

**IN THE TENTH JUDICIAL CIRCUIT
IN AND FOR HARDEE, HIGHLANDS
AND POLK COUNTY, FLORIDA**

**CASE NUMBER: 2002CC-003090
APPEAL NO. 2002-AP-000008**

**KELLY WADE WILLYARD and
LAVERN LEROY BRADLEY,**

Appellants,

v.

**SPA CREEK SERVICES, LLC,
a Florida limited liability company,**

Appellee.

OPINION OF THE COURT

This is an appeal from the county court of Polk County, Judge Keith P. Spoto presiding. The Appellants, Kelly Willyard and Lavern Bradley, appeal the entry of an order granting preliminary injunction and setting bond in the amount of \$1,000.00 on August 8, 2002. This court has jurisdiction. Fla. R. App. P. 9.110. The ruling of the county court is affirmed.

I.

Appellee is in the business of pest control. The Appellants began working for the Appellee on March 15, 2002, when Appellee took over the company that previously employed them. As a condition of their employment, Appellants were required to sign an employment agreement that contained a covenant not to compete that would be effective for 2 years after termination of employment. Appellants ceased employment with Spa Creek on June 5, 2002 and on July 1, 2002 began their own business, known as "Total Termite and Pest Control." Appellant Willyard had substantial prior experience in the pest control business prior to working with Spa Creek and claims that Appellee did not contribute significantly to his training. Appellant Bradley had substantial prior experience in sales prior to working for Spa Creek and also claims that he did not learn anything from Appellee.

The Appellee filed a motion for preliminary injunctive relief seeking to prohibit the Appellants from engaging in the pest control business within the seven (7) county area set forth in the employment agreement. After hearing the evidence, the trial court entered an order granting the injunction and setting bond in the amount of \$1000.00. The order prohibited Appellants from engaging in the pest control business in any shape, form, or fashion in the seven (7) county area and enforced the restrictive covenant provisions of the employment agreements.

Appellants filed a motion to dissolve or, alternatively, to modify order granting preliminary injunction. The court denied the motion on October 18, 2002 and this appeal followed. Trial courts have wide discretion to grant or deny a temporary injunction, and appellate court will not intercede unless the grieving party clearly shows an abuse of discretion. Richard v. Behavioral Healthcare Options, Inc., 647 So.2d 976 (Fla. 2nd DCA 1994). Further, a trial court's ruling on a motion for injunction and, a motion to dissolve injunction comes to appellate court with presumption of correctness, and will be reversed only upon showing of clear abuse of discretion or clearly improper ruling. M.G.K. Partners v. Cavallo, 515 So.2d 368 (Fla. 4th DCA 1987).

II.

Appellants have three issues on appeal, and each will be addressed in turn. First, Appellants argue that the trial court erred in finding that Appellee's employees, customers, pricing information, and referral sources to be "legitimate business interests" subject to protection under §542.335, Florida Statutes (2001).

With respect to employees, Appellants argue that Spa Creek presented only one witness, who testified that Willyard solicited him to perform work for Appellant's company, and Appellants disputed this testimony. No other testimony was proffered concerning employee solicitation and Appellants argue that Appellee failed to carry its burden to prove its employees comprise a legitimate business interest. In response, Appellee argues that Spa Creek could not operate and would not have purchased the assets unless at least 75% of the employees remained with Spa Creek after the purchase and therefore, Spa Creek's relationship with its employees is an investment by Spa Creek and a legitimate business interest.

Concerning customers, Appellants argue that the purpose of §542.335(1) is to prevent an employee from taking advantage of a customer relationship that was developed during the term his employment. Further, the relationship contemplated under the statute is a "substantial relationship" with "specific" prospective or existing customers. Appellants contend that Appellee failed to specifically identify any customer in the record with whom it had any relationship, much less a "substantial" relationship, or identify specifically any customer with whom either of the Appellants had had contact. In response, Appellee states that Spa Creek purchased the customer list and the goodwill associated with those customers from Bray's Pest Control. Appellee claims that Appellants have attempted to wrongfully misappropriate Spa Creek's customer leads by soliciting them from its employees and consequently, Spa Creek's relationship with its prospective and existing customers is a legitimate business interest and its use against Spa Creek would amount to unfair competition.

Regarding pricing information, Appellants dispute the testimony of the Spa Creek employee who testified that Willyard attempted to gain their supplier pricing information. They also argue that under Dyer v. Pioneer Concepts, Inc., 667 So.2d 961 (Fla. 2nd DCA), it is not enough to prove that a former employee knows confidential information; the former employer must prove that the employee is using the information in his or her new job. In response, Appellee argues that Appellant Willyard intentionally misrepresented himself as a Spa Creek employee and though the supplier refused to disclose Spa Creek's confidential pricing information, it is still a legitimate business interest.

With respect to referral sources, Appellants argue that no specific referral source having any relationship, substantial or otherwise, was identified by the Appellee. Where customer relationship with employer was non-exclusive, no legitimate business interest is shown. In response, Appellee contends that it invests capital into developing and maintaining a database of those referral sources, which is an identifiable business asset Spa Creek uses to grow its database; and if these referral sources are misappropriated would give Appellants an unfair advantage.

The Court finds that the enumerated legitimate business interests listed in §542.335 are not all-inclusive. In addition, Florida courts have recognized that employees, customers, pricing information and referral sources are legitimate business interests warranting injunctive relief. Balasco v. Gulf Auto Holding, Inc., 707 So.2d 858 (Fla. 2nd DCA 1998); Open Magnetic Imaging Inc. vs. Nieves-Garcia, 826 So.2d 415 (Fla. 3rd DCA 2002); Austin v. Mid State Fire Equipment of Cent. Florida, Inc., 727 So.2d 1097 (Fla. 5th DCA 1999). Therefore, the lower court did not abuse its discretion.

III.

Second, Appellants argue that the trial court erred in failing to modify the ex parte order granting preliminary injunction as being overbroad, overlong, and not reasonably necessary to protect Appellee's legitimate business interests.

Appellants argues that the effect of the ex parte order granting preliminary injunction and the subsequent denial of Appellants' request to dismiss or modify the order was to shut down their business, prevent them from working in any county in which the Appellee conducts business, and eliminate them as a lawful competitor in the pest control business. Appellants allege that if a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, a court shall modify the restraint and grant only the relief reasonably necessary to protect such interest or interests. §542.335(1)(c). Further, Appellants argue that they received little training from the Appellee and there was no evidence presented by the Appellee that it would be irreparably harmed by Appellants being in the pest control business as long as they did not divulge pricing information, which they never obtained, or approach Appellee's employees or customers.

Appellee states that the covenant not to compete is reasonable in time, area, and line of business and, accordingly, the court did not abuse its discretion in denying the motion. Specifically, Appellee argues that (1) the enforcement period is not more than two years in duration and, therefore, by statute is not presumably unreasonable; and (2) the geographic scope of the covenant is also reasonable because it only restricts the employees from engaging in the pest control business in the seven counties in which Spa Creek currently conducts business. Appellee further contends that a court shall construe a restrictive covenant in favor of providing reasonable protection to all legitimate business interests established by the person seeking enforcement, and shall not employ any rule of contract construction that requires the court to construe a restrictive covenant narrowly, against the restraint, or against the drafter of the contract.

The only authority a court possesses over terms of covenants not to compete between employer and employee is to determine the reasonableness of time and area limitations, and the court is not empowered to rewrite valid covenants. Xerographics Inc. v. Thomas, 537 So.2d 140 (Fla. 2nd DCA 1988). A period of two years, and in some cases three years, for the enforcement of a restrictive covenant has been held to be reasonable by Florida courts. Balasco v. Gulf Auto Holding, Inc., 707 So.2d 858; Flickenger v. R.J. Fitzgerald & Co., Inc., 732 So.2d 33 (Fla. 2nd DCA 1999); Mathieu v. Old Town Flower Shops Inc., 585 So.2d 1160 (Fla. 4th DCA 1991). Furthermore, the Second District has found a covenant to be valid as to geographic area if out of 67 counties in the state, the former employee was only prohibited from working in five counties. Xerographics at 143. It is also undisputed that Appellants signed the employee agreements and covenants not to compete, that they have opened and operated a pest control business in Polk County, Florida in direct competition with Appellee within one month after ending employment. Additionally, there is sufficient evidence that Appellants wrongfully obtained customer leads from Spa Creek employees, made derogatory comments about Spa Creek to at least one of Spa Creek's current customers, and fraudulently tried to obtain confidential pricing information from one of Spa Creek's suppliers. For the foregoing reasons, the Court finds that the trial court did not abuse its discretion in denying the motion to modify the order granting preliminary injunction.

IV.

Third, Appellants argue that the trial court abused its discretion in setting the amount of the injunction bond at \$1000.00 without holding an evidentiary hearing. Appellants contend that both parties are entitled to present evidence as to the appropriate amount of bond and the trial court is required to conduct an evidentiary hearing. In response, Appellee states that Appellants failed to raise the issue of the sufficiency of the amount of the bond in their motion to dissolve or modify the preliminary injunction and at the hearing on this motion. Appellee argues that it is inappropriate for an appellate court to address the sufficiency of the bond for the first time on appeal when the aggrieved party fails to raise the issue prior to appeal. Bansal v. Bansal, 748 So.2d 335 (Fla. 5th DCA 1999). A party must obtain a ruling on an argument presented in the lower court to preserve an issue for review. Miller v. Miller, 709 So.2d 644 (Fla. 2nd DCA 1998). The Court agrees with Appellee and finds that Appellants waived their right to appeal the amount of the bond by not raising this issue before the lower court. Therefore, the trial court did not abuse its discretion in setting the amount of the injunction bond without an evidentiary hearing.

Accordingly, it is ORDERED that the ruling of the county court is AFFIRMED

ORDERED April 28, 2003.

RONALD HERRING, Chief Judge

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