NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

AMERICAN POOL MANAGEMENT OF PENNSYLVANIA, LLC Appellant v. GREG QUEEN AND SPARKLING POOL SERVICES, INC. Appellee	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2544 EDA 2013

Appeal from the Order August 12, 2013
In the Court of Common Pleas of Bucks County
Civil Division at No(s): 2013-02241

BEFORE: PANELLA, J., LAZARUS, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J.: **FILED JULY 22, 2014**

Appellant American Pool Management of Pennsylvania, LLC ("American Pool") appeals from the denial of its petition for preliminary injunction. We affirm.

I. Factual and Procedural History

In its 1925(a) opinion, the Court of Common Pleas of Bucks County found the following facts:

> Queen began his employment with [American Pool] on December 21, 2006 as a regional [m]anager. [American Pool] is a Delaware Limited Liability Company, registered to do business in Pennsylvania. [American Pool] provides full service swimming pool management, repair and renovation services to commercial swimming pools in Eastern Pennsylvania. Those general services include preparation for and the opening of the swimming facilities at the beginning of the swim season and full management

services until the season closed. [American Pool] services over one-hundred (100) swimming facilities in Eastern Pennsylvania. In his capacity as Regional Manager, Queen was the primary contact with many of those facilities. Queen was often the first to meet with potential customers; negotiated contracts with swimming facilities on [American Pool]'s behalf; oversaw fifty (50) to [sixty-five] (65) swimming facilities during the normal swimming season; regularly interacted with each swimming facility representative; handled complaints and oversaw the closing of swimming facilities at the end of swim season.

When Queen began his employment with [American Pool], he was given access to confidential and trade secret information, including but not limited to customer lists, pricing, operations manuals, and [American Pool]'s business database. As a condition of employment as an [American Pool] Regional Manager and due to access to customer history information, Queen was required to execute a Confidentiality Agreement containing several restrictive covenants regarding non-solicitation, non-competition, and non-disparagement. Specifically, the Confidentially Agreement provided for an effective term of twenty-four (24) months immediately following the date of termination of employment, Queen was prohibited from engaging in the following activities:

> 1. Solicitation of [American Pool] clients and/or affiliates;
> 2. Hire, retain, or employ any person who was an [American Pool] employee within one year of the date of termination of the Employee who signed a confidentiality agreement; and
> 3. Compete within a forty (40) mile radius of each business location of [American Pool] and of its affiliates in the field of management, construction, repair, service, sale of chemicals and parts, or operation of residential or commercial pool facilities.

> As stated, throughout Queen's employment, he had access to confidential, trade secret customer history information. In 2009, in the course of his employment, Queen was asked to sign a new restrictive covenant ("Restrictive Covenant") as part of his employment with [American Pool]. The 2009 Restrictive Covenant expanded the terms of the 2006 agreement, specifically extending the non-compete clause duration from 24 months to thirty (30) months and the geographic scope from 40 miles to one-hundred (100) miles of any [American Pool] location or affiliate location.
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> On July 11, 2012, Queen gave two (2) weeks notice that he was voluntarily terminating his employment as an [American Pool] Regional Manager. He left his employment at [American Pool] on July 21, 2012. On July 25, 2012, Queen was advised by [American Pool] that pursuant to his employment agreement, he was prohibited from entering into employment which competes with [American Pool] and/or solicits any of [American Pool]'s customers. In October 2012, Queen became an employee of [Sparkling Pool Services, Inc. ("Sparkling Pool")]. [Sparkling Pool] is a Delaware corporation authorized to do business in Pennsylvania and is a direct competitor of [American Pool]. Beginning in November 2012, Queen, in his capacity as an [Sparkling Pool] employee, began soliciting and submitting bids to swimming facilities in Eastern Pennsylvania, including some [American Pool] clients, for the 2013 swim season. [American Pool] believed that Queen had also been soliciting its employees, causing two (2) employees to leave [American Pool] and begin employment with [Sparkling Pool].
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> On March 27, 2012, [American Pool] filed a Complaint in equity against Queen and [Sparkling Pool]. [American Pool] demanded the issuance of: (1) an injunction claiming the 2006 Agreement is complete and binding between [American Pool] and Queen, and (2) asserted a claim for interference with [American Pool]'s contract in that [Sparkling Pool] knew that Queen's employment with [American Pool]

> precluded Queen from soliciting [American Pool] customers, competing with [American Pool] in the aforementioned geographic area, disparaging [American Pool], and soliciting [American Pool] employees. Along with the Complaint, [American Pool] filed a Petition for Preliminary Injunction and averred that Queen and [Sparkling Pool] [were] violating the terms of the Confidentiality Agreement and Restrictive Covenants. [American Pool] claimed the injunction was necessary because (1) [American Pool] was facing immediate and irreparable harm, (2) the [i]njunction would restore the parties to the status quo, (3) denying the injunction would cause greater injury to [American Pool], and (4) granting an injunction would not adversely affect the public interest.
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> Due to the nature of the proceeding and the filing of a Preliminary Injunction, a hearing was held immediately. This hearing, however, was vastly different from other hearings for preliminary injunctions as [American Pool] went into such finite, extensive and exhaustive detail that our decision had to await the conclusion of [American Pool]'s presentation which prompted similar detail from [Sparkling Pool]. The hearings started in April and would not be completed until August. During this time, the Parties conducted discovery as agreed upon between them. After the unhurried and unexpeditious progression of these hearings, we entered our ruling on August 9, 2013. We denied the Petition for Preliminary Injunction.

Trial Court 1925(a) Opinion, 11/6/2013 ("Opinion"), at 2-5 (internal citations omitted).

At the conclusion of the preliminary injunction hearing, the Court found the contracts involved at-will employment, and that continued employment served as consideration for the 2009 contract. N.T. 8/9/2013, at 176-77. It found, however, there was no adequate consideration for the

restrictive covenant contained in the 2009 contract. The Court, therefore, denied American Pool's request for a preliminary injunction, finding it was not likely to succeed on the merits. ***Id.*** at 177.

In its 1925(a) opinion, the court noted American Pool waited five months after it discovered Queen's employment with Sparkling Pool to file a complaint and the parties allowed the proceedings to continue over a period of months, during which time they conducted discovery. Opinion, at 8. Although American Pool blamed the court for the delay in scheduling, American Pool did not inform the court it would take more than the day originally scheduled to conduct the hearing. ***Id.***

The court also found American Pool did not establish Queen's access to confidential information and trade secrets harmed American Pool. Opinion, at 9. Although customers left American Pool after being solicited by Sparkling Pool, the clients were dissatisfied with American Pool's service. The court found American Pool failed to present evidence that Queen used confidential information and/or trade secrets to solicit the clients. ***Id.***

The court next found the 2006 and 2009 agreements signed by Queen involved at-will employment and continued employment was adequate consideration for the 2009 employment agreement. Opinion, at 11. The court found the 2009 contract was a novation replacing the 2006 agreement. ***Id.***

The court then found the restrictive covenant contained in the 2009 agreement unenforceable. Opinion, at 11. The covenant restricted

employment within 100 miles for a thirty-month period, which was not a reasonable limitation because it would not allow Queen to work in the business for the thirty-month period. ***Id.*** The court re-iterated there was no evidence Queen or Sparkling Pool used confidential information. ***Id.*** Potential customers of pool servicing companies must register with the Pennsylvania Department of Health and, therefore, no confidential information is necessary when looking for potential customers. ***Id.***

II. Claims Raised On Appeal

American Pool raises the following claims on appeal:

> A. Whether the Lower Court erred in denying [American Pool's] Petition For Preliminary Injunction?
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> B. Whether the 2006 Agreement was valid and contained enforceable restrictive covenants?
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> C. Whether, based upon the evidence in the record, [American Pool] was entitled to injunctive relief where the testimony showed that Queen and [Sparkling Pool] breached the restrictive covenants?
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> D. Whether, based on the evidence in the record, [American Pool] met its burden of proving that a preliminary injunction should issue against Queen and [Sparkling Pool]?
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> E. Whether [American Pool] was entitled to injunctive relief, even if, arguendo, there was no valid restrictive covenant, where the evidence showed that Queen and [Sparkling Pool] used confidential, trade secret information of [American Pool's]?
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> F. Whether the 2009 Agreement was a novation and extinguished the 2006 Agreement?

> G. Whether, where the restrictive covenants in the 2009 Agreement were unenforceable for lack of consideration, the remainder of the 2009 Agreement could supersede the 2006 Agreement?
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> H. Whether [American Pool] was prejudiced by the scheduling of the hearings on the preliminary injunction, which sought emergent relief, where the Bucks County Court Administrator scheduled four separate hearing days over a period of four months from April 10, 2013 until August 9, 2013?
>
> I. Whether the Lower Court erred in abruptly concluding the proceeding before all of the evidence was introduced?

Appellant's Brief at 5-6.

American Pool essentially claims: (1) the trial court erred in denying the preliminary injunction because the 2006 contract, which Queen breached, was the operative agreement; (2) American Pool is entitled to an injunction due to Queen's misappropriation of trade secrets; and (3) the trial court improperly faulted American Pool for delay in the proceedings even though the court administrator scheduled the hearing dates.

III. Standard of Review

We review a trial court's denial of a preliminary injunction for an abuse of discretion. ***Summit Towne Centre, Inc. v. Shoe Show of Rocky Mount, Inc.***, 828 A.2d 995, 1000 (Pa.2003) (citing ***Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz***, 529 Pa. 241, 602 A.2d 1277, 1286–87 (1992). "Within the realm of preliminary injunctions," appellate courts apply the following standard:

> [W]e recognize that on an appeal from the grant or denial of a preliminary injunction, we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the [trial court].

Id. (citing ***Roberts v. Board of Dirs. of Sch. Dist.,*** 462 Pa. 464, 341 A.2d 475, 478 (1975)). Therefore, "in general, appellate inquiry is limited to a determination of whether an examination of the record reveals that 'any apparently reasonable grounds' support the trial court's disposition of the preliminary injunction request.'" ***Id.***

To establish a right to preliminary injunctive relief, a party must show:

> 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages; 2) that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings; 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits; 5) that the injunction it seeks is reasonably suited to abate the offending activity; and, 6) that a preliminary injunction will not adversely affect the public interest.

Warehime v. Warehime, 860 A.2d 41, 46 (Pa.2004) (quoting ***Summit Towne***, 828 A.2d at 1002).

IV. Analysis

The trial court found American Pool failed to establish it was likely to succeed on the merits, because the 2009 contract was the applicable contract and the restrictive covenant contained therein was unenforceable. The court also held American Pool failed to establish it was irreparably harmed and failed to establish the customer lists were trade secrets. This was within the court's discretion.

A. The 2009 Agreement Was A Novation and the Restrictive Covenant Was Unenforceable

The court properly found the 2009 agreement valid and enforceable.

To establish a novation, which replaces a prior contract, a party must show "the displacement and extinction of a valid contract, the substitution for it of a valid new contract, . . . a sufficient legal consideration for the new contract, and the consent of the parties . . . ." ***Buttonwood Farms, Inc. v. Carson***, 478 A.2d 484, 486 (Pa.Super.1984); ***compare Innoviant Pharmacy, Inc. v. Morganstern***, 390 F.Supp.2d 179, 193 (D.N.Y.2005) (applying Pennsylvania law and finding restrictive covenant contained in earlier agreement unenforceable because later contract, signed by both parties, replaced the earlier contract, and reasoning the documents presented to the employee, which both parties signed, acknowledged the non-existence of any written or implied employment contract), ***with Buttonwood Farms, Inc.***, 478 A.2d at 486-87 (no evidence the parties intended to supplant the earlier contract where new contract was a one-page

document that did not state it superseded the original agreement and did not contain all the essential terms of the original agreement, and the later agreement could not be read without reference to the original agreement). An intention to substitute a prior contract can be shown by "writings, or by words, or by conduct or by all three." ***Id.*** A novation extinguishes all rights and duties under the earlier agreement. ***Id.***

"[T]o be enforceable a restrictive covenant must satisfy three requirements: (1) the covenant must relate to . . . either a contract for the sale of goodwill or other subject property or to a contract for employment; (2) the covenant must be supported by adequate consideration; and (3) the application of the covenant must be reasonably limited in both time and territory." ***Socko v. Mid-Atlantic Sys. of CPA, Inc.***, -- A.3d --, 2014 Pa.Super.103 (Pa.Super.2014) (quoting ***Maintenance Specialties, Inc. v. Gottus***, 455 Pa. 327, 314 A.2d 279 (1974) (Jones, C.J., concurring)); ***accord Davis & Warde, Inc. v. Tripodi***, 616 A.2d 1384, 1387 (Pa.Super.1992) (quoting ***Piercing Pagoda, Inc. v. Hoffner***, 465 Pa. 500, 506-507, 351 A.2d 207, 210 (1976)). Continued employment is inadequate consideration for a covenant not to compete. ***See Davis & Warde, Inc.***, 616 A.2d at 1387 (if employment contract contains a covenant not to compete, but is not entered into at the commencement of employment, the covenant "must be supported by new consideration which could be in the form of a corresponding benefit to the employee or a beneficial change in his employment status"); ***see also Socko***, 2014 Pa.Super. 103 (noting the

Pennsylvania Supreme Court has held the benefit of continuation of employment insufficient consideration for covenant not to compete).

Here, the 2009 agreement, entitled "Confidential Information and Restrictive Covenant" contains terms addressing employment at-will, records and materials, confidential information, and a covenant not to compete. Exh. P-10. The agreement stated:

> This Agreement [supersedes] any and all other agreements concerning the subject matter hereof, whether written or oral, by and between the Company and Employee and any and all such prior Agreements are hereby canceled effective as of the date of this Agreement.

Id. at ¶ 21.[1] Both parties signed the 2009 agreement. The only consideration for the 2009 agreement, and the restrictive covenant contained therein, was continued employment.

The court acted within its discretion when it found American Pool had not established a likelihood of success on the merits because the 2009 contract, not the 2006 contract, was applicable and the restrictive covenant contained therein was unenforceable. The 2009 contract, which both parties signed, stated it superseded all prior contracts and appears to contain most,

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[1] The 2009 agreement also states that "if any provision of the Agreement or the application thereof to any party or any circumstances shall, for any reason and to any extent, be invalid or unenforceable, the remainder of the Agreement and the application of such provision to other persons, firms, entities or circumstances shall not be affected thereby and shall remain in force and effect." Exh. P-10, at ¶ 19.

if not all, provisions from the 2006 contract. Because no additional consideration was provided for the enlarged covenant not to compete contained in the 2009 contract, that provision was unenforceable.

B. American Pool Not Entitled To An Injunction Absent A Restrictive Covenant

American Pool claims that even if no restrictive covenant exists, it was entitled to an injunction because Queen and Sparkling Pool used its confidential and trade secret information.

A plaintiff seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be compensated adequately by money damages. ***Summit Towne Centre,*** 828 A.2d at 1001. To meet this burden, a plaintiff must present "concrete evidence" demonstrating "actual proof of irreparable harm." ***Greenmoor, Inc. v. Burchick Constr. Co., Inc.***, 908 A.2d 310, 314 (Pa.Super.2006) (citing ***Kessler,*** 851 A.2d at 951). "'[I]rreparable harm' cannot be based solely on speculation and hypothesis" and "the claimed harm must be irreversible before it will be deemed irreparable." ***Id.*** (emphasis deleted).

The trial court found American Pool failed to establish the customer list was confidential because the information it contained was publicly available and failed to establish immediate and irreparable harm. Opinion, at 9, 11. The trial court presided over the hearing and heard the testimony from American Pool that it lost customers and had to lower its prices to retain

other customers. N.T., 4/10/13, at 58-69. It also heard testimony that Queen did not use or disclose pricing or other confidential information, did not set the pricing for Sparkling Pool, and did not possess any documents containing confidential information, and that the customer lists were publicly available. N.T., 8/9/13, 9-10, 23-24, 99-105.

The court acted within its discretion in finding that American Pool failed to establish the customer listing information was confidential. ***Iron Age Corp. v. Dvorak***, 880 A.2d 657, 664 (Pa.Super.2005) (finding plaintiff's compiled information, which was available to competitors through legitimate means, "cannot be declared a trade secret"). Moreover, it's finding that American Pool failed to establish immediate and irreparable harm did not constitute an abuse of discretion. ***See id.***, at 665-66 (noting defendant returned materials and plaintiff failed to demonstrate misconduct by defendant or new employer and agreeing with trial court that plaintiff failed to show a preliminary injunction was necessary to prevent immediate and irreparable harm).

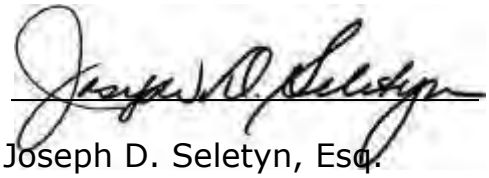
C. Hearing

The trial court repeatedly noted that the preliminary injunction hearing was conducted over an extended period of time, from April to August. American Pool attempts to fault the court for this scheduling, as the dates were assigned by the court administrator. The court, however, found American Pool never notified it that more than one day would be required for the hearing. Further, it noted American Pool did not file the complaint until

five months after it learned of Queen's employment with Sparkling Pool. It found this weighed against the imperative nature of preliminary injunctions. This was not error. ***See Herman v. Dixon***, 141 A.2d 576, 577 (Pa.1958) (denying preliminary injunction where no evidence of "urgent necessity for the prevention of irreparable harm").[2]

Order affirmed. Appellees' Motion to Dismiss is denied.[3]

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/22/2014

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[2] The court ended the hearing before the defense presented testimony. American Pool, however, had completed its presentation of evidence.

[3] Appellees Queen and Sparkling Pool filed a motion to dismiss claiming the motion for preliminary injunction is moot because Queen is no longer employed at Sparkling Pool, is not employed by a competitor, has not applied or interviewed for a competitor, and Queen and Sparkling Pool do not possess confidential information. Because we affirm the trial court's order denying the preliminary injunction, Appellees' motion to dismiss is denied as moot.