, *3 (May 13, 1999).

{¶ 20} The mootness doctrine has two primary exceptions. A court may retain jurisdiction to address moot issues when a case presents "an important public right or a matter of great public or general interest" or when the issue is "capable of repetition yet evading review." (Quotation and citation omitted.) *B.M. v. G.H.*, 7th Dist. No. 19 MA 0076, 2020-Ohio-3629, ¶ 11.

{¶ 21} We have held that an action to enforce a non-competition agreement that expired by its own terms is moot. *Doran v. Heartland Bank*, 10th Dist. No. 16AP-586, 2018-Ohio-1811. The agreement expired by its own terms on April 28, 2023. Using the date of injunctive relief, the agreement expired on December 15, 2023. *Lykins Oil Co. v. Corbin*, 12th Dist. No. CA2020-07-036, 2021-Ohio-1126. Because the agreement has expired, Bartoe's first four assignments of error would be moot for present and future claims. However, we review for alleged breach of the non-compete agreement when it was in force and the resulting damage award granted to appellee due to the alleged breach. Therefore, we cannot find Bartoe's first four assignments of error moot.

{¶ 22} We find that Bartoe's first four assignments of error are related and shall be considered together. We begin our analysis to review the trial court's finding that the non-compete agreement is reasonable under Ohio law, that Bartoe breached the non-compete agreement, and the non-compete agreement is enforceable subject to the terms of the preliminary injunction.

{¶ 23} Non-compete agreements have long been recognized as valid in Ohio. *Lake Land Emp. Group of Akron, L.L.C. v. Columber*, 101 Ohio St.3d 242, 2004-Ohio-786. The general policy in Ohio is to enforce reasonable covenants not to compete. " 'A covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests.' " *Charles Penzone, Inc. v. Koster*, 10th Dist. No. 07AP-569, 2008-Ohio-327, ¶ 16, quoting *Raimonde v. Van Vlerah*, 42 Ohio St.2d 21 (1975), paragraph one of the syllabus. " 'A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.' " *Id.*,

quoting *Raimonde* at paragraph two of the syllabus. If the restrictive covenants are reasonable, it fulfills the reasonableness requirement of Ohio law, and the agreement is enforceable. *Id.*

{¶ 24} All non-compete agreements create some level of hardship. *Id.* at ¶ 20. "However, the *Raimonde* test requires more than just some hardship." (Quotation and citation omitted.) *AK Steel Corp. v. Arcelormittal USA, L.L.C.*, 12th Dist. No. CA2015-11-190, 2016-Ohio-3285, ¶ 19. Bartoe is alleged to have violated the agreement by performing work at WCI. Bartoe had previously prepared a bid on behalf of CCM and knew CCG and WCI were CCM customers.

{¶ 25} General principles of contract law apply to non-compete agreements. This dispute centers on the definition of the term "customer." The non-compete agreement precludes Bartoe's involvement with "any business or person who is a customer of Capital City as of the date of Employee's termination, or had been a customer of Capital City at any time during the last year of Employee's employment with Capital City." (Pl.'s Ex. A at 2.) The trial court defined "customer" as a person or entity with whom one entreats for purposes of transacting business.

{¶ 26} The trial court determined that Bartoe breached the agreement by using CCM's information and knowledge to submit an identical bid to CCG for the work at WCI. The trial court also found that Bartoe breached the agreement by performing the work at Franklin Equipment, Madison Correctional Institution, Lillibridge, JT Murray, Franklin Medical Center, Fairfield County, Liberty Township, and Coleman Spohn.

{¶ 27} Bartoe argues the trial court erred in its interpretation and that the contract is ambiguous. Contractual language is ambiguous if " 'the meaning of the language cannot be determined from the four corners of the agreement, or where the language is susceptible to two or more reasonable interpretations.' " *Clifton Steel Co. v. Trinity Equip. Co.*, 8th Dist. No. 105675, 2018-Ohio-2186, ¶ 18, quoting *Co. Wrench, Ltd. v. Andy's Empire Constr., Inc.*, 8th Dist. No. 94959, 2010-Ohio-5790, ¶ 19.

{¶ 28} CCM has interpreted "customer" to be any entity with which it did business during the relevant time period, even if it did not contract directly with or invoice that entity, such as WCI. CCM offered testimony that an owner such as a prison will contact CCM directly and instruct them to perform a certain service as a sub-contractor at the

prison and invoice the general contractor. Bartoe has interpreted customer more narrowly, to mean only entities with which CCM directly contracted for plumbing work, which would not include WCI.

{¶ 29} We have recognized that customer has been defined as a " ' "buyer, purchaser, consumer or patron." ' " *Ferron v. Fifth Third Bank*, 10th Dist. No. 08AP-473, 2008-Ohio-6967, ¶ 10, quoting *Wojnarowsky v. Shelby Ins. Co.*, 11th Dist. No. 2003-L-164, 2005-Ohio-1410, ¶ 29, quoting *Black's Law Dictionary* 386 (6th Ed. Rev.1990).

{¶ 30} The trial court addressed the issue of upstream customers in the preliminary injunction decision. The trial court recognized that while the agreement may preclude Bartoe from working directly for an end-user such as WCI, Bartoe may work for an unrelated general contractor at an end-user without breaching the non-compete provisions, even if the end-user is a CCM customer. The objective of the non-compete agreement was to prevent unfair competition, but not all competition.

{¶ 31} Bartoe testified that sometimes a general contractor will solicit a bid for a job, but other times they will simply call a sub-contractor and offer the job. An end-user such as WCI may bypass the general contractor and call a sub-contractor directly and offer a job. The phone calls to CCM were often made to Bartoe's CCM provided cell phone. It appears that CCM, as well as the other mechanical contractors, functioned at times as general contractors hiring sub-contractors and at other times as the sub-contractors being hired by a general contractor.

{¶ 32} Bartoe did not object to or contest any of the testimony about the way WCI and other end-users conducted business with its general and sub-contractors.

{¶ 33} Bartoe points out the inconsistent treatment of All Pack Services ("APS"), a general contractor and CCM competitor. Bartoe refused work from Grove City, a CCM customer, but APS hired Bartoe as a sub-contractor to perform the same work for Grove City. CCM and APS did not have any relationship, and Grove City was a customer of both entities.

{¶ 34} In the preliminary injunction decision, the trial court singled out APS and other upstream general contractors who are free to hire Bartoe even on projects such as Grove City where he was precluded from working by the non-compete agreement. The

agreement was equitably modified to allow Bartoe to work for other general contractors not subject to the non-compete clause.

{¶ 35} However, in its summary judgment decision, the court identified Bartoe's work for APS as prohibited by the agreement. The magistrate noted the discrepancy in its decision on damages and did not award any damages based on Bartoe's APS work. This harmless error does not impact the decision.

{¶ 36} Consideration of the reasonableness of the terms in a non-compete agreement is a fact-intensive review, with validity determined in each case on its own facts. *Dr. Safadi & Assocs., Inc. v. McColley*, 6th Dist. No. L-22-1182, 2023-Ohio-1234. The trial court properly determined the parameters of the term "customer" and found that Bartoe had breached the agreement.

{¶ 37} Bartoe argues that he had inferior bargaining power regarding the agreement. However, there is no evidence of coercion, duress, fraud, or other improper action in the record to support Bartoe's contention that he had inferior bargaining power and was forced to sign the agreement. *Hilb, Rogal & Hamilton Agency of Dayton, Inc. v. Reynolds*, 81 Ohio App.3d 330 (2d Dist.1992). Some unequal bargaining power between employee and employer "is in and of itself insufficient to render an agreement unenforceable." *Id.* at 338. This was the fourth version of the non-compete agreement he had signed, and the same clause was in the previous versions.

{¶ 38} Bartoe admits that he skimmed the agreement. We have previously found that "parties to contracts are presumed to have read and understood them and * * * a signatory is bound by a contract that he or she willingly signed." (Quotation and citation omitted.) *Khoury v. Denny Motors Assocs., Inc.*, 10th Dist. No. 06AP-1024, 2007-Ohio-5791, ¶ 17. Now is not the time to declare it should have been read more thoroughly. Bartoe's argument of unequal bargaining power fails.

{¶ 39} Bartoe also asserts that the two-year restriction is unreasonable. Non-compete agreements typically contain geographic and temporal limitations on former employees. Bartoe's agreement precluded contact with CCM customers for a two-year period but did not contain any geographical limitations. The trial court found the two-year time period to be reasonable and enforceable.

{¶ 40} Morbitzer stated that it takes about a year to find the right person and a year to train them. Even though CCM had identified Zachary Gray as a potential successor to Bartoe, he had not formally assumed the special projects department head position.

{¶ 41} The agreement was reasonable under the *Raimonde* analysis. It did not have any geographical restrictions. There was no showing that the two-year period was unreasonable. Bartoe possessed knowledge about CCM methodology and customers that is not privy to the general public. The agreement was able to safeguard CCM's protectable interest and allow Bartoe to earn a living in the plumbing trade.

{¶ 42} Bartoe's first, second, third, and fourth assignments of error are overruled.

{¶ 43} Bartoe argues as his fifth assignment of error that the trial court erred in not finding that CCM tortiously interfered with Bartoe's business relationships.

{¶ 44} Bartoe alleges that Morbitzer told KH Excavating and McDaniels Construction false information that was disparaging, and that the companies then refused to hire him on projects for several months. Bartoe viewed CCM's actions as maliciously interfering with his business.

{¶ 45} A person unlawfully interferes with a business relationship "when a person, without a privilege to do so, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." *A & B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14 (1995).

{¶ 46} The trial court determined that Bartoe did not identify any business relationships that were interfered with and was not able to identify any revenue that he lost as a result of interference. McDaniels Construction was a CCM customer, and Bartoe was already precluded from doing business with them pursuant to the non-compete agreement. KH Excavating never solicited any bids from Bartoe, and he had no firm expectation of receiving work. Without any evidence that Morbitzer cost Bartoe business from KH Excavating, recovery on a tortious interference claim is precluded.

{¶ 47} CCM was allowed to inform people in the trade of the non-compete clause and that a preliminary injunction against Bartoe was in place. Summary judgment was proper on the tortious interference claim.

{¶ 48} Bartoe's fifth assignment of error is overruled.

{¶ 49} In Bartoe's sixth and seventh assignments of error, he asserts that the trial court erred in finding that CCM did not engage in frivolous conduct and that the court also erred in calculating damages. The trial court referred these two matters to a magistrate, who determined damages in the amount of $15,720.14 was proper and that CCM did not engage in conduct that would warrant sanctions.

{¶ 50} Civ.R. 53(D)(3)(b)(iii) states in relevant part that "[a]n objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available." In the absence of a transcript or proper affidavit, the trial court was required to accept the magistrate's factual findings. *Gill v. Grafton Corr. Inst.*, 10th Dist. No. 09AP-1019, 2010-Ohio-2977. While Bartoe objected to the magistrate's decision in the trial court, he did not file a transcript or an affidavit of evidence of the hearing held on April 19, 2023. " ' "The duty to provide a transcript for appellate review falls upon the appellant. This is because the appellant bears the burden of showing error by reference to matters in the record." ' " *Lee v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 06AP-625, 2006-Ohio-6658, ¶ 10, quoting *Dailey v. R & J Commercial Contracting, Inc.*, 10th Dist. No. 01AP-1464, 2002-Ohio-4724, ¶ 20, quoting *Fleisher v. Siffrin Residential Assn., Inc.*, 7th Dist. No. 01-CA-169, 2002-Ohio-3002, ¶ 25. "Absent a transcript, this court must presume the regularity of the proceedings below and affirm the trial court's decision." *Id.*, citing *Edwards v. Cardwell*, 10th Dist. No. 05AP-430, 2005-Ohio-6758, ¶ 4-6. *Abu-Arish v. Badawi*, 10th Dist. No. 23AP-312, 2024-Ohio-350. Due to appellant's failure to comply with Civ.R. 53(D)(3)(b)(iii), this court presumes the regularity of the proceedings below.

{¶ 51} Bartoe's sixth and seventh assignments of error are overruled.

V. CONCLUSION

{¶ 52} For the foregoing reasons, we overrule Bartoe's seven assignments of error. The judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

MENTEL, P.J., and EDELSTEIN, J., concur.