

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

ROCHE FINANCIAL, INC.,	:	NO. 12 - 00,271
Plaintiff	:	
	:	CIVIL ACTION - LAW
vs.	:	
	:	
JOHN M. MACHAK,	:	
Defendant	:	Motion for Preliminary Injunction

OPINION AND ORDER

Before the Court is Plaintiff's Motion for Preliminary Injunction, filed February 8, 2012, in which Plaintiff seeks to prevent Defendant, a former employee, from conducting business in competition with Plaintiff, and also seeks the return of certain property removed from Plaintiff's place of business, including a computer, cell phone and files. A hearing held February 10, 2012, resulted in an order of that date which required Defendant to return the property, and also prevented him from conducting any business in competition with Plaintiff. A second hearing was held February 13, 2012, at the conclusion of which, this court entered an Order directing Defendant to return the files (the testimony established that he had not yet done so) and to sign a document transferring the accounts to Maggie Roche, Vice President of Plaintiff corporation. This opinion addresses the remaining issue of the enforceability of a covenant not to compete and a non-disclosure provision of Defendant's employment agreement with Plaintiff.

According to the testimony of both parties, Defendant was hired in September 2008, and during the interview, was informed that he would be required to sign a written employment agreement. That written agreement was not signed until December 16, 2008, however, some three months after Defendant began his employment, and there is no dispute that no additional consideration was given at that time. Defendant thus argues that the restrictive covenants are not enforceable for lack of consideration. Plaintiff argues, on the other hand, that since Defendant was made aware at the time of the interview that he would be required to sign an employment agreement and that such would contain the restrictive covenants at issue, no additional consideration was required.

Under the law of Pennsylvania it has been held that even where a later formal document is contemplated, parties may bind themselves contractually prior to the execution of the written document through mutual manifestations of assent. Thus evidence of mutual assent to employ and be employed which contains all the elements of a contract may be construed as a binding contract of employment though not reduced to writing.

George W. Kistler, Inc. v. O'Brien, 347 A.2d 311 (Pa. 1975). Further, “as long as the restrictive covenants are an auxiliary part of the taking of regular employment, and not an after-thought to impose additional restrictions on the unsuspecting employee, a contract of employment containing such covenants is supported by valid consideration, and is therefore enforceable.” Beneficial Finance Co. v. Becker, 222 A.2d 873, 876 (Pa. 1966). Therefore, in the instant case, if it appears that Defendant was informed prior to beginning his employment that the written employment agreement would contain the restrictive covenants at issue, such covenants are valid and enforceable.

David Roche, President of plaintiff corporation, testified that at the time of Defendant’s employment interview, Defendant was informed he would be required to sign a written employment agreement and, further, it was his practice to discuss the restrictive covenants with prospective employees. Defendant admitted to having been informed of the need for a written agreement, but denied being told he would be subject to the restrictive covenants. Defendant testified that he was presented with the agreement on December 16 by the office manager and was told that he had to sign it and was given five minutes to do so. Defendant testified that he felt that he had to sign the agreement as he had already moved to the area.

The Court believes, consistent with David Roche’s testimony, that Defendant was informed of the covenants at the time of his employment. From Defendant’s testimony, it was obvious to the court that Defendant is intelligent and assertive and had the covenants been a complete surprise to Defendant on December 16, the Court feels confident that Defendant would have at least raised some objection or sought time for review. Therefore, as they were “an auxiliary part of the taking of employment”, they are valid and enforceable.

The Court does agree with Defendant, however, that the scope of the covenant not to compete is excessively broad. Such a covenant must be reasonably limited in both time and

territory. Kistler v. O'Brien, *supra*. The covenant at issue purports to prevent competition in eleven counties. As the evidence established that plaintiff corporation's business is principally in Lycoming County, however, the Court will modify the covenant's reach to only Lycoming County.

ORDER

AND NOW, this 16th day of February 2012, for the foregoing reasons, the Motion for Preliminary Injunction is GRANTED. The Orders of February 10, 2012, and February 13, 2012, are hereby affirmed. Further, Defendant shall comply with the terms of the Employment Agreement dated December 16, 2008, with a single modification to Paragraph 8 thereof, such that the counties listed in that Paragraph shall be modified to Lycoming County only.

BY THE COURT,

Dudley N. Anderson, Judge

cc: James Casale, Esq.
Thomas Marshall, Esq.
Gary Weber, Esq.
Hon. Dudley Anderson