

**THE BUSINESS LAW SECTION  
OF THE FLORIDA BAR**

**PRESENTS:**

**Lunch 'n' Learn CLE**

**Topic: Non-Compete Agreements: Recent  
Developments**

**Presenter: Peter F. Valori, Managing Partner,  
Damian & Valori LLP**

**Friday, December 2, 2005**

**12:00 pm - 1:15 pm**

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## CASE LAW UPDATE

### Solicitation – Direction of Contact

***Scarborough v. Liberty National Life Insurance Company*, 872 So. 2d 283 (Fla. 1st DCA 2004).** The Florida First District Court of Appeal held that client initiated contacts may be considered “solicitation.” *Scarborough* would appear to be an expansion of the rights of employers to stop former employees from selling competing products. The First District Court of Appeal relied on a broad law dictionary definition of “solicitation” to include conduct “regardless of who initiates the meeting.” *Id.* The touchstone for the Court was that the former employee compared the price of his current employer’s product with that of his former employer’s product.

Mr. Scarborough, the former employee, has sought discretionary review from the Florida Supreme Court of the District Court’s decision, arguing that the decision “thrusts into turmoil, and ambiguity” the law of non-solicitation agreements. Prior law, decided under a previous statute, suggested that accepting or servicing former clients did not constitute “solicitation”. See *JKR Inc. v. Triple Check Tax Serv.*, 736 So. 2d 43,44 (Fla. 1st DCA 1999); *Kephart v. Hair Returns, Inc.*, 685 So. 2d 959, 960 (Fla. 4th DCA 1996).

***Costal Loading, Inc., v. Tile Roof Loading, Inc.*, 908 So.2d 609 (Fla. 2d DCA 2005).** The Second Circuit held that the sellers of a company did not breach the covenant not to solicit because the evidence did not establish that the sellers called, or solicited business from, customers of the sold company. Instead, the customer called the sellers of the company. The court did not perform a *Scarborough* analysis.

### Contract Expiration

***Gray, Dallin, and Management By Pinnacle, Inc. v. Prime Management Group, Inc.*, 30 Fla. L. Weekly D2346, (Fla. 5th DCA 2005).** Employee entered into a five year term employment agreement. The employment agreement contained a non-competition covenant. The employee worked for a period after the employment agreement expired, before leaving and starting his own management company. The Fifth District Court of Appeal reversed the grant of temporary injunction because enforcement of the non-compete clause after the expiration of the employment agreement, absent express language extending the non-compete provisions after termination, would violate the Statute of Frauds.

The Court disregarded the trial court’s conclusion that by continuing the agreement past the expiration of the employment agreement, the parties displayed a mutual assent to a new contract containing the same provisions as the original. Instead, the Court held that the Statute of Frauds requires the written renewal of the employment agreement.

Citing *Sanz v. R.T. Aerospace Corp.*, 650 So.2d 1057 (Fla. 3d DCA 1995), the Court agreed that when a covenant not to compete is contained in an employment contract, it cannot always be enforced after its expiration when an employee has continued working under an oral contract. Absent an express provision, the fact that the non-compete clause was independent of other covenants in the agreement did not mean that it survived the expiration of the contract. Finally, the Court held that continued performance of the written agreement could not remove the restrictive covenant from the Statute of Frauds.

### **Prohibition of Sale of Business/Injunction Against Third Party**

*Osmo Tec SACV Co. v. Crane Environmental, Inc.*, 884 So. 2d 324 (Fla. 2d DCA 2004). The trial court entered an order enforcing a non-compete agreement that required the defendants to cease business operations. Thereafter, the defendants sold the assets of the company to a third party. The trial court held that the existence and operation of the company was in contempt of the court's order because they were included as the "fruit of the illicit conduct." The Florida Second District Court of Appeal reversed holding that because the trial court did not specifically state in the injunction that it precluded the sale, the new purchaser would not be held in contempt of the court's injunction.

### **Breach by Employer**

*Spencer D. Lee, M.D. v. Mark A. Pinsky, M.D., P.A.*, 30 Fla. L. Weekly D526 (Fla. 4th DCA 2005). The Fourth District Court of Appeal held that where an employer breached an employment contract by failing to compensate an employee for the services performed, the employer failed to demonstrate a substantial likelihood of success on the merits of its claim to enforce a non-compete agreement.

*Northern Trust Investments v. Domino*, 2005 WL 475385 (Fla. 4th DCA March 2, 2005). The Fourth District Court of Appeal upheld the trial court's denial of a temporary injunction on the grounds that the employer breached the employment agreement between the parties by failing to pay monies owed. In sum, an employer who has refused to pay an employee earned income is barred from enforcing restrictive covenants, even if the restrictive covenants are otherwise enforceable.

### **Timing of Injunction**

*Vela v. Kendall*, 905 So.2d 1003 (Fla. 5th DCA July 8, 2005). Plaintiff ran a delivery service to various retail stores to whom Defendant was hired as an independent contractor to provide such delivery services. Defendant was terminated, and Plaintiff brought suit seeking an injunction and damages pursuant to Defendant's alleged violation of a restrictive covenant (two year non-compete clause) in his employment contract with Plaintiff. The trial court ruled in favor of Plaintiff, awarded damages, and granted a two year injunction. Defendant appealed. The Florida Fifth District Court of Appeal affirmed the ruling in all respects except the injunction. In so doing, the court held that the time of the two year non-compete clause had already run, Plaintiffs received

sufficient damages for that time period, and the trial court was without authority to further extend the restrictive covenant for another two years in the final judgment.

### **Required Findings**

***Masters Freight, Inc. v. Servco Inc., and AVXA, Inc.*, 30 Fla. L. Weekly D2396 (Fla. 2d DCA 2005).** The Second District Court of Appeal reversed a grant of temporary injunction because the trial court did not make specific findings which would support injunctive relief. The Court held that the trial court did not find clear, definite, and unequivocal proof that “immediate and irreparable injury, loss, or damage will result” to the moving party. Additionally, the Court ruled that the trial court failed to address the availability of an adequate remedy at law.

### **Current Events**

*Microsoft v. Google* – October 14, 2005 News Article

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(Cite as: 872 So.2d 283)

**H**

Briefs and Other Related Documents

District Court of Appeal of Florida, First District.  
Larry SCARBROUGH, Appellant,

v.

LIBERTY NATIONAL LIFE INSURANCE CO.,  
Appellee.

No. 1D03-2905.

March 31, 2004.

**Background:** Insurance company sought temporary injunction against former employee, enjoining him from soliciting the sale of insurance to its customers on behalf of his new employer. The Circuit Court, Duval County, Aaron K. Bowden, J., entered temporary injunction. Employee appealed.

**1Holding:** The District Court of Appeal held that trial court did not abuse its discretion by entering injunction.

Affirmed.

West Headnotes

**[1] Injunction 212 ↪ 138.39**

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. Most Cited Cases

Trial court did not abuse its discretion by temporarily enjoining insurance company employee from soliciting the sale of insurance to customers of his former employer on behalf of his current

employer, pursuant to a non-compete contract between employee and former employer, despite employee's contention that he did not violate contract because customers approached him first; term "solicit" was not defined in non-compete contract, and could include a transaction in which employee was proactive, regardless of whether the customer or the employee initiated the transaction. F.S.1995, § 542.33(2)(a).

**[2] Appeal and Error 30 ↪ 954(1)**

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k950 Provisional Remedies

30k954 Injunction

30k954(1) k. In General. Most

Cited Cases

District Court of Appeals' review standard over orders granting temporary injunctions is whether the trial court abused its discretion in so acting.

\*284 Donald E. Pinaud, Jr., of Kattman & Pinaud, P.A., Jacksonville, for Appellant.

Eric J. Holshouser and Amy H. Reisinger of Coffman, Coleman, Andrews & Grogan, P.A., Jacksonville, for Appellee.

PER CURIAM.

This is an appeal from an order temporarily enjoining appellant, Larry Scarbrough, from soliciting the sale of insurance to customers of appellee, Liberty National Life Insurance Company, his former employer, on behalf of his current employer, Colonial Life Insurance Company. Scarbrough signed a non-compete contract with Liberty on March 4, 1996, wherein he agreed not to solicit the replacement of insurance coverage with Liberty's customers for 18 months after termination of his employment. He complains that he did not violate the terms of the contract, because his former Liberty customers first approached him regarding a

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change in insurance coverage. We affirm.

[1] [2] Initially, we note that our review standard over orders granting temporary injunctions is whether the trial court abused its discretion in so acting. In our judgment, no abuse of discretion occurred. Scarbrough relies on the rule that contracts restraining persons from exercising their lawful professions are void unless expressly authorized by section 542.33(2)(a), Florida Statutes (1995). FN1 He cites cases construing such statute as not forbidding an employee from soliciting an employer's old clients who voluntarily follow the employee to his or her new place of business. See *J.K.R., Inc. v. Triple Check Tax Serv.*, 736 So.2d 43, 44 (Fla. 1st DCA 1999) (issuance of temporary injunction was too broad, because the words in the parties' agreement, "call upon, solicit, \*285 divert or take away," only prohibited the former employee and his agency "from taking proactive steps to obtain" former clients, but did not prevent them "from accepting ... clients who actively [sought] their assistance."); *Kephart v. Hair Returns*, 685 So.2d 959 (Fla. 4th DCA 1996).

FN1. Section 542.33(2)(a) provides, in pertinent part:

[O]ne who is employed as an agent, independent contractor, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a reasonably limited time and area....

We consider the facts in the above cases distinguishable. The trial court concluded that even if the former client had initiated the contact with Scarbrough, a solicitation could nonetheless occur if, as the evidence disclosed, Scarbrough made a comparison for the client between the benefits and premiums afforded by the two insurance companies. We cannot say the lower court's decision in this regard was an abuse of discretion. Neither the parties' non-compete contract nor the statute defines the term "solicit." Solicitation is defined in BLACK'S LAW DICTIONARY 1398 (7th ed.1999), as "the act or

an instance of requesting or seeking to obtain something; a request or petition." It reasonably appears from the above definition that a person may, in appropriate circumstances, solicit another's business regardless of who initiates the meeting. Cf. *FCE Benefit Adm'rs Inc. v. George Washington Univ.*, 209 F.Supp.2d 232, 239 (D.D.C.2002) (holding that an insurance agent breached an agreement not to "call upon, solicit, or take away" her former employer's customers, because "[e]ven though she was initially contacted by Melwood [a former customer], ... she assumed an active role in Melwood's decision-making process."). The active involvement of a former employee in enticing a customer away from the prior employer appears to have been clearly envisaged by this court in *J.K.R.*, because we there recognized that the term "solicit" in an agreement prohibited the employee from being "proactive" in such efforts.

The order granting the application for temporary injunction is in all respects

AFFIRMED.

ERVIN and BOOTH, JJ., and SMITH, Senior Judge, CONCUR.

Fla.App. 1 Dist., 2004.

Scarbrough v. Liberty Nat. Life Ins. Co.  
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Briefs and Other Related Documents (Back to top)

• 1D03-2905 (Docket) (Jul. 11, 2003)

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(Cite as: 908 So.2d 609)

C

Briefs and Other Related Documents

District Court of Appeal of Florida, Second District.  
COASTAL LOADING, INC., Brett Williamson,  
and Carolyn Williamson, Appellants,  
v.  
TILE ROOF LOADING, INC., Appellee.  
No. 2D04-5702.

Aug. 19, 2005.

**Background:** Buyer of roof tile loading business brought action against seller and its principals seeking damages and an injunction against breach of noncompete agreement executed as part of the sale. The Circuit Court, Lee County, Jay B. Rosman, J., granted temporary injunction in favor of buyer. Seller and principals appealed.

**Holdings:** The District Court of Appeal, Silberman, J., held that:

1(1) noncompete agreement unambiguously prohibited seller and its principals from engaging only in the business of loading roof tiles;

2(2) principal did not violate covenant not to solicit former customers by agreeing to haul roof tiles for former customer; and

3(3) trial court could not enjoin seller and principals from transacting business related to the hauling and placement of roof tiles for former customers.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Contracts 95 ↪ 202(2)

95 Contracts

95II Construction and Operation

95II(C) Subject-Matter

95k202 Trade and Business

95k202(2) k. Restriction of

Competition. Most Cited Cases

Injunction 212 ↪ 157

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to

Procure

212IV(A)4 Proceedings

212k156 Order on Application

212k157 k. In General. Most Cited

Cases

Noncompete agreement between seller and buyer of roof tile loading business unambiguously prohibited seller and its principals from engaging only in the business of loading roof tiles from ground to roof of building, and thus trial court could not temporarily enjoin principals from engaging in the business of hauling roof tiles from manufacturer to construction site; roof tile hauling and roof tile loading were different services often provided separately, noncompete agreement only mentioned roof tile loading, and parties negotiated and specifically agreed to the description of the business in which seller and principals were to be forbidden to engage. West's F.S.A. § 542.335(1)(a).

[2] Contracts 95 ↪ 312(4)

95 Contracts

95V Performance or Breach

95k312 Acts or Omissions Constituting Breach in General

95k312(4) k. Contract Not to Engage in or Injure Business Carried on by Another. Most Cited Cases

Principal of roof tile loading business that was sold to buyer did not violate covenant not to solicit former customers that was contained in noncompete

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agreement executed as part of the sale by agreeing to haul roof tiles for former customer; principal did not call on or solicit customer, but rather customer called principal and asked him to haul roof tile.

[3] **Contracts 95** ↪ **202(2)**

95 Contracts

95H Construction and Operation

95H(C) Subject-Matter

95k202 Trade and Business

95k202(2) k. Restriction of

Competition. Most Cited Cases

**Injunction 212** ↪ **157**

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to

Procure

212IV(A)4 Proceedings

212k156 Order on Application

212k157 k. In General. Most Cited

Cases

Trial court could not temporarily enjoin seller of roof tile loading business and its principals from transacting business related to the hauling and placement of roof tiles for former customers; noncompete agreement entered into as part of the sale barred only calling on or soliciting customers, and did not prohibit transacting business with customers.

\*610 Michael D. Randolph of Simpson, Henderson, Carta & Randolph, Fort Myers, for Appellants. Theodore L. Tripp, Jr. and Kevin P. Fularczyk of Garvin & Tripp, P.A., Fort Myers, for Appellee.

SILBERMAN, Judge.

Coastal Loading, Inc. (the Seller), and its principals, Brett Williamson and Carolyn Williamson, appeal a nonfinal order granting a temporary injunction in favor of Tile Roof Loading, Inc. (the Buyer), based on a noncompetition agreement. We affirm the temporary injunction to the extent that it prohibits the Seller and the Williamsons from using the name Coastal Loading, reverse the remainder of the temporary injunction, and remand for further

proceedings.

In October 2003, Matthew Garcia and Lucinda Burke began negotiating the terms of an asset sale and purchase agreement with the Seller. On January 12, 2004, Mr. Garcia and the Seller entered into a Business Asset Sale and Purchase Agreement (the Asset Purchase Agreement).\*611 The Asset Purchase Agreement states that Mr. Garcia or his assigns would purchase “all of SELLER’S assets and properties pertaining to the business known as Coastal Loading, Inc. [,]” including the name of the business. The Asset Purchase Agreement also provides that the Seller and its stockholders “shall agree at the closing not to compete with the business being sold” and that “Brett Williamson shall agree to not compete in the same business terms as SELLER.” This document does not further describe the business being sold.

The closing occurred in March 2004 between the Seller and the Buyer as Mr. Garcia’s assignee. As part of the closing, the Seller and the Williamsons entered into an Agreement Not To Compete (the Noncompete Agreement) with the Buyer. The Noncompete Agreement specifies that the Seller and the Williamsons agree not to engage in the business of “roof tile loading” for five years in the State of Florida.

The Buyer subsequently learned that Brett Williamson had hauled roof tiles in Florida for D. Peck Roofing, Inc., after the closing. The record evidence established that Dave Peck, of D. Peck Roofing, Inc., had contacted Mr. Williamson and requested his services. The Buyer filed suit against the Seller and the Williamsons, seeking injunctive relief in count I for breach of the Noncompete Agreement and seeking damages in count II for breach of the Asset Purchase Agreement.

After a hearing on the Buyer’s motion for temporary injunctive relief, the trial court entered an order enjoining the Seller and the Williamsons from (1) “engaging in the truck hauling business related to the transportation or installation of roof tiles in the State of Florida”; (2) “contacting, or transacting business related to the hauling and placement of roof tiles for customers of the Plaintiff, including

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but not limited to those customers identified on the Customer Contact List dated December 3, 2003"; and (3) "any use of the name Coastal Loading in connection with any business enterprise."

#### COVENANT NOT TO COMPETE

[1] The Seller and the Williamsons argue that the Noncompete Agreement only prohibits "roof tile loading" and not "roof tile hauling." Thus, they contend that the trial court erred in enjoining them from hauling roof tiles.

The Buyer responds that the pertinent documents, including the Asset Purchase Agreement, the Bill of Sale, and the Customer Contact List, together with the testimony of Matthew Garcia and Lucinda Burke, reflect the intent of the parties with respect to the restrictive covenant ultimately memorialized in the Noncompete Agreement. The Buyer argues that the parties intended to include both hauling and loading of roof tiles in the sale of the business and as part of the covenant not to compete even though the covenant only specified roof tile loading. Thus, the Buyer contends that the trial court properly concluded that the Seller and the Williamsons were prohibited from both hauling and loading roof tiles.

This court has noted "that although the interpretation of a covenant not to compete is a matter of law to be resolved by a trial court, an appellate court is nevertheless empowered to undertake an independent assessment of the covenant's meaning." *Emergency Assocs. of Tampa, P.A. v. Sassano*, 664 So.2d 1000, 1002 (Fla. 2d DCA 1995); see also *Morgan v. Herff Jones, Inc.*, 883 So.2d 309, 313 (Fla. 2d DCA 2004) (stating that the issue of "whether a noncompete covenant arose under the contract is subject to de novo review"). Thus, \*612 we conduct a de novo review of the interpretation of the covenant not to compete.

"When the terms of a contract are clear and unambiguous, the contracting parties are bound by those terms." *Morgan*, 883 So.2d at 313 (citing *Emergency Assocs.*, 664 So.2d 1000). It is clear from the record that the parties understood that roof

tile hauling and roof tile loading were two separate aspects of the Seller's business. In fact, Matthew Garcia and Lucinda Burke recognized that hauling roof tiles from the manufacturer to the construction site and loading of roof tiles from the ground to the roof of a building were different services that were often provided separately. The phrase "roof tile loading," which is contained in the Noncompete Agreement, is unambiguous, and that term, even when considered in the context of the other documents and the record evidence, does not include the hauling of roof tiles from the manufacturer to the construction site.

The Asset Purchase Agreement reflects that at closing, the parties would enter into a separate agreement not to compete. The Noncompete Agreement, as drafted, contained a blank line for insertion of the description of the business in which the Seller and the Williamsons would not engage. The record reflects that in conjunction with the closing, the parties negotiated and specifically agreed to the words that were handwritten on the blank line. The signed document restricts the Seller and the Williamsons from engaging in "roof tile loading." Significantly, the Noncompete Agreement also contains an integration clause that states: "This agreement constitutes the entire agreement and understanding between the parties with respect to any covenant or agreement not to compete, not to solicit customers and not to disclose trade secrets and cannot be modified except in writing signed by the party to be charged." Nothing in the record suggests that the parties entered into a written modification of the Noncompete Agreement. Thus, in conjunction with the closing, the parties reached a specific, written agreement as to the scope of the restriction, and the Noncompete Agreement makes no mention of roof tile hauling as being part of the restriction. See § 542.335(1)(a), Fla. Stat. (2003) ("A court shall not enforce a restrictive covenant unless it is set forth in writing signed by the person against whom enforcement is sought.").

The Asset Purchase Agreement contemplated that a covenant not to compete would be required as part of the closing. The Asset Purchase Agreement did not prevent the parties from further negotiating, as

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they did, the exact language to be used in the covenant not to compete. Because the covenant not to compete that is contained in the Noncompete Agreement only restricts the Seller and the Williamsons from engaging in the business of roof tile loading, which is distinct from the business of roof tile hauling, the trial court erred in entering a temporary injunction that prohibited roof tile hauling.

#### COVENANT NOT TO SOLICIT

[2] The covenant not to solicit provides that the Seller and the Williamsons "shall not (1) call on or solicit ... customers of Seller on whom they called, with whom they became acquainted, or of whom they learned during its operation of the Business[.]" The evidence established that sometime after the closing, Dave Peck, a customer of Coastal Loading, called and asked Mr. Williamson to haul roof tile. Because the evidence did not establish that Mr. Williamson called on or solicited the customer, he did not breach the covenant not to solicit. *See Advantage Digital Sys., Inc. v. Digital Imaging Servs., Inc.*, 870 So.2d 111, 115 (Fla. 2d DCA 2003) (recognizing\*613 that if the employer's customer approaches former employees, "that is not solicitation").

[3] In the order, the trial court enjoined the Seller and the Williamsons "from contacting, or transacting business related to the hauling and placement of roof tiles for customers of the Plaintiff[.]" Apart from the fact that there was no evidence that Mr. Williamson called on or solicited any former customers, the injunction goes beyond the covenant not to solicit contained in the Noncompete Agreement by prohibiting the Williamsons from "transacting business" with those customers. *See id.* at 114-15 (determining that injunction prohibiting contact with customers was beyond scope of the covenant that prohibited only solicitation).

#### USE OF BUSINESS NAME

The temporary injunction also prohibited the Seller

and the Williamsons from using the name "Coastal Loading." Because they have not specifically argued on appeal that the trial court erred in granting injunctive relief as to use of the name, we affirm that portion of the temporary injunction.

#### CONCLUSION

We affirm the temporary injunction only to the extent that it prohibits the Seller and the Williamsons from using the name "Coastal Loading." In all other respects, we reverse the temporary injunction and remand for further proceedings on the Buyer's complaint.

Affirmed in part, reversed in part, and remanded.

NORTHCUTT, J., and THREADGILL, EDWARD F., Senior Judge, Concur.  
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*Coastal Loading, Inc. v. Tile Roof Loading, Inc.*  
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(Cite as: 912 So.2d 711)

**H****Briefs and Other Related Documents**District Court of Appeal of Florida,  
Fourth District.Douglas GRAY, an individual, Robert Dallin, an  
individual, and Management byPinnacle, Inc., a Florida corporation, Appellants,  
v.

PRIME MANAGEMENT GROUP, INC., Appellee.

No. 4D04-1940.

Nov. 2, 2005.

Rehearing Denied Nov. 9, 2005.

**Background:** Property management company brought action against its former president and vice president and a company they formed to compete with property management company seeking, among other things, to enforce the non-competition provision in former president's employment contract. The Circuit Court, Fifteenth Judicial Circuit, Palm Beach County, William J. Berger, J., granted property management company a temporary injunction. Former president and vice president and their rival company appealed.

**Holding:** The District Court of Appeal held that alleged oral extension of president's written employment contract did not extend non-competition provision.  
Reversed and remanded.

West Headnotes

**Frauds, Statute Of §131(2)**

185k131(2) Most Cited Cases

Alleged oral extension of written employment contract between property management company and its president did not extend non-competition provision of contract, and thus statute of frauds

precluded enforcement of such provision against president when he resigned 15 months after expiration of written contract; contract provision allowing extension of the contract "by mutual agreement of the parties hereto" did not specifically refer to the non-competition provision. West's F.S.A. §§ 542.335(1), 725.01.

\*712 Christopher C. Sharp of Rothstein Rosenfeldt Adler, Fort Lauderdale, for appellants.

Rachelle R. McBride and Kerry A. Raleigh of Sachs, Sax & Klein, P.A., Boca Raton, for appellee.

## CORRECTED OPINION

PER CURIAM.

We withdraw our previously issued opinion and substitute the following in its place.

Appellants seek reversal of a temporary injunction. They were enjoined from soliciting existing clients of Prime Management Group. We reverse because enforcement of Douglas Gray's non-compete clause after expiration of the employment agreement violates the Statute of Frauds. *Sanz v. R.T. Aerospace Corp.*, 650 So.2d 1057 (Fla. 3d DCA 1995).

Prime Management is a property management and maintenance service organization. Appellant Douglas Gray was employed and served as Prime's president. Appellant Robert Dallin was Prime's Vice President. Gray resigned as President. Dallin resigned soon after. The two started Pinnacle, a competing management business. At issue is Gray's employment contract with its covenant not to compete and nondisclosure of information clauses. Dallin did not sign an agreement.

Gray was hired by Prime in May 1997. The following month he entered into an employment agreement. The term of employment under the

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contract was to commence on the effective date, May 1, 1997, and end five years from that date, "unless terminated pursuant to section 6 of this Agreement, or unless extended by the mutual agreement of the parties hereto." The agreement contained a restrictive covenant prohibiting Gray from competing with Prime in the business of property management and maintenance services, and from soliciting the business of Prime's clients, for a period of eighteen months "following termination of this Agreement." Gray resigned from Prime in July 2003 and thereafter started Pinnacle.

Prime sued Gray, Dallin, and Pinnacle alleging breach of contract, tortious interference with a business relationship, misappropriation of trade secrets, and conspiracy. It also moved for the injunctive relief that is the subject of this non-final appeal.

Section 542.335, Florida Statutes, provides that restrictive covenants are valid restraints of trade or commerce if they are reasonable in time, area and line of business; set forth in a *writing* signed by the party against whom enforcement is sought; the contractually specified restraint is supported by at least one legitimate business interest justifying the restraint; and the covenant is reasonably necessary to protect that interest. § 542.335(1), Fla. Stat. [FN1] Under the Statute of Frauds, any agreement that is not to be performed within the space of one year from its making must be reduced to writing in order to be \*713 enforceable. § 725.01, Fla. Stat. (1997); *Tanenbaum v. Biscayne Osteopathic Hosp., Inc.*, 190 So.2d 777 (Fla.1966). Gray, Dallin, and Pinnacle take issue with the trial court's forgiving of the "writing" requirement required by both section 542, Florida Statutes, and the Statute of Frauds.

FN1. Restrictive covenants with an effective date before July 1, 1996 are governed by section 542.33, Florida Statutes. *See* § 542.331, Fla. Stat. The instant contract began in July 1997.

The trial court relied on several cases for the proposition that where an employment agreement

expires by its own terms, and the parties continue to perform as before, an implication arises that they have mutually assented to a new contract containing the same terms as the old. *Rubenstein v. Primedica Healthcare, Inc.*, 755 So.2d 746 (Fla. 4th DCA 2000); *Sultan v. Jade Winds Constr. Corp.*, 277 So.2d 574 (Fla. 3d DCA 1973); *Port-A-Pit, Inc. v. Gerhart*, 138 B.R. 624 (U.S.Bank.Ct.M.D.Fla.1992). Those cases involved enforcement of one year employment agreements, or one year renewals, exempting them from the Statute of Frauds. Here, the agreement would have to extend at least fifteen months as Gray resigned in July 2003.

Five years from the effective date of the agreement was April 30, 2002. The trial court found that after that date Gray continued to work for Prime as if the Agreement continued in full force and effect and that in the summer of 2003, while Prime and Gray were negotiating the terms of a new contract, they did not act as if the Agreement or the covenant not to compete had expired. "Without saying so, they acted as if they had extended the Agreement by mutual agreement pursuant to paragraph 4 thereof." The trial court concluded that an implication arose that Prime and Gray had mutually assented to a new contract containing the same provisions as the old. *Rubenstein*, 755 So.2d at 749. We reverse, finding that the Statute of Frauds required the written renewal of Gray's fully performed contract. *Sanz*, 650 So.2d at 1057; *Gafnea v. Pasquale Food Co.*, 454 So.2d 1366 (Ala.1984).

We point out that this court was not provided with a transcript of the evidentiary injunction hearing. Consequently, we have considered only legal issues, or those issues based on undisputed facts. *Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla.1979).

We agree with the Third District's conclusion that where a written employment contract has expired and the employee has continued working under an oral contract, a covenant not to compete contained in the original contract cannot always be enforced. *Sanz v. R.T. Aerospace Corp.*, 650 So.2d 1057 (Fla. 3d DCA 1995). *Sanz* reasoned that the contract there to which the covenant was ancillary had been

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fully performed and had expired by its terms. 650 So.2d at 1059 (citing *Storz Broadcasting Co. v. Courtney*, 178 So.2d 40 (Fla. 3d DCA 1965), *cert. denied*, 188 So.2d 315 (Fla.1966)).

*Sanz* rejected the employer's contention that the non-compete covenants of the written agreement survived the expiration of the three-year term of the agreement. The Third District reasoned that the fact that the non-compete clauses were independent of other covenants in the agreement did not mean that they survived the expiration of the contract in the absence of an express provision to that effect. *Id.*; compare *Brenner v. Barco Chems. Div., Inc.*, 209 So.2d 277 (Fla. 3d DCA 1968) (non-compete provisions were held to survive the expiration of an employment agreement where the contract expressly provided that its terms would continue after the contract's expiration if the employee continued to work without renewing the contract).

Addressing the Statute of Frauds, the Third District held that *Sanz's* continued \*714 employment, beyond the expiration of the three-year term therein, could not serve to extend any of the provisions of the written agreement. Further, *Sanz's* continued performance after the expiration of the written agreement pursuant to any oral agreement could not serve to remove the restrictive covenant from the confines of the Statute of Frauds. Herein, Prime argues that there is no Statute of Frauds violation *because* of the mutual agreement language of section four of the written contract as follows:

The term of employment hereunder will commence on the Effective date as set forth above [May 1, 1997] and end five (5) years from the Effective date, unless terminated pursuant to Section 6 of this Agreement, or unless extended by the mutual agreement of the parties hereto.

We reject this argument as the language does not specifically refer to the restrictive covenant. Compare *Brenner*, 209 So.2d at 277.

Based on the foregoing, we conclude that the order granting the temporary injunction as to Gray was error.

*Reverse and Remand.*

POLEN, KLEIN and SHAHOOD, JJ., concur.

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**Briefs and Other Related Documents (Back to top)**

- 4D04-1940 (Docket) (May. 21, 2004)

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(Cite as: 884 So.2d 324)

**H**

District Court of Appeal of Florida, Second District.  
OSMO TEC SACV CO., a Florida corporation;  
Roger Biset; and Jose Cervera, Appellants,

v.

CRANE ENVIRONMENTAL, INC., a Delaware  
corporation, Appellee.

No. 2D03-498.

Sept. 8, 2004.

**Background:** Environmental company brought action against water filtration company and two of its executives for violation of covenant not to compete. The Circuit Court, Sarasota County, Nancy K. Donnellan, J., granted temporary injunction requiring water filtration company and its executives to cease business operations pertaining to reverse-osmosis water filtration systems. Environmental company moved to have buyer of water filtration company's assets held in contempt for violation of injunction. The Circuit Court granted motion, and buyer appealed.

**Holding:** The District Court of Appeal, Canady, J., held that water filtration company could not be held in contempt for participating in sale not clearly enjoined.

Reversed and remanded.

West Headnotes

**[1] Injunction 212 ↪205**

212 Injunction

212VI Writ, Order, or Decree

212k202 Writ or Order

212k205 k. Operation and Effect. Most  
Cited Cases

Temporary injunction prohibited neither the sale of any asset of water filtration company nor the use of company's fictitious name by any third parties in connection with a water filtration business; injunction required that company and two executives cease business operations pertaining to reverse-osmosis water filtration systems, whether through fictitious name or a third party, and that parties cease and desist from soliciting environmental company's employees and from using environmental company's proprietary information and marketing materials with depiction of environmental company's products. West's F.S.A. RCP Rule 1.610(c).

**[2] Injunction 212 ↪232**

212 Injunction

212VII Violation and Punishment

212k232 k. Punishment. Most Cited Cases

A contempt sanction may not be imposed for the violation of an injunction unless the purportedly contemptuous act clearly contravenes the injunction. West's F.S.A. RCP Rule 1.610(c).

**[3] Contempt 93 ↪20**

93 Contempt

93I Acts or Conduct Constituting Contempt of Court

93k19 Disobedience to Mandate, Order, or Judgment

93k20 k. In General. Most Cited Cases

An essential finding to support contempt is the party's intent to violate the court order at issue.

\*324 Daniel Joy of Law Office of Daniel Joy and Thomas C. Valentine of Valentine & Gorman, Sarasota, for Appellants.

Lawrence P. Bermis and Michael S. McCauley of Kirkland & Ellis, Los Angeles, California, and Digna B. French of Steel Hector & Davis LLP, Miami, for Appellee.

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\*325 CANADY, Judge.

BY ORDER OF THE COURT:

Appellee's motion for rehearing en banc is denied.

Appellee's motion for rehearing is granted in part. The opinion dated December 19, 2003, is withdrawn, and the attached opinion is substituted therefor.

No additional motions for rehearing will be entertained.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

The appellants, Osmo Tec SACV Co., Roger Biset, and Jose Cervera, appeal an order finding them in contempt for violating an injunction entered in a lawsuit to which they were not parties. Because we conclude that the appellants did not violate the injunction, we reverse.

#### I. BACKGROUND

The injunction that the appellants were found to have violated resulted from litigation filed by Crane Environmental, Inc., the appellee, against Edward Closuit, Myriam Murphy, and Andalite Industries, Inc., who are not parties to this appeal. Crane Environmental's suit alleged violations of noncompete agreements entered in connection with Crane Environmental's purchase of Environmental Products USA, Inc. (EP USA), a company that manufactured water filtration systems. Closuit and Murphy, who are husband and wife, both had roles in the leadership of EP USA before it was sold, and both served terms as its president. As a part of the sale of EP USA, a number of persons, including Closuit and Murphy, agreed to five-year noncompete agreements with Crane Environmental. After the sale, Crane Environmental employed Closuit for a short time, but ultimately his relationship with Crane Environmental soured and his employment ended.

Shortly following Closuit's departure from Crane

Environmental, Closuit and Murphy reentered the water filtration business. They incorporated Andalite Industries and registered "Haliant Technologies" as a fictitious name for the corporation. Under that name, Andalite Industries began selling water filtration systems similar to those produced by EP USA and Crane Environmental.

Crane Environmental filed suit and requested a temporary injunction to prevent violation of the noncompete agreement. The trial court entered a temporary injunction, requiring that "Andalite Industries/Haliant Technologies," Edward Closuit, and Myriam Murphy cease business operations pertaining to reverse osmosis water filtration systems, "whether through Haliant or a third party." Further, the court required that those parties cease and desist from soliciting Crane Environmental employees and from using Crane Environmental's proprietary information and marketing materials with depictions of Crane Environmental products.

After this injunction was issued, Murphy and Closuit entered into negotiations with Crane Environmental concerning an orderly shut-down of Andalite Industries' water filtration business under the terms of the temporary injunction. At the same time, Closuit and Murphy made arrangements-without informing Crane Environmental-to sell the assets of Andalite Industries' Haliant Technologies division to Osmo Tec. Osmo Tec purchased virtually all of the assets used by Andalite Industries for its water filtration business. The purchase agreement transferred various items of capital equipment and inventory and also provided for the transfer of intangible property, including the fictitious name "Haliant Technologies" and the internet \*326 address and telephone numbers used in Andalite Industries' water filtration business.

When it discovered that Andalite Industries had sold these assets, Crane Environmental moved to have Closuit, Murphy, Andalite Industries, and the appellants held in contempt for violating the temporary injunction. This motion was filed in conjunction with the lawsuit against Closuit, Murphy, and Andalite Industries to which the

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appellants were not parties. In the motion for contempt, Crane Environmental argued that Osmo Tec was in contempt for continuing Andalite Industries' water filtration business. Crane Environmental also moved for a contempt order against Biset and Cervera, alleging that Biset managed Osmo Tec's operation and that Cervera was the owner of Osmo Tec.

At the contempt hearing, where the appellants were represented by counsel, the trial court orally concluded that the appellants should be held in contempt, noting that the appellants had knowingly purchased "as [a] going concern" a business that the court had effectively ordered shut down. In its written order (the order on appeal), the court stated that Haliant Technologies' existence as a business was "the fruit of illicit conduct" and that the appellants had actual knowledge of the injunction enjoining its operations. The contempt penalty imposed against the appellants was an additional injunction specifically enjoining the appellants from "conducting business operations pertaining to [a] membrane-based water purification business through the name Haliant, Haliant Technologies[,] or any derivative thereof" and also enjoining the use of any of the assets acquired from Andalite Industries in furtherance of a water purification business. The injunction also prohibited the appellants from using the internet address, telephone numbers, software, customer lists, and other intellectual property obtained from Andalite Industries. FN1

FN1. In its contempt order, the trial court specifically found Osmo Tec and Biset in contempt for violating its prior injunction.

It did not explicitly make such a finding as to Cervera. However, the contempt order imposed the same contempt penalty, a second injunction, against Osmo Tec, Biset, and Cervera. We conclude that, at least implicitly, the trial court found Cervera in contempt.

## II. ANALYSIS

[1] Florida Rule of Civil Procedure 1.610(c)

provides:

Every injunction shall specify the reasons for entry, shall describe in reasonable detail the act or acts restrained without reference to a pleading or another document, and shall be binding on the parties to the action, their officers, agents, servants, employees, and attorneys and on those persons in active concert or participation with them who receive actual notice of the injunction.

Two provisions of this rule are particularly pertinent here: (1) an injunction is binding and enforceable against "persons in active concert or participation with" the parties named in an injunction if those persons have "receive[d] actual notice of the injunction," and (2) "[e]very injunction ... shall describe in reasonable detail the act or acts restrained."

[2] [3] Corollary to the requirement that enjoined acts be described "in reasonable detail" is the rule that a contempt sanction may not be imposed for the violation of an injunction unless the purportedly contemptuous act clearly contravenes the injunction. *See Power Line Components, Inc. v. Mil-Spec Components, Inc.*, 720 So.2d 546, 548 (Fla. 4th DCA 1998) ("A party may not be held in contempt of an injunction that is ambiguous and could reasonably\*327 be interpreted in two ways." ). Moreover, "[a]n essential finding to support contempt is the party's intent to violate the court order at issue." *Merrill Lynch Trust Co. v. Alzheimer's Lifeliners Ass'n*, 832 So.2d 948, 954 (Fla. 2d DCA 2002) (citing *Power Line Components*, 720 So.2d at 548).

The appellants do not dispute that they had knowledge of the injunction at issue in this case prior to their purchase of assets from Andalite Industries. Nor do they contest that the assets that Osmo Tec purchased from Andalite Industries permitted the continuance of Andalite Industries' Haliant Technologies' operations essentially without interruption. Instead, they contend that the injunction enjoining "Andalite Industries/Haliant Technologies" from continuing operations did not prohibit the sale of the assets of Andalite Industries to a third party. We agree.

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If the trial court intended to prohibit the sale of Andalite Industries' assets, the temporary injunction does not reflect that intention. The temporary injunction is devoid of a description "in reasonable detail" of the conduct for which the trial court has held the appellants in contempt; there is no basis for concluding that the appellants intended to violate the injunction. Accordingly, the contempt order must be reversed.

From a review of the transcript of the contempt hearing, it is apparent that the trial court's rationale for finding the appellants in contempt was its belief that the purpose of the injunction was to destroy the ongoing operations of a company that had grown as a result of violations of a valid noncompete agreement. However, that purpose was not reflected in the written order imposing the injunction. The temporary injunction specifically enjoined neither the sale of any asset of Andalite Industries nor the use of the name of Haliant Technologies by any third parties-such as the appellants-in connection with a water filtration business.

Our conclusion is not altered by the fact that the injunction specifically enjoined the activities of "Andalite Industries/Haliant Technologies" and Osmo Tec acquired and used the trade name Haliant Technologies. Obviously Andalite Industries, a Florida corporation, could properly be enjoined. Haliant Technologies, a fictitious name, had no independent legal existence and could not be enjoined; any reference to Haliant Technologies was simply a reference to Andalite Industries. *See Riverwalk Apartments, L.P. v. RTM Gen. Contractors, Inc.*, 779 So.2d 537, 539 (Fla. 2d DCA 2000) (noting that "[a] fictitious name is just that-a fiction involving the name of the real party in interest, and nothing more"). And the reference to Haliant Technologies in the injunction was not sufficient to prohibit the use of that name by a third party such as Osmo Tec.

Additionally, we address the language of the injunction that prohibited Andalite Industries from continuing its water filtration business "whether through Haliant or a third party." There is no evidence that the sale of assets was an attempt by

Andalite Industries to continue to participate in the water filtration business through a third party. Although Andalite Industries maintains a security interest in the assets it sold to Osmo Tec, this was a natural consequence of the parties' decision to privately finance the transaction. The amount to be paid to Andalite Industries under the asset purchase agreement is fixed and is not contingent on Osmo Tec's profits. Under the sale agreement with Osmo Tec, Andalite Industries is not continuing its involvement in the water filtration business.

### 328III. CONCLUSION

Because the provisions of the prior injunction did not prohibit the conduct for which the trial court found the appellants to be in contempt, we reverse the trial court's contempt order in its entirety and remand for the entry of an order denying the motion for contempt against the appellants.

Reversed and remanded.

VILLANTI and WALLACE, JJ., Concur.  
Fla.App. 2 Dist.,2004.

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**H**

Briefs and Other Related Documents

District Court of Appeal of Florida, Fourth District.  
Spencer D. LEE, M.D., Appellant,

v.

Mark A. PINSKY, M.D., P.A., Appellee.  
Nos. 4D04-137, 4D04-718.

Feb. 23, 2005.

Rehearing Denied April 6, 2005.

**Background:** Appeal was taken from decision of the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Catherine M. Brunson, J., granting a temporary injunction as a prelude to the enforcement of a non-compete clause in an employment contract.

**2Holding:** The District Court of Appeal held that there was substantial evidence that employer materially breached the employment agreement when he did not compensate employee for over \$275,000 worth of services provided by employee, despite the fact that agreement provided that employee should receive a percentage of such revenues, and thus, employer did not demonstrate a substantial likelihood of success on the merits so as to warrant issuance of temporary injunction.

Reversed and remanded.

West Headnotes

**[1] Injunction 212 ↪ 138.18**

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)2 Grounds and Objections

212k138.18 k. Likelihood of Success on Merits. Most Cited Cases

A party seeking temporary injunctive relief is required to demonstrate a substantial likelihood of its success on the merits.

**[2] Injunction 212 ↪ 138.39**

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. Most Cited Cases

There was substantial evidence that employer materially breached the employment agreement when he did not compensate employee for over \$275,000 worth of services provided by employee, despite the fact that agreement provided that employee should receive a percentage of such revenues, and thus, employer did not demonstrate a substantial likelihood of success on the merits so as to warrant issuance of temporary injunction as a prelude to enforcement of non-compete clause in employment agreement.

**\*1188** Elliot H. Scherker and Julissa Rodriguez of Greenberg Traurig, P.A., Miami and Gary M. Dunkel of Greenberg Traurig, P.A., West Palm Beach, for appellant.

William H. Pincus of William H. Pincus, Attorney at Law, West Palm Beach, for appellee.

PER CURIAM.

This case involves the granting of a temporary injunction as a prelude to the enforcement of a non-compete clause in an employment contract.

The employee alleges that the employer materially breached the contract thereby making the clause unenforceable. We agree with the employee that under these facts there is substantial evidence that

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the employer breached the agreement and therefore, the trial court erred in granting the temporary injunction.

Mark A. Pinsky, M.D., P.A., and Spencer Darrell Lee, M.D., entered into an employment contract which included a non-compete clause. Prior to the expiration of such contract, the parties entered into an amended employment agreement which extended the original agreement while modifying certain provisions, mainly those dealing with compensation. The amended agreement was on a month-to-month basis.

The amended employment agreement provided that Lee was to be paid forty-five percent of his gross collections, for each prior month, in excess of nineteen thousand dollars, the minimum collection amount. Gross collections were revenues generated from fees charged for Lee's professional services.

During the initial month the amended employment agreement was in effect, Pinsky collected over \$50,000 for Lee's professional services. Less than a month later, Pinsky had \$275,000 in accounts receivable attributed to Lee's services performed prior to the effective date of the amended agreement. A large portion of this amount would have been collected before Lee left Pinsky's employ, approximately six months after the execution of the amended employment agreement. However, Pinsky refused to pay Lee any percentage of these revenues where the services which generated these revenues were performed by Lee during the time when the original agreement was in effect, but the revenue was collected during the time the amended employment agreement was in effect. Pinsky argued that as a result, \*1189 Lee was not entitled to any percentage of these revenues, neither that provided for by the original agreement, fifty-percent, nor the percentage agreed to in the amended employment agreement, forty-five percent.

[1] [2] The argument which Lee makes in this appeal is similar to that made by the plaintiff in *Benemerito & Flores, M.D.'s, P.A. v. Roche, M.D.*, 751 So.2d 91 (Fla. 4th DCA 1999). In *Benemerito*, this Court affirmed a trial court's denial of

temporary injunctive relief where the employee alleged that certain services she performed were excluded from the calculation upon which her bonus was based in breach of her contract. Section 542.335(1)(g)(3), Florida Statutes, provides that when a court is considering the enforceability of a non-compete clause it is required to consider all applicable legal and equitable defenses. A party seeking temporary injunctive relief, such as that sought by Pinsky in this action, is required to demonstrate a substantial likelihood of its success on the merits. See *Benemerito*, 751 So.2d at 93. The trial court determined that Pinsky satisfied such burden despite Lee's assertion that Pinsky materially breached the agreement. We do not agree. There is substantial evidence that Pinsky materially breached the agreement where he did not compensate Lee for over \$275,000 worth of services provided by Lee, despite the fact that both agreements provided that Lee should receive a percentage of such revenues. This Court need not determine which percentage was applicable or what the proper interpretation of the contract is where Pinsky made *no* payment for this portion of gross revenues.

Having found that Pinsky did not demonstrate a substantial likelihood of its success on the merits where there is substantial evidence that it materially breached the contract prior to Lee leaving Pinsky's employ, the other issues raised in this appeal are moot. We reverse the granting of the temporary injunction and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

WARNER, POLEN and HAZOURI, JJ., concur.  
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**H**

Briefs and Other Related Documents

District Court of Appeal of Florida, Fourth District.  
NORTHERN TRUST INVESTMENTS, N.A.,  
Appellant,

v.

Carl J. DOMINO, Appellee.  
No. 4D04-2662.

March 2, 2005.

Rehearing Denied April 8, 2005.

**Background:** Employer sought temporary injunction to enforce provisions of covenant not to compete against former employee. The Circuit Court, 15th Judicial Circuit, Palm Beach County, Timothy P. McCarthy, J., denied motion on grounds employer was unlikely to succeed on merits. Employer appealed.

**3Holding:** The District Court of Appeal, Warner, J., held that employer's prior breach of employment contract precluded entitlement to a temporary injunction.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪920(3)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k920 Interlocutory Orders and  
Proceedings

30k920(3) k. Injunction. Most Cited  
Cases

Appeal and Error 30 ↪954(1)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k950 Provisional Remedies

30k954 Injunction

30k954(1) k. In General. Most

Cited Cases

A trial court's ruling on a motion for a temporary injunction is clothed with a presumption of correctness, subject to reversal only for a clear abuse of discretion.

[2] Injunction 212 ↪138.39

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to  
Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. Most Cited Cases

A trial court may consider an employer's breach of the employment agreement when deciding whether to grant a temporary injunction to enforce a covenant not to compete.

[3] Injunction 212 ↪138.39

212 Injunction

212IV Preliminary and Interlocutory Injunctions

212IV(A) Grounds and Proceedings to  
Procure

212IV(A)3 Subjects of Relief

212k138.36 Contracts

212k138.39 k. Noncompetition

Covenants or Agreements. Most Cited Cases

Employer was not entitled to temporary injunction to enforce noncompetition provisions of employment contract with former employee due to employer's breach of employment contract prior to employee's termination, where employer failed to pay retention bonuses from full amount of bonus pool estimated at \$7 million as provided in contract,

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and instead paid bonuses from reduced pool of \$4 million.

\*881 Kathy M. Klock and Joseph J. Galardi of Steel, Hector & Davis, LLP, West Palm Beach, for appellant.

Brenda J. Carter, Fort Lauderdale, and Jack Scarola of Searcy, Denny, Scarola, Barnhart & Shipley, P.A., West Palm Beach, for appellee.

WARNER, J.

Northern Trust Investments, N.A., appeals the trial court's denial of its motion for temporary injunctive relief to enforce the provisions of a covenant not to compete against its employee, Carl Domino. The court concluded that Domino presented evidence that Northern Trust materially breached its agreement with Domino prior to terminating his employment, preventing the company from obtaining equitable relief to enforce the non-competition agreement. We affirm the trial court's ruling.

Domino sold his company to Northern Trust for a substantial sum. As part of the agreement, Domino and his partners entered into employment contracts with Northern Trust. Domino's contract provided for compensation and contained a covenant not to compete if Domino resigned or was terminated for cause. As part of the compensation, the contract provided that Domino and other employees would be entitled to a retention bonus from a Retention Bonus Pool "consist [ing] of cash in the amount of \$7,000,000." Instead, the company paid bonuses based upon its arbitrary inclusion of only \$4,000,000 in the pool. Domino objected. Some months later, Northern Trust terminated Domino for, among other things, soliciting another employee to leave the company and requesting reimbursement for expenses that had not been approved by the company, which Northern Trust considered a violation of its reimbursement policy.

After hearing all the evidence, both on the issue of Northern Trust's breach of contract and the reasons for Domino's termination, the trial court denied the injunction because it found Northern Trust did not prove it had a substantial likelihood of success on

the merits, given the evidence of its breach of contract in failing to fully fund the Retention Bonus Pool.

[1] [2] A trial court's ruling on a motion for a temporary injunction is clothed with a presumption of correctness, subject to reversal only for a clear abuse of discretion. *Gold Coast Chem. Corp. v. Goldberg*, 668 So.2d 326, 327 (Fla. 4th DCA 1996). The trial court may consider an employer's breach of the employment agreement when deciding whether to grant a temporary injunction to enforce a covenant not to compete. See \*882 *Benemerito & Flores, M.D.'s, P.A. v. Roche*, 751 So.2d 91, 93-94 (Fla. 4th DCA 1999); *Cordis Corp. v. Prooslin*, 482 So.2d 486, 490 (Fla. 3d DCA 1986). In *Benemerito* we quoted from *Bradley v. Health Coalition, Inc.*, 687 So.2d 329 (Fla. 3d DCA 1997), which said:

"A party is not entitled to enjoin the breach of a contract by another, unless he himself has performed what the contract requires of him so far as possible; if he himself is in default or has given cause for nonperformance by defendant, he has no standing in equity." *Seaboard Oil Co. v. Donovan*, 99 Fla. 1296, 1305, 128 So. 821, 824 (1930) (affirming denial of temporary injunction).

"Having committed the first breach, the general rule is that a material breach of the Agreement allows the non-breaching party to treat the breach as a discharge of his contract liability." *In the Matter of Walter W. Thomas, Debtor*, 51 B.R. 653, 654 (M.D.Fla.1985). If the employer wrongfully refuses to pay the employee his compensation, the employee is relieved of any further obligation under the contract and the employer cannot obtain an injunction.

687 So.2d at 333 (internal citations omitted).

[3] We agree with the trial court that Northern Trust did not show a substantial likelihood of success on the merits because it did not dispel Domino's claim that the company breached the employment contract prior to terminating Domino by refusing to fully fund the Retention Bonus Pool. Without full funding, Northern Trust was not in material compliance with the contract, which provided that the company would base the bonuses

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on each employee's share of the pool. Although payments to an individual employee above a guaranteed minimum were within Northern Trust's discretion, Domino showed that the employment contract contemplated that the employee payments would constitute the entire \$7,000,000 pool, which Northern did not fully fund. Domino presented evidence that he was entitled to have his bonus figured as a share of a \$7,000,000 fund, not the \$4,000,000 the company actually disbursed. Therefore, because the trial court found credible evidence that Northern Trust breached the contract first, it did not abuse its discretion in denying the temporary injunction to enforce the covenant not to compete.

Affirmed.

FARMER, C.J., and GUNTHER, J., concur.  
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**C**

Briefs and Other Related Documents

District Court of Appeal of Florida, Fifth District.  
Charles Robert VELA, et al., Appellants,

v.

Gaynes D. KENDALL and Robin L. Kendall, et al.,  
Appellees.

No. **SD04-1454**.

July 8, 2005.

**Background:** Delivery company brought action against independent contractor seeking damages and an injunction for contractor's breaches of two-year non-compete clause in parties' contract. The Circuit Court, Seminole County, Marlene M. Alva, J., entered judgment in favor of delivery company, awarding damages and an injunction. Contractor appealed.

**Holding:** The District Court of Appeal, Monaco, J., held that trial court could not enjoin contractor from competing with delivery company for two years after the date of judgment.

Affirmed in part and reversed in part.

Peterson, J., concurred in result only.

West Headnotes

**[1] Injunction 212**  **189**

212 Injunction


212V Permanent Injunction and Other Relief

212k189 k. Nature and Scope of Relief. Most

Cited Cases

Trial court that awarded damages to delivery

company for independent contractor's violation of a two-year non-compete clause could not enjoin contractor from competing with delivery company for two years after the date of judgment; original two-year term expired before entry of judgment, delivery company never sought temporary injunction, delivery company was fairly compensated with damages for breaches during term of restrictive covenant, and injunction would extend term of parties' contract beyond what parties agreed to.

**[2] Injunction 212**  **189**

212 Injunction

212V Permanent Injunction and Other Relief

212k189 k. Nature and Scope of Relief. Most Cited Cases

As a general rule, a trial court cannot by use of an injunction extend the terms of a contract after its termination.

**\*1034** Jeffrey D. Keiner, Frank A. Hamner and Daniel E. Traver of GrayRobinson, P.A., Orlando, for Appellants.

Stephen D. Milbrath of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A., Orlando, for Appellees.

MONACO, J.

The appellant, Charles Robert Vela, seeks review of a final judgment that granted the appellees, Gaynes D. Kendall and Robin L. Kendall, d/b/a Quality Assurance Home Delivery ("Quality"), a permanent injunction, as well as damages, for violation of a restrictive covenant in an employment contract.

We affirm the final judgment in all respects except the grant of the injunction. Because the time period of the restrictive covenant had already run, and Quality received damages for that time period, the trial court was without authority to further extend it in the final judgment.

According to the complaint, Quality operated a

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delivery service for various retail stores dealing in appliances and other large goods. Reduced to their essence, the facts reveal that Quality entered into an agreement FNI with Mr. Vela under which Mr. Vela agreed to provide delivery services for Quality's delivery clients as an independent contractor. In return, Vela received a portion of the delivery fee for his services. The agreement contained a non-compete clause which restricted Mr. Vela from making deliveries for Quality's clients "for a period of no less than two years from the date of termination."

FNI. There were actually two sequential agreements, but for purposes of this appeal we will deal only with the later agreement.

Both agreements contained the restrictive covenant.

Mr. Vela was terminated on May 1, 2001. Five months later Quality demanded in writing that Mr. Vela stop delivery services in violation of the non-compete provision, and eventually brought suit, seeking damages and injunctive relief, including temporary injunctive relief. Mr. Vela answered and counterclaimed, and asserted a material breach of the independent contractor agreement, citing to Quality's alleged failure to pay Mr. Vela for services. Quality, however, never pursued a temporary injunction and, accordingly, none was ever issued.

The case proceeded to a non-jury trial. On March 24, 2004, almost three years after Quality terminated its contract with Mr. Vela, the trial court entered a judgment in favor of Quality for both damages and injunctive relief. More specifically, the trial court awarded Quality damages of \$10,505 for damages caused to it by Mr. Vela's violation of the non-compete provision of the contract, and permanently enjoined Mr. Vela for two years from the date of the judgment from making deliveries to or on behalf of customers of Quality. Mr. Vela appeals.

[1] While Mr. Vela raises a number of issues for our consideration, we find merit only in his argument that the injunction should not have been

issued. He asserts, essentially, that by granting damages for violation of the restrictive covenant, and by extending the injunction for another two \*1035 years, Quality has been given a double recovery. We choose to view it from a slightly different perspective.

[2] As a general rule, a trial court cannot by use of an injunction extend the terms of a contract after its termination. There may be times, however, where the equities involved make this a necessary and proper action. *See Florida Power Corp. v. Town of Belleair*, 830 So.2d 852 (Fla. 2d DCA 2002), *decision quashed*, 897 So.2d 1261 (Fla.2005). *See also Florida Power Corp. v. City of Winter Park*, 887 So.2d 1237, 1240-41 (Fla.2004). Quality chose not to seek a temporary injunction during the pendency of this lawsuit, and the non-competition time agreed to by the parties expired well before the trial of this cause. Quality, therefore, was treated with complete fairness by virtue of its recovery of damages for the violation of the restrictive covenant during the two-year period of its viability. That part of the final judgment that extends the injunction period for two years from the date of the judgment, however, inculcates a term not agreed to by the parties, and erroneously extends the contract terms.

Accordingly, the final judgment is affirmed in all respects except to the extent that it enjoins Mr. Vela from competing against Quality for two years. The entry of the injunction is reversed.

AFFIRMED IN PART, REVERSED IN PART.

TORPY, J., concurs.

PETERSON, J., concurs in result only, without opinion.

Fla.App. 5 Dist., 2005.

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## Briefs and Other Related Documents

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District Court of Appeal of Florida, Second District.  
 MASTERS FREIGHT, INC., Eric Masters, and  
 Michael Wellner, Appellants,

v.

SERVCO, INC., and AVXA, Inc., d/b/a American  
 Freight Company, Appellees.

No. 2D05-1536.

Oct. 12, 2005.

**Background:** Action was brought between former employees and former employer. The Circuit Court, Pinellas County, Walt Logan, J., entered temporary restraining order preventing employees from competing against employer, pursuant to a noncompete agreement. Employees appealed.

**Holding:** The District Court of Appeal, Whatley, J., held that trial court failed to make specific findings supporting injunctive relief.

Reversed and remanded with directions.

[1] Injunction 212 ↪150

212 Injunction

212IV Preliminary and Interlocutory Injunctions  
 212IV(A) Grounds and Proceedings to  
 Procure

212IV(A)4 Proceedings

212k150 k. Restraining Order Pending  
 Hearing of Application. Most Cited Cases  
 Trial court that entered temporary restraining order

preventing former employees from competing against their former employer, pursuant to a noncompete agreement, failed to make specific findings supporting injunctive relief, even though order stated that immediate and irreparable injury would result to employer in the absence of an injunction; trial court did not address availability of an adequate remedy at law, whether there was a substantial likelihood of success on the merits, or considerations of the public interest. West's F.S.A. RCP Rule 1.610(c).

[2] Injunction 212 ↪138.1

212 Injunction

212IV Preliminary and Interlocutory Injunctions  
 212IV(A) Grounds and Proceedings to  
 Procure

212IV(A)2 Grounds and Objections

212k138.1 k. In General. Most Cited

Cases

A temporary injunction may be granted only if the movant establishes: (1) a likelihood of irreparable harm; (2) unavailability of an adequate legal remedy; (3) a substantial likelihood of succeeding on the merits; and (4) considerations of the public interest support the entry of the injunction. West's F.S.A. RCP Rule 1.610(c).

[3] Injunction 212 ↪157

212 Injunction

212IV Preliminary and Interlocutory Injunctions  
 212IV(A) Grounds and Proceedings to  
 Procure

212IV(A)4 Proceedings

212k156 Order on Application

212k157 k. In General. Most Cited

Cases

A temporary injunction must specify the reasons for its entry and the findings supporting the elements necessary to establish entitlement to a temporary injunction must be clear, definite, and unequivocal. West's F.S.A. RCP Rule 1.610(c).

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Patrice A. Pucci of Patrice A. Pucci, P.A., St. Petersburg, for Appellants.  
 Robert Hitchens of Paul W. Hitchens, P.A., St. Petersburg, for Appellees.

WHATLEY, Judge.

\*1 The Appellants challenge the entry of a temporary restraining order preventing them from competing against American Freight Company, their former employer, pursuant to a noncompete agreement. We reverse because the trial court did not make specific findings which would support injunctive relief.

[1] [2] [3] A temporary injunction may be granted only if the movant establishes (1) a likelihood of irreparable harm; (2) unavailability of an adequate legal remedy; (3) a substantial likelihood of succeeding on the merits; and (4) considerations of the public interest support the entry of the injunction. *Snibbe v. Napoleonic Soc'y of Am., Inc.*, 682 So.2d 568, 570 (Fla. 2d DCA 1996). An injunction must specify the reasons for its entry and the findings supporting the four elements must be clear, definite, and unequivocal. *Id.*; Fla. R. Civ. P. 1.610(c). In the present case, the order on appeal addresses only the first element, finding that "immediate and irreparable injury, loss, or damage will result" to the Appellees. The trial court failed to address in the order or at the hearing on the injunction the availability of an adequate remedy at law, whether there was a substantial likelihood of success on the merits, and considerations of the public interest.

Accordingly, we reverse the order and remand this case for the trial court to review the record and make a determination regarding whether the record supports the above four elements and enter a proper order delineating the specific reasons why the Appellees are entitled to injunctive relief. *See Snibbe*, 682 So.2d at 570. On remand, if the trial court enters a temporary injunction, it must set a bond after providing both parties with an opportunity to present evidence regarding the appropriate amount of the bond. *See Santos v. Tampa Med. Supply*, 857 So.2d 315 (Fla. 2d DCA 2003).

Reversed and remanded with directions.

SALCINES and CANADY, JJ., concur.  
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Masters Freight, Inc. v. Servco, Inc.

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### Judge Tentatively Sides With Microsoft

Friday October 14, 3:59 pm ET

By Michael Liedtke, AP Business Writer

#### Judge Tentatively Sides With Microsoft in Google Employment Dispute

SAN JOSE, Calif. (AP) -- Google Inc.'s attempt to lift the job restrictions on a top computer engineer lured from rival Microsoft Corp. suffered another blow Friday under a tentative court ruling that would limit the search engine company's legal options for at least another three months.

Lawyers from the high-tech titans appeared in federal court a few hours after Judge Ronald Whyte indicated he will pause a Google lawsuit that seeks to invalidate a noncompete agreement that's preventing Kai-Fu Lee from carrying out all his duties as the new director of the company's research center in China.

Lee, who received a \$10 million compensation package to join Google in July, signed the noncompete agreement five years ago shortly after taking a top executive position at Microsoft.

As soon as he took the Google job this year, Lee moved from Microsoft's home state of Washington to a Silicon Valley home near Google's Mountain View, Calif.-based headquarters.

That transfer has become the pivotal point in the tug-of-war over Lee's services because Washington honors noncompete agreements while California law doesn't.

Stephen Taylor, an attorney representing Google, tried to sway Whyte from finalizing his ruling. He argued that a stay of the federal case would effectively end the company's hopes of proving Lee's noncompete agreement is unenforceable under California law.

Michael Bettinger, a Microsoft attorney, disagreed, contending that the merits of California laws governing employment agreements can be weighed by a Washington state judge, who has already heard evidence in a separate lawsuit that Microsoft filed after Lee defected.

The Washington judge, Steven Gonzalez, last month issued an order that prevents Lee from doing anything similar to the work he performed at Microsoft, including search technology. Gonzalez's order remains in effect until the completion of a trial scheduled to begin Jan. 9.

If Whyte formalizes his stay of the federal case, the suit would remain on hold until after the Washington trial. By then, less than six months could be remaining on the one-year noncompete agreement that's handcuffing Lee and Google.

Whyte, who described the matter as a "tough case," didn't indicate when he might issue a definitive ruling.

"We are very pleased and encouraged by the tentative ruling," Microsoft attorney Karl Quackenbush said after Friday's hearing.

Michael Kwun, Google's chief litigation attorney, said the company still hopes Whyte will change his mind.

The struggle over Lee, previously little known outside the high-tech industry, has attracted international interest because the battle has exposed the behind-the-scenes acrimony between two of the world's most recognized companies.

A sworn deposition given by a former Microsoft employee in the Washington state case depicted Microsoft CEO Steve Ballmer as an obscenity-spewing leader on a mission to destroy Google -- a characterization that Ballmer labeled a gross exaggeration. Other evidence and testimony showed Google hungrily pursuing Lee, who passed along confidential Microsoft documents during the courtship.

The tensions have been triggered by Google's rapid rise in just seven years of existence. The company's dominance of the lucrative Internet search engine has provided Google's management with the money to introduce an array of new software, including products that eventually could morph into a threat to Microsoft's long-running dominance of the personal computer.

The battle also has implications beyond Lee. Google intends to hire thousands of new employees during the next few years, so it would like to establish that noncompete agreements aren't necessarily valid under California law. Microsoft hopes prevailing in the Lee case discourages future raids on its work force, particularly by Google.

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