IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

F.K. EVEREST, INC. and
J. Mike Martain,
Plaintiffs,

v.

Civil Action No.: 15-C-134
Presiding Judge: James J. Rowe
Resolution Judge: Paul T. Farrell

Ryan L. EDDY, David Bryte,
Jarod Graffius, Jason Tamaro,
Infinity Electric, Inc., and
Orange Constrution Corporation.
Defendants.

ORDER DENYING PRELIMINARY INJUNCTION AND MOTION TO DISMISS

Now before the Court is the Plaintiffs' Motion for Preliminary Injunction, filed February 23, 2015, and Defendants' Motion to Dismiss Count II of Plaintiffs' Amended Complaint, filed March 30, 2015.

With regard to Plaintiffs' Motion for Preliminary Injunction, the Court has reviewed the Motion for Preliminary Injunction, filed February 23, 2015; the Defendants' Response, filed March 4; the Plaintiffs' Post-hearing Brief in Support of their Motion for Preliminary Injunction, filed March 20; and Defendants' Response to Plaintiffs Post-hearing Brief, filed March 25. Following transfer of the matter to the Business Court Division, the parties also submitted, and the Court has reviewed, Plaintiff's Supplemental Brief in Support of their Motion for Preliminary Injunction, filed June 5, including a transcript of the hearing which took place before Judge Tucker on March 12; Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed June 19; and Plaintiffs' Reply to Defendants' Supplemental Brief in Opposition to Plaintiffs' Motion for Preliminary Injunction, filed June 19.

The granting or refusal of a temporary injunction rests in the sound discretion of the trial court, and the trial court's exercise of its discretion will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. Sams v. Goff, 208 W.Va. 315 (1999). "Under the balance of hardship test the district court must consider, in 'flexible interplay,' the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest." Jefferson County Bd. of Educ. v. Jefferson County Educ. Ass'n, 183 W.Va. 15 (1990); quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley, 756 F.2d 1048, 1054 (4th Cir. 1985). West Virginia Supreme Court of Appeals has uniformly held that in order to obtain a preliminary injunction, a party must demonstrate the presence of irreparable harm. Id.

Following the four factors in determining whether to issue a preliminary injunction as laid out in Jefferson County Bd. of Educ., 183 W.Va. 15, we first look to the likelihood of irreparable harm to the Plaintiff. Plaintiff alleges irreparable harm through the loss of skilled employees and the potential use of confidential information to be used by a competitive company. While serious, this Court finds no justification in the reasoning laid out by the Plaintiff. Skilled employees can be replaced and damages, if any, can be paid. While Defendants may have been well adjusted and skilled for Plaintiff, they can be replaced by others working in the same field. As "at-will" employees, Plaintiff cannot force his employees to work for him, nor require the employees who left to return to his company. Granting of a Preliminary Injunction will not remedy the Plaintiffs loss of his work force. Further, no confidentiality agreements or non-compete agreements were created between Plaintiff and his employees. Plaintiff could have prevented the harm of lost confidential information and loss of skilled workers to competitors

through confidentiality and non-compete agreements. Plaintiff was aware that without these agreements their employees could potentially go work for a competing company and have confidential information exposed.

Second, the Court must consider the likelihood of harm to the Defendants. Plaintiff argues that the Defendants will not be prejudiced because they will not be losing anything that they are legally entitled to. This however is not the case. Defendants, Jarod Graffius and Jason Tamaro, will lose their jobs if the Preliminary Injunction is granted. Neither Defendant is legally restricted from working for a competing company, and is legally entitled to leave Plaintiffs employment in search of better work. A Preliminary Injunction is prejudicial to Tamaro and Graffius. Defendants, David Bryte, Infinity Electric, Inc., and Orange Construction Corporation., will also be prejudiced because they will lose two skilled employees who sought employment. These defendants are legally entitled to hire workers to better their company and have no legal duties to Plaintiff. Defendant Ryan L. Eddy is potentially the only defendant that will not lose anything he is legally entitled to. However, Defendant Eddy is only legally required to not solicit or recruit employees of Plaintiff. Defendant Eddy will be harmed by losing skilled employees that he is legally entitled to hire unless Plaintiff can prove Defendant breached his non-solicitation agreement.

Next, the Court must look to the Plaintiff's likelihood of success on the merits. Plaintiff has shown a contract between Plaintiff and Defendant Eddy, which legally forbids Defendant Eddy from soliciting or recruiting Plaintiff's employees. However, without anything further, Plaintiff has relied upon reasonable inferences based on phone calls. Plaintiff has alleged that Defendants, Tamaro and Eddy, called and texted each other during the time Tamaro worked for Plaintiff and until Tamaro left Plaintiff's employment. Plaintiff alleges Tamaro called one of

Plaintiff's employees on a company phone, and said employee eventually left Plaintiffs employment to work for Defendants. Finally, Plaintiff alleges Defendant Graffius refused to comment on his future plans when he resigned from Plaintiff's employment. While conclusions can be drawn, reasonable inferences are all they are at this time. Plaintiff has not shown that Defendant Eddy has breached his contract and is simply ruling out that Plaintiff's employees were actively searching for better work.

Finally, the Court must consider the public's interest. Plaintiff argues that his business is a part of community and has been for many years. While there may be some sentimental value to be held, the public's interest is receiving their electrical demands. Our society encourages competition between businesses and the public's interest can be served by receiving their electrical demands by another local company.

With respect to Defendants' Motion to Dismiss Count II of Plaintiffs' Amended Complaint, filed March 30, 2015, the Court has received and reviewed the Plaintiffs' Response to Defendants' Motion to Dismiss Count II, filed June 19, and Reply in Support of Their Motion to Dismiss Count II, filed July 6.

Rule 12(b)(6) of the West Virginia Rules of Civil Procedure authorizes the filing of a motion requesting dismissal of a claim or counterclaim for "failure to state a claim upon which relief can be granted." W.V.R.C.P. 12(b)(6). "Appellate review of a circuit court's order granting a motion to dismiss a complaint is de novo." Evans v. United Bank, Inc., 2015 WL 3822895; citing Syl. Pt. 1, Longwell v. Bd. of Educ. of the Cnty. of Marshall, 213 W.Va. 486, 583 S.E.2d 109 (2003). The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Evans; citing Syl.

Pt. 2, Sticklen v. Kittle, 168 W.Va. 147 (1981). West Virginia continues to adhere to the liberal pleading standard of Conley v. Gibson that the Court "should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Appalachian Regional Healthcare, Inc. v. West Virginia Dept. of Health and Human Resources, 752 S.E.2d 419, 424 (W.Va. 2013).

To establish prima facie proof of tortious interference, a plaintiff must show: (1) existence of a contractual or business relationship or expectancy; (2) an intentional act of interference by a party outside that relationship or expectancy; (3) proof that the interference caused the harm sustained; and (4) damages. Torbett v. Wheeling Dollar Sav. & Trust Co., 173 W.Va. 210 (1983).

First, Defendants argue that the soliciting the employees of another company is permissible and cite syllabus point two of West Virginia Transp. Co. v. Standard Oil Co., 56 L.R.A. 804 (1901). Defendants claim Bryte, Graffius, Tomaro, and Orange Construction Company are not individually prohibited from soliciting or recruiting Plaintiff's employees. Defendants contend that the Plaintiffs have alleged that they acted with Eddy to solicit Plaintiff's employees but make no further allegations as to how Defendants tortiously interfered. However, viewed in a light most favorable to Plaintiffs, it appears that they could prove a set of facts to support the allegations contained in Count II and therefore this claim meets the liberal pleading standard.

Defendants further argue that they are not liable for tortious interference because they had a legitimate competitive interest in hiring Plaintiff's employees; citing Bryan v. Massachusetts Mutual Life Insurance Co., 178 W.Va. 773, (1987). Defendants claim that, even if solicitation and recruitment constituted tortious interference, they had a legitimate competitive

interest in doing so. While this may be true, Eddy is forbidden from soliciting employees of the Plaintiff through a non-solicitation agreement. Competitive interest may be the case; however, Eddy's non-solicitation agreement forbids indirect soliciting of employees and therefore this competitive interest may violate the non-solicitation agreement.

Third, Defendants argue that they are not liable for tortious interference because Eddy is a party to the contract and therefore because Eddy cannot be liable for tortious interference, neither can they. It is correct that Eddy cannot be held liable for tortious interference because he is a party to the contract. However, the remaining Defendants are strangers to the contract and therefore could have engaged in an intentional act of interference that caused the damages the Plaintiffs allege. Plaintiffs seek to hold these Defendants liable for tortious interference while proceeding against Defendant Eddy for breach of contract, and this Court is of the opinion that Count II of the Plaintiffs' Amended Complaint states a claim for which relief could potentially be granted.

Finally, Defendants argue that allegations against Defendant Bryte must be dismissed because Plaintiff has alleged no facts that would expose Bryte to liability. Defendants argue Bryte can only be liable if he directed, sanctioned or participated in the wrongful act of the corporation. While it is correct that Bryte can only be liable if he participated in some way, Plaintiff alleges that a reasonable inference can be drawn that Bryte knew and sanctioned such acts by Eddy and the other defendants. Plaintiff alleged that the close relationship between Bryte and Eddy in starting Infinity can be reasonably inferred to show that Bryte had knowledge of his company's hiring plan and Eddy's actions to obtain employees.

A Preliminary Injunction is only granted when a party can show irreparable harm. For the forgoing reasons, Plaintiffs have not met the burden to warrant a preliminary injunction and the same is therefore **DENIED**.

Under the liberal pleading standard of Conley, Plaintiff has pleaded a set of facts sufficient to survive a Motion to Dismiss. Defendants' Motion to Dismiss Count II of Plaintiffs' Amended Complaint is therefore **DENIED**.

The Circuit Clerk shall forward a copy of this Order to counsel at their respective addresses of record.

IT IS SO ORDERED this 29th day of July, 2015.

James J. Rowe, Chief Judge
Eleventh Judicial Circuit

ENTERED July 29, 2015

DOCKET LINE #: 88

JEAN FRIEND, CIRCUIT CLERK

STATE OF WEST VIRGINIA, ss:
I, Circuit and Family Courts of
do hereby
copy of the original
made and entered by said Court

Circuit Clerk