D.N. FST CV 10-5013459 S : SUPERIOR COURT

XPLORE TECHNOLOGIES CORP. : J.D. STAMFORD/NORWALK

V. : AT STAMFORD

TIMOTHY P. KILLION AND DRS :
TECHNOLOGIES, INC. : OCTOBER 8, 2010

SUPERIOR COURT
STAMFORD-NORWALK
JUDICIAL DISTRICT
2010 OCT -8 P 3:06

MEMORANDUM OF DECISION
MOTION FOR TEMPORARY INJUNCTION AND
MOTION TO DISSOLVE INJUNCTION

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Xplore Technologies Corp., instituted this action by way of a Verifed Complaint and Application for Exparte Temporary Injunction dated July 2, 2010. This application was granted by the court, Mintz, J. on July 2, 2010. The plaintiff named as defendants Timothy P. Killion (hereinafter referred to as Killion) and DRS Technologies, Inc. (hereinafter DRS).[1] The plaintiff has filed this complaint in nine counts. Counts one and two allege a claim for breach of express written contract in regard to the employment contract and the non-disclosure agreement. Count three alleges a tortious interference of contract by DRS. Count four alleges a breach of fiduciary duty of loyalty as to Killion. Count five alleges a tortious inducement of termination of at-will employment by DRS. Count six alleges a misappropriation of trade secrets and confidential information by DRS and Killion. Count seven alleges a tortuous interference with prospective business relations as to DRS and Killion. Count eight alleges unfair competition and count nine requests injunctive relief. The plaintiff is in the business of engineering, developing and marketing rugged computer tablets. This

[1] There was testimony and argument that there are actually different entities such as DRS Technologies and DRS Tactical Systems, Inc. and that the plaintiff has brought this action against the wrong entity. However, for purposes of this motion and based upon some of the discrepancies in the documents before the court, this distinction is not dispositive of the request to prevent Timothy Killion from competitive employment.

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product is not the same as a computer or even a notebook. The product is intended for organizations that work under extreme conditions such as military or outdoor work for a company such as AT&T. The defendant, Killion, was employed by the plaintiff as a Senior Sales Representative, within Major Accounts Utility Market Northern Region from December 8, 2003 until June 2010. When first hired, the defendant signed an agreement which contains a clause captioned non-compete and a non-disclosure clause. In late June 2010, Killion announced he would be working for another organization. Thereafter, the plaintiff learned that the new position was with DRS, a direct competitor in the market for rugged computer tablets.

The plaintiff sought an ex parte injunction to prevent the defendant from beginning work with DRS. On July 2, 2010, the court, (*Mintz,* J.) entered an ex parte temporary injunction and scheduled the matter for a hearing on July 19, 2010.

The plaintiff has requested that the court enter a temporary injunction enjoining and restraining the defendant DRS from employing the defendant, Killion, for a period of one year as of June 30, 2010 or an injunction as to Killion preventing him from working for DRS, and preventing the defendants from disclosing or utilizing any confidential information regarding Xplore's business operations or other matters involving Xplore.

The court heard testimony on August 9 and August 13, 2010. Post hearing memorandum were filed simultaneously by the parties on August 23, 2010. The court finds the following facts. On December 8, 2003, Killion began employment with Xplore Technologies. Xplore is a company that engineers, develops and markets a unique product defined as a mobile computer system. The product marketed by Xplore is produced by less than a handful of computer companies. The plaintiff has indicated that its competitors in the business are Panasonic, Dell and DRS. The parties refer to the product as a rugged tablet or computer. The

product which is presently being developed and promoted has been described as a very rugged device to perform in extreme conditions (outdoors). This product is not a "Notebook" but a "Tablet" that can withstand extreme conditions to a greater degree. Groups such as military organizations and companies with outdoor work like AT&T would have need for this product. Prior to beginning employment, the defendant Killion signed a written agreement which set out terms of his employment. Within this agreement there was a clause that states in part: "By accepting this offer, you agree not to exercise or participate in any activity directly or indirectly competing with that of Xplore Technologies Corp. or its affiliates or which otherwise contradicts the company's or its affiliates' reasonable business interests for a period of one year subsequent to termination. Further, you acknowledge that you both represent and warrant that by entering into this employment relationship with Xplore Technologies, you will not be in a breach of any contractual obligation towards any other party...:" (Pl. Exh. 1). This provision has been referred to as the non competition clause by the parties. In addition to this clause, the employment agreement contained a non-disclosure clause that states in relevant part: "Each party agrees as follows: a) That it shall use all reasonable efforts to protect [Xplore's] interest in the Confidential Information and to keep it confidential; . . . c) Neither party shall disclose the Confidential Information to a third party without [Xplore's] prior written consent; d) Neither party shall use the Confidential Information in any manner except as reasonably required for the Purpose . . ." The agreement defines confidential as ". . . includes such party's trade secrets, business, technical, marketing, financial or other information such party holds confidential and has not publicly disclosed."

The defendant Killion was employed by Xplore for approximately 6 years. During this time period he was involved in the marketing, sales and development of a new product called a

rugged computer. As a part of his job duties, he was responsible for meeting and discussing the business and its products. For about three years prior to his resignation, Mr. Killion worked with a number of accounts. He spent about two-thirds of his time over the last three years wining and dining the representatives of AT&T. The plaintiff is interested in obtaining an agreement with AT&T to sell as many as 6000 units that will help resurrect its' business. DRS is a competitor of Xplore. DRS produces and markets rugged computers. The company has also initiated efforts to sell its rugged computer to AT&T. DRS employs approximately 70 employees. DRS had a 2.6 million dollar revenue last year. The AT&T project would be valued at 20 to 23 million dollars.

Sometime in May 2010, Killion was contacted directly by a friend who worked at DRS, Brian Yurkiw, to inquire if he had any interest in change of employment. Mr. Yurkiw is involved in sales with DRS Tactical Systems, including the rugged computer. He had several contacts with Mr Killion and in late May, Killion agreed to join DRS Tactical Systems. From approximately 2007, DRS Tactical Systems has been attempting to sell its rugged computer product to AT&T. Like Xplore, DRS began a dialogue and met with construction people at AT&T to learn what they could do to address the needs of AT&T. The attempts to sell a rugged computer to AT&T is ongoing. At this time, neither DRS Tactical Systems nor Xplore have entered into any agreement with AT&T. When Mr. Yurkiw hired Timothy Killion, he intended that he work on the systems in Connecticut. His position would require that he report to Mr. Yurkiw as sales manager and that he promote the companies products and services specifically this rugged computer to businesses like AT&T.

Shortly after the job offer, there were discussions between Mr. Killion and Mr. Sassower, the owner of Xplore, about his resignation. Mr. Sassower reminded the defendant of his non

competition agreement and attempted to have him remain with an offer of more compensation. Mr. Killion refused. During the course of his discussions and preparations to begin work at DRS Tactical Systems, Mr. Killion provided to DRS Tactical Systems the non compete clause at their request. After the plaintiff filed the legal action for injunctive relief, DRS Tactical Systems, Inc. offered a different employment position to Mr. Killion. This new position is to have structural boundaries to prevent communication about the AT&T project. It is also involved with a different division within the company that would not be in contact with the rugged computer marketing and sales. Mr. Killion has not begun employment with DRS Tactical Systems to this date and the plaintiff seeks an injunction to prevent any employment during the time period stated in the non compete as well as to enforce the non-disclosure agreement as it relates to DRS Technologies, Inc.

DISCUSSION

A. GENERAL STANDARD

The standard for granting a temporary injunction 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 granted he or she will suffer irreparable harm for which there is no adequate remedy at law." *Moore* v. *Ganim*, 283 Conn. 557, 569 n. 25, 660 A.2d 742 (1995). The primary purpose of a temporary injunction is to maintain the status quo until the rights of the various parties can be sorted out, after a hearing on the merits. *Clinton* v *Middlesex Assurance Co.*, 37 Conn. App. 269, 270, 685 A.2d 814 (1995). The temporary injunction is a preliminary order, granted at the outset or during the pendency of an action, forbidding the performance of matters such as threatened act. . . until the rights of the parties can be finally determined by the court. *Deming*

v. *Bradstreet*, 85 Conn. 650, 659, 84 A. 116 (1912). A party seeking injunctive relief must demonstrate that: (1) it has no adequate remedy at law; (2) it will suffer irreparable harm absent an injunction; (3) it will likely prevail on the merits; and (4) the balance of equities tip in its favor. *Waterbury Teacher's Assn.* v. *Freedom of Information Commission*, 230 Conn. 441, 446, 645 A.2d 978 (1994), *Danso* v. *University of Connecticut*, 50 Conn. Sup. 256 (2007).

The plaintiff seeking injunctive relief bears the burden of proving facts which will establish irreparable harm and the lack of adequate remedy at law. *Kelo* v. *New London*, 268 Conn. 1, 89, 843 A.2d 500 (2004), aff'd. 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) *Schlichting* v. *Cotter*, 109 Conn. App. 361, 952 A.2d 73 (2008). Moreover, "[t]he extraordinary nature of injunctive relief requires that the harm complained of is occurring or will occur if the injunction is not granted. *Tighe* v. *Berlin*, 259 Conn. 83, 87-88, A.2d (2002). 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." *Karls* v. *Alexandra Realty Corp.*, 179 Conn. 390, 402, 426 A.2d 784 (1980). Whether or not the plaintiff is entitled to relief is determined, not by the situation existing at the time of the alleged violations, but by that which has developed at the time of trial. *Loew's Enterprises, Inc.* v. *International Alliance*, 127 Conn. 415, 419, 17 A.2d 525 (1941) *Edson* v. *Griffin Hospital*, 21 Conn. Sup. 55, 63-64, 144 A.2d 341 (1958).

The instant matter involves the applicability of a non-compete agreement and as such the plaintiff argues in its memorandum that the case of *Kim's Hair Studio, LLC* v. *Rogers*, Superior Court, judicial district of Middlesex, 2005 WL 1971259 (July 20, 2005, *Aurigemma, J.)* does not require a finding of irreparable harm and lack of adequate remedy. This theory,

has been reviewed by a number of courts and the opinion of the courts has been that, "Connecticut law supports a distinctly moderated level of proof required to establish the elements of irreparable harm and lack of an adequate remedy at law necessary for the issuance of a temporary injunction where the circumstances involve an alleged breach of a noncompetition agreement." *POP Radio* v. *News America Marketing In-Store*, 49 Conn. Supp. 566, 577, 898 A.2d 863 (2005). Therefore, where it is found that there is a covenant not to compete that imposes a reasonable restraint which has been violated the elements of irreparable harm and inadequate remedy are rebuttably presumed.

Therefore, the first argument for the court to address concerns the legality and reasonableness of the covenant not to compete to determine whether the plaintiff is likely to succeed. The defendant argues that the agreement signed by him does not contain a non competition clause and thus there is no prohibition. If this is correct, then the irreparable harm and adequate remedy at law elements would require a review by this court based upon the evidence produced. The specific language in the agreement states in part that: ". . . you agree not to exercise or participate in any activity directly or indirectly *competing* with that of Xplore Technologies Corp. or its affiliates or which otherwise contradicts the company's or its affiliates reasonable business interests for a period of one year subsequent to termination. Further, you acknowledge that you both represent and warrant that by entering into this employment relationship with Xplore Technologies, you will not be in breach of any contractual obligations towards any other party, including *non-competition* restrictions and non-disclosure obligations (whether or not you consider that such restrictions, if any, are enforceable at law) with any current or former employer, which might affect or restrict your activities hereunder." (Emphasis added) Not only does the language specifically indicate that

part of the employment agreement with Xplore requires that the defendant not compete "directly or indirectly" but this language additionally emphasizes that the non compete provision is concerned with any previous position. There is clearly a restriction on competition with future employment for a year after termination. The defendant also argues that the language "to exercise" could not be interpreted to apply to other employment. However, the plain language of this paragraph that he will not participate in any activity directly or indirectly *competing* with Xplore as well as the paragraph heading "*Non-Competition Agreements*", could not make the meaning of this paragraph clearer. (Emphasis added). The argument of the defendant that this is not an enforceable agreement is further contradicted by the very actions of Killion. It is undisputed that the new employer, DRS, was concerned enough about a non compete that it requested a copy of it from the defendant. The defendant Killion responded to the proposed employer by providing it with a copy of the very agreement he claims is non- enforceable or non-existent. Additionally, before the hearing on this matter, the defendant was offered another position with the company that would remove him from the division with direct involvement for sales of the rugged computer. Based upon the facts presented to the court and the clear language of the agreement, the court finds that the defendant entered into an agreement with Xplore that specifically discussed the implications of future employment that would harm the plaintiff's business and thus there is a non-compete provision within the agreement. Therefore, the next issue before the court is whether the non-compete agreement is enforceable and in this context the court analyzes whether the plaintiff is likely to prevail on the merits and performs a balancing of the equities test. The court does not review this action pursuant to the four step temporary injunction review.

B. LIKELY TO PREVAIL ON THE MERITS

The plaintiff claims that the defendant Killion's resignation and re-employment with a direct competitor violated two distinct contractual agreements. The first is the 2003 agreement contract that states: "By accepting this offer, you agree not to exercise or participate in any activity directly or indirectly competing with that of Xplore Technologies Corp. or its affiliates or which otherwise contradicts the company's ....." The second agreement is the non-disclosure agreement in which the defendant essentially agreed to use all reasonable efforts to protect the interests of Xplore in its confidential information. The agreement specifically defines this as "trade secrets, business, technical marketing and financial" information.

The defendant argues as to the breach of contract claim, that the plaintiff is not likely to prevail on the merits of the agreement because, the contract provision referred to as the non-compete is too broad and thus unenforceable, and also that the plaintiff has failed to demonstrate a factual basis to support the remaining claims A covenant not to compete 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). "The five factors to be considered in evaluating the reasonableness of a restrictive covenant ancillary to an employment agreement 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 interest. *Robert S. Weiss & Associates, Inc.* v. *Wiederlight,* 208 Conn. 525, n.2, 546 A.2d 216 (1988). "The five prong test is disjunctive, rather than conjunctive; a finding of unreasonableness in any one of the criteria is enough to render the covenant unenforceable. *New Haven Tobacco Co.* v. *Perrelli,* supra., 534. The defendant has

argued that the plaintiff cannot satisfy these criteria for a variety of reasons that this court does not accept. The first element refers to the time of the restriction. In the instant action, the agreement precludes the non competition for a period of one year. The court finds that, given the length of employment and the specific involvement with the attempt to market this new product before other companies are able to sell similar products, a one year restriction is a reasonable period of time.

The second argument is that the geographical requirement is non-existent. However, the defendant is looking at this requirement in a very narrow form. The second element regarding the geographical area in the context of this case is actually the territory that would encompass only the rugged computer marketed by three competing companies. In the world of internet and technical advancements in the sales context a set number of miles from an office is useless. Unlike a dentist or doctor who operate a office within a certain geographical area where he or she competes for patients, the sale of computers can be done in a different manner. Mr. Killion himself testified that his work was not performed at a set location and even though the offices were in New York he was able to work from his home or the area in Connecticut. It goes without saying that in the world of marketing a new computer product, the world is at your fingertips. The plaintiff very clearly demonstrated and admitted during the testimony of Mr. Sassower that the "directly affecting" language in the covenant refers to approximately three different companies, Dell, DRS, and Panasonic that are marketing a rugged computer tablet. Therefore, the geographical area or in this instance the territory of the rugged computer is restricted only as to the three direct competitors attempting to gain the business from the same client base. In *Robert J. Reby & Co., Inc* v. *Bryne*, Superior Court, judicial district of Danbury, Docket No. CV 054004259 (July 13, 2006, *Schuman, J.*), the court upheld a restrictive

covenant that prohibited an employee from soliciting potential customers that were identified to him through leads developed in the course of his employment. In the instant matter, the defendant not only had leads with AT&T for the same sale but had many meetings, discussions and attempts to garner the business for Xplore. There is no question in any one's mind that the potential customers for this one product are limited to companies such as AT&T as well as the military. The geography is covered by the operations of the companies. In other words, the defendant could seek employment with any other computer based company for a position that is not competing for the same customer for the same product. Considering the rapid growth of the computer, notebook and tablet industry this restriction is reasonable. In other words, as the plaintiff argues, Mr. Killion could work in a number of other companies and/or for a distinctly different product that would not have the impact upon the plaintiff that was intended to be prevented by the non-compete provision. The geographical area is based upon the market area and therefore the fact that no specific miles are incorporated or calculated is not a basis to determine that the geographical area element is not satisfied. The area is the clearly defined by the product and potential customers. In *New Haven Tobacco Co.* v. *Perrelli*, supra, 18 Conn. App. 537, the court determined that a covenant that applied only to former and present customers was automatically limited in geography in that it applied to the area in which customers were located. Here, customers are very limited as noted above but even more so the competitors are limited. In following this rationale the product and client base have limited the area for purposes of competition. Therefore, the court cannot agree with the defendants' claim that without a specific area noted the covenant is presumed invalid. The contract provision is limited to the product, client base and even competitors by the very nature of Xplore's business.

The protection that is afforded through the non compete provision to the plaintiff is a reasonable and fair restriction given the uniqueness of the product and the industry. It appears reasonable that when you are working with and introducing a product that is new to the market, there will be a need to protect the new technology. The business of Xplore is dependent upon this one new product that according to Mr. Sassower will introduce them to the market and stabilize their company.

Taking the covenant as a whole, nothing on the face of the agreement renders the covenant unenforceable as a matter of law. The facts demonstrate that the covenant protects the employer in the specific area in which they do business. In fact, the purpose of the covenant is to protect employers where the "employment involves the imparting of . . . contacts and associations with clients or customers . . . [and] to restrain the use. . . of the knowledge and acquaintance so acquired, to injure or appropriate the business which the party was employed to maintain and enlarge." *May* v. *Young*, 125 Conn. 1, 7, 2 A.2d 385 (1938). Given the limited nature of the employment and the limited products of Xplore, this covenant prevents the defendant Killion from accepting employment from a very narrow group of companies that compete directly or indirectly with Xplore. As such, the plaintiff has demonstrated that it is likely to succeed on the breach of contract claim. Given this finding, the court need not review each claim as to the likelihood of success in order to find a basis for the temporary injunction and does not endeavor to do so here. However, because part of the relief requested involves the non-disclosure agreement, the court addresses this provision.

The second count alleges breach of non-disclosure of the confidential information of the company to other parties. This provision states in relevant part that : "Each party agrees. . . that it shall use all reasonable efforts to protect [Xplore's] interest in the Confidential information

and to keep it confidential. . . c) neither party shall disclose the Confidential Information to a third party without [Xplore's] prior written consent." Confidential is defined in the agreement as "party's trade secrets, business, technical, marketing, financial or other information such party holds confidential and has not publicly disclosed." Although the plaintiff testified as to possible concerns about the disclosure of confidential information by Mr. Killion, there is no sustainable evidence that would warrant the court at this time to determine that there is a likelihood of success as to these claims within the complaint. However, this does not equate to the court permitting the defendant from ignoring the enforceability of this non-disclosure agreement. The court does not find that there is sufficient information that the defendant shared strategies, business, technical, marketing, financial or other information, concerning this product or the business strategies with anyone from DRS or any other company.[2] The parties have recognized the importance of following this provision through the efforts to offer a different position to Mr. Killion. Therefore, although the success of the claim regarding a violation of this provision may not satisfy the likely to succeed elements for purposes of an injunction, the court does consider the provision for purposes of balancing of the equities.

D. BALANCING OF THE EQUITIES

Finally, the court must determine whether the balancing of equities favors granting the injunction. *Waterbury Teachers Assn.* v. *Freedom of Information Commission*, 230 Conn. 441, 446, 645 A.2d 978 (1994). The covenant not to compete is relatively specific to the work and competition with Xplore. Since the basic product of the plaintiff is limited, the defendant, Killion, has the opportunity to work for any company except in the particular division that markets or sells the rugged computer for the four companies that

[2] Both Mr. Killion and Mr. Yurkiw testified credibly and denied that any information whatsoever was exchanged between them relating to the business of Xplore and particularly the rugged computer.

are in this market. The defendant argues that because of the legal action and this challenge as to his credibility, he has lost the ability to work and support his family. The courts in Connecticut have held that the inability to work or continue in a certain path because of the allegations will be viewed to determine if the party is unduly prejudiced in being able to continue employment. In particular, the court is concerned that the individual will not be able to support himself or his family if prevented by a court order from employment. Thus the court recognizes that an overzealous application could affect an opportunity to work, especially if it is a very restrictive order. Here, the defendant cannot argue that he will be precluded from work, because his work and educational background is wide ranging. He could work for other groups selling a different computer or related products. Mr. Killion graduated from college and has worked at a number of different companies in different capacities.[3] He is capable of employment elsewhere other than this position with DRS in the division that involves the very same product being developed and marketed by Xplore. In fact, DRS Tactical Systems has offered Mr. Killion a second position in sales of a completely different product. This clearly demonstrates his marketability.

Having recognized that the defendant does not have only one employment option, the court agrees that in the balancing of the equities, the defendant will not be prevented from employment in the computer field. The court recognizes that at the present time, the defendant has been offered a new position for DRS Tactical Systems. The defendant argues that this change in divisions and sales should eliminate any need for injunctive relief because at the present time he will not be involved in direct competition with Xplore. This argument, while intriguing, does not address the reality of allowing Mr. Killion to continue unfettered without

[3] Mr. Killion began his testimony outlining his credentials and in particular that he had been involved in various areas of sales related to computers. He has a vast array of experiences which would make him marketable.

the oversight of the court. Without the filing of this request for injunctive relief, Mr. Killion was ready to begin a position that obviously utilized his prior employment to gain insight into the sales of a similar product to the same customer. The skills, knowledge, expertise and direct contact with the same customer will undoubtedly be utilized if Mr. Killion is not restricted from the first offer of employment from DRS. Without an order from this court, he will be left with the opportunity to make whatever arrangements are in his interest and ignore the interest of Xplore. His past actions indicate his willingness to ignore the non compete provision. Therefore, in balancing the equities, an order prohibiting the employment that utilizes the skill, knowledge and experience from Xplore in regard to the rugged computer is reasonable and will maintain the status quo. Additionally, since the defendants recognize the non disclosure and emphatically state that there has been no violation, an order should be entered that recognizes this agreement.

CONCLUSION

The court finds that the equities militate in favor of issuing a temporary injunction. The court orders that the defendant is temporarily enjoined from engaging in employment with DRS Technologies, Inc. or any of its parents, affliates, or subsidiaries (including DRS Tactical Systems, Inc.) solely relating to the sale of rugged computer tablets for a period of time not to exceed one year from July 1, 2010. The defendant is not enjoined from working in other capacities with DRS Tactical Systems, Inc. or other computer related companies. However, Killion may not engage in employment that would permit him to assist or be part of any involvement with the rugged computer tablet, particularly related to the negotiations or discussions concerning the rugged computer tablet. The defendant Killion is specifically enjoined from having any business contact with employees or representatives of AT&T

particularly, and any other clients he had contact with during his employment with Xplore. The defendant Killion is further enjoined from disclosing trade secrets, business, technical, marketing, financial or other information he has regarding Xplore or its products or operations, particularly related to the rugged computer tablet.

In so much as DRS Technologies, Inc., or its parents, affliates or subsidiaries, is involved in the employment of the defendant Killion, it is enjoined from employing him in a capacity that would violate the injunctive relief granted above as to him.

Based upon the above, the defendants' Motion to Dissolve the Exparte Injunction is denied.

THE COURT

Brazzel-Massaro, J.

Decision entered in accordance with the above memorandum. 10/8/10 Copies sent to all counsel of record. 10/08/10 E Condron, Asst Clerk