[Cite as *Mark Phillips Salon/Spa v. Blessing*, 2011-Ohio-388.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

MARK PHILIPS SALON/SPA		
Plaintiff-Appellant	**:**	**C.A. CASE NO. 23875**
vs.	**:**	**T.C. CASE NO. 2008-CV-9278**
JACQUELYN BLESSING, et al.	**:**	**(Civil Appeal from Common Pleas Court)**
Defendants-Appellees	**:**	

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O P I N I O N

Rendered on the 28th day of January, 2011.

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GRADY, J.:

Plaintiff, Mark Philips Salon/Spa ("MPS"), appeals from an order granting summary judgment in favor of Defendant, Jacquelyn Blessing.

MPS hired Blessing as a hair stylist in April of 2006. Prior to her employment with MPS, Blessing had worked as a hair stylist

at two other salons. Blessing signed a "Non-Competition Agreement" with MPS on her first day of employment. The pertinent terms of the Agreement are as follows:

"A. COVENANT NOT TO COMPETE: The Employee expressly covenants and agrees that at no time during the term of his or her employment and for a period of one (1) year immediately following the termination of his or her employment, whether voluntary or involuntary, will the Employee, for himself or herself or on behalf of any other person, partnership, firm association or corporation, act as an independent contractor or an employee for a competitor, or open a business which would be a competitor or act as a manager/director of any present or future competitor of the company within a territory of seven (7) miles in radius from the following: 20 S. Tippecanoe Drive, Tipp City, Ohio; 415 Miamisburg-Centerville Road, Dayton, OH; or any and all other facilities in which Mark Philips Salon/Spa maintains business.

"B. COVENANT NOT TO DIVERT BUSINESS: The Employee covenants and agrees that neither during the term of his or her employment and for a period of one (1) year following his or her termination, whether voluntary or involuntary, will the Employee divert any business from the Company that was obtained during employment at Mark Philips Salon/Spa by influencing or attempting to influence any clientele of the Company, or attempt to attract any supplier

away from the Company, or use his or her information regarding the Company's suppliers in any way which could detrimentally affect the Company."

On August 23, 2008, Blessing resigned from her position at MPS. She subsequently accepted a hair styling position at Contemporary Salon in West Carollton, Ohio, which is approximately 4.5 miles from MPS's Centerville location.

On October 10, 2008, MPS commenced an action against Blessing, seeking a preliminary injunction and money damages against Blessing based on her breach of the Non-Competition Agreement. Both parties filed motions for summary judgment. On November 4, 2009, the trial court granted Blessing's motion for summary judgment and overruled MPS's motion for summary judgment. MPS filed a motion for reconsideration, which the trial court overruled on December 16, 2009. MPS filed a timely notice of appeal.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED BY GRANTING JACQUELYN BLESSING'S MOTION FOR SUMMARY JUDGMENT AND AWARDING JUDGMENT TO BLESSING ON MARK PHILIPS CLAIM FOR BREACH OF RESTRICTIVE COVENANT WHEN, AT LEAST, GENUINE ISSUES OF FACT AND LAW REMAIN FOR A JURY'S DELIBERATION."

When reviewing a trial court's grant of summary judgment, an appellate court conducts a de novo review. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 1996-Ohio-336. "De Novo review means that this court uses the

same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. Of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co.* (1980), 64 Ohio St.2d 116, 119-20. Therefore, the trial court's decision is not granted any deference by the reviewing appellate court. *Brown v. Scioto Cty. Bd. Of Commrs.* (1993), 87 Ohio App.3d 704, 711.

"[N]on-competition agreements are not favored, because they are a restraint against trade and therefore against public policy." *Westco Group, Inc. v. City Mattress* (Aug. 15, 1991), Montgomery App. No. 12619. The purpose in enforcing covenants not to compete is to foster commercial ethics and to protect an employer's legitimate business interests. Id. "A covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if it 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, 26.

Absent the existence of legitimate business interest of the employer to protect a covenant not to compete is unreasonable and will not be enforced. *Premier Health Service, Inc. v. Schneiderman*, Montgomery App. No. 18795, 2001-Ohio-7087; *Westco Group, Inc*. A court determining the enforceability of a covenant

not to compete must analyze "whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition." *Raimonde*, 42 Ohio St.2d at 25. "Covenants not to compete are valid only when the competition they restrict is somehow unfair, not because it is unfair that the promisor fails to perform on the promise he made." *Busch v. Premier Integrated Medical Associates, Ltd.*, Montgomery App. No. 19364, 2003-Ohio-4709, at ¶17.

Blessing testified that she was an experienced hair dresser and had worked for two other salons previous to her employment with MPS. (Tr. 7-8). Blessing brought approximately thirty clients with her to MPS, and while there she acquired approximately twenty more. (Tr. 16, 27). Blessing testified that virtually all of her clients are obtained through referrals from other clients (Tr. 10, 52), and there is no evidence that MPS did anything that benefitted Blessing in obtaining any of her clients.

Blessing also testified that MPS gave her no particular training or skill that she uses. (Tr. 17-18). The only training she received was from vendors whose products were used by MPS. (Tr. 17). Blessing testified that after she left MPS she created a list of all her former clients "from my brain, from my knowledge." (Tr. 28, 30). There is no evidence that she obtained that information from a database or list maintained by MPS. Indeed,

Blessing testified that she could not access the client lists maintained by MPS. (Tr. 54-55).

By engaging in competition with MPS as she has, and especially by mailing solicitations to clients she obtained while employed by MPS, Blessing violated her agreement with MPS in those respects. However, on this record there is nothing in the competition with MPS in which Blessing has engaged that makes it unfair. Blessing uses no trade secrets or competitive advantages she obtained from MPS. The competition MPS seeks to prevent is merely ordinary competition. Therefore, the covenant not to compete cannot be enforced.

MPS cites *Charles Penzone, Inc. v. Koster*, Franklin App. No. 07AP-569, 2008-Ohio-327, in support of its argument that the covenant not to compete should be enforced. Unlike the employer in *Penzone*, however, MPS did not present any evidence that MPS made a significant investment in training Blessing regarding hair styling or customer relations. We believe the facts before us are inapposite with the facts in *Penzone* and are closer to the facts in *Moda Hair Designs, Inc. v. Dechert*, Stark App. No. 2005CA00192, 2006-Ohio-682, and *HCCT, Inc. v. Walters* (Dec. 23, 1994), Lucas App. No. L-94-028, in which the Courts of Appeals for the Fifth and Sixth Districts found the covenants not to compete were unenforceable.

The assignment of error is overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and MCFARLAND, J. concur.

(Hon. Matthew W. McFarland, Fourth District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

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