STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

HERITAGE WOOD FLOOR, INC.,

Plaintiff,

v

File No. 99-19677-AZ
HON. PHILIP E. RODGERS, JR.

STEPHEN SMITH,

Defendant.
/

Robert W. Parker (P31571)
Rachel Y. Brochert (P51635)
Attorney for Plaintiff

Richard L. Benedict (P10675)
Attorney for Defendant

DECISION AND ORDER REGARDING
PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

This is an action by Plaintiff Heritage Wood Floors, Inc. ("Heritage") against a former employee, Defendant Stephen Smith ("Smith"), to enforce a non-competition agreement. The Plaintiff filed a Motion for Summary Disposition claiming that it is entitled to judgment as a matter of law because there is no genuine issue of material fact. MCR 2.116(C)(10). The Defendant filed a timely Response to the motion. The Court heard the arguments of counsel on February 22, 2000 and took the matter under advisement. For the reasons stated herein, the Plaintiff's Motion for Summary Disposition is granted in that the Agreement is enforceable, but only as limited by the Court.

STANDARD OF REVIEW

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was most recently set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

> In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).
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> In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins. Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

I

THE NON-COMPETITION AGREEMENT

The Agreement in the instant case is a part of the Defendant's employment agreement with Heritage. It contains the following provisions:

1. Agreement not to Divulge Information. The employee agrees that he will not, whether during or subsequent to the termination of his/her employment, divulge, disclose or communicate to any person, firm or corporation any information of any kind, nature or description concerning any matters affecting or relating to the employer's business. Such matters include the names, addresses or particular desires or needs of customers; the prices charged for services or products or any other information about the

employer's business, its manner of operation, processes or other data of any kind, without regard to whether any or all of the foregoing matters would be deemed confidential, material or important enough to warrant protection as a trade secret.

2. Agreement Not to Compete. While acting as an employee or the employer, and for three (3) years thereafter, the employee agrees that he/she will not do any of the following:

(1) Own an interest in, operate, control or participate in or be connected as an officer, employee, agent, independent contractor, partner, shareholder or principal of or in, any corporation, partnership, proprietorship, firm, association or other entity, soliciting orders for, selling, distributing or otherwise marketing products, goods, equipment, and/or services which directly or indirectly compete with the employer's business within the boundaries of the territory prescribed in this Agreement;

b. Make any use of the information described in subparagraph (a) above or cause or attempt to cause any other person to use such information, for purposes other than the business of the employer; or

c. Undertake planning for or organization of any business activity competitive with the employer's business or combine or conspire with other employees or sales representatives of the employer for the purpose of organizing any such competitive business activity.

II.

Agreements not to compete are permissible under Michigan law as long as they are reasonable. MCL § 445.774a(1); MSA § 28.70(4a)(1) provides:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may

limit the agreement in order to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

According to Michigan law, a non-compete agreement is enforceable provided it is reasonable with respect to duration, geographical area, and the line of business it seeks to limit. *Lowry Computer Products, Inc v Head*, 984 F Supp 1111 (ED Mich 1997).

As to duration, courts have upheld time periods of six months to three years. See, e.g., *Superior Consulting, Inc v Walling*, 851 F Supp 839, 847 (ED Mich 1994) (six months); to *Robert Half Int'l, Inc v Van Steenis*, 784 F Supp 1263, 1274 (ED Mich 1991) (twelve months); *Stubblefield v Siloam Springs Newspapers, Inc*, 590 F Supp 1032 (WD Ark 1984)(holding that under Arkansas law, maximum duration of non-compete clause incident to employment agreement is three years). Given the nature of the field in this case, a three-year duration appears reasonable.

Geographic limitations in non-competition agreements must be tailored so that the scope of the agreement is no greater than is reasonably necessary to protect the employer's legitimate business interests. *Superior Consulting Co, Inc v Walling*, 851 F Supp 839 (ED Mich 1994). Here, the non-competition agreement specifies a geographical area of "within a 100 mile radius of Traverse City." Given the scope of the Plaintiff's business as outlined in the affidavit accompanying Plaintiff's motion, this geographical limitation is reasonable.

As to line of business, the Agreement would preclude Defendant Smith from using any information or skills relating to the wood floor industry to either directly or indirectly compete with Heritage. In other words, Defendant Smith would be precluded from engaging in any way at any level in the wood floor industry for three years within a 100 mile radius of Traverse City.

The Defendant claims that he will not be competing with the Plaintiff because: (1) he works only for those who "never contract with the Plaintiff to install a floor;" (2) he "never contacted or worked for" any of the 70 general contractors who submit bids to Heritage on wood floor jobs; and (3) he "does not advertise his services." The Defendant claims that "the installation of wood floors can be learned by anyone through video tapes, books, and classes at local lumber years" and that "the Plaintiff has no installation trade secrets."

Enforcement of the non-competition agreement would effectively prevent the Defendant from holding any job involving any aspect of the wood floor industry even if that job did not involve the

use of any information or knowledge unique to Heritage. Thus, this Court finds that, in this respect, the Agreement is over broad and unreasonable. See, *Lowry, supra* wherein the non-competition agreement was found to be reasonable because it only prohibited the defendant from engaging in a small part of the computer software and products market.

MCL § 445.774a(1); MSA § 28.70(4a)(1) allows a court to modify an unreasonable agreement and to specifically enforce the agreement as modified. *Thermatool Corp v Borzym*, 227 Mich App 366, 375; 575 NW2d 334 (1998). The Agreement itself also provides for specific enforcement.

The non-competition agreement in the instant case is enforceable to the extent that it precludes the Defendant from using any of Heritage's customer information or other data that is unique to Heritage. Further, the Agreement is enforceable to the extent that it precludes the Defendant from starting up or otherwise establishing or being involved in the establishment of a commercial enterprise engaged in the wood floor business. The Agreement can not, however, preclude the Defendant from being employed in the wood floor industry altogether. So long as the Defendant does not use any information or data unique to Heritage and so long as the Defendant does not have any ownership interest in a competing commercial enterprise or engage in any sales distribution or marketing activities for three years after the termination of his employment with Heritage and within the 100 mile radius of Traverse City, the competing interests involved are protected. In other words, the Defendant may work as an employee for another and install wood floors. There is a substantial demand for construction laborers within 100 miles of Traverse City, and, as modified, this Agreement allows the Defendant a meaningful opportunity to work within the wood floor industry without injury to the Plaintiff.

CONCLUSION

The non-competition Agreement is reasonable in duration and geographical limitation. It is unreasonable, however, in that it would preclude the Defendant from being gainfully employed in the wood floor industry altogether. Thus, the Court has modified the Agreement to permit the Defendant to work as an employee installer in the wood floor industry so long as he does not use any information or knowledge unique to Heritage and so long as he has no ownership interest in a

competing commercial enterprise and so long as he is not involved in the sales, marketing or distribution of wood floors. No costs or damages are requested and none are ordered. This is a final order and resolves all remaining issues in this case.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 3/02/00