IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE

EASTERN SECTION AT KNOXVILLE

FILED

August 20, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

CSJ TRAVEL, INC.,	)	
	)	BLOUNT CHANCERY
Plaintiff/Appellant	)	
	)	NO. 03A01-9604-CH-00142
v.	)	
	)	
STEVEN PAYNE,	)	AFFIRMED IN PART;
	)	REVERSED IN PART
Defendant/Appellee	)	AND REMANDED.

L. Lee Kull, Maryville, For the Appellant

David T. Black, Maryville, For the Appellee

O P I N I O N

INMAN, Senior Judge

These parties entered into an employment agreement on August 30, 1993 for an indefinite term. Compensation was to be fixed by the Board of Directors; the defendant agreed to maintain the confidentiality of the employer's business records and, for a period of one year after the date of termination of employment and within 250 miles from Maryville, the defendant agreed that he

> will not, directly or indirectly own, manage, operate control, be employed by, participate in, or be connected in any manner with the ownership, management, operation or control of any travel agency, firm, company or other entity that in any manner solicits business from any of the accounts, clients or customers that are the accounts, clients or customers of Employer or the accounts that Employee, during the term of his employment hereunder, in any manner services, handles, or produces or that are assigned to Employee, or that in any way, directly or indirectly, competes with Employer. Employee acknowledges that the failure of Employee to comply with the terms of this paragraph would cause Employer irreparable harm, and Employee agrees that Employer shall, in addition to whatever other remedies Employer may have for any such violation by Employee, have the right to obtain immediate injunctive relief to enforce the provisions of this Section. The provision of this Section shall survive the termination or expiration of this Agreement for any reason.

The defendant was initially employed in 1990 and was trained as a travel

agent. Before the formal agreement was executed in August 1993 it was preceded by discussions concerning an agreement not to compete and to maintain the confidentiality of business records, the sale of corporate stock to the defendant and his election to the Board.

Concomitantly with the execution of the Agreement, the defendant became a shareholder and was elected to the Board.

One of the most lucrative accounts of the plaintiff was with Mastercraft, which was serviced by the defendant, who maintained a part-time office on the premises of Mastercraft, and never allowed a fellow agent to assist with its business.

Seventeen months after the Employment Agreement was executed, the defendant resigned, effective February 1, 1995, and on that date contracted for employment with HMI Travel, an agency near Washington D.C., more than 250 miles from Maryville.

This action was filed March 14, 1995 for a temporary injunction. The plaintiff alleged that the defendant violated and was continuing to violate his agreement by openly soliciting various accounts.

A hearing was held on March 28, 1995. Various witnesses testified, including the defendant, who characterized himself as an independent travel agent working out of his home initially, but presently maintaining an office in Maryville.

The Chancellor issued the injunction limited, as hereafter noted, upon finding:

! that the defendant Payne terminated his employment and submitted his resignation;

! that the defendant executed the agreement voluntarily, with full understanding and with no duress;

! that the terms of the agreement are reasonable under the circumstances and not unconscionable;

! that the agreement is supported by adequate consideration;

! that the agreement is mutually obligatory and binding;

! that the defendant was aware of the consequences that could result when he signed the agreement and must be held accountable;

! that the geographic and time limitations in the agreement are not unreasonable;

! that the employer will likely suffer economic loss by the violation of the

agreement;

! that the plaintiff sustained the allegations in the Complaint.

The Chancellor declined to enforce the contractual provisions which prohibited the defendant's employment with an entity that directly or indirectly competed the plaintiff. The provision which forbade the solicitation of customers of CSJ Travel, Inc. was enforced.

These findings of the Chancellor are presumptively correct unless the evidence otherwise preponderates. TENN. R. APP. P., RULE 13(d); *Leek v. Powell,* 884 S.W.2d 118 (Tenn. App. 1994). We think the evidence preponderates against the judgment that the contract not to compete should not be enforced.

The employer appeals, complaining of the failure of the Chancellor to enforce the agreement in its entirety and of his finding that the parties intended only to prevent the defendant from solicitation of his employer's customers.

The employee appeals, complaining that the Chancellor erred in failing to void the Agreement because it was not supported by consideration and in holding that "there is no evidence in the record that the defendant sought out CSJ's customers under the commonly understood definition of the term 'solicit'."

The findings of the Chancellor are supported by the great preponderance of the evidence, and we concur therein, but we cannot agree that the Agreement "goes too far," or that it is ambiguous. The defendant agreed that upon leaving the employment of the plaintiff he would not directly or indirectly compete with it, nor solicit its customers. He began competing one day after he terminated his employment. His argument that the erstwhile customers of the plaintiff sought his services and that he did not solicit them borders on sophistry.

Agreements not to compete are not favored and the trend is to construe them favorably to the employee. But they are not invalid *per se*, and may be enforced if they are reasonable under the circumstances. *Hasty v. Rent-a-Driver, Inc.,* 671 S.W.2d 471 (Tenn. 1984).

As stated, we agree with the Chancellor that the subject agreement is reasonable and that the continued employment of the defendant was adequate consideration. We cannot agree, however, that the covenant not to compete "goes

too far." *See Di Deeland v. Colvin,* 347 S.W.2d 483 (Tenn. 1961); *Central Adj. Bureau v. Ingram,* 678 S.W.2d 28 (Tenn. 1984). We note that the covenant was to be in force for only one year and that, as a result of his close, personal relationships with some of the plaintiff's customers, which was nurtured during his employment with the plaintiff, these customers almost immediately began doing business with him after he terminated his employment with the plaintiff.

The injunction has become a moot issue, more than a year having expired since the termination of the defendant. Because the Chancellor declined to enforce the non-compete provision, the plaintiff could not prove any damages it sustained as a result of the defendant's actions and seeks a remand for a determination of any such damages in the event this Court finds the non-compete provision to be enforceable.

We affirm the judgment with respect to the finding that the defendant solicited the plaintiff's customers in violation of the Agreement; we reverse the judgment with respect to the finding that the provision not to compete is unenforceable, and remand the case for further proof, if any, on the issue of damages, if any.

Costs are assessed to the appellee.

_____
William H. Inman, Senior Judge

Concur:

_____
Don T. McMurray, Judge

_____
Herschel P. Franks, Judge