

Attachment 2

Amended Order Dated November 1, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
)
Millennium Health, LLC,)
)
Plaintiff,)
)
v.)
)
Kyle B. Crawford, and Unidentified)
John Does,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.: 2016-CP-23-04218

**AMENDED
ORDER**

Upon issuing an Order on September 1, 2016, the Plaintiff filed Plaintiff's Motion to Reconsider, Alter and Amend Order on Preliminary Injunction, Rules 52, 59, S.C. R. Civ. P. After further consideration, the Court would submit this amended Order which removes the finding that the agreement is "not enforceable" since such a finding would be premature at this juncture. All other matters raised in the Motion to Reconsider are denied.

This matter initially came before the Court upon pleading entitled "Plaintiff Millennium Health, LLC's Verified Complaint and Motion for Temporary Restraining Order and Preliminary Injunction." The matter was heard on August 3, 2016, with notice to counsel for Defendant, Andrew Arnold. Due to proper notice to Defendant and his attorney, the Court has treated this as a Motion for Preliminary Injunction.

The Plaintiff sought to enforce the terms of its "Agreement regarding Confidentiality, Non-Disclosure and Non-Competition" dated October 6, 2011. The primary provision which Plaintiff sought to enforce is found at paragraph 3.b.(i) and states as follows:

IN ALL OTHER STATES: Employee agrees that Employee will not, directly or indirectly, solicit, accept, or service the business of any customers or

potential customers with whom Employee worked or directly contacted during the eighteen (18) months preceding Employee's termination of employment with respect to products or services competitive with those offered by Company at the close of Employee's Employment from the effective date of Employee's termination from Company. Employee agrees that this restriction will last for one (1) year Employee agrees that application of this covenant to certain of Company's business relationships instead of a geographical area is the most reasonable, and the narrowest, method of protecting the Company's legitimate business interests, Confidential Information, and good will.

The general rule is that "an injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the Plaintiff." Scratch Golf Co. v. Dune W. Residential Golf Props., Inc., 603 S.E.2d 905 (S.C. 2004). To prevail on a Motion for an Injunction, the Plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation." Levine v. Spartanburg Regional Services Dist., Inc., 626 S.E.2d 38 (S.C. Ct. App 2005) (*citations omitted*). In considering a covenant not to compete, the S.C. Court of Appeals in Baugh v. Columbia Heart Clinic, P.A., 738 S.E.2d 480 (S.C. Ct. App. 2013), stated that restrictions on competition are generally disfavored and will be strictly construed against the employer and must be narrowly drawn to protect the "legitimate interest of the employer." In addressing this issue, the South Carolina appellate courts have determined that certain contracts are enforceable because the company is protecting "legitimate interests":

- a. Restricting solicitation of former clients covered by limited territory was reasonable. Baugh v. Columbia Heart, 738 S.E.2d 480 (S.C. App 2012).
- b. Limitation on contacting previous customers assigned to employee to protect loss of customers was reasonable. Standard Register v. Kerrigan, 119 S.E.2d 533 (S.C. 1961).

- c. Prohibition against contacting existing customers can be substitute for geographic limitation for nationwide business. Wolf v. Colonial Life and Accident Ins. Co., 420 S.E.2d 217 (S.C. Ct. App. 1992).
- d. Geographic restriction covering area where employee was able to establish contact with his customers. Rental Uniform Service of Florence, Inc. v. Dudley, 301 S.E.2d 142 (S.C. 1983).
- e. Restriction from employee getting customers to terminate insurance policy issued by employer determined to be reasonable. Oxman v. Proffitt, 126 S.E.2d 852 (S.C. 1962).
- f. Restriction against competing with former employer was determined to be too broad was not protecting employer's legitimate interest and thus unenforceable. Faces Boutique, Ltd. v. Gibbs, 455 S.E.2d 707 (S.C. Ct. App. 2013).

Except for specific circumstances, the South Carolina Appellate Courts have not determined that "potential customers" or "prospective customers" are legitimate interests of former employers.

The Court finds that the prohibition against contacting "potential customers" is too broad, difficult to determine and could encompass all customers in the market even if these customers have never been customers of the Plaintiff. *Therefore, the Court finds that the Plaintiff has not met its burden to establish the enforceability of these provisions in connection with a Motion for Temporary Restraining Order/Preliminary Injunction.*

As a further point, the Court would note that the appellate courts have generally held that if it is determined that a clause is overly broad, then it cannot re-write the provision or "blue-pencil" the agreement. See Poynter Investments, Inc. v. Century Builders of Piedmont, Inc., 694 S.E.2d 15 (S.C. 2010); Faces Boutique, Ltd. v. Gibbs, 455 S.E.2d 707 (S.C. Ct. App. 1995).

Therefore, based on the analysis set forth above, the Court denies the Plaintiff's Motion for Temporary Restraining Order/Preliminary Injunction and denies Plaintiff's Motion for Reconsideration except as stated.

[Signature Page to Follow]



Greenville Common Pleas

Case Caption: Millennium Health LLC vs. Kyle B Crawford , defendant, et al
Case Number: 2016CP2304218
Type: Order/Other

Motion/Order Granted

s/ Honorable Perry H. Gravely, #2755