IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

FILED

October 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

AMARR COMPANY, INC.,

Plaintiff-Appellee,

Vs.

Sullivan Chancery No. 26708
C.A. No. 03A01-9511-CH-00412

MARK DEPEW,

Defendant-Appellant.

FROM THE CHANCERY COURT FOR SULLIVAN COUNTY
THE HONORABLE JOHN S. MCLELLAN, III, JUDGE

J. Eddie Lauderback of Johnson City
For Plaintiff-Appellee

David S. Bunn of Bristol
For Defendant-Appellant

REVERSED IN PART, AFFIRMED IN PART

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

SAMUEL L. LEWIS, JUDGE

This case involves the enforcement of a noncompetition clause in an employment contract and a related contract claim for a bonus. Defendant, Mark Depew, appeals from the trial court's judgment in favor of plaintiff, Amarr Company, Inc. The trial court entered a permanent

injunction in favor of Amarr that enforced and modified the covenant not to compete, and also ruled that Depew was not entitled to his bonus.

In its complaint, Amarr avers that it is a manufacturer and wholesale dealer of garage doors, and that Depew was one of its employees who was acting under an employment agreement that contained a covenant not to compete. Amarr avers that Depew was provided with confidential, proprietary information such as trade secrets, customer lists, customer credit information, pricing information, selling techniques, managing techniques, future business plans, and future promotional plans and opportunities. Amarr alleges that Depew actively breached the employment agreement by engaging in direct competition with them and contacting their customers.[1] Amarr sought a temporary and a permanent injunction against Depew to enforce the covenant not to compete.

In his answer, Depew admits that he was employed by Amarr and that he acted under an employment agreement. Depew also admits that he now is an employee of R & M Door Systems, L.L.C. However, he denies that he breached the employment agreement but alleges that the restrictive covenant not to compete contained in the agreement is unenforceable because it is unreasonable and contrary to public policy. Depew also asserts that he was only an ordinary salesman and that his service for Amarr was not unique or original and did not involve any acquisition of special business or trade secrets.

In a separate action, Depew filed suit against Amarr claiming that he was entitled to a bonus pursuant to his employment contract. Depew's contract action was tried in the General Sessions Court at Bristol, Tennessee and was appealed to the Bristol Law Court.[2] By agreement of the parties, Depew's contract claim was transferred to chancery court and consolidated with this action. A non-jury trial was held on October 9, 1995. The pertinent facts developed from the hearing are as follows.

Amarr hired Depew, as an at-will employee, to work as an Assistant Manager at the Tri-

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[1] The complaint also alleges tortious interference with contract, tortious interference with business relationships and prays for compensatory, treble, and punitive damages. The claims for monetary damages against Depew were voluntarily nonsuited and dismissed without prejudice.

[2] The technical record does not have the pleadings or the judgment from this action, but it appears that the general sessions court awarded the bonus to Depew and the decision was appealed by Amarr.

Cities Door Center in April of 1993. At that time, Depew was required to sign an employment agreement. The agreement provided, *inter alia*, that upon Depew's separation from Amarr for any reason, a non-compete provision would go into effect. The covenant not to compete provided:

> The Employee covenants and agrees that for a period of two years after the termination of his employment with the Employer (regardless of whether his termination is voluntary or involuntary), and within either the Territory or two hundred and fifty miles of any of the facilities of Employer . . . the Employee will not, as principal, agent, trustee, or through the agency of any corporation, partnership, association, or agency, engage, directly or indirectly, in any of the businesses engaged in by the Employer at or immediately prior to the date hereof. During the two-year period, Employee shall not directly or indirectly, be the owner of more than 5% of the outstanding capital stock of any corporation; or an officer, director, or employee of any corporation; or a member or employee of any partnership; or an owner or an employee of any other business, which conducts business of a like or similar nature to the business of Employer within geographic areas set forth above. The Employee acknowledges that because his position will provide him with access to all important business information of the Employer, some of which will be of universal application, including customer lists, trade secrets and pricing information, the Employer is entitled to the protection provided in this paragraph 8 regardless of whether the Employee actually works in each of (or every part of any of) the specified restricted areas.

On October 1, 1993, Depew was promoted to manager of the Tri-Cities Door Center. As manager, Depew was primarily responsible for making sales calls. He attended a training course that dealt with general sales, information about the product, general office skills, and computer instruction. Depew had access to customer lists each month that summarized the purchases from the previous month, and Depew was aware of which customers had credit limits with Amarr. Depew had access to profit and loss statements, sales totals, expense figures and maximum and minimum pricing levels. Mr. Jay Tilley, Amarr's District Manager, testified that the four trade secrets of importance were the customer list, the customer credit information, the pricing information, and the profit and loss statements.

However, Depew testified, concerning the customer list, that it is common knowledge who is in the door business in the area because all advertise in the phone book. Depew also testified that the price lists were available to anyone if they were in the door business. Tilley admitted that Amarr's customer list was primarily developed through trade publications and the Yellow Pages, and that the customer base is primarily made up of door installation and building

supply companies. Tilley further admitted that all competitors probably keep track of Amarr's prices and that Amarr tracks all of their competitor's prices. Tilley stated that Amarr did not have a patent on any of its garage doors, and that there was nothing really special about being a salesman for Amarr.

Upon the promotion to manager, Depew enrolled in Amarr's management incentive plan. The plan permitted managers to receive a bonus based on their monthly sales achievements. The plan included the following language: "Participants must be employed at fiscal year end (June 30th) to be eligible to participate in that year's management incentive plan." This language was inserted into the plan in May of 1994, but Depew knew that changes had been made to the plan. It was stipulated by the parties that, as of June 15, 1995, Depew had earned a bonus of $4,400.00 under the management incentive plan for sales of 110% above his quota, but that he was not employed by Amarr at the end of the fiscal year.

In the spring of 1995, Depew was disciplined and received a written reprimand. Depew received numerous oral warnings about job performance, but also received some satisfactory job evaluations. On June 15, 1995, Tilley made a surprise visit to the Tri-Cities Door Center which resulted in Depew's termination. Approximately two weeks after his termination, Depew went to work for R & M Door Systems as a salesman. R & M sells garage doors and is in direct competition with Amarr. Despite the language of the covenant not to compete, Depew contacted and made sales to Amarr's customers. Therefore, Amarr filed this action seeking an injunction that enforced the covenant not to compete.

The trial court found that Depew would have an unfair advantage over Amarr because of his access to customer lists, credit information and the pricing levels. However, the trial court decided that the covenant not to compete was too broad and too expansive and changed the terms to provide for a one year no compete period and a one-hundred mile no competition radius.[3] The court then enjoined and prohibited Depew from engaging in the wholesale garage door sales business. The trial court also held that Depew was not entitled to receive a bonus.

Depew then perfected this appeal and presents the following issues for our consideration:

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[3] A covenant not to compete which contains an unreasonable restriction may be judicially modified to make the restrictions reasonable. ***Central Adjustment Bureau, Inc. v. Ingram***, 678 S.W.2d 28 (Tenn. 1984). The fact that the trial court modified the covenant is not an issue in this case.

(1) whether the trial court erred in finding that the covenant not to compete, as modified, was reasonable; and (2) whether the trial court erred in ruling that he was not entitled to the bonus.

Agreements in restraint of trade, such as covenants restricting competition, are not invalid per se. Although disfavored by law, such agreements are valid and will be enforced provided they are deemed reasonable under the particular circumstances. ***Heyer-Jordan & Associates, Inc. v. Jordan***, 801 S.W.2d 814, 820 (Tenn. App. 1990).

If the circumstances indicate no bad faith on part of the employer, the covenant not to compete may be enforced to the extent that it is reasonably necessary to protect the employer's interest without imposing undue hardship on the employee when the public interest is not adversely affected. ***Central Adjustment Bureau, Inc. v. Ingram***, 678 S.W.2d 28, 37 (Tenn. 1984).

The issue before this Court boils down to a question of reasonableness. The Supreme Court has indicated some factors which should be considered in making the determination:

> There is no inflexible formula for deciding the ubiquitous question of reasonableness, insofar as noncompetitive covenants are concerned. Each case must stand or fall on its own facts. However, there are certain elements which should always be considered in ascertaining the reasonableness of such agreements. Among these are: the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed on the employee by such a covenant; and whether or not such a covenant should be inimical to public interest.

AllRight Auto Parks Inc. v. Berry, 219 Tenn. 280, 285, 409 S.W.2d 361, 363 (1966).

The consideration supporting the agreement is not in issue, and the question of public interest is not a relevant factor in this case, so they will not be considered. Therefore, we must balance the threat to the employer and the economic hardship imposed on the employee. More particularly, the issue is whether the employer has a legitimate business interest for the protection of which a restrictive covenant is reasonable. ***See Hasty v. Rent-A-Driver, Inc.***, 671 S.W.2d 471, 473 (Tenn. 1984). The Supreme Court has recognized certain legitimate business interests that are entitled to protection:

> Such legitimate business interests include trade or business secrets or other confidential information. Restrictive covenants have been held reasonable where the employee closely associates or has repeated contact with the employer's customers so that the customer tends to associate the employer's business with the employee. Covenants have also been held reasonable in order to

prevent misuse of customer lists.

Hasty, 671 S.W.2d at 473 (citations omitted).

The employer cannot use a restrictive covenant to prevent ordinary competition from former employees. To enforce a covenant not to compete, the employer must be able to show the presence of special facts above and beyond ordinary competition that would give an unfair advantage to the employee when competing with his former employer. ***Id.***

Amarr argues that unless Depew is enjoined, he will have an unfair advantage over them because of his previous access to customer lists, customer credit information, pricing levels, and profit and loss statements. The trial court found that Depew would have an unfair advantage because of this information. We must respectfully disagree. We do not believe that Amarr has shown a legitimate business interest that needs to be protected or that this information would give Depew an unfair advantage.

In the case of ***Heyer-Jordan & Associates, Inc. v. Jordan***, 801 S.W.2d 814 (Tenn. App. 1990), this Court explored the meaning of "confidential information" and "trade secrets." In that case, the defendants were sales representatives for the plaintiff, Heyer-Jordan, a manufacturer's sales representative company. After the defendants resigned, they formed their own company that went into direct competition with their old employer. Heyer-Jordan sued to enforce a covenant not to compete. In ***Heyer-Jordan***, this Court stated:

> The proof established that manufacturers routinely furnish a selling agent the information and/or training concerning their products. In the case at bar, it was developed that when Jordan and Brown were first hired by Heyer-Jordan they were furnished the information initially about purchasers of various manufacturers' products. However, this information has lost its importance because Heyer-Jordan does not represent the same manufacturers that it represented at the time Jordan and Brown were initially hired. The proof does not establish that there were any confidential customer lists furnished to Jordan and Brown and both Jordan and Brown testified that there are many sources available to determine the identity of potential purchasers of the manufacturer's products, including, but not limited to, telephone book yellow pages, trade magazines and registration lists of trade associations conventions.
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> In the case at bar, it appears that all of the information acquired by Jordan and Brown and used by them in their competitive effort was general information available in the trade and business involvement, and that they were not privy to any confidential business information which they used in violation of

> the contract. In ***Selox, Inc. v. Ford***, 675 S.W.2d 474 (Tenn.1984) our Supreme Court quoted with approval comment "g" to § 188 of the Restatement of Contracts. The last sentence of the quotation approved by the court states: "A line must be drawn between the general skills and knowledge of the trade and information that is peculiar to the employer's business." 675 S.W.2d at 476.

Heyer-Jordan & Associates, 801 S.W.2d at 820-22.

In the case *sub judice*, the proof is similar. When Depew was hired, Amarr trained him concerning the product and gave him information about their customers. Depew was given customer lists each month, but like ***Heyer-Jordan***, the identity of the potential customers could be determined from the Yellow Pages and a study of the industry. We do not see how these customer lists were confidential information or that they were misused. The information received by Depew was general information available to the trade and did not give him an unfair advantage.

We also do not see how a profit and loss statement can be a "trade secret" that gives an unfair advantage. Likewise, the price lists were readily available to any purchaser who was comparing prices between competitors, and the price lists were tracked by all competitors. The price lists also cannot be classified as a trade secret, nor can it be argued that access to the price lists gives an unfair advantage. Selling on price is ordinary competition that happens every day in this state. We do not believe that Amarr has alleged special facts that show a legitimate business interest that needs to be protected. ***See also Selox, Inc. v. Ford***, 675 S.W.2d 474 (Tenn. 1984) (protection from non-competition agreement not needed where the identity of customers "could be ascertained by anyone of reasonable intelligence by a mere reference to the Yellow Pages" and where the defendant had no specialized training and the work "could have been performed by any other employee of average competence.")

The Supreme Court has observed that "[r]estrictive Covenants have been held reasonable where the employee closely associates or has repeated contact with the employer's customers so that the customer tends to associate the employer's business with the employee." ***Hasty***, 671 S.W.2d at 473. Depew admitted contacting some of Amarr's customers. However, we do not believe that these contacts are anything more than ordinary competition, and the proof does not show that Amarr's customers associate Amarr's business with Depew. If anything, the proof showed that some customers were dissatisfied with Depew and were happy to continue buying

from Amarr since Depew was gone.

Finally, the scope of a covenant is another factor that must be considered when determining whether or how to enforce it. To be enforceable, the restriction must not be overly broad in its geographic scope, or in the time period during which it applies. ***Dabora, Inc. v. Kline***, 884 S.W.2d 475, 478 (Tenn. App. 1994). The trial court found "that there was no evidence of reasonableness of the terms of the restrictions as to time and territory contained in the covenant not to compete, and that the actual time and territory restrictions were too broad and too expansive, and should be modified by the Court." We agree with the trial court that the covenant not to compete was overly broad in both the geographic scope and the time period. However, we believe that the restriction should not have been modified because Amarr has not shown special facts establishing a legitimate business interest that needs protection. Therefore, we hold that the trial court erred in enjoining Depew as set out in the final decree.

Depew also argues that the trial court erred by ruling that he was not entitled to his bonus. Depew asserts that he is entitled to the bonus on the basis of *quantum merit*. Amarr awarded a bonus to managers who exceeded sales goals under a Management Incentive Plan. The Plan stated, "Participants must be employed at fiscal year end (June 30th) to be eligible to participate in that year's Management Incentive Plan." Depew claims that Amarr owes him $4,400.00 that he earned under the incentive plan.

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement. ***Winfree v. Educators Credit Union***, 900 S.W.2d 285, 289 (Tenn. App. 1995). However, Depew has not alleged a lack of good faith on the part of Amarr. Therefore, we must interpret the contract based on the words of the provision alone. The cardinal rule for interpretation of contracts is to ascertain the intention of the parties from the contract as a whole and to give effect to that intention consistent with legal principles. ***Id.*** Where there is no ambiguity, it is the duty of the court to apply to the words used their ordinary meaning and neither party is to be favored in their construction. ***Id.***

In the case *sub judice*, the words of the contract are not ambiguous. To be eligible for a bonus, an employee must have been employed at the end of the fiscal year. The evidence shows that Depew was terminated on June 15, 1995, and the fiscal year ended on June 30, 1995. By the words of the contract, Depew is not entitled to his bonus because he was not employed

by Amarr at fiscal year end. Employment at fiscal year end was a condition precedent to payment of the bonus, and Depew was unable to satisfy the condition. Therefore, the contract must be enforced as written.

Accordingly, the judgment of the trial court granting injunctive relief is reversed. The judgment in all other respects is affirmed. Costs of this appeal are assessed one-half to appellant and one-half to appellee.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

SAMUEL L. LEWIS, JUDGE