IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

GARY CORBETT, Plaintiff	:	DOCKET NO. 11-02080
vs.	:	CIVIL ACTION – IN LAW AND IN EQUITY
SUPPLY SOURCE DC, LLC, and SUPPLY SOURCE, INC., Defendants	:	

O R D E R

AND NOW, this 23rd day of January, 2012, following a factual hearing on Plaintiff's Petition for Preliminary Injunction and a supplemental briefing period, it is hereby ORDERED and DIRECTED that Plaintiff's petition is DENIED. Plaintiff failed to satisfy the prerequisites for the granting of a preliminary injunction.

Brief Procedural History:

1. On November 7, 2011, Plaintiff filed a complaint against Defendants that set forth five counts. These counts include: I) Injunctive Relief, 2) Breach of Contract, 3) Declaratory Judgment, 4) Breach of Contract, and 5) Wage Payment and Collection Law Claim.
2. Also, on November 7, 2011, Plaintiff filed a Petition for Preliminary Injunction. Plaintiff requested that this Court issue an order:
    a. precluding the defendants from enforcing the provisions of paragraph 8 of the Agreement;
    b. precluding the defendants from interfering with Corbett's ability to seek employment with a competitor in the Washington, DC metropolitan area;
    c. awarding attorney's fees and costs; and
    d. granting such other relief as is appropriate and just under the circumstances.

Petition, 4 (the "Agreement" referred to is the 2009 Employment Agreement between SupplySource DC, LLC, SuplySource, Inc., and Gary Corbett, dated April 1, 2009, and marked as Pl. Exhibit 1).

3. On November 10, 2011, Defendants filed a Response to Petition for Preliminary Injunction.
4. A hearing on the petition was originally scheduled for November 10, 2011. That hearing was rescheduled and held before this Court on December 21, 2011.

Factual Findings:

1. Plaintiff, Gary Corbett, is an adult individual residing at 10019 Scenic View Terrace, Vienna, Virginia, 22182.
2. Defendant SupplySource, Inc. (SupplySource) is a Pennsylvania corporation, having offices at 415 West Third Street, Williamsport, Pennsylvania, 17701. SupplySource was formed on August 1, 1984, as reflected in a Business Entity Filing History. Def. Exhibit 3-1.
3. Defendant SupplySource DC, LLC (SupplySource DC) is a limited liability company which conducts business in Washington, District of Columbia. SupplySourceDC was formerly known as Capital Furniture Services, LLC, as reflected in a Business Entity Filing History. Def. Exhibit 4.
4. Defendants are engaged in the sale of commercial office furniture.
5. Ray A. Thompson (Mr. Thompson) is the President of SupplySource.

6. Defendant SupplySource hired Plaintiff under the terms of a written agreement dated January 25, 2007. Plaintiff executed this agreement on January 29, 2007 ("2007 Employment Agreement"). Def. Exhibit 1.
7. The 2007 Employment Agreement provided that Plaintiff would first serve as SupplySource's Director of Human Resources and then would subsequently serve as Capitol Region Vice President. SupplySource and Plaintiff reached this agreement based upon the fact that at the time of the 2007 Employment Agreement Plaintiff was under a non-competition agreement with his former employer, Corporate Express. Upon expiration of Plaintiff's non-compete agreement with Corporate Express, Plaintiff would be promoted to Capitol Region Vice President.
8. Plaintiff and Mr. Thompson testified that both Plaintiff and SupplySource were parties to a litigation arising out of Plaintiff's breach of his non-competition agreement with Corporate Express.
9. The 2007 Employment Agreement provided that Plaintiff would be subject to a non-competition and non-solicitation covenants with SupplySource upon Plaintiff's appointment to the position of Capital Region Vice President. In particular, the 2007 Employment Agreement provided:

    2. During the eighteen months following the date of the termination of your employment, for any reason whatsoever, you will not, at any location within your territory, without our express written consent, compete in any way with us, or consult with or have any interest in any business, firm, person, partnership, corporation or other entity, whether as employee, officer, director, agent, security holder, creditor, consultant or otherwise, which competes with us in any aspect of our business. This covenant will become effective only with your assumption of the position of Capital [R]egion Vice President and will commence as of that date.
    3. During the eighteen months following the date of the termination of your employment, for any reason whatsoever, you will not, without our express prior written consent, solicit, divert, take away, or attempt to take away from us, any current or prospective customers, clients, suppliers, business, or patronage,

directly or indirectly, through any business, firm, person, partnership, corporation or other entity, whether as employee, officer, director, agent, security holder, creditor, consultant or otherwise.

* * * * * *

5. By your signature below, you acknowledge that any violation of the foregoing provisions of this agreement would entail irreparable injury to our business and goodwill and would jeopardize our competitive position in the marketplace.

2007 Employment Agreement, 3-4.

10. Mr. Thompson testified that he established SupplySource DC to compete for federal government and other commercial furniture contracts within the District of Columbia market.

11. Mr. Thompson testified that he initially hired Plaintiff as the Director of Human Resources and that he subsequently promoted Plaintiff to Capital Region Vice President, pursuant to the 2007 Employment Agreement and Plaintiff's non-compete agreement with Corporate Express. Mr. Thompson also testified that he eventually promoted Plaintiff to President of SupplySource DC.

12. SupplySource, Supply Source DC, and Plaintiff entered into a subsequent employment agreement on March 31, 2009 ("2009 Employment Agreement"). Pl. Exhibit 1. That agreement was executed by Ray A. Thompson, for SupplySource, and Plaintiff on that date. In that agreement, Plaintiff was referred to as Executive.

13. The 2009 Employment Agreement provided for "Restrictions on Competition." These restrictions were set forth in Section 8 of the agreement and stated:

    a. Executive covenants and agrees that during the period of Executive's employment with the Company and for a period of eighteen (18) months immediately following the termination of Executive's employment, Executive shall not, in any executive or managerial capacity similar to the capacity in which he was employed by the Company, whether as principal or agent, officer, director,

executive, franchisee, consultant, shareholder, or otherwise, compete with the Company within a fifty (50) mile radius of any Company office.

b. Executive further covenants and agrees that during the period of Executive's employment with the Company and for the period of eighteen (18) months immediately following the termination of Executive's employment, Executive shall not solicit or induce, assist or attempt to solicit or induce competitive business from any Company customer.
c. Executive further covenants and agrees that during the period of Executive's employment with the Company and for a period of eighteen (18) months immediately following the termination of Executive's employment, Executive shall not solicit or induce, assist or attempt to solicit or induce, any employee of the Company to leave the Company for any reason whatsoever.
d. The provisions set forth in Sections 6, 7, and 8 of this Agreement shall survive the termination of Executive's employment with the Company, or the expiration of this Agreement, as the case may be, and shall continue to be binding upon Executive in accordance with their respective terms.
e. Executive recognizes and acknowledges that the services to be rendered by him are of a special and unique character and that the restrictions on Executive's activities contained in this Agreement are required for the Company's reasonable protection. Executive agrees that if he shall breach paragraphs 6, 7, or 8 of this Agreement, the Company will be entitled, if it so elects, to institute and prosecute proceedings at law or in equity to obtain damages with respect to such breach or to enforce the specific performance of this Agreement by Executive or to enjoin Executive from engaging in any activity in violation of this Agreement.

2009 Employment Agreement, 6-7.

14. Plaintiff testified that he took an active role in negotiating the language of the 2009 Employment Agreement. Plaintiff also testified that he obtained counsel to assist him in this negotiation process. *See* Def. Exhibit 10.

15. Both Mr. Thompson and Plaintiff testified that Plaintiff's role as Capital Region Vice President and then as SupplySource DC's President lead to the success of SupplySource DC. Plaintiff developed professional relationships with both commercial and federal government customers within the District of Columbia market during his tenure with Defendants.

16. Defendants terminated Plaintiff's employment on approximately August 16, 2011.

17. Since Plaintiff's termination, Defendants have paid Plaintiff's severance pay, calculated pursuant to the 2009 Employment Agreement. Defendants deducted from this severance pay an amount that was due to Defendants from Plaintiff, i.e. automobile loan. At the injunction hearing, Defendants introduced a spreadsheet of payments made to Plaintiff, payments made on behalf of Plaintiff, and deductions for the automobile loan. Def. Exhibit 7.

18. In particular, as of December 21, 2011, i.e. hearing date, the severance paid accounted for a gross outlay of $76,153.88. In addition to this severance amount, Defendants have paid the following amounts in gross: $5,825.77 (employer taxes); $4,472.00 (Cobra); and $2,973.24 (life insurance). Def. Exhibit 7.

19. Defendants have not sought to enforce its 2009 Employment Agreement or any restrictive covenant through the use of legal proceedings, nor have Defendants filed a counterclaim in the above-captioned matter.

20. Mr. Thompson testified that he would not object to Plaintiff seeking employment in the business of selling commercial office furniture within the District of Columbia market. In other words, Mr. Thompson testified that he would not enforce Section 8a of the 2009 Employment Agreement.

21. However, Mr. Thompson did testify that he would seek to enforce Section 8b of the 2009 Employment Agreement if Plaintiff sought and obtained employment within this market with a direct competitor of SupplySource DC. Mr. Thompson identified that a direct competitor of SupplySource DC would be an entity seeking business from a list of customers that Defendants prepared and entered into evidence as Def. Exhibit 8A.[1]

[1] Initially, Defendants provided Def. Exhibit 8 as the list of customers; however, Defendants narrowed this listing to these customers' specific offices and presented it as Def. Exhibit 8A.

22. To date, Plaintiff has not secured employment that would cause him to be in direct competition with any of the customers listed on Def. Exhibit 8A.[2]

Conclusions of Law:

1. In *Allegheny Anesthesiology Assocs. v. Allegheny Gen. Hosp.*, 826 A.2d 886 (Pa. Super. Ct. 2003), our Superior Court held that:

> [a] preliminary injunction should be granted only if all of the following four "essential prerequisites" are proven: (i) a strong likelihood of success on the merits; (ii) a showing of immediate and irreparable harm that cannot be compensated by money damages; (iii) a showing that greater injury will result if preliminary injunctive relief is denied than if such injunctive relief is granted; and (iv) a showing that a preliminary injunction would restore the status quo.

Id. at 891 (citing *Temple Univ. of the Commonwealth System of Higher Education v. Allegheny Health Educ. and Research Found.*, 690 A.2d 712, 718 (Pa. Super. Ct. 1997); *see also Valley Forge Historical Soc'y v. Washington Mem'l Chapel*, 426 A.2d 1123 (Pa. 1981) *and Chambliss v. City of Philadelphia*, 535 A.2d 291 (Pa. Cmwlth. Ct. 1987).

2. In *Insulation Corp. v. Brobston*, 667 A.2d 729 (Pa. Super. Ct. 1995), our Superior Court held that in order to be enforceable, non-competition covenants must "relate to a contract for employment, be supported by adequate consideration and be reasonably limited in both time and territory." 667 A.2d at 733. Particularly, the enforcement of post-employment restraints is permitted "only where they are ancillary to an employment relationship between the parties, the restrictions are reasonably necessary to protect the employer, and the restrictions are reasonably limited in duration and geographic extent." *Id.; see also Hayes v. Altman*, 225 A.2d 670 (Pa. 1967).

[2] This Court received testimony from a prospective employer of Plaintiff. However, Plaintiff was not awarded the employment with this entity because of the covenants in his 2009 Employment Agreement.

3. When determining whether a non-competition covenant is reasonable in time and territory, the trial court must weigh the employer's need for protection from the covenant against the hardship that the covenant might impose on the employee. *Insulation*, 667 A.2d at 734.

4. "General covenants are reasonably limited if they are 'within such territory and during such time as may be reasonably necessary for the protection of the employer… without imposing undue hardship on the employee…'." *Hayes*, 225 A.2d at 672 (citing Restatement of Contracts § 516(f) (1932)).

5. As a general rule, non-competition covenants should be construed narrowly because they impose a restraint on the ability of an employee to earn a livelihood. *Allegheny*, 826 A.2d at 892.

6. Regarding the immediate and irreparable harm prong of the preliminary injunction test, our Commonwealth Court has adopted the reasoning of the Supreme Court of the United States, holding that:

> [t]he key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. *The possibility that adequate compensatory or other corrective relief will be available at later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm.*

535 A.2d at 294 (emphasis in original) (citing *Sampson v. Murray*, 415 U.S. 61, 90 (1974)).

7. Also, in assessing the immediate and irreparable harm prerequisite, the trial court should consider harm to the public. 826 A.2d at 893.

8. "The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy." 426 A.2d at 1129.
9. Plaintiff's right to a preliminary injunction must be clear to be awarded. 426 A.2d at 1128.

Discussion:

This Court will not preliminarily enjoin Defendants from enforcing the 2009 Employment Agreement because Plaintiff failed to satisfy the prerequisites for the granting of a preliminary injunction.[3] This Court will address these prerequisites in turn.

1. Strong Likelihood of Success on the Merits

Plaintiff did not show that he has a strong likelihood of success on the merits.[4] Plaintiff alleges that the covenants in the 2009 Employment Agreement are so unreasonable in time and territory that there is a strong likelihood that a trial court would not enforce these covenants. Even considering the general rule that non-competition covenants should be construed narrowly, this Court finds that Plaintiff does not have a strong likelihood of success on the merits. Plaintiff argues that this Court should not enforce the agreement because Defendants fired Plaintiff and cites our Superior Court's decision in *Insulation Corp. v. Brobston*, 667 A.2d 729 (Pa. Super. Ct. 1995), to support this proposition. This Court believes that this reliance is unfounded because the facts of *Insulation* differ greatly from the facts of the case at hand.

[3] This Court notes that the only issue properly before it at this time is Plaintiff's Petition for Preliminary Injunction. This Court will not decide the merits of any other claims between the parties.
[4] This Court will not decide the underlying issue of whether or not the non-competition agreement is enforceable. This Court will only decide whether Plaintiff has a strong likelihood of success on the merits on his claim that covenants should not be enforced due to their alleged unreasonableness.

In *Insulation*, the Superior Court considered the enforceability of a two-year, three hundred mile covenant not to compete upon the termination of an employee for poor performance. *Id*. at 730. In particular, the employee in that case was terminated for the following reasons:

> [employee] failed to properly file sales call and expense account reports. Further, [employee] failed to make a satisfactory number of overnight sales calls. Finally, of the fourteen accounts in his territory, only three showed growth; the others showed either flat or decreasing sales.

Id. at 732. Our Superior Court held that a searching inquiry must be done of all of the circumstances surrounding the employment relationship and the circumstances surrounding the termination in the determination of the enforceability of non-competition covenants. *Id*. at 737. In that case, the Court determined that imposing the non-competition covenant on that employee, who was terminated for poor job performance, was unreasonable in light of the employer's interest in enforcement. *Id* at 738. In making this determination, the Superior Court stated:

> [w]here an employee is terminated by his employer on the grounds that he has failed to promote the employer's legitimate business interest, it clearly suggests an implicit decision on the part of the employer that its business interests are best promoted without the employee in its service. The employer who fires an employee for failing to perform in a manner that promotes the employer's business interests deems the employee worthless. Once such a determination is made by the employer, the need to protect itself from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant. Under such circumstances, we conclude that it is unreasonable as a matter of law to permit the employer to retain unfettered control over that which he has effectively discarded as worthless to its legitimate business interests.

Id. at 735.

In the case at hand, this Court believes that the circumstances surrounding the employment relationship and the termination of this relationship vary substantially from the facts as presented in the *Insulation* case. During the hearing, at no time did either party testify that Plaintiff was fired for poor performance, i.e. failing to promote Defendants' legitimate business

interest. To the contrary, this Court received testimony from both Plaintiff and Mr. Thompson about Plaintiff's integral role in establishing SupplySource DC and maintaining its customers. Plaintiff played a key role in acquiring clients in the District of Columbia market and spent significant time and energy maintaining these professional relationships. Ultimately, Defendants terminated Plaintiff on the basis of his management style, particularly his interactions with the employees at Defendants' Washington office and with the management team sitting in Williamsport. Mr. Thompson's testimony clearly indicated to this Court that Plaintiff's worth to Defendants was significant and that the profitability of SupplySource DC was based upon Plaintiff's management of the outfit. The factual scenario in the case at bar is a far cry from the scenario that the Superior Court witnessed in *Insulation*. Therefore, this Court will not analogize the employee in that case with Plaintiff and will not find that Plaintiff has a strong likelihood of success on the merits based on the Superior Court's decision in *Insulation*.

2. Immediate and Irreparable Harm that cannot be compensated by Money Damages

Plaintiff did not show any immediate or irreparable harm that cannot be compensated by money damages that would fall upon him by this Court's denial of his Petition for Preliminary Injunction. Plaintiff alleged in his petition that he would suffer irreparable harm because the enforcement of the covenant would "effectively foreclose him from taking any sales position within the area of his residence, the territory that he knows, and the products that he is an expert in." Petition, 3-4. This Court believes that this assertion of immediate and irreparable harm can be compensated by money damages. Plaintiff alleges that the immediate and irreparable harm that he will face through the enforcement of the 2009 Employment Agreement is that he will be unable to obtain a job in office furniture sales within the District of Columbia market for the

duration of the covenant. It is obvious to this Court that loss wages can be compensated by money damages. Therefore, Plaintiff failed to satisfy the prerequisite showing that he will face immediate and irreparable harm that cannot be compensated by money damages.

3. Greater Injury will result if Preliminary Injunctive Relief is Denied than if Granted

Plaintiff did not prove that greater injury will result if the preliminary injunctive relief is denied than if it was granted. Again, this Court notes that the only injury that will befall onto Plaintiff is loss wages and loss employment opportunities, i.e. money damages. If this Court grants Plaintiff's petition, Plaintiff will be allowed, for the time being, to directly compete with Defendants' customers listed on Def. Exhibit 8A. This Court received testimony from both Plaintiff and Mr. Thompson that Plaintiff played an integral role in obtaining and maintaining these customers. This Court believes that if Defendants were enjoined from enforcing the covenants in the 2009 Employment Agreement, greater injury could fall upon Defendants because Defendants have the potential to lose its customer base in the District of Columbia market. Therefore, this Court holds that Plaintiff did not prove greater injury will result if the injunctive relief is denied than if it was granted.

4. Grant of Preliminary Injunction will restore the status quo

Lastly, Plaintiff did not show that the grant of this preliminary injunction will restore the status quo. Plaintiff argues that preventing the enforcement of the covenant will maintain the status quo. This Court does not agree with Plaintiff's interpretation of the status quo.

Arguably, since 2007, a non-competition agreement and employment arrangement has been in place between Plaintiff and at least one defendant. Since approximately August 16,

2011, this employment arrangement has ceased; this termination has caused the contention between the parties and has sparked this instant litigation. Therefore, in this instance, the status quo, i.e. the last peaceable and lawful noncontested status proceeding the pending controversy, would be when Plaintiff was employed by Defendants, with a non-competition agreement in full force and effect. *See* 426 A.2d at 1129.

Plaintiff argues that the status quo between the parties does not involve a non-competition agreement. However, the only time that a non-competition agreement was absent in this employment relationship was during the time period that Plaintiff worked as Director of Human Resources. After his promotion to Capital Region Vice President, Plaintiff agreed to be bound by a non-competition agreement. *See* 2007 Employment Agreement. Then, again, in 2009, Plaintiff helped negotiate the terms of the current non-competition agreement. *See* 2009 Employment Agreement *and* Def. Exhibit 10. Therefore, the existence of a non-competition agreement between the parties is the status quo that this Court refuses to disrupt through the grant of a preliminary injunction.

Alternatively, Plaintiff's argument could be construed to stating that the status quo between the parties is Defendants' non-enforcement of the non-competition agreement. Again, this Court does not believe that this is the current status quo between the parties. To date and to the best of this Court's knowledge, Plaintiff has not violated the non-competition agreement between the parties. Therefore, Defendants have not needed to enforce the covenant through a legal proceeding. The letter dated October 12, 2011, and marked as Pl. Exhibit 3, illustrates that Defendants would enforce the non-competition agreement if they had evidence establishing Plaintiff's violation. Therefore, this Court will not hold that the status quo between the parties is Defendants' non-enforcement of the non-competition agreement.

In short, this Court denies Plaintiff's petition for a preliminary injunction. Plaintiff did not provide this Court with sufficient evidence that would support any prong of the preliminary injunction test. Plaintiff is an educated business man who has been in prior litigation for violation of a non-competition agreement. Plaintiff fully negotiated the terms of his current non-competition agreement with the Defendants, and even employed counsel to assist in this negotiation process. This Court does not believe that it would be equitable to grant Plaintiff's requested relief.

BY THE COURT,

Date Richard A. Gray, J.

RAG/abn

cc: J. David Smith, Esquire
William P. Carlucci, Esquire
Gary L. Weber, Esquire, Lycoming County Reporter