THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Dove Data Products, Inc., Appellant,

v.

Jamie DeVeaux, Respondent.

Appeal From Florence County
The Hon. Thomas A. Russo, Circuit Court Judge

Unpublished Opinion No. 2008-UP-202
Heard December 12, 2007 – Filed March 24, 2008

AFFIRMED

Paul M. Platte, of Columbia, for Appellant.

Walker Coleman and Ellis Lesemann, both of Charleston, for Respondent.

PER CURIAM: Dove Data Products, Inc. (Dove Data) brought suit against Jamie DeVeaux (DeVeaux), a former employee, alleging eight causes of action: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) misappropriation of trade secrets; (4) intentional interference with contractual relations; (5) intentional interference with prospective contractual relations; (6) breach of the employee duty of loyalty; (7) violation of the South Carolina Unfair Trade Practices Act (UTPA); and (8) equitable relief. Dove Data appeals the trial court's grant of summary judgment in favor of DeVeaux on all eight causes. Dove Data additionally appeals the trial court's grant of DeVeaux's motion to dissolve preliminary injunction. We affirm.

FACTS

Dove Data is engaged in the business of the manufacture, re-manufacture, and sale of computer printer, facsimile machine, and copier supplies. For approximately nine and one-half years, DeVeaux was employed with Dove Data as a marketing representative and account manager.[1] During DeVeaux's employment, he sold toner cartridges and related products to customers in the Charleston, Myrtle Beach, and Savannah areas.

DeVeaux began working for Dove Data in August 1995. Thirteen months later, Dove Data presented DeVeaux with an "Employee Non-Compete Agreement" and "Employee Non-Disclosure Agreement." The Employee Non-Compete Agreement included a non-compete covenant, one year in duration and completely unrestricted as to geographic scope.

On January 31, 2001, over five years after the inception of DeVeaux's employment, Dove Data presented DeVeaux with a new employment agreement (Employment Agreement). DeVeaux signed the Employment

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[1] DeVeaux was an "at-will" employee at all times.

Agreement, which contained a covenant not to compete and a covenant not to disclose. The covenant not to compete provided:

> (a) [DeVeaux] covenants that he will not at any time during his employment by [Dove Data] or within a period of two (2) years after the termination of his employment with or without cause:
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> (1) . . . within [DeVeaux's] territory, engage in the business of selling, soliciting or taking orders for computer printer, facsimile machine, and copier supplies, including toner and ink products, in competition with the business of [Dove Data].
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> (2) . . . within [DeVeaux's] territory or any other area assigned to him during any part of the two (2)-year period immediately preceding the termination of his employment, sell, solicit, or take orders for computer printer, facsimile machine, and copier supplies, including toner and ink products, from any person or entity who or which shall have been a customer or account of [Dove Data's] during any part of the two (2)-year period immediately preceding the termination of his employment or who or which was actively solicited as a customer or account by [Dove Data] during the two (2)-year period immediately preceding the termination of his employment.
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> (3) . . . within [DeVeaux's] territory, solicit, divert, take away, or interfere with or attempt to solicit, divert, take away, or interfere with any of the custom, trade, business or patronage of [Dove Data] or in any manner, directly or indirectly, hire, employ, or interfere with any person who shall be employed by [Dove Data].

The Employment Agreement indicated that continued employment, which included continued access to certain information, was the consideration provided DeVeaux in exchange for entering the Employment Agreement:

> [Dove Data] hereby agrees to continue the employment of [DeVeaux] as a salesman. [DeVeaux] hereby agrees to continue in such employment. [DeVeaux] has been and will be furnished with certain data reflecting the names and addresses of present and prospective customers or accounts of [Dove Data] and [Dove Data]'s methods of selling and delivering products to said customers or accounts. [DeVeaux] recognizes and acknowledges that the above-described data is confidential information constituting a business secret and/or a trade secret of [Dove Data].

On October 14, 2004, DeVeaux filed articles of incorporation for a new company, Southpoint Products, Inc. (Southpoint). On the evening of January 23, 2005, DeVeaux faxed a resignation letter, dated January 24, 2005, to Dove Data, which read: "please consider this letter as my resignation from Dove Data Products as of 10 am today." On the afternoon of January 24, 2005, DeVeaux began to compete with Dove Data.

Dove Data filed this action alleging eight causes of action and seeking a preliminary injunction against DeVeaux. The trial court granted Dove Data's motion for preliminary injunction. Under the preliminary injunction, DeVeaux maintained the right to compete with Dove Data but was temporarily prohibited from soliciting or doing business with certain customers identified on an attached list. The injunction and attached list of customers were filed with the court.

On October 10, 2005, Dove Data filed a motion to hold DeVeaux in contempt, based on allegations that he had given a copy of the preliminary injunction order to two of Dove Data's competitors. This motion was set for a hearing on two occasions, but was continued on Dove Data's request both times. On May 3, 2006, DeVeaux filed a motion for summary judgment and motion to dissolve the preliminary injunction. A hearing was set for May 22, 2006, on all pending motions. At the hearing, both parties indicated they wished to go forward on DeVeaux's motion for summary judgment and in

the event summary judgment was not granted, Dove Data indicated it would request a third continuance of the motion for contempt.

The trial court granted summary judgment to DeVeaux on all eight causes, dissolved the preliminary injunction, and denied the motion for contempt as moot in light of the fact that there was no legal basis for the injunction. This appeal followed.

STANDARD OF REVIEW

A trial court should grant a motion for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). When reviewing a grant of a summary judgment motion, this court applies the same standard of review as the trial court. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). In determining whether any triable issues of fact exist, the reviewing court must consider all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party. Willis v. Wu, 362 S.C. 146, 151, 607 S.E.2d 63, 65 (2004).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

The moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact. Rule 56(c), SCRCP. Once the moving party carries its initial burden, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts" but "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Baughman v. American Telephone and Telegraph Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (emphasis in original) (citation omitted). The non-moving party must set forth facts, "as would be admissible in evidence," to show that a true jury issue exists. Rule 56(e), SCRCP. "Ultimate or conclusory facts and conclusions of law, as well as statements on 'information and belief' cannot be utilized on a summary judgment motion." Dawkins v. Fields, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003) (quoting Charles Alan Wright et al., Federal Practice and Procedure § 2738 (3d ed. 2007)).

LAW/ANALYSIS

Dove Data claims the trial court erred in granting summary judgment in favor of DeVeaux on Dove Data's eight causes of action.[2] Dove Data also claims the trial court erred in dissolving the preliminary injunction against DeVeaux.

I. Breach of Contract

Dove Data contends summary judgment on its breach of contract claim was improper because the trial court improperly applied the additional consideration requirement of a non-compete covenant to the non-solicitation

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[2] Additionally, Dove Data contends summary judgment as to all eight causes of action was premature because it did not have a fair and full opportunity to complete discovery. Dove Data did not object and, in fact, assented to moving forward with the summary judgment motion. A party cannot complain of a ruling, which the party itself induced or invited the trial court to make. Floyd v. Thorton, 220 S.C. 414, 426, 68 S.E.2d 334, 339-40 (1951).

clause provided in the Employment Agreement.[3] Regardless, Dove Data contends it presented evidence that it provided DeVeaux additional consideration, other than "at-will" employment, for entering the Employment Agreement.

A. Non-Compete vs. Non-Solicitation

On appeal, Dove Data claims non-solicitation covenants are separate and distinct from non-compete covenants and, as such, do not require additional consideration for support. Dove Data further contends because DeVeaux signed an earlier non-compete agreement in 1996, additional consideration was not necessary when DeVeaux signed the Employment Agreement in 2001. We disagree.

South Carolina disfavors restrictive post-employment covenants and will critically examine and construe such covenants against the employer. See Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983); Oxman v. Sherman, 239 S.C. 218, 122 S.E.2d 559 (1961); Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41-42, 455 S.E.2d 707, 708 (Ct. App. 1995). For this type of restrictive covenant to be upheld, it must be: (1) necessary for the protection of the legitimate interest of the employer; (2) reasonably limited in its operation with respect to time and place; (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood; (4) reasonable from the standpoint of sound public policy; and (5) supported by valuable consideration. Faces Boutique, Ltd., 318 S.C. at 42, 455 S.E.2d at 708. When a restrictive covenant is included in an initial contract of employment, at-will employment constitutes sufficient consideration to support the covenant. Riedman v. Jarosh, 290 S.C. 252, 349 S.E.2d 404 (1986). However, when a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.

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[3] Although the covenant not to compete in the Employment Agreement contained various post-employment restrictions, Dove Data seeks only to enforce the non-solicitation clause.

Poole v. Incentives Unlimited, Inc., 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001) (Poole II).

First, Dove Data claims there is a distinction between non-compete and non-solicitation covenants and that no South Carolina court has applied the additional consideration requirement, as discussed in Poole II, to a non-solicitation covenant. Thus, Dove Data contends the trial court's application of Poole II to this case was improper.

Dove Data correctly asserts a distinction exists between a non-compete covenant and a non-solicitation covenant. Typically a non-compete covenant prohibits an employee from competing with an employer within a specific geographic location and must be "reasonably limited in its operation with respect to time and place." Rockford Mfg., Ltd. v. Bennet, 296 F. Supp. 2d 681, 686 (D.S.C. 2003); Collins Music Co. v. Parent, 288 S.C. 91, 93, 340 S.E.2d 794, 795 (Ct. App. 1986). A non-solicitation covenant often does not contain a limitation as to place, as it restricts contacts with existing customers rather than competition within a specific geographic area. South Carolina law provides that a customer-based restriction can substitute for a limitation as to a "place" in a non-solicitation covenant. Wolf v. Colonial Life & Acc. Ins., 309 S.C. 100, 109, 420 S.E.2d 217, 222 (Ct. App. 1992) (stating that "[p]rohibitions against contacting existing customers can be a valid substitute for a geographic limitation"). We do not find any legal distinction in these standards dispositive to this matter.

Dove Data additionally claims, under this court's intermediate decision in Poole v. Incentives Unlimited, Inc., 338 S.C. 271, 274, 525 S.E.2d 898, 900 (Ct. App. 1999) (Poole I), additional consideration was not necessary in this case because DeVeaux was already subject to an existing non-compete covenant. Dove Data contends this court found in Poole I, if an at-will employment relationship already exists with a covenant not to compete, any future restrictive covenant need not be based upon additional consideration more than at-will employment. Initially, we find Dove Data erroneously interprets our holding in Poole I and ignores the holding of Poole II in which the supreme court "adopt[ed] the rule that when a covenant is entered into

after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable." Poole II, 345 S.C. at 382, 548 S.E.2d at 209. Regardless, Dove Data's argument relies on the unenforceable non-compete covenant contained in the 1996 Employee Non-Compete Agreement. The 1996 Employee Non-Compete Agreement had no geographic limitation or customer-based limitation, rendering it void and unenforceable. See, e.g., Stonhard, Inc. v. Carolina Flooring Specialists, Inc., 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005) (a restrictive covenant without a geographic limitation is void and unenforceable).

Accordingly, we find no reason to limit the additional consideration requirement, as discussed in Poole II, solely to non-compete covenants.[4] Therefore, we hold the trial court properly applied Poole II to the non-solicitation covenant contained in the Employment Agreement.

B. Consideration

Regardless of whether the trial court improperly applied Poole II to this case, Dove Data argues the trial court erred in precluding evidence of consideration given to support the non-solicitation covenant contained in the Employment Agreement. We disagree.

At trial, Dove Data argued it provided additional consideration to DeVeaux for entering the Employment Agreement. Dove Data averred DeVeaux received a $50 increase in his monthly vehicle allowance as

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[4] In fact, federal courts have already applied Poole II to non-solicitation covenants in several cases. See, e.g., Rockford Mfg., 296 F. Supp. 2d 681, 690 (citing Poole II as applicable to non-solicitation covenant); Nucor Corp. v. Bell, 482 F. Supp. 2d 714, 730 (D.S.C. 2007) (noting the rationale of Poole II and applying Rockford to non-solicitation and non-disclosure covenants).

specific consideration for the Employment Agreement.[5] Dove Data further argued the modification of the 1996 Employee Non-Compete Agreement and its alleged forbearance of rights under this agreement constituted additional consideration. The trial court found the Employment Agreement set forth the consideration that was exchanged between the parties and found it did not reference any of the additional items of consideration alleged by Dove Data. The trial court, therefore, excluded the additional items under the parol evidence rule.

On appeal Dove Data contends it was improper to exclude the parol evidence of consideration because the language of consideration used in the Employment Agreement was a "mere recital."

Under South Carolina law, the parol evidence rule excludes evidence which would give a perfectly clear agreement a different meaning or effect than that indicated by the plain language of the agreement. Taylor by Taylor v. Taylor, 291 S.C. 261, 264, 353 S.E.2d 156, 158 (Ct. App. 1987). If the writing on its face appears to express the whole agreement, parol evidence cannot be admitted to add another term thereto. Blackell v. Faucett, 117 S.C. 60, 108 S.E. 295, 297 (1921). The parol evidence rule is particularly applicable where the writing in question has an integration clause. Wilson v. Landstrom, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984) (integrated agreement cannot be varied or contradicted by parol evidence omitted from the writing).

An exception to the parol evidence rules exists "when [the] language of consideration [in an agreement] is intended as a mere recital." Iseman v. Hobbs, 290 S.C. 482, 483, 351 S.E.2d 351, 352 (Ct. App. 1986). Further, "parol evidence may be admitted to show a separate and independent agreement which is not inconsistent with the terms of a contemporaneous agreement if it can be inferred the parties did not intend the written paper to be a complete integration of the agreement." Beckham v. Short, 294 S.C. 415, 418, 365 S.E.2d 42, 43 (Ct. App. 1988).

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[5] This argument first arose in Dove Data's Rule 30(b)(6) deposition of Mark Opel (Opel), the vice-president of sales for Dove Data.

We reject Dove Data's claim that the consideration language contained in the Employment Agreement was a "mere recital." The Employment Agreement provides, "in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto covenant and agree as follows . . . ." The Employment Agreement then lists various promises Dove Data made to DeVeaux. The Employment Agreement contains no further recitals of "other consideration" that are not specifically referenced. Furthermore, the Employment Agreement contains a detailed integration clause to illustrate the parties clearly intended the Employment Agreement would be a complete integration of their agreement.

Thus, we find Dove Data's purported evidence of the existence of additional consideration for the Employment Agreement is inadmissible parol evidence and hold the trial court properly precluded such evidence.

Because the Employment Agreement, and thereby the non-solicitation covenant, was entered into after the inception of employment, separate consideration, in addition to continued at-will employment, was necessary in order for the covenant to be enforceable. See Poole II, 345 S.C. at 382, 548 S.E.2d at 209. A review of the arguments made to the trial court reveals that separate and valuable consideration, in addition to continued at-will employment, was not provided to DeVeaux for entering the Employment Agreement. Therefore, we find the trial court, in considering the specific grounds raised, properly granted summary judgment in favor of DeVeaux on the claim for breach of contract.

Further, at oral argument Dove Data presented a new additional consideration argument. Dove Data claimed the Employment Agreement's termination provision provided for a two week notice period, not contained in the earlier Employee Non-Disclosure Agreement. In addition, the termination provision provides "[Dove Data] reserves the right to substitute two (2) weeks' severance pay in lieu of two (2) weeks' previous notice in writing of termination."

Valuable consideration may consist of "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." Prestwick Golf Club, Inc. v. Prestwick Ltd. P'ship, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App. 1998). A change in an employee's contractual relationship with his employer may suffice as consideration for entering a new employment contract, when it confers a valuable benefit to the employee. See, e.g., Std. Register Co. v. Kerrigan, 238 S.C. 54, 73-74, 119 S.E.2d 533, 543-44 (1961).

The court recognizes, in this case, the change in the Employment Agreement's termination provision conferred a valuable benefit to DeVeaux. However, Dove Data failed to raise this argument before the trial court or in its appellate brief. The first time Dove Data raised the claim that a change in the termination provision sufficed as additional consideration was at oral argument before this court. Therefore, Dove Data's claim is not properly preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (holding that issues must be raised and ruled upon in the trial court to be preserved for appellate review).

II. Breach of the Implied Covenant of Good Faith and Fair Dealing

Dove Data contends summary judgment on its breach of implied covenant of good faith and fair dealing claim was improper because genuine issues of material fact exist as to the validity and enforceability of the Employment Agreement. We disagree.

A claim for breach of implied covenant of good faith and fair dealing is considered to be subsumed within a claim for breach of contract and no longer exists as an independent cause of action. RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004). Accordingly, because we find summary judgment was proper on the claim for breach of contract, we find no error in the trial court's grant of summary judgment on this claim.

III. Misappropriation of Trade Secrets

Dove Data claims summary judgment was improper on its violation of the South Carolina Uniform Trade Secrets Act (the Act) claim because it presented evidence DeVeaux misappropriated Dove Data's trade secrets. We disagree.

The Act states "[e]very employee who is informed of or should reasonably have known from the circumstances of the existence of any employer's trade secret has a duty to refrain from using or disclosing the trade secret without the employer's permission." S.C. Code Ann. § 39-8-30(B) (Supp. 2006). The Act defines misappropriation as the use of a trade secret, without consent, by a person who knew or had reason to know that his knowledge of the trade secret, under the circumstances, gave "rise to a duty to maintain its secrecy or limit its use." S.C. Code Ann. § 39-8-20(2)(c)(ii)(B) (Supp. 2006). The Act defines "trade secret[s]" as "information including, but not limited to, a formula, pattern, compilation, program, device, method, technique, product, system, or process, design, prototype, procedure, or code" that derives independent economic value from both being generally known to others who could obtain economic value from its disclosure and is the subject of efforts used to maintain its secrecy. S.C. Code Ann. § 39-8-20(5)(a) (Supp. 2006).

Dove Data contends it gave DeVeaux trade secrets, including customer and pricing lists, profit margins and operating policies, and that he is now using the information to compete directly with Dove Data. The trial court found no specific evidence DeVeaux was physically in possession of the information or that he misappropriated the information. The trial court found the only specific allegation offered by Dove Data was that DeVeaux purportedly admitted to Opel he provided two individuals with a copy of the preliminary injunction and attached list of customer names. The trial court held, assuming DeVeaux did give the document to other people, neither the preliminary injunction nor the attached customer list could constitute a trade secret because they were public court documents. Thus, the trial court found the record did not contain any specific, admissible evidence DeVeaux