2017 IL App (2d) 170462-U
No. 2-17-0462
Order filed July 3, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PAUL JOSEPH SALON & SPA, INC.	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 17-CH-805
	)	
CALEB YESKE,	)	Honorable
	)	Paul M. Fullerton,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's decision to grant a temporary restraining order (TRO).

¶ 2 Plaintiff, Paul Joseph Salon & Spa, Inc., filed suit against defendant, Caleb Yeske, for breach of a written restrictive covenant with a one-year, post-employment term. It alleged that defendant, after almost two years employment, left to operate a competing salon two miles away and recruited both plaintiff's customers and its employees. Plaintiff moved for a temporary restraining order (TRO) to prohibit defendant from operating a business competitive with plaintiff within 10 miles, soliciting plaintiff's clients and employees, and disclosing plaintiff's proprietary information (as was prohibited by the terms of the restrictive covenant). It attached

the affidavit of its owner, Paul Joseph. On June 23, 2017, the trial court granted plaintiff's motion for the TRO based on the pleadings, to remain in effect until July 26, 2017, when the matter would be set for a hearing on a motion for a preliminary injunction.

¶ 3 Defendant now appeals the TRO. We have jurisdiction under Illinois Supreme Court Rule 307(d) (Ill. S. Ct. R. 307(d) (eff. Nov. 1, 2016)) to conduct a "quick review" of the grant or denial of injunctive relief, nothing more. *Harper v. Missouri Pacific R.R. Co.*, 264 Ill. App. 3d 238, 244 (1994). A TRO is a short-term process that is intended to maintain the *status quo*. *Id.* at 243. It is not meant to be an instrument that causes protracted litigation. *Id.* Rather, by its own terms, it expires due to cessation by law, or it is superseded by an order entered in a proceeding for a preliminary injunction. *Id.* We review the trial court's grant of a TRO for an abuse of discretion and will only reverse if no reasonable person would take the view adopted by the court. *Bochantin v. Petroff*, 198 Ill. App. 3d 369, 374-75 (1990).

¶ 4 A party seeking a TRO must establish a fair question that it: (1) possesses a certain and clearly ascertainable right needing protection; (2) has no adequate remedy at law; (3) would suffer irreparable harm without the TRO; and (4) has a likelihood of success on the merits. *County of Du Page v. Gavrilos*, 359 Ill. App. 3d 629, 634 (2005). The party seeking relief is not required to make out its entire case that would entitle it to relief on the merits. *Id.* Rather, it need show only that it raises a fair question about the existence of its right and that the court should preserve the *status quo* until the case can be decided on the merits. *Id.*

¶ 5 Here, the *status quo* would be enforcement of the restrictive covenant. Restrictive covenants are scrutinized by the courts, because they operate as partial restrictions on trade. *Fifield v. Premiere Dealer Services, Inc.*, 2013 IL App (1st) 120327, ¶ 13. The restrictive covenant must be ancillary to a valid contract, and it must be supported by adequate

consideration. *Id*. ¶ 13. Further, the restrictive covenant must be reasonable, in that it: (1) is no greater than is required for the protection of a legitimate business interest of the employer; (2) does not impose undue hardship on the employee; and (3) is not injurious to the public. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 17 (2011).

¶ 6 Defendant argues that plaintiff cannot meet TRO elements one (ascertainable right in need of protection) and four (likelihood of success on the merits), because the restrictive covenant is not enforceable. In turn, defendant contends that the restrictive covenant is not enforceable, because it: (1) was not supported by adequate consideration; and (2) did not protect plaintiff's legitimate business interest.

¶ 7 As to consideration, defendant correctly asserts that, generally, continued employment for two years constitutes adequate consideration. *Fifield*, 2013 IL App (1st) 120327, ¶ 14. Defendant notes that, in this case, he resigned two days before the two-year mark. Defendant's argument that the trial court *abused its discretion* because it found a found a *fair question* of adequate consideration, where defendant's employment fell just *two days* short of the generally accepted two-year term, is frivolous. Because of this, and because our review is to be brief, we do not discuss other aspects of defendant's consideration, such as whether the salon provided him with beneficial management training or the adequacy of his financial compensation ($54,000 per year, after two years of experience in the industry, despite a commission cut from 40% to 32%).

¶ 8 As to plaintiff's legitimate business interest, defendant correctly asserts that a legitimate business interest is determined by a totality of the circumstances. *Reliable Fire*, 2011 IL 111871, ¶ 43. The court may consider, among other factors, the near-permanence of customer relationships, the employee's acquisition of confidential information through his employment,

and time and place restrictions. *Id*. Defendant, relying on *LSBZ, Inc. v. Brokis*, 237 Ill. App. 3d 415 (1992), concentrates exclusively on the customer near-permanence factor. In determining whether an employer has a near-permanent relationship with its customers, the court may consider: (1) the length of time required to develop clientele; (2) the amount of money invested to acquire clients; (2) the degree of difficulty in acquiring clients; (4) the extent of personal customer contact by the employee; (5) the extent of the employer's knowledge of its clients; (6) the duration of the customers' relationship with the employer; and (7) the continuity of employer-customer relationships. *Id*. at 426.

¶ 9 Here, plaintiff set forth facts that raise a fair question of a near-permanent customer relationship. Paul Joseph submitted an affidavit explaining that he paid a high overhead to maintain a business in a location next to Whole Foods, where he was likely to attract customers willing to pay a high price for a good product; he spent money, time, and effort advertising through social media and other outlets; he maintained a computer database of his customers; and he developed a conversation script, which he shared with defendant, to maintain good conversation with customers during the appointments. He quantified his customer loss. He explained that, of the salon's 61 customers affiliated with defendant, 23 affirmatively canceled their appointments, and 12 "no-showed," after defendant left the salon. (Plaintiff did not attach the customers' names to the pleading "due to basic privacy concerns," but offered to provide them to the court upon request.) According to Joseph, defendant entered the customer database and took customer information. Joseph submitted text messages between defendant and a customer demonstrating that defendant recruited the customer.

¶ 10 Joseph also set forth facts speaking to other aspects of the salon's protectable legitimate business interest, including its management techniques, its relationship with other employees,

and the reasonableness of the covenant's time and place restrictions. Joseph trained defendant to be a manager and included defendant in the management meetings. Joseph shared a conversation script with defendant. It took Joseph years to develop the script, which helped stylists maintain appropriate and entertaining conversation with each customer and increased the chance of return. Also, according to Joseph, defendant actively recruited two other employees to work at the competing business. Joseph identified the employees by name, and he quantified the loss to his business. Defendant brought in $15,000 per month, and the other employees brought in $11,000 and $7,000 per month. Finally, plaintiff noted the reasonableness of the time and place restrictions. The one-year term, in particular, was far less restrictive than other enforceable covenants.

¶ 11 As noted by the court in *LSBZ*, the salon-stylist relationship is unique and requires special attention in the context of restrictive covenants. *LSBZ*, 237 Ill. App. 3d at 428. However, there is no *per se* rule that a restrictive covenant cannot be enforced against a stylist. Contrary to defendant's position, the facts alleged in plaintiff's pleading distinguish this case from *LSBZ*.

¶ 12 *LSBZ* involved a hair stylist who simply wished to *work* for another salon. *Id*. at 417. She had a customer base *before* she signed the restrictive covenant. *Id*. at 420. She did not actively recruit existing customers to come to the new salon. *Id*. at 419. She did not recruit other employees. *Id*. The salon did not advertise, and it did not have unique overhead costs. *Id*. at 427.

¶ 13 In this case, in contrast, defendant sought to *operate* a competing salon. He had *no* significant customer base at the time he signed the restrictive covenant. Rather, plaintiff referred clients to defendant. In his first months, defendant grossed approximately $2800 per month for the salon (receiving a 40% commission). By the end of the second year, defendant grossed

approximately $15,000 per month for the salon (receiving a 32% commission). Defendant actively recruited other customers, *and* he actively recruited other employees. Plaintiff made efforts to advertise and paid a high overhead to attract desirable clients. In sum, among other differences, defendant's two-year trajectory from novice to would-be competing salon owner—with management skills, employees, and a significant number of clients gained from plaintiff—sets this case far apart from *LSBZ*.

¶ 14 By this order, we have determined only that the trial court did not abuse its discretion in determining that plaintiff raised a fair question of its right to enforce the restrictive covenant. *Gavrilos*, 359 Ill. App. 3d at 634. We have not decided any contested issues of fact. The TRO shall remain in effect until further decision of the trial court, presumably at the upcoming hearing, set for July 26, 2017.

¶ 15 III. CONCLUSION

¶ 16 For the reasons stated, we affirm the trial court's decision to grant the TRO.

¶ 17 Affirmed.