

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 1971

EDGEWATER SERVICES, INC. and)
LUCINDA DOSHER,)
)
Plaintiffs)
)
v.)
)
EPIC LOGISTICS, INC., DON and)
BARBARA SHERRILL, and)
JOLIE ANN OSGOOD,)
)
Defendants)
)
_____)

ORDER

THIS CAUSE, designated a complex business and exceptional case and assigned to the undersigned Special Superior Court Judge for Complex Business Cases by Order of the Chief Justice of the North Carolina Supreme Court, pursuant to Rules 2.1 and 2.2 of the General Rules of Practice for the Superior and District Courts, came to be heard upon Defendant Osgood’s Motion for Partial Summary Judgment (the “Motion”), pursuant to North Carolina Rule of Civil Procedure (“Rule(s)”) 56; and was so heard on August 29, 2007; and

THE COURT, having considered the Motion, the arguments and submissions of counsel, appropriate matters of record, and the ends of justice, CONCLUDES:

I.

OVERVIEW

1. This civil action arises out of a dispute between the daughter and the widow of the late Joseph A. Doshier, the former president of Plaintiff Edgewater Services, Inc. (“Edgewater”). The allegations of the Complaint paint Defendant Osgood

in a most unbecoming light. Indeed, the following from former Chief Justice Stacy may be appropriate here: “In undertaking to change horses for what the defendant regards a better mount, he is reminded of his obligation to the steed which brought him safely to midstream and readied him for the shift.” *Sonotone Corp. v. Baldwin*, 227 N.C. 387, 391, 42 S.E.2d 352, 355 (1947).

2. Consistent with the instruction of Rule 56(d), the court does not find it practicable to specify material facts that appear without substantial controversy beyond those explicitly discussed below.

II.

OSGOOD’S MOTION

3. Defendant Osgood filed the Motion on February 14, 2006¹, seeking judgment as a matter of law as to Plaintiff’s Third Claim for Relief, which is for Breach of Contract—Employment and Non-Compete Agreement (“Claim Three,” alleging breach of the “Employment Agreement”).

4. Defendant Osgood’s Motion contends that there is no genuine issue of material fact as to her alleged breach of the Employment Agreement and that she is entitled to summary judgment as to Claim Three.

5. Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c).

¹ The substantial delay between filing of the Motion and the date of hearing on its merits resulted from a lengthy and somewhat tortuous series of discovery disputes involving issues of privilege, the resolution of which was required before the Motion could be heard.

III.

THE EMPLOYMENT AGREEMENT

6. The Employment Agreement, which is attached as Exhibit C to Defendant Osgood's brief in support of the Motion, contains three restrictive covenants (the "Restrictive Covenants") between Edgewater and Defendant Osgood. Though the signature page of the Employment Agreement is not dated, the Employment Agreement purports to be effective beginning January 1, 2002 (the "Effective Date"). The issues of whether Defendant Osgood knowingly executed such agreement, and, if so, when, remain in dispute, to be resolved by the trier of fact. However, for the purposes of considering the remaining arguments regarding the Motion, the court assumes, *arguendo*, that the Employment Agreement was duly executed.

7. The Restrictive Covenants provide in pertinent part as follows:

Non Competition Covenant. For a period commencing on the date hereof and ending one year (365 days) after the date the Employee's employment is terminated by the Company pursuant to Section 5(b), 5(c) or 5(d) above, or 5(e), the Employee agrees that she will not, directly or indirectly, own any interest in, manage, operate, control, be employed by, render consulting or advisory services to, or participate in or be connected with the management or control of any Competitive Business (as defined below) within the Restricted Territory (as defined below) As used herein, the term "Competitive Business" means any business that operates as a brokerage, freight forwarding, third or fourth party logistics or transportation-focused companies and the "Restricted Territory" means any county or similar political subdivision of any state, or any state, territory or possession of th[e] United States in which the business of the Company is carried on, or in which the Company intends to carry on business; provided, however, that if a court of competent jurisdiction determine[s] that the foregoing definition of "Restricted Territory" is unenforceable, "Restricted Territory" shall mean any county or similar political subdivision of any state, or any state, territory or possession of the United States in which the business of the Company is carried on.

(Employment Agreement ¶ 6) (the "Non-Competition Covenant").

Non-solicitation. During the Non-competition Period, the Employee will not directly or indirectly either for herself or for any other person, business, partnership, association, firm, company or corporation, call upon, solicit, divert or tak[e] away or attempt to solicit, divert or tak[e] away, any of the customers, business or prospective customers of the Company or officers or employees of the Company in existence from time to time during his employment with the Company.

(Employment Agreement ¶ 7) (the “Non-Solicitation Covenant”).

Non-disclosure Obligation. The Employee will not at any time, whether during or after the termination of her employment, reveal to any person, association or company any of the trade secrets or confidential information concerning the organization, marketing plans and strategies, pricing policies, technical and other specifications, customer list and accounts, business finances or financial information of the Company so far as they have come or may come to her knowledge, except as may be required in the ordinary course of performing her duties as an officer of the Company or as may be in the public domain through no fault of her or as may be required by law. Employee shall keep secret all matters of such nature entrusted to her and shall not us[e] or attempt to use any such information in any manner, which may injure or cause loss to the Company, whether directly or indirectly.

(Employment Agreement ¶ 8) (the “Non-Disclosure Covenant”).

IV.

DISCUSSION

8. By incorporation, Claim Three of the Complaint fairly alleges that Defendant Osgood breached each of the Restrictive Covenants. (See Compl. ¶¶ 79–83.) In support of her Motion, Defendant Osgood argues that the Restrictive Covenants (a) are not supported by consideration, and (b) are overly broad and unreasonable in their scope, do not serve a legitimate business interest, and violate public policy.

9. “[I]n North Carolina, restrictive covenants between an employer and employee are valid and enforceable if they are (1) in writing; (2) made part of a contract of employment; (3) based on valuable consideration; (4) reasonable as to both time and

territory; and (5) not against public policy.” *United Labs., Inc. v. Kuykendall*, 322 N.C. 643, 649–50, 370 S.E.2d 375, 380 (1988). As stated above, the court assumes that the writing requirement has been met only for the purpose of considering the Motion.

A.

Consideration

10. Defendant Osgood contends that the evidence of record shows that the Restrictive Covenants are not based on valuable consideration. (Def.’s Br. Supp. Mot. 7.)

11. To be enforceable, a restrictive covenant between employer and employee must be based on valuable consideration. *Id.* “When the employment relationship is established before the covenant not to compete is executed, there must be separate consideration to support the covenant, such as a pay raise or other employment benefits or advantages for the employee.” *Stevenson v. Parsons*, 96 N.C. App. 93, 97, 384 S.E.2d 291, 292–93 (1989) (citations omitted). The fact that a written agreement is executed after the employee receives the consideration is insignificant as to the value of the consideration if the restrictive covenants were part of a verbal agreement entered before such consideration passed. *See Robins & Weill v. Mason*, 70 N.C. App. 537, 542, 320 S.E.2d 693, 697 (1984).

12. While the parties agree that the Restrictive Covenants must be supported by valuable consideration to be enforceable, they dispute whether such consideration exists.

13. Plaintiffs contend that Defendant Osgood received a pay raise, eligibility for an employee stock option plan and a promotion as new consideration supporting the Restrictive Covenants, all of which were part of a year-long plan of reorganization for Edgewater. (Pls.’ Br. Opp. Mot. 12.) Defendant Osgood contends, however, that the

evidence to date demonstrates that the alleged consideration was not related to her entering the Employment Agreement. (Def.'s Br. Supp. Mot. 7.)

14. Defendant Osgood argues that there is no dispute over the fact that she began making the salary provided for in the Employment Agreement months before the Agreement's effective date. (Def.'s Br. Supp. Mot. 8.)

15. Plaintiffs counter that it is of no consequence whether Defendant Osgood began receiving her increased salary before the Effective Date because the terms of the Employment Agreement, including the Restrictive Covenants and the salary increase, were part of a verbal agreement predating the salary increase. (Pls.' Br. Opp. Mot. 13.) In this regard, Plaintiffs rely upon the affidavit of Bruce Holsten (the "Holsten Affidavit"). (Pls.' Br. Opp. Mot. Ex. D) However, contrary to Plaintiffs' argument, the Holsten Affidavit demonstrates that a verbal agreement regarding the Employment Agreement was entered in November or December 2001—after the October 2001 salary increase. (See Holsten Aff. ¶ 27 (referencing an earlier meeting but providing no evidence of any prior agreement).)

16. Accordingly, upon the Plaintiffs' own evidence, it appears that the salary provided for in the Employment Agreement was not "new" consideration capable of supporting the Restrictive Covenants.

17. Defendant Osgood further argues that there is no evidence that she received a promotion related to the Employment Agreement; but, rather, as evidenced by an e-mail from the then-acting President of Edgewater, that she did not receive such a promotion until January of 2003. (Def.'s Br. Supp. Mot. 10, Ex. H.) Such e-mail, however,

is unclear as to whether it is in regards to the promotion provided for in the Employment Agreement or to a subsequent promotion.

18. Plaintiffs argue that the Holsten Affidavit shows that Defendant Osgood received a new title and new responsibilities in exchange for signing the Employment Agreement. (Pls.' Br. Opp. Mot. 14; Holsten Aff. ¶ 29.)

19. A new job assignment may support a finding that the employer and employee entered into a new employment contract supported by adequate consideration. *See Whittaker Gen. Med. Corp. v. Daniel*, 324 N.C. 523, 527–28, 379 S.E.2d 824, 827–28 (1989). Here, the evidence reflects a genuine issue as to whether Defendant Osgood received a promotion as consideration for entering the Employment Agreement. Therefore, the issue of consideration hinges on the credibility of the parties and will be decided according to whose version the trier of fact believes. *See Robins*, 70 N.C. App. at 542, 320 S.E.2d at 697. Accordingly, the Restrictive Covenants are not void as a matter of law for want of consideration. *Id.*²

B.

Scope of the Restrictive Covenants

20. Defendant Osgood contends that the Restrictive Covenants are overly broad and unreasonable as to the scope of their restrictions, do not serve a legitimate business interest, and violate public policy. (Def.'s Br. Supp. Mot. 14–21.)

21. “Covenants not to compete between an employer and employee are ‘not viewed favorably in modern law.’” *Farr Assocs., Inc. v. Baskin*, 138 N.C. App. 276, 279, 530 S.E.2d 878, 881 (2000) (quoting *Hartman v. W. H. Odell and Assocs., Inc.*, 117 N.C.

² For these same reasons, the court does not accept Defendant Osgood’s argument that the Employment Agreement is, as a matter of law, based on non-existent or illusory consideration and therefore an unenforceable “naked non-compete agreement in restraint of trade” (See Def.'s Br. Supp. Mot. 19–21).

App. 307, 311, 450 S.E.2d 912, 916 (1994)). To be valid, the restrictions on the employee's future employability by others must be "designed to protect a legitimate business interest of the employer." *Hartman*, 117 N.C. App. at 311, 450 S.E.2d at 916.

22. Restrictions barring an employee from working in an identical position for a direct competitor are typically valid and enforceable. See *Precision Walls, Inc. v. Servie*, 152 N.C. App. 630, 638, 568 S.E.2d 267, 273 (2002). On the other hand, courts will not enforce a covenant that, rather than attempting to prevent a former employee from competing for business, instead requires the employee "to have no association whatsoever with any business that provides [similar] services." *Hartman*, 117 N.C. App. at 317, 450 S.E.2d at 920.

23. If a covenant not to compete "is too broad to be a reasonable protection to the employer's business it will not be enforced. The courts will not rewrite a contract if it is too broad but will simply not enforce it." *Whittaker*, 324 N.C. at 528, 379 S.E.2d at 828. Non-solicitation and non-disclosure covenants are subject to the same legal restraints as non-competition covenants. See *QSP, Inc. v. Hair*, 152 N.C. App. 174, 566 S.E.2d 851 (2002).

i.

The Non-Competition Covenant

24. The Court of Appeals addressed the permissible scope of a covenant not to compete in *VisionAIR, Inc. v. James*. 167 N.C. App. 504, 606 S.E.2d 359 (2004). The covenant at issue in *VisionAIR* stated that the employee could not "own, manage, be employed by or otherwise participate in, directly or indirectly, any business similar to Employer's." *Id.* at 508, 606 S.E.2d at 362. In declaring the covenant unenforceable, the

court seized upon the prohibition on indirect ownership of a similar business, and noted that it would prohibit the employee from even “holding interest in a mutual fund invested in part in a firm engaged in business similar to VisionAir.” *Id.* at 509, 606 S.E.2d at 363.

25. The Non-Competition Covenant at issue in the case at bar contains a similar provision. It provides that Defendant Osgood may not

directly or indirectly, own any interest in, manage, operate, control, be employed by, render consulting or advisory services to, or participate in or be connected with the management or control of any Competitive Business As used herein, the term “Competitive Business” means any business that operates as a brokerage, freight forwarding, third or fourth party logistics or transportation-focused companies

(Employment Agreement ¶ 6.) By prohibiting Defendant Osgood from even indirect ownership of a competing company, the Non-Competition Covenant goes farther than is necessary to prevent Defendant Osgood from competing for customers of Edgewater. It therefore cannot be seen as protecting a legitimate business interest of Edgewater. See *CNC/Access, Inc. v. Scruggs*, 2006 NCBC 20 ¶ 51 (N.C. Super. Ct. Nov. 15, 2006), www.ncbusinesscourt.net/opinions/2006%20NCBC%2020.htm. Accordingly, the Non-Competition Covenant is unreasonably broad and therefore unenforceable as a matter of law.

ii.

The Non-Solicitation Covenant

26. The Non-Solicitation Covenant is similarly doomed. First, its purported applicability during the “Non-competition Period” is unduly vague as the Employment Agreement fails to define such “Non-competition Period.” Second, even assuming that the “Non-competition Period” is that period referenced in the Non-Competition Covenant (i.e. “a period commencing on the date [of the Employment Agreement] and ending one year

(365 days) after the date” of termination), the Non-Solicitation Covenant still runs afoul of North Carolina law.

27. “The protection of customer relations against misappropriation by a departing employee is well recognized as a legitimate business interest of an employer.” *Farr*, 138 N.C. App. at 280, 530 S.E.2d at 881 (citing *United Labs.*, 322 N.C. at 651, 370 S.E.2d at 381). However, “[i]n evaluating reasonableness as to time and territory restrictions, [the court] must consider each element in tandem—the two requirements are not independent and unrelated.” *Id.*

28. As to time, “when a non-compete agreement reaches back to include clients of the employer during some period in the past, that look-back period must be added to the restrictive period to determine the real scope of the time limitation.” *Id.* at 280–81, 370 S.E.2d at 881 (citing *Prof. Liab. Consultants, Inc. v. Todd*, 345 N.C. 176, 478 S.E.2d 201 (1996) (adopting dissenting opinion of Smith, J., in 122 N.C. App. 212, 468 S.E.2d 578 (1996))). Applying this rule in *Farr*, the Court of Appeals held that a covenant restricting the employee for a period of three years after termination from providing services to any client served by the employer within the two years preceding termination was in fact a five-year restriction. *Id.* at 281, 370 S.E.2d at 882 (reasoning that the real time restriction encompassed both the “three years after the date of termination plus the two-year look-back period.”)

29. The Non-Solicitation Covenant at issue here seeks to restrain Defendant Osgood from soliciting “any of the customers, business or prospective customers of the Company or officers or employees of the Company in existence from time to time during his employment with the Company.” (Employment Agreement ¶ 7.) Accordingly, the Non-

Solicitation Covenant purports to restrain Defendant Osgood for a time including one year after her termination³ plus the “look-back period” of her employment with the company. Such look-back period is vague because, unlike the period in *Farr* that limited itself to clients served by the employer in the two years preceding termination, its only outward limitation is the length of employment. Such vagueness alone likely renders the Non-Solicitation Covenant unenforceable as a matter of law. However, even at best for the covenant, on the undisputed evidence presented, the actual look-back period affecting Defendant Osgood would encompass approximately four-and-one-half years. (See Pls.’ Br. Opp. Mot. Ex. G, Nov. 3, 2005 Dep. Jolie Ann Osgood 27 (providing that Defendant Osgood began working for Edgewater in August 1999); Pls.’ Br. Opp. Mot. Ex. B, Dep. Lucinda Doshier 20 (providing that Defendant Osgood was terminated from Edgewater in May 2004).) This look-back period plus the one-year post termination restriction means that the actual time restriction affecting Defendant Osgood is in excess of five years.

30. North Carolina has “previously held that time restrictions of a certain length are presumed unreasonable absent a showing of special circumstances. A five-year time restriction is the outer boundary which our courts have considered reasonable, and even so, five-year restrictions are not favored.” *Farr*, 138 N.C. App. at 280, 530 S.E.2d at 881. However, a “longer period of time is acceptable where the geographic restriction is relatively small, and *vice versa*.” *Id.*

31. As to geographical scope, the Court of Appeals has set forth a six-part test to determine whether the geographical scope of a restrictive covenant is reasonable. The six factors are: (a) the area or scope of the restriction; (b) the areas assigned to the

³ Assuming, *arguendo*, that the “Non-competition Period” is the period referenced in the Non-Competition Covenant. See *supra* ¶ 26.

employee; (c) the area where the employee actually worked; (d) the area in which the employer operated; (e) the nature of the business involved; and (f) the nature of the employee's duty and her knowledge of the employer's business operation. *See Hartman*, 117 N.C. App. at 312, 450 S.E.2d at 917. When the restrictive covenant is client-based, like the Non-Solicitation Covenant, rather than geography based, the court still applies the six-part test set forth in *Hartman* to assess the restriction. *Farr*, 138 N.C. App. at 281–82, 530 S.E.2d at 882. Ultimately, “a client-based limitation cannot extend beyond contacts made during the period of the employee's employment.” *Id.* at 282, 530 S.E.2d at 883.

32. Analyzing the area of the Non-Solicitation Covenant, the court first notes that the client-based restriction does not limit itself to those contacts made by Defendant Osgood during her employment. Further, the Non-Solicitation Covenant does not even limit itself to the actual customers of Edgewater, but, rather, purports to include “prospective customers”—an undefined and, therefore, unduly vague group.

33. Accordingly, the court must conclude that the client-based territorial restriction in the case at bar is unreasonable, thereby rendering the Non-Solicitation Covenant unenforceable. In addition, since time and territory restrictions are two parts to one inquiry, the in excess of five year time limitation lends further support to the conclusion that the Non-Solicitation Covenant is unreasonably broad and therefore unenforceable as a matter of law. *See id.* at 283, 530 S.E.2d at 883.

iii.

The Non-Disclosure Covenant

34. The court finds no grounds on which to grant Defendant Osgood's Motion as to the Non-Disclosure Covenant.

IV.

CONCLUSION

For the reasons stated herein, Defendant Osgood's Motion for Partial Summary Judgment is GRANTED in part and DENIED in part, as follows:

1. Defendant Osgood's Motion is GRANTED as to the Non-Competition Covenant (Employment Agreement ¶ 6) and the Non-Solicitation Covenant (Employment Agreement ¶ 7); and to the extent that Plaintiff's Claim Three is based upon the Non-Competition Covenant and the Non-Solicitation Covenant the same is DISMISSED.
2. Defendant Osgood's Motion is DENIED as to the Non-Disclosure Covenant (Employment Agreement ¶ 8).
3. Except as explicitly granted herein, Defendant Osgood's Motion for Partial Summary Judgment is DENIED.

SO ORDERED, this the 22nd day of October, 2007.

/s/ John R. Jolly, Jr.
John R. Jolly, Jr.
Special Superior Court Judge for
Complex Business Cases