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| A.C. 42795 | : | APPELLATE COURT |
| In the matter of a Petition for a Common Law Writ of Habeas Corpus, | : | |
| NONHUMAN RIGHTS PROJECT, INC., on behalf of BEULAH, MINNIE, and KAREN, Plaintiff, | : | STATE OF CONNECTICUT |
| v. | : | |
| R.W. COMMERFORD & SONS, INC. a/k/a COMMERFORD ZOO, and WILLIAM R. COMMERFORD, as President of R.W. COMMERFORD & SONS, INC., Defendants. | : | October 15, 2019 |

**MOTION FOR TEMPORARY INJUNCTION**

Pursuant to Connecticut Practice Book §§ 60-1, 60-2, and 60-3, Plaintiff, the Nonhuman Rights Project, Inc. ("NhRP"), moves this Court for a temporary injunction restraining Defendants from permanently moving Minnie—the sole surviving elephant in this matter—out of the State pending completion of the current appeal.

## I. Brief history of the case

On November 13, 2017, Plaintiff filed its first Verified Petition for a Common Law Writ of Habeas Corpus ("Petition I") seeking a good faith extension or modification of the common law of habeas corpus on behalf of Beulah, Minnie, and Karen, three elephants alleged to be illegally detained by Defendants (collectively, "Commerford"). Plaintiff sought only the recognition of the elephants' common law right to bodily liberty protected by habeas corpus and their immediate release from illegal detention.

On December 26, 2017, the trial court declined to issue the writ on the ground that Plaintiff lacked standing under P.B. § 23-24(a)(1), and, alternatively, on the ground that the

Petition was "wholly frivolous" under P.B. § 23-24(a)(2). On August 20, 2019, the Appellate Court, 192 Conn. App. 36 (AC 41464), affirmed the trial court's decision, and on September 12, 2019, the Appellate Court denied Plaintiff's motion for reconsideration en banc. On October 2, 2019, the Connecticut Supreme Court denied Plaintiff's petition for certification, and accordingly also dismissed as moot Plaintiff's motion for a temporary injunction, which sought to prevent Commerford from permanently moving Minnie out of state pending completion of the proceeding or further order of the Court.

On June 11, 2018, Plaintiff filed a second habeas corpus petition ("Petition II") on behalf of Beulah, Karen, and Minnie. On February 13, 2019, the trial court dismissed Petition II pursuant to PB § 23-29(3). On August 9, 2019, Plaintiff filed its brief in this appeal with the Appellate Court.

## II. Specific facts upon which the moving party relies

On September 15, 2019, Beulah died while being forced to perform at the Big E Exposition in Springfield, Massachusetts. Five days later Plaintiff was able to confirm that Karen died in March of this year under presently unknown circumstances. Upon information and belief, Commerford intends to imminently and permanently move Minnie, the last surviving elephant detained by Defendants, out of the State of Connecticut.

Specifically, on September 19, 2019, Courtney Fern, the Director of Government Relations and Campaigns for the NhRP, was provided with information by a reliable source that, prior to Beulah's death, Commerford had been finalizing arrangements to permanently relocate Beulah and Minnie to a location outside of Connecticut. She was informed that Commerford had previously owned a fourth elephant who was permanently relocated

somewhere in Florida, and Commerford was planning on sending its remaining elephants to that location.

Minnie's removal from Connecticut would strip this Court of its jurisdiction to consider and decide this appeal. In turn, Minnie would be irreparably harmed by losing her only opportunity to have her fundamental right to bodily liberty recognized, and therefore almost certainly lose her only opportunity to be sent to one of the two accredited elephant sanctuaries in the United States—either The Elephant Sanctuary in Tennessee ("TES") or the Performing Animal Welfare Society ("PAWS") near Sacramento, California[1]—where she would be able to live out her years in a place that respects her autonomy, her complex cognitive abilities, and her complex social and psychological needs.

## III. Legal grounds upon which the moving party relies

As a court of "equitable jurisdiction,"[2] this Court can issue injunctive relief under Connecticut General Statutes § 52-471(a). "The principal purpose of a temporary injunction

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[1] PAWS and TES are the only elephant sanctuaries in the United States accredited by the Global Federation of Animal Sanctuaries. Both sanctuaries are willing and able to provide lifetime care to Minnie at no cost to Commerford, and yet Commerford has refused to release Minnie into their care.

[2] In *Blumberg Associates Worldwide Inc v. Brown and Brown of Connecticut*, 311 Conn. 123, 145 (2014), the Connecticut Supreme Court noted that "most jurisdictions, including Connecticut and the federal courts, have merged law and equity courts, and one set of appellate courts administers both systems." *See also Niles v. Williams*, 24 Conn 279, 283 (1855) ("The supreme court, as a court of equity, has no jurisdiction of the present suit..."); *Equitable Life Assur. Soc. of U.S. v. Slade*, 3 Conn. Supp. 232, 233 (1936) ("'It is the policy in this state that all courts shall to the full extent of their jurisdiction administer legal and equitable rights and apply legal and equitable remedies in favor of every party in one and the same suit so that the legal and equitable rights of the party may be enforced and protected in one action.'") (citation omitted).

'is to preserve the status quo until the rights of the parties can be finally determined after a hearing on the merits.'" *Clinton v. Middlesex Mutual Assurance Co.*, 37 Conn. App. 269, 270 (1995) (citation omitted). In Connecticut, it is within the sound discretion of the court to "exercise its equitable power to order a temporary injunction pending final determination of the order, upon a proper showing by the movant that if the injunction is not granted she will suffer irreparable harm for which there is no adequate remedy at law." *Moore v. Ganim*, 233 Conn. 557, 569 n. 25 (1995).

A party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm without an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tips in its favor. *Waterbury Teachers Assn. v. Freedom of Information Commission*, 230 Conn. 441, 446 (1994). In 2014, in a very similar situation, Plaintiff successfully obtained a preliminary injunction[3] preventing the removal of its chimpanzee client, Tommy, from the State of New York pending the completion of the appeal in *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dept. 2014).[4] The factors New York courts consider in exercising their discretion to issue a

[3] Copy of order available at: https://www.nonhumanrights.org/content/uploads/20.-Decision-and-order-granting-motion-for-preliminary-injunction-1.pdf.

[4] On September 30, 2019, in Plaintiff's New York habeas corpus case on behalf of Happy, an elephant imprisoned at the Bronx Zoo, the NhRP successfully obtained a temporary restraining order preventing respondents from moving her out of state pending a hearing on the NhRP's motion for a preliminary injunction. Copy of order available at: https://www.nonhumanrights.org/content/uploads/Signed-Restraining-Order-Happy-Case.pdf

preliminary injunction are nearly identical to the factors this Court must consider.[5] Each relevant factor supports this Court issuing a temporary injunction.

**A. Plaintiff is entitled to a temporary injunction.**

**1. There is no adequate remedy at law.**

If the temporary injunction is denied, Minnie has no adequate remedy at law. "Adequate remedy at law means a remedy vested in the complainant, to which he may, at all times, resort, at his own option, fully and freely, without let or hindrance." *Stocker v. Waterbury*, 154 Conn. 446, 449 (1967) (Internal quotation marks omitted). "A remedy at law, to exclude equity jurisdiction, must be as complete and beneficial as the relief in equity." *Berin v. Olson*, 183 Conn. 337, 342 (1981) (Internal quotation marks omitted).

In this case, there is no adequate remedy at law because the only remedy Plaintiff is seeking on behalf of Minnie, as is true in any habeas corpus action, is her immediate release from unlawful detention. There is no remedy at law or otherwise that will be as complete and beneficial to Minnie as her freedom.

**2. Minnie will be irreparably harmed if the injunction is denied.**

"Although an absolute certainty is not required, it must appear that there is a substantial probability that but for the issuance of the injunction, the party seeking it will suffer irreparable harm." *Aqleh v. Cadlerock Joint Venture II, L.P.*, 299 Conn. 84, 98 (2010). Additionally, "[w]hether harm is 'to be viewed by a court of equity as 'irreparable' or not depends more upon the nature of the right which is injuriously affected than upon the

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[5] *See Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 N.Y.3d 839, 840 (2005) ("The party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor").

pecuniary measure of the loss suffered.'" *New England Eyecare of Waterbury, P.C. v. New England Eyecare, P.C.*, 1991 WL 27919 at *5 (Conn. Super.) (quoting *Robertson v. Lewie*, 77 Conn. 345, 346 (1904)).

If Minnie is permanently removed from the State of Connecticut, she will certainly suffer irreparable harm because her removal will strip this Court of jurisdiction to consider and decide Plaintiff's appeal upon which Minnie's liberty rests. "Indeed, there is nothing more critical than the denial of liberty, even if the liberty interest is one day in jail." *Gonzalez v. Comm'r of Corr.*, 308 Conn. 463, 483-84 (2013). Minnie has been denied her liberty for 10,000 days. Must that denial end only upon her death, as it did with Beulah and Karen?

In Connecticut, jurisdiction in a habeas corpus proceeding requires that the "person" detained is in the custody of someone from the State. *See Hickey v. Comm'r of Correction*, 82 Conn. App. 25, 32 (2004), *cert. granted in part*, 269 Conn. 913, *appeal dismissed*, 274 Conn. 553 (2005) (holding that, as petitioner was incarcerated in Arizona and "not in the custody of the commissioner . . . the court, therefore, lacked jurisdiction to consider his petition for a writ of habeas corpus."); *see also Mock v. Warden*, 48 Conn. Supp. 470, 477 n.5 (2003) ("'If there has been, or will be, an *unconditional* release from custody before inquiry can be made into the legality of detention, it has been held that there is no habeas corpus jurisdiction.'") (citations omitted; emphasis original).

As set forth above, on September 19, 2019, the NhRP's Director of Government Relations received information indicating that Commerford had been finalizing plans to permanently relocate Minnie to Florida. Commerford is capable of transporting Minnie out of state as it has a history of constantly trucking Beulah, Minnie, and Karen all over the northeast to exploit them for financial gain. For instance, as recently as July 4, 2019, Minnie

was used in a Fourth of July parade in Springfield, PA where she was photographed wearing a banner for the Springfield Republican Party while being ridden down the street by an adult male and child. The last time Commerford transported an elephant out of state, which was as recently as September 2019, she (Beulah) died.

If Minnie is permanently removed from Connecticut, she will never have the opportunity to have her fundamental right to bodily liberty recognized by a Connecticut court and, in turn, unless she is sent to TES or PAWS, will most certainly be condemned to further exploitation that will end—as it did with Beulah and Karen—with her death. Such great harm is irreparable.

**3. Plaintiff will likely prevail on the merits.**

Plaintiff's brief demonstrates that the trial court's dismissal of Petition II under PB § 23-29(3) was patently erroneous. PB § 23-29(3) encapsulates a narrowed application of res judicata to habeas corpus proceedings,[6] and therefore a habeas corpus petition that cannot be dismissed under res judicata cannot be dismissed under the provision. Under res judicata, the dismissal of Petition I cannot bar Petition II because (1) the NhRP did not actually litigate Petition I and (2) its dismissal was not a judgment on the merits. *See* Brief at 6-8. Moreover, Petition II satisfied the requirements of PB § 23-29(3) because it stated "new facts" and proffered "new evidence" within the meaning of the provision. *Id.* at 9-16.

Accordingly, there is a strong likelihood that this Court will resolve the merits of this appeal in Plaintiff's favor and reverse the trial court's decision.

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[6] *See Kearney v. Commissioner of Correction*, 113 Conn.App. 223, 234 (2009).

**4. The balance of equities tips in favor of granting the temporary injunction.**

The balance of equities tips in favor of granting Plaintiff a temporary injunction, because "if it appears that to deny or dissolve it may result in great harm to the plaintiff and little to the defendant, the court may well exercise its discretion in favor of granting or continuing it, unless indeed, it is very clear that the plaintiff is without legal right." *Griffin Hosp. v. Comm'n on Hosps. & Health Care*, 196 Conn. 451, 457 (1985) (citing *Olcott v. Pendleton*, 128 Conn. 292, 295 (1941)). Plaintiff merely seeks to preserve the status quo pending completion of the current appeal.

As discussed above, Minnie will likely suffer great irreparable harm if Plaintiff's temporary injunction is not granted. Defendants will suffer no such harm from having to wait for a final ruling on the merits of the appeal, and any potential financial harm they may incur would be inconsequential to Minnie's potential loss of freedom. *See Fleet Nat. Bank v. Burke*, 45 Conn. Supp. 566, 577 (1998) ("It is not irreparable harm to incur a loss of profits which may be recovered through other business ventures.").

**B. Plaintiff should not be required to post a bond.**

Although Conn. Gen. Stat. § 52-472 provides that a temporary injunction should not be granted without the posting of a bond by the moving party, the Court has the statutory authority to waive this requirement. *See* Conn. Gen. Stat. § 52-472 ("a bond need not be required when, for good cause shown, the court or a judge is of the opinion that a temporary injunction ought to issue without bond.") "The purpose of the bond is to indemnify the

defendants from any damages which they might sustain if the plaintiff failed to prosecute the action to effect." *Spiniello Construction Co. v. Manchester*, 189 Conn. 539, 546 (1983).[7]

The bond requirement ought to be waived here because Plaintiff fully intends to prosecute this action to its conclusion, as evidenced by the fact that, since 2017, it filed two habeas corpus petitions on behalf of Minnie and continues to aggressively litigate them through their appeals. The NhRP has never abandoned a case brought on behalf of its nonhuman animal clients.

**THE PLAINTIFF, THE NONHUMAN RIGHTS PROJECT, INC.**

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**VERIFICATION**

I hereby verify that the facts stated in the foregoing Motion for Temporary Injunction are true and correct to the best of my knowledge, information and belief.

Courtney Fern

Sworn to and subscribed before me
this 15 day of October, 2019.

Alma Q. Blanco

Notary Public

[7] Courts frequently issue temporary injunction orders without bond. See, e.g., *Maintenance Technologies Internat'l, LLC v. Vega*, 2006 WL 279429 (Conn. Super.) (granting temporary injunction, without bond, to enjoin defendant from employment in violation of non-compete agreement for a period of one year).

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT** **CIVIL CODE § 1189**

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )
County of Los Angeles )
On October 15, 2019 before me, Alma A. Polanco, Notary Public
*Date* *Here Insert Name and Title of the Officer*
personally appeared Courtney Maureen Fern
*Name(s) of Signer(s)*

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

ALMA A. POLANCO
Commission # 2142253
Notary Public - California
Los Angeles County
My Comm. Expires Feb 9, 2020

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____
*Signature of Notary Public*

*Place Notary Seal Above*

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| ☐ Individual ☐ Attorney in Fact | ☐ Individual ☐ Attorney in Fact |
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| ☐ Other: _____ | ☐ Other: _____ |
| Signer Is Representing: _____ | Signer Is Representing: _____ |

## CERTIFICATION

I hereby certify that: a copy of the foregoing has been delivered electronically on the date hereof to each other counsel of record and the non-appearing defendants; counsels' and defendants' names, addresses, e-mail addresses and telephone numbers are listed below; the foregoing has been redacted or does not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and the foregoing complies with all applicable rules of appellate procedure.

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# APPENDIX

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2006 WL 279429

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,
Judicial District of Ansonia-Milford.

MAINTENANCE TECHNOLOGIES INTERNATIONAL, LLC
v.
Daniel VEGA et al.

No. CV054005177S.
|
Jan. 12, 2006.

**Attorneys and Law Firms**

Stephen P. Wright, Harlow Adams & F, Milford, for Maintenance Technologies International Llc.

**Opinion**

RONAN, JTR.

*1 Presently before the court is the plaintiff's application for a temporary injunction and order to show cause, as authorized by General Statutes § 52-471 et seq. The plaintiff, Maintenance Technologies International, LLC, has instituted this action against a former employee, Daniel Vega (Vega) and the present employer of Vega, Schultz Electric Co. (Schultz), to enforce a contractual covenant not to compete.

Based on the evidence presented at an evidentiary hearing held on December 19, 2005, the court finds the following facts. The plaintiff is a company located in Milford, Connecticut that performs highly specialized engineering maintenance services. The defendant[1] Vega, an engineer, commenced employment with the plaintiff on February 25, 2002, after having previously worked for the plaintiff in 1990. As a field service specialist, the defendant performed highly technical services such as vibration analysis, infrared thermography, motor testing and laser alignment.

On February 25, 2002, the plaintiff and the defendant signed an employment agreement. Section 2.4, entitled "Noncompetition," of the agreement states in relevant part: "The Employee agrees that all times during the term of his employment hereunder and for a period of two (2) years after the termination of his employment hereunder, howsoever brought about, whether voluntary or involuntary, he will not, within 150 miles of the current principal place of business of the Employer, engage in any business engaged in by the Employer and shall not be the owner of any of the outstanding capital stock of any Corporation other than Employer or an Officer, Director or employee of any Corporation (other than Employer or a Corporation affiliated with Employer), or a partner or employee of any Partnership or member, manager or employee of any limited liability company or an owner or employee of any other business, which conducts a similar business within 150 miles of the current principal place of business of the Employer. In the event that the provisions of this Section should ever be deemed to exceed the time, geographic or occupational limitations permitted by the applicable laws, then such provisions shall be reformed to the maximum time, geographic or occupational limitations permitted by the applicable laws."

By letter dated October 7, 2005, the defendant gave written notice that "[d]ue to family related issues and a personal ambition to finish [his] master's degree in theology," he was resigning from his position with the plaintiff. On October 30, 2005, the defendant began working for Schultz, a competitor of the plaintiff with major locations in Connecticut, Maine, Massachusetts and New Jersey.

On November 28, 2005, the plaintiff filed the present application for a temporary injunction and order to show cause seeking a temporary and permanent injunction enjoining: (1) the defendant from continued employment with Schultz; and (2) Schultz from continuing to employ the defendant. An evidentiary hearing was held on December 19, 2005, at which time the defendant and Robert Davis, president of Schultz, appeared pro se.

*2 "The principal purpose of a temporary injunction is to preserve the status quo until the rights of the parties can be finally determined after a hearing on the merits." (Internal quotation marks omitted.) *Clinton v. Middlesex Mutual Assurance Co.*, 37 Conn.App. 269, 270, 655 A.2d 814 (1995). The standard for granting a temporary injunction in Connecticut is well settled. "In general, a court may, in its discretion, exercise its equitable power to order a temporary injunction pending final determination of the order, upon a proper showing by the movant that if the injunction is not wanted he or she will suffer irreparable harm for which there is no adequate remedy at law ... In exercising its discretion, the court, in a proper case, may consider and balance the injury complained of

with that which will result from interference by injunction." (Citations omitted; internal quotation marks omitted.) *Moore v. Ganim,* 233 Conn. 557, 569, n. 25, 660 A.2d 742 (1995). There is a four-part test for the issuance of a temporary injunction: "(1) the plaintiff [has] no adequate legal remedy; (2) the plaintiff would suffer irreparable injury absent [the injunction]; (3) the plaintiff [is] likely to prevail ... and (4) the balance of the equities [favors the issuance of the injunction]." *Waterbury Teachers Ass'n. v. Freedom of Information Commission,* 230 Conn. 441, 446, 645 A.2d 978 (1994).

The standard for granting a temporary injunction to enforce a covenant not to compete, however, is somewhat different in that the plaintiff does not need to prove irreparable harm. "While ordinarily proof of imminent harm is essential, in this type of case there is no such requirement. It has long been recognized in this state that a restrictive covenant is a valuable business asset which is entitled to protection ... Irreparable harm would invariably result from a violation of the defendant's promises ... The reason for this is that such a plaintiff's actual injury is not susceptible of determination to its entire extent but is estimable largely by conjecture and prediction." (Citations omitted; internal quotation marks omitted.) *Sagarino v. SCI Connecticut Funeral Services, Inc.,* Superior Court, judicial district of New Britain, Docket No. CV 000499737 (May 22, 2000, Aurigemma, J.) (27 Conn. L. Rptr. 281); see also *Merryfield Animal Hospital v. Mackay,* Superior Court, judicial district of New Haven, Docket No. CV 02 0464586 (July 31, 2002, Hadden, J.T.R.) (32 Conn. L. Rptr. 652); *Musto v. Opticare Eye Health Centers, Inc.,* Superior Court, Complex Litigation Docket at Waterbury, Docket No. CV 99 0155663 (August 9, 2000, Hodgson, J).

The standard is also different in that the plaintiff does not have to demonstrate that there is no adequate remedy at law. "[W]hile the plaintiff could maintain a claim for damages as to each violation that causes injury the difficulty of proof and the inefficiency of repetitive suits render inadequate the use of successive remedies at law, and injunctive relief is therefore warranted to protect the plaintiff from harm which the restrictive covenant was intended to prevent." (Internal quotation marks omitted.) *Sagarino v. SCI Connecticut Funeral Services, Inc., supra,* Superior Court, Docket No. CV 00 0499737 (27 Conn. L. Rptr. 281); see also *Merryfield Animal Hospital v. Mackay, supra,* Superior Court, Docket No. CV 02 0464586; *Musto v. Opticare Eye Health Centers, supra,* Superior Court, Docket No. CV 99 0155663. Thus, the present application only requires this court to determine that the plaintiff is likely to prevail and that the balance of the equities favors the issuance of the injunction.

*3 "A covenant that restricts the activities of an employee following the termination of his employment is valid and enforceable if the restraint is reasonable." *New Haven Tobacco Co. v. Perrelli,* 18 Conn.App. 531, 533, 559 A.2d 715, cert. denied, 212 Conn. 809, 564 A.2d 1071 (1989). In determining whether a covenant is reasonable, "[t]he five factors to be considered ... are: (1) the length of time the restriction operates; (2) the geographical area covered; (3) the fairness of the protection accorded to the employer; (4) the extent of the restraint on the employee's opportunity to pursue his occupation; and (5) the extent of interference with the public's interests." *Robert S. Weiss & Associates, Inc. v. Wiederlight,* 208 Conn. 525, 529 n. 2, 546 A.2d 216 (1988).

The court first begins with an analysis of the geographical area covered. The court finds that the 150 mile geographical area is reasonable given the nature of the plaintiff's business. At the hearing, Ronald Hemming (Hemming), president and owner of Maintenance Technologies International, LLC, testified that the plaintiff's clients are located, among other places, in Boston, Massachusetts, northern Philadelphia, Albany, New York, and southern New Hampshire. "[A] restrictive covenant must be confined to a geographic area that is reasonable in view of the particular situation." *New Haven Tobacco Co. v. Perrelli, supra,* 18 Conn.App. at 534. As explained by Hemming, the nature of the specialized services offered by the plaintiff is such that the plaintiff cannot limit itself to customers only in Connecticut but must also extend its services to customers in other states. The nature of the plaintiff's services, coupled with the fact that the plaintiff must travel to customers in other geographical areas to provide on-site services and training, make the 150 mile geographical area restriction reasonable.

With regard to the fairness of protection accorded to the plaintiff, the court finds that the covenant not to compete is a reasonable protection of the plaintiff's business. "If ... a restriction is to be upheld and enforced it must be reasonably necessary for the fair protection of the employer's business, good will or rights ..." *May v. Young,* 125 Conn. 1, 5, 2 A.2d 385 (1938). "[R]estrictions are valid when they appear to be reasonably necessary for the fair protection of the employer's business or rights ... due regard being had to the subject-matter of the contract and the circumstances and conditions under which it is to be performed. Especially if the employment involves the imparting of trade secrets, methods or systems and contacts and associations with clients or customers it is appropriate to restrain the use, when the service is ended, of the knowledge and acquaintance, so acquired, to injure

or appropriate the business which the party was employed to maintain and enlarge." *Id.*, at 6-7.

The evidence before the court establishes that the plaintiff invests a great deal of time and money in training its employees. For instance, Hemming testified that it generally takes three to five years to fully train an employee. He also testified that the plaintiff's employees are its "assets." The evidence further establishes that the plaintiff's employees have direct access to customer information, pricing, databases, electronic and printed forms, and other confidential information used in the business. The plaintiff understandably seeks to protect this information from such competitors as Schultz. Because the plaintiff's employees and its customer relationships are the plaintiff's most valuable assets, it is important to protect that interest by enforcing the covenant not to compete. The restrictive covenant, therefore, provides a fair and reasonable degree of protection to the plaintiff.

*4 Next, the court considers the extent of the restraint on the defendant's opportunity to pursue his occupation. The Connecticut Supreme Court has recognized that "[t]he interests of the employee himself must ... be protected, and a restrictive covenant is unenforceable if by its terms the employee is precluded from pursuing his occupation and thus prevented from supporting himself and his family." *Scott v. General Iron & Welding Co.*, 171 Conn. 132, 137, 368 A.2d 111 (1976). Here, the covenant allows the defendant to work outside the restricted area. Further, the covenant does not prohibit him from engaging in any business not engaged in by the plaintiff. Thus, the court finds that the covenant does not unfairly restrain the defendant from pursuing his occupation.

The court now determines the extent of the covenant's interference with the public's interests. "In order for such interference [with the public interest] to be reasonable, it first must be determined that the employer is seeking to protect a legally recognized interest, and then, that the means used to achieve this end do not unreasonably deprive the public of essential goods and services." *New Haven Tobacco Co. v. Perrelli, supra,* 18 Conn.App. at 536. "In determining whether a restrictive covenant unreasonably deprives the public of essential goods and services, the reasonableness of the scope and severity of the covenant's effect on the public and the probability of the restriction's creating a monopoly in the area of trade must be examined." *Id.*

"An employer can protect its business in the area where it does business." *Daniel V. Keane Agency, Inc. v. Butterworth,* Superior Court, judicial district of Fairfield, Docket No. 313181 (February 22, 1995, Levin, J.); see also *Robert S. Weiss & Associates v. Wiederlight, supra,* 208 Conn. at 533; *May v. Young, supra,* 125 Conn. at 7. Here, the plaintiff's interest in protecting itself against the defendant's use of confidential and customer information by a competitor of the plaintiff is a legally protected interest. See *May v. Young, supra,* 125 Conn. at 7 (employment which involves acquisition of confidential knowledge involved in business and acquaintance with employer's clientele is appropriate to restrictions against use of such knowledge in competition with employer). Furthermore, this restriction does not create a monopoly or interfere with the public's ability to procure engineering maintenance services.

After hearing the testimony of the parties and examining the documentary evidence, the court finds that the plaintiff has met its burden of demonstrating the probability that it will succeed on the merits. Moreover, the nature of the employment demonstrates a reasonable basis for including the covenant not to compete in the agreement signed by the parties. Furthermore, there is no evidence that the defendant did not fully understand his obligations under the written agreement.

*5 The defendant had informed Hemming that he was resigning in order to help his father part-time in the ministry and to pursue a master's degree. However, a week after his resignation with the plaintiff, he commenced work with Schultz. Moreover, the defendant testified that he had been using a headhunter to locate a new job since August of 2005. Hemming, on the other hand, tried to find ways to accommodate the defendant so that he could continue to work for the plaintiff. The court notes that the defendant was less than candid with his former employer regarding his future.

Lastly, while the agreement calls for a two-year restriction on future employment, the court is concerned that this time period may be somewhat inequitable. Because of this concern, the court will at this time grant the injunction for one year and invite the parties to submit further argument *prior* to the expiration of the one year as to a potential extension of the injunction until October 28, 2007.

Accordingly, the application for a temporary injunction is granted without bond. It is hereby ordered that the defendant is enjoined from employment with Schultz for a period of one year from the date of his termination with the plaintiff, which was October 28, 2005.

**All Citations**

Not Reported in A.2d, 2006 WL 279429, 40 Conn. L. Rptr. 576

Footnotes

1 The defendant hereinafter refers only to Daniel Vega.

1991 WL 27919

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.
Superior Court of Connecticut, Judicial District of Waterbury.

NEW ENGLAND EYECARE OF WATERBURY, P.C. d/b/a New Insight Family Eyecare, P.C., et al.
v.
NEW ENGLAND EYECARE, P.C., et al.

No. 099465.
|
Jan. 18, 1991.

*MEMORANDUM OF DECISION*

BLUE, Judge.

*1 This case is a legal battle between two optometrists who no longer see eye-to-eye. In the opening round of their fight, the parties have focused on whether it would be appropriate for this court to issue a temporary injunction barring one doctor from competing with the other. For the reasons discussed below, the court concludes that the requested temporary injunction should not issue.

The optometrists in question are Albert Germain and Howard Gottlieb, who are the respective heads of the plaintiff and defendant corporations. Gottlieb is something of an entrepreneur and owns thirteen stores that license the name of New England Eyecare. Germain is a younger man who got his professional start under Gottlieb in a store located at 835 Wolcott Street in Waterbury, where he (Germain) still practices.

Gottlieb and Germain began as what they called partners at 835 Wolcott Street in 1983. The business was then called New England Eyecare of Waterbury, P.C. This business, as the name suggests, was a professional corporation, of which Gottlieb owned 80% of the stock and Germain 20% (for which he paid Gottlieb $20,000). In 1984, Germain purchased an additional 29% of the stock for consideration (cash and a note) totalling $70,000.

On February 29, 1988, Gottlieb sold the remaining 51% of the business to Germain for consideration of approximately $154,000 in cash and the assumption of approximately $100,000 debt. The terms of this sale are set forth in a Stock Purchase Agreement signed by the parties and entered into evidence as plaintiff's exhibit 1. This was not a contract of adhesion. Both parties were represented by attorneys, and the terms were the result of vigorous negotiation. For purposes of this case, the following provisions of this agreement are particularly important:

Paragraph 7(a). Gottlieb licensed to Germain the right to use the trade name "New England Eyecare" for 2½ years (that is, until August 29, 1990). In return for this license (this is in addition to the consideration mentioned above) Germain agreed to pay Gottlieb a bi-weekly fee equal to 2% of his gross sales.

Paragraph 7(b). 120 days in advance of the termination of the 2½ year period just mentioned (that is, by sometime in April 1990), Germain had the option to renew the license for another 2½ years.

Paragraph 7(c). Germain agreed to pay a late fee of $25 a day for each day a licensing fee remained unpaid.

Paragraph 8. Gottlieb agreed to provide marketing services (budgeting and advertising) to Germain for 2½ years in return for an additional bi-weekly fee of 1% of gross sales for the first year and 2% of gross sales thereafter. Germain agreed to pay a late fee of $25 a day for each day a marketing fee remained unpaid.

Paragraph 15. For a period of four years "provided [Germain] is not in default hereunder" Gottlieb agreed not to open a competing optometric practice in Waterbury.

Paragraph 20. The Agreement is to be governed by Connecticut law.

*2 Paragraph 21. The Agreement constitutes the entire agreement between the parties and may only be modified in writing.

Paragraph 22 (appearing, by reason of a typographical error, as paragraph 19). "The waiver by either party of a breach of any provision of this Agreement shall not operate or be construed as a waiver of any subsequent

breach of the same or any other provision of this Agreement."

The first fourteen months after this Agreement was signed were uneventful. In May 1989, however, Germain began to experience serious financial difficulties. Between then and January 1990, he missed a total of twenty bi-weekly licensing and marketing payments. (Some sporadic payments were made.) The late fees for these payments totaled over $11,000. This was plainly a serious situation, and Germain acknowledges that he was in default during this period. Gottlieb, however, exercised considerable patience and, as far as the record indicates, made no threatening move until January 16, 1990. On that date, Gottlieb wrote Germain a letter (plaintiff's exhibit 6) listing the then-unpaid licensing, marketing and late fees. The letter concluded with the following sentence: "The penalties will be waived if payment is made in full or suitable arrangements are made by January 24, 1990."

This letter was received by Germain on January 18. (All dates are now 1990 dates.) Later that day, he made a telephone call to Gottieb which lasted 17 minutes. The duration is established by Germain's telephone bill (plaintiff's exhibit 10) and is about the only precise thing that can be said about the conversation since the memories of both parties about what must have been for each a discussion of exceedingly great importance became curiously deficient once the parties reached the witness stand. Gottlieb, who was the more credible witness on this point, remembered very little of the conversation. He testified that he never said that any of the prior defaults would be waived and that if someone had said something to him about a payment plan, he would have remembered it. Gottlieb is obviously an astute businessman (not even Germain contests that), and the court is inclined to believe him on this latter point.

Germain's memory of this conversation differs significantly. Unfortunately, his memory at any given moment on the witness stand differed significantly from his memory the next moment. Questions propounded by the court only added to the variety of answers. A final improved version was added after a mid morning recess. In his most optomistic version, he testified that Gottlieb had told him that the letter was just a "formality" that he (Gottlieb) wasn't going to hold him to the date in the letter, and that payment of the late fees would be waived. The court does not find this testimony credible, although it does not doubt (in light of subsequent events) that Germain did make various representations that he would endeavor to pay and that Gottlieb encouraged prompt payment.

*3 On January 20, Germain wrote Gottlieb a check for $2,402. (Plaintiff's exhibit 11.)

On January 31, an employee of Gottlieb's wrote Germain a letter (plaintiff's exhibit 7) thanking him for his "partial payment of past due royalities" and requesting an accounting of sales for the still-unpaid weeks and a payment plan by February 15. The letter concluded, "As a formality, you will be notified of your default under the terms of your contract, under separate cover."

On February 4, Germain wrote Gottlieb two checks-one business and one personal-totalling $4,257. (Plaintiff's exhibit 12-13.) All parties agree that this was sufficient to pay all of Germain's underlying debt *except* the approximately $11,000 in late fees.

The next three months were, at least as far as the evidence submitted to this court indicates, amazingly uneventful. There is undisputed evidence that, following his February 4 payments, Germain made faithful and timely payments of his licensing and marketing fees right up to August 29, when his obligation to make those payments ceased. There is also undisputed evidence that Gottlieb accepted these payments without reservation. Indeed, the next significant event was a nonevent. In late April the deadline for Germain to renew his licensing agreement passed without any activity on his part. This nonevent seemed to act as a catalyst for Gottlieb.

On May 24, Gottlieb wrote to Germain remarking on the fact that the licensing agreement had not been renewed and ordering him to cease using the name New England Eyecare by August 29. He further advised Germain that he owed $12,550 in late fees and that the letter "shall be notice of your default under the Agreement due to the non-payment" of those fees. (Plaintiff's exhibit 8.)

An even more ominous letter from Gottlieb followed on July 30. It began by remarking that, "[a]s of this date there has been no cure of the default" stated in the May 24 letter. Gottlieb ordered Germain to cease using the name New England Eyecare effective August 29 and to vacate the premises at 835 Wolcott Street. The letter then stated that because of the default, "New England Eyecare shall be released from the [noncompetition] provision of Section 15 [of the Agreement] and shall be permitted to license the name New England Eyecare within the City of Waterbury, Connecticut effective August 29." (Plaintiff's exhibit 9.)

In late August, Gottlieb sent a flyer (Plaintiff's exhibit 3) to area optometrists seeking a new licensee for New England Eye Care in Waterbury.

In November, Gottlieb opened a New England Eyecare Store at 625 Wolcott Street in Waterbury-about half a mile from Germain's store, which had, in the meantime changed its name to New Insight Family Eyecare. Gottlieb's new store is heavily promoted, both by newspaper advertisements (plaintiff's exhibit 4) and direct mailings to former New England Eyecare Customers (plaintiff's exhibit 5).

There is undisputed evidence that, in addition to Gottlieb's new store, there are four other eyecare stores within three-quarters of a mile of Germain's store. There is no evidence whatsoever on the record of any actual negative impact of Gottlieb's new store on Germain's business, although it would be surprising if some negative impact did not exist.

*4 As of the date of the hearing (held on December 17 and 20), the late fees had not been paid. Germain apparently also owes Gottlieb approximately $860 for some contact lenses. (Defendant's exhibits 1 and 2.)

The court must initially determine the proper standard for the issuance of a temporary injunction. Connecticut law on this subject is somewhat rudimentary. Conn.Gen.Stat.Sec. 52-473(b) requires a clear showing of "irreparable loss or damage" before a temporary injunction may be issued without notice to the adverse party, but in regard to temporary injunctions requested after notice and hearing'-as is the case here-the legislature has chosen a discrete silence. The Connecticut Supreme Court has never directly addressed this latter subject either, although it has made some noteworthy statements in analogous cases. In *Olcott v. Pendleton,* 120 Conn. 292, 22 A.2d 633 (1941), the court explained the standards that should govern a temporary injunction issued on the pleadings as follows:

In deciding whether it should be granted or, if granted, whether it should be continued or dissolved, the court is called upon to balance the results which may be caused to one party or the other, and if it appears that to deny or dissolve it may result in great harm to the plaintiff and little to the defendant, the court may well exercise its discretion in favor of granting or continuing it, unless indeed, it is very clear that the plaintiff is without legal right.

*Id.* at 295. The requirement that it be "very clear that the plaintiff is without legal right," the court later explained, "necessarily requires consideration of the probable outcome of the litigation." *Griffin Hospital v. Commission on Hospitals and Health Care,* 196 Conn. 451, 457, 493 A.2d 229 (1985). *Griffin Hospital* reviewed a number of Superior Court decisions involving temporary injunctions, *id.* at 457-58, but it refrained from taking any detailed position on the subject itself since it was considering a stay of an administrative decision and was looking to temporary inunction cases only by way of analogy. *Cf. Hartford Division, Emhart Industries, Inc. v. Amalgamated Local Union 376, U.A.W.,* 190 Conn. 371, 393-94, 461 A.2d 422 (1983) (discussing the specific statutory criteria set forth in Conn.Gen.Stat.Sec. 31-115 governing temporary injunctions in labor dispute cases).

The United States Supreme Court has also spoken little on the subject, although it did advise us in *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 931 (1975), that, "The traditional standard for granting a preliminary injunction requires the plaintiff to show that in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits."

The federal courts of appeal have, in contrast, developed highly articulated standards to guide the federal district courts in deciding whether to issue preliminary injunctions. Each federal circuit has a somewhat different formulation, *see* 7 J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice* par. 65.04[1] (2d ed. 1989), but the test enunciated by the Second Circuit is particularly useful, both because it is likely to be familiar to litigants in Connecticut and because it effectively synthesizes the balancing approach of *Olcott* with the two-pronged test of *Doran.* Under the well settled law of the Second Circuit,

*5 [T]o succeed on a motion for a preliminary injunction, the moving party has the burden of establishing: (a) irreparable harm; and (b) either (1) probable success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary in unactive relief.

*Kaplan v. Board of Education,* 758 F.2d 256, 259 (2d Cir.1985). *Accord Loveridge v. Pendleton Woolen Mills, Inc.,* 788 F.2d 914, 916 (2d Cir.1986). The court concludes that it is appropriate to use the Second Circuit test here.

Under this standard, a party seeking a temporary injunction must first establish irreparable harm. Whether harm is "to be viewed by a court of equity as 'irreparable' or not depends more upon the nature of the right which is injuriously affected than upon the pecuniary measure of the loss suffered." *Robertson v. Lewie,* 77 Conn. 345, 346, 59 A. 409 (1904). "Irreparable injury vs one that cannot be redressed through a monetary award. Where

money damages are adequate compensation a preliminary injunction should not issue." *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir.1990).

The litigation here is strictly commercial. The plaintiff has no land that will be irreparably destroyed, as in *Robertson*, or liberty interests that are endangered, as is often the case in civil rights litigation. While business and financial interests may unquestionably merit the protection of a temporary injunction in appropriate circumstances, those circumstances are not present here. If a damage award will "come too late to save the plaintiff's business," *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386 (7th Cir.1984), the loss to the plaintiff will be irreparable. Germain wants to sell eyeglasses, "not to live on the income from a damages award." *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir.1970). Thus, if Germain established that the competition from Gottlieb was likely to shut down his business, irreparable harm would be shown. But no such showing has been made here. Not only is there not one scintilla of evidence in the record with respect to the actual impact of Gottlieb's new business on Germain, the record clearly establishes that there are four *other* optometry shops competing with Germain within a three-quarters mile radius of his shop. Although, as noted above, it would be surprising if Gottlieb's new enterprise would not have some negative impact on Germain's business, there is simply no evidence from which the court can infer that this impact is likely to be ruinous under all of the circumstances.

This is not, moreover, a case where Germain's goodwill will be damaged by an inability to provide his retail customers with New England Eyecare products. *Compare, e.g., Reuters Limited v. United Press International, Inc.*, 903 F.2d 904, 907-09 (2d Cir.1990). Germain had decided to disassociate himself from New England Eyecare months before Gottlieb's new shop opened. His only complaint is that he has an additional competitor in violation (so he says) of the 1988 Agreement.

*6 In the absence of any evidence indicating that Germain is lkely to be put out of business or suffer the loss of goodwill, the court concludes that money damages are likely to be adequate here. It should be remembered that under paragraph 15 of the Agreemeent, Gottlieb's covenant not to compete runs only for four years even in the absence of default-i.e. until February 24, 1992. Thus, even under the most dire (to him) set of circumstances, Germain will have an additional competitor (one of five within three-quarters of a mile) for an additional sixteen months (November 1990 to February 1992). The court does not intend to imply by this that the impact is likely to be small, for it has no doubt that Gottlieb will be a formidable competitor. But, at bottom, Germain is simply contending that his business is likely to be less profitable. Even if he "were able to prove such an injury ... such a loss would be compensable in money damages.... [W]here money damages are adequate compensation, a preliminary injunction will not issue since equity should not intervene where there is an adequate remedy at law." *Loveridge v. Pendleton Woolen Mills, Inc., supra,* 788 F.2d at 917-18.

Although this is technically the end of the matter, the court adds that if it were to proceed to a consideration of the merits of the case (based on the evidence submitted to it thus far) and the balance of the hardships, the plaintiff would fare no better. Germain has not established that Gottlieb waived the late fees owed to him in their telephone conversation of January 18, 1990. He does have an argument, based on Gottlieb's acceptance of his licensing and marketing fees in the aftermath of the February 4, 1990, payments, that the late fees were waived by that acceptance, *see Grippo v. Davis,* 92 Conn. 693, 696, 104 A. 165 (1918); *Bronson v. Leibold,* 87 Conn. 293, 297, 87 A. 979 (1913). The evidentiary hearing did not, however, focus on this matter, and additional evidence may remain to be presented at a full trial on the merits.[2] But it is quite clear in any event, that the balance of hardships tips decidedly toward Gottlieb. If a temporary injunction is denied, Germain will doubtless suffer a loss of income, but there is no reason to believe, based on this record, that his business will be destroyed. If, however, a temporary injunction is granted, Gottlieb will, by definition, be put out of business in Waterbury. Although there are doubtless circumstances in which such a temporary injunction would be appropriate, this is not one of them.

The requested temporary injunction is denied.

**All Citations**

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Footnotes

1 One problem here is terminological. Under Connecticut law, the phrase "temporary injunction refers both to what the somewhat more highly articulated federal courts would call a "temporary restraining order" (i.e. one issued without notice to the averse party) and to what they would call a "preliminary injunction" (i.e. one issued after notice and hearing). *See* Fed.R.Civ.P. 65. Obviously the former type of order requires a greater showing of immediate danger than the latter. When this opinion hereinafter refers to a "temporary injunction," it is referring to a temporary injunction issued after notice and hearing.

2 It is not the court's function at this stage of the litigation to fully try the facts. That will be the function of the ultimate trial. The task of the court here is simply to determine whether facts exist which make the issuance of a temporary injunction appropriate. *See American Cyanamid Co. v. Ethicon Ltd.*, [1974] A.C. 396, 407 (H.L.1975).

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