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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-377

Filed: 6 November 2018

Guilford County, No. 17 CVS 1383

ECMD, INC., Plaintiff,

v.

NEAL DUNSTAN GRUBBS, Defendant.

Appeal by Defendant from Preliminary Injunction entered 14 December 2017 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 2 October 2018.

Wyatt Early Harris Wheeler, LLP, by Scott F. Wyatt and Donavan J. Hylarides, for Plaintiff-Appellee.

Patrick, Harper and Dixon LLP, by Michael P. Thomas and Molly Simpson Gross for Defendant-Appellant.

INMAN, Judge.

Defendant Neal Dunstan Grubbs ("Grubbs") appeals from a preliminary injunction enforcing certain provisions of a noncompetition agreement entered into with plaintiff ECMD, Inc. ("ECMD"). Prior to hearing, ECMD moved to dismiss

Grubbs' appeal as moot and interlocutory. After careful review, we allow ECMD's motion and dismiss the appeal.

I. FACTUAL AND PROCEDURAL HISTORY

ECMD manufactures, markets, and distributes wood construction materials, such as stair parts, molding, and windows. Grubbs began working for ECMD in 1991, eventually advancing to the position of Vice-President of Pro Dealer Sales and Marketing. In 2007, Grubbs entered into a "Nondisclosure, Noncompetition and Nonsolicitation Agreement" (the "Non-Compete") in exchange for stock in ECMD (the "Stock Trade Agreement"). The Non-Compete prohibited Grubbs from engaging in the following conduct upon his termination from ECMD:

1) Disclosing information designated by ECMD as confidential to third parties for a period of five years;
2) Manufacturing, selling, or distributing, either by himself or on behalf of another, products similar to or in competition with those made, sold, and distributed by ECMD in certain states for a period of one year;
3) Soliciting customers of ECMD within one year; and
4) Inducing ECMD's employees from leaving the company for a period of one year.

Grubbs was terminated from ECMD on 24 August 2017, and in connection with his termination the parties entered into a "Stock Sale and Redemption Agreement." The agreement provided that ECMD exercised its option under the Stock Trade Agreement to buy back Grubbs' shares in the company and included a limited mutual release of claims by Grubbs and ECMD.

One month later, Grubbs took a sales position with one of ECMD's competitors. ECMD sued to enforce the terms of the Non-Compete through preliminary and permanent injunctive relief. Grubbs denied liability, arguing that: (1) the Non-Compete is unenforceable as overbroad; and (2) he was released from the Non-Compete under the Stock Sale and Redemption Agreement.

The trial court entered a preliminary injunction enforcing the Non-Compete on 14 December 2017, prohibiting Grubbs from:

(1) Disclosing ECMD's confidential and proprietary information until 24 August 2022;

(2) Engaging in or assisting others with the manufacture and sale of products similar to those made/sold by ECMD until 24 August 2018; and

(3) Soliciting ECMD's customers in certain states or inducing ECMD's employees from engaging in any of the above until 24 August 2018.

Grubbs filed a notice of appeal from the preliminary injunction and requested a temporary stay in the trial court, which was denied. Grubbs thereafter filed a petition

for writ of supersedeas and motion for temporary stay with this Court, requesting relief from the trial court's denial of stay only—not the preliminary injunction itself. We allowed both the writ of supersedeas and motion for stay "for the limited purpose of staying further proceedings in the trial court" without prejudice to Grubbs' ability to seek other relief from the preliminary injunction. On 17 May 2018, ECMD filed a motion to dismiss Grubbs' appeal as moot and interlocutory.

II. ANALYSIS

ECMD argues Grubbs' appeal is in part moot because, as of the appeal's hearing date, the second and third provisions of the preliminary injunction have expired and are no longer enforceable. It further contends that the first provision of the injunction does not affect a substantial right. After reviewing the record and applicable case law, we agree. We therefore dismiss Grubbs' appeal *in toto*.

In *A & D Env't Servs., Inc. v. Miller*, 243 N.C. App. 1, 776 S.E.2d 733 (2015), this Court reviewed the case law concerning preliminary injunctions enforcing non-competition agreements. 243 N.C. App. at 4, 776 S.E.2d at 735-36. We held that "[n]ot every order which affects a person's right to earn a living is deemed to affect a substantial right. Rather, whether such an order affects a substantial right depends on the extent that a person's right to earn a living is affected." *Id.* at 4, 776 S.E.2d at 735. We went on to note that a preliminary injunction that "effectively *prevents*" a person from earning a living in their trade or profession affects a substantial right,

id. at 4, 776 S.E.2d at 735 (emphasis in original), but "an injunction which merely *limits* a person's ability to earn a living may not affect a substantial right." *Id.* at 4, 776 S.E.2d at 736 (citing *Consol. Textiles, Inc. v. Sprague*, 117 N.C. App. 132, 134, 450 S.E.2d 348, 349 (1994)) (additional citations omitted) (emphasis in original).

Assuming *arguendo* that the second and third provisions affected a substantial right by preventing Grubbs from working in his field of expertise, this Court will dismiss an appeal as moot "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue[.]" *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131 (1994) (citations omitted). Because these provisions have now expired, Defendant's substantial right to earn a livelihood is no longer restrained by them. Our case law is replete with opinions dismissing similar appeals as moot. *See, e.g.*, *Artis & Assocs. v. Auditore*, 154 N.C. App. 508, 572 S.E.2d 198 (2002) (dismissing an appeal from a preliminary injunction enforcing a noncompetition agreement as moot where the agreement's terms expired before hearing of appeal); *see also Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 241 S.E.2d 700 (1978) (holding assignments of error pertaining to an order amounting to a preliminary injunction were rendered moot where the underlying noncompetition agreement expired pending disposition of appeal).

Grubbs' sole counter-argument to mootness relies on the continued duration of the first provision in the preliminary injunction; however, that provision does not affect a substantial right giving rise to an interlocutory appeal.

The first and only provision of the preliminary injunction remaining in effect, which prohibits Grubbs from sharing ECMD's proprietary information, does not affect a substantial right. In *Consol. Textiles, Inc. v. Sprague*, this Court was asked to review a preliminary injunction that prohibited a former employee from contacting his former employer's customers and sharing what his former employer had identified as its confidential trade secrets. 117 N.C. App.132, 450 S.E.2d 348. We dismissed the appeal, holding that "[a] substantial right is not affected in this case[,]" even though the trade secret restriction was perpetual in duration. *Id.* at 134, 450 S.E.2d at 349. If a temporally unrestricted non-disclosure clause did not affect a substantial right in *Sprague*, the five-year restriction on sharing ECMD's confidential information in this case does not either.

Grubbs also posits that the arguments raised in ECMD's motion to dismiss were previously rejected by this Court as raised in response to his petition for writ of supersedeas and motion for stay, which were allowed for a limited purpose by this Court, indicating that ECMD is unlikely to succeed on its claims. But ECMD's responses to the prior motions did not raise the issue of mootness, because at that time none of the injunctive provisions had expired. Furthermore, in allowing the

petition for supersedeas and stay, this Court did not stay the preliminary injunction or indicate that ECMD was unlikely to succeed on the merits; rather, we merely stayed the ongoing litigation pending the appeal from the preliminary injunction at a time when none of its provisions was moot. ECMD's motion to dismiss Grubbs' appeal thus presents a fundamentally different question than that raised by the petition for writ of supersedeas and motion for stay: namely, whether Grubbs' appeal is moot and does not implicate a substantial right. Because we answer that question in the affirmative, Grubbs' appeal is dismissed.

"[N]o appeal lies to an appellate court from an interlocutory order or ruling of a trial judge unless such order or ruling deprives the appellant of a substantial right *which he would lose absent a review prior to final determination*." *A.E.P. Indues., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (emphasis added). "Thus, the threshold question presented by a purported appeal from an order granting a preliminary injunction is whether the appellant has been deprived of any substantial right which might be lost *should the order escape appellate review before final judgment*." *State v. School*, 299 N.C. 351, 358, 261 S.E.2d 908, 913 (1980) (emphasis added). Even if the second and third provisions of the preliminary injunction—which have expired—impacted a substantial right, the first provision does not. *See Sprague*, 177 N.C. App. at 134, 450 S.E.2d at 349. This appeal therefore does not present the

issue of "a substantial right which [Grubbs] would lose absent a review prior to final determination." *McClure*, 308 N.C. at 400, 302 S.E.2d at 759.

DISMISSED.

Judges BRYANT and DIETZ concur.

Report per Rule 30(e).