STATE OF VERMONT

SUPERIOR COURT
Franklin Unit

CIVIL DIVISION
Docket No. 2-1-21 Frcv

MARK ST. PIERRE and AMANDA ST. PIERRE, Individually and d/b/a PLEASANT VALLEY FUELS, LLC and D & D OIL, INC.,
Plaintiffs,

v.

ROBERT MCALLISTER and FRED'S PLUMBING AND HEATING, INC. d/b/a FRED'S ENERGY,
Defendants.

RULING ON DEFENDANT MCALLISTER'S REQUEST FOR WRONGFUL INJUNCTION DAMAGES

Plaintiffs commenced this suit in January of this year seeking to enjoin the Defendants from continuing to sell fuel oil to customers within a 40-mile radius of Plaintiffs' offices in Berkshire, Vermont. Plaintiffs alleged that the Defendants had to be enjoined because their sale of fuel oil within the restricted area violated both a covenant not to compete and the Vermont Trade Secrets Act and, if continued, would cause Plaintiffs irreparable harm.

On January 8, 2021, this court issued at Plaintiffs' request an ex parte "Order to Show Cause and Temporary Restraining Order" ("TRO"), temporarily enjoining Defendant McAllister from, among other things, "working for any fuel oil company," "contacting any customers ... for any purpose related to the purchase of fuel oil," or "driving any vehicle that depicts or promotes a fuel oil business" within the aforesaid 40-mile radius, until a hearing could be held by the court. Following a two-hour evidentiary hearing held on January 19, 2021, however, the court on January 26th issued a ruling denying Plaintiffs' motion for a preliminary injunction and vacating the TRO (*see* Ruling on Pending Motions, 1/26/21, at 10).

McAllister now seeks to recover damages that he allegedly sustained on account of the TRO. More specifically, he seeks to recover $2,750 in wages allegedly lost because of the injunction, plus $6,825 in attorney's fees allegedly incurred in

getting the TRO vacated (*see* Defendant Robert McAllister's Petition for Judgment on the Bond). The parties have fully briefed the issue, and on July 21, 2021, the court held an evidentiary hearing on McAllister's motion. For the reasons explained below, McAllister's request is granted in part and denied in part.

It is axiomatic that a party is liable for damages caused by an injunction improvidently obtained. Sykas v. Alvarez, 126 Vt. 420, 422 (1967) ("If a court of equity dissolves an injunction because a plaintiff has failed to establish his right in equity to have had the benefit of such relief, that plaintiff is, of course, liable for any damage caused by the injunction unjustifiably given him...." (citation omitted)). Three potential avenues of relief are available to the party damaged by the injunction. If the injunction is dissolved "by a final judgment in favor of the enjoined party," he may seek damages pursuant to 12 V.S.A. § 4447. If there is no final judgment, the enjoined party may invoke the inherent power of the court that issued the injunction. ADE Software Corp. v. Hoffman, 172 Vt. 259, 262 (2001) ("'[T]he power to assess injunction damages is inherent in the court, independent of the statute.'" (quoting Spaulding & Kimball Co. v. Aetna Chemical Co., 98 Vt. 169, 172 (1920)). Lastly, the damaged party may sue on the bond that the suing party was required to post in order to obtain the injunction. Couture v. Lowery, 122 Vt. 505, 508 (1962) ("An additional remedy is available to the defendants in the form of an action to enforce the contractual rights created by the terms of the injunction bond." (citation omitted)).

Here, there is no final judgment in this case, so the statutory avenue is not available to McAllister. For the same reason, a suit on the bond is not available to him either.[1] However, the TRO that the Plaintiffs obtained at the outset of this case has been vacated by this court on the grounds that Plaintiffs failed to meet their burden of establishing a likelihood of prevailing on the merits of their claims against McAllister, and any benefit Plaintiffs might obtain from a continuation of the injunction would be outweighed by the potential harm to McAllister and those members of the public who require fuel oil in the winter (Ruling at 6). Therefore, McAllister can seek injunction damages by invoking the inherent powers of this court. In order to succeed, he "must show both that the injunction was wrongfully issued" and that he "suffered damages resulting from the wrongful issu[ance]." ADE Software Corp., 172 Vt. at 263 (citations and internal quotation marks omitted).

McAllister has met his burden of showing that the TRO was wrongfully issued. The court issued the TRO based upon the assertions set forth in Plaintiffs'

[1] The "Non-Surety Bond" that the Plaintiffs posted in order to obtain their TRO in this case states: "Therefore, the undersigned Plaintiffs promise to pay a party enjoined in this matter a sum not to exceed $10,000. for damages the Defendant may sustain by reason of the TRO and/or the Preliminary Injunction, if the Court finally decides that the Plaintiff's [sic] are not entitled to the TRO or the Preliminary Injunction."

verified complaint, motion for a temporary restraining order, and supporting affidavits of Mark St. Pierre and Daniel Carswell, all filed with the court on January 6, 2021. In those papers Plaintiffs represented to the court that: McAllister had signed a covenant not to compete with the St. Pierres; that the St. Pierres had duly assigned the covenant to D&D Oil, Inc.; that McAllister, while still employed by the St. Pierres, had misappropriated Plaintiffs' customer lists and had begun to solicit Plaintiffs' customers to switch their accounts to a competitor, Fred's Energy, by using untrue and misleading statements, in violation of his covenant not to compete and the Vermont Trade Secrets Act; that Plaintiffs had already lost several customers on account of McAllister's wrongful conducts and would be irreparably harmed if McAllister were allowed to continue violating his legal duties; and that Plaintiffs were likely to prevail on the merits of their claims against him.

When a hearing was held on the Plaintiffs' motion to keep the TRO in place, however, Plaintiffs proved that McAllister had signed a covenant not to compete and had taken a job with Fred's Energy, but Plaintiffs were unable to establish any of the elements necessary to sustain an injunction. To the contrary, the evidence produced at the hearing demonstrated the following: because the St. Pierres were no longer in the fuel oil business, McAllister's employment by Fred's Energy did not violate his covenant not to compete with them; because the covenant not to compete was unassignable and never assigned to D&D Oil, Inc. that Plaintiff had no standing to enforce the covenant either; none of the Plaintiffs had ever asked McAllister to sign a confidentiality agreement of any kind; there was no evidence that McAllister or Fred's Energy had ever received or had access to the St. Pierres' customer list; there was no evidence that McAllister had solicited, or attempted to solicit any of the St. Pierres' customers while still employed by them; there was no evidence that McAllister had made misrepresentations to induce customers to switch to Fred's Energy; and, therefore, Plaintiffs could not prevail on their claims that McAllister had violated his covenant not to compete or the Vermont Trade Secrets Act (*see* Ruling at 7-10). If the court had known these facts on January 8th, the court would not have issued the TRO.

In addition, at the hearing held on January 19th on Plaintiffs' motion to keep the TRO in place, the court learned that, prior to filing this suit, Plaintiffs had received a letter from Attorney Peter F. Langrock, stating that he was representing McAllister in connection with their demand that he stop working for, or soliciting customers on behalf of Fred's Energy. The court further learned at the hearing that the Plaintiffs failed to inform Langrock of their July 6th application to this court for a TRO, and they failed to provide him or his client with copies of their filings, until after the TRO was issued. Had the court known on July 8th that McAllister was represented by counsel in connection with this dispute, the court would not have issued the TRO without first giving him notice and an opportunity to be heard.

Having shown that the TRO was wrongfully issued, McAllister may recover whatever damages he can prove were caused by the injunction. As noted earlier, McAllister seeks to recover $2,750 in wages allegedly lost because of the injunction, plus $6,825 in attorney's fees allegedly incurred in getting the TRO vacated.

At the July 21st hearing on his request, McAllister proved by a preponderance of the evidence that he did not work for eleven days in January because the court's TRO prevented him from doing so. He also proved to the court's satisfaction that he ordinarily would have earned $2,750 for working those eleven days, had he been allowed to do so. However, McAllister also acknowledged at the hearing that he was a salaried employee of Fred's Energy at the time, and that Fred's Energy paid him his fully salary during those eleven days, despite his inability to work due to the TRO. Therefore, McAllister did not suffer any actual loss of income on account of the TRO.

McAllister argues that he should nonetheless be allowed to recover his $2,750 of "lost" wages under the so-called "collateral source" rule. The collateral source rule applies in tort actions to prevent tortfeasors from avoiding having to pay damages for losses caused by their negligence; under that rule, injured parties may recover all of their damages from the tortfeasor, even if some of those damages were paid by a third party (i.e., a "collateral source"), such as an insurance company. That rule does not apply to the case at hand. Moreover, this is a matter within the court's equity jurisdiction, and it would not be equitable to allow McAllister to enjoy a windfall at the expense of the Plaintiffs. Therefore, the court will not award lost wages to McAllister.

The court will, however, award McAllister the attorney's fees he reasonably incurred in getting the TRO vacated. Under the so-called "American rule," attorney's fees are generally not recoverable in the absence of a recognized statutory or other exception, but injunction damages are one of the recognized exceptions to the rule. Attorney's fees "may be allowed as part of injunction damages, provided they are generated solely by its wrongful issuance." Sykas, 126 Vt. at 422 (citations omitted). Moreover, the relative equities of the parties are a factor in deciding whether equity justifies such an award. Id. at 422 ("By the equitable standards of Rule 41, it may be wrongful to insist on and obtain, unnecessarily, a devastating injunctive remedy for enforcement of a technical right which may be fully preserved by ordinary relief of a different form.... On the other hand, where the only impact of the injunction is represented by legal expenses comparable to those faced by a defendant obtaining dismissal of an action at law, there will be a much stronger insistence on a showing that the injunction was indeed wrongfully issued.").

Here, McAllister was faced with the prospect of losing his sole means of support. As the court noted when it vacated the TRO: "Selling fuel oil is the

principal, if not only business McAllister has been engaged in for the past 11 years; that business is the main, if not sole means of support for himself and his family. Loss of the ability to engage in that business would constitute a real hardship for him." Ruling at 8. Therefore, for McAllister this was not the usual, run-of-the-mill kind of lawsuit. Moreover, it was foreseeable to the Plaintiffs when they filed their suit that McAllister would feel compelled to vigorously oppose any request for an injunction that threated his ability to compete in the fuel oil business. Despite this, the Plaintiffs applied ex parte for a TRO against McAllister, asserting claims and making allegations that they lacked the evidence to prove. Under these circumstances, it would be inequitable not to allow McAllister to recover the attorney's fees he reasonably incurred in getting the TRO vacated.

McAllister received two bills from Attorney Langrock: a bill for $5,250 for services rendered during the period January 12-26, 2021; and a second bill for $1,575 for services rendered from February 9-July 21, 2021. Except for 2.0 hours devoted to drafting a counterclaim for McAllister, all of Attorney Langrock's services in the first bill were related to getting the TRO vacated. All the services in Langrock's second bill were related to McAllister's request for wrongful injunction damages.

The court will award McAllister $4,550 in attorney's fees ($5,250 minus $700 for the two hours spent preparing the counterclaim). Those fees are recoverable because they were generated solely by the wrongfully issued injunction. The fees McAllister has incurred in seeking damages from the Plaintiffs, however, do not fall within the narrow scope of the exception to the American rule, so those will not be allowed.

Judgment and Order

For the foregoing reasons, judgment is hereby entered in favor of Robert McAllister to recover from the Plaintiffs, jointly or severally, $4,550 in wrongful injunction damages.

SO ORDERED this 23rd day of July, 2021.

Robert A. Mello, Superior Judge