

OMICRON SYSTEMS INC., et al.

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COURT OF COMMON PLEAS
: PHILADELPHIA COUNTY
: COMMERCE PROGRAM

vs.

:
: AUGUST TERM, 2001

FRED WEINER

: NO. 00669

ORDER and MEMORANDUM

AND NOW, to wit, this 10th day of OCTOBER, 2003, upon consideration of the Post-Trial Motion filed by defendant, Fred Weiner, and the plaintiffs' response thereto, it is hereby ORDERED and DECREED that said Motion is **DENIED**.

It is further ORDERED and DECREED that judgment is entered in favor of the plaintiffs and against defendant in the amount of \$238,000.00.

BY THE COURT:

GENE D. COHEN, J.

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MEMORANDUM

COHEN, GENE D., J.

The plaintiffs in this matter sued the defendant in order to enforce the terms of a restrictive employment covenant. The defendant left the employ of the plaintiffs after 14 years to occupy a position with a company called Proscap Technologies. The plaintiff, Omicron, maintained that at all times it engaged in the same business as Proscap – a business broadly defined as computer consulting and software implementation (that is the Court’s definition) – and so the defendant’s participation in the affairs of Proscap naturally breached the terms of a restrictive employment covenant he had signed with the plaintiff. After hearing testimony and examining exhibits presented by both sides in this very capably tried case, the Court found in favor of the plaintiffs issuing its findings from the bench. *See* N.T. April 22, 2003, pp.44-51. The non-prevailing defendant has now filed post-trial motions. These motions having been briefed and argued the Court will deny the relief sought for the reasons set forth herein.

The Court will address the issues the defendant raises in his post-verdict motions in the sequence in which they are raised.

1. Attorneys’ Fees

The defendant takes issue with the Court’s ruling that the plaintiff is entitled to attorneys fees as the prevailing party in this litigation. In a separate ruling the Court has awarded attorneys fees to the plaintiff. We now deal with the plaintiff’s general right to recover attorneys

fees in this action.

The defendant argues that the plaintiff did not ask for attorneys fees in its complaint. However, since the Court found that the defendant violated the covenant not to compete and the covenant by its terms allowed for the recovery of attorneys fees, the Court finds that the defendant's argument is not well taken.

The so-called "American Rule" provides that parties to litigation are responsible for their own counsel fees "unless otherwise provided by statutory authority, agreement of the parties, or some other recognized exception". Hart v. O'Malley, 781 A.2d 1211, 1216 (Pa. Super. 2001); *see also* Merlino v. Delaware County, 728 A.2d 949, 951 (Pa. 1999). Here, the non-compete clause contained an express provision providing for counsel fees. And, what is more, the Court found that the defendant breached the agreement, giving rise to the entitlement. *See* Mrozek v. Eiter, 805 A.2d 535, 538-539 (Pa. Super. 2002) (finding that no right of attorneys fees arises when the Court did not find that the defendant breached the agreement, but only modified the agreement).

Hence, the Court will allow the petition for attorneys fees to go forward.

2. No Harm, No Foul

The defendant argues that the Court erred in concluding that the defendant breached the restrictive covenant by working for a competitor and by using portions of his former employer's proposal language. In support of this contention the defendant claims that the plaintiff did not prove that any harm resulted from such actions. Under Pennsylvania law this Court may enforce the provisions of a restrictive covenant in such a manner as to protect the interests of the employer with whom the ex-employee signed the agreement. *See* Citgo Paper Co. v. Aaron, 351 A.2d 250, 252-253 (Pa. 1976). The Court may act equitably to enforce the post-employment restraints where they are "incident to an employment relation between the parties to the covenant, the restrictions are reasonably necessary for the protection of the employer and the restrictions are reasonably limited in

duration and geographic extent.” (Id. at p.252).

As the plaintiff correctly points out, this Court has wide discretion to award damages in a breach of restrictive covenant case. *See Judge Technical Services v. Clancey*, 813 A.2d 879 (Pa. Super. 2002). As the Court explained in its verdict on the record “Because of the conduct of Mr. Weiner in dealing with the confidential material the Court will order him to pay damages in the amount of \$238,000.00 which are contractual damages in this particular case absent proof of actual damages or absent sufficient proof of actual damages.” (N.T. 4/22/03 pp.8-9). Essentially, the Court agreed with the defendant’s analysis of the damage issue. The Court imposed upon the defendant the obligation to pay *liquidated* damages amounting to the proven compensation that the defendant received for the work he did for Proscap that in the Court’s view drew upon the specific relationship between the defendant and Omicron that came within the scope of the restrictive covenant.¹

3. The Propriety of “Equitable Accounting”

The defendant next argues that the Court erred in granting plaintiffs’ request for an equitable accounting, substantiating its argument by contending that the equitable accounting was (1) not available as a remedy, (2) an unenforceable penalty, (3) improperly calculated, and (4) violative of the wage payment and collection law. The Court will deal with these sub-arguments in reverse order.

(1) The Wage Payment and Collection Law

The Pennsylvania Wage Payment and Collection Law, 43 Pa.C.S. §260.3 *et seq.*, provides a statutory basis for an employee who has not been paid his wages to proceed against his employer or former employer. The defendant now argues that the restrictive covenant was

¹ The Court found two obstructive discovery tactics by Proscap and Weiner prevented Omicron from proving additional lost business and the value thereof.

“illegal and unenforceable under the WPCL”. (See defendant’s Post-Trial Motion at p.17). The defendant cites the following provisions of the WPCL: “No provision of this act shall in any way be contravened or set aside by private agreement.” 43 Pa.C.S.A. § 260.7. As the plaintiff urges, not too kindly (the plaintiff dubs this a “bizarre” argument), this is a novel argument. The Court fails to see how any “provision” of the Act is contravened by the language of the restrictive covenant. The restrictive covenant merely characterizes the right to the equitable accounting as a remedy. In exercising the equitable accounting provision this Court has no where to look but to the compensation that the defendant received. That compensation – liquidated damages – along with attorneys fees constitute damages to which the plaintiff is entitled. The restrictive covenant was a contract between Omicron and defendant Fred Weiner. As such it is akin to a collective bargaining agreement. The defendant seems to be arguing that even a collective bargaining agreement would contravene the provisions of the Wage Payment and Collection Law. This argument runs afoul of reality.

(2) The Calculation of the Damage Award

Here the defendant takes issue with this Court’s finding of fact. Moreover, the defendant’s argument seems to be that this Court erred by failing to reduce the award by the amount of taxes that the defendant paid. The Court notices that the Internal Revenue Service and the Pennsylvania Department of Revenue were not parties to this action. What the defendant earned was what the defendant earned and, as stated incessantly herein, was the measure of liquidated damages. To that extent the award was properly calculated.

(3) Was the Award of Liquidated Damages Reasonable or an Unenforceable Penalty?

The award of liquidated damages was written into the restrictive covenant agreement between the parties. That agreement was enforceable under Pennsylvania law. To the

extent that the parties contemplated that damages payable upon violation of the restrictive covenant agreement would be measured by the defendant's compensation the Court's award of \$238,000.00, which is based upon the compensation he drew from Proscap when he applied Omicron's proprietary information, was more than reasonable. The defendant is over-reaching in defining the Court's award as a penalty or a forfeiture.

(4) The Enforceability of the Restrictive Covenant Agreement

(a) Whether the Agreement was Breached.

A restrictive covenant agreement between an employer and employee is enforceable in equity if it is (1) ancillary to an employment contract, (2) supported by adequate consideration, (3) reasonably limited in time and geographic territory, and (4) necessary to protect a legitimate business interest of the employer without imposing an undue hardship on the employee. *See Citgo Paper Co., op. cit., John G. Bryant v. Sling Testing and Repair*, 369 A.2d 1164, 1168 (Pa. 1977); *Davis and Warde, Inc. v. Tripodi*, 616 A.2d 1384, 1386-1387 (Pa. Super. 1992) alloc. denied 637 A.2d 284 (Pa. 1993).

At trial of this matter the plaintiff effectively proved that (1) Omicron and the defendant's subsequent employer, Proscap, shared identical clients and (2) the two concerns provided similar if not identical services to those clients, and (3) the defendant applied information and actual proposal language that he acquired at Omicron in the service of Proscap's clients. The parties created an exhaustive record before this Court. The defendant candidly acknowledged that he used proposal language from Omicron to further Proscap's business interests (*see* N.T. 4/10/03 pp. 87-98). The record is replete with instances of the defendant's anti-competitive conduct that was clearly violative of the restrictive covenant agreement.

(b) Did Defendant Breach the Confidentiality Agreement?

In a sentence, the defendant's pilfering of Omicron's proposal language

breached the confidentiality agreement. The defendant's parsing of the proposal language with the aim of showing that it is "generic" is not persuasive upon this Court. Nor, the Court holds, does the restrictive covenant agreement specifically have to identify material deemed to be confidential for such a breach to occur.

(c) Did Omicron Release Defendant from Liability?

The Court declines to conclude as a matter of fact that the Release that Omicron and defendant signed included the defendant's obligations under the restrictive covenant agreement.

The reference to a release and the discussion of it occurs in the record. *See* N.T. 4/15/03 pp. 43-45. The release (defense Exhibit 8) was signed between Omicron and Proscap, the defendant's employer, and by its terms releases *Proscap* and its "parents, affiliates, subsidiaries and related organizations, its and their officers, directors, employees, trustees, agents, representatives, predecessors, successors and assignees" from any liability "arising out of or in any way connected with or related to Weiner's employment contract with Omicron and PBR, Proscap's employment of Weiner or any actions taken by Weiner as an employee of Proscap." At the time this release was signed the defendant was an employee of Proscap. However, it would be pure fiction to extend the protections accorded Proscap and its employees by the release to Weiner. Inferentially, the purpose of the release is to guard Proscap against any invasion of its assets as a result of finding that defendant Weiner had run afoul of the terms of his employment contract and restrictive covenant with Omicron. Thus, the Court finds that the release, being thus limited in scope, does not apply.

(d) Evidentiary Rulings

The defendant also takes issue with this Court's rulings on the following exhibits introduced by the plaintiff and admitted upon the record: Plaintiff's exhibits 5 and 6; 26

through 29; 31 through 39; 53 through 67; 76; 77 through 81.

The Court heard argument on defendant's objections to these exhibits. (N.T. 4/21/03 pp. 5-12). The Court held that each and every one of these exhibits was relevant and admissible. None of the exhibits contained information that was prejudicial or especially critical in the ultimate resolution of the case. Indeed, the character of each exhibit was more in the nature of material evidence. This Court based its conclusions upon the testimony of the witnesses. What is more, in seeking a new trial based upon evidentiary rulings the defendant has failed to point to any passage of the Pennsylvania Rules of Evidence which this Court transgressed by admitting the contested exhibits.

(e) Motion for New Trial

The defendant also moves for a new trial. The Court notes that "a new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake." Harmon v. Borah, 756 A.2d 1116, 1122 (Pa. 2000) (citations omitted). The Supreme Court in Harmon held that a trial court abuses its discretion to the point where a new trial is required by rendering a judgment that is manifestly unreasonable and arbitrary or capricious or has failed to apply the law or is motivated by partiality, prejudice, bias or ill will. Id. at p.1123. The defendant does not and cannot make this representation. Indeed, the defendant's request for a new trial is based upon its reiteration of its claim that this Court erred by equating the business activities of Proscap and Omicron. This Court heard sufficient testimony about the activities of Omicron and Proscap and how the defendant appropriated the proposal language and other business methods of Omicron in his subsequent employment with Proscap. The Court listened as both parties patiently and exhaustively and in great detail explained the nature of the respective enterprises and the history of the defendant's passage from Omicron to Proscap. Having

heard the aforementioned evidence it was the Court's considered conclusion that the defendant breached the terms of the restrictive covenant and the plaintiff was entitled to equitable relief and damages as well as attorneys fees. Accordingly the request for a new trial will be denied.

CONCLUSION:

For the foregoing reasons the defendant's motion for post-trial relief is denied.

BY THE COURT:

GENE D. COHEN, J.

Dated: 10/10/03