In the Missouri Court of Appeals
Eastern District
DIVISION ONE

WHELAN SECURITY CO.,	)	No. ED96394
	)	
Appellant,	)	Appeal from the Circuit Court
	)	of St. Louis County
vs.	)	
	)	
CHARLES KENNEBREW, SR., and	)	
W. LANDON MORGAN,	)	Hon. Maura Bridget McShane
	)	
Respondents.	)	FILED: November 29, 2011

Whelan Security Company ("Whelan") appeals from the trial court judgment granting summary judgment in favor of Charles Kennebrew, Sr. and W. Landon Morgan in Whelan's action to enforce restrictive covenants in their employment contracts. Whelan contends that the trial court erred in concluding that the restrictive covenants were unreasonable on their face. We reverse and remand.

Whelan is a Missouri Corporation based in St. Louis County that provides security services in a number of cities throughout the country, including Houston, Texas, and Dallas, Texas. Whelan employed Kennebrew and Morgan, and both signed employment contracts that included covenants not to compete against Whelan. Kennebrew, who had previously worked for a competitor of Whelan, executed his employment contract on November 26, 2007. Its restrictive covenants provided that:

> During the term of this Agreement, and for a period of **two (2) years thereafter**, whether the termination of this Agreement is initiated by EMPLOYER or EMPLOYEE, EMPLOYEE shall not,- without the prior

written consent of EMPLOYER, in any manner, directly or indirectly, either as an employee, employer, lender, owner, technical assistant, partner, agent, principal, broker, advisor, consultant, manager, shareholder, director, or officer, for himself or in behalf of any person, firm, partnership, entity, or corporation, or by any agent or employee:

(a) Solicit, take away or attempt to take away **any customers** of EMPLOYER or the business or patronage of any such customers or prospective customer(s) whose business was being sought during the last twelve (12) months of EMPLOYEE's employment; or

(b) Solicit, interfere with, employ, or endeavor to employ **any employees** or agents of EMPLOYER,

(c) Work for a competing business within a fifty (50) mile radius of **any location** where EMPLOYEE has provided or arranged for EMPLOYER to provide services.

(d) Work for a customer of EMPLOYER or prospective customer(s) whose business was being sought during the last twelve (12) months of EMPLOYEE's employment, if the work would include providing, or arranging for, services the same as, or similar to, those provided by EMPLOYER.

"Competing business" means any business engaged in providing guard and/or security services the same as, or similar to, those offered by EMPLOYER.

(Emphasis added). On December 8, 2006, Whelan and Morgan executed an employment agreement that also had similar covenants not to compete.[1]

[1] Morgan's agreement with Whelan provided, in part, that:

4. ***Non-Solicitation of Customers.*** During the period of Employee's employment, and for a period of two (2) years subsequent to the termination of that employment, whether said termination is initiated by Employer or Employee, Employee shall not, without the prior written consent of Employer, in any manner, directly or indirectly, …, solicit, take away, or attempt to take away the trade or patronage of any customer or perform service for any customer, of Employer or any potential customer whose trade or patronage was being sought by Employer during the last twelve (12) months of Employee's employment.

6. ***Non-Solicitation of Employees.*** Employee acknowledges and agrees that Employer invests considerable time, effort, and money in training its employees. Accordingly, during the period of Employee's employment and for a period of time of one (1) year subsequent to the termination of that employment, whether said termination is initiated by Employer or Employee, Employee shall not, without the prior written consent of Employer, in any manner, directly or indirectly, …, solicit the services of, interfere with the employment or business relationship of, employ or endeavor to employ any employee or agents of Employer.

Whelan hired Kennebrew in part because of his reputation in the security guard business, his business contacts, and his ability to attract clients, especially in Houston. Kennebrew began working at Whelan as the Director of Quality Assurance, and was assigned to Dallas in November 2007, in part to comply with a non-compete contract that Kennebrew had with his previous employer. Kennebrew's duties included managing "all operations, clients, [and] customers" and he had access to employee records, including compensation, and to Whelan's financial information. Kennebrew contacted Whelan Customers in different parts of Texas, including Houston, where he had more than ten clients with which he had strong relations.

Kennebrew submitted a letter of resignation to Whelan dated March 30, 2009, but continued to work for Whelan until August 2009. Whelan was aware that Kennebrew was starting up his own security guard company, Elite Protective Services, LLC, but believed that it was not directly competing with Whelan.

Morgan was the Branch Manager for Whelan based in Nashville and responsible for its territory in Tennessee, handling operations, sales, and marketing. He met with clients, had access to Whelan's confidential billing templates, and to client records, and employee files. He worked for Whelan until December 2008, when he resigned. He

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6. ***Non-Competition.*** During the period of Employee's employment by Employer, and for a period of two (2) years subsequent to the termination of the employment, …, Employee will not accept employment from, render services to, or otherwise engage in any business with any competing business located within fifty (50) miles of any location where Employee has provided or arranged for Employer to provide services, with any customers of Employer, or with any prospective customers of any [e]mployer whose business was being sought during the last twelve (12) months of Employee's employment, if such employment would entail providing or arranging from guard and/or security services comparable to those provided by Employer.

…

worked for a time in South Carolina, then ended up working for Kennebrew in Texas and later Tennessee.

Kennebrew actively solicited the business of Park Square Condominiums, a Whelan client in Houston in November and December 2009. On December 17, 2009, Park Square signed a contract with Kennebrew on behalf of Elite to provide security service. The following day, Morgan met with Whelan's employees at Park Square, giving them employment packets for Elite, and thereafter had regular contact with Park Square on behalf of Elite regarding security. Park Square terminated its relationship with Whelan effective January 2010, and was replaced by Elite, which retained the services of a number of Whelan security personnel who had worked at the Park Square location.

On January 4, 2010, Whelan filed a petition seeking injunctive relief against Kennebrew and Morgan, as well as damages for breach of contract, unjust enrichment, and civil conspiracy. After a hearing over a period of several days, the trial court denied Whelan's request for a preliminary injunction. Whelan filed a motion to modify, and all of the parties filed motions for summary judgment.

The trial court issued its judgment on January 7, 2011. It concluded that "the employment agreements at issue in this case, **as written**, are overbroad, not reasonable as to time and space and are therefore not valid." (Emphasis added). The trial court granted the motion for summary judgment in favor of Kennebrew and Morgan and denied Whelan's motion for summary judgment, and dismissed the case.

Whelan now appeals from this judgment.

Our review of a summary judgment is essentially de novo. ITT Commercial Finance v. Mid-America Marine, 854 S.W.2d 371, 376 (Mo. banc 1993). This Court

reviews the record in the light most favorable to the party against whom judgment was entered and accords that party the benefit of all reasonable inferences that may be drawn from the record. Id. "Facts that are set forth by affidavit or otherwise in support of a party's motion for summary judgment are taken as true unless contradicted by the non-moving party's response to the motion." Id.

In its first point relied on, Whelan contends that the trial court erred in granting summary judgment in favor of Kennebrew and Morgan on the basis that the employment agreements at issue in this case were not valid because they were overly broad and not reasonable as to time and space as written. Whelan asserts that the agreements, specifically the non-competition and non-solicitation covenants therein, are not overly broad on their face and are reasonably limited as to time and space under Missouri law. We agree.

Missouri courts recognize that public policy approves restrictive covenants in employment contracts because the employer has a proprietary right in its stock of clients and their goodwill, and if the covenant is reasonable otherwise, the court will protect the asset against appropriation by an employee. Schott v. Beussink, 950 S.W.2d 621, 625 (Mo. App. 1997). Restrictive covenants that limit a person's pursuit of his or her occupation are in restraint of trade, and in order to be valid and enforceable, they must be reasonable as to time and space. Id. at 625-26. Restraints that are temporally and spatially limited are enforceable if they are reasonable under all attending circumstances and if enforcement serves the legitimate interests of the employer. Id. at 626. The standard for determining whether the geographic scope of a restrictive covenant is reasonable is whether it is no greater than fairly required for protection. Id.

A restrictive covenant without geographic limitations is not *per se* unreasonable if the prohibition is against the solicitation of the employer's clients and customers. See id. at 626-27 "'[A]s the specificity of limitation regarding the class of person with whom contact is prohibited increases, the need for limitation expressed in territorial terms decreases.'" Id. at 627 (quoting Seach v. Richards, Dieterle & Co., 439 N.E.2d 208, 213 (Ind. App. 1982)). Accordingly, the restrictive covenants in the agreements between Whelan and Kennebrew and Morgan against soliciting clients for a period of two years are not unreasonable on their face due to the lack of spatial restrictions. Nor are they unreasonable on their face because of the two year duration; a two year restriction against soliciting clients was held to be reasonable in Schott, and as this Court observed in Alltype Fire Protection Co. v. Mayfield, 88 S.W.3d 120, 123 (Mo. App. 2002), a term of two years "is supported by the overwhelming weight of case authority."

Regarding the restrictive covenant against soliciting employees of Whelan, we note that in 2001, Missouri enacted section 431.202. This statute provides, in part, that:

> 1. A reasonable covenant in writing promising not to solicit, recruit, hire or otherwise interfere with the employment of one or more employees shall be enforceable and a restraint of trade pursuant to subsection 1 of section 416.031, RSMo, if:
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> …
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> (4) Between an employer and one or more employees, notwithstanding the absence of protectable interests described in subdivision (3) of this subsection, so long as such covenant does not continue for more than one year following the employee's employment; provided, however, that this subdivision shall not apply to covenants signed by employees who provide only secretarial or clerical services.
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> 2. Whether a covenant covered by this section is reasonable shall be determined based upon the facts and circumstances pertaining to such covenant, but a covenant covered exclusively by subdivision (3) or (4) of

> subsection 1 of this section shall be conclusively presumed to be reasonable if its postemployment duration is no more than one year.
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> …
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> 4. Nothing in this section shall preclude a covenant described in subsection 1 of this section from being enforceable in circumstances other than those described in subdivisions (1) to (4) of subsection 1 of this section, where such covenant is reasonably necessary to protect a party's legally permissible business interests.
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> …

Under section 431.202, a restrictive covenant that prohibits an employee from soliciting other employees for up to one year after the former leaves the employment of the employer is "conclusively presumed to be reasonable[,]" even if there is no issue of trade secrets, confidential information, or "customer or supplier relationships, goodwill, or loyalty." Accordingly, the restrictive covenant against solicitation of employees in Whelan's agreement with Morgan, which was limited to one year after the termination of his employment, is conclusively presumed to be reasonable. As for such a restrictive covenant that exceeds one year, while it is not conclusively presumed to be reasonable, it is also not conclusively presumed to be unreasonable, especially in light of subsections 2 and 4. The restrictive covenant in Whelan's agreement with Kennebrew against solicitation of Whelan employees is not, as a matter of law, on its face unreasonable due to its two year duration.[2] As for the lack of a geographic limitation, the rationale that applies to restrictive covenants against solicitation of customers and clients applies equally well to the solicitation of employees. Accordingly, the restrictive covenants

[2] We would observe that if the trial court were to find the two year duration of the restriction not to solicit Whelan employees was unreasonable, it could modify that restriction to make it reasonable. See Mid-States Paint & Chemical Co. v. Herr, 746 S.W.2d 613, 616 (Mo. App. 1988).

against solicitation of employees in the Kennebrew and Morgan agreements are not, as written, unreasonable due to its lack of spatial limitations.

The other restrictive covenant in the agreement at issue is the provision that Kennebrew agreed not to work for a competing business of Whelan within a fifty mile radius of any location where he provided or arranged for Whelan to provide services for a period of two years.[3] As previously noted, a duration of two years for a restrictive covenant in an employment situation is not *per se* unreasonable. Regarding the geographic limitation of fifty miles, such a distance is not *per se* unreasonable. See Silvers, Asher, Sher & McLaren, M.D.s Neurology, P.C. v. Batchu, 16 S.W.3d 340, 344 (Mo. App. 2000) (75 mile restriction not unreasonable). The appropriate inquiry is if the temporal and spatial restrictions on non-competition are reasonable under the particular circumstances of the case and serve the employer's legitimate interests. Payroll Advance, Inc. v. Yates, 270 S.W.3d 428, 435 (Mo. App. 2008). In Mid-States Paint & Chemical Co. v. Herr. 746 S.W.2d 613, 617 (Mo. App. 1988), a geographical restriction of 125 miles was held to be reasonable, with the trial court in that case finding that the original restriction of 350 miles from the employer's headquarters was reasonable. The facts and circumstances of each case are different.

Nothing in the restrictive covenants at issue in this case in the employment agreements of Kennebrew or of Morgan are, as a matter of law, unreasonable on their face. Point sustained.

[3] Whelan did not allege in its petition that Morgan violated the covenant not to compete in his agreement, noting in its brief that Whelan employed Morgan in Tennessee, and the activities at issue in this case occurred in Texas, much more than fifty miles from where he provided or arranged for Whelan to provide services. While this clause is not at issue on appeal, Whelan does submit that this provision in Morgan's agreement is also reasonable as written.

Because the holding on Whelan's first point relied on is dispositive, we need not address its remaining three points relied on. Whelan requests that this Court instruct the trial court to issue an injunction enjoining Kennebrew and Morgan from violating the terms of their employment agreements with it, beginning October 8, 2010, and enforced from the date that the trial court enters its final judgment after remand and for a two-year period thereafter. We deny this request, and hold that injunctive relief is moot because the two-year period under the restrictive covenants of the employment agreements, if valid, began on the date that the respondents were no longer employed by Whelan.[4] See Willman v. Beheler, 499 S.W.2d 770, 778-79 (Mo. 1973) (abrogated in part on other grounds by State ex rel. Leonardi v. Sherry, 137 S.W.3d 462 (Mo. banc 2004)). The two-year period has passed.

This does not mean that Whelan has no relief if the trial court on remand finds that Kennebrew and/or Morgan have violated their employment agreements. In a similar situation, the Missouri Supreme Court in Willman, 499 S.W.2d at 778, acknowledged that protracted litigation should not substantially diminish or eliminate rights entitled to enforcement from a day certain for a defined period, but noted that "the realities of the

[4] Whelan relies on Furniture Manufacturing Corp. v. Joseph, 900 S.W.2d 642, 649 (Mo. App. 1995) for its request that this Court direct the trial court to enforce the restrictive covenants of the employment agreements from the date that the trial would enter judgment after remand. Joseph relies on Southwest Pump & Machiner Co. v. Forslund, 29 S.W.2d 165 (Mo. App. 1930), a case where the injunction was entered by the trial court within a month of the defendant leaving the employment of the plaintiff, and is distinguishable from the present case. Joseph also relies on Ranch Hand Foods, Inc. v. Polar Pak Foods, Inc., 690 S.W.2d 437, 440-45 (Mo. App. 1985), a case applying both Kansas and Missouri law that is distinguishable as well, and that appears to lack authority for its holding that the plaintiff could, on remand, possibly pursue injunctive relief. The Missouri Supreme Court's opinion in Willman v. Beheler, 499 S.W.2d 770, 778-79 (Mo. 1973), and cases from all three intermediate appellate districts hold effectively that the duration of a restrictive covenant is, as a general rule, not tolled by litigation. See Paradise v. Asphalt Coatings, Inc., 316 S.W.3d 327 (Mo. App. 2010); Mihlfeld & Associates, Inc. v. Bishop & Bishop, L.L.C., 295 S.W.3d 163 (Mo. App. 2009); AEE-EMF, Inc. v. Passmore, 906 S.W.2d 714 (Mo. App. 1995); Superior Gearbox Co. v. Edwards, 869 S.W.2d 239 (Mo. App. 1993); C.M. Brown & Associates v. King, 680 S.W.2d 365 (Mo. App. 1984). See also, Willam M. Corrigan, Non-Compete Agreements--An Overview, 54 J.Mo.B. 140 (1998).

situation may not be ignored." It held that notwithstanding the wrongful breach of a restrictive covenant by the defendant, the defendant had built a business in the area in the years between the time he left a partnership and the date of the Missouri Supreme Court's decision, and that to enforce the restrictive covenant for the defined period from the date of its opinion forward "would be inequitable and unfair…because it would impose upon him a much harsher penalty" than if the restrictive covenant had been enforced from the date that he left the partnership. Id. It noted that the purpose of the restrictive covenant was to prevent financial loss to the plaintiff from competition with the defendant if the partnership failed. Id. It held that "[t]he only feasible way" to enforce the restrictive covenant in favor of the covenantee, the plaintiff, and still protect the covenantor, the defendant, from an unjust penalty was to remand the matter to the trial court for a hearing to permit the parties to present evidence on plaintiff's actual financial losses resulting from the breach of the restrictive covenant. Id. at 778-79. In contrast to Willman, where the plaintiff sought only injunctive relief, in the present case Whelan sought both equitable relief and monetary damages in its petition. Accordingly, if the trial court on remand finds that Kennebrew and/or Morgan breached the restrictive covenants of their respective employment agreements, then Whelan may recover its actual pecuniary losses due to those breaches. This would avoid the injustice of penalizing Kennebrew by effectively terminating the security guard business that he has established and built since 2009. If the restrictive covenants in the employment agreements are valid as applied, and if Kennebrew and/or Morgan violated them, then Whelan is entitled to prove its damages from those breaches.

We reverse and remand to the trial court for further proceedings in accordance with this opinion.

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CLIFFORD H. AHRENS, Presiding Judge

Roy L. Richter, J., concurs.
Gary M. Gaertner, J., concurs.