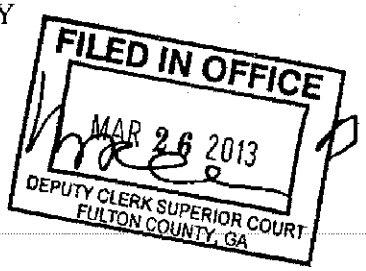
ORIGINAL

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA



SCOTT CONE, Plaintiff, v. MARIETTA RECYCLING CORPORATION, a Georgia corporation, Defendant/Counterclaimant.	)	Civil Action File No. 2012 CV 223811

ORDER

PROCEDURAL HISTORY & MOTIONS TO BE DECIDED

This case arises from a dispute primarily regarding the enforceability of restrictive covenants (the "Non-Competition Provision," "Non-Solicitation Provision," and "Non-Disclosure Provision" (collectively the "Restrictive Covenants")) contained at sections 2.C, 2.A.1, and 2.D respectively of the February 25, 2011 *Agreement Regarding Profit Sharing And Employment* (the "Employment Agreement") between Marietta Recycling Corporation ("MRC") and Scott Cone ("Cone"). In his Complaint, Cone asserted three causes of action: (1) Count I for Declaratory Judgment regarding the unenforceability of the Restrictive Covenants; (2) Count II for Interlocutory and Permanent Injunction on the same issue; and (3) Count III for Attorney Fees pursuant to O.C.G.A. § 13-6-11. MRC filed an Answer & Counterclaim and then an Amended Answer & Counterclaim denying Cone's causes of action in their entirety and asserting a variety of counts against Cone arising from the Employment Agreement and a subsequent *Separation Agreement and Full and Final Release of Claims* ("Separation Agreement") executed by the parties: (1) Count I for Injunctive Relief regarding the Restrictive Covenants; (2) Count II for Breach of the Restrictive Covenants; (3) Count III for Breach of the

Separation Agreement; (4) Count 4 for Attorney Fees; (5) Count V for Tortious Interference with Contractual Relations & Business Relations; and (6) Count VI for Civil Conspiracy.

Currently before the Court are: (1) Cone's Motion for Interlocutory Injunction regarding the Restrictive Covenants; (2) Cone's Motion for Partial Judgment on the Pleadings regarding the Restrictive Covenants; (3) MRC's Motion for Interlocutory Injunction regarding the Restrictive Covenants; and (4) MRC's Motion to Add Non-Party Intonu, LLC.

UNDISPUTED MATERIAL FACTS

The following material facts are not in dispute: MRC is a scrap metal dealer in Marietta, Georgia. Cone became an MRC employee in or about January 2008. Cone's primary duties involved the purchase and sale of scrap metal. On February 25, 2011, Cone and MRC executed the Employment Agreement, a document drafted, prepared, and provided by MRC. On May 4, 2012, MRC fired Cone. Shortly thereafter, Cone executed the Separation Agreement, which was also prepared by MRC. Section 13 of the Separation Agreement stated that the Separation Agreement "superseded" and "rendered null and void" all prior agreements between Cone and MRC (including the Employment Agreement) other than two categories of policies/provisions that were specifically not superseded or extinguished: (1) MRC's policies regarding confidentiality of company information; and (2) the Restrictive Covenants contained in the Employment Agreement. The Separation Agreement reiterated that the February 25, 2011 (with specific reference to that date) Restrictive Covenants were not changed and instead were to "remain in full force and effect." True and correct copies of the Employment Agreement and the Separation Agreement were attached to Cone's Verified Complaint and are properly before this Court.

In September 2012, Cone began work as an employee at Intonu, LLC ("Intonu"). Intonu is an Atlanta scrap metal dealer. Cone's primary duties at Intonu involve the buying and selling of scrap metal.

DISCUSSION

I. CONE'S MOTION FOR JUDGMENT ON THE PLEADINGS

A. Standard

"When deciding a motion for judgment on the pleadings, the issue is whether the undisputed facts appearing from the pleadings entitle the movant to judgment as a matter of law." Holsapple v. Smith, 267 Ga. App. 17, 20, 599 S.E.2d 28, 32 (2004) (disapproved on other grounds by Bellemead, LLC v. Stoker, 280 Ga. 635, 631 S.E.2d 693 (2006)). When exhibits have been incorporated by either party into the pleadings, the court may consider their content in ruling upon a motion for judgment on the pleadings. McKenna Long & Aldridge, LLP v. Keller, 267 Ga. App. 171, 172, 598 S.E.2d 892, 894 (2004). It is true that well-pleaded material allegations by the nonmovant are taken as true. Holsapple, 267 Ga. App. at 20, 599 S.E.2d at 32. However, these "well-pleaded material allegations" must be specific assertions of material fact. "The trial court need not adopt a party's *legal conclusions*[.]" Id. (emphasis added). Likewise, a party opposing a motion for judgment on the pleadings "cannot defeat its use by merely alleging that an issue of fact exists." Barton v. Scott Hudgens Realty & Mortgage, Inc., 136 Ga. App. 565, 567, 222 S.E.2d 126, 128 (1975).

Here, MRC has merely alleged that the Restrictive Covenants are reasonable and enforceable. These allegations are conclusory and are insufficient to create any justiciable issue of material fact. Indeed, MRC has not disputed *any* of the material facts set forth above, which form the sole and entire basis for Cone's Motion for Partial Judgment on the Pleadings and this

Court's ruling thereon. Accordingly, with the pertinent material facts not in dispute, Cone's motion is ripe for a decision based upon the parties' legal arguments.

B. Governing Law of Restrictive Covenants

Restrictive covenants entered into on or after May 11, 2011 are governed by O.C.G.A. § 13-8-50, et seq. (Georgia's "New Law"). Restrictive covenants entered into before that date are governed by Georgia's prior covenant-related law (the "Old Law"). See House Bill 30, Laws 2011, Act 99, § 5. Because the Employment Agreement at issue herein was executed on February 25, 2011, analysis of the Restrictive Covenants begins with the application of Georgia's Old Law.

Covenants against competition contained in employment contracts must be "strictly limited in time and territorial effect and otherwise reasonable considering the business interest of the employer sought to be protected and the effect on the employee." Arnall Ins. Agency, Inc. v. Arnall, 196 Ga. App. 414, 416, 396 S.E.2d 257, 259 (1990). Such covenants are especially disfavored and receive the highest level of judicial review: "strict scrutiny." Advance Technology Consultants v. Roadtrac, LLC, 250 Ga. App. 317, 319, 551 S.E.2d 735, 736 (2001). Courts may not edit or revise such covenants, which must therefore stand or fall as written. Johnstone v. Tom's Amusement Co., Inc., 228 Ga. App. 296, 297-98, 491 S.E.2d 394, 397 (1997). If, as is the case herein, the employer drafts the covenants, ambiguities are construed against the employer. O.C.G.A. § 13-2-2(5). "Whether the restraints imposed by an employment contract are reasonable is a question of law for determination by the court." Arnall, 196 Ga. App. at 416, 396 S.E.2d at 259. The examining court considers the covenant's terms regarding: (1) time, (2) territory, and (3) scope of the prohibited activity. American General Life & Ins. Co. v. Fisher, 208 Ga. App. 282, 283, 430 S.E.2d 166, 167 (1993). If the covenant's

provisions regarding any one of these three factors imposes a greater limitation upon the employee than is necessary to protect the employer, the entire covenant is unenforceable. Howard Schultz & Associates v. Broniec, 239 Ga. 181, 184, 236 S.E.2d 265, 268 (1977).

A covenant that is void on its face cannot be saved by additional facts. Koger Properties v. Adams-Cates Co., 247 Ga. 68, 69, 274 S.E.2d 329, 331 (1981). In such instance, the legality of the covenant is "a legal question which [can] be determined by looking solely to the language of the restrictive covenant." Uni-Worth Enterprises v. Wilson, 244 Ga. 636, 640-641, 261 S.E.2d 572, 575 (1979). As is discussed below, the Court finds that the Restrictive Covenants herein present just such a case because they are facially void.

C. Application of Georgia Law to the Restrictive Covenants

The pertinent language of the Non-Solicitation Provision at issue here is as follows:

> Employee understands and agrees that, during the period of his or her employment by MRC and for a period of two years immediately following termination (voluntary or involuntary) of such employment, Employee will not, on Employee's own behalf or on behalf of any other individual or entity, without the prior written consent of MRC:
>
> 1. solicit, contact, or call upon or submit a bid proposal to any existing personal customer of MRC, or any representative of any existing personal customer of MRC, with a view to providing any service competitive or potentially competitive with any service sold or provided or under active development by MRC during the period of two years immediately preceding the termination of Employee's employment with MRC; provided that, this restriction shall apply only to those existing personal customers of MRC with whom Employee had personal contact on behalf of MRC during the period of two years immediately preceding the termination of Employee's employment with MRC.

The Non-Competition Provision at issue here is as follows:

> Employee further agrees to refrain, for a period of two years following termination and within the territory where the Employee is working at the time of termination, from performing any of the services of the type that Employee conducted, authorized, offered, or provided by during employment with MRC during the time period beginning two years prior to Employee's termination.
>
> Activities, products or services that are competitive with the activities, products, or services of MRC (or any recycling business owned by Steve and Muriel Stewart) shall include activities, products, or services that are the same as or similar to the activities, products, or services that MRC (or any recycling business owned by Steve and Muriel Stewart) provided to its customers during Employee's employment.

Applying Georgia's Old Law, the Court finds that the above Non-Solicitation Provision is unenforceable as a matter of Georgia law because it purports to prohibit Cone from responding to *unsolicited* calls, invitations, and business offers from the prohibited clients. Orkin Exterminating Co. v. Walker, 251 Ga. 536, 538, 307 S.E.2d 914, 917 (1983). As such, the covenant is void on its face. The Non-Solicitation Provision is also unenforceable as a matter of Georgia law because the scope of the prohibited services/products is not limited or even related to MRC's services/products. Avion Systems, Inc. v. Thompson, 293 Ga. App. 60, 64, 666 S.E.2d 464, 468 (2008). Instead, the universe of prohibited products/services is defined by reference to the actual and contemplated business activities of companies that are strangers to the Cone/MRC relationship, that may be wholly unknown to Cone, and that may have business lines that radically differ from any business activity ever undertaken or even considered by MRC. See Riddle v. Geo-Hydro Engineers, Inc., 254 Ga. App. 119, 120, 561 S.E.2d 456, 458 (2011). As such, the Court finds that the covenant is not enforceable in the employer-employee context.

The Court further finds that the above Non-Competition Provision is likewise unenforceable as a matter of Georgia law because the prohibited territory could grow or change after contract execution. See Orkin Extermination Co., Inc. v. Pelfrey, 237 Ga. 284, 227 S.E.2d 251 (1976) ("Pelfrey") and its progeny. Furthermore, because non-solicitation provisions and non-competition provisions rise or fall together under Georgia law, each such provision in the Employment Agreement is also unenforceable on the basis of the companion covenant's unenforceability. Advance Technology Consultants, 250 Ga. App. at 321, 551 S.E.2d at 738. Finally, both the Non-Competition Provision and the Non-Solicitation Provision are unenforceable for additional breadth and vagueness-related reasons set forth in Cone's briefs.

The Court further finds that the Non-Disclosure Provision is also unenforceable as a matter of Georgia law. That provision unambiguously prohibits Cone at all times after his "employment is terminated" from the "use, sale, disclosure, or transmission" of any "confidential information." Because there is no time limit for the Non-Disclosure Provision, which instead purports to apply in perpetuity after Cone's termination, the provision is unenforceable except as it applies to "trade secrets." Pregler v. C&Z, Inc., 259 Ga. App. 149, 151, 575 S.E.2d 915, 917 (2003).

D. MRC's Ratification Argument

MRC argues that, even if the Restrictive Covenants were originally unenforceable at the time of Employment Agreement execution, Cone later ratified them by executing the Separation Agreement. This argument is without merit. A restrictive covenant that is invalid under Georgia law is *void ab initio*. Pelfrey, 237 Ga. at 285, 227 S.E.2d at 252. A contract that is "*void ab initio* as against public policy is never in force, cannot be ratified or affirmed and is not subject to being enforced by the courts." Loney v. Primerica Life Ins. Co., 231 Ga. App. 815, 817, 499 S.E.2d 385, 387 (1998). "Neither ratification nor estoppel can result from a contract which is void as against public policy." Milton Frank Allen Pub., Inc. v. Georgia Ass'n of Petroleum Retailers, Inc., 224 Ga. 518, 528, 162 S.E.2d 724, 730 (1968). It is therefore "an anomaly to speak of the ratification of an agreement which never had any legal existence as a contract." Jones v. Belle Isle, 13 Ga. App. 437, 437, 79 S.E. 357, 358 (1913). A void provision "is wholly ineffective, inoperative, and incapable of ratification and . . . thus has no force or effect so that nothing can cure it." Ameris Bancorp v. Ackerman, 296 Ga. App. 295, 298-99, 674 S.E.2d 358, 361 (2009).

Accordingly, as a matter of Georgia law, Cone's execution of the Separation Agreement could not and did not resurrect the void Restrictive Covenants. The Court finds that the authorities cited by MRC – Tidwell v. Critz, 248 Ga. 201, 282 S.E.2d 104 (1981), Ackerman v. Kimball International, Inc., 634 N.E.2d 778 (Ind. 1994), and Ackerman v. Kimball International, Inc., 652 N.E.2d 507 (Ind. 1995) – are inapposite. Finally, it appears to the Court that, were the law as MRC argues, then every employee who accepted a post-May 11, 2011 paycheck in relation to a pre-May 11, 2011 employment agreement containing a restrictive covenant would be deemed to have ratified that covenant under the New Law, thereby gutting the New Law's dictate that it not apply to pre-May 11, 2011 provisions. The Court is thus not persuaded by MRC's ratification argument.

E. MRC's Novation Argument

1. Question of Law

Whether there was a meeting of the minds sufficient to support a novation is ordinarily a question of fact reserved for the jury. Feely v. First American Bank of Georgia, N.A., 206 Ga. App. 53, 56-57, 424 S.E.2d 345, 348-49 (1992) (finding as a matter of law that no novation occurred). However, "where the intent of the parties is shown by clear, plain, and palpable evidence so that the jury can draw but one conclusion, the issue of intent can be decided as a matter of law" by the trial court. Id. "[I]f no ambiguity appears, the trial court enforces the contract according to its terms irrespective of all technical or arbitrary rules of construction. That is, where the terms of a written contract are clear and unambiguous, the court will look to the contract alone to find the intention of the parties." Core LaVista, LLC v. Cumming, 308 Ga. App. 791, 794, 709 S.E.2d 336, 340 (2011) (finding as a matter of law that no novation occurred).

2. Application of Georgia Law

There is only one way that MRC could have taken advantage of the May 11, 2011 change in Georgia's law to secure enforceable restrictive covenants against Cone – requiring Cone to execute on or after May 11, 2011 a new contract with new restrictive covenants having a new effective date or, in other words, by the replacement of the old Restrictive Covenants with new ones – i.e., via a novation.

In a novation-related dispute, the burden of proof lies with the party arguing the presence of a novation (i.e., MRC herein). Hall v. Bank South, 186 Ga. App. 860, 860, 368 S.E.2d 810, 811 (1988). That party must show: "(1) a previous valid obligation; (2) the agreement of all the parties to the new contract; (3) a mutual intention by the parties to substitute the new contract for the old one; and (4) a valid new contract." Mil–Spec Indus. Corp. v. Pyrotechnic Specialties, Inc., 262 Ga. App. 582, 585, 586 S.E.2d 7, 9 (2003) (citations omitted). If any one of these elements is lacking, there is no novation. Id.

In relation to the third element – the mutual intention of the parties to replace the old contract or provision with the new contract or provision – the party claiming novation must specifically show that the new contract was intended to and did extinguish or supersede the specific terms at issue in the prior contract. Beasley v. Agricredit Acceptance Corp., 224 Ga. App. 372, 373-74, 480 S.E.2d 257, 259-60 (1997). In the absence of such an extinguishment, there can be no finding of novation. Lumsden v. Williams, 307 Ga. App. 163, 170-71, 704 S.E.2d 458, 464-65 (2010). Accordingly, MRC's novation argument requires an express showing by MRC that the Separation Agreement was intended to and did extinguish and/or supersede the Restrictive Covenants contained in the February 25, 2011 Employment

Agreement. MRC cannot make this showing because the Separation Agreement expressly and unambiguously states that it does not supersede or extinguish the February 25, 2011 Restrictive Covenants. Indeed, the Court finds the Separation Agreement to be very clear in this mandate:

> Any prior agreements between or directly involving the parties to the [Separation] Agreement are superseded by the terms of this [Separation] Agreement and thus are rendered null and void. Notwithstanding the foregoing, all MRC company policies regarding confidentiality of company information, as well as all prior non-solicitation, non-recruitment, non-competition, and non-disclosure agreements between MRC and Cone shall remain in full force and effect including, without limitation, the provisions of Article 2 of the February 25, 2011 [Employment Agreement].

While the "[a]ny prior agreements . . ." language unambiguously provides for a novation in relation to the remainder of the Employment Agreement, the "remain in full force and effect" sentence clearly and specifically excepts and excludes the Restrictive Covenants from any novation that otherwise applies.

MRC's use of the word "remain" in articulating the continuing applicability of the Restrictive Covenants (i.e., that they "*remain* in full force and effect") underscores the parties' intent regarding the survival of those pre-existing covenants. "Remain" means "to continue unchanged" or "to continue in the same state." *Merriam-Webster's Collegiate Dictionary (10th Edition 1996) and American Heritage Dictionary (5th Edition 2011), respectively.* Accordingly, both the black-letter Georgia law and the plain language of the Separation Agreement make clear that, in relation to Cone's firing and the Separation Agreement, it was MRC's intent to preserve the status quo regarding the Employment Agreement's restrictive covenants. The force and effect of the restrictive covenants immediately *prior* to the execution of the Separation Agreement – whatever force and effect that was – would continue on unchanged *after* the execution of the Separation Agreement. MRC's use of the word "prior" further underscores the fact that the February 25, 2011 Restrictive Covenants (which are also referenced specifically by

that date) were to continue on, unchanged by the Separation Agreement. The Court is thus not persuaded by MRC's novation argument.

II. CROSS-MOTIONS FOR INTERLOCUTORY INJUNCTION

A. Standard

A trial court has broad discretion in deciding whether to grant or deny a request for an interlocutory injunction. Lee v. Environmental Pest & Termite Control, Inc., 271 Ga. 371, 373, 516 S.E.2d 76, 78 (Ga. 1999). In deciding whether such an injunction should issue, the trial court considers whether: (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted; (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined; (3) there is a substantial likelihood that the moving party will prevail on the merits of h[is] claims at trial; and (4) granting the interlocutory injunction will not disserve the public interest. SRB Invest. Services, LLLP v. Branch Banking and Trust Co., 289 Ga. 1, 5, 709 S.E.2d 267, 271 (2011). The moving party is not required to prove all four of these factors. Rather, the Court considers these factors in the context of a balancing test. See Id. at n. 7.

B. Application of Georgia Law to Parties' Cross Motions

The first, third, and fourth elements are necessarily present in suits involving employment-related restrictive covenants. "Georgia courts have not hesitated to find irreparable harm in cases involving covenants not to compete." MacGinnitie v. Hobbs Group, LLC, 420 F.3d 1234, 1242-43 (11th Cir. 2005) (citing Enron Capital & Trade Resources Corp. v. Pokalsky, 227 Ga. App. 727, 729, 490 S.E.2d 136, 138 (1997)). Moreover, the threatened injury to Cone outweighs the threatened injury to MRC because a former employer's "[l]oss of business due to free and fair competition is not a harm." Id. "Georgia public policy is clear that restrictive

covenants in employment contracts are disfavored as potential restraints of trade which tend to lessen competition." Id.

Furthermore, as discussed above, the Restrictive Covenants are unenforceable. Thus Cone, and not MRC, is entitled to the requested interlocutory injunctive relief. Moreover, because the Restrictive Covenants are void on their respective faces and in light of the grant of Cone's Motion for Partial Judgment on the Pleadings, Cone is also entitled to the entry of a permanent injunction regarding the unenforceability of the Restrictive Covenants.

III. MRC'S MOTION TO ADD NON-PARTY INTONU, LLC

In light of the ruling above, if Defendant still seeks to add Intonu, LLC as a party, it is directed to file a supplemental brief within fifteen (15) days of entry of this Order. Plaintiff shall file its responsive brief, if any, no later than fifteen (15) days of the filing of Defendant's supplemental brief.

ORDER & RELIEF

In accordance with the discussion above, **IT IS HEREBY ORDERED** that:

(1) Cone's Motion for Partial Judgment on the Pleadings is hereby granted in relation to all Counts of MRC's Amended Counterclaim insofar as each Count arises from or complains of the breach of the Non-Competition Provision, the Non-Solicitation Provision, and/or the Non-Disclosure Provision (except as the latter provision relates to Trade Secrets);

(2) Cone's Motion for Partial Judgment on the Pleadings is hereby granted in relation to Cone's Count for Declaratory Judgment regarding the unenforceability of the the Non-Competition Provision, the Non-Solicitation Provision, and the Non-Disclosure Provision (except as the latter provision relates to Trade Secrets);

(3) Cone's Motion for Interlocutory Injunction is hereby granted and MRC is accordingly ordered to cease and desist from all efforts to enforce the invalid Restrictive Covenants (other than any appellate rights to which MRC may now or in the future be entitled to in the above-styled litigation);

(4) On the basis of the grant of Cone's Motion for Partial Judgment on the Pleadings regarding the unenforceability of the Restrictive Covenants, Cone is hereby awarded permanent injunctive relief against MRC on the same terms as the interlocutory relief set forth in the immediately-preceding subparagraph;

(5) MRC's Motion for Interlocutory Injunctive Relief is hereby denied; and

(6) The Court reserves ruling on MRC's Motion to Add Non-Party Intonu, LLC.

IT IS SO ORDERED THIS 26 DAY OF March, 2013.

Judge Alford J. Dempsey, Jr.
Superior Court of Fulton County