

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Fortress Homes, LLC t/b/k/a)
Eastwood Homes of Columbia, LLC,)
)
Plaintiff,)

C/A No. 2017-CP-32-04509

vs.)

PRELIMINARY INJUNCTION

Fortress Builders, LLC, William Sinnett,)
Tim Kern, Fortress Realty, LLC, and)
Sinnett Realty, Inc.)

Defendants/Third-Party Plaintiffs,)

vs.)

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Allen Nason, Kevin Hutchins, Clark)
Stewart, Joe Stewart, Justin Meyers,)
Grant Thornton, LLP, Wade Kruse,)
Patrick McCauley, Cherry Bekaert, LLP,)
and Ann Townsend,)

JUL 16 2018

SC Court of Appeals

Third-Party Defendants.)

This matter came before the Court on the motion of Plaintiff Fortress Homes, LLC t/b/k/a Eastwood Homes of Columbia, LLC (Eastwood), requesting a preliminary injunction against Defendants Fortress Builders, LLC, William Sinnett, Tim Kern, Fortress Realty, LLC and Sinnett Realty, Inc. The Court heard the motion February 22, 2018. James Edward Bradley appeared for Eastwood and Brett H. Bayne appeared for the Defendants.

Eastwood has asked the Court to enforce a non-competition agreement against the Defendants. The Defendants oppose the enforcement of this covenant. They argue that the covenant should not be enforced because Eastwood has not shown irreparable harm, Eastwood violated their employment contract, and Eastwood violated the sales contract.

FACTS

The Court has reviewed the Affidavit of Kevin Hutchins who is Eastwood's Chief Financial Officer. It has also reviewed the verified complaint and verified answer, counterclaim, and crossclaim. For purposes of this motion only, the Court sets forth its understanding of the facts.

Eastwood bought the Defendants' residential construction business based on written promises that its book value was approximately 4.8 million dollars. Eastwood paid approximately 1.8 million dollars in cash and assumed approximately 12.8 million dollars in debt. After making payments to the Defendants for the business assets, Fortress Homes discovered the Defendants' books were incorrect and that the business actually had a book value of negative 1.5 million dollars.

As part of the sale, the Defendants agreed not to compete in the residential construction business, and Eastwood agreed to employ Tim Kern and William Sinnett. When Eastwood learned of the financial misstatements it released Tim Kern and William Sinnett. Kern and Sinnett then opened a competing homebuilding business named Conquest Homes.

DISCUSSION

Fortress Homes is asking this Court to enforce the sales contract by enjoining the Defendants from competing in the residential construction business only in the markets in which Eastwood does business. Tim Kern and William Sinnett agreed to the non-competition in the asset purchase agreement upon advice of counsel. They were paid a large sum of money for this promise. The promise is limited in scope to residential construction in the areas where Fortress Builders' customers are located. As a result, the Court believes the covenant not to compete is reasonable in its scope and was entered voluntarily for consideration as part of the sale of a business.

The Court finds, based on the evidence presented, that Plaintiff has shown a likelihood of success on the merits of its claim that Defendants are in breach and violation of the non-competition agreement included in the asset purchase agreement pursuant to which Plaintiff purchased the business of Defendant Fortress Builders, Inc. Plaintiff's evidence showed that

1. Defendants have admitted that the financial statements attached to the asset purchase agreement were materially misstated;

2. As a result of the admission of misstatement, Defendants' warranty in the asset purchase agreement that the financial statements were accurate is not true constituting a breach of warranty by Defendants;

3. The breach of warranty by Defendant Sinnett and Kern constituted cause under the asset purchase agreement for termination of their employment by Plaintiff causing the non-competition agreement to be in effect;

4. The non-competition agreement is reasonable as to time and territory and supports a legitimate business interest of Plaintiff;

5. Defendant has presented no evidence from which the Court could conclude that the non-competition agreement is not reasonable; and

6. The Defendants have agreed in the asset purchase agreement that a breach of the agreement, including the non-competition agreement, would cause irreparable harm and that as a matter of law any harm would be so difficult to ascertain that a remedy in damages would be inadequate.

The Court therefore concludes that Plaintiff has shown a likelihood of success on the merits and that its harm will be irreparable.

The Court further finds that the equities favor the entry of the injunction and that the harm to Plaintiff from not having the injunction outweighs the harm to Defendants from being required to comply with the terms of the asset purchase agreement.

The Court further finds that issuance of this injunction is necessary for the protection of Plaintiff's rights during the course of the litigation.

Considering the motion, and based upon the pleadings, affidavits, exhibits, and other matters of record which were properly before the Court, as well as the applicable common law and statutory law, the Court finds that the motion should be GRANTED.

NOW THEREFORE, it is hereby ORDERED, that:

- (1) Defendants, their agents, attorneys, advisors, and anyone acting in concert with such individuals, are hereby enjoined from:
 - (i) engaging in any business identical or substantially similar to the business of the construction of residential homes, within the Prohibited Territory, as defined below;
 - (ii) materially assisting any person (whether in a construction, manufacturing, financial, managerial, employment, advisory or other capacity or as a shareholder, member or other owner or consultant, or by providing information) to engage in a business identical or substantially similar to the business of the construction of residential homes within the Prohibited Territory, as defined below;
 - (iii) engaging in any work for a competitor of the Plaintiff or Defendants that is likely to result in the Defendants' use or disclosure of any of Plaintiff's confidential information;

- (iv) owning any interest in or organizing a corporation, limited liability company, partnership, or other business or organization which engages in the business of the construction of residential homes within the Prohibited Territory, as defined below; provided, however, that ownership of stock, partnership interests or other securities not in excess of 5% of any class of such interests or securities that are publicly traded shall not be prohibited by the preceding restriction; or
 - (v) training any person in the performance of the construction of residential homes, including methods and processes developed or utilized by the Defendants, when it might reasonably be anticipated that the person trained will engage in the business of the construction of residential homes within the Prohibited Territory, as defined below.
- (2) For purposes of paragraph 1, the term Protected Territory shall mean the geographic locations where:
- (i) the Defendants for the twelve months prior to April 7, 2017, carried on or transacted residential real estate sales and construction,
 - (ii) the counties where Defendants sold or marketed its products or services as of the April 7, 2017,
 - (iii) the counties where any customer of the Defendants are located; including, without limitation: (A) the counties of Kershaw, South Carolina, Lexington, South Carolina and Richland, South Carolina (H) the territory within a 75 mile radius of Charlotte, North Carolina, (I) the territory within a 75 mile radius of Charleston, South Carolina, (J) the territory within a 50 mile radius

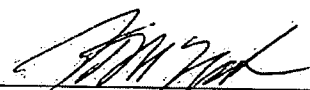
of Atlanta, Georgia and (K) the territory within a 75 mile radius of each other office of Plaintiff existing as of April 7, 2017.

- (3) This Preliminary Injunction is effective immediately. However, Plaintiff shall, no later than 5:00PM on the 10th business day after the entry of this order, post a surety bond in the amount of \$ 30,000⁰⁰ to secure any damages Defendants may suffer as a result of a later determination that this Preliminary Injunction was improperly entered.
- (4) This Preliminary Injunction is effective until April 7, 2019, or until the conclusion of this case (including any applicable appellate proceedings), whichever is first.
- (5) This injunction only relates to the business of residential construction and does not affect the Defendants ability to buy or sell real estate or engage in commercial construction.

AND IT IS SO ORDERED.

Lexington, South Carolina

7 March 2018



The Honorable R. Knox McMahon