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| DIXON A.C.&R. CORPORATION, | : | IN THE COURT OF COMMON PLEAS OF |
| | : | LYCOMING COUNTY, PENNSYLVANIA |
| Plaintiff | : | |
| | : | |
| vs. | : | NO. 03-01,557 |
| | : | |
| ROBERT M. KIBBE and TROJAN TUBE AND FABRICATION COMPANY, | : | |
| | : | |
| Defendants | : | 1925(a) OPINION |

***Date: April 21, 2004***

***OPINION IN SUPPORT OF THE ORDER OF FEBRUARY 23, 2004 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE***

Defendants have appealed this Court's Order filed February 23, 2004 in which the Court granted Plaintiff's Motion for a Preliminary Injunction. On March 18, 2004, this Court issued an Order in compliance with Pa.R.A.P. 1925(b) directing Defendants to file a Concise Statement of Matters Complained of on Appeal within fourteen days of the Order. Defendants filed their Statement of Matters on March 23, 2004.

By way of brief background, this case involves litigation over an employment restrictive covenant. Defendant Kibbe had entered into a restrictive covenant while an employee of Plaintiff, Dixon A.C.&R. Corporation ("Dixon"), in 1990. Since 1988, Dixon had employed Kibbe as the manager of its commercial boiler business. Defendant Trojan is an acknowledged competitor of Dixon. In 2003, Kibbe quit his employment with Plaintiff and began work for Trojan. This Court granted a preliminary injunction through an Opinion and Order of February 18, 2004, filed February 23, 2004. Kibbe was enjoined from working for Trojan and both defendants were enjoined from competing with Dixon.

Upon reviewing the Statement of Matters, the Court concludes that a number of the issues raised therein have been addressed by the Court's Opinion and Order of February 23, 2004; specifically, issues 1,2,3, and 6. The Court will address issues 4 and 5 in this Opinion.

Issue number 4 states that the Court erred in restricting the business operations of Defendant Trojan Boiler Services in spite of the admission by Dixon, that it was not seeking an injunction against Defendant Trojan Boiler Services. In his opening statement at the preliminary injunction hearing, counsel for Plaintiffs said:

> The status quo prior to Mr. Kibbe violating the restrictive covenant was that Trojan Tube and Dixon were competitors, and Mr. Kibbe was not assisting Trojan in competing against Dixon. Therefore, the injunction we're seeking, which is not to enjoin Trojan tube from conducting any business, is simply to enjoin Mr. Kibbe from helping Trojan compete against it, which was the purpose for the restrictive covenant.
>
> Additionally, the activities sought to be restrained is actionable; and the injunction is reasonably suited to abate it. Again, we're asking that Mr. Kibbe be prohibited from assisting a direct competitor in competing with Dixon; … .

Notes of Testimony, 10 (September 25, 2003).

Dixon's counsel made a similar statement in the context of an argument regarding an objection to testimony concerning existing contracts of Dixon for boiler work. Dixon's counsel stated;

> What we're asking to do is enforce a restrictive covenant that prohibits Mr. Kibbe from competing in any manner. Therefore, I believe the wearing of the two hats, that is representing Mr. Kibbe and representing Trojan Tube, has blurred the lines regarding what's relevant. We are not here seeking an order prohibiting Trojan Tube from engaging in the boiler business.

N.T., 91.

This Court believes that Defendants misconstrued the above-referenced statements of Dixon's counsel. Defendants' contention takes Dixon's counsel's statements entirely out of context. At the time these statements were made, the Court in no way perceived that Dixon's counsel was withdrawing a major thrust of its claim; that is, to prevent Trojan from using the benefit of Kibbe's services to compete against Plaintiff Dixon.

The first statement attributed to Dixon's counsel, which Defendants contend amounts to a withdrawal of injunctive relief against Trojan, is simply the ending of Dixon's counsel's opening statement. In summarizing the thrust of the evidence and primary relief sought, Dixon's counsel stated ". . . which is not to enjoin Trojan from conducting any business, simply to enjoin Mr. Kibbe from helping Trojan to compete against. . . ." N.T., 10. In the course of argument, this Court accepted the reference to "any business" as meaning that Dixon was not seeking to keep Trojan from *all* of its business. As the Court listened to the argument, the statement was taken to mean that Dixon wanted to keep Kibbe and Trojan from competing against Dixon and specifically Trojan from using Kibbe's help to so do.

The second statement was made in the context of Dixon's counsel arguing in support of an objection made to defense counsel's inquiry of a Dixon officer, asking him to name all the current customers, clients and contracts of Dixon. Dixon's counsel objected on the basis of relevance, specifically when the witness was asked to disclose this information in the Courtroom and thereby give Defendant Trojan its complete customer list. N.T. 89, 90. In support of Dixon's objection to such a disclosure, its counsel argued that the nature of existing contracts was not relevant because the relief being sought was to prohibit Kibbe from engaging in competition and, as such, who comprised the current customer list would not be relevant to

whether the injunction was proper. Again, the Court did not believe this argument in any way amounted to withdrawal of the claim against Trojan.

Dixon's counsel did not withdraw Dixon's request for injunctive relief against Defendant Trojan. Dixon's counsel presented evidence and testimony that would support injunctive relief against Defendant Trojan. In his closing, Dixon's counsel sought preliminary injunctive relief against Defendant Trojan. (This last statement is based upon the Court's recollection and notes as the transcript of final arguments held on December 12, 2003 is not available as of the drafting of this Opinion.)

Dixon has also pursued this injunctive relief against Defendant Trojan in its Complaint. Through this Complaint, Dixon is seeking a permanent injunction against Defendant Trojan with respect to the restrictive covenant. Dixon vigorously opposed Defendant Trojan's demurrer, which sought to dismiss the claim for a permanent injunction, as can be seen in its brief filed December 5, 2003 in opposition to Defendants' preliminary objections.

Dixon has taken no action that would lead this Court to conclude that it has withdrawn its claim to enjoin Defendant Trojan from using Defendant Kibbe's knowledge to compete against Dixon. Therefore, the Court did not err in this regard when it enjoined Defendant Trojan.

Issue number 5 states that the Court erred by enforcing the restrictive covenant against Defendant Kibbe when the evidence indicated that the agreement was orally modified by Defendant Kibbe and Dixon. The evidence presented does not indicate that a modification to the restrictive covenant. There was no modification because there was no consideration to support a modification and there was no acceptance of the modification offer.

A written contract, which is not for the sale of goods, may be orally modified. ***Fina v. Fina***, 737 A.2d 760, 764 (Pa. Super. 1999); ***Somerset Community Hosp. v. Allen B. Mitchell and Assocs.***, 685 A.2d 141 (Pa. Super. 1996). A contract may only be modified if both parties mutually agree to the modification and the modification is supported by valid consideration. ***J.W.S. Delavu v. Eastern Amer. Transp. and Warehousing, Inc.***, 810 A.2d 672, 681 (Pa. Super. 2002), *app. denied*, 827 A.2d 430 (Pa. 2002). A modification of an existing contract must be proved by clear, precise and convincing evidence. ***In re Estate of Bowman***, 797 A.2d 973, 977 (Pa. Super. 2002); ***Fina***, 737 A.2d at 764.

Consideration may be any bargained for exchange. ***Greene v. Olive Realty, Inc.***, 526 A.2d 1192, 1195 (Pa. Super. 1987), *app. denied*, 536 A.2d 1331 (Pa. 1987). "Consideration confers a benefit upon the promisor and causes a detriment to the promisee." ***Eighth North-Val, Inc. v. William L. Parkinson, D.D.S., P.C. Pension Trust***, 773 A.2d 1248, 1253 (Pa. Super. 2001). However, "performance of that which one is already legally obligated to do is not consideration sufficient to support a valid agreement." ***Cohen v. Sabin***, 307 A.2d 845, 849 (Pa. 1973); ***Pennsylvania State Univ. v. Univ. Orthopedics***, 706 A.2d 863, 873 (Pa. Super. 1998).

Defendant Kibbe testified that he made a handshake agreement with G. Lee Miller, President of Dixon, whereby Miller agreed that Dixon would not enforce the restrictive covenant against Kibbe and Kibbe could go work for Trojan so long as Kibbe did not go after current Dixon customers.

In its Finding of Fact #36 in the Opinion and Order filed February 23, 2004, this Court specifically held that "Mr. Miller, Jr. (then President of Plaintiff Dixon) expressed to Kibbe he would not object to Kibbe working for another boiler company as long as Kibbe would not be

performing work in competition with Dixon." Under the proposed modification, Dixon promised not to enforce the restrictive covenant and Kibbe promised not to compete with Dixon.

Defendant Kibbe has not given any valid consideration that would support this modification. The only detriment he has incurred is not to compete with Dixon. Defendant Kibbe was required to refrain from competing with Dixon under the existing restrictive covenant. This is a prior legal obligation and cannot form the basis for valid consideration. Therefore, there was no valid consideration of the restrictive covenant.

Pursuant to the modification, as testified to by Kibbe, Dixon promised not to enforce the restrictive covenant and Kibbe promised not to go after current customers. Miller denies that any such agreement was made, but even if it was there was no valid consideration to support the modification. Under this agreement in light of the evidence most favorable to Kibbe, he has promised to do what he already is obligated to do. Under the restrictive covenant, Kibbe was obligated/restricted from going after current customers of Dixon, as such would be acting in competition. This is a prior legal obligation and cannot form the basis for valid consideration. Therefore, there was no valid consideration and no modification of the restrictive covenant.

There also was no modification of the restrictive covenant because Defendant Kibbe did not accept the modification offer. It is clear that at most the statement of Dixon President, G. Lee Miller, Jr., would have permitted Kibbe to go to work for another boiler company on the condition that he would not compete with Dixon. It is clear from the evidence presented and the Findings of Fact made by this Court that Kibbe chose not to accept this offer because he rejected its condition. Specifically, as pointed out in Findings of Fact #39-45 and #54-58, Kibbe voluntarily left Dixon and entered into competition with it by accepting

employment with Trojan. Prior to and immediately after leaving Dixon, Kibbe also specifically sought to hire Dixon's employees away from it in order to aid Trojan's competing business. Therefore, it is clear that no effective modification of the restrictive covenant was entered into by mutual consent or understanding of the parties.

Accordingly, the Superior Court should deny the appeal and affirm the February 23, 2004 Opinion and Order of this Court.

BY THE COURT,

William S. Kieser, Judge

cc: Thomas C. Marshall, Esquire/Ryan Tira, Esquire
Joseph F. Orso, III, Esquire/Michael J. Casale, Jr.
Judges
Christian J. Kalaus, Esquire
Gary L. Weber, Esquire (Lycoming Reporter)