STATE OF NORTH CAROLINA

CATAWBA COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
14 CVS 104

TSG FINISHING, LLC,

Plaintiff,

v.

KEITH BOLLINGER,

Defendant.

ORDER

THIS MATTER is before the Court on Plaintiff TSG Finishing, LLC's ("Plaintiff") Motion for Preliminary Injunction (the "Motion"). Having considered the Motion; the briefs, exhibits, and affidavits filed in support and opposition to the Motion; and the arguments of counsel at the hearing held on February 5, 2014, the Court finds and concludes as follows:

I. Procedural History

1. On January 16, 2014, Plaintiff filed its Verified Complaint against Defendant Keith Bollinger ("Defendant") alleging claims for breach of a non-compete agreement, misappropriation of trade secrets, and unfair and deceptive trade practices; and requesting that the Court issue a temporary restraining order and preliminary injunction.

2. With the filing of the Verified Complaint, Plaintiff simultaneously sought designation to the North Carolina Business Court. The case was designated and assigned to this Court on January 22, 2014.

3. On January 23, 2014, the Court held a hearing on Plaintiff's Motion for Temporary Restraining Order. Both parties were represented by counsel at the hearing, and provided the Court with a brief of their respective positions. After considering the briefs and arguments of counsel at the hearing, the Court denied the Motion for Temporary Restraining Order and set a

briefing schedule for the current Motion. *TSG Finishing, LLC v. Bollinger*, No. 14 CVS 104 (N.C. Super. Ct. Jan. 23, 2014) (order denying temporary restraining order).

4. Thereafter, Plaintiff and Defendant submitted their respective briefs supporting and opposing the Motion, and the Court heard arguments on February 5, 2014.

II. Factual Background

5. In 1982, after graduating high school, Defendant began working for Geltman Corp. at a fabric finishing plant in Catawba County. Except for one year around 1985, Defendant worked continuously for Geltman Corp. until 1992, and advanced to the position of Quality Control Supervisor.

6. In 1992, TSG, Incorporated acquired Geltman Corp., and offered Defendant an hourly position with the company.

7. By the late 1990's, TSG, Incorporated promoted Defendant to Quality Control Manager.

8. In December 2007, TSG, Incorporated notified the company's managers and supervisors that they would be required to sign an employment agreement that contained certain confidentiality and non-compete provisions. In exchange for their consent, TSG, Incorporated promised the managers and supervisors a raise and a year-end bonus.

9. Specifically, TSG, Incorporated promised Defendant a raise of $1,300 annually and a $3,500 bonus to sign the Employment Agreement (the "Agreement"). Plaintiff paid Defendant his year-end bonus in December 2007, and incorporated his raise on at least one paycheck, although Defendant did not sign the Agreement until January 14, 2008. Defendant argues, however, that after he signed the Agreement the promised raise did not materialize.

10. The Agreement contains the following non-compete provision:

> During the period of two (2) years following the date of termination of the Employee's term of employment with TSG the Employee shall not, in the

> Prohibited Territory, without the express prior written consent of TSG (which shall not be unreasonably withheld), compete with TSG by engaging, as an employee or contractor, in the performance of Textile Finishing, engaging in the manufacture or Textile Finishing machinery or equipment, including by not limited to a jobber, reseller, or dealers of used textile machinery or equipment or engaging in sales, marketing or managerial services for any individual or entity that competes with TSG directly or indirectly within the Prohibited Territory.

(V. Compl. Ex. B § 3.b.) The Agreement outlines various definitions for Prohibited Territory that arguably include all of North America. (V. Compl. Ex. B § 3.e.)

11. The Agreement also provides that it "shall be binding upon the Employee and all of the Employee's heirs and legal representatives and shall be binding upon and inure to the benefit of TSG its successors and assigns." (V. Compl. Ex. B § 6.) Section 7 of the Agreement, a choice of law provision, requires the application of Pennsylvania law to govern the Agreement. (V. Compl. Ex. B § 7.)

12. In 2009, TSG, Incorporated declared Chapter 11 bankruptcy. During reorganization, TSG, Incorporated allegedly assigned all of its contracts to Plaintiff, an affiliated company created on April 14, 2011. Although Plaintiff attached the Bankruptcy Court order confirming the plan of reorganization as evidence of this assignment, it does not appear that the Bankruptcy Court specifically mentioned Plaintiff or the assignment of TSG, Incorporated's employment contracts. (V. Compl. Ex. D.) Thereafter, Defendant worked for Plaintiff, rather than TSG, Incorporated, until 2013. Defendant was neither asked nor required to sign a new employment agreement with Plaintiff.

13. In the fall of 2013, Veryl Elston approached Defendant about a position as operations manager with American Custom Finishing, LLC ("ACF"). ACF is one of Plaintiff's competitors in the fabric finishing business. On November 15, 2013, ACF officially extended Defendant an offer of employment as operations manager with a 25% increase in compensation, which Defendant accepted.

14. On November 21, 2013, Defendant gave his two-week notice to Plaintiff, and informed his supervisor that he had accepted a position with ACF. Plaintiff asked Defendant to leave immediately rather than continue working for two more weeks. Defendant then began working at ACF.

15. On November 26, 2013, Plaintiff sent Defendant a letter demanding that he cease working for ACF because, according to Plaintiff, Defendant's employment with ACF constituted a breach of the non-compete clause in the Agreement, and could implicate Plaintiff's trade secrets.

16. Defendant declined to terminate his employment with ACF and, thereafter, Plaintiff filed suit alleging that, in addition to breaching the Agreement, Defendant's position would inevitably require him to disclose Plaintiff's trade secrets. Specifically, Plaintiff asserts trade secret protection of its customer information and a number of components associated with its process of treating and finishing fabrics. During the hearing, Plaintiff clarified that its claimed trade secret is the process as a whole, *i.e*, how all the variables come together to satisfy each customer by adapting the technical requirements to customize the fabric finishing process to the customer's preferences. Furthermore, Plaintiff avers that these methodologies remain subject to strict confidentiality protections, including provisions in employment agreements, password settings on the computer systems, and restricted access to the plant itself.

III. Legal Standard

17. "The purpose of a preliminary injunction is ordinarily to preserve the *status quo* pending trial on the merits." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (quotation and citation omitted). The Court has discretion to grant an injunction "after a careful balancing of the equities." *Id.* However, "a preliminary injunction is an extraordinary

measure . . . [and] will be issued only (1) if a plaintiff is able to show likelihood of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued . . . ." *Id.* at 401, 302 S.E.2d at 759.

IV. Discussion

18. In the Motion, Plaintiff seeks an injunction based on both its breach of contract claim and its misappropriation of trade secrets claim. As such, the Court analyzes the likelihood of success of each claim, respectively.

A. Breach of Non-Compete Clause

19. Similar to North Carolina, "restrictive covenants are not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living." *Hess v. Gebhard & Co. Inc.*, 570 Pa. 148, 157, 808 A.2d 912, 917 (2002) (citation omitted). To be enforceable, restrictive covenants must be "incident to an employment relationship between the parties; . . . reasonably necessary for the protection of the employer; and . . . reasonably limited in duration and geographic extent." *Id.* This analysis also requires the Court to apply "a balancing test whereby the court balances the employer's protectable business interests against the interest of the employee in earning a living in his or her chosen profession, trade or occupation, and then balances the result against the interest of the public." *Id.* at 163, 808 A.2d at 920. Before reaching this analysis, however, Defendant contends that Plaintiff does not have standing to enforce the non-compete provision because the Agreement was not validly assigned to Plaintiff by TSG, Incorporated.

20. Because restrictive covenants pose such a restraint on an employee's right to earn a living, the Pennsylvania Supreme Court in *Hess* stressed that courts should be hesitant to condone the assignment of restrictive covenants. *Id.* at 166, 808 A.2d at 922 ("[T]he

employment contract, of which the covenant is a part, is personal to the performance of both the employer and the employee . . . ."). Therefore, where a non-compete provision in an employment agreement becomes part of a sale of assets, the non-compete provision may only be assigned to the purchasing business if there is a specific assignability provision. *Id.* at 166–67, 808 A.2d at 922 ("The fact that an individual may have confidence in the character and personality of one employer does not mean that the employee would be willing to suffer a restraint on his employment for the benefit of a stranger to the original undertaking.").[1]

21. Although the Agreement here includes a general provision making reference to TSG, Incorporated's assigns, the Court is not satisfied that such a provision meets the strict construction requirements applied to restrictive covenants under Pennsylvania law. *See All-Pak, Inc. v. Johnston*, 694 A.2d 347, 351 (1997) (holding that restrictive covenants "should be construed narrowly; and, absent an explicit assignability provision, courts should be hesitant to read one into the contract").

22. Furthermore, there is no evidence in the record, apart from Plaintiff's statement in the Verified Complaint, that TSG, Incorporated actually assigned anything to Plaintiff. The Bankruptcy Court order Plaintiff relies on makes no mention of Plaintiff or the employment agreements. Indeed, the Bankruptcy Court order does not purport to transfer or assign any interests; it merely approves the reorganization plan that presumably contemplates the assignment of TSG, Incorporated's assets to other entities. Without a clear assignability

[1] Plaintiff attempts to distinguish the assignment here from a sale of assets. However, the Court finds this argument unavailing. Although the courts in Pennsylvania distinguish certain transactions, such as stock sales, from this general rule, the overriding policy behind all these cases remains that an employee should not be restricted from competing with a new entity absent that employee's consent. Here, Defendant entered the Agreement with TSG, Incorporated, not Plaintiff. Unlike the cases mentioned by Plaintiff where the employees continued to work for and be bound to their original employers, this case is directly analogous to *Hess* given that Defendant ceased working for TSG, Incorporated and began working for Plaintiff.

provision or an explicit assignment, Plaintiff's efforts to enforce the non-compete provision by way of an injunction must fail, based upon the record currently before the Court.

23. The Court notes that Defendant also challenges the consideration supporting the Agreement. Specifically, Defendant argues that, because Plaintiff paid him the bonus and the increase in salary on at least one paycheck prior to Defendant signing the Agreement, Defendant's execution of the Agreement was not truly a condition to receiving the increase in benefits. The Court disagrees. Because Defendant and TSG, Incorporated entered into the Agreement post-employment, ordinarily there must have been new consideration for the restrictive covenant. *See Insulation Corp. of America v. Brobston*, 446 Pa. Super. 520, 667 A.2d 729, 733 (1995). Here, however, it is clear from the initial notice and the Agreement itself that the Agreement was conditioned on the bonus and the raise. The fact that Defendant did not sign the Agreement until days after he received the bonus and his first paycheck does not make the Agreement invalid. *See Beneficial Fin. Co. of Lebanon v. Becker*, 422 Pa. 531, 222 A.2d 873 (1966) ("As long as the covenants were auxiliary to the raises and promotions and not after-thoughts to impose additional burdens on unsuspecting employees, they are enforceable."). Furthermore, any subsequent non-payment of the promised raise might give rise to a claim for breach, but it would not alone invalidate the Agreement for lack of consideration.

24. Regardless, even if the Court had concluded that a valid assignment of the Agreement occurred, a balancing of the equities would not inure to Plaintiff's benefit. Enforcement of the non-compete provision in the manner articulated by Plaintiff would effectively bar Defendant from seeking employment anywhere in North America in the only profession he has practiced

since graduating high school.[2] Without deciding whether Plaintiff does or does not have a protectable business interest, the Court concludes, nonetheless, that the equities weigh in favor of Defendant at this stage of the proceedings.

25. Therefore, based on the current record, the Court concludes that Plaintiff failed to show a likelihood of success on its breach of contract claim sufficient to warrant a preliminary injunction.

B. Misappropriation of Trade Secrets

26. The Trade Secret Protection Act ("TSPA") provides a cause of action for misappropriation of a trade secret where Plaintiff can prove the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." N.C. GEN. STAT. § 66-152(1) (2013). The TSPA defines a "trade secret" as

> business or technical information . . . that: (a.) [d]erives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b.) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

§ 66-152(3).

27. "To plead misappropriation of trade secrets, 'a plaintiff must identify a trade secret with sufficient particularity so as to enable a defendant to delineate that which he is accused of misappropriating and a court to determine whether misappropriation has or is threatened to occur.'" *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 510–11, 606 S.E.2d 359, 364 (2004); *see*

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[2] Plaintiff notes that, under Pennsylvania law, the Court could narrow the geographic restriction of the non-compete provision in the injunction. However, the Court cannot determine from the record how a narrower restriction would change the equities involved by protecting Plaintiff's legitimate business interest and not unfairly restricting Defendant's ability to earn a living.

also Analog Devices, Inc. v. Michalski, 157 N.C. App. 462, 468, 579 S.E.2d 449, 453 (2003). However, an employer may not assert trade secret protection over an employee's "general skills and knowledge acquired during his tenure with the former employer." *Engineering Assoc., Inc. v. Pankow*, 268 N.C. 137, 140, 150 S.E.2d 56, 59 (1966); *see also Kadis v. Britt*, 224 N.C. 154, 29 S.E.2d 543 (1944).

28. "The TSPA also provides that 'actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action . . . .'" *Washburn v. Yadkin Valley Bank & Trust Co.*, 190 N.C. App. 315, 326, 660 S.E.2d 577, 585 (2008) (quoting § 66-154(a)). "However, North Carolina courts are reluctant to grant injunctive relief solely on the basis of threatened misappropriation without proof of actual misappropriation." *Allegis Group, Inc. v. Zachary Piper LLC*, 2013 NCBC 13 ¶ 52 (N.C. Super. Ct. Feb. 25, 2013) (citing *Analog Devices, Inc.*, 157 N.C. App. at 470–71, 579 S.E.2d at 455).

29. Here, Plaintiff claims trade secret protection over its customer preferences and a number of components associated with its process of treating and finishing fabrics. Regarding the various components involved in Plaintiff's process, Plaintiff continually asserted at the hearing that it is the combination of these components – the process as a whole – that it claims as a trade secret. However, the Court finds this case analogous to *Analog Devices*, where the Court of Appeals held that similar definitions failed to sufficiently identify protectable trade secrets. *Analog Devices, Inc.*, 157 N.C. App. at 469, 579 S.E.2d at 454 (holding as insufficient plaintiff's trade secret definition asserting protection over the combination of all aspects of its designs, solutions, and implementation, including the techniques and adjustments to the components). Much like the plaintiff in *Analog Devices*, Plaintiff failed to put forward enough facts to support

trade secret protection over the process as a whole or any particular component such that the Court would be justified in granting the injunction sought.

30. The same holds true for Plaintiff's claims regarding their customer preferences. Although Plaintiff maintains significant security measures over its finishing process, it is clear from the record that this process is frequently being adjusted to meet the needs of each customer and fabric. Indeed, Plaintiff appeared to rely heavily on Defendant to interpret the customers' needs and adjust the finishing process to accommodate these needs. However, this skill appears more akin to general knowledge and skill acquired on the job than any trade secret maintained by Plaintiff. On these facts, the Court is hesitant to restrain Defendant from utilizing his learned skills for a competitor, particularly without any evidence of bad faith.

31. Accordingly, the Court concludes that Plaintiff has failed to show a likelihood of success on the merits of its misappropriation of trade secrets claim sufficient to warrant the injunction sought in the Motion.

C. Irreparable Loss

32. In light of the Court's conclusions above, the Court need not reach the issue of irreparable harm. However, the Court notes that, even though Defendant has been working for ACF since November 2013, Plaintiff has to date not shown any concrete loss suffered as a result of Defendant's employment with ACF.

V. Conclusion

33. In the exercise of its discretion, and after a careful balancing of the equities involved, the Court hereby DENIES the Motion.

34. SO ORDERED, this the 20th day of February, 2014.

/s/ Calvin E. Murphy
Calvin E. Murphy
Special Superior Court Judge