

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION**

TRI-STATE PAPER, INC.,	:	November Term 2009
Plaintiff,	:	
v.	:	No. 4078
PRESTIGE PACKAGING, INC. and	:	
DAVID FRANK,	:	COMMERCE PROGRAM
Defendants.	:	
	:	Control Number 09112675

ORDER

AND NOW, this 30TH day of December 2009, upon consideration of Plaintiff Tri-State Paper, Inc.'s Petition for Special Injunction, Defendants' response in opposition, after a hearing and in accord with the attached Opinion, it hereby is **ORDERED** and **DECREED** that the Petition for Special Injunction is **Denied**.

BY THE COURT,

MARK I. BERNSTEIN, J.

The Employee shall not request any customers of any business then being conducted or contemplated by the Company or its affiliates to curtail or cancel their business with the business or its affiliates.

The Employee shall not disclose to any person, firm, or corporation any trade, technical or technological secrets, any details of organizations or business affairs, any names of past or present customers of the Company or its affiliates or any other information relating to the business or businesses or their affiliates.

The Employee shall not solicit, canvass, or accept any business, any employee of the Company or its affiliates to terminate employment with the Company or its affiliates or to enter into any employment or other business relationship with any other person, firm or corporation.¹

Frank signed the covenant not-to-compete on September 9, 2009.² On November 9, 2009, Frank resigned from Tri-State's employ. On November 13, 2009, Frank returned all of Tri-State's belongings. On November 16, 2009 Frank began his employment as a salesperson with Prestige, a competitor in the business of providing packaging supplies to the food service industry. Tri-State made Prestige aware of the covenant not-to-compete signed by Frank. Nonetheless while working at Prestige, Frank contacted Tri-State customers.

On November 23, 2009, Tri-State filed a complaint and petition seeking a preliminary injunction to enforce the covenant not-to-compete. On December 7 and 10, 2009, the court conducted a hearing on the petition wherein evidence and testimony was presented by the respective parties.

DISCUSSION

The purpose of a preliminary injunction is to prevent irreparable injury or gross injustice by preserving the status quo as it exists or it previously existed before the acts complained of in the complaint. A preliminary injunction is an extraordinary, interim remedy which may not be

¹ Covenant Not to Compete.

² Although Frank testified that he signed the Covenant under duress, no evidence presented supports this proposition.

issued unless the moving party's right to relief is clear and the wrong to be remedied is manifest.³ A plaintiff seeking an injunction must establish that: 1) relief is necessary to prevent immediate and irreparable harm; 2) a greater injury will occur from refusing the injunction than from granting it; 3) the injunction will restore the parties to the status quo; 4) the alleged wrong is manifest and the injunction is reasonably suited to abate it; 5) the plaintiff's right to relief is clear and 6) the injunction will not adversely affect the public interest. If a petitioner fails to establish any one of these, injunctive relief will not be granted.⁴

Here Tri-State asks this court to enforce a restrictive covenant. Restrictive covenants are disfavored in Pennsylvania. They have been historically viewed as a trade restraint that prevents a former employee from earning a living. Restrictive covenants are enforceable only if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent. The law permits equitable enforcement of covenants not-to-compete only so far as reasonably necessary for the protection of the employer.⁵

To be valid, a covenant not-to-compete must be consummated contemporaneously with the exchange of consideration.⁶ If a covenant not-to-compete is executed at the inception of the employment the job itself is the consideration supporting the restrictive covenant.⁷ However,

³ Anchel v. Shea, 762 A.2d 346, 351 (Pa. Super. 2000).

⁴ Kessler v. Broder, 851 A.2d 944, 947 (Pa. Super. 2004), appeal denied, 582 Pa. 676, 868 A.2d 1201 (Pa. 2005).

⁵ Hess v. Gebhard & Co., 808 A.2d 912 (Pa. 2002)(citations omitted).

⁶ Capital Bakers Inc. v. Townsend, 426 Pa. 188, 190-91, 231 A.2d 292, 293-94 (1967); Records Center Inc. v. Comprehensive Management, Inc., 363 Pa. Super. 79, 85, 525 A.2d 433, 435 (1987).

⁷ *See e.g.*, Barb-Lee Mobile Frame Co. v. Hoot, 416 Pa. 222, 225-26, 206 A.2d 59, 61 (1965).

when the noncompetition clause is injected into an existing employment relationship, it is enforceable only if the employee received a corresponding benefit or change in status such as a promotion, a cash payment, a guarantee of job benefits, a transformation in employment classification, a stock purchase agreement, or increased commissions. In the absence of new or additional consideration, the covenant not-to-compete is unenforceable.⁸

Here, the covenant not-to-compete is not supported by adequate consideration. The evidence demonstrates that Frank signed the covenant not-to-compete 6 1/2 months after he became employed with Tri-State and 4 weeks after his salary had been increased to compensate for increased responsibilities. There is no evidence that Frank's increase in compensation was in any way conditioned upon or related to signing the covenant not-to-compete. The evidence demonstrates that Frank was a current employee asked to assume a contract with a covenant not-to-compete without any new consideration.⁹ The covenant not-to-compete is unenforceable. The Petition is denied.

The Pennsylvania Supreme Court has articulated the doctrine of unclean hands as "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."¹⁰ Here, Tri-State seeks to enforce the covenant not-to-compete as part of an independent contractor sale arrangement. The evidence conclusively demonstrated that this agreement had been intentionally entered into by all the parties with the specific intent of avoiding the payment of Pennsylvania Sales Tax, Pennsylvania Income Tax, City Business

⁸ Maintenance Specialties Inc. v. Gottus, 455 Pa. 327, 330, 314 A.2d 279, 281 (1974); Insulation Corp. of America v. Brobston, 446 Pa. Super. 520, 529, 667 A.2d 729, 733 (1995).

⁹ Tri-State also failed to prove that Frank misappropriated any confidential information.

¹⁰ Jacobs v. Halloran, 551 Pa. 350, 359, 710 A.2d 1098, 1103 (1998) (citing Shapiro v. Shapiro, 415 Pa. 503, 506-507, 204 A.2d 266, 268 (1964)).

Privilege Tax, City Wage Tax, New Jersey Sales Tax, New Jersey Income Tax and Federal Income Tax. Such conduct precludes granting the injunctive relief sought.

BY THE COURT,

MARK I. BERNSTEIN, J.