2014 IL App (1st) 140284-U

FIRST DIVISION
July 21, 2014

No. 1-14-0284

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

CROWN PACKAGING INTERNATIONAL, INC.,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13 CH 9556
	)	
LARRY BROWN and LIBATION CONTAINER, INC.,	)	
	)	Honorable LeRoy K. Martin, Jr.,
Defendants-Appellees.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by granting a preliminary injunction against defendants who operated a clandestine competing business in contravention of the restrictive covenant contained in the parties' employment agreement and contrary to the fiduciary duty which employees owe to their employers.

¶ 2 This interlocutory appeal arises from the trial court's entry of a preliminary injunction in favor of Crown Packaging International, Inc. (Crown Packaging) enjoining Larry Brown (Brown), a former Crown Packaging employee. The injunction prohibits Brown from soliciting, diverting, taking away or accepting orders from, or attempting to engage in these acts, from any

customer for whom Crown Packaging had performed services through Brown or to whom Crown Packaging sold products through Brown during the twelve-month period prior to Brown's termination. The injunction is subject to two exceptions: Brown may sell to any customer delineated on a six-page existing customer list attached to the employment agreement, and he may fulfill certain orders placed with his company which were listed in the temporary restraining order entered earlier in the case. Brown appeals, claiming the injunction is not supported by the evidence and is overbroad. For the reasons set forth below, we affirm.

¶ 3 BACKGROUND

¶ 4 Because this is an interlocutory appeal, the evidence in the case is merely a "snapshot" based on the injunction hearing and not necessarily demonstrative of the complete story that a full trial record might provide. The evidence in the record at this point shows that Crown Packaging is a supplier of rigid containers, including glass bottles, crowns (bottle caps), and other items related to craft breweries. Before working for Crown Packaging, Brown worked in the craft beer packaging industry and originally developed packaging for "beer-of-the-month" clubs, which were popular with craft beer enthusiasts during the 1980s. In December 1998, Crown Packaging entered into an employment agreement with Brown. Under the agreement, Crown Packaging employed Brown as an outside salesperson responsible for servicing and procuring customers—primarily craft breweries in the Midwest—for Crown Packaging. Crown Packaging invested substantial resources in Brown and in the brewing customers to create and maintain that business. Brown received a number of benefits, including a salary and commissions depending on the amount of business he brought in. Brown was very successful, and earned more than $400,000 per year from Crown Packaging.

¶ 5 The employment agreement prohibited Brown from soliciting Crown Packaging customers for non-Crown Packaging business both during Brown's employment and for twelve months thereafter. More specifically, section 2 of the agreement stated that Brown "shall neither directly nor indirectly, on his own account, or as an employee, consultant, partner, joint venture, owner, officer, director or stockholder of any other person, firm, partnership, corporation or other entity, or in any other capacity, in any way * * * solicit, divert, take away or accept orders from, or attempt to solicit, divert, take away or accept orders from, any person, firm, partnership, corporation or other entity for whom Crown Packaging has performed any services or to whom Crown Packaging has sold any product within the twelve (12) month period terminating on the date upon which the employment of Employee by Crown Packaging shall terminate."

¶ 6 Section 4 of the agreement establishes remedies for violation, and provides in relevant part:

> "Employee agrees that the services to be performed by him/her for Crown Packaging are special and unique [and] that damages cannot compensate Crown Packaging in the event of a violation of the covenants contained herein, and that injunctive relief shall be essential for the protection of Crown Packaging. Accordingly, Employee agrees and consents that, in the event he/she shall violate or breach any of the covenants contained herein, Crown Packaging shall be entitled to obtain (and Employee hereby consents thereto) injunctive relief against Employee, without bond but upon due notice, in addition to such further or other relief as any appertain at law or in equity."

¶ 7 Furthermore, Section 5 contains an indemnification clause providing that Brown agrees to indemnify Crown Packaging and hold it harmless against all costs Crown Packaging incurs if Brown breaches the agreement.

¶ 8 In September 2010, Brown established a secret side business, co-defendant Libation Container, Inc. (Libation) which actively and directly competed with Crown Packaging and solicited its customers. Libation had its own website, which showed that Libation was engaged in the same business as Crown Packaging. Brown did not tell Crown Packaging that he was incorporating Libation and he took numerous steps to keep it secret. He did not seek Crown Packaging's permission to sell craft brewing containers on his own while he was still employed by Crown Packaging. Brown never told Crown Packaging that he was establishing his own company, and he never sought Crown Packaging's permission to sell related products.

¶ 9 Brown also enlisted the aid of others to hide Libation from Crown Packaging. For example, he asked alternate bottle supplier Owens-Illinois not to mention Libation to Crown Packaging, even while he was attempting to recruit Owens-Illinois as his new supplier of bottles. Brown also used his administrative assistant, Sherry Carnahan (Carnahan), a Crown Packaging employee, to help him with hiding the side business, and he had customers begin using Carnahan's personal Gmail account to shield communications from Crown Packaging management. The email record concerning Carnahan's involvement with Libation was extensive; discovery produced numerous emails from Libation referring to Carnahan telling customers to contact Carnahan at her personal Gmail account. Brown also established a non-Crown Packaging internet fax system which only he and Carnahan could access.

¶ 10 Crown Packaging became aware that Brown might be operating Libation on January 30, 2013, when he forwarded some email correspondence regarding a contract with one of Crown

Packaging's customers to David Blitstein (Blitstein), Crown Packaging's Vice President and General Manager. One of the emails from the customer was directed to "Libation Container, Inc." at Libation's email address. After receiving that email, Blitstein and others began actively investigating Libation and Brown's activities through Libation. They found that Brown and Libation were actively competing with Crown Packaging because the Libation website, for example, contained a photograph of various products, including certain glass bottles and promotional items which bore the name of several Crown Packaging customers. There was also evidence on the website that Brown was competing with Crown Packaging and actively soliciting glass decorating business.

¶ 11 In April 2013, Blitstein spoke with a representative of one of Crown Packaging's vendors. He informed Blitstein that he was aware of Libation and that he started doing business with Brown and Libation several months earlier. Among other things, he said he was providing repacking services for various customers in Chicago, including at least one current Crown Packaging customer.

¶ 12 Crown fired Brown and sued him. Count 1 of the complaint sets forth claims for breach of the restrictive covenant in Brown's employment contract; count 2 is a claim for breach of fiduciary duty. Crown Packaging sought injunctive relief under both counts. The parties first entered into an agreed temporary restraining order. The defendants answered Crown Packaging's complaint asserting a number of affirmative defenses, which *inter alia* included claims that Crown Packaging so materially breached its employment contract with Brown that the restrictive covenant contained in the employment agreement was not enforceable, and that these material breaches left Crown Packaging with unclean hands and therefore unable to obtain

equitable relief. The defendants also filed a counterclaim alleging violations of the Illinois Wage Payment and Collection Act, 820 ILCS 115/1 *et seq*. and for breach of contract.

¶ 13 The court granted a preliminary injunction against Brown following discovery and an eight-day evidentiary hearing. The trial court's order on the preliminary injunction found that Crown Packaging: (1) "possessed a protectable right in need of protection, in that Crown [Packaging] has legitimate interests in its customer relationships, and the covenant with Brown was intended by the parties to protect those relationships"; (2) "had no adequate remedy at law, in that Crown [Packaging] could not be properly compensated for loss of sales and customers"; (3) "would suffer irreparable harm through Brown's solicitation of its business and customers"; and (4) "has shown a likelihood of success on the merits of its claims against Brown." The injunction specifically ordered:

> "As of 12:00 p.m. on January 13, 2014, Defendants Brown and Libation and all of their respective officers, agents, employees, and upon those persons in active concert or participation with them are ordered to cease and desist from soliciting, diverting, taking away or accepting orders from, or attempting to solicit, divert, take away, or accept orders from, any customer from whom [Crown Packaging] has performed services through Brown or to whom [Crown Packaging] has sold through Brown for the twelve (12) month period prior to Brown's termination, with two exceptions:
>
> 1) Brown shall be permitted to sell to any customer listed on the six-page Customer List attached to his employment agreement with [Crown Packaging] dated December 18, 1998;

> 2) Brown shall be permitted to fulfill any order placed with Libation in compliance with the Agreed Temporary Restraining Order in this case, for orders placed on or before 12:00 noon on January 13, 2014."

¶ 14 This interlocutory appeal under Ill. Sup. Ct. R. 307(a)(1) followed.

¶ 15 ANALYSIS

¶ 16 Brown and Libation present several arguments on appeal. Primarily, though, they claim that the preliminary injunction enforcing the restrictive covenant was improper because Crown Packaging materially breached the employment agreement with Brown by shorting him on his commissions and other types of compensation. They contend that the trial court should have evaluated the validity of the underlying employment agreement in light of their counterclaim and determined that the restrictive covenant was no longer enforceable due to Crown's misconduct. Furthermore, the defendants contend that the injunction extends far beyond the restrictions in the employment agreement because the one-year prohibition preventing Brown from conducting business with Crown Packaging's customers expired on April 9, 2014, and the injunction improperly subjects Brown to greater restrictions than what he had bargained for.

¶ 17 "A preliminary injunction preserves the status quo until the merits of the case are decided." *Clinton Landfill, Inc. v. Mahomet Valley Water Authority*, 406 Ill. App. 3d 374, 378 (2010). This type of remedy is an "extraordinary one" and a court should grant it only in situations where, for example, serious harm would result if the preliminary injunction was not issued. *Id.* A court does not decide disputed facts pertaining to the merits of the case at the preliminary injunction stage. *Id.* Nonetheless, a court must take the evidence as it presently exists in the record into account when deciding when to grant an injunction.

¶ 18 In order to obtain a preliminary injunction, the moving party must show "(1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case." *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 62 (2006). "On appeal, we examine only whether the party seeking the injunction has demonstrated a *prima facie* case that there is a fair question concerning the existence of the claimed rights." *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 177 (2002) (citing *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 366 (2001)). A court's decision to grant or deny a preliminary injunction is generally reviewed for an abuse of discretion. *Callis, Papa, Jackstadt & Halloran*, 195 Ill. 2d at 366. "A trial court abuses its discretion only when its ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would adopt the court's view." *People ex rel. Madigan v. Petco Petroleum Corp.*, 363 Ill. App. 3d 613, 634 (2006). But "whether injunctive relief should issue to enforce a restrictive covenant not to compete in an employment contract depends upon the validity of the covenant, the determination of which is a question of law." *Mohanty*, 225 Ill. 2d at 63. See also *Woodfield Group, Inc. v. DeLisle*, 295 Ill. App. 3d 935, 938 (1998) ("determination of whether a restrictive covenant is enforceable is a question of law"). Therefore, we review that particular determination *de novo*. *Mohanty*, 225 Ill. 2d at 63.

¶ 19 The trial court neither erred nor abused its discretion in granting Crown Packaging's motion for preliminary injunction. Initially, we note that the trial court gave little, if any, weight to Brown's argument that the employment agreement was null and void due to Crown Packaging's repeated violation of it, finding that issue was "not particularly germane" to the motion for preliminary injunction. Whether the agreement was valid was certainly relevant to the pending injunction motion, because it went directly to whether Crown Packaging had a

likelihood of success on the merits. However, the trial court did not completely ignore the issue as the defendants claim it did. The trial court specifically stated that "there was a great deal of testimony * * * and evidence regarding this issue," but that "I don't believe that that issue would cause the covenant to be unenforceable." While not explicitly saying so, the defendants appear to seek rescission of the employment agreement. Rescission is an extraordinary remedy requiring stringent proof because the law favors the enforcement of contracts. *Royal Extrusions Ltd. v. Continental Window and Glass Corp.*, 349 Ill. App. 3d 642, 651 (2004) ("Illinois recognizes a public policy favoring the enforcement of contracts."). To state a cause of action for rescission, "the plaintiff must allege facts which establish that there has been substantial nonperformance or a substantial breach by another party." *Lempa v. Finkel*, 278 Ill. App. 3d 417, 426 (1996). The defendants did not plead a specific rescission claim, although one of the affirmative defenses states that the employment contract was null and void. We agree that the evidence before the court during the injunction hearing was not so one-sided that the trial court was compelled to find that it was likely that Brown would succeed on his invalidity claim. While there was some evidence that Crown Packaging did not pay Brown all that he was entitled to, Brown was still paid a substantial salary and, as the trial court noted, Brown had the "right to pursue the plaintiff for any malfeasance that he claims the plaintiff engaged in by not compensating him" at the appropriate level. Even under a *de novo* standard of review, we cannot say that the record demonstrates that the written employment agreement was invalid.

¶ 20 Additionally, the written agreement was not the only basis supporting injunctive relief. Count 2 of the complaint sought relief for Brown's common-law breach of fiduciary duty. Our supreme court has explained that a claim for breach of fiduciary duty "is founded on the substantive principles of agency, contract and equity." *Armstrong v. Guigler*, 174 Ill. 2d 281,

294 (1996) (emphasis in original). As such, claims for breach of fiduciary duty are not purely contractual in nature and are not subject to the statute of limitations normally applicable to contract claims. *Id.*

¶ 21 There was more than sufficient evidence that Brown breached his fiduciary duty to Crown Packaging to support injunctive relief under count 2, independently of count 1. Employees owe fiduciary duties to their employers. *ABC Trans National Transport, Inc. v. Aeronautics Forwarders Inc.*, 62 Ill. App. 3d 671, 683 (1978) ("a fiduciary cannot act inconsistently with his agency or trust; *i.e.*, solicit his employer's customers for himself, entice coworkers away from his employer, or appropriate his employer's personal property"). There was evidence that Brown breached his fiduciary duties by creating a secret company that competed with Crown Packaging for more than two years. *See, e.g., Unichem Corp. v. Gurtler*, 148 Ill. App. 3d 284, 290-91 (1986) (concealment of the company itself constitutes a breach of fiduciary duty).

¶ 22 Brown also engaged in a number of other fiduciary duty breaches. For example, he usurped new business opportunities that should have gone to Crown Packaging. *Lawlor v. North American Corp. of Illinois*, 2012 IL App 112530, ¶ 69 ("a fiduciary cannot * * * cannot solicit his employer's customers for himself"). He also improperly recruited Carnahan, a former Crown Packaging employee, to advance his secret company. *See, e.g., Corroon & Black of Illinois, Inc. v. Magner,* 145 Ill. App. 3d 151, 161 (1986) ("[a] third person who has colluded with a fiduciary in committing a breach of duty, and who obtained a benefit therefrom, is under a duty of restitution to the beneficiary").

¶ 23 While the primary remedy for breach of fiduciary duty is monetary damages, namely disgorgement of ill-gotten gains, the injunction could be independently justified as a temporary

remedy aimed at keeping the status quo until the claim could be resolved on its merits. Under Illinois law, a breach of fiduciary duty merits injunctive relief. *ABC Trans National Transport, Inc*., 62 Ill. App. 3d at 686-87. In *ABC Trans National Transport*, the defendant-employees did substantially what Brown did in this case. While they were still employed, they created a competing company and actively competed with their employer. They then left to go to their new company and continued to solicit their former employer's customers. *Id*. There were no restrictive covenants. The court analyzed the injunction question in the context of the employees' breach of fiduciary duty:

> "Turning to the question of relief where a betrayal of confidence and trust has been demonstrated, we note that equity will prevent the continuance of such conduct in a proper case.
>
> [Here] that plaintiff had the right to be free of interference with its customers by those in its employ; that this was a right that was entitled to protection until the merits of this case are disposed of."
>
> *Id*. at 684, 686.

The court then found it to be an abuse of discretion by the trial court to deny an injunction. *Id*. at 686.

¶ 24 Illinois law also allows post-termination injunctions against employees where, as here, their actions are substantially intertwined in the business operations of the employer. *Foodcom International v. Barry*, 328 F.3d 300, 304 (7th Cir. 2003) (the defendants, who were not corporate officers, owed a fiduciary duty to their employer because they were two of the company's highest paid employees, had control over a major business segment, and had substantial autonomy and discretion); *H & H Press, Inc. v. Axelrod*, 265 Ill. App. 3d 670, 679-80

(1994) (employee owed a fiduciary duty to company because she placed orders on behalf of the company, met sellers and buyers at trade shows, and was responsible for selling the services of the company).

¶ 25 In this case, Brown was substantially intertwined with the business operations of Crown Packaging. He was the sole craft brewing salesperson and was responsible for running the entire craft brewing business. Although Brown did not maintain an office at Crown Packaging and operated outside of the office and set his own schedule, he did meet with customers and suppliers, and attended trade shows. In other words, he was the "face" of Crown Packaging. Brown's role was critical to Crown Packaging because, in 2012, he was responsible for about 32% of all revenues of Crown Packaging's primary division. His high compensation reflected his status; from 2010 through 2012, he made more than $1.3 million dollars for these years, and he was on track to make well over half a million dollars in 2013. As such, he was substantially intertwined in Crown Packaging's business operations. Because Brown breached his fiduciary duty to Crown Packaging, the trial court did not abuse its discretion in entering the preliminary injunction against the defendants.

¶ 26 In sum, Crown Packaging established the four elements required for a preliminary injunction. *Mohanty*, 225 Ill. 2d at 52. First, it showed that it had a protectable interest in maintaining its business relationships with its customers and in the continued viability of its business. Next, Crown Packaging established irreparable harm to its business because the defendants improperly violated the restrictive covenant by competing for and stealing its customers. There was no adequate remedy at law as money damages might not fully compensate Crown Packaging for the loss of current and future customers. Lastly, Crown Packaging showed that it has a likelihood of succeeding on the merits because Brown admitted that he established

Libation while working for Crown Packaging, which violated the restrictive covenant in the parties' employment agreement. The trial court did not abuse its discretion in awarding an injunction to preserve the status quo established by the employment agreement, and Crown presented a *prima facie* case showing there was a "fair question" regarding the existence of Crown Packaging's claimed rights.

¶ 27 We also reject Brown's claim that the injunction improperly extends past the one-year period established by the employment agreement. Brown's argument is a bit disingenuous, because it would allow an employee to solicit employees immediately upon termination and drag out litigation long enough for the no-contact period to expire, assiduously fighting injunctive relief in the meantime. We understand that only three days passed between Brown's termination and the entry of the temporary restraining order. Given the nature of Brown's actions, however, the trial court had the equitable powers to fashion a remedy appropriate to the situation, and it did not abuse its discretion by essentially establishing a new period of at least one year during which Brown could not solicit Crown Packaging clients. We note that the normal remedy for breach of fiduciary duty is disgorgement of profits, not permanent injunctive relief. *Vendo Co. v. Stoner*, 58 Ill. 2d 289, 314 (1974) (Under Illinois law, it is clear that the full forfeiture of compensation is a permissible measure of damages for the breach of fiduciary duties); *see also ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 90 Ill. App. 3d 817, 838 (1980) ("one who breaches fiduciary duties has no entitlement to compensation during a wilful or deliberate course of conduct adverse to the principal's interests"). Upon receipt of our mandate, the trial court can revisit whether sufficient time has passed so that the injunction against client contact can now be dissolved or not made permanent, noting that the parties had bargained for a one-year no-contact period in the first instance. However, we do not mean to

necessarily limit the remedies available should the trial court find that a longer time period is necessary to equitably remedy a breach of fiduciary duty under count 2.

¶ 28 CONCLUSION

¶ 29 Accordingly, we affirm the judgment of the trial court.

¶ 30 Affirmed.