

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH 6

OUTAGAMIE COUNTY

SCHOOL SPECIALTY, INC.,
Plaintiff,
vs.

**OPINION AND ORDER ON
MOTION FOR TEMPORARY
INJUNCTION**

BRENT KANE,
Defendant.

Case No.: 17-CV-882

The Plaintiff in this case, School Specialty Supply (hereafter "SCHOOL") has moved for a Temporary Injunction against the Defendant in this case, Bruce Kane (hereafter "KANE") on the grounds that certain of his activities since he has left the employment of SCHOOL violates not only a restrictive covenant but a prohibition on the disclosure of confidential information. SCHOOL relies upon a document which it claims was signed by KANE when he began his employment in 2005. There is a dispute as to whether KANE signed the document and also as to its legal effect. That document is hereafter referred to as the "CONTRACT".

It is uncontested that the CONTRACT was drafted by SCHOOL and that any ambiguity in the document created by the drafter would appropriately be resolved against the drafter, SCHOOL, and in favor of KANE.

The restriction includes two particularly relevant provisions for the determination of the Court in this request for a Temporary Injunction. The first of these is a restriction on the right of KANE to compete with SCHOOL for a period of two years following his cessation of employment. This provision will hereafter be referred to as the "RESTRICTION". There is also a restriction on the disclosure of confidential information

and trade secrets. This provision will hereafter be referred to as the “DISCLOSURE RESTRICTION”. Assuming that the underlying CONTRACT was properly executed by KANE (and for purposes of this Temporary Injunction it is assumed by the Court that it was as there was adequate evidence presented at the hearing for at least those purposes) that RESTRICTION would preclude KANE from contacting any “restricted customer”, as that term is defined in the agreement for a period of eighteen months.

The definition of restricted customer is central to the resolution of this matter. A restricted customer is defined as a customer with whom KANE was in contact for eighteen months prior to his termination of employment with respect to the provision of services by SCHOOL on behalf of the customer. What that provision clearly does not restrict is KANE from contacting any customer in the world at any time with respect to the sale of goods. KANE is restricted from contacting customers with whom he had dealings regarding **services** to be provided by SCHOOL. The document says nothing about the provision or sale of goods.

Frankly, that is a peculiar provision from a company whose business was and apparently still is, primarily the sale of school supplies and equipment, including furniture, school supplies, etc. The Court asked the parties to brief the issue of what constituted the provision of services and in its Brief subsequent to the hearing SCHOOL conceded at least for the purposes of the Injunction it was now seeking that that Injunction would only cover those customers to whom KANE provided a **furniture quote** within the eighteen months prior to his departure from SCHOOL. In its Supplemental Brief after the hearing, SCHOOL argues that while some of its business is merely the sale of products out of a catalog, a separate part of its business is service

intensive, especially the area of the sale of furniture. SCHOOL argues that KANE did more than just sell furniture products and to say that his work did not include the provision of services is “fanciful”. SCHOOL then relies upon KANE’S current employer, Duet Resource Group (hereafter “DUET”) for DUET’S explanation of the service intensive consultative sale portion of its business, a portion which includes five key service components, including needs assessment and layout, budget analysis, bid documentation and contract procurement, bid analysis and product management. SCHOOL argues that it provides precisely those same services to its customers as does DUET and that KANE did so while he was employed by SCHOOL to at least 131 of the customers which SCHOOL now asserts are included within the category of “restricted customers.” SCHOOL further argues that there are 2,215 school districts in the State of Wisconsin and that restricting KANE from contacting 131 of them is not a substantial restriction. SCHOOL then argues that the Court “need not make an all or nothing distinction between goods and services that courts need to make in other context”. Rather in this particular fact situation SCHOOL asserts:

“The parties’ dispute centers on the definition of the term service.”

and then gives several potential dictionary definitions of the word “service”. SCHOOL asserts that the Court should rely upon dictionary definitions, or should consider the treatment accorded to the distinction between goods and services under the Uniform Commercial Code or in the Economic Loss Doctrine.

What SCHOOL’S arguments make abundantly clear is that the document which SCHOOL drafted and upon which it relies is not itself clear in resolving this central question of the meaning of “providing service.” The canons of document construction

require Courts to resolve ambiguities against the party that created the ambiguity in the first place. In this case that is SCHOOL because SCHOOL created this document. This cannon of construction is further bolstered by the fact that covenants not to compete are disfavored under the law.

There may very well be industry standard or terms which make the definition of services abundantly clear and which would have been clear to KANE when (and if) he signed this RESTRICTION in the first place but that has not been established one way or the other at the hearing on the Temporary Injunction. What was established at that hearing is that there is substantial confusion about exactly what conduct of KANE the Court should enjoin if any. In fact, SCHOOL'S own Supplement Brief points out that confusion and suggests that the Court apply an Injunction against 131 customers because those are customers of KANE where quotes for furniture were actually made.

In the Brief in Opposition to the Injunction, KANE'S counsel argues, of course, for the principles of construction set forth above, but also makes the point, which was not the subject of testimony at the hearing, that of those 131 customers who received quotes, the vast majority of them did not receive any of the "services" enumerated in the Affidavit of Mr. Mapes at all. KANE'S counsel claimed that the five services identified by Mr. Mapes in his Affidavit and cited above were provided by a small group of SCHOOL employees known as "Project by Design Managers", "PBD managers" and that KANE was not a PBD manager; others were and KANE had to rely upon them to provide any of these services. Further, the vast majority of furniture quotes provided to those 131 customers, it is alleged, did not involve work by any of those Project by Design Managers. In fact, it is alleged that less than two percent of all the questioned furniture

bids and transactions required the services of the project by design team at all. Ultimately KANE asserts that only a single one of all of the contacts alleged by Mr. Mapes to have occurred by KANE ultimately involved in the sale of furniture to one of KANE'S customers and only three of the 131 quotes even involved a PBD manager providing any of the other services enumerated by Mr. Mapes.

Perhaps as this case develops, SCHOOL will be able to show better than it has already that there was a service being sold to any of these "restricted customers" or that there was any likelihood of a service to be sold to any other "restricted customers" in the two years since May, 2017 when KANE terminated his employment. There is simply not adequate evidence, in fact no evidence in the record, that any restricted customer has negotiated with or purchased any kind of service from KANE or KANE'S employer, Duet, since he began that employment.

At best, there is an ambiguity as to what the term "services" means in this CONTRACT. Perhaps it means exactly what SCHOOL asserts, that is the consultative sales aspects of furniture selling. Perhaps it means something else. What is crystal clear is that it is not clear and in that case, the Court cannot enforce a provision that is unclear now and was probably just as unclear when it was drafted by SCHOOL in the first place.

Secondly and entirely independently, what was clear at the hearing and from the testimony of MAPES is that even if SCHOOL sustained harm, even irreparable harm, that harm can easily be remedied by money damages. MAPES testified that that harm is the lost profit on sales to restricted customers. Now we know that restricted customers means 131 customers. If KANE proceeds within two years of his cessation

of employment in contacting any of these 131 customers and as a result, or even as a coincidence, those customers purchase furniture items and those purchases arise from a consultative type sales effort, and it can be shown that KANE provided similar such services to that customer in the eighteen months prior to the termination of KANE'S employment, then the lost profit can be determined and damages assessed. There is no irreparable harm which cannot be remedied by dollar damages because by MAPES' own testimony, the only damages which may occur here would be financial ones.

There was also a request that KANE turn over proprietary information. It appears from correspondence which the Court has received since the conclusion of the hearing that KANE has turned over any and all such proprietary information. To the extent that SCHOOL is dissatisfied with what has been turned over because it is not everything included within confidential information, that material must be turned over forthwith, and in no more than ten days from the date of this Order. There is no doubt in the Court's mind that any information generated while KANE was an employee of SCHOOL relating to any customer contacts is the property of SCHOOL because it was generated while KANE was an employee of SCHOOL as part of his job duties. The fact that he may have maintained that on a private cell phone or on some other private device is immaterial to that analysis. This information goes far beyond the potential 131 restricted customers. Any information which KANE developed and reduced to any recorded form while he was an employee relating to any customer or potential customer of SCHOOL is to be turned over to SCHOOL no more than ten days from the date of this Order, if it has not already been.

CONCLUSIONS & ORDER

Restricted covenants are disfavored in the law. They are enforceable if they are reasonable. The first requirement of reasonableness be that they are clear. The second that the geographic scope and time is appropriate and the third is that there is a very substantial likelihood of harm to the business of the party seeking to enforce such a covenant. As the Court has stated, the language of this restrictive covenant is not clear, at least at this point based upon the evidence as has been developed.

If there is an enforceable covenant, a restriction of two years, limited only to 131 customers with whom KANE had contact and provided a furniture quote in the eighteen months prior to May, 2017 would not be per se unreasonable and may ultimately be sustained by the evidence. So clarity has not been established but reasonable time has, at least as a preliminary matter.

An equally significant hurdle is the requirement of substantial likelihood of harm to SCHOOL, which harm cannot be remedied other than by an Injunction restricting KANE'S employment. SCHOOL has failed to meet that burden as well.

MAPES testified that the harm actually sustained by SCHOOL was the loss of profit from the sales which might be generated in the next two years from restricted customers. It is clear to the Court that at trial the identity of restricted customers could be determined. That number may be 131, or it may be 3, or it may be 1, but that number could be determined by evidence in any event. It will be a relatively simply matter to determine what sales resulted from contacts in the two years from May, 2017 through May, 2019 at any of these identified restricted customers from furniture purchased as a result of service based selling such as DUET describes on its website and what the profit lost by SCHOOL would be. This is all susceptible to arithmetic

computation. It is classically the sort of conduct that can be reduced to a monetary number and therefore is not an appropriate subject for an Injunction.

The Motion for a Temporary Injunction restricting KANE is denied. KANE, of course, stays bound by whatever limitations exist under the CONTRACT and susceptible to potential damages for violating those restrictions, however an Injunction at this time is not the remedy needed to prevent any harm from such a breach.

As to the question of confidential information, it is clear to the Court that any information generated by KANE with respect to any customer, not the 131 suggested in SCHOOL'S Supplemental Brief, but any customer, is properly the property of SCHOOL whether it was stored on KANE'S personal cell phone or in any other form. The Court has been advised that DUET has recreated and voluntarily turned over any and all such information to SCHOOL. To the extent that that has not occurred, the Court orders that it do in fact occur within ten days of the date of this Order.

S/S James A. Morrison 10/27/17