NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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4110 Chain Bridge Road
Fairfax, Virginia 22030-4009
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July 28, 2011

Bernard E. Goodman, Esquire
PETERSON, NOLL & GOODMAN, PLC
Tysons Square Office Park
8214-C Old Courthouse Road
Vienna, Virginia 22182
Counsel for Plaintiff, Preferred Systems Solutions, Inc.

Milton C. Johns, Esquire
DAY & JOHNS, PLLC
9116 Center Street
Suite 107
Manassas, Virginia 20110
Counsel for Defendant, GP Consulting, LLC

Re: *Preferred Systems Solutions, Inc. v. GP Consulting, LLC*
Case No. CL 2010-6693

Dear Counsel:

This matter came before the Court on June 14, 2011. Subsequent to a bench trial and after considering the pleadings, memoranda, arguments of counsel, and post-trial briefings, the Court took the matter under advisement. The following embodies the Court's ruling.

FACTS

Plaintiff Preferred Systems Solutions ("PSS") is a government information technology ("IT") solutions contractor. It provides IT services for the federal

government. Defendant GP Consulting ("GP") is a consulting firm which also provides IT services. Sreenath Gajulapalli ("Gajulapalli") is the sole member and manager of GP.

On October 1, 2003, PSS and GP entered into an agreement ("Agreement") in which GP would provide certain services, namely, SAP/ERP consulting services.[1] A covenant not-to-compete provision was included in the Agreement. This provision prohibited GP's competition with PSS during the term of the Agreement and for twelve months thereafter.

On February 1, 2010, GP terminated the Agreement by advising PSS that its last day would be February 12, 2010.[2] On February 16, 2010, GP began to work directly for Accenture – performing the same duties that it had previously performed for PSS.[3] Accenture is a company that directly competes with PSS for government contracts, namely, here, contracts with Defense Logistics Agency ("DLA").

PSS filed its Complaint on May 7, 2010, alleging Breach of Contract, Violation of Virginia Code § 59.1-336 *et seq.*, Tortious Interference with Contract, and also seeking an injunction and specific performance of the contract.[4]

A bench trial was held on June 14, 2011, after which the Court took the matter under advisement. Subsequently, each party filed a brief in lieu of closing arguments.

ANALYSIS

Standard for Breach of Covenant Not-to-Compete

A non-competition agreement between an employer and an employee will be enforced if the contract is sufficiently narrowly drawn to protect the employer's legitimate business interest, is not unduly burdensome on the employee's ability to

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[1] ERP stands for enterprise resource planning. "It is a solution by which despairing computer systems or functions within an entity are unifying under one platform." (Trial Tr. 32, June 15, 2011.) "SAP is a commercial off-the-shelf software that is an ERP solution-based software." (Trial Tr. 34.)

[2] GP's last day of work was actually February 13, 2010. (Trial Tr. 160.)

[3] *Id.*

[4] On July 30, 2010, the court heard GP's Demurrer and sustained it as to the Trade Secrets count.

earn a living, and is not against public policy.[5] Because such restrictive covenants are disfavored restraints on trade, the employer bears the burden of proof and any ambiguities in the contract will be construed in favor of the employee.[6] Each non-competition agreement must be evaluated on its own merits, balancing the provisions of the contract with the circumstances of the business and employee involved.[7]

GP Breached its Agreement with PSS.

Paragraph 14 of the Agreement titled "Non-Competition" states:

> During the term of this Agreement and for twelve (12) months thereafter, [GP] hereby covenants and agrees that [it] will not, either directly or indirectly: (a) enter into a contract as a subcontractor with Accenture, LLP and or DLA to provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program. (b) enter into an agreement with a competing business and provide the same or similar support that PSS is providing to Accenture, LLP and/or DLA and in support of the DLA Business Systems Modernization (BSM) program.

The covenant not-to-compete provision is very narrowly drawn. It prevented GP from working for only two specific companies, namely, Accenture and DLA. It proscribed this competition for only a specific period, namely, one year. Itt was also specific as to what type of work was to be prohibited.

Pursuant to the testimony of PSS's senior vice president of corporate development, there were between four and five hundred SAP programmer jobs within the metropolitan D.C. area at the time GP entered into its contract with Accenture.[8] As a result, no undue burden or restraint existed upon GP when it entered into the Agreement.

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[5] *Modern Env'ts, Inc. v. Stinnett*, 263 Va. 491, 493, 561 S.E.2d 694, 695 (2002); *Simmons v. Miller*, 261 Va. 561, 580-81, 544 S.E.2d 666, 678 (2001).

[6] *Modern Env'ts, Inc.*, 263 Va. at 493, 561 S.E.2d at 695.

[7] *See Id.* at 494-95, 561 S.E.2d at 696.

[8] (Trial Tr. 41, June 14, 2011.)

GP plainly breached its contract with PSS on February 16, 2010, when it entered into a contract with Accenture for services in support of the DLA BSM program. This was made clear when Gajulapalli, upon cross-examination, admitted that three days after leaving PSS he went to work for Accenture on the same DLA project, at the same desk, at the same computer, and on the same problems.[9]

Because the covenant not-to-compete was for twelve months, this Court awards PSS damages in the amount of $172,395.96.[10]

PSS Is Not Entitled to Injunctive Relief Beyond the Date of Termination.

In Virginia, injunctions are an extraordinary remedy.[11] A prospective injunction, in which the injunction dates from a court's final order, may be issued where the party seeking the injunction did not contribute unnecessarily to the delay that led to the expiration of the original covenant not-to-compete.[12] This is because where the plaintiff has not caused the delay, failure to enforce the injunction "would reward the breach of contract, encourage protracted litigation, and provide an incentive to dilatory tactics" by defendants.[13] As with any equitable remedy, injunctive relief may be awarded in addition to contract damages if damages alone would not compensate a plaintiff.[14]

Although an injunction may have been appropriate for the initial twelve month post-agreement period, PSS is not entitled to a prospective injunction now.

First, the period for which an injunction might lie was twelve months from the date of termination. That time began to run immediately upon GP's termination of the Agreement.

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[9] (Trial Tr. 160-61, June 14, 2011.)

[10] The Court calculated the damages by multiplying the hours GP spent during the twelve month period after GP started working with Accenture by the rate per hour that PSS was damaged. GP worked 375 hours from February 16, 2010 to March 31, 2010, at a PSS calculated damages per hour of $72.84. GP worked 1,824 hours from April 1, 2010 to February 15, 2010, at a PSS calculated damages per hour of $79.54. Thus, the total calculated damages equal $172,395.96.

[11] *Noell Crane Systems GmbH v. Noell Crane and Service, Inc.*, 677 F.Supp.2d 852, 876-77 (E.D. Va. 2009) (citing *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 662 S.E.2d 44 (2008)).

[12] *Roanoke Engineering Sales Co. v. Rosenbaum*, 223 Va. 548, 554-55, 290 S.E.2d 882, 886 (1982).

[13] *Id.*

[14] *Noell Crane Systems GmbH*, 677 F.Supp.2d at 877.

Second, although PSS relies upon *Roanoke Engineering Sales Co. v. Rosenbaum* for the proposition that the Virginia Supreme Court has permitted trial courts to defer the beginning of the injunctive period for a covenant not-to-compete until the date of final judgment, the holding of that case is not applicable here.[15] The court in *Roanoke* permitted such a deferral of the injunction, but it did so because "neither party contributed unnecessarily to the delay which carried the time of decision a year past the expiration of the protected period."[16] The court found that the fact that the case had been in litigation for three and a half years was "attributable to the increasing burdens of the judicial system, not to the litigants."[17] The court granted the requested injunction (minus six months attributable to the plaintiff's delay in filing the lawsuit).[18]

Here, PSS waited two months after the breach of the Agreement before even filing suit. Although it is true that the trial date came later, PSS could have sought a temporary injunction immediately.[19] It did not do so. The twelve month period of prohibition has now long since passed.

Furthermore, as with any request for injunctive relief, PSS must show that an injunction would be appropriate under the circumstances by demonstrating that monetary damages would be inadequate and that only the imposition of an injunction would provide adequate relief.[20] PSS bargained for a year of non-competition from GP in order to protect its investment in DLA's ERP solution. GP's breach resulted in precisely the loss of profits that its one-year non-compete clause was designed to prevent. Awarding damages on the breach of the Agreement protects PSS's legitimate business interest by compensating it for the breach. To further enjoin GP from working at Accenture now would give PSS injunctive relief that is not related to any legitimate business interest *after* the expiration of the twelve month period.

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[15] 223 Va. 548, 555-56, 290 S.E.2d 882, 886-87.

[16] 223 Va. at 554, 290 S.E.2d 882, 885-86.

[17] *Id.*

[18] *Id.* at 556, 290 S.E.2d 882, 887.

[19] A request for an injunction or a temporary restraining order always enjoys precedence on any court's docket. That is especially true in Fairfax County.

[20] *Noell Crane Systems*, 677 F.Supp.2d at 877 (citing *Black & White Cars v. Groome Transp., Inc.*, 247 Va. 426, 431, 442 S.E.2d 391 (1994)).

PSS Has Failed to Show Tortious Interference with Contract.

The elements required for a prima facie showing of tortious interference with contract are:

> The existence of a valid contractual relationship or business expectancy, knowledge of the relationship or expectancy on the part of the interferor, intentional interference inducing or causing a breach of termination of the relationship or expectancy; and resultant damage to the party whose relationship or expectancy has been disrupted.[21]

It is clear that a contractual relationship existed between PSS and GP as a result of the Agreement of October 3, 2003. It is also clear that GP had knowledge of the covenant not-to-compete when it entered into its contract with Accenture on February 16, 2010. Because GP entered into the Accenture contract, PSS and GP's contract was breached.

PSS hired GP as its subcontractor for a specific contract, namely, IT work for DLA. The senior vice president of PSS testified that when GP went to work for Accenture, there was a lost business opportunity for PSS.[22] What is not guaranteed, however, is that PSS would have continued to receive contracts from DLA *even if GP had continued to work for it.* Further, PSS failed to show that it could not have hired other subcontractors who could have done the same work. These facts preclude resulting damage which would evidence a tortious interference with the DLA contract.

Finally, even if PSS could have shown that GP's breach tortiously interfered with its contract with DLA and/or Accenture, which the evidence did not demonstrate, damages are not permitted. Separate damages may be awarded only if *separate harms are inflicted.*[23] Here, there is no separate harm. Any harm that resulted from the tortious interference is duplicative of the harm from the breach of contract.

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[21] *DurretteBradshaw, PC v. MRC Consulting, LC,* 277 Va. 140, 670 S.E.2d 704 (2009).

[22] (Trial Tr. 29, June 14, 2011.)

[23] *Advanced Marine Enterprises. v. PRC, Inc.*, 256 Va. 106, 124, 501 S.E.2d. 148, 159 (1998).

CONCLUSION

Because PSS is not entitled to injunctive relief beyond the twelve month period, and because PSS failed to show tortious interference with contract, it is entitled to damages in the amount of $172,395.96 with interest from February 16, 2010.

An Order is enclosed.

Very truly yours,

R. Terrence Ney

Enclosure

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PSS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	CL-2010-6693
GP CONSULTING,	)	
	)	
Defendant.	)	

ORDER

This matter came before the Court for a bench trial on June 14, 2011;

IT APPEARING TO THE COURT that for the reasons stated in the July 28, 2011 Opinion Letter, which is incorporated herein and made part hereof; it is hereby

ORDERED that PSS is awarded $172,395.96 with interest from February 16, 2010;

ENTERED this 28th day of July, 2011.

JUDGE R. TERRENCE NEY

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT.