STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

Chemgard, Inc.,

Plaintiff,

vs.

Darrell Keith Haynes, Chem-Tek, LLC and Alfred Bell,

Defendants.

Civil Action No. 2015-CP-23-03546

ORDER

THIS MATTER CAME BEFORE THE COURT on Defendants Darrel Keith Haynes, Chem-Tek, LLC and Alfred Bell (collectively, the "Defendants") Motion for Summary Judgment. For the reasons set forth below, the Court grants summary judgment in favor of Defendants.

I. FACTUAL BACKGROUND

Chemgard, Inc. ("Chemgard") is a South Carolina corporation that sells and distributes chemicals, chemical products, and equipment, including water management systems, at retail or wholesale. Chemgard is also in the business of servicing equipment that utilizes or consumes the products sold by Chemgard. Chemgard hired Defendant Darrell Keith Haynes on September 15, 2000, and Mr. Haynes signed an Employment Agreement (the "Agreement") upon starting his employment with Chemgard.

The Agreement states that Mr. Haynes was employed as a salesman for the territory of Georgia and Alabama. During the course of his employment, Mr. Haynes was the only salesman in Georgia. Mr. Haynes never worked or made contact with customers in South Carolina, North Carolina or any other of Chemgard's customer territories. On May 10, 2015, Mr. Haynes

voluntarily resigned form Chemgard. On May 11, 2015, Mr. Haynes began working for Defendant ChemTek, a competitor of Chemgard.

On June 5, 2015, Plaintiff filed suit against Mr. Haynes. On June 25, 2015, Plaintiff amended its Verified Complaint to add Mr. Bell and ChemTek as Defendants. On that same day, Plaintiff moved for injunctive relief against Defendants pursuant to the following provision of his Agreement:

> (d) Accordingly, Employee agrees that during the course of his/her employment by the Company and for a period of twenty-four (24) months after termination of his/her employment, he/she will not:
>
> (i) Solicit or call on, either directly or indirectly, *any customer of the Company* for the purpose of selling any products or services sold by the Company or any products similar to those sold by the Company

(Agreement at ¶ 9(d)(i)) (emphasis added.) The Hon. Perry L. Gravely heard oral arguments on Plaintiff's motion on July 6, 2015, and issued a Temporary Injunction Order (the "Order") on July 17, 2015, stating:

> Defendant Haynes is enjoined from soliciting or calling on, either directly or indirectly *any* business or entity that was *a customer of Chemgard as of May 10, 2015*, for the purpose of selling any products or services sold by Chemgard or any products or services similar to those sold by Chemgard for a period of two years from the date of May 10, 2015 or until trial can be had on the merits, whichever is earlier.

On September 25, 2016, Plaintiff again amended its Verified Complaint. Plaintiff's Second Amended Complaint alleges claims for: (1) Breach of Contract (Injunctive Relief-Defendant Haynes); (2) Breach of Contract (Other Equitable and Legal Remedies/Attorney Fees Against Defendant Haynes); (3) Tortious Interference with Contractual Relations (Against Defendants ChemTek and Mr. Bell); and (4) Tortious Interference with Prospective Contractual Relations (Against All Defendants). Each of these causes of action arise solely from an alleged breach of the same provision of Mr. Haynes' Agreement set forth above.

On July 6, 2016, Defendants filed a Motion to Dissolve and Vacate the Preliminary Injunction. Judge Gravely denied Defendants' motion on August 10, 2016, finding he lacked authority to modify his earlier decision. Defendants filed a Motion to Reconsider on August 11, 2016.

On August 12, 2016, Defendants filed the instant Motion seeking summary judgment as to each of Plaintiff's claims. Judge Gravely subsequently informed the parties that he would refrain from ruling on Defendants' Motion to Reconsider (as well as a Second Rule to Show Cause filed by Plaintiffs) pending this Court's consideration of Defendants' Motion for Summary Judgment.

On September 22, 2016, this Court held a hearing on Defendants' Motion and entertained extensive arguments by the parties. For the reasons that follow, the Court grants summary judgment in favor of Defendants.

II. DISCUSSION

A. Summary Judgment Standard.

A motion for summary judgment should be granted where the Court is satisfied 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." Rule 56(c), SCRCP. Summary judgment is appropriate in those cases in which plain, palpable and undisputable facts exist on which reasonable minds cannot differ. *Priest v. Brown*, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990). It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. *Main v. Corley*, 281 S.C. 525, 316 S.E. 2d 406 (1984). A party opposing a motion for summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts but must come forward with specific facts showing that there is a genuine issue for trial."

Hedgepath v. AT&T Co., 378 S.C. 340, 354, 559 S.E.2d 327, 335 (Ct. App. 2001). Moreover, "it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). Reliance on allegations in a pleading is insufficient to overcome a motion for summary judgment. Rule 56(e), SCRCP.

B. Restrictive Covenants Under South Carolina Law.

Generally, covenants not to compete are looked upon with disfavor, examined critically, and strictly construed. *Cafe Assocs. v. Gerngross*, 305 S.C. 6, 406 S.E.2d 162 (1991). When a contract is clear and unambiguous, the construction of the contract is a question of law for the court. *Conner v. Alvarez*, 285 S.C. 97, 328 S.E.2d 334 (1985). In construing the terms of a contract, the foremost rule is that the court must give effect to the intentions of the parties by looking to the language of the contract. *Id.* at 101, 328 S.E.2d at 336. "When a court construes an employment contract, as with any contract, resort is first made to the language of the contract in issue, and if the language is perfectly plain and capable of legal construction, it determines the rights and obligations of the parties." *Holden v. Alice Mfg., Inc.*, 317 S.C. 215, 221, 452 S.E.2d 628, 631 (Ct. App. 1994) (emphasis added) (citing *Stuckey v. University of South Carolina*, 284 S.C. 295, 325 S.E.2d 709 (Ct.App.1985)).

South Carolina law is clear that a restrictive covenant may be no broader than is reasonably necessary to protect an employer's legitimate business interest. *See, e.g., Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961); *Team IA, Inc. v. Lucas*, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). A covenant not to compete must be reasonable in its restrictions or it will not be upheld. *Reeves v. Sargeant*, 200 S.C. 494, 498-99, 21 S.E.2d 184, 186 (1942) (general restraint of trade is against public policy and void).

Therefore, if a covenant not to compete is deemed overbroad and unenforceable, there can be no genuine issue of material fact as to whether an employee breached the employment contract and a former employer cannot base their claims upon the invalid agreement. *Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) ("Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot."); *see also Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable).

It is equally well established that to be enforceable, a customer non-solicitation provision must limit its scope to the customers a former employee actually serviced or encountered during his or her employment. *See Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (holding a non-solicitation provision was permissible where the former employee remained "free to solicit new customers to which he had not been assigned while in Collins' employ").[1] The foregoing precedent flows from the fundamental requirement that a restrictive covenant may be no more broad than is reasonably necessary to protect a legitimate business interest. *See Kerrigan*, 238 S.C. at 66, 119 S.E.2d at 539; *Lucas*, 395 S.C. at 245, 717

[1] *See e.g., Rental Uniform Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675–76, 301 S.E.2d 142, 143 (1983) (noting a critical factor to determine if a restrictive covenant is enforceable is whether "is limited to the territory in which the employee was able, during the term of his employment, *to establish contact with his employer's customers.*") (emphasis added) (citations omitted); *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 119 S.E.2d 533 (1961) (holding former employee should be enjoined "from competing, directly or indirectly, with it, in selling *to eighteen certain accounts* in the Greenville area of South Carolina, *formerly assigned to the respondent* while he was employed as a sales representative of business forms and equipment for the appellant") (emphasis added); *see also ScanSource, Inc. v. Thurston Group*, LLC, C/A No. DKC 11–0380, 2011 WL 3608227, at *4–5 (D. Md. Aug. 15, 2011) (unpublished) (applying South Carolina law and concluding a non-solicitation clause was likely enforceable because it was limited to customers "with which Contractor had contact during the term of this Agreement as a result of being retained by the Company"); *Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009) (holding non-solicitation provision was unenforceable because it prohibited the solicitation of *any* of the employer's customers, not just the ones the former employee had personally serviced).

S.E.2d at 107. Moreover, if the restrictive covenant is overbroad in the least, it is void and unenforceable en toto, and cannot be saved by any manner of judicial interpretation or construction. *Lucas*, 395 S.C. at 246, 717 S.E.2d at 107 (quoting *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) (a court may not "blue pencil" the restrictions contained in a non-competition provision by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable)).

Although it is true that a customer-based restriction is a valid substitute for a geographic restriction, this allowance does not diminish the fundamental requirement that the resulting restriction must be as narrowly tailored as possible to protect the legitimate interest in question. *See, e.g., Fournil v. Turbeville Ins. Agency, Inc.*, 2009 U.S. Dist. LEXIS 16303, *11-12, 2009 WL 512261 (D.S.C. Mar. 2, 2009); *Rockford Mfg., Ltd. v. Bennet*, 296 F. Supp. 2d 681, 689 (D.S.C. 2003); *Collins Music Co. v. Parent*, 288 S.C. 91, 94, 340 S.E.2d 794, 796 (Ct. App. 1986) (reasoning that a non-solicitation covenant under South Carolina law *must* be limited in effect to those customers who were actually serviced or encountered by the former employee).

C. The Restrictive Covenant in Question is Patently Overbroad and Unenforceable.

Based on the foregoing, the Court concludes the restrictive covenant at issue here is unenforceable as a matter of law, as it is patently overbroad. The Agreement's customer non-solicitation provision is not limited as required by South Carolina law to customers which Haynes had contact with during the term of the Agreement. Therefore, on its face, Mr. Haynes is prohibited not only from soliciting his former customers, but also all of the customers of *other* salesmen, in *other* states, with whom he had absolutely no contact or involvement whatsoever. Indeed, Mr. Haynes is prohibited from soliciting Chemgard customers that he may literally not even know were customers of the company at the time of his termination.

As written and, indeed, as interpreted by Plaintiff, the Agreement's customer non-solicitation provision also prohibits Mr. Haynes from responding to a customer's unilateral request for services or even continuing his personal friendships with employees of customers. In so doing, the restrictive covenant is patently overbroad, as it captures and binds customers to a contract to which they have never joined nor been paid consideration. This is not a restriction on unfair competition, but on competition itself, and it is patently invalid as a matter of law. *See Fournil v. Turbeville Ins. Agency, Inc.*, No. 3:07-3836-JFA, 2009 WL 512261, at *3 (D.S.C. Mar. 2, 2009); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995) (covenants are deemed patently over broad when prohibition goes far beyond the protection of any legitimate business interests).

D. Plaintiff's Second Amended Complaint Must be Dismissed in its Entirety.

The Court further concludes that each of the four causes of action in Plaintiff's Second Amended Complaint arise out of an alleged breach of the covenant not to compete as stated in Paragraph 9(d) of the Employment Contract. It is well established that "only a valid agreement can support claims" for breach of contract and tortious interference with a contract. *See Prudential Real Estate Affiliates, Inc. v. Long & Foster Real Estate, Inc.*, 208 F.3d 210 (4th Cir. 2000) (citing *Fraidin v. Weitzman*, 611 A.2d 1046, 1056 (Md.Ct.Spec.App.1992) ("Only a valid agreement can support a claim for tortious interference with contract; an invalid agreement cannot."); *see also Poole v. Incentives Unlimited, Inc.*, 338 S.C. 271, 276, 525 S.E.2d 898, 901 (Ct. App. 1999), *aff'd*, 345 S.C. 378, 548 S.E.2d 207 (2001) (granting former employee summary judgment, finding covenant not to compete invalid and unenforceable). Chemgard's restrictive covenant, as written, is overbroad as a matter of law and there is no genuine issue of material fact as to whether Defendant Haynes is in breach of contract or whether Defendants are liable for

tortious interference with a contract or prospective contract. Accordingly, Defendants are entitled to summary judgment pursuant to Rule 56 of SCRCP, as to all of Chemgard's claims as stated within its Second Amended Complaint.

NOW THEREFORE, based on the foregoing, the Court hereby **GRANTS** Defendants' Motion and enters summary judgment as to each of Plaintiff's claims within its Second Amended Complaint.

IT IS SO ORDERED.

Honorable Roger L. Couch
Seventh Judicial Circuit

Greenville, South Carolina

~~October~~ 11/8, 2016