

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

BRUNS GENERAL CONTRACTING, INC.	:	
	:	Appellate Case No. 09-CA-23
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CV-99
v.	:	
	:	(Civil Appeal from Common Pleas Court)
PHILIP MILLER	:	
	:	
Defendant-Appellant	:	
	:	

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OPINION

Rendered on the 18th day of August, 2009.

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BROGAN, J.

{¶ 1} Philip Miller appeals from the judgment of the Miami County Common Pleas Court which granted Bruns General Contracting Inc.’s motion for a preliminary injunction enjoining Miller from operating any business in Ohio which directly or

indirectly engages in a business similar to Bruns, which includes all aspects of general contracting.

{¶ 2} This litigation began in February 2009 when Bruns filed a complaint against Miller alleging that Miller had breached a covenant not to compete agreement with Bruns. Bruns also alleged that Miller had intentionally interfered with a business relationship between Bruns and the Vineyard Christian Fellowship Church (hereinafter "Vineyard") and had misappropriated certain trade secrets of Bruns. Bruns sought compensatory and punitive damages from Miller as well as a preliminary and permanent injunction.

{¶ 3} The trial court conducted a hearing on Bruns' request for a preliminary hearing on April 3, 2009. Before the hearing began, Bruns withdrew its request that Miller be enjoined from disclosing any of Bruns' confidential information as described in the Agreement. (Tr. 3.) At the hearing Philip Miller was called and upon cross-examination testified about his professional background and the circumstances surrounding his employment with Bruns. Miller testified he received a degree in civil engineering in 1992 and became employed in the pre-engineered steel building industry. He testified he did the detailing, shop drawings, packaging lists, and design engineering for these steel buildings. He testified he was self-employed for about ten years as a consultant mostly in the Pennsylvania area.

{¶ 4} Miller testified he became employed by Bruns in 2003 estimating the cost of and ordering pre-engineered steel buildings. In 2007, Miller became a manager of technical services assisting with the autoclaved aerated concrete product. Later on in 2008, Miller performed structural engineering consulting for

Bruns on on-going projects. In May 2008, Miller signed the agreement with the non-compete provision which is the subject of this litigation. It provided in pertinent part:

{¶ 5} “In consideration of continued employment with Bruns, the receipt of future wages and other good and valuable consideration, the sufficiency and adequacy of which is hereby acknowledged by Employee, Employee hereby covenants and agrees that during the period commencing on the date of this Agreement and ending two years after the termination of Employee’s employment with Bruns, regardless of the reasons for which the employment relationship is ended, **Employee shall not, directly or indirectly, own, manage, operate, participate in, or act as a director, officer, employee of, or consultant to any business or entity in Ohio or Indiana directly or indirectly engaged in competition with or in any business or entity which is engaged in business similar to the type of business which is now conducted by Bruns or which is conducted by Bruns at the time of the termination of Employee’s employment.**

{¶ 6} “In the event of a breach, or threatened breach, by the Employee of the terms and conditions herein contained, Bruns shall be entitled to a preliminary and permanent injunction restraining the Employee from violating any term of this Agreement and from disclosing, in whole or in part, any of Bruns’ confidential information, whether specifically referred to herein or not, or from rendering services to any person, firm, corporation, association, partnership or other entity to whom such information has been disclosed, or to whom such information is threatened to be disclosed, whether or not such person or entity is, at the time of such disclosure or

threatened disclosure, a competitor of Bruns.”

{¶ 7} On December 5, 2008, Miller was laid off by Bruns for lack of work. Miller began doing consulting work for architectural firms regarding steel building structural analysis. Miller formed a construction management firm with David Frye called F & M Management for the purpose of managing small commercial projects for project managers or general contractors. (Tr. 26.)

{¶ 8} Shortly after being laid off from Bruns, Miller was contacted by Mike Herrick, who was employed by Vineyard to serve as the construction manager for a new church facility, and to assist in the construction. Miller testified he provided a floor plan and wall elevations for Vineyard. Herrick provided Miller and Frye with a site plan for the Vineyard church prepared by a civil engineering firm. Miller said his goal was to be a construction consultant to Vineyard or the general contractor. Miller testified he and Frye also assisted a church in Dayton with a floor plan for refurbishing a house for seminary students.

{¶ 9} Steve Bruns, president of Bruns, testified that his company provides general construction full service with a focus on design build construction. He testified his company does a lot of pre-engineered metal buildings and also AAC construction, which is construction with autoclaved concrete for use in sub-soils that cannot support heavier construction material. He explained that his company does commercial and industrial construction and a lot of church work. (Tr. 40.) He explained his company competes with construction management firms and is in fact competing with Miller and Frye for the Vineyard project. (Tr. 42.) Bruns testified his company has provided renderings, a floor plan, and a rough preliminary total design for The Vineyard Church

project. Bruns stated he learned in February 2009 that Miller and Frye were competing with Bruns to obtain the design work and to help Mike Herrick manage the church project. Bruns testified that his company performs similar work as F & M, and he asked the court for a temporary injunction because Miller and Frye were interfering with Bruns' opportunity to get the Vineyard project and similar projects.

{¶ 10} On cross-examination, Bruns stated his company has about 75 employees and the company is a design build contractor. He admitted Bruns does not generally provide just consulting advice on a construction project. (Tr. 50.) He also admitted Bruns completed its contract with Vineyard on December 2, 2008.

{¶ 11} Pastor Douglas Roe of the Vineyard Church testified that the church initially hired Bruns to do some initial design work on an educational facility. Later the project changed from an educational facility to a sanctuary. Bruns then wanted the church to hire his company as a general contractor to build the sanctuary. Negotiations broke down between Bruns and the church over the cost of the project. Roe testified that Miller and Frye began providing consulting services to the church sometime in 2009 concerning the sanctuary project. He testified neither Miller nor Frye ever attempted to interfere with any contract Vineyard had with Bruns regarding the sanctuary project. Roe testified that Bruns and F & M are free to bid for the project to build the sanctuary in the future. (Tr. 92.)

{¶ 12} The construction manager for the Vineyard sanctuary project, Mike Herrick, corroborated the testimony of Pastor Roe. He also testified that Miller never discouraged Herrick or anyone connected with Vineyard from working with Bruns on the sanctuary project. (Tr. 125.) Herrick stated the church decided not to use a design

build form to build the project. (Tr. 128.)

{¶ 13} On May 15, 2009, the trial court granted Bruns' motion for a preliminary injunction. The trial court modified the territorial boundary of the non-compete clause to the State of Ohio. The trial court found that enforcing the non-competition clause would not impose an undue hardship on Miller and it was not injurious to the public. The trial court concluded that Bruns had established that Miller is competing for business "the nature of which is similar to the business of plaintiff." The trial court noted that Miller acknowledged he is seeking construction business from churches, which is exactly what Bruns engages in. The trial court noted that Miller received the benefit of substantial training at the expense of Bruns, and Miller entered into an enforceable non-competition agreement with his former employer. The trial court found Bruns would suffer irreparable harm if Miller continued to compete with Bruns.

{¶ 14} The trial court found that Bruns had failed to establish that Miller had an existing business relationship with the Vineyard Church, and the court denied injunctive relief as it pertained to Bruns' claim that Miller interfered with Bruns' business relationship with Vineyard.

{¶ 15} In his first assignment of error, Miller contends the trial court erred in granting Bruns' motion for a preliminary injunction. He contends the trial court erred in deciding the non-competition agreement was reasonable and enforceable, that he had or was likely to breach it, that Bruns would suffer irreparable harm, that no third parties would be unjustifiably harmed by an injunction or that the public interest would be served by the injunction.

{¶ 16} Miller argues that the non-competition agreement does not prohibit him

from competing with Bruns itself but only prohibits him from associating with a business that engages in a business similar to Bruns. Bruns argues that Miller's interpretation of the agreement is nonsensical as it would be of no benefit to Bruns. We agree with Bruns and the trial court that Miller's argument is "hypertechnical" because the clause must be read in its entirety to achieve a reasonable result.

{¶ 17} Bruns argues that the trial court did not abuse its discretion in granting the preliminary injunction because the evidence established that Miller and Bruns are in direct competition with each other by providing consultation on new construction. Bruns argues the trial court properly found that it would suffer irreparable harm because Miller admitted he is seeking construction business from churches, which is exactly what it is engaged in, and the extent of its injury cannot be predicted so as to provide an adequate monetary determination. Bruns also notes that Miller failed to produce any evidence that third parties would be harmed by the issuance of the injunction since the service he provides is not unique. Lastly, Bruns argues that the trial court did not err in deciding that the public interest would be served by the issuance of the injunction.

{¶ 18} The purpose of a preliminary injunction is to preserve the status quo of the parties pending a resolution of the case on its merits. *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 2004-Ohio-6425.

{¶ 19} The burden of proof upon the party seeking a preliminary injunction is to establish each of the elements by clear and convincing evidence. *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.* (1996), 109 Ohio App.3d 786.

{¶ 20} In deciding if this burden has been met, the court must consider whether (1) the plaintiff has shown a substantial likelihood it will prevail on the merits of the

underlying claims; (2) the plaintiff will suffer irreparable harm if the preliminary injunction is not granted; (3) issuance of the injunction will not harm third parties; and (4) the public interest would be served by issuing the preliminary injunction. *TGR Enterprises, Inc. v. Kozhev*, 167 Ohio App.3d 29, 2006-Ohio-2915.

{¶ 21} A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public. *Raimonde v. Van Vlerah* (1975), 42 Ohio St.2d 21.

{¶ 22} Miller argues and we agree that the services he provides are not in competition with Bruns. Bruns performs structural engineering consulting only with the context of its own design/build general construction projects. (Tr. 13.) Miller, on the other hand, provides the much more limited service of structural engineering consulting. Miller testified neither he nor F & M intended to bid on any construction projects with Bruns. No evidence was presented at the hearing that Miller misappropriated any of Bruns' trade secrets. The parties both conceded at the oral argument that neither intends to bid for the Vineyard Church project.

{¶ 23} In reviewing what restrictions contained in a covenant not to compete would be reasonable, Justice Brown noted in *Raimonde* the following factors should properly be considered: “(t)he absence or presence of limitations as to time and space, * * * whether the employee represents the sole contact with the customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or

merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a bar to the employee's sole means of support; whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment." Id. at 25, quoting with approval while also overruling, in part, *Extine v. Williamson Midwest* (1964), 176 Ohio St. 403, 406; see, also, *Arthur Murray Dance Studios of Cleveland v. Witter* (1952), 62 Ohio Law Abs. 17.

{¶ 24} Bruns has failed to demonstrate by clear and convincing evidence a substantial likelihood that it will prevail on the merits of its claim that Miller breached the terms of the non-competition agreement. In deciding the reasonableness of the agreement, there is no evidence that Miller is unfairly competing with Bruns. There was no evidence presented that Miller breached the confidentiality agreement or has revealed any trade secrets of Bruns. Bruns and Miller are not in direct competition with each other. Miller provides consulting advice on small construction projects, while Bruns is a design/build general contractor on larger projects. Bruns failed to demonstrate it would suffer irreparable harm if the preliminary injunction is not granted. Issuance of the injunction will harm those parties with small construction projects who would benefit from the technical skills of Miller with autoclaved aerated concrete products and his experience with steel building structures. Lastly, Bruns has failed to demonstrate that the public interest would be served by the issuance of the injunction.

{¶ 25} It is also clear that the covenant seeks to stifle the inherent skill and

experience of the employee and any benefit to Bruns by enforcing the agreement is far less than the detriment caused Miller. There is little evidence the employee's talent which Bruns seeks to suppress was actually developed during the period of his employment.

{¶ 26} The trial court abused its discretion in granting the preliminary injunction issued in this matter. Appellant's first assignment of error is Sustained. We need not address Miller's claim in his second and third assignments of error that the trial court erred in granting the preliminary injunction without requiring Bruns to post a bond or that it failed to comply with Civ.R. 65(D). The judgment of the trial court is Reversed and the cause Remanded for further proceedings consistent with this Opinion.

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FAIN and FROELICH, JJ., concur.

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