2016 IL App (5th) 160056-U

NO. 5-16-0056

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

TSD ENTERPRISE, LLC, doing business as Massage Envy of O'Fallon,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiff-Appellant,	)	
v.	)	No. 15-CH-177
AARON SECORA, also known as Aaron Swalley,	)	Honorable Randall W. Kelley,
Defendant-Appellee.	)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court improperly dismissed, without hearing evidence, the plaintiff's request for preliminary injunction.

¶ 2 The plaintiff, TSD Enterprise, LLC, doing business as Massage Envy of O'Fallon, sought a preliminary injunction to enjoin the defendant, Aaron Secora, also known as Aaron Swalley, from working within five miles of the plaintiff's business. Without hearing evidence, the circuit court dismissed the plaintiff's request for a preliminary injunction. We reverse and remand.

¶ 3 BACKGROUND

¶ 4 On March 9, 2015, the plaintiff filed a "Motion for Temporary Restraining Order and Preliminary Injunction," along with a "Complaint for Injunction and Other Relief." The plaintiff's complaint included count I, entitled "Preliminary Injunction," wherein the plaintiff alleged that the defendant had been employed by the plaintiff as a massage therapist. The plaintiff alleged that on March 17, 2009, the defendant executed a "Non-competition, Non-solicitation and Confidential Information Agreement" containing restrictions prohibiting the defendant from engaging in competitive activity after termination of his employment with the plaintiff. Specifically, the agreement restricted the defendant, for 12 months after the date of termination of employment with the plaintiff, from engaging in any competing business; soliciting or accepting business from the plaintiff's clients; diverting business away from the plaintiff; attracting suppliers away from the plaintiff; diverting the employees or agents away from the plaintiff; and disclosing the plaintiff's trade secrets or confidential information. The plaintiff alleged that the defendant was restricted from engaging in any competing business within a five mile radius of the plaintiff.

¶ 5 The plaintiff alleged that on September 23, 2013, the defendant ratified the March 17, 2009, agreement by executing an additional "Confidentiality Agreement" as part of the "Massage Envy Therapy Training Manual." The plaintiff alleged that the aforementioned restrictive covenant was enforceable under Illinois law because it was a material part of the defendant's employment agreement, defendant received substantial

consideration through his employment with the plaintiff over five years, and the restrictive covenant was limited in duration and scope.

¶ 6 In count I, the plaintiff further alleged that the defendant voluntarily terminated his employment with the plaintiff on November 21, 2014. The plaintiff alleged that since leaving its business, the defendant violated his contractual obligation to refrain from competing with the plaintiff. The plaintiff alleged that it had suffered substantial and irreparable injury as a result of the defendant's employment with Massage LuXe, a direct competitor of the plaintiff's. The plaintiff alleged that the substantial and irreparable injury that it suffered as a result of the defendant's breach and continued employ at Massage LuXe was a constant and frequent occurrence that was ongoing and would not be prevented or rectified by final judgment at trial. The plaintiff alleged that it had no adequate remedy at law for the injury it sustained because money damages were inappropriate, inadequate, or hard to calculate or quantify. The plaintiff alleged that injunctive relief was necessary to restore the status quo. In its prayer for relief, the plaintiff requested that the court issue a temporary restraining order pending a hearing on its request for a preliminary injunction and set a hearing date on the plaintiff's request for preliminary injunction. In count II of the plaintiff's complaint, the plaintiff alleged a breach of contract action, asserting that the defendant breached the employment agreement and that the plaintiff had been damaged by lost profits, loss of customers, and expenses related to enforcement of the agreement.

¶ 7 The plaintiff attached the employment agreements to its complaint. Pursuant to the March 17, 2009, agreement, upon termination of employment, for 12 months after the date of termination, the defendant agreed that he would not:

> "(a) engage in any business which is the same as or substantially similar to any business in which Employer is engaged as of the Termination Date, or which is otherwise competitive with any business in which Employer is engaged as of the Termination Date;
>
> (b) directly or indirectly solicit or accept business from any customers or clients of Employer for products or services that are similar to or competitive with products or services sold by Employer as of the Termination Date;
>
> (c) directly or indirectly divert any business from Employer by influencing or attempting to influence any customers or clients of Employer;
>
> (d) directly or indirectly attempt to attract any supplier away from Employer or use information regarding Employer's suppliers in any way which would detrimentally affect Employer;
>
> (e) directly or indirectly solicit, hire, recruit, divert or take away from Employer the services of any of the employees or agents of Employer, or induce in any way any non-performance of any of the obligations of such employees or agents to Employer; and
>
> (f) undertake, or engage in, any employment or business activities involving the disclosure or use of Employer's trade secrets or confidential information."

This agreement provided that competition was prohibited within a five mile radius of the plaintiff. This agreement also provided that in the event the defendant violated the agreement, the plaintiff "shall be authorized and entitled to obtain temporary, preliminary, and permanent injunctive relief," as well as an equitable accounting of all profits or benefits arising out of such violation.

¶ 8 The "Confidentiality Agreement" executed on September 23, 2013, also provided that the defendant shall not engage in any competing business within five miles of the plaintiff. The defendant again agreed to a non-compete period of one year after his employment terminated with the plaintiff. In this agreement, the defendant further agreed that "any breach of th[e] Agreement shall cause irreparable injury" and that "in the event of such breach [the plaintiff] shall be entitled to seek temporary and permanent injunctive relief against" the defendant, in addition to any other legal and equitable remedies.

¶ 9 On April 24, 2015, the defendant filed a motion to dismiss the plaintiff's complaint. The defendant acknowledged that after terminating employment with the plaintiff, he accepted a position as massage therapist for Massage Luxe, located in Fairview Heights, Illinois, within five miles of the plaintiff's business. The defendant asserted that he had made no attempt to contact any of the plaintiff's customers or to solicit any business from the plaintiff's customers. Pursuant to section 2-615 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-615 (West 2014)), the defendant argued that the plaintiff failed to state facts sufficient to demonstrate irreparable harm or an inadequate remedy at law. Pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)), the defendant argued that there was inadequate consideration to support the

September 23, 2013, agreement and that the restrictive covenant was not a reasonable restraint.

¶ 10 On June 26, 2015, the circuit court found that the plaintiff had an adequate remedy at law and thereby dismissed the plaintiff's request for a preliminary injunction. The circuit court denied the defendant's motion to dismiss count II. On July 16, 2015, the plaintiff filed a motion to reconsider, requesting the court to, among other things, grant a "preliminary injunction" restraining the defendant for one year from engaging in any competing business within a five mile radius of the plaintiff. On January 13, 2016, the circuit court denied the plaintiff's motion to reconsider. On February 5, 2016, the plaintiff filed notice of interlocutory appeal. See Ill. S. Ct. R. 307(a) (eff. Feb. 26, 2010).

¶ 11 ANALYSIS

¶ 12 The defendant argues that this appeal should be dismissed for lack of jurisdiction because it is not interlocutory in nature. The defendant argues that the plaintiff sought permanent injunctive relief in count I of its complaint and did not seek a preliminary injunction merely to maintain the status quo. We disagree.

¶ 13 Illinois Supreme Court Rule 307(a)(1) (eff. Feb. 26, 2010) allows for appeals by right of interlocutory orders "granting, modifying, refusing, dissolving, or refusing to dissolve or modify an injunction." "Illinois courts have construed the meaning of 'injunction' in Rule 307(a)(1) broadly." *Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 221 (2000); see also *Five Mile Capital Westin North Shore SPE, LLC v. Berkadia Commercial Mortgage, LLC*, 2012 IL App (1st) 122812, ¶ 11. "An injunction is 'a judicial process operating in personam and requiring [a] person to whom it is directed to

do or refrain from doing a particular thing.' " *Skolnick*, 191 Ill. 2d at 221 (quoting *In re A Minor*, 127 Ill. 2d 247, 263 (1989)). Because Rule 307(a) is addressed only to interlocutory orders, the order appealed from must not be in the nature of a permanent injunction. See *Steel City Bank v. Village of Orland Hills*, 224 Ill. App. 3d 412, 416-17 (1991). "Orders which are not limited in duration and which alter the status quo are permanent in nature." *Id.* at 417 (status quo is defined as last peaceable uncontested status preceding the pending controversy).

¶ 14 Although inartfully pled, count I of the plaintiff's complaint, entitled "Preliminary Injunction," alleged the elements required to request a preliminary injunction, including the request to preserve the status quo, and its prayer for relief included the plaintiff's request for a hearing on its right to a preliminary injunction. After the circuit court dismissed count I of the plaintiff's complaint, the plaintiff filed a motion to reconsider, again requesting the court to grant a "preliminary injunction." Accordingly, in dismissing count I of the plaintiff's complaint, the circuit court denied the plaintiff's request for a preliminary injunction. Rule 307(a)(1) gives this court jurisdiction to hear an interlocutory appeal from the judgment of the circuit court refusing the plaintiff's request for a preliminary injunction. See *Travelport, LP v. American Airlines, Inc.*, 2011 IL App (1st) 111761, ¶ 21. As a result, the circuit court's order dismissing the plaintiff's request for preliminary injunction is properly before us. See *Five Mile Capital Westin North Shore SPE, LLC*, 2012 IL App (1st) 122812, ¶ 10; see also *Nameoki Township v. Cruse*, 155 Ill. App. 3d 889, 893 (1987) (interlocutory appeal from dismissal of complaint requesting preliminary injunctive relief was proper pursuant to Rule 307(a)).

¶ 15 The plaintiff argues that the circuit court improperly dismissed its request for a preliminary injunction because, contrary to the circuit court's judgment, its complaint sufficiently alleged that it did not have an adequate remedy at law for the defendant's restrictive covenant violations. We agree.

¶ 16 Illinois courts have held that, generally, the standard of review regarding the propriety of a preliminary injunction is whether the trial court abused its discretion in determining that the plaintiff provided *prima facie* evidence to support his or her claim. *Callis, Papa, Jackstadt & Halloran P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 366 (2001). However, "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" that is reviewed *de novo*. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63 (2006). Likewise, *de novo* review is appropriate where the trial court does not hear evidence and makes no findings of fact. See *Doe v. Department of Professional Regulation*, 341 Ill. App. 3d 1053, 1059-60 (2003) (review of a preliminary injunction is *de novo* where the circuit court did not make findings of fact).

¶ 17 "An employer has a valid interest in protecting its long-standing client relationships against the subterfuge and sabotage of former employees. See *Cockerill v. Wilson* (1972), 51 Ill. 2d 179, 184 *** (clients of an established veterinarian protectable); *Canfield v. Spear* (1969), 44 Ill. 2d 49, 52 *** (clients of existing medical practice protectable)." *A-Tech Computer Services, Inc. v. Soo Hoo*, 254 Ill. App. 3d 392, 399 (1993). However, "[b]ecause restrictive covenants in employment agreements are a form

of restraint of trade, they are scrutinized carefully to ensure their intended effect is not to prevent competition *per se*." *Lifetec, Inc. v. Edwards*, 377 Ill. App. 3d 260, 268 (2007). "Where restrictive covenants are ancillary to valid contracts supported by adequate consideration and are reasonable in their terms as to time and territory, such covenants will be enforced by the courts and relief by injunction is customary and proper." *Id.* at 268-69. The reasonableness of a postemployment restrictive covenant necessarily depends upon the unique facts and circumstances of each case. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 447 (2007).

¶ 18 It is well established that the purpose of a preliminary injunction is not to resolve the merits of a case, but to preserve the status quo until the merits can be decided. *Callis, Papa, Jackstadt & Halloran, P.C.*, 195 Ill. 2d at 365. Consistent with the provisional nature of this remedy, a party seeking preliminary injunctive relief is not required to make out a case which would entitle him to final judgment; rather, he need only show that he raises a "fair question" and that the court should preserve the status quo until it can decide the case on the merits. *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill. 2d 373, 382 (1985). "Granting a preliminary injunction is used to prevent a threatened wrong or continuing injury and preserve the status quo with the least injury to the parties concerned." *Kalbfleisch v. Columbia Community Unit School District Unit No. 4*, 396 Ill. App. 3d 1105, 1113 (2009).

¶ 19 Accordingly, a party seeking a preliminary injunction must demonstrate a *prima facie* case that there is a fair question concerning the existence of the claimed rights. *Id.* at 1112. A party seeking a preliminary injunction must allege and show: (1) that it

possesses a clear right or interest needing protection, (2) that it has no adequate remedy at law, (3) that irreparable harm will result if the preliminary injunction is not granted, and (4) that there is reasonable likelihood of success on the merits. *People ex rel. White v. Travnick*, 346 Ill. App. 3d 1053, 1060 (2004). On appeal, the reviewing court generally decides "whether the plaintiff has demonstrated a *prima facie* case that there is a fair question as to the existence of the rights claimed, that the circumstances lead to a reasonable belief that the plaintiff probably will be entitled to the relief sought, and that the matters should be kept in the status quo until the case can be decided on the merits." *Id.*; see also *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164, 177 (2002).

¶ 20 "An adequate remedy at law is one which is clear, complete[,] and as practical and efficient to the ends of justice and its prompt administration as the equitable remedy." *Cross Wood Products, Inc. v. Suter*, 97 Ill. App. 3d 282, 286 (1981). With regard to the breach of a restrictive covenant in an employment contract, although immediate damages, such as lost revenues from clients, might be calculable, the injury to reputation and goodwill, as well as the resulting potential loss of future business, is hard to assess with any degree of accuracy and is often incapable of adequate computation. See *Scheffel & Co., P.C. v. Fessler*, 356 Ill. App. 3d 308, 314 (2005); *U-Haul Co. of Central Illinois v. Hindahl*, 90 Ill. App. 3d 572, 577 (1980); see also *A-Tech Computer Services, Inc.*, 254 Ill. App. 3d at 401 ("While pecuniary damages can be calculated, loss of competitive position is intangible, incapable of being measured."). Moreover, the fact that plaintiffs' ultimate relief may be a money judgment does not deprive a court of equity of the power to grant a preliminary injunction. *A-Tech Computer Services, Inc.*, 254 Ill. App. 3d at

401; *All Seasons Excavating Co. v. Bluthardt*, 229 Ill. App. 3d 22, 28 (1992); *ABC Trans National Transport, Inc. v. Aeronautics Forwarders, Inc.*, 62 Ill. App. 3d 671, 684 (1978); *K.F.K. Corp. v. American Continental Homes, Inc.*, 31 Ill. App. 3d 1017, 1021 (1975).

¶ 21 In the case at bar, the plaintiff sought a preliminary injunction to enjoin the defendant from violating the restrictive covenant contained in the employment contract. The plaintiff alleged that pursuant to the employment agreement, the defendant had agreed to the covenant not to compete and agreed that, upon any violation thereof, the plaintiff shall be authorized to obtain preliminary injunctive relief. The plaintiff further alleged that the defendant subsequently terminated his employment and violated the covenant not to compete. In alleging that a remedy at law was inadequate, the plaintiff alleged that the defendant "would have the ability to take customers from" the plaintiff; that the substantial and irreparable injury was a "constant and frequent occurrence" that was ongoing; and that money damages were "inappropriate, inadequate, or hard to calculate or quantify."

¶ 22 We find that the plaintiff sufficiently alleged that it had an inadequate remedy at law, in order to seek a preliminary injunction. See *Central Water Works Supply, Inc. v. Fisher*, 240 Ill. App. 3d 952, 959 (1993) (because potential loss of profits and customers to plaintiff by defendant's competition in the geographical area are difficult to calculate, plaintiff established the inadequacy of a legal remedy); *McRand, Inc. v. van Beelen*, 138 Ill. App. 3d 1045, 1054-59 (1985) (where employer sought preliminary injunction against employee who allegedly violated restrictive covenant by competing with employer, there

was no adequate remedy at law for purposes of preliminary injunction). Thus, we find that the circuit court erred in dismissing, without hearing evidence, the plaintiff's request for a preliminary injunction, on the basis that the plaintiff had an adequate remedy at law.

¶ 23 Because the circuit court prematurely dismissed the plaintiff's request for a preliminary injunction, we decline to address the defendant's argument that the agreement was unreasonable, and therefore, unenforceable. See *Mohanty*, 225 Ill. 2d at 62-63 (because restrictive covenant contained in physician employment contract was valid and reasonable, employer was entitled to a preliminary injunction to enforce restrictive covenants). The circuit court made no findings or determinations with regard to whether the agreement was valid and reasonable. See *Travelers Casualty & Surety Co. v. Bowman*, 229 Ill. 2d 461, 477 (2008) (since trial court did not rule on statutory timeliness, appellate court should have simply reversed and remanded the cause). Moreover, although we find that the circuit court erred in dismissing the plaintiff's request for a preliminary injunction on the aforementioned basis, we offer no opinion regarding whether the plaintiff will be entitled to a preliminary injunction after a full hearing on the claims. We merely conclude that the circuit court erred in dismissing the plaintiff's complaint on the basis that the plaintiff failed to sufficiently allege no adequate remedy at law for purposes of requesting a preliminary injunction.

¶ 24 CONCLUSION

¶ 25 For the reasons stated herein, we reverse the judgment of the circuit court of St. Clair County, and we remand the cause for further proceedings consistent with this order.

¶ 26 Reversed and remanded.