

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

LITIGATION MANAGEMENT, INC.)	CASE NO: CV 08 655349
)	
Plaintiff,)	JUDGE JOHN P. O'DONNELL
)	
vs)	
)	
JEAN C. BOURGEOIS, et al.)	<u>JOURNAL ENTRY</u>
)	
Defendants.)	

John P. O'Donnell, J.:

The plaintiff filed this lawsuit claiming that all nine remaining individual defendants breached confidentiality agreements and that eight of the nine defendants (excluding Jean Bourgeois) breached covenants not to compete.¹ The claims were tried to a jury. The jury returned general verdicts in favor of the plaintiff against each defendant and assessed damages at \$4,000 per individual defendant and \$45,000 against the corporate defendant. Those verdicts have since been reduced to money judgments against each defendant.

The plaintiff now asks the court to enter injunctions against the individual defendants to prevent eight of them from working for Excelas, the corporate defendant, for an amount of months equal to the time the evidence at trial showed that they each worked in violation of the non-compete agreements, and for an injunction against defendant Bourgeois to prevent her from soliciting clients of the plaintiff for twelve days because the evidence showed that she violated her non-solicitation agreement with the plaintiff for that length of time.

The question here is whether the plaintiff is entitled to injunctive relief and money damages.

¹ See the court's journal entry of April 21, 2010, for a more detailed recitation of the facts.

An injunction is an equitable remedy that should be used only when an adequate remedy at law is not available.² In determining whether to grant injunctive relief, a trial court must determine whether (1) there is a substantial likelihood that the plaintiff will prevail on the merits, (2) the plaintiff will suffer irreparable injury if the injunction is not granted, (3) third parties will be unjustifiably harmed if the injunction is granted, and (4) the public interest will be served by granting the injunction.³ Since a jury has already found in the plaintiff's favor the first element has been established and the third and fourth elements are not particularly implicated under the facts of this case, so the focus here is on the element of irreparable harm.

As ordinarily understood, an injury is irreparable, within the law of injunctions, where it is of such a character that a fair and reasonable redress may not be had in a court of law, so that to refuse the injunction would be a denial of justice.⁴ Although there is authority to suggest that money damages and prospective injunctive relief may be awarded in the same case,⁵ that result is not typical and would not be just in this case.

The plaintiff asked the defendants to agree to covenants not to compete to prevent unfair competition. Each defendant breached her agreement with the plaintiff and the unfair competition the plaintiff hoped to avoid has happened. However, each defendant has been ordered to pay damages as a result. The purpose of the damage awards is to compensate the plaintiff for the economic injury it sustained as a result of the unfair competition. In short, not

² *Davis v. Widman*, 184 Ohio App.3d 705, 2009-Ohio-5430, ¶ 29.

³ *Vanguard Transp. Sys., Inc. v. Edwards Transfer & Storage Co.* (1996), 109 Ohio App.3d 786.

⁴ *Arthur Murray Dance Studios of Cleveland v. Witter* (1952), 105 N.E. 2d 685, 702.

⁵ See, e.g., *Rogers v. Runfola* (1991) 57 Ohio St. 3d 5, where the Ohio Supreme Court ordered that a non-compete was still enforceable by injunction entered after the restrictive period expired and remanded to the lower court with instructions to determine damages for the breach to date. But the dissent noted that the equities of the case weighed against the issuance of an injunction where the defendants have operated "a functioning business which provides a needed service" for two years and the plaintiff could be compensated in damages to the extent he had been "economically injured by unfair competition."

only is an adequate remedy at law available, it has been given. The wrong of competing unfairly has been righted by the jury's award: LMI has received fair and reasonable redress.

To enforce the agreements by injunction now – almost four years after the last breach in the case of some of the defendants – would not protect the plaintiff's legitimate business interest by preventing unfair competition because the unfair competition occurred when Excelas first opened for business and was able to quickly establish itself as a competitor to the plaintiff by the efforts of the breaching defendants. Future competition by Excelas will be ordinary and fair and is not the type of competition a non-compete is designed to stifle.

The court recognizes that not enforcing an expired covenant non-competition agreement where damages have been calculated and awarded may cause some employee-plaintiffs to gamble at the expense of employer-defendants. An employee may decide to breach in the hope that the breach is not discovered for the duration of the non-compete with the expectation that the worst that can happen thereafter is a lawsuit for damages that are difficult to calculate and prove. The employer in that circumstance is stuck with having not only incurred damages but, from its perspective, continuing to incur them because the employee has never taken the "time out" from competition that the covenant required. But an employer in that situation may simply elect a remedy: damages or an injunction.

As for a 12-day injunction against defendant Bourgeois, the same reasoning applies: Bourgeois has been ordered to pay the plaintiff for breaching her non-solicitation agreement. Moreover, enforcement of an injunction that lasts less than two weeks would be at least unwieldy and at most impossible.

Because the plaintiff has been awarded damages the equities do not support the additional remedy of an injunction and the court therefore finds in favor of the defendants on the plaintiff's complaint for injunctive relief.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date

SERVICE

A copy of this Journal Entry was sent by e-mail, this ___ day of June, 2010, to the following:

Michelle Pierce Stronczer, Esq.
Shelley.stronczer@piercellegal.com

James B. Niehaus, Esq.
jniehaus@frantzward.com
Attorneys for Plaintiff

Michele Morris, Esq.
mmorris@mmorrislaw.com

William S. Pidcock, Esq.
Wspidcock1@neo.rr.com

Thomas F. Haskins, Jr., Esq.
Thas0909@aol.com
Attorneys for Defendant

Judge John P. O'Donnell