

V I R G I N I A

IN THE CIRCUIT COURT OF SPOTSYLVANIA COUNTY

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| GERALD WAYNE CORBITT, | : | |
| | : | |
| Plaintiff, | : | |
| -vs- | : | CASE NO. CL09-491 |
| | : | |
| TRANG THIEN THI THAN, | : | |
| | : | |
| Defendant. | : | |
| | : | |
| - - - - - | x | |

Courtroom 1
Spotsylvania County Courthouse
Spotsylvania, Virginia

Monday, December 6, 2010

The above-entitled matter came on to be heard,
before the HONORABLE DAVID H. BECK, Judge, in and for the
Circuit Court of Spotsylvania County, in the Courthouse,
Spotsylvania, Virginia, beginning at 10:25 o'clock a.m.

On Behalf of the Plaintiff:

JASON PELT, ESQUIRE

On Behalf of the Defendant:

RICHARD H. NGUYEN, ESQUIRE

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P R O C E E D I N G S

(The Court Reporter was sworn by the Clerk of the Court.)

THE COURT: This is the case of Corbitt v. Than. Mr. Pelt, you represent Gerald Corbitt and Mr. Nguyen you represent Trang Than. Neither party is present today.

This matter is actually set for trial later this month, December 23rd.

MR. PELT: It is, Your Honor. Something I think that opposing counsel and I agree on is that of our two competing motions for summary judgment, one should be granted. I don't think there's middle ground.

Either one or the other should be granted, which would dispose of it. I may be talking out of turn, but --

THE COURT: You think yours should be granted, he thinks his should be granted?

MR. PELT: I think we both think that they should be granted. I'm trying to get to the point where one of them should be granted, which would take off the trial for the 23rd. I guess that's what I was trying to get to.

1 I'd be happy to kind of state my position.

2 THE COURT: Yes, sir. Then we'll hear from
3 Mr. Nguyen subsequently.

4 MR. PELT: Thank you, Your Honor. May it
5 please the Court, I represent Gerald Wayne Corbitt. I
6 know the Court has had an opportunity to read my motion
7 for summary judgment.

8 Just to lay out some of the facts of the case,
9 this matter comes before the Court when Mr. Corbitt is
10 suing Ms. Than for breach of contract. This is where Mr.
11 Corbitt purchased a nail salon from Mrs. Than.

12 The nail salon is called Only Nails. I would
13 refer to Only Nails as the nail salon. As part of his
14 agreement to purchase this nail salon, we turn to
15 paragraph 7 of the contract.

16 Paragraph 7 states in part the seller agrees
17 not -- and just for an interesting side note, the word not
18 is all capitalized -- to open any nail salon business or
19 related business within a ten mile radius of the Only
20 Nails business within three years from the date of this
21 bill of sale. That's paragraph 7.

22 After the bill of sale was executed, the
23 Plaintiff received information that Ms. Than had violated

1 that provision. Subsequently this complaint of breach of
2 that contract -- breach of a non compete contract --
3 pursuant to a bill of sale of the business.

4 During the discovery process, the Defendant
5 acknowledged that she worked in three different nail
6 salons within the three year period of time --

7 MR. NGUYEN: I would object to that. I
8 believe if Mr. Pelt has documentation to that effect, the
9 documentation will speak for itself.

10 THE COURT: I'm going to go ahead and hear
11 from Mr. Pelt and then we'll hear from the Defendant.

12 MR. NGUYEN: Yes, sir.

13 MR. PELT: Certainly there was discovery on
14 this exact matter. Certainly I will defer to counsel if
15 he wants to argue against it. It's through the discovery
16 process information was admitted that Ms. Than worked in
17 three different nail salons during the three year period,
18 all within the ten mile radius.

19 Based on that and that alone, Mr. Corbitt
20 comes before the Court upon his motion for judgment and
21 upon his motion for summary judgment in this matter saying
22 that based on the admitted conduct that she worked in the
23 nail salon business within a three year period of time,

1 within the ten mile radius, and upon the paragraph 7 that
2 seller agrees not to open any nail salon business or
3 related business within a ten mile radius of the nail
4 salon business within the three years of the bill of sale,
5 that there's no disputed matter, except as but for damages
6 and that would be the only disputed matter before the
7 Court.

8 The Court -- certainly this is not a unique
9 situation amongst the Courts and the Courts have to deal
10 with these. It really comes down to exactly what the non
11 compete agreement says.

12 Now, we know exactly what ours say. Under
13 Rule 3:20 it's proper for a party to make a motion of
14 summary judgment if there are no facts in dispute. Now,
15 when evaluating and determining the validity of
16 forcibility of this restricted covenant, the law is well
17 established.

18 I will tell you that Mr. Corbitt has the
19 burden here to prove it. If there's any ambiguity to the
20 term and terminology, it really falls to Ms. Than in this
21 situation and we acknowledge that.

22 That's well established with two of the big
23 cases that have been cited on both sides of the case,

1 Richard v. Paxton and Roanoke Engineering versus
2 Rosenbaum.

3 The facts before this Court though are very
4 clear that the Defendant sold a business to the Plaintiff
5 with paragraph 7 being inserted into the sales contract.
6 The restriction was of a limited time, three years, and
7 was with a limited area, ten miles.

8 So certainly the restriction is not overly
9 harsh or overly oppressive as cited in Roanoke Engineering
10 versus Rosenbaum.

11 MR. NGUYEN: Your Honor, with all due respect,
12 if I may renew my objection. This is testimony as to the
13 facts that his Plaintiff has the burden to prove, Your
14 Honor, and he's giving testimony.

15 MR. PELT: Your Honor, we are arguing a
16 summary judgment motion.

17 THE COURT: I'm going to hear from you in the
18 matter. I know you may disagree on certain points, but
19 I'm going to hear from Mr. Pelt.

20 MR. NGUYEN: Yes, sir.

21 MR. PELT: So really I think the only true
22 issue before the Court -- and I'm an attorney that likes
23 to narrow the issues. The only real issue is what the

7
1 word open means in paragraph 7. What exactly did
2 paragraph 7 intend to mean when it said she would not open
3 another nail salon or competing business?

4 It really just turns down to that actual word,
5 four letters, open. Mr. Corbitt would say open, while he
6 would concede that she did not open a new business, that
7 she did not establish a new place of business within the
8 ten miles and within the three years, but she opened and
9 worked in three other nail salons and opened from time to
10 time that business, and put herself in that stream of
11 commerce.

12 She opened herself up to that stream of
13 commerce, Your Honor. With that, Mr. Corbitt is saying
14 that she has violated the terms of paragraph 7 and that
15 the violation -- there's no facts in dispute about that
16 violation and then the only thing that this Court would
17 have to decide is damages.

18 I will address very briefly in the opposing
19 motion for summary judgment there is an argument that Mr.
20 Corbitt doesn't own Only Nails. I will address that. He
21 does not own Only Nails anymore. He has subsequently sold
22 that business.

23 His rights under paragraph 7 in that contract

1 survives him owning Only Nails anymore. Certainly that
2 contract is -- Only Nails is not a Defendant or even a
3 party to this suit. This contract was between two
4 individuals.

5 He doesn't have any interest in Only Nails,
6 however, that doesn't stop him from moving forward on this
7 breach of contract, Your Honor.

8 THE COURT: So contrary to Mr. Nguyen's
9 argument, which we'll come to in a moment, you're
10 asserting that for Mr. Corbitt, the Plaintiff, that
11 contractual provision -- that paragraph 7 that you
12 referred to -- didn't transfer over to the purchaser when
13 Mr. Corbitt sold to another purchaser?

14 MR. PELT: It didn't. Paragraph 7 is a
15 purchase agreement between two individuals. Mr. Corbitt
16 then entered into another purchase. He sold the business
17 to another person. That is a completely separate
18 contract. There would be no restrictions to the next in
19 line purchaser.

20 THE COURT: But as an asset of the business,
21 you're asserting that did not carry over? Just as if it
22 was a piece of furniture?

23 MR. PELT: It would be. It didn't. It was

1 not a -- she was under no --

2 THE COURT: Not part of the bill of sale?

3 MR. PELT: She was under no further
4 restriction to any other person or persons after Mr.
5 Corbitt sold the business. She was only restricted as to
6 Mr. Corbitt, not to any subsequent purchaser of Only
7 Nails.

8 THE COURT: Thank you.

9 MR. PELT: For those reasons, I'd be asking
10 for a summary judgment and for --

11 THE COURT: On the issue of liability?

12 MR. PELT: The issue of liability and then ask
13 that a damages hearing be set, and that damages hearing
14 does not have to be on December 23rd or whenever the case
15 is heard. The damages hearing doesn't need to be before a
16 jury.

17 THE COURT: Okay. Thank you. Mr. Nguyen?

18 MR. NGUYEN: Your Honor, may I make my
19 argument from here?

20 THE COURT: Yes, sir.

21 MR. NGUYEN: To address Plaintiff's argument,
22 under Rule 3:20, Your Honor, it's clear that we understand
23 in order for the Plaintiff to prevail on his motion for

1 summary judgment, there needs to be no material issue of
2 fact.

3 I'd like to point out those issues of fact
4 that I've reviewed are clearly in dispute and they are
5 genuinely in dispute, Your Honor.

6 I'd point the Court to the Answer and Grounds
7 of Defense filed on behalf of my client. If Your Honor
8 will review paragraph 7, 8 and 9, in which the Defendant
9 denied the allegations as to the breach of that clause
10 that caused damages to the Plaintiff, et cetera, that's
11 clearly an issue in dispute.

12 That's something Mr. Pelt, the Plaintiff, has
13 not addressed. He mentions discovery vaguely. I haven't
14 seen a pleading or an admission before the Court that
15 would prove that.

16 Under Rule 3:20, the Court must look at the
17 pleadings, orders and admissions in order to rule on
18 summary judgment. Deposition transcripts and things of
19 that nature are not admissible.

20 Your Honor, on an evidentiary or a substance
21 level, we would argue that there's nothing before the
22 Court to show the admissions Mr. Pelt claims were made by
23 my client.

1 Furthermore, the ten mile radius, that's a
2 conclusion made by the Plaintiff that we've seen no
3 evidence of. The names of the locations and even what
4 admissions were made, we don't see where that was
5 substantiated.

6 In page 2 of the answer, Your Honor, my client
7 has asserted two affirmative defenses, the first of which
8 being what Mr. Pelt touched upon in enforcibility of the
9 contract, if there's a reasonableness, which Mr. Pelt --

10 THE COURT: Which goes to the burden?

11 MR. NGUYEN: Yes, Your Honor, which goes to
12 the burden upon the Plaintiff at trial to prove -- which
13 in the Plaintiff's own motion they cite what that is, to
14 prove the reasonableness, how it isn't more -- I'll
15 reference the Plaintiff's motion and I'll cite what it
16 says there.

17 It says the employer bears the burden to show
18 that the restraint is no greater than necessary to protect
19 a legitimate business interest. It's not unduly harsh or
20 oppressive in compelling any employee's ability to earn a
21 livelihood and it's reasonable.

22 These are the factual allegations the
23 Plaintiff must prove at trial or today through admissions,

1 which they have not yet done, Your Honor.

2 We suggest to the Court that that doesn't
3 attest to any of this, other than the Plaintiff's
4 testimony, which we've objected to.

5 Your Honor, we would point the Court to the
6 Stoneman case, Stoneman versus Wilson, 169 VA 239, Your
7 Honor. I have copies of that for Your Honor.

8 (Whereupon, Mr. Nguyen passed documents to the
9 Court and to counsel for their examination.)

10 MR. NGUYEN: This is a case we believe is
11 directly on point. It deals with the business sale
12 between two parties in which there was a non compete
13 clause of similar drafting to the one at issue.

14 Would you like time to read that or may I --

15 THE COURT: Let me just refer to the -- you
16 know, you've given me a very thorough written argument for
17 your summary judgment. I think you're going to the first
18 portion of your summary.

19 MR. NGUYEN: Yes, Your Honor.

20 THE COURT: Go ahead.

21 MR. NGUYEN: It clearly shows the analysis the
22 Virginia Supreme Court made in reviewing the agreement,
23 that agreement stated that the restricted party would not

1 delve into I believe the hardware business. That's
2 similar in category to this, will not open a nail salon
3 business. It's ambiguous, Your Honor.

4 As the Plaintiff has admitted -- has conceded
5 that -- but any ambiguity should be construed in favor of
6 the employee or the Defendant in this case, my client.

7 Your Honor, under the similar facts of
8 Stoneman and their conclusion, the Court held that in
9 order to be restricted by the seller in this case, it was
10 that they could not occupy the same position in another
11 business. That's what they looked at. They looked at
12 what they didn't do in the past and though they did that
13 in the future.

14 We'd argue that the Plaintiff has shown really
15 no admissions or pleadings that would attest to what my
16 client is doing. The Plaintiff has conceded that they
17 have not started a new business, Your Honor.

18 They said with that concession made under the
19 Stoneman holding, that if they have not opened a business
20 in which they were the owner before, they cannot be in
21 violation of this non-compete option.

22 That's something that is clearly set forth by
23 the case cited in the brief, Your Honor, the Burchell

1 versus Capital City Dairy, Your Honor, another Virginia
2 Supreme Court case.

3 That case has very similar facts, Your Honor.
4 The Court determined that the party had sold its business
5 to another party, that business and its assets being in a
6 non compete agreement, stated that that asset -- that non
7 compete agreement -- went with the sale.

8 It didn't even have to be spelled out
9 specifically in that sales agreement, that subsequent
10 sale, to be transferred. In this case, Mr. Pelt has
11 acknowledged that's happened. We have a request for
12 admissions that we've attached to our motion, which admits
13 that they sold their entire interest and all their
14 interest in this Only Nails business to another party.

15 We've tried to locate the identity of that
16 party. We've tried to do it through a request for
17 production.

18 THE COURT: In the request for admissions, you
19 said admit or deny that you conveyed all your interest in
20 the business.

21 MR. NGUYEN: Yes, Your Honor. That's exactly
22 right. We would submit that as an exhibit, our cross
23 motion for summary judgment.

1 In conclusion, Your Honor, clearly under the
2 Burchell holdings, it shows that a party that has conveyed
3 all its interest of a business, that this includes the non
4 compete agreement, they don't have standing to enforce
5 that agreement.

6 It's very clear that they have no standing in
7 this above the other arguments that I've presented, Your
8 Honor. We'd ask that the Plaintiff's complaint as amended
9 be dismissed with prejudice, Your Honor, based on all of
10 the above --

11 THE COURT: Grant your client's summary
12 judgment on both liability and damages?

13 MR. NGUYEN: Yes, Your Honor.

14 THE COURT: Going back to the first prong of
15 your argument, you're focusing on the same word -- it's
16 the same word, both of you -- in that paragraph 7 of the
17 agreement.

18 Then relying on the Stoneman case?

19 MR. NGUYEN: Yes, Your Honor. We submit based
20 on the Plaintiff's interpretation of the word open, that
21 interpretation is overly broad and as such that
22 interpretation is not enforceable.

23 THE COURT: And Mr. Pelt acknowledges that

1 document needs to be read in favor --

2 MR. NGUYEN: As strictly construed --

3 THE COURT: Strictly construed and construed
4 in favor of your client, who was the seller in this
5 matter.

6 MR. NGUYEN: Yes, Your Honor.

7 THE COURT: Pursuant to the written opinion in
8 the Roanoke Engineering case.

9 MR. NGUYEN: Yes, Your Honor. The case cited
10 by the Plaintiff in his motion.

11 THE COURT: Is that everything?

12 MR. NGUYEN: Yes, Your Honor.

13 THE COURT: Mr. Pelt, anything final?

14 MR. PELT: Just briefly, Your Honor. I was
15 under the impression that Mr. Nguyen was in my -- we did
16 some robust discovery in this. I was under the impression
17 that Mr. Nguyen would stand by his discovery answers that
18 Ms. Than worked --

19 THE COURT: It's admissible in summary
20 judgment?

21 MR. PELT: What's that? I'm sorry, Your
22 Honor.

23 THE COURT: No, you go ahead.

1 MR. PELT: I was under the impression that Mr.
2 Nguyen was admitting these facts. And maybe he's not now,
3 and maybe Ms. Than would go back on those discovery --
4 what she -- the information she provided in discovery.

5 If that's the case, Your Honor, then certainly
6 that would be a disputed fact for a fact finder to look
7 at, Your Honor.

8 If the Court finds some weight to the
9 Defendant's motion that the Plaintiff lacks standing in
10 this matter, certainly that wouldn't be a summary
11 judgment. That would be a motion to dismiss, Your Honor.

12 THE COURT: Then I understand that your client
13 takes the position that that would be -- by my questions
14 to you -- a factual matter that would be in the words of
15 the summary judgment a matter that is genuinely in
16 dispute.

17 MR. PELT: Yes, sir.

18 So certainly if there is a standing issue and
19 we need more parties to protect the Defendant -- because
20 certainly the Defendant has the right to have all of the
21 plaintiffs come before and fight this case at one time.

22 If we needed more plaintiffs on this side of
23 the table, that would be a motion to dismiss without

1 prejudice and certainly the Plaintiff then could seek to
2 find these other potential plaintiffs.

3 I don't think that's the case. When you look
4 at the bill of sale, it was a bill of sale between one
5 person to another person. It was not contemplated that
6 the business Only Nails was ever a party to that.

7 Certainly Mr. Gerald Corbitt held that right
8 of the non compete and he held that. When he sold that
9 business, that right did not transfer. But I'll leave it
10 to the Court to determine.

11 THE COURT: Thank you.

12 MR. NGUYEN: If I may, Your Honor. My client
13 stands by any discovery responses that she's provided.
14 The burden is on the Plaintiff to submit to the Court the
15 basis for his motion, Your Honor. I addressed that
16 initially.

17 We believe the standing issue is important,
18 but the substantive legal issues in the provision were
19 noted, we believe that's dispositive of the motion.

20 THE COURT: Gentlemen, thank you very much.
21 That's the Court's conclusion in this matter and let me
22 provide it to you. I'm going to ask Mr. Nguyen to prepare
23 this order.

1 First, with regard to the Plaintiff's motion
2 for summary judgment, it's denied. I adhere -- and I
3 accept that there are -- when we look solely at the
4 Plaintiff's summary judgment motion, there are material
5 facts genuinely in dispute, which Mr. Nguyen asserts.

6 But likewise, when you look at the second
7 prong, Mr. Nguyen, of your client's summary judgment
8 motion that your client asserts, that is the sale of the
9 business and the transfer on of this covenant not to
10 compete and consequently the standing issue, I'm going to
11 deny that as well because there are material facts in
12 dispute from the Plaintiff's point of view.

13 What was conveyed to the subsequent purchaser
14 in the Court's mind -- I understand the cases cited, the
15 Burchell case, the Defendant clearly digging into the
16 facts of what Mr. Corbitt conveyed off, genuine facts
17 materially in dispute.

18 But then we come to the first prong of Mr.
19 Nguyen's client's motion for summary judgment. It cuts
20 right to the liability and the damages. It's this word
21 open.

22 As Mr. Pelt can agree and the Court would
23 acknowledge with regard to his client's position, that

1 language must be certainly construed and in the event of
2 any ambiguity has to be construed in favor of Mr. Nguyen's
3 client.

4 Then we look at the acknowledgments of fact
5 that are set forth in the Plaintiff's motion. Those
6 acknowledgments of fact make it clear to the Court that
7 interpreting the word open in this context, strictly
8 construing it against Mr. Corbitt and resolving any
9 ambiguity in favor of Mr. Tran (sic), that it's
10 appropriate to grant summary judgment pursuant to the
11 principles in Richardson, Roanoke Engineering and the
12 Stoneman case that you cite on behalf of your client under
13 those principles that this word open contemplated where an
14 owner -- that is, Ms. Tran (sic), your client, sold the
15 business to Mr. Corbitt.

16 She was the owner, that's an acknowledged
17 fact, Only Nails. She did not become owner of any
18 subsequent business. She merely worked. I find that the
19 limitation of time, three years, and the limitation in
20 range, ten miles, is appropriate and not an undue burden.

21 But it's clear that the word open in the
22 Court's mind and in the context of those three cases that
23 we have that both of you made mention of and recognize,

1 means that I would need to have -- and acknowledged in the
2 Plaintiff's argument for summary judgment is that Ms. Tran
3 (sic) did not open a business.

4 She worked in three other nail salons. So I'm
5 going to grant the first summary judgment on that first
6 prong, Mr. Nguyen, of your client's motion for summary
7 judgment on both the issue of liability and the issue of
8 damages, because what did open mean? Interpreting that
9 word under these cases.

10 So if you would prepare that order.

11 Gentleman, this concludes that matter set for December
12 23rd and it shall be removed from the docket for that day.
13 The Clerk's going to let the jury coordinator know.

14 MR. NGUYEN: Thank you, Your Honor. I have
15 order prepared, Your Honor.

16 THE COURT: You have an order prepared?

17 MR. NGUYEN: Yes, sir. If I could make one
18 correction. My client's name is Ms. Than, T-H-A-N, not
19 Tran, just for the reporter.

20 THE COURT: I apologize. The court reporter
21 can correct that the Defendant's name is Ms. Than,
22 T-H-A-N.

23 MR. NGUYEN: Thank you, Your Honor.

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THE COURT: Sorry about that.

* * * * *

(Whereupon, at approximately 10:52 o'clock
a.m., the hearing in the above entitled hearing was
concluded.)

* * * * *

CERTIFICATE OF COURT REPORTER

I, MICHELLE L. MOLL, a Verbatim Reporter, do hereby certify that I took the stenographic notes of the foregoing proceedings and thereafter reduced the same to typewriting; that the foregoing is a true record of said proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were held; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of the action.

MICHELLE L. MOLL
VERBATIM REPORTER