

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 2002

ACADIAN CYPRESS & HARDWOODS, INC.

VERSUS

JOY STEWART

*PM
superior*

Judgment Rendered: SEP 03 2013

* * * * *

On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 2012-0001413

Honorable Elizabeth P. Wolfe, Judge Presiding

* * * * *

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* * * * *

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

*Whipple, J. concurs in the result.
Higginbotham, J. dissents.*

McCLENDON, J.

The defendant appeals from a trial court judgment granting plaintiff's motion for contempt. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Acadian Cypress & Hardwoods, Inc. (Acadian) is a supplier of domestic and imported hardwood lumber and plywood, hardware, and specialty items, as well as a manufacturer of hardwood moldings. Joy Stewart was employed by Acadian from May 2004 through April 2012 as a sales representative. In September 2009, Acadian presented a Non-competition/Non-solicitation Agreement (Agreement) to Ms. Stewart, which she signed. Ms. Stewart continued employment with Acadian until April 27, 2012, after which she began employment with Deano Hardwoods, LLC (Deano), a competitor of Acadian. Thereafter, Acadian filed a petition for injunctive relief and damages against Ms. Stewart to enforce the Agreement. Following a hearing, the trial court signed a judgment on June 1, 2012, granting the preliminary injunction.¹

The preliminary injunction provides, in relevant part:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue herein effective until the further Order of this Court, but in no event for a period to exceed two years from April 27, 2012 and enjoining defendant, Joy Stewart, from soliciting current or former, customers or suppliers, of Acadian Cypress & Hardwoods, Inc.; and from carrying on or engaging in a business directly or indirectly, as an employee, independent contractor, owner, principal, or otherwise, that competes with Acadian Cypress & Hardwoods, Inc., specifically including, but not limited to Deano Hardwoods, LLC, where such business provides any of the following products and services: domestic and imported hardwood sales, domestic and imported plywood sales, milling services, cypress propriety products, cabinets and millwork accessories, drying services and distribution of those products. Said restrictions shall only apply within the following parishes and counties:

Louisiana: St. Tammany Parish, Livingston Parish, Tangipahoa Parish, St. Helena Parish, Iberville Parish, East Baton Rouge Parish, West Baton Rouge Parish, Ascension Parish, East Feliciana Parish, West Feliciana Parish, Orleans Parish, Jefferson

¹ Ms. Stewart appealed the judgment granting the preliminary injunction, which was affirmed by this Court. *See Acadian Cypress & Hardwoods, Inc., v. Stewart*, 12-1425 (La.App. 1 Cir. 3/22/13), --- So.3d ---. Ms. Stewart alleged that the Agreement between the parties was null and void and therefore the injunction was invalid. She did not allege lack of conformity between the Agreement and the preliminary injunction that was issued. We note that the preliminary injunction is clearly broader than the terms of the Agreement, as it contained a non-competition provision in addition to the non-solicitation clause.

Parish, Jefferson Davis Parish, St. Charles Parish, St. John the Baptist Parish, St. Bernard Parish, Evangeline Parish, St. Landry Parish, Lafayette Parish, Iberia Parish, Washington Parish, Cameron Parish, Vermillion Parish, and Acadia Parish;

Mississippi: Pearl River County, Hancock County, Harrison County, Hinds County, Forrest County, Pike County, Stone County, and Jackson County;

Alabama: Mobile County and Baldwin County

On July 18, 2012, Acadian filed a motion for contempt, alleging that Ms. Stewart "has willfully and intentionally ignored and disregarded the lawful order of this Court." Acadian asked that Ms. Stewart be held in contempt and sanctioned for her failure to comply with the preliminary injunction. After a hearing, the trial court signed a judgment on August 13, 2012, granting the motion for contempt and "finding [Ms.] Stewart to be in contempt of court in that she has intentionally and willfully violated the preliminary injunction." The trial court ordered Ms. Stewart to pay all court costs regarding the motion. It is from this judgment that Ms. Stewart now appeals.

DISCUSSION

In her appeal, Ms. Stewart maintains that the trial court erred in granting Acadian's motion for contempt. She asserts that she did not violate the trial court's June 1, 2012 judgment granting the preliminary injunction by continuing her employment with Deano and by conducting business outside the confines of the restricted parishes encompassed by the Agreement or by conducting business in her home office located in Tangipahoa Parish, Louisiana.

Authority to punish for contempt of court falls within the inherent power of the court to aid in the exercise of its jurisdiction and to enforce its lawful orders. **Rogers v. Dickens**, 06-0898 (La.App. 1 Cir. 2/9/07), 959 So.2d 940, 945. Contempt of court is defined in LSA-C.C.P. art. 221 as "any act or omission tending to obstruct or interfere with the orderly administration of justice, or to impair the dignity of the court or respect for its authority." There are two types of contempt. A direct contempt is one committed in the immediate view and presence of the court and of which it has personal knowledge. LSA-C.C.P. art.

222. A constructive contempt of court is defined in LSA-C.C.P. art. 224(2) as any contempt other than a direct one, including willful disobedience of any lawful judgment, order, mandate, writ, or process of the court. **Charter School of Pine Grove, Inc. v. St. Helena Parish School Bd.**, 07-2238 (La.App. 1 Cir. 2/19/09), 9 So.3d 209, 224.

Proceedings for contempt must be strictly construed, and the policy of our law does not favor extending their scope. **Estate of Graham v. Levy**, 93-0636 (La.App. 1 Cir. 4/8/94), 636 So.2d 287, 290, writ denied, 94-1202 (La. 7/1/94), 639 So.2d 1167. The trial court is vested with great discretion in determining whether a party should be held in contempt for disobeying a court order, and the court's decision should be reversed only when the appellate court discerns an abuse of that discretion. **Mason v. Hadnot**, 08-2015 (La.App. 1 Cir. 2/13/09), 6 So.3d 256, 258.

The parties initially argue whether this contempt proceeding was civil or criminal in nature. If a contempt proceeding is incidental to a civil action, it is a civil matter if its purpose is to force compliance with a court order or the punishment imposed is remedial or coercive. **Rogers**, 959 So.2d at 947; **Estate of Graham**, 636 So.2d at 290. The burden of proof in a civil contempt case is by a preponderance of the evidence. **Carvajal v. George**, 07-2366 (La.App. 1 Cir. 5/2/08) (unpublished opinion); **McKee v. McKee**, 03-254 (La.App. 3 Cir. 10/1/03), 856 So.2d 135, 137. However, if the purpose of the contempt proceeding is to punish disobedience of a court order or the punishment imposed is punitive and intended to vindicate the authority of the court, it is a criminal matter and the elements of contempt must be proved beyond a reasonable doubt. **Rogers**, 959 So.2d at 947.

In this matter, the trial court's judgment finding Ms. Stewart in contempt of court ordered that she pay the court costs in connection with the motion for contempt, but did not attach any conditions or seek any specific compliance on the part of Ms. Stewart in order to purge herself of the contempt. Because this is an unconditional penalty, one that Ms. Stewart cannot affect or end, it is

criminal in nature. See **Rogers**, 959 So.2d at 947. Accordingly, we find that Ms. Stewart was adjudicated guilty of constructive criminal contempt, and, therefore, the elements of contempt had to have been established beyond a reasonable doubt.

In her appeal, Ms. Stewart argues that she did not violate the terms of the preliminary injunction. At the hearing, she testified that she was currently working for Deano, which is located in Lafayette Parish, one of the restricted parishes. She also stated that her home office was in Tangipahoa Parish, another restricted parish. When asked what she did to make sure she was in compliance with the injunction, Ms. Stewart testified:

We stayed ... within the unrestricted parishes. Basically as far as soliciting and calling on customers I abided by the parishes that are not on the non-compete. ... Now, we did turn me into more of an outside sales person so therefore when I get calls they will be in the parishes that are unrestricted. So yes, I still get calls from my home office, but I am on the road more frequent, therefore, in unrestricted parishes.

Ms. Stewart continued and stated that she transferred calls that would go into the home office to her cell phone. She stated that her understanding was that "I am not supposed to solicit business or customers in those [restricted] parishes. And so that's why when the injunction took place we stayed within the areas that are not restricted."

During cross-examination, Ms. Stewart was asked whether she had been contacted by Acadian customers within the restricted parishes since she had been working for Deano, and she responded affirmatively. Then, she was asked what she told those customers when she was contacted, and Ms. Stewart responded:

Basically, that I could not help them because they were in, because I'm in the middle of a non-compete and they were in the restricted areas.

Ms. Stewart was asked what was her understanding of the terms of the preliminary injunction, and she stated:

Basically, the way I interpret is it says do not solicit, contact customers. I think it may even say vendors in restricted parishes. So basically what we did was, we looked at the parishes that were

not on there and that is who I call on or the customers that I go see.

On redirect examination, the following exchange took place:

Q: When you got calls from these customers that you turned away, did you send them onto another sales person at Deano?

A: I told them they could call the outside salesman for that rep, or they could call the warehouse.

Q: And you gave them the phone number correct?

A: Actually nobody took me up on it. I mean --

Q: So you couldn't do it yourself, but you were willing to let someone else from Deano do what you couldn't do?

A: Redirect them to someone else? Yes.

In its written reasons for judgment, the trial court stated:

[T]he Court considered the plaintiff's motion for contempt and heard the testimony of witnesses, as well as reviewing the memorandum, case law and statutes. The Court granted the motion for contempt and found that the defendant intentionally, knowingly violated the court order in question. The order prohibited her from competing with the plaintiff's business in certain parishes, and she was in clear violation of that. She lives in Tangipahoa Parish and works from her home office in a business that directly competes with the plaintiff. Also, she has materials shipped from Lafayette Parish, where that business likewise competes with the plaintiff. She did attempt to comply with the order by not doing business in the other restricted parishes, but she knew Tangipahoa and Lafayette were restricted and yet she did business activities in those two parishes which competed with the plaintiff. For this contempt, the Court ordered the defendant to pay all of the plaintiff's costs of court.

While we tend to agree with Ms. Stewart that the trial court's interpretation of the injunction may be overly broad,² because such interpretation could effectively prevent her from engaging in her business anywhere in the United States, we nevertheless find no abuse of discretion in the trial court's finding of contempt. Ms. Stewart admitted in her testimony that she referred customers of Acadian to Deano. Clearly, this conduct was willful and intentional and constituted a violation of the non-solicitation provisions of the

² We are specifically troubled by any interpretation that placing sales telephone calls from a home office to a potential customer outside the restricted area would equate to doing business in an area from which the call was placed. In our ever-expanding technological world, such an interpretation would arguably prevent a cell phone call to a customer outside of the restricted area, but made while passing through a restricted area. This does not seem to accomplish the purpose or intent of such agreements.

injunction. Therefore, based on the record before us, we conclude that any rational trier of fact could find the essential elements of criminal contempt beyond a reasonable doubt, and we affirm the trial court's judgment.³

CONCLUSION

For the foregoing reasons, the August 13, 2012 judgment of the trial court is affirmed. All costs of this appeal are assessed to Joy Stewart.

AFFIRMED.

³ Having found a violation of the non-solicitation clause of the preliminary injunction, it is not necessary to address whether Ms. Stewart violated the non-competition provision of the injunction.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1425

ACADIAN CYPRESS & HARDWOOD INC.

VERSUS

JOY STEWART

Judgment Rendered: MAR 22 2013

On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
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Honorable Elizabeth P. Wolfe, Judge Presiding

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Joy Stewart

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

Whipple, C.J. concurs and assigns reasons.

Handwritten initials: JMC and TMT

McCLENDON, J.

The defendant appeals from a trial court judgment granting a preliminary injunction in favor of the defendant's former employer based on a non-competition agreement. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

Joy Stewart was employed by Acadian Cypress & Hardwood, Inc. (Acadian) from May 2004 through April 2012 as a sales representative and was an at-will employee at all times in which she worked for Acadian. Acadian is a supplier of domestic and imported hardwood lumber and plywood, hardware, and specialty items, as well as a manufacturer of hardwood moldings. Because of the amount of training that employees received and their exposure to confidential information, Acadian presented a non-competition and non-solicitation agreement to their key employees, mainly those in upper management and sales. Ms. Stewart signed the Non-Competition/Non-Solicitation Agreement (Agreement) in September of 2009. She continued employment with Acadian until April of 2012, when she began employment with Deano Hardwoods, LLC, a competitor of Acadian.

Acadian filed a petition for injunctive relief and damages against Ms. Stewart for her breach of the Agreement. On May 21, 2012, after an evidentiary hearing, the trial court granted Acadian's request for preliminary injunction. A judgment was signed on June 1, 2012 and provided, in pertinent part:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue herein effective until the further Order of this Court, but in no event for a period to exceed two years from April 27, 2012 and enjoining defendant, Joy Stewart, from soliciting current or former, customers or suppliers, of Acadian Cypress & Hardwoods, Inc.; and from carrying on or engaging in a business directly or indirectly, as an employee, independent contractor, owner, principal, or otherwise, that competes with Acadian Cypress & Hardwoods, Inc., specifically including, but not limited to Deano Hardwoods, LLC, where such business provides any of the following products and services: domestic and imported hardwood sales, domestic and imported plywood sales, milling services, cypress propriety products, cabinets and millwork accessories, drying services and distribution of those products. Said restrictions shall only apply within the following parishes and counties:

Louisiana: St. Tammany Parish, Livingston Parish, Tangipahoa Parish, St. Helena Parish, Iberville Parish, East Baton Rouge Parish, West Baton Rouge Parish, Ascension Parish, East Feliciana Parish, West Feliciana Parish, Orleans Parish, Jefferson Parish, Jefferson Davis Parish, St. Charles Parish, St. John the Baptist Parish, St. Bernard Parish, Evangeline Parish, St. Landry Parish, Lafayette Parish, Iberia Parish, Washington Parish, Cameron Parish, Vermillion Parish, and Acadia Parish;

Mississippi: Pearl River County, Hancock County, Harrison County, Hinds County, Forrest County, Pike County, Stone County, and Jackson County;

Alabama: Mobile County and Baldwin County; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that a preliminary injunction issue herein enjoining defendant, Joy Stewart, from disclosing names and contact information of current or former customers, names and contact information of current or former suppliers, costs, pricing, or other confidential information of Acadian Cypress & Hardwoods, Inc. (confidential information being defined as any information not freely distributed to the public by Acadian Cypress & Hardwoods, Inc. and/or information that cannot be acquired independently, without resort to confidential information that Acadian Cypress shared with Joy Stewart during her employment.) until the further Orders of this Court[.]

In her appeal, Ms. Stewart urges that the trial court erred in granting the preliminary injunction. Ms. Stewart asserts that the Agreement is void and unenforceable because: (1) the Agreement does not contain a clear and unequivocal definition for when the non-competition provisions are triggered; (2) there was no valid cause in the Agreement; and (3) the Agreement did not contain a "severability" clause which would validate otherwise valid provisions.

LAW AND DISCUSSION

Historically, Louisiana has disfavored noncompetition agreements. **SWAT 24 Shreveport Bossier, Inc. v. Bond**, 00-1695 (La. 6/29/01), 808 So.2d 294, 298. Such agreements are deemed to be against public policy, except under the limited circumstances delineated by statute. **J4H, L.L.C. v. Derouen**, 10-0319 (La.App. 1 Cir. 9/10/10), 49 So.3d 10, 13.¹

Louisiana Revised Statutes 23:921A(1) provides:

¹ Louisiana's strong public policy restricting non-competition agreements is based on an underlying state desire to prevent an individual from contractually depriving himself of the ability to support himself and consequently becoming a public burden and also based on the fundamental right of individuals to seek success in our free-enterprise society. **Vartech Systems, Inc. v. Hayden**, 05-2499 (La.App. 1 Cir. 12/20/06), 951 So.2d 247, 254.

Every contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void. However, every contract or agreement, or provision thereof, which meets the exceptions as provided in this Section, shall be enforceable.

The exceptions are found in Subsection C, which provides, in pertinent part:

Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment.

Thus, to be valid, a noncompetition agreement may limit competition only in a business similar to that of the employer, in a specified geographic area and for up to two years from termination of employment. **Cellular One, Inc. v. Boyd**, 94-1783 (La.App. 1 Cir. 3/3/95), 653 So.2d 30, 33, writ denied, 95-1367 (La. 9/15/95), 660 So.2d 449. Because Subsection C is an exception to Louisiana's public policy against non-competition agreements, it must be strictly construed. **Vartech Systems, Inc. v. Hayden**, 05-2499 (La.App. 1 Cir. 12/20/06), 951 So.2d 247, 255.

Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury if the injunction does not issue and must show entitlement to the relief sought; this must be done by a prima facie showing that the party will prevail on the merits of the case. **Vartech Systems**, 951 So.2d at 255. However, in the event an employee enters into an agreement with his employer not to compete, pursuant to LSA-R.S. 23:921, and fails to perform his obligation under such an agreement, the court shall order injunctive relief even without a showing of irreparable harm, upon proof by the employer of

the employee's breach of the non-competition agreement. See LSA-R.S. 23:921H.²

In determining whether the employer has met his burden of proof, the courts have been called on to consider the validity and enforceability of the agreement sought to be enforced by the employer. **Vartech Systems**, 951 So.2d at 255. Where the actions sought to be enjoined pursuant to a non-compete agreement do not fall within the exception found in LSA-R.S. 23:921C or where the non-compete agreement is found to be unenforceable for failure to conform to LSA-R.S. 23:921, the employer is unable to establish that it is entitled to the relief sought. **Vartech Systems**, 951 So.2d at 255-56.

Typically, a trial court enjoys considerable discretion in determining whether a preliminary injunction is warranted, and the issuance of a preliminary injunction by the trial court will not be disturbed on appeal absent a clear abuse of discretion. **Vartech Systems**, 951 So.2d at 256. However, the underlying issue in this case is whether the noncompetition agreement falls within the exception found in LSA-R.S. 23:921C. The proper interpretation of a statute is a question of law that we review on a *de novo* basis. **J4H, L.L.C.**, 49 So.3d at 14.

In the matter *sub judice*, Ms. Stewart argues that the Agreement does not contain a clear and unequivocal definition for when the non-competition provisions begin. Ms. Stewart argues that instead of tying the non-competition provisions to a date certain such as the termination of employment, the Agreement states that its provisions are triggered when her "relationship" ends. The Agreement provides, in pertinent part: "This agreement shall only restrain competition or solicitation by Employee for a period of two (2) years after Employee's *relationship with Company terminates.*" (Emphasis added). Ms. Stewart argues that "relationship" is never defined in the Agreement, and this

² Louisiana Revised Statutes 23:921H provides, in relevant part:

H. Any agreement covered by . . . this Section shall be considered an obligation not to do, and failure to perform may entitle the obligee to recover damages for the loss sustained and the profit of which he has been deprived. In addition, upon proof of the obligor's failure to perform, and without the necessity of proving irreparable injury, a court of competent jurisdiction shall order injunctive relief enforcing the terms of the agreement.