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

REPORTING SERVICES ASSOCIATES, INC. and Lee Goldstein, Plaintiffs,	:	June Term, 2003
	:	No.: 489
v.	:	Commerce Program
VERITEXT, L.L.C., Michael Sandler and Veritext PA/ RSA, L.L.C., Defendants.	:	Control Number 071465

O R D E R

AND NOW, this 10th day of September, 2003, upon consideration of Plaintiff Lee Goldstein's Petition for a Preliminary Injunction, all responses in opposition, the respective memoranda, all matters of record, after oral argument, and in accordance with the contemporaneous Findings of Fact, Discussion and Conclusions of Law, it is hereby **ORDERED** and **DECREED** that Plaintiff Lee Goldstein's Petition for a Preliminary Injunction is **Granted in part and Denied in part.**

In accordance with the Findings of Fact, Discussion and Conclusions of Law filed contemporaneously in support of this order, Plaintiff is prohibited under the terms of the Non Competition Agreement to compete with Veritext for a period of one year commencing May 19, 2003.

BY THE COURT:

_____
C. DARNELL JONES II, J.

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MEMORANDUM OPINION

JONES, J.....

Before the court is Plaintiff Lee Goldstein's Petition for a Preliminary Injunction. Goldstein seeks to be relieved from the restrictions imposed by a covenant not to compete entered into after the sale of his business. For the reasons discussed below, Plaintiff's Petition for a Preliminary Injunction is Granted in part and Denied in part.

FINDINGS OF FACT

1. Reporting Services Associates (RSA) is a court reporting agency which was once wholly owned by Lee Goldstein (Goldstein or Plaintiff). (N.T. p. 7-8).

A. THE ASSET PURCHASE AGREEMENT

2. On April 17, 1998, Goldstein sold RSA to Veritext, L.L.C. (Veritext Defendants or Defendants). (N. T. p. 8). In connection with the sale, Goldstein and Veritext entered into an Asset Purchase Agreement which incorporated various Ancillary Agreements. The Ancillary Agreements included a Subordinated Promissory Note, an Employment Agreement and a Non-

Competition Agreement. (PPI Exhibit 2A-D). The Asset Purchase Agreement and the Ancillary Agreements were executed on the same date. (Id.)

3. The Asset Purchase Agreement provides that in consideration for the sale of RSA, execution of an employment agreement as well as an agreement not to compete, the Buyer shall pay or deliver to the Seller the aggregate amount of $8, 454, 498.00 payable with a cash sum in the amount of $6, 740,000.00 seven days prior to the closing date, a promissory note in the principal amount of $1,714,498.00 and a cash sum in the amount of $47, 500.00 for working capital. (PPI Exhibit 2A ¶ 2.3 (a)(i)-(iii)).

4. The Asset Purchase Agreement required Goldstein, identified within the agreement as the Stockholder, to execute and deliver to Veritext an executed non-competition agreement in the form attached to the Asset Purchase Agreement. See Section B of this Memorandum Opinion. (PPI Exhibit 2A ¶ 5.14).

5. The Asset Purchase Agreement also required RSA, identified within the agreement as the Seller, not to compete with Veritext for a period of five years following the closing date. (PPI Exhibit 2A ¶ 8.4 (a)(i)-(iii)).

6. The Asset Purchase Agreement and the Ancillary Agreements which included the non competition agreement purported to set forth the entire agreement among the parties. (PPI Exhibit 2A ¶ 9.5.).

7. Goldstein was represented by counsel throughout the Veritext transaction. (N.T. p. 43). Goldstein's counsel reviewed the Asset Purchase Agreement as well as the Ancillary Agreements and found them to be to his satisfaction. (DPI Exhibit 1).

B. THE NON COMPETITION AGREEMENT

8. As a condition of the sale of RSA to Veritext, Goldstein, the stockholder, executed a non compete agreement.

9. The Non Competition Agreement provides in part as follows:

> **4. NON COMPETITION-** As an inducement for RSA to enter into the Purchase Agreement and in consideration for the Consideration to be paid under this Agreement to the Stockholder, the Stockholder agrees that:
>
> (a) For a period of five years after the Closing, or for a period of five years after the termination of his employment with RSA or Veritext, whichever is longer (the "Non Compete Period")...
> (PPI Exhibit 2D ¶ 4).

10. As consideration for the non compete agreement Goldstein received an "additional" sum of $100,000.00. (Id., N.T. p 15-16 DPI Exhibit 3)[1].

11. Under the terms of the Non Compete Agreement, Goldstein agreed that the provisions contained within the non compete agreement were fair, reasonable and necessary to protect and preserve legitimate interests. Id. ¶ 2(c)-(d).

12. The Non Competition Agreement further contains an integration clause integrating the Non Compete Agreement, the Purchase Agreement and the Employment Agreement as an entire agreement between the parties. Id. ¶ 16.

C. THE EMPLOYMENT AGREEMENT

13. In addition to the Asset Purchase Agreement and the Non Compete Agreement, Goldstein also signed an Employment Agreement as a condition of the Asset Purchase Agreement. According to the terms of the Employment Agreement, Veritext agreed to employ Goldstein

[1]Goldstein testified that the $100,000.00 was earmarked as additional consideration for the Non Compete Agreement. Goldstein also testified he did not receive anything more or less on the purchase price. (N.T. p. 15-16).

from April 17, 1998 to April 18, 2001 in consideration of a yearly salary of $100,000.00. (PPI Exhibit C ¶ 1 (a)).

14. The Employment Agreement also contains an integration clause integrating The Asset Purchase Agreement and the documents contemplated by the Asset Purchase Agreement. Id ¶ 9.

D. THE SUBORDINATED PROMISSORY NOTE

15. The parties also executed a Subordinated Promissory Note obligating Veritext to pay Goldstein the principal sum of $1,714,498.00 together with interest at the rate of eight and one half percent. (PPI Exhibit B).

16. The Subordinated Promissory Note, which obligates Veritext to pay the principal of and interest to Goldstein, is subordinate and junior to the right of payment to all other indebtedness of the company. (Id. ¶ 7).

17. Indebtedness is defined by the Subordinated Promissory Note as indebtedness for borrowed money or for the deferred purchase price of property or services, including contingent reimbursement obligations with respect to letters of credit, indebtedness guaranteed in any manner, obligations under capitalized leases. Subordination could also occur upon the occurrence of any insolvency event or upon any acceleration of indebtedness; this is referred to as a Blockage Event.(Id. ¶ 7).

18. The Subordinated Promissory Note provides that when a Blockage Event occurs, Veritext can not directly or indirectly make any payment to Goldstein, a subordinated note holder, and that Goldstein cannot take any action to collect on the note until the Blockage Event is removed unless his rights to recovery are in jeopardy, i. e. running of the statute of limitations. (Id. ¶ 7).

19. The Blockage Event continues until the holder of indebtedness receives payment in full of

all principal. (Id. ¶ 7).

20. Goldstein signed the Subordinated Promissory Note knowing that there were certain risks of non payment. (N.T. p. 51).

E. POST CLOSING

21. Pursuant to the terms of the Employment Agreement, immediately following execution of the Asset Purchase Agreement and the Ancillary Agreements, Goldstein became employed as Vice President of Veritext and Vice President of RSA. Goldstein was responsible for the management of the day to day operations of RSA. (PPI Exhibit 2C ¶ 2; N.T. 13, 17).

22. Veritext began paying the balance of the purchase price through quarterly payments of $95, 250.00 as required under the Note. (N.T. p. 19).

23. On October 12, 2000, Fleet Bank, a senior note holder, informed Veritext to stop making payments on all subordinated and junior lien holders. (DPI Exhibit 15). The Blockage Event is still in place today. (N.T. p. 204).

24. After October 2000, the Veritext Defendants suspended payments on the Subordinated Promissory Note held by Goldstein pursuant to a Blockage Event. (N.T. p. 20, 49-50).

25. On April 17, 2001, Goldstein's Employment Agreement expired. (N.T. p. 47). Goldstein continued to remain employed by RSA. (Id.).

26. On May 19, 2003, Goldstein was terminated by Sandler, the Chief Executive Officer president of Veritext. (N.T. p. 26).

27. Goldstein's termination followed a demand by his counsel for Veritext to pay the obligations under the Subordinated Promissory Note or risk litigation to obtain payment. (N.T. p. 26-27, 66; PPI Exhibit 1).

28. Sandler testified that Goldstein was fired due to performance related issues. (N.T. p. 91-97).

D. PROCEDURAL HISTORY

30. On June 4, 2003, plaintiffs filed their complaint in this matter.

31. On July 2, 2003, Veritext filed preliminary objections to the complaint.

32. On July 21, 2003, Goldstein and RSA filed an Amended Complaint asserting claims against the Veritext Defendants for declaratory judgment, breach of contract, unjust enrichment, negligent misrepresentation, promissory estoppel, defamation as well as filed a Motion for a Temporary Restraining Order and Special Injunction seeking to have the Restrictive Covenant declared unenforceable.

33. On July 22, 2003, the court issued a Rule to Show Cause why a Preliminary Injunction should not issue.

34. On August 25, 2003 the Court heard argument on Plaintiffs Rule to Show Cause.

DISCUSSION

Goldstein's Petition for Preliminary Injunction asks this court to relieve him from restrictions imposed by a non compete agreement. In support of his Petition, Goldstein argues (1) that the restrictive covenant is overly broad, unduly burdensome and unenforceable as a matter of law and (2) that the Veritext Defendants materially breached the Purchase Agreement by failing to make the required payments under the Subordinated Promissory Note rendering the restrictive covenant unenforceable.

A. STANDARD FOR PRELIMINARY INJUNCTION

In determining whether to grant a preliminary injunction, a court may consider the averments of the pleadings and petition, affidavits of the parties or third parties, or any other

proof. United Products Corp. v. Transtech Mfg, Inc., 2000 WL 33711051, *10 (Pa. Com. Pl. Nov. 9, 2000) (Sheppard)(citing Pa. R. Civ. P. 1531). "[A] preliminary injunction is a most extraordinary form of relief which is to be granted only in the most compelling cases." Id (quoting Goodies Olde Fashion Fudge Co. v. Kuiros, 408 Pa. Super. 495, 597 A.2d 141, 144 (1991)). "The purpose of the preliminary injunction is to preserve the status quo as it exists or previously existed before the acts complained of, thus preventing irreparable injury or gross injustice."Id (quoting Maritrans GP, Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 602 A.2d 1277, 1286 (1992). The court may grant the injunction only if the moving party establishes the following elements:

(1) relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages,
(2) greater injury will occur from refusing the injunction than from granting it,
(3) the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct,
(4) the wrong is actionable and the plaintiff's right to relief is clear, and
(5) the injunction is reasonably suited to abate that wrong.

Id (citing School Dist. of Wilkinsburg v. Wilkingsburg Educ. Ass'n, 542 Pa. 335, 667 A.2d 5, 6 n.2 (Pa. 1995). These requisite elements "are cumulative, and if one element is lacking, relief may not be granted." Id (quoting Norristown Mun. Waste Authority v. West Norriton Tp. Mun. Authority, 705 A.2d 509, 512 (Pa. Comwlth. 1998)).

1. Relief is Not Necessary to Prevent Immediate and Irreparable Harm

Goldstein argues that he suffers from irreparable harm every day he is not able to advertise and do business in the legal court reporting industry since he is unable to maintain his contacts because the covenant not to compete is overly broad. On the other hand, defendants argue that Goldstein cannot establish that he has been irreparably harmed because the restrictive

covenant is enforceable. Before addressing the question of whether Goldstein suffers from irreparable harm as a result of the covenant not to compete it is necessary to determine whether the covenant not to compete at issue is enforceable.

(a) The Non- Competition Agreement is Enforceable

A restrictive covenant may only be enforced at equity if:

> (1) it is ancillary to an employment relationship or the sale of a business between the parties to the covenant,
> (2) it is reasonably limited in duration and geographic scope and
> (3) it is necessary to protect a legitimate business interest or the employer without imposing an undue hardship on the employee.

Olympic Paper Co. v. Dubin Paper Co., 60 D & C 4th 102 (Pa. Com. Pl. 2000). If the restrictive covenant meets this three-part test for reasonableness, it is prima facie enforceable at equity. Id; citing John G. Bryant Co., Inc. v. Sling Testing & Repair Co., 471 Pa. 1, 8, 369 A.2d 1164, 1167 (Pa. 1977). The employee bears the burden of establishing the unreasonableness of the covenant and demonstrating how it is unenforceable. Id.

(1) The Covenant Not to Compete is Ancillary to the Sale of RSA Assets

To be ancillary to a sale of assets, a covenant not to compete must be supported by adequate consideration, which can be in the form of a corresponding benefit or a corresponding change in employment status. Olympic Paper Co. v. Dubin Paper Co., supra. The circumstances presented here demonstrate that the non compete agreement is supported by adequate consideration. Goldstein signed a separate agreement entitled Non Competition Agreement for which he received an additional $100,000.00 as consideration. Although Goldstein testified that the $100,000.00 was part of the purchase price, the documents suggest and Goldstein confirms that the $100,000.00 was earmarked as consideration for the Non

Compete Agreement. (N.T. p. 15-16). Moreover, the non competition agreement was entered into ancillary to a contract for the sale of RSA's assets, including goodwill. Accordingly, the Agreement's covenant not to compete was ancillary to the sale of assets by RSA to Veritext.

(2) The Reasonableness and Scope of the Covenant not to Compete

This court has previously discussed the use of restrictive covenants in two types of cases. The first are cases where an employer has attached a restrictive covenant to an employee's contract of employment. The second are cases where a restrictive covenant has been attached to a contract for the sale of a business. Piercing Pagoda, Inc. v. Hoffner, 465 Pa. 500, 351 A.2d 207, 507 (Pa. 1976) (citations omitted). Here, the parties agree that the restrictive covenant attaches to the sale of a business, RSA to Veritext.

A covenant not to compete which is ancillary to a contract for the sale of a business is subjected to a less rigorous reasonableness examination than those ancillary to an employment contract. Scobell, Inc. v. Schade, 455 Pa. Super. 414, 688 A.2d 715, 718 (Pa. Super. 1997).

The enforcement of the restriction to compete in New Jersey, Pennsylvania and Delaware is not unreasonable given the fact that Goldstein has for many years engaged in the business of providing court reporting services in those communities. The geographic restriction imposed by the restrictive covenant does not prevent Goldstein from practicing his trade or skill or from utilizing his experience in the court reporting business. Since Goldstein is not prohibited from working in his chosen profession outside of the geographic scope of the agreement, the court finds that the geographic scope is reasonable under the circumstances.

With respect to the duration of the non compete agreement, the covenant not to compete imposes a five year restriction following the sale of the business or termination of employment

whichever is longer. (PPI Exhibit 2D ¶ 4). Plaintiff maintained his employment with Veritext from April 19, 1998 to May 19, 2003. On May 19, 2003, five years after execution of the Asset Purchase Agreement, plaintiff was terminated. The plaintiff argues that the court should interpret the non compete provision to extend five years from the sale of the business. Defendants argue that the court should interpret the non compete provision to begin on May 19, 2003 and end on May 19, 2008. On its face, the non competition period within the non compete agreement appears to span a period of ten years. However, the clear and explicit language contained within the agreement provides that the non compete period is five years from the sale of the business or termination whichever is longer. Under different circumstances, a non compete period of five years is not unreasonable. Here, imposing a five year non compete restriction from the date of plaintiff's termination would impose upon him a hardship which outweighs that which would be suffered by defendants. The court finds that Goldstein did sign the covenant with the knowledge that the non compete period was for five years from his termination, however, under the circumstances presented here the covenant is broader than necessary to protect Veritext's interests. Goldstein has been within Veritext's employ for five years, has not been paid a salary since April 2001 and has not been paid pursuant to the Subordinated Promissory Note since October 2000. Based on the foregoing, the court finds that it is unreasonable that the covenant not to compete be enforced for a five year period of time from Goldstein's termination. Accordingly, this court will modify the covenant not to compete and limit the duration of the covenant for a period of one year effective from the date of Goldstein's termination.

(3) The Restrictive Covenant is Necessary to Protect Veritexts' Legitimate Business Interests

A covenant not to compete ancillary to a sale of a business is designed to protect, in addition to physical assets and investments, the good will of the business, i.e. its name, reputation and reliability. Geisinger Clinic v. Di Cuccio, 414 Pa. Super. 85, 606 A.2d 509 (Pa. Super.1992). For that reason, a restrictive covenant ancillary to the sale of a business promotes"goodwill [as] a saleable asset 'by protecting the buyer in the enjoyment of that for which he pays.'"Id. Restrictive covenants ancillary to the sale of a business are designed to protect, in addition to physical assets and investments, the good will of the business, i.e. its name, reputation and reliability. For that reason the restrictive covenant promotes "goodwill [as] a saleable asset 'by protecting the buyer in the enjoyment of that for which he pays.'" Prison Health Services, Inc. v. Umar, 2002 U.S. Lexis 12267, *17 (E. D. Pa. May 9, 2002) (quoting Geisinger Clinic v. DiCuccio, 414 Pa. Super. 85, 606 A.2d 509, 518 (Pa. Super. 1992). It is the interference with or the destruction of the good will purchased with the physical attributes of the business which is unascertainable and unquantifiable in terms of actual loss. Id.

In determining the reasonableness on such restraints on trade, Pennsylvania law includes an inquiry into whether the restraint on the promisor's activities are no greater than is necessary to protect the legitimate interests of the promisee's need for protection is outweighed by the hardship enforcement would create for the promisor and or the injury it would work tot he public's interest. Id. at 18. Reasonableness requires the consideration of the types of activities embraced, the geographical area, the duration of the covenant, the hardship on the plaintiff and the public interest. Id.

Here, the court agrees that the covenant not to compete is necessary to protect Veritext's

legitimate business interest as modified by the court. As discussed supra, the hardship of imposing a five year non compete agreement outweighs any hardship to defendants. The court further finds that the restrictive covenant as modified is a reasonable restraint imposed upon Goldstein.

The court recognizes that plaintiff has an important interest in being able to earn a living in his chosen profession, however, plaintiff did enter into an enforceable agreement not to compete. Accordingly, the court finds that Goldstein will not suffer irreparable harm if prohibited from working for a period of one year from his termination.

2. A Risk of Greater Injury Will Not Result by Refusing the Preliminary Injunction

Plaintiff argues that this second requirement is met because without injunctive relief, Goldstein will continue to endure hardship because (1) the restrictive covenant is unenforceable, (2) Veritext materially breached their obligation to pay under the Subordinated Promissory Note and (3) Plaintiff was terminated for poor performance. As discussed above, the restrictive covenant is enforceable. The court concludes that a risk of greater injury will not result by refusing to grant the preliminary injunction especially in light of the modifications made to the duration of the Non Compete Agreement. Moreover, Goldstein continues to have an opportunity to pursue his claims in the instant cause of action to seek redress for alleged wrongs. With

respect to plaintiff's remaining arguments, the court is unpersuaded.

(a) The Veritext Defendants have not Materially Breached its Obligations

Goldstein maintains that the covenant not to compete is unenforceable because Veritext materially breached the Asset Purchase Agreement by failing to fully pay Goldstein the promised purchase price. Plt. memo pg. 5-7. Defendants argue that Veritext has not breached its obligations under the Subordinated Promissory Note and that if there was such a breach, the Subordinated Promissory Note and the Non-Competition Agreement are distinct agreements supported by separate consideration. Dfts. memo pg. 16-18.

In order to determine whether Veritext materially breached its contract by failing to pay Goldstein, the court must determine whether the non compete agreement may stand alone or must be considered mutually dependent on the Asset Purchase Agreement, the Promissory Note and the Employment Agreement. It is a general rule of contract law that where two writings are executed at the same time and are intertwined by the same subject matter, they should be construed together and interpreted as a whole, each one contributing to the ascertainment of the true intent of the parties. International Milling Co. v. Hachmeister, Inc., 380 Pa. 407, 417-418, 110 A.2d 186, 191 (Pa. 1995).

In Sheilds v. Hoffman, 416 Pa. 48, 204 A.2d 436 (Pa. 1964), two business partners entered into a partnership liquidation agreement whereby Hoffman sold his interest to Shields and also agreed not to compete with Sheilds for five years. Upon examination of the agreement, the Pennsylvania Supreme court concluded that the buy-sell and non-compete provisions were severable provisions. Even if the agreement has not specifically provided that it was to construed

as a contract severable in all its parts, the court concluded it was severable because the parties had apportioned the consideration both as to subject matter and payment. AEL Industries, Inc. v. Alvarex, 1989 WL 27930, * 2 (E.D. Pa. March 23, 1989) (citing Sheilds v. Hoffman, supra.). It has generally been held that where there is single consideration, the contract is entire... and to make a contract severable, there must be an apportionment of the consideration. Keenan v. Larkin, 194 Pa. Super. 436, 168 A.2d 640 (Pa. Super.1961). The intention of the parties controls in determining whether or not a contract is severable. Id.

After examining the agreements, the court concludes that the Asset Purchase Agreement, the Subordinated Promissory Note, the Employment Agreement and the Non Compete Agreement are associated with the sale of RSA's assets to Veritext and should be construed together.[2] First, it is undisputed that the Agreements were entered into simultaneously. Second, the non competition agreement was a condition of the sale. Section ¶ 5.14 of the Asset Purchase Agreement required Goldstein to execute and deliver to Veritext a non compete agreement. Exhibit A. Moreover, Goldstein would not have entered into the Non Competition Agreement were it not for the sale of RSA's assets. Finally, the subject agreements contain integration clauses referencing all the agreements between the parties. (PPI Exhibit 2A ¶ 9.5, PPI Exhibit 2D ¶ 16). The non competition agreement is referred to within the Asset Purchase Agreement as an Ancillary Agreement. Ancillary Agreement is defined within the asset purchase agreement as part of the underlying transaction. (PPI Exhibit 2A ¶ 3.9).

In light of the simultaneous execution and the cross referencing within the agreements,

[2]Although apportionment of the consideration as to subject matter and payment tends to indicate that the Agreements are severable, the intention of the parties controls in determining

the written agreements should be construed together. See Kroblin Refrigerated Xpress, Inc. v. Pitterich, 805 F.2d 96, 108 (3rd Cir. 1986)(concluding as a matter of law that an agreement of sale and a non compete agreement were "inexorably associated" with the sale of the business and should be construed together); see also Neville v. Scott, 182 Pa. Super. 448, 452, 127 A.2d 755, 757 (Pa. Super. 1956)(where two agreements are made as part of one transaction they will be read together to express the essential elements of the parties' undertaking).

After reviewing the separate agreements as one transaction, the court concludes that defendants have not materially breached its obligations under the contract. The Subordinated Promissory Note specifically provides that Vertext's obligation to pay Goldstein is subordinate and junior in right of payment. (PPI Exhibit 2B ¶ 7(a)). Pursuant to the terms of the agreement, Goldstein's right to receive payment would become subordinated upon an insolvency event or an acceleration of indebtedness for borrowed money. (Id.¶ ¶7(b), 15). An acceleration of borrowed money would be referred to as the "Blockage Event". (Id.¶ 7(c)). Once such events occur the holders of the indebtedness would be entitled to receive payment in full before Goldstein. (Id.¶ 7(b)). The Blockage Event would exist until all indebtedness is paid in full. (Id. ¶ 7 (c)). In the event a Blockage Event does not exist and the payment in full is prohibited by ¶ 7 (c) then Veritext is permitted to pay Goldstein the maximum portion of such amount so as not to create a default. Id.

According to Goldstein the last payment he received on the Note was in or about October 2000. (N.T. p. 20). On or about October 12, 2000, Fleet Bank, a holder of indebtedness senior

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whether or not a contract is severable.

to Goldstein, declared Veritext in default and prohibited Veritext from making any payments to any holders of subordinated debt. (DPI 15). Veritext has not made any payments to Goldstein pursuant to the terms of the Subordinated Promissory Note.

Plaintiff argues and the defendants do not dispute that Veritext has an absolute and unconditional obligation to pay Goldstein. Goldstein may exercise his remedies in the event of a failure to make payments to the extent that a loss of his rights would occur such as the running of the statute of limitations. (PPI Exhibit 2B¶ 7 (h)). However, Veritext's failure to make payments under the Note is not a material breach since the non payment is pursuant to the Blockage Event described within the Note. Although Veritext is in default of the Note, the default was created by the terms of the Note to which Goldstein bargained for and assented.

(b) Goldstein's Termination Does Not Effect the Enforceability of the Non Compete Agreement

In further support of his claim that the non compete agreement is unenforceable, Goldstein argues that since he was terminated for poor performance the non compete agreement should not be upheld. Defendants, on the other hand, argue that Goldstein's performance as an employee plays no part in the enforceability of a non compete agreement ancillary to a sale of business. Dfts memo. p. 18-19.

In Insulation Corp. of America v. Brobston, 446 Pa. Super. 520, 667 A.2d 729 (Pa. Super. 1995), the court held that the fact an employee was terminated rather than quit voluntarily, was an important factor when considering the enforceability of a restrictive covenant. Id. The court further stated that the reasonableness of enforcing such a restriction is determined on a case by case basis. The mere termination of an employee would not serve to bar the employer's right to

injunctive relief where the employee intentionally engaged in conduct that caused his termination. Id.

Here, the record does not clearly demonstrate why Goldstein was terminated. Goldstein testified that he was terminated after his employer received his attorney letter demanding payment under he Subordinated Promissory Note. Sandler testified that Goldstein was terminated due to poor performance. Assuming Goldstein was terminated for poor performance, he could have intentionally engaged in this conduct in order to cause his termination and avoid the non compete agreement. Accordingly, based on the lack of evidence surrounding Goldstein's termination, the court finds that Goldstein's termination does not effect the covenant not to compete.

3. Restore the Status Quo Among the Parties

The third prerequisite for preliminary injunctive relief is proof that a preliminary injunction would restore the status quo among the parties. "The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy." Valley Forge Historical Soc. v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1023, 1129(Pa. 1981). In this case granting plaintiff's request for injunctive relief will not return things to the last actual, peaceful and lawful status. To the contrary, the status quo would be altered.

4. The Alleged Wrong to Goldstein has not Occurred

Goldstein further fails to satisfy the fourth requirement. Although Goldstein was terminated in May 2003, he is not prohibited from earning a living. Goldstein could begin to operate a business outside of the states identified within the covenant not to compete. Moreover,

the court has modified the covenant not to compete by limiting its duration to one year beginning from his termination.

5. The Requested Relief is not Reasonably Suited to Abate the Wrong

Goldstein bargained for and assented to the terms of the covenant not to compete. Notwithstanding, Goldstein's assent the court does find that the duration of the covenant was unreasonable under the circumstance and modified the covenant.

6. The Public Is Not Harmed

Numerous cases decided in Pennsylvania held that the public interest is served by enforcement of a restrictive covenant executed in connection with the sale of a business or its assets. Prison Health Services, Inc. v. Umar, 2002 U. S. Lexis 12288, *73 (E.D. Pa. July 3, 2002)(citing Volunteer Fireman's Ins. Servs., Inc. v. Cigna Property and Cas. Ins. Agency, 693 A.2d 1330, 1337 (Pa. Super. Ct. 1997); Westec Security Services, Inc. v. Westinghouse Electric Corporation, 538 F. Supp. 108, 121 (E.D. Pa. 1982)). Accordingly, the public interest will not be harmed in enforcing the restrictive covenant in this case.

CONCLUSIONS OF LAW

1. The restrictive covenant was ancillary to Goldstein's sale of his business to Veritext and was supported by adequate consideration.

2. The duration of the restrictive covenant is unreasonable under the circumstances.

3. Enforcement of a modified restrictive covenant is necessary to protect the good will that Goldstein established with his customers.

4. The modified restrictive covenant is reasonable in duration and geographic scope.

5. Goldstein will not suffer from immediate and irreparable harm than cannot be compensated

by monetary damages.

6. A greater injury will not occur from denying the preliminary injunction that from modifying the restrictive covenant.

7. An injunction will not restore the parties to the status quo.

8. The alleged wrong to Goldstein has not occurred.

9. The requested relief is not reasonably suited to abate the wrong.

10. The public interest will not be harmed if the restrictive covenant were enforced as modified.

Conclusion

Having reviewed the record and considered the arguments of the parties, the court Grants in part and Denies in part plaintiff's request for injunctive relief. In accordance with the Findings of Fact, Discussion and Conclusions of Law, Goldstein is prohibited under the terms of the Non Competition Agreement to compete with Veritext for a period of one year commencing May 19, 2003.

BY THE COURT:

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C. DARNELL JONES, II, J.

Dated: September 10, 2003