

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**  
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**  
**CIVIL TRIAL DIVISION**

J.J. WHITE, INC.	:	DECEMBER TERM, 2008
	:	
Plaintiff,	:	No. 3889
	:	
v.	:	(Commerce Program)
	:	
JOHN F. BURKE	:	Superior Court Docket
	:	No. 2051 EDA 2009
Defendant.	:	

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**OPINION**

**Albert W. Sheppard, Jr., J. .... August 25, 2009**

This Opinion is submitted relative to the appeal of plaintiff, J.J. White, Inc., from this court’s Order dated June 9, 2009. That Order denied plaintiff’s Motion for Preliminary Injunction against defendant, John F. Burke, seeking to enforce a restrictive covenant.

As a result of the June 9, 2009 Order, John F. Burke (“Burke”) may continue his employment with Nooter Construction Company (“Nooter”).

For the reasons discussed, this Court respectfully submits that its decision should be affirmed.

## BACKGROUND

J.J. White, Inc. (“White”) was founded in 1920 and functions as a single-source, multi-trade contractor with experience in varying disciplines, including mechanical construction, general construction, and construction management.<sup>1</sup> White provides these services to clients in the Mid-Atlantic region.<sup>2</sup> Burke was originally employed with White as a steamfitter. However, in 1989 his role was altered, and Burke took on a position as a Project Manager in White’s Mechanical Group.<sup>3</sup> In 1994, Burke was elevated to the position of Vice-President, Mechanical Group, and was the senior executive responsible for submitting cost estimates to potential White customers.<sup>4</sup> As part of his employment, Burke had occasion to meet face-to-face with White customers to discuss deliverables, costs and change orders.<sup>5</sup>

On September 12, 2006, Burke executed a Confidentiality and Restrictive Covenant Agreement (“Agreement”) with White.<sup>6</sup> Burke received a payment equal to five percent (5%) of his base salary as consideration for signing the Agreement.<sup>7</sup> The Agreement restricts Burke from working for a competitor of White, in any state in which White operates, for two (2) years following a severing of the employment relationship.<sup>8</sup>

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<sup>1</sup> Motion for Preliminary Injunction, p. 3.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at p. 4.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at p. 5.

<sup>7</sup> *Id.*

<sup>8</sup> Agreement, pp. 1-2, §2. Restrictive Covenant (09/12/2006).

In addition, Burke may not use, take, retain or disclose confidential White information without written consent from White.<sup>9</sup> Lastly, Burke cannot solicit any White customer or employee for two (2) years following separation from White.<sup>10</sup>

In late 2007, Burke's responsibilities at White were scaled back due to claims of ineffective leadership, inability to take direction well, and a lack of accountability for not meeting expected goals.<sup>11</sup> These failures, according to White's president, James J. White, IV hurt the bottom line of the company, and had a "cancerous effect" on other senior management at White.<sup>12</sup> Burke's deficiencies were further highlighted by his job performance on the "Dominion Project;" a project about which James J. White stated that Burke was singularly responsible for the "worst project financial performance in the company's 89 year history."<sup>13</sup> On September 4, 2008, Burke was fired.<sup>14</sup>

Following his termination, Burke was offered, and accepted, employment with Nooter as a contract engineer beginning October 6, 2008.<sup>15</sup> White filed a Writ of Summons on December 22, 2008, and on January 28, 2009, White filed a Complaint against Burke.<sup>16</sup> On February 20, 2009, White filed a Motion for Preliminary Injunction alleging Burke's employment with Nooter was a violation of the Agreement. In an Order

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<sup>9</sup> *Id.* at p. 1, §1 Nondisclosure of Confidential Information.

<sup>10</sup> *Id.* at p. 2. §3 Non-Solicitation.

<sup>11</sup> Deposition of James J. White, IV, 03/31/2009, pp. 55-57.

<sup>12</sup> *Id.* at pp. 58-59.

<sup>13</sup> *Id.* at pp. 77-79.

<sup>14</sup> Motion for Preliminary Injunction, p. 6.

<sup>15</sup> Deposition of John F. Burke, April 3, 2009, pp. 224-226.

<sup>16</sup> Motion for Preliminary Injunction, p. 1.

dated June 9, 2009, this court denied White's Motion for Preliminary Injunction. The instant appeal followed.

## DISCUSSION

The purpose of a preliminary injunction is to "preserve the *status quo* and to prevent imminent and irreparable harm that might occur before the merits of a case can be heard and determined."<sup>17</sup> An injunction will be granted if a party can show that:

- 1) relief is necessary to prevent immediate and irreparable harm;
- 2) a greater injury will occur from refusing the injunction than from granting it;
- 3) the injunction will restore the parties to the status quo;
- 4) the alleged wrong is manifest and the injunction is reasonably suited to abate it; and
- 5) the plaintiff's right to relief is clear.<sup>18</sup>

A covenant not to compete is a restrictive covenant that is used by employers to shield their protectible (sic) business interests."<sup>19</sup>

In Pennsylvania, restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent.<sup>20</sup>

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<sup>17</sup> Ambrogio v. Reber, 932 A.2d 969, 976 (Pa. Super. 2007).

<sup>18</sup> *Id.*

<sup>19</sup> J.C. Ehrlich Co., Inc. v. Martin, 2009 Pa. Super 127, p. 6. (July 9, 2009)(quoting Hess v. Gebhard & Co., Inc., 808 A.2d 921, 917 (Pa. 2002).

<sup>20</sup> *Id.*

In order to determine whether a restrictive covenant should be enforced, the court must apply a balancing test that weights the protectable interest of the employer against the employee's continued ability to earn a living in his/her chosen profession.<sup>21</sup>

Here, White argues that a preliminary injunction is appropriate because Burke has breached the confidentiality and non-compete provisions of the Agreement through his employment with Nooter.<sup>22</sup> Specifically, White argues that Burke is subject to an enforceable agreement which prohibits him from working for a White competitor within any state that White operates for two (2) years following his employment termination.<sup>23</sup> Nooter, White contends, is a direct competitor that is located within White's sphere of operations.<sup>24</sup> White further argues it is highly likely Burke has already disclosed or used White confidential information in conjunction with his position at Nooter, and if he has not done so already, it will inevitably occur in the immediate future.<sup>25</sup>

This court has concluded that White has not adequately demonstrated the necessary requirements for application of a preliminary injunction.

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<sup>21</sup> *Id.*

<sup>22</sup> Motion for Preliminary Injunction, p. 9.

<sup>23</sup> *Id.* at pp. 9-10.

<sup>24</sup> *Id.* at p. 10.

<sup>25</sup> *Id.*

In order to succeed in a motion for preliminary injunction, a party must show they are in danger of immediate and irreparable harm. White has not done that here. In particular, White has not specifically identified any instance where Burke has disclosed or used confidential White information, nor has White shown a reduction in customer base as a result of Burke's employment with Nooter. These sentiments are echoed by reviewing an excerpt from White's deposition testimony:

**Q.** Let me ask it this way: Do you have any knowledge that Mr. Burke possesses any [proprietary and confidential] electronic or written documents of the type that you have just enumerated?

**A.** No.

**Q.** Are you aware of anyone at J.J. White that believes that?

**A.** No.<sup>26</sup>

In addition to White's testimony, Burke also was deposed and made the following statements:

**Q.** Are you following the terms of the Agreement today?

**A.** I feel I am.

**Q.** And why do you feel that you are?

**A.** Because I'm not using any confidential information. I'm not dealing with any customers that weren't already customers of Nooter.<sup>27</sup>

White's argument is further weakened by an inability to precisely identify what confidential materials are at risk of disclosure beyond a general statement claiming what Burke "possesses in his mind is proprietary and confidential information acquired over

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<sup>26</sup> Deposition of James J. White, IV, 03/31/2009, p. 121.

<sup>27</sup> Deposition of John F. Burke, April 3, 2009, p. 314.

years of having been in our employ.”<sup>28</sup> This failure, coupled with an inadequate showing of lost customers and revenue, lead this court to believe White is not at risk of immediate and irreparable harm. Therefore, the first requirement for application of a preliminary injunction has not been met.

The second requirement for granting a preliminary injunction specifies that a greater injury will occur from refusing the injunction than granting it. Here, White has not demonstrated the irreparable harm it will suffer if Burke is allowed to continue in the employ of Nooter. In the alternative, it is clear to this court that, if the injunction is granted, Burke will be severely limited geographically in his ability to find employment in his chosen profession. Specifically, Burke will be restricted from working in any of the eight (8) states White conducts business.<sup>29</sup> Moreover, at age fifty-six (56), Burke will be forced to pursue a different line of work rather than earn a livelihood in the field to which he has devoted a significant portion of his life. This imbalance in potential harm weighs in favor of Burke, and is part of the reason this court concludes the granting of the injunction is inappropriate.

Lastly, post-employment restrictive covenants are subject to a heightened level of scrutiny because there is a “historical reluctance on the part of our courts to enforce any contracts in restraint of free trade, particularly where they restrain an individual from earning a living at his trade.”<sup>30</sup> The Brobston Court further concluded that it is

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<sup>28</sup> Deposition of James J. White, IV, 03/31/2009, p. 120.

<sup>29</sup> *Id.* at pp. 213-14.

<sup>30</sup> Insulation Corp. of America v. Brobston, 667 A.2d 729, 733 (Pa. Super. 1995).

“unreasonable as a matter of law to permit the employer to retain unfettered control over that which it has effectively discarded as worthless to its legitimate business interests.”<sup>31</sup>

The court’s analysis in Brobston applies directly to the matter at hand. White terminated Burke for numerous reasons, including ineffective leadership, inability to take direction well, and a lack of accountability for not meeting expected goals.<sup>32</sup> In addition, it is White’s position that Burke is responsible for the biggest financial failure in the company’s eighty-nine (89) year history,<sup>33</sup> and that these cumulative failures hurt the bottom line of the company, and had a “cancerous effect” on other senior management at White.<sup>34</sup> It is the position of this court that White cannot retain complete control over Burke, an employee White has labeled as cancerous to the company, particularly after having fired him for his failure to meet his job obligations and for his role in the financial disaster that was the “Dominion Project.”<sup>35</sup>

In summary, White’s Motion for Preliminary Injunction was correctly denied.

### **CONCLUSION**

For these reasons, this court respectfully submits that the Order entered June 9, 2009 denying White’s Motion for Preliminary Injunction should be affirmed.

**BY THE COURT:**

**ALBERT W. SHEPPARD, JR., J.**

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<sup>31</sup> *Id.* at 735.

<sup>32</sup> Deposition of James J. White, IV, 03/31/2009, pp. 55-57.

<sup>33</sup> *Id.* at pp. 77-79.

<sup>34</sup> *Id.* at pp. 58-59.

<sup>35</sup> *Id.* at pp. 82-83.