

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000985

DONALD E. BROWN AND STANDLEE
HAY COMPANY, INCORPORATED

MOVANTS

ON MOTION FOR INTERLOCUTORY RELIEF UNDER CR 65.07
FROM FAYETTE CIRCUIT COURT
v. HONORABLE JAMES D. ISHMAEL, JR.
ACTION NO. 09-CI-00779

CHARLES T. CREECH,
INCORPORATED

RESPONDENT

ORDER GRANTING CR 65.07 RELIEF

** ** * * * * * ** ** **

BEFORE: STUMBO, TAYLOR AND VANMETER, JUDGES.

The Court has considered movants' motion for emergency and interlocutory relief. The Court has also considered the respondent's motion to dismiss the motion, the motion by Standlee Hay Company, Inc., to withdraw its response in support of the motion and Standlee's motion to be dismissed as a party.

Movant, Donald Brown, was employed by Respondent, Charles T. Creech, Inc., a company in the hay business. According to Brown, who is now 54 years old, he

had worked in the hay business since he was 14 years old prior to his employment by Creech in 1990. He worked for 16 years for Creech, alternatively as a driver, sales representative and dispatcher. During the time of his employment with Creech, he claims he used the Kentucky Thoroughbred Farm Managers Club Directory to generate sales.

On July 20, 2006, he was presented with a "Conflicts of Interest" statement that contained a list of "types of activity" which "might" cause a conflict of interest for Creech employees. The list was followed by provisions requiring employees to keep "proprietary" information in strict confidence and requiring all employees to agree that after leaving the company they would not "work for any other company that directly or indirectly competes with the company for 3 years after leaving" without the company's consent. Mr. Brown did not immediately sign the statement. He claims that Mr. Creech came to him 30 days after the statement was given to him and asked him to go ahead and sign it to "get my daughter off our backs." Creech, on the other hand, claims that it was signed in "consideration for continued employment." The parties do not disagree that just shortly after Mr. Brown was asked to sign the statement he was removed from his job as a sales representative and was, according to Brown, "demoted" to dispatcher and that Creech's son became the sales representative. However, Brown's salary remained essentially the same.

Brown continued to work for Creech until October 17, 2008. According to Brown, he notified Creech of his plans to work for Standlee Hay Company, a direct competitor and that he would be selling to farm managers and other customers in Kentucky and surrounding states. According to Creech, Brown said the work he would

be doing would not be in direct competition with Creech and that he would only be selling to non-Creech customers.

On November 13, 2009, counsel for Creech sent a letter to Brown stating that Creech understood that Brown was leaving to work for Standlee but would not be directly competing for Creech customers and warning Brown that the use of any proprietary information was prohibited by the conflict statement. A similar letter was sent to Standlee on November 14, 2008. On November 17, 2008, the same date Brown started working for Standlee, counsel for Standlee sent a letter to counsel for Creech explaining that Standlee hired Brown as a salesman in Kentucky; that Standlee did not intend to use any proprietary information Brown might have regarding Creech's operations, techniques, formulas or methods; that Standlee was already aware of the customer list in the Lexington area; that Brown would be contracting with any and all of the horse farms in Kentucky and surrounding states; that Standlee intended Brown to work from the publicly available lists and that Brown would most likely be contacting Creech customers who were on the lists. The letter requested that Creech contact Standlee "with its thoughts on the matter." Creech did not respond to the letter.

Creech claims that Brown did solicit Creech customers and contacted Creech suppliers, which prompted Creech to file the underlying complaint on February 16, 2009, against Brown and Standlee. The complaint stated claims for breach of contract, intentional interference with contract, aiding and abetting breach of contract, and intentional interference with current and prospective business contracts. An amended complaint was filed on May 5, 2009. Creech also filed a motion for a temporary

injunction, which is the subject of the motion now before the Court. Creech claimed that the Conflicts Statement was a valid covenant not to compete and that Brown was working in violation of the covenant.

The trial court found that Brown contacted and intended to contact current or potential customers of Creech in competition with Creech, that Brown and Standlee used or may use confidential and proprietary information in violation of the agreement, resulting in a loss of business and good will for Creech. The Court also found that the delay between the written communications between the attorneys and the filing of the complaint was insufficient to serve as a waiver or estoppel of Creech's right to rely on the agreement, and that the communications were insufficient to serve as a waiver. The Court further found that there was sufficient legal consideration in that Brown continued to work for a substantial period of time after signing the agreement. The trial court determined that the equities weighed in favor of the temporary injunction and that the public interest would be served by partially modifying and enforcing the agreement by imposing a geographic restriction prohibiting Brown from any activities (whether on behalf of Standlee or otherwise) which directly or indirectly compete with Creech's business interest within the Commonwealth of Kentucky and from using or disclosing of any such information by either Brown or by Standlee. Brown and Standlee filed the instant motion for interlocutory relief pursuant to CR 65.07.

The standard for issuing a temporary injunction is summarized in *Rogers v. Lexington-Fayette Urban County Government*, 175 S.W.3d 569, 571 (Ky. 2005): 1) Has the plaintiff shown an irreparable injury; 2) Are the equities in the plaintiff's favor,

considering the public interest, harm to the defendant, and whether the injunction will merely preserve the status quo; and (3) does the complaint present a substantial question?" See *Oscar Ewing, Inc. v. Melton, d/b/a Melton's Grocery*, 309 S.W.2d 760 (Ky. 1958), and *Maupin v. Stansbury*, 575 S.W.2d 695 (Ky. App. 1978). The Court will only disturb a trial court ruling on a motion for temporary injunction upon a showing that the trial court abused its discretion or that the trial court's findings are clearly erroneous. *Oakwood Mobile Homes, Inc. v. Sprowls*, 82 S.W.3d 193 (Ky. 2002); *Maupin*, 575 S.W.2d at 699. However, because a temporary injunction is extraordinary relief, "doubtful cases should await trial of the merits." *Maupin* at 698 (Ky. App., 1978).

The crux of Brown's argument is that the Conflicts of Interest Statement is not enforceable as a covenant not to compete and therefore, the trial court abused its discretion by imposing a geographic limitation so as to make it enforceable.

Because covenants not to compete are an exception to the general prohibition against contracts in restraint of trade, if a covenant does not contain a geographic limitation, it is legally unreasonable. *Hodges v. Todd*, 698 S.W.2d 317, 318 (Ky. App. 1985). While *Hodges* also stands for the proposition that a Court can establish a reasonable geographic limitation based on the intention of the parties at the time the contract was executed, adding a geographic limitation cannot transform an otherwise unenforceable covenant not to compete into an enforceable one. Further, *Hodges* is distinguishable as the covenant at issue was ancillary to the sale of a business and the court took into consideration the amount of the purchase price as evincing the intent of the parties to sell the goodwill involved. In the instant case the only intent implicit from

the facts is Creech's intent that none of its employees leave its employ and work for a direct or indirect competitor for a period of 3 years after termination. While it is understandable that Creech wanted to protect itself in what it argues is a highly competitive market, it cannot do so by way of a covenant made in the restraint of trade.

Brown argues that the covenant is unreasonable because it was presented so long after his employment. *Central Adjustment Bureau, Inc. v. Ingram Associates, Inc.*, 622 S.W.2d 681 (Ky. App., 1981), held that covenants were enforceable even though they were signed after employment. However, the instant case is distinguishable as all of the employees in *Central Adjustment* signed the agreements within a few weeks of their initial employment and the agreements were ancillary to employment contracts. Brown, on the other hand, had considerable experience in the industry before taking the position with Creech. He worked for Creech for 16 years before being presented with the agreement for which he received no additional compensation.

Central Adjustment is further distinguishable as it focused on the fact that the covenants were the only way for the employer to protect its employees from "pirating" away clients after it had expended considerable time and energy, effort, and money in training the employees. In the instant case, Creech has made no claim that it expended time, energy, effort or money in training Brown. Indeed, the evidence seems to establish that Brown brought his own experience to Creech and that he initially identified customers using publicly available information.

Brown also argues that the trial court abused its discretion in finding that he was using Creech's proprietary and confidential information. The mere fact that Brown

acquired certain information about certain customers while in the Creech's employ does not necessarily make the information confidential or proprietary. *Birn v. Runion*, 222 S.W.2d 657, 659 (Ky. 1949). This was not a specialized field, market prices are readily available for a commodity such as hay, and it appears that the horse farm lists and hay supplier information was readily available from other sources. Although Creech presented some evidence that there were specific farm manager names that were not contained in the public books, that their cell phone numbers were not in the public listings and that Brown obtained that information while working for Creech, this was insufficient to establish that the information was proprietary so as to support a temporary injunction.

Brown also argues that the trial court abused its discretion in finding that the letters sent from Creech to Brown and Standlee were a waiver of its right to enforce the agreement. However, the letters clearly waive the agreement to the extent it prohibited Brown from "working" for a competitor. While they do state Creech's intent to otherwise enforce the agreement as it related to its proprietary information, they further highlight the overall problem with the conflict statement being enforced as a covenant not to compete. However, as stated previously, there was insufficient evidence to establish that the information was proprietary so as to entitle Creech to the extraordinary remedy of a temporary injunction.

For the foregoing reasons, we conclude that the trial court abused its discretion in granting the motion for a temporary injunction, which warrants relief


pursuant to CR 65.07. We therefore, ORDER the trial court's temporary injunction be, and it is hereby, VACATED.

The Court further ORDERS that the motion for oral argument be, and it is hereby, DENIED; Standlee's motion to be dismissed as a party be, and it is hereby, GRANTED; Standlee's motion to withdraw its response in support be, and it is hereby, DENIED AS MOOT; and the motion for emergency relief be, and it is hereby, DENIED AS MOOT.

STUMBO, JUDGE, CONCURS.

TAYLOR, JUDGE, DISSENTS to the extent that the order grants CR 65.07 relief and CONCURS with all other rulings.

ENTERED: JUL - 7 2009 _____



JUDGE, COURT OF APPEALS