THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

RECEIVED
MAR 20 2015
SC Court of Appeals

Case No. 13-CP-10-5579
Appellate Case No. 2014-001828

JOSHUA FAY, ...Appellant-Respondent,

vs.

TOTAL QUALITY LOGISTICS, LLC..........Respondent-Appellant.

RESPONDENT'S FINAL BRIEF OF APPELLANT-RESPONDENT

Alice F. Paylor, Esquire (SC #4380)
Rene S. Dukes, Esquire (SC #78215)
ROSEN, ROSEN & HAGOOD, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726 (o)
(843) 724-8036 (f)

Attorneys for Appellant-Respondent

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Facts 1

Argument 3

I. APPLICABLE STANDARD OF REVIEW 3

II. THE TRIAL COURT CORRECTLY RULED THERE WAS A MATERIAL QUESTION OF FACT AS TO WHETHER FAY HAD VIOLATED THE AGREEMENT AND DENIED TQL'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY 3

A. The trade secrets portion of the Agreement is invalid, because it prohibits any competition by Fay without any restrictions on time or place. 3

B. Even if the Court determines that the Noncompetition Agreement is valid, TQL has admitted that Fay has not violated the Noncompete Agreement 5

Conclusion 6

TABLE OF AUTHORITIES

Cases

Cad Cam, Inc. v. Underwood, 521 N.E.2d 498, 502 (Ohio Ct. App.1987) 5

Carolina Chem, Equip. Co., Inc. v. Muckenfuss, 322 SC 289, 293, 296-97, 471 SE 2d 721, 722-23, 725 (Ct. App. 1996) 4

Faces Boutique, Ltd. v. Gibbs, 318 S.C. 35, 41-42, 455 S.E. 2d 707, 708-09 (Ct. App. 1995) 5

Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009), reh'g denied (Aug. 25, 2009) 3

Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496-97, 662 S.E.2d 606, 607-08 (Ct. App. 2008) 3

STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN DENYING TQL'S MOTION FOR SUMMARY JUDGMENT AS TO TQL'S CLAIMS THAT FAY HAD BREACHED THE AGREEMENT AT ISSUE EVEN THOUGH FAY DENIED SUCH CLAIMS?

STATEMENT OF THE CASE

Fay adopts the Statement of the Case that he set forth in his Initial Appellant-Respondent's Brief.

FACTS

Fay adopts the Facts set forth in his Initial Appellant-Respondent's Brief with the addition of the following:

TQL's counterclaims, which are the subject of this appeal, allege that Fay violated the noncompetition and trade secret portions of the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (Agreement) (R. pp. 34-45). Fay denies that he competed with TQL or that he misappropriated any of TQL's trade secrets. (R. pp. 181-86).

TQL's factual account claims that Fay "underwent a six month, intensive training program and was entrusted with a range of confidential information and materials, detailed expense information, pricing, profitability and margin information ..." However, Fay denied in his affidavit that he learned any trade secrets or even needed any alleged trade secrets from TQL to provide logistics planning services for Brandt Engineering:

> While working at [TQL], I initiated contact with Brandt Engineering to provide services. Although Brandt was on a potential customer list, the list was not generated through company connections, but rather by brokers simply checking the internet or telephone books for trucking companies and entering them into the system. All this information is within the

> public doman and could be accessed by checking the internet or telephone listing for trucking companies.
>
> . . .
>
> All information that I obtained in order to be of service to Brandt was received solely from Brandt. There was nothing unique that I learned from my training with Defendant.

(R. p. 182 ¶ 7; p. 183 ¶ 11. TQL's Group Sales Manager, Hillary Kotlarz, stated that Fay could serve as a logistics planner without violating the Agreement. (R. p. 198 ¶ 4). Logistics planning is what Fay was doing for Brandt, which necessarily means he was not in breach of the Agreement Ms. Kotlarz further testified that Fay could use certain information that he obtained while working for TQL and still not be in violation of the trade secrets provision:

> As an employee of TQL, Fay learned the following general transportation concepts, methods, and information that he is freely permitted to use in the intermodal transportation industry, consistent with the definition of Confidential Information: how to price loads for customers and to the motor carriers; how to price multiple loads in different lanes depending on the commodity; how to know what to tell a carrier when they are hauling high value cargo, produce, metals, etc.; how to know what type of trailer is needed depending on the product and how to make sure the produce is properly secured before leaving; how to make appointments at shipping points and receivers and how long it should take to unload each; how to tak to a carrier about sealing the doors to their trailers; how to handle mechnical problems with a trailer or truck and how to get the product off the vehicle either at the point where the vehicle is broken down or at a cross-dock; how to calculate how long it should take for the carrier to haul a load and communicate that to the customer; how to tell a carrier how to run its regrigerated unit during transit; how to locate flag cars and permits for a motor carrier hauling a wide or unusual load; what is required to move cargo across international lines; how to read and analyze all types of bills of lading; how to approach carriers and convince them to take a load and haul it and still earn a profit margin; pricing to haul certain proudcts during certain period of the year (e.g., produce, landscaping, building materials), where products originate … and where they are headed – this will help brokers understand when truck costs and availability will 'tighten up' because of increased demand and how to obtain backhauls for motor carriers and how to price them.

(R. pp. 199-200). There is no evidence in the record that Fay ever used or received information that was not included in the list above or within the public domain.

LEGAL ARGUMENTS

I. APPLICABLE STANDARD OF REVIEW

The appellate court must review a grant of summary judgment under the same standard of review applied by the trial judge. Zurich Am. Ins. Co. v. Tolbert, 378 S.C. 493, 496-97, 662 S.E.2d 606, 607-08 (Ct. App. 2008) aff'd, 387 S.C. 280, 692 S.E.2d 523 (2010) (citing *Cowburn v. Leventis,* 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005)). "Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law." Id. (citing S.C.R. Civ. P. 56(c)) When determining whether a material issue of fact exists, the appellate court must view all evidence and the inferences to be drawn in a light most favorable to the non-moving party. Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009), reh'g denied (Aug. 25, 2009) (citing *Sauner v. Pub. Serv. Auth. of S.C.,* 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003)). If more than one inference can be drawn, then the task is one for the jury, and summary judgment should not be granted. Id. (citing *Vaughan v. Town of Lyman,* 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006).

II. THE TRIAL COURT CORRECTLY RULED THERE WAS A MATERIAL QUESTION OF FACT AS TO WHETHER FAY HAD VIOLATED THE AGREEMENT AND DENIED TQL'S MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY.

A. THE TRADE SECRETS PORTION OF THE AGREEMENT IS INVALID, BECAUSE IT PROHIBITS ANY COMPETITION BY FAY WITHOUT ANY RESTRICTIONS ON TIME OR PLACE.

Under the terms of the Agreement, "Confidential Information" includes every piece of information gleaned by, or provided to, the Employee while employed by TQL. (R. p. 23). The Agreement limits the use of "Confidential Information" as follows:

> 4. Confidential Information is for TQL's Use Only. Unless Employee has prior written consent from TQL, Employee shall not at any time during the course of his or her employment by TQL, and ***at all times thereafter***, use for any purpose or publish, or publish, copy, disclose, or communicate to any individual, firm, corporation, or other business entity other than TQL, any Confidential Information, except as properly necessary and authorized by TQL in the conduct of TQL's business. Employee agrees that ***all information disclosed to Employee or to which Employee has access during the period of his or her employment shall be presumed to be Confidential Information if there is any reasonable basis to believe it to be Confidential Information or if TQL appears to treat it as confidential.*** Notwithstanding anything herein to the contrary, the restrictions contained in this Section 4 are not intended and shall not be construed to prohibit Employee from disclosing or using the general skills and knowledge acquired as an employee of TQL, except as such disclosure and use is restricted in Section 8 hereof. [Section 8 deals with property rights and assignment with regard to any work product created by the Employee. This is not an issue in this case.]

(R. p. 25) emphasis added).

As the South Carolina Supreme Court has held, a confidentiality provision in an agreement may constitute a non-compete if its purpose is to prevent the employee from engaging in the same business as the employer. See Carolina Chem. Equip. Co., Inc. v. Muckenfuss, 322 SC 289, 293, 296-97, 471 SE 2d 721, 722-23, 725 (Ct. App. 1996). ("Despite its designation as a "Covenant Not to Divulge Trade Secrets," this section would substantially restrict Muckenfuss's competitive employment activities. Because it basically has the effect of a covenant not to compete, we must subject it to the same scrutiny as a covenant not to compete.")

TQL's covenant not to compete set forth in its confidentiality provision has no time or geographic limitations and prevents Fay from engaging in a competitive

enterprise at any place at any time now or in the future. In both South Carolina and Ohio, such a covenant is not enforceable. See Faces Boutique, Ltd. v. Gibbs, 318 S.C. 35, 41-42, 455 S.E. 2d 707, 708-09 (Ct. App. 1995), ("A covenant not to compete will be upheld only if it is : ... (2) reasonably limited in its operation with respect to time and place..."); Cad Cam, Inc. v. Underwood, 521 N.E.2d 498, 502 (Ohio Ct. App.1987) ("We have found no cases upholding as reasonable a covenant not to compete unlimited as to both geography and time. It would take an extraordinary showing to establish that an unlimited restriction against competition, anywhere... and at any time...was reasonably necessary to protect the covenantee's legitimate business interests....").

Because the trade secret provisions of the Agreement are so broad and overarching, they amount to a covenant not to compete and are invalid. Thus, Fay can have no liability for violating the trade secrets provisions, because they are invalid.

B. EVEN IF THE COURT DETERMINES THAT THE NONCOMPETITION AGREEMENT IS VALID, TQL HAS ADMITTED THAT FAY HAS NOT VIOLATED THE NONCOMPETE AGREEMENT OR HAS CREATED A QUESTION OF FACT AS TO THIS ISSUE BY THE AFFIDAVIT OF HILLARY KOTLARZ.

Fay incorporates his arguments set forth in his Appellant-Respondent's Briefs previously filed with regard to the invalidity of the multiple provisions of the Agreement. TQL has admitted that performing logistics planning services for a company other than a freight brokerage is not a violation of the Agreement. (R. p. 198 ¶ 4). Despite the sworn testimony of its own agent, TQL now argues that Fay violated the Agreement by performing logistics planning services for Brandt, an engineering company which moves its own products, but does not broker freight.

The only evidence in the record relative to the relationship between TQL and Brandt is that TQL directed Fay to stop doing business with Brandt because TQL did not consider the business to be lucrative. (R. p. 182 ¶ 8). It is further undisputed that Brandt solicited Fay to perform logistics planning for the company. (R. p. 183 ¶ 10). Therefore, the factual record establishes that Fay did not interfere with any business or contracutal relationship between TQL and Brandt.

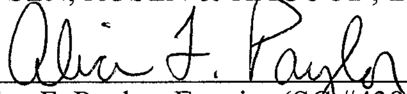
TQL states in its brief that JF Progressions, LLC was a freight broker licensed by the Department of Transportation. However, there is nothing in the record that supports this statement. The only evidence is that JF Progressions, LLC, is a wholly owned limited liability company of Fay. If Fay would not be in violation of the noncompete agreement but for his working through a wholly owned LLC, how could his performance of the same duties through that LLC violate it?

CONCLUSION

For all of the reasons stated herein and in the Appellant-Respondent's Briefs previously filed, the Agreement between TQL and Fay is invalid and unenforceable. Furthermore, based on TQL's admissions, the activities performed by Fay did not violate the noncompete or the trade secrets provisions of the Agreement. Therefore, this Court should affirm the trial court's decision that TQL is not entitled to summary judgment as to its alleged violations of the Agreement.

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC



Alice F. Paylor, Esquire (SC #4380)
Rene S. Dukes, Esquire (SC 78215)
151 Meeting Street, Suite 400
Charleston, SC 29401
(843)577-6726

March 17, 2015

Attorneys for Appellant-Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 2 0 2015
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 13-CP-10-5579
Appellate Case No. 2014-001828

JOSHUA FAY, ...Appellant-Respondent,

vs.

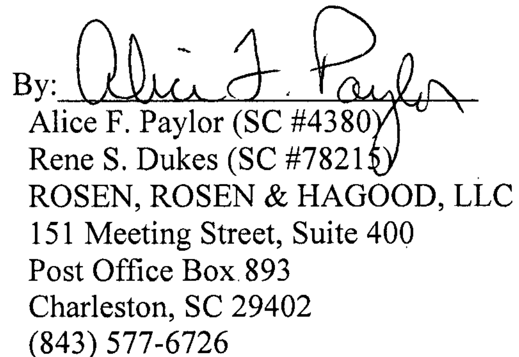
TOTAL QUALITY LOGISTICS, LLC, ...Respondent-Appellant

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Respondent's Final Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

March 17, 2015

Respectfully submitted,



By:
Alice F. Paylor (SC #4380)
Rene S. Dukes (SC #78215)
ROSEN, ROSEN & HAGOOD, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726

Attorneys for Appellant-Respondent

RECEIVED
MAR 2 0 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 13-CP-10-5579
Appellate Case No. 2014-001828

JOSHUA FAY, ...Appellant-Respondent,

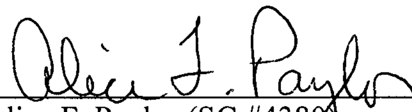
vs.

TOTAL QUALITY LOGISTICS, LLC..Respondent-Appellant.

PROOF OF SERVICE

I certify that I have served the Respondent's Final Brief of Appellant-Respondent by depositing a copy of it in the United States Mail, postage prepaid on March 17, 2015 addressed to attorney of record as follows:

Robert D. Moseley, Jr., Esquire
Peter A. Rutledge, Esquire
Smith Moore Leatherwood
2 West Washington Street, Suite 1100
Greenville, SC 29601



Alice F. Paylor (SC #4380)
Rene S. Dukes (SC # 78215)
ROSEN, ROSEN & HAGOOD, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726 (o)
(843) 724-8036 (f)

March 17, 2015