IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Circuit Court Judge

Case No. 2013-CP-10-5579

Appellate Case No. 2014-001828

JOSHUA FAY...Appellant-Respondent,

vs.

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

APPELLANT'S FINAL BRIEF OF THE RESPONDENT-APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN FAILING TO FIND THAT APPELLANT-RESPONDENT BREACHED THE NONCOMPETE PROVISIONS, IN LIGHT OF ITS DENIAL OF FAY'S MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

Appellant-Respondent Joshua Fay (hereinafter "Fay") was previously employed by Respondent-Appellant Total Quality Logistics, LLC (hereinafter "TQL") as a Logistics Sales Account Executive in Training. Following his termination on June 17, 2013, he immediately began competing with TQL unfairly and in violation of his Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement"), by providing to a TQL customer, the Brandt Companies ("Brandt"), the same services that he had provided to Brandt while employed by TQL. Fay established and competed through his own brokerage company, JF Progressions, which had its own broker authority with the U.S. Department of Transportation.

Fay filed this lawsuit on September 23, 2013, alleging violations of the Fair Labor Standards Act and seeking a declaratory judgment that the Agreement is invalid and unenforceable. Fay amended his Complaint on November 12, 2013, to add a claim for interference with contract, after Brandt ceased its dealings with him as the result of litigation TQL filed against Brandt to enforce its rights under the Agreement.

The parties filed cross motions for summary judgment. Fay filed his motion for judgment on the pleadings, or for summary judgment in the alternative, to ask the lower court to rule that his Agreement is unenforceable. Fay has also asked the court—prematurely, without the benefit of any discovery—to rule against TQL on its counterclaim for conversion and misappropriation of confidential information and trade secrets, arguing that he had not in fact violated the Agreement.

By order dated April 14, 2014, the lower court correctly held that the Agreement is enforceable under Ohio law and could be enforced in South Carolina because it does not violate the public policy of South Carolina. The court also correctly denied Fay's motion for summary judgment on TQL's claims for breaches of contract, and in so doing, implicitly found that he had violated his Agreement. However, in response to Fay's motion for partial reconsideration, by order dated August 4, 2014, the lower court revoked its finding that Fay had breached the Agreement, upheld its ruling that the Agreement is enforceable, and certified the issue for an immediate appeal.

Fay appealed those orders August 21, 2014. TQL filed and served its Notice of Cross-Appeal September 2, 2014.

FACTS

A. TQL'S offer of employment to Fay.

TQL is an Ohio corporation providing logistics services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the continental United States, Mexico, and Canada. (R. p. 34) ¶51; (R. p. 187) ¶3.

TQL offered Fay employment as a Logistics Sales Account Executive in Training ("LAET") by email dated November 20, 2012. (R. p. 190) ¶4. The offer of employment specifically informed Fay that: "You are also required to complete, sign, and return a TQL non-compete/non-disclosure agreement on your first day of employment. Failure to meet these requirements will result in the retraction of this offer." (R. p. 191) ¶6.

Thereafter, TQL employed Fay on December 10, 2012. (R. p. 34) ¶52; (R. p. 187) ¶4. At the inception of his employment, and as an inducement to TQL's employing him, Fay entered into the subject Employee Non-Compete, Confidentiality and Non-

Solicitation Agreement (the "Agreement"). (R. pp. 35-39) ¶53; (R. p. 187) ¶5. Fay admits he signed the Agreement on his first day of employment. (R. pp. 181-182) ¶¶3-5.

B. The Agreement contains reasonable covenants against competition.

1. <u>The Agreement restricts competition and solicitation in Section 9</u>.

In Section 9, Fay agreed that, for a period of one year after his employment terminated, he would not "become employed by or engaged in a Competing Business ..., in a capacity similar to that in which Employee is engaged by TQL or in a capacity in which Employee is in a position to use or benefit from the use of TQL's Confidential Information." (R. p. 49) ¶9(b), ¶9(b)(ii). The parties agreed that a "Competing Business" is "any person, firm, corporation, or entity that is engaged in the Business anywhere in the Continental United States." (R. p. 50-51) ¶9(d). The parties agreed that "the Business" is "providing motor carrier transport and related services, including third-party logistic services, motor freight brokerage services and supply chain management services throughout the Continental United States." (R. p. 46) First Recital. [1]

Fay also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, solicit any Customer... for any business purpose in competition with or in conflict with the Business of TQL." (R. pp. 49-50) ¶9(b), ¶9(b)(iii). He also agreed that for a period of one year after his employment terminated, he would not "directly or indirectly, interfere with, tamper with, disrupt, or attempt to interfere with, tamper with or disrupt any contractual relationship, or prospective

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[1] Thus, Fay's arguments on pages 13, and 15 of his initial brief, that the restriction lacks a geographic limit and that it would prohibit Fay from working in Europe, are specious.

contractual relationship, between TQL and any Customer[2] …, or otherwise take any action to divert Business from TQL." (R. pp. 49-50) ¶9(b), ¶9(b)(iv).

2. <u>The Agreement restricts the use of Confidential Information and Trade Secrets in Sections 3, 4, 5, 6, and 7</u>.

The Agreement addresses confidential information and trade secrets in a number of provisions. The parties agreed that "All Confidential Information as described herein is proprietary and the sole property of TQL." (R. p. 48) ¶3. The Agreement prohibits Fay from "us[ing] for any purpose or publish[ing], copy[ing], disclos[ing], or communicat[ing] to any Individual, firm, corporation, or other business entity other than TQL any Confidential Information." (R. p. 48) ¶4.

Fay agreed that "engaging in an employment relationship with a Competing Business … in a position similar to Employee's position at TQL or in any other position in which the knowledge or use of TQL's Confidential Information would be beneficial, would necessarily and inevitably result in Employee revealing, basing judgments and decisions upon, or otherwise using TQL's Confidential Information to unfairly compete with TQL." (R. p. 48) ¶6.

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[2] "Customer" is any customer or prospective customer: (A) with whom Employee had contact in connection with Employee's employment with TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason; or (B) about whom Employee had access to proprietary, confidential or commercially advantageous information through Employee's employment by TQL during the twelve (12) month period prior to termination or cessation of Employee's employment with TQL for any reason.

Contrary to the position he takes now, Fay agreed that "TQL's trade secrets, Customer lists, Motor Carrier lists, Load Management System, private processes, and other Confidential Information as they may exist from time to time are valuable, special, and unique assets of TQL's Business and operations, access to and knowledge of which are essential to performance of Employee's duties hereunder... ." (R. pp. 48-49) ¶7. The parties agreed that the term Confidential Information was defined in the Third Recital of the Agreement.

C. Fay's extensive training provided him with a breadth of trade secrets.

As a Logistics Sales Account Executive, Fay's job included developing his own book of business through the pursuit of new customers and by selling to existing TQL customers. (R. pp. 187-188) ¶6. Through this process, he would obtain freight orders from these customers and arrange transportation of the freight. Id. His job also required that he negotiate freight rates with customers and the motor carriers who physically hauled the freight, schedule pick-ups and deliveries, and resolve any issues that arose. Id.

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, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information. (R. p. 188) ¶7. As part of his training and employment, Plaintiff had access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees. Id.

Before he was employed by TQL, Fay had no knowledge of and did not understand TQL's methods to develop leads or how to "build" loads, nor did he know what TQL's pricing, profitability and margin information was. (R. p. 188) ¶8. Before he was hired, Fay did not have any of the non-public information about the individualized needs and requirements of TQL's customers, or their contact information. Id. In fact, at the time of his hire Fay had previously worked for his parent's company, T. Mark Fay Consulting which was not in the transportation or logistics industry. Id.

D. Fay establishes JF Progressions and begins competing.

Although he now seeks to re-characterize his work through his competing brokerage company, JF Progressions, Incorporated, as not competition that violates the Agreement, it plainly is, because Fay did through JF Progressions exactly what he did with TQL. And he did so for a former TQL customer, Brandt. (R. pp. 181-184) In his affidavit, Fay admits that he created JF Progressions and entered into a contract with Brandt "to provide qualified carriers, manage logistics, provide support, and handle claims and documentation." (R. p. 183) ¶10. This violates his Agreement, and Fay initiated the declaratory judgment action in hopes of having it declared invalid, so that he could continue competing.

ARGUMENT

I. THE LOWER COURT ERRED IN FAILING TO FIND THAT APPELLANT-RESPONDENT BREACHED THE NONCOMPETE PROVISIONS.

When it issued its Order Amending April 14, 2014 Order and Certifying Case for Appeal Under SCRCP 54(b), the lower court clarified that it had not found that Fay had in fact breached the Agreement. This was error, because there is no genuine issue of material fact that he violated the Agreement. Rule 56(c) of the South Carolina Rules of Civil Procedure provides that a motion for summary judgment shall be granted "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 the moving party is entitled to a judgment as a matter of law."

Fay breached the Agreement, operating as JF Progressions, Incorporated, a brokerage company with its own broker authority from the Department of Transportation, in the following ways: [3]

a. by violating the noncompete: by "becom[ing] employed by or engag[ing] in a Competing Business **[here, JF Progressions, Incorporated]**..., in a capacity similar to that in which Employee [wa]s engaged by TQL..." (R. p. 49) ¶9(b), ¶9(b)(ii);

b. by violating the non-solicitation clause: by "directly or indirectly, solicit[ing] any Customer **[here, Brandt]**... for any business purpose in competition with or in conflict with the Business of TQL." (R. pp. 49-50) ¶9(b), ¶9(b)(iii); and

c. by violating the non-interference clause: by "directly or indirectly, interfer[ing] with, tamper[ing] with, disrupt[ing], or attempt[ing] to interfere with, tamper with or disrupt any contractual relationship, or prospective contractual relationship, between TQL and any Customer

[3] Fay did not challenge the scope of the non-solicitation or non-interference covenants in paragraphs 9(b)(iii) & 9(b)(iv), both of which he violated when he began providing freight broker services to The Brandt Companies through his competing company, JF Progressions, Incorporated.

> **[here, Brandt]** …, or otherwise tak[ing] any action to divert Business from TQL." (R. p. 50) ¶9(b), ¶9(b)(iv).

These facts are simply not in dispute in light of Fay's admissions in his affidavit. Moreover, TQL met its burden to demonstrate that because Fay had no prior experience in the industry, he had to call upon the knowledge and information he learned from TQL in order to service Brandt. Thus, he did in fact use TQL's confidential and proprietary information.

The fact that Brandt is not a competitor of TQL's is not dispositive of TQL's claim for breaches of contract. This is true because in this situation, Brandt is the customer, whereas JF Progressions, Incorporated is the competitor. That Fay continues to obscure Brandt's significance as a Customer is troubling, particularly given the fact that he instituted a claim for declaratory relief so that he could continue to service Brandt.

At summary judgment, Fay did not deny receiving "detailed expense information, pricing, profitability and margin information, as well as non-public information about the individualized needs and requirements of TQL's customers, as well as their contact information." (R. p. 188) ¶7. Neither did he deny having had "access to TQL's proprietary software system—Load Manager—which contained much of TQL's Confidential Information as well as marketing and business strategy for TQL's sales employees." Id. And he has admitted and even alleged that he provided freight brokering services to a TQL customer operating through J.F. Progressions.

Thus, at most, Fay simply disagreed with the Court's legal conclusions that the information he did receive merits protection under the Employee Non-Compete, Confidentiality and Non-Solicitation Agreement (the "Agreement") he signed. This does not constitute a disputed material fact. See e.g., Shupe v. Settle, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) ("A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment."); See also Price v. Mercury Supply Co., Inc., 682 S.W.2d 924, 929 (Tenn. Ct. App. 1984) (term "genuine issue for trial" connotes genuine *factual* issues, not issues involving legal conclusions to be drawn from facts).

CONCLUSION

For the foregoing reasons, TQL respectfully requests that the order of the lower court, revoking its earlier finding that Fay breached his Agreement, be reversed. This is fully consistent with the lower court's denial of Fay's motion for partial summary judgment and the undisputed record.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

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

March 26, 2015

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PROOF OF SERVICE

The undersigned employee of the law offices of Smith Moore Leatherwood LLP, attorneys for Respondent-Appellant, does hereby certify that service of **the Appellant's Final Brief of the Respondent-Appellant** was made on all counsel of record, specified below, by mailing a copy of the same by United States Mail, postage prepaid, on **March 30, 2015**, to the following address:

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