

IN THE SUPREME COURT OF OHIO

CLIFTON STEEL COMPANY)	Case No: 2018-1006
)	
Plaintiff/Appellee)	On Appeal from Eighth District Court
)	Of Appeals Cuyahoga County, Ohio
vs.)	Case No: CA 17-105675
)	
TRINITY EQUIPMENT COMPANY)	
)	
Defendant/Appellant)	
)	
)	

**PLAINTIFF- APPELLEE CLIFTON STEEL COMPANY'S MEMORANDUM IN
RESPONSE TO DEFENDANT-APPELLANT TRINITY EQUIPMENT COMPANY'S
MEMORANDUM IN SUPPORT OF JURISDICTION**

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I. PLAINTIFF-APPELLEE CLIFTON STEEL COMPANY’S EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE ANY SUBSTANTIAL CONSTITUTIONAL QUESTION

Defendant/Appellant Trinity Equipment Company (hereinafter “Trinity”), in its Memorandum in Support of Jurisdiction, fails to identify any substantial constitutional question associated with this appeal. Accordingly, this Court’s sole inquiry in determining whether to consider this case on the merits is whether the matter involves public or great general interest. This case, however, does not address any broad or over-arching issues of law. Rather, it deals with the interpretation of specific language in a sales agent agreement between Plaintiff/Appellee Clifton Steel Company (hereinafter “Clifton”) and Trinity. Trinity is not asking this Court to revisit the well-established law on the factors a court should consider in enforcing a non-compete agreement. Rather, the issues raised by Trinity only relate to how those factors should be applied to this particular contract. As such, it does not involve any issues of public or great interest.

Trinity, in its Memorandum in Support of Jurisdiction, grossly misrepresents the terms of the non-compete language contained in the applicable Sales Agent Agreement. Trinity describes the preliminary injunction as issuing “a ban on all nationwide competition.” (Memorandum in Support of Jurisdiction, p.1). The relevant non-compete/non-solicitation provision contained in the parties’ Sales Agent Agreement, which was enforced through the preliminary injunction, was limited to the sale of specific parts to specific customers identified in the Agreement.

The actual language provides that “For one (1) year after termination of the Agreement, Trinity ‘shall not * * * engage in the sale of or solicit the sale of * * * the products and services of Clifton Steel Company to Clifton’s customers * * *’ (“the Termination Provision”). See Eighth District Court of Appeals June 7, 2018 Journal Entry and Opinion from Case No: 105675 (hereinafter “Eighth Dist. Op. ¶____”). The Trial Court looked to the terms of the Sales Agent

Agreement to determine who were “Clifton’s customers” and “the products and services of Clifton Steel Company” as referred to in this Termination Provision. The Sales Agent Agreement specifically identified Clifton customers which Trinity was supposed to service, as well as the specific Clifton products which Trinity was supposed to sell on Clifton’s behalf. (Eighth Dist. Op. ¶11).

Based on the terms of this particular agreement, the Trial Court, therefore, held that Trinity was prohibited from selling any of the products identified in the Sales Agent Agreement to any of the customers identified in the Sales Agent Agreement for one (1) year after the termination of the Agreement. This clearly was not a blanket ban on all nationwide competition. Rather, the scope of the non-solicitation provisions are limited by the scope of Trinity’s actual duties while the company sold parts for Clifton.

Trinity’s reliance on the dissent of Judge Patricia Ann Blackmon in the Court of Appeals Decision is misplaced. Judge Blackmon would uphold the preliminary injunction, but would merely narrow its scope. Rather than having it apply to all of the customers and parts listed in the Sales Agent Agreement, she would limit it to the parts that Trinity had actually sold and the customers it actually dealt with. Judge Blackmon based this holding on this Court’s decision in *Raimonde v. VanVlerah*, 42 Ohio St.2d, 325, N.E.2d 554 (1975), which provides that a non-compete clause is only enforceable to the extent it is necessary to protect the company’s legitimate interest and does not impose an undue hardship on the party who is prohibited from competing. This principal of the law, however, is well settled. The Court of Appeals Decision in this case rests solely on the interpretation of that legal principal in light of the specific and particular facts of this case and language of this particular agreement. Nothing in either the majority or dissenting opinion have any over-arching effect on Ohio law relating to non-compete

agreements.

Trinity also misinterprets the elements of a preliminary injunction, by arguing that the Trial Court improperly shifted the burden to Trinity when it held that Trinity had not proven it would suffer an undue hardship if the injunction was issued. This argument is premised on the mistaken contention that a party seeking an injunction has the burden of proving the adverse party will not be harmed by the injunction. The factors to be considered by a trial court in issuing a preliminary injunction, however, only require the court to look for harm to third parties, not the parties to the litigation. It is not a defense to the issuance of a preliminary injunction to argue that the party who will be enjoined will suffer adverse consequences as a result of the injunction.

Rather, the Trial Court's reference to Trinity not proving it will suffer undue hardship is recognizing that in the context of non-compete agreements, this Court has recognized that the scope of the non-compete can be modified if it creates an undue hardship for the party who is prohibited from competing. In that context, however, the burden is clearly on the party who wishes to avoid the consequences of the non-compete agreement to show that they would suffer undue hardship as a result of the enforcement of the agreement. As such, the Trial Court's application of the relative burdens of proof in this case was proper.

This case deals with the specific interpretation of particular language in one agreement between the parties to this litigation. There are no broad principals of law addressed by this case. As such, there is no public or great general interest presented by any of the issues raised by Trinity in their Memorandum in Support of Jurisdiction.

II. STATEMENT OF THE CASE AND FACTS

Clifton commenced this action against Trinity to enforce a non-compete/non-solicitation provision contained in a written agreement governing the relationship between the parties. Trinity had been engaged as a sales agent for Clifton beginning in 1986. (8th Dist. Op. ¶3). In May of 2012, the parties entered into a written Sales Agent Agreement (hereinafter “Agreement”). (8th Dist. Op. ¶3).

On October 20, 2015, Trinity terminated the Agreement. (8th Dist. Op. ¶8). This triggered the relevant non-compete/non-solicitation provision of the Agreement, which provided that “For one year after termination of the agreement, Trinity ‘shall not * * * engage in the sale or solicit the sale of * * * the products and services of Clifton Steel Company to Clifton’s customers * * * ’ (the “Termination Provision”).” (8th Dist. Op. ¶6).

On March 15, 2017, the Trial Court held a hearing on Clifton’s Motion for Preliminary Injunction seeking to enforce the Termination Provision and prevent Trinity from selling the products and services of Clifton to Clifton’s customers. On March 22, 2017, the Court entered an Order granting Clifton’s Motion for Preliminary Injunction. In identifying the “products and services of Clifton Steel Company” referenced in the Termination Provision, the Court looked to Exhibit “B” of the Agreement, which identified the parts which Trinity was supposed to sell on behalf of Clifton. Likewise in identifying Clifton’s customers, the Court looked to Exhibit “A” of the Agreement, which identified the customers to whom Trinity was supposed to sell on Clifton’s behalf. (8th Dist. Op. ¶11).

Trinity appealed the issuance of this preliminary injunction to the Eighth District Court of Appeals. The Eighth District Court of Appeals upheld the Trial Court's interpretation of the Agreement and imposition of the preliminary injunction, writing as follows:

The title of Section 5 as well as the reference to both Exhibits A and B in the Agreement lead us to conclude that the parties intended the Termination Provision to mean that Trinity could not sell any of the products listed on Exhibit B to any of the companies listed on Exhibit A for a period of one year following termination of the Agreement, which we find to be reasonable geographical and temporal restrictions.

(8th Dist. Op. ¶31).

III. ARGUMENTS IN OPPOSITION TO TRINITY'S PROPOSITIONS OF LAW

Clifton's Response to Trinity's Proposition of Law No. 1: The relevant contract language in this case was subject to more than one reasonable interpretation and the Trial Court properly considered all of the evidence presented at the Preliminary Injunction Hearing in determining the parties' intended meaning.

Trinity argues that the language of the Termination Provision can only have one meaning. Trinity contends that the phrase "the products and services of Clifton Steel Company" must refer to the actual products manufactured by Clifton, as opposed to the types of products Clifton makes, but which are manufactured by other companies. As an initial matter, it is not clear on the face of the contract which of these interpretations is intended. Significantly, however, Trinity's interpretation of this provision would render the Termination Provision meaningless. This non-competition provision only becomes effective if Trinity has terminated the Agreement. If Trinity has terminated the relationship, then, by necessity, they are no longer selling the products of Clifton Steel and this provision would be unnecessary. This language only makes sense if it was intended to prohibit Trinity from selling the types of products that Clifton makes for twelve months after Trinity terminated the contract.

Ohio law, as it relates to contract interpretation, requires a court to give preference to an interpretation that gives meaning to all terms as opposed to one that renders portions of the contract meaningless. The court in *Kademenos v. Harbor Homeowners Assoc.* (2011), 193 Ohio App.3d 112, 951 N.E.2d, 125 quoting *Pokorny v. Pecsok* (1977), 50 Ohio St.2d 260, 268, 364 N.E.2d 241, held that “in the interpretation of a promise or agreement or a term thereof, * * * an interpretation which gives reasonable, lawful and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect.”

Trinity’s reference to language in another section of the agreement that prevents Trinity from selling competitive products during the term of the Sales Agent Agreement references a broader concept than the idea of selling the same product, but created by a different manufacture. For example, a company may sell movies on DVD. In that context, “competitive products”, would not just be other movies on DVD’s, but, also movies on VHS, Blue Ray or digital downloads. The provision that prohibited the sale of all competitive products would prevent the sale of all of those. The provision that only prohibited the sale of products made by a company whose products was movies on DVD, however, would just be limited to prohibiting the sale of movies on DVD’s, not the broader range of competitive products.

Indeed, the evidence at the preliminary injunction hearing demonstrated this is exactly the type of distinction that was meant to be captured in these two separate provisions. Trinity’s president, Keith Massey, testified that the concept of the competitive product identified in Section 5 arose out of Trinity’s efforts to sell a propriety product from another manufacturer that was in competition with one of Clifton’s products:

A. And there was also some issues where Trinity Equipment had been retained to sell for other principals, if you will, in the industry. Particularly the principal's name was TransDyne. And they offered a propriety product that was kind of in competition with Clifton's pedestal roof liner, and that had upset Mr. Neides to the point that we had done that, so he wanted to clarify again rules of engagement moving forward. So that's why the contract was done.

Q. So the contract prevented you from selling those TransDyne parts, correct?

A. Correct.

(Tr. p. 106). Based on this, it is clear the prohibition on selling "competitive products" during the term of the Agreement did, in fact, reference something different than the prohibition on selling the products of Clifton after the Agreement was terminated. The lower Courts' interpretation of this language was supported by the evidence presented at the preliminary injunction hearing.

Clifton's Response to Trinity's Proposition of Law No. 2: The maxim that ambiguities need to be construed against the drafter is a secondary rule of contract construction that was not applicable to this case because the Trial Court was able to use a primary rule of contract construction in determining the party's intended meaning.

Trinity is essentially arguing in this Proposition of Law that because Clifton drafted the Agreement, its proposed interpretation must be disregarded by the Court based on the rule of construction that provides that ambiguity should be construed against the drafter of the document. That is not, however, how Ohio Courts apply this secondary rule of construction. Rather, this secondary rule of construction is only relied upon if the court cannot determine the intent of the parties from the primary rules of construction.

This principal was laid out in detail by the Ninth District Court of Appeals in *Raphael v. Flage* (9th Dist. 1989), 1989 WL 109122:

In the case *sub judice*, in interpreting the agreement on its face, the trial court was unable to determine the intent of the disputed clause. However, the trial court was able to make the determination after application of Williston's Fourth Primary Rule:

The circumstances under which a writing was made may also be shown. The question the court is seeking to answer is the meaning of the writing at the time and place when the contract was made; and all the surrounding circumstances at that time necessarily through light upon the meaning of the contract.

Benes v. Hickox Bldg. Co. (1952) 64 Ohio Law Abs. 449, 454; Williston [on Contracts 3d Ed. (1961)], 716-717, Section 618.

* * *

The “strict construction against the drafter” maxim is not applicable, as it is only a secondary rule of interpretation. Williston *supra* 760, § 621. Secondary rules are only applicable if the primary rule fails to interpret the contract. Williston, *supra* 669-670, §617.

Raphael at *2.

Courts have also held that the requirement that a contract be construed against the drafter should not be applied as a secondary rule of construction if it results in an interpretation that would render other portions of the contract meaningless:

The Ohio Supreme Court has held that: “In the construction of a contract courts should give effect, if possible, to every provision therein contained, and if one construction of a doubtful condition written in a contract would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, then the latter construction must obtain.” *Bank v. Ins. Co.* (1911), 83 Ohio St. 309, 94 N.E. 834, ¶6 of the Syllabus. To interpret the term “delivery” to permit notice via ordinary mail would nullify or render meaningless the portion of the provision specifically requiring the parties to give notice via certified or registered mail. Therefore, based upon the language employed by the parties, and construing the notice provision as a whole, it is plain and unambiguous that the parties intended that any notice provided by mail was to be sent via certified or registered mail.

* * *

Therefore, we find it unnecessary to employ the secondary rule of contract construction that requires a court to construe any ambiguity strictly against the drafter of the contract.

Molnar v. Castle Bail Bonds (4th Dist. 2005) 2005-Ohio-6643, 2005 WL 3436923, ¶42-43. As argued above in connection with Trinity's Proposition of Law No. 1, the interpretation by the Trial Court was made specifically so as to not render the non-compete aspects of the Termination Provision meaningless.

Based on the Trial Court and the Court of Appeals determination regarding the intent of the parties when they entered into the contract language at issue, application of the principal that contract language must be construed against the drafter, is inapplicable to the case at bar.

Clifton's Response to Trinity's Proposition of Law No. 3: While section headings in a contract are not binding on the parties, they can be used as evidence in determining the parties' intended interpretation of language contained in that section of a contract.

Trinity grossly misrepresents the holdings of the two cases it relies on in connection with this proposition of the law. Trinity first cites to *Bhd. Of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947) to stand for the proposition that the United States Supreme Court has opined that section headings in contracts are not binding provisions. This decision, however, was dealing with the interpretation of §17(11) of the Interstate Commerce Act. The quotations cited by Trinity in its brief related to whether section headings in the statute should be used to interpret the statute, not in a contract. As such, this case is inapplicable to Trinity's argument.

Trinity also cited to *City of Westlake v. City of Cleveland*, 2017-Ohio-4064, ¶18 (8th Dist. 2017) for the proposition of law that "section headings in a contract are not binding provisions". An examination of the entire quotation, however, makes it clear that the court's true holding is that while section headings are not binding, they can provide evidence as to the intent of the parties:

Because Article 7 specifically addresses what Cleveland claims is the property right encompassed by a franchise, we give independent meaning to Article 5 of the Agreement, titled in part as "EXCLUSIVE FRANCHISE". While it is true that section headings in a contract are not binding provisions, *Jordan v. Marion*

Tech. College, 3d Dist. Marion No. 9-90-36, 1991 Ohio App. LEXIS 3966, at 5, 1991 WL 217662 (Aug. 15, 1991), there is no doubt that Article 5 addresses Cleveland’s desire to be the sole provider of water for Westlake in a manner inconsistent with Cleveland’s assertion that it dealt only with property rights. Cleveland drafted the agreement, so the court correctly viewed the use of the words “exclusive franchise” used in Article 5 as being conceptually different from the property rights granted under Article 7.

City of Westlake v. City of Cleveland at ¶18.

Similarly, in this case, the Trial Court used the title of Section 5, which was “Restriction on other Representation During the Term of this Agreement and From Competing on Termination” as one of a number of pieces of evidence in interpreting this provision, not the sole basis for its holding. Trinity’s Proposition of Law No. 3 is not well taken.

Clifton’s Response to Trinity’s Proposition of Law No. 4: The Eighth District did not affirm a nationwide ban on Trinity, but, rather prohibited Trinity from doing business with specific customers identified in the Sales Agent Agreement between Clifton and Trinity.

Trinity’s fourth Proposition of Law relies on the mistaken suggestion that the preliminary injunction issued by the Trial Court was a nationwide ban on Trinity selling railroad wear parts. As noted above, however, there was no such blanket prohibition. Rather, the Trial Court limited the non-competition provisions to the customers which Trinity was supposed to be servicing on Clifton’s behalf, which were identified in Exhibit “A” to the contract, and only those wear parts which Trinity was supposed to be selling on Clifton’s behalf, which were identified in Exhibit “B”. While Trinity may have argued that this was tantamount to a nationwide ban, the Trial Court certainly did not make that finding of fact.

Similarly, Trinity’s reliance on Judge Blackmon’s dissent, which would limit the scope of the non-compete provisions to companies on Exhibit A that Trinity had actually done business with and parts from Exhibit B which Trinity had actually sold, is seeking to make a distinction without a difference. The evidence presented at the Preliminary Injunction Hearing demonstrated

that all of the companies which Trinity claimed it would no longer be able to do business with as a result of the injunction were ones which it had already been selling wear parts to on behalf of Clifton. (*Tr.* pp. 97-98). Trinity has not actually identified any manufacturers it did not deal with already on Clifton's behalf, which it has been prevented from doing business with because of this injunction.

Clifton's Response to Trinity's Proposition of Law No. 5: The Trial Court properly entered, and the Eighth District properly upheld, the preliminary injunction enforcing Trinity's non-compete obligations contained in the Sales Agent Agreement between Clifton and Trinity.

a. The Eighth District properly held that Trinity had the burden of proving that the non-compete agreement would create an undue hardship on Trinity.

Trinity misrepresents both the Trial Court's holdings, and the burden of proof necessary for preliminary injunction to issue, when it points to the trial court's holding that "Trinity did not demonstrate that it would suffer any undue hardship as a result of the enforcement of this agreement" and barring Trinity from selling any railroad wear parts found in Exhibit "B" to customers identified in Exhibit "A." In its Proposition of Law No. 5, Trinity improperly states that the third element of preliminary injunction is that "there will be no harm to the non-moving party." As has been repeatedly recognized by multiple courts of appeals over the last several months, the third element of a preliminary injunction is whether third parties will be unjustifiably harmed if the injunction is granted. *See, for example, Aids Task Force of Greater Cleveland v. Ohio Department of Health*, 2018 WL 3409673 (8th Dist. 2018); *Youngstown City School District Board of Education v. State*, 2018 WL 319954 (10th Dist. 2018); *Stevens v. City of Akron*, 2018 WL 1320746 (9th Dist. 2018). Trinity's references, at the preliminary injunction hearing, to the harm it would suffer if the injunction were granted were not relevant to the elements of preliminary injunction.

Rather, the undue hardship analysis applicable to the enforcement of a non-compete provision comes from this Court's holding in *Raimonde v. Van Vlerah, supra*, where this Court held that in order for a restrictive covenant to be enforced, it could not impose an undue hardship on the party against whom it was being enforced. In that context, courts have held that the burden is on the party wishing to compete to prove that undue hardship. *Life Line Screenings of America, Ltd. v. Calger* (Cuyahoga County Common Pleas 2006), 145 Ohio Misc.2d 6, 18, 881 NE 2d 932, 941, ¶27. As such, the Trial Court properly applied the burden of proof relevant to the undue burden analysis. It was Trinity, not Clifton, who had the burden to show that Trinity would face an undue hardship as a result of the enforcement of the non-compete provisions Trinity had agreed to enter into.

b. Clifton did not delay in seeking injunctive relief from the Trial Court.

Trinity, yet again, misrepresents the state of the record to argue that Clifton engaged in any type of delay in pursuing its rights under the non-compete agreement. The evidence presented at the Preliminary Injunction Hearing demonstrated that immediately upon learning that Trinity was terminating the Sales Agent Agreement, Clifton reminded Trinity of its obligations under the non-compete agreement. (*Tr.* pp. 26-27, Pl. Ex. B). In April, 2016, when Clifton learned that Trinity had violated the non-compete agreement, Clifton filed its Complaint. Contemporaneously with the Complaint, Clifton also filed a Motion for Preliminary Injunction.

When Trinity failed to timely respond to the Complaint, Clifton filed a Motion for Default Judgment on June 3, 2016. This prompted Trinity to hire local Ohio counsel, who both responded to the Motion for Default Judgment and sought leave to file a Motion to Dismiss. The Trial Court ultimately denied the Motion for Default Judgment, allowing Trinity to file its

Motion to Dismiss. In a July 28, 2016 Judgment Entry, the Trial Court held that the Motion for Preliminary Injunction would be held in abeyance until after the court ruled on the Motion to Dismiss. It was not until February 9, 2017 that the Trial Court denied Defendant's Motion to Dismiss, at which time the Preliminary Injunction Hearing was set for March 15, 2017.

The suggestion that Clifton somehow sat on its rights is completely unsupported by the record. Clifton sought the preliminary injunction on the same day it filed the Complaint in this matter. The fact that the preliminary injunction was not heard until almost eleven (11) months later, is attributable to Trinity's failure to timely respond to the Complaint as well as the filing of its meritless Motion to Dismiss. It is Trinity who has consistently attempted to delay these proceedings so as to avoid the impact of the non-compete agreement it entered into with Clifton. Clifton did not delay enforcing any of its rights.

c. Trinity should not be rewarded for its efforts to delay the Trial Court's hearing evidence on Clifton's Motion for Preliminary Injunction.

As noted above, Trinity's attempt to blame Clifton for the delay in the preliminary injunction motion being heard is entirely misplaced. Clifton filed its Motion for Preliminary Injunction on the same day it filed its Complaint. It was Trinity that failed to timely file its Answer and then pursued a baseless Motion to Dismiss. Denying the preliminary injunction based on delay that was solely the result of Trinity's actions would be to improperly reward Trinity for those delaying tactics.

V. CONCLUSION

Trinity has not identified any public or great general interest raised by this case. As such, this Court should not accept jurisdiction over this matter.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of August, 2018 a copy of the foregoing was filed electronically and a copy was served on the following by email and Regular U.S. Mail:

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