

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

REGSCAN, INC.,	:	NO. 02-01,152
Plaintiff	:	
	:	
vs.	:	
	:	CIVIL ACTION - EQUITY
RICHARD MARTIN,	:	
Defendant	:	Reconsideration

OPINION AND ORDER

Before the Court is Defendant's Petition for Reconsideration of this Court's Orders of July 24, 2002, and July 30, 2002, which granted and then continued Plaintiff's request for a preliminary injunction. Argument on the petition was heard October 9, 2002, at which time it was determined by the Court that a transcript of the hearing held July 29, 2002, would be necessary for the Court to render a decision. A rough draft of that transcript was completed on November 13, 2002.

In the Order of July 24, 2002, this Court preliminarily enjoined Defendant from engaging in any activity, including sales, in the regulation field or providing any information to any person in the regulatory field, from working for any firm which competes with RegScan, and from using or divulging certain information that he obtained from RegScan, based on the finding that Defendant had entered an employment contract with RegScan which contained a covenant not to compete and a restriction against subsequent use of proprietary information. In his Petition for Reconsideration, Defendant argues the covenant not to compete is invalid as not having been supported by adequate consideration, and further, that it cannot be enforced because he was fired from his position for poor performance. Because the Court agrees with Defendant regarding the second issue, the first will not be addressed.

In Insulation Corporation of America v. Gary Brobston, 667 A.2d 729 (Pa.Super. 1995), the Court reasoned that once an employee is fired for failing to perform in a manner that promotes the employer's business interests, the employee has been deemed worthless by the employer and the need of the employer to protect itself from such an employee is presumably insignificant. The Court went on to hold that it would be unreasonable as a matter of law to permit the employer to retain unfettered control of the employee through the enforcement of a covenant not to compete.

In the instant case, Defendant testified he was being paid \$3000 per month plus expenses but his sales were only \$11,000 in the six months he was employed by RegScan. He indicated he had been given an "expected sales" figure at the beginning of his employment, of \$300,000 per year. In the letter given to Defendant at the time of his termination,¹ Defendant was informed that his sales were not sufficient to justify the costs. While Plaintiff argues its action was not the result of any poor performance on Defendant's part but, rather, simply to provide him with incentive to improve his performance, the Court sees no distinction. Clearly, Defendant was terminated for poor performance.

The covenant not to compete will therefore not be enforced. The restriction regarding dissemination or use of proprietary information will continue to apply, however.

¹ Although Plaintiff argues that Defendant was not "terminated", but, rather, voluntarily left employment with RegScan, the Court finds that the change in compensation structure, from a salary of \$3000 per month plus expenses to a straight commission of 20%, considering Defendant's sales history, is equivalent to a termination.

ORDER

AND NOW, this 18th day of November, 2002, for the foregoing reasons, this Court's Order of July 24, 2002, as continued by Order dated July 30, 2002, is hereby modified to eliminate paragraphs 1) and 2). Paragraph 3) shall continue in full force and effect. The Prothonotary is directed to return to Plaintiff the bond posted in this matter.

BY THE COURT,

Dudley N. Anderson, Judge

cc: Allen E. Ertel, Esq.
J. David Smith, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson