Pacific American Title Insurance & Escrow (CNMI), Inc.
Plaintiff/Appellant,
v.
Kim Fell **Anderson**, Security Title, Inc. and
John Does One Through Seven,
Defendants/Appellees**.**
Appeal No. 98-019
Civil Action No. 98-0010
July 23, 1999

Argued and submitted April 30, 1999

Counsel for Appellant: Gregory J. Koebel (O'Connor Berman Dotts & Banes), Saipan.

Counsel for Appellees: Rexford C. Kosack, Saipan

BEFORE: DEMAPAN, Chief Justice, CASTRO, Associate Justice, and SALAS, Special Judge.

CASTRO, Associate Justice:

¶1 **[1]** Pacific American Title Insurance & Escrow (CNMI), Inc. ("Pacific Title") appeals an order of the trial court denying its request for a preliminary injunction enjoining its former employee, Kim Fell Anderson ("Anderson"), from doing business with any of its customers. We have jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution, as amended.[1] We affirm.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 I. Whether, in balancing the hardships, the trial court erred in finding that Pacific Title would have an adequate remedy at law should it lose its customers to Anderson;

II. Whether, in determining the probability of success on the merits, the trial court erred in finding that the Employment Agreement only prohibits Anderson from actively soliciting Pacific Title's customers; and

III. Whether the denial of the preliminary injunction should be reversed if the trial court committed either or both of the errors above.

¶3 **[2,3,4,5]** The first two issues are questions of law which we review *de novo*. *Commonwealth v. Oden*, 3 N.M.I. 186, 191 (1992), *aff'd* 19 F.3d 26 (9th Cir. 1994). The third issue, involving the

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[1] N.M.I. Const., art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

denial of a preliminary injunction, is reviewed for abuse of discretion. *Norita v. Norita*, 4 N.M.I. 381, 383 (1996). In addition, factual findings of the trial court are reviewed under the clearly erroneous standard. *Camacho v. L & T Int'l Corp.*, 4 N.M.I. 323, 325 (1996). We will not reverse unless, after viewing the evidence, we are left with a firm and definite conviction that the trial court made a mistake. *Id.*

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Pacific Title is a CNMI corporation engaged in the business of producing real property title reports and selling real property title insurance. In 1991, Manu Melwani, President of Pacific Title, hired Anderson as its Office Manager. Anderson signed an Employment Agreement, dated January 11, 1991, in which she agreed to abide by the following relevant provisions:

> 6.1. Solicitation after Termination. Anderson agrees that from this date until the expiration of two (2) years after termination of her employment with [Pacific Title], regardless of the circumstances of termination of employment, Anderson will not, on behalf of herself or on behalf of any other person, firm, corporation, or other entity . . . directly or indirectly:
>
> > 6.1.1. call on any of the customers of [Pacific Title] for the purpose of soliciting and/or providing to any of such customers any title insurance, escrow, abstract, title search or similar services;
> >
> > 6.1.2. solicit, divert, or take away any customer of [Pacific Title];

Employment Agreement, Excerpts of Record ("E.R.") at 30.[2]

¶5 In addition to working as Pacific Title's Office Manager, Anderson served as Vice-President, Director and 25% shareholder, from January 1991, until she was terminated, allegedly for disloyal and dishonest conduct, in June 1997. After she was terminated, Anderson incorporated her own title insurance company, Security Title, Inc. ("Security Title") on August 4, 1997.

¶6 In January 1998, Pacific Title filed a complaint against Anderson and Security Title, essentially seeking to enjoin Anderson from doing business with any of Pacific Title's customers. Accordingly, Pacific Title filed an application for a temporary restraining order ("TRO"), requesting that the Superior Court enjoin the Defendants from performing services for or issuing real property title insurance to Pacific Title's

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[2] The remaining paragraphs of Section 6.1read as follows:

> 6.1.3. solicit, induce, or entice any employee of [Pacific Title] to leave such employment;
> 6.1.4. solicit, induce, or entice First American Title Insurance Company, or any other title insurance company with whom [Pacific Title] has a relationship, to terminate, reduce authority, or otherwise modify any such agency relationship, or to grant or create a new agency relationship with any competitor in the Northern Mariana Islands or Guam.

Id. These subsections, however, are not at issue in this interlocutory appeal.

customers. Shortly thereafter, Pacific Title withdrew the TRO application and re-noticed it as a Motion for Preliminary Injunction. E.R. at 139-40.

¶7 The trial court denied the request for the preliminary injunction on April 29, 1998. *Pacific Am. Title Ins. & Escrow v. Anderson*, Civ. No. 98-0010 (N.M.I. Super. Ct. April 29, 1998) ([Unpublished] Order Denying Preliminary Injunction) ("Order"). The trial court based its denial of injunctive relief on its findings that (1) there was no irreparable injury because Pacific Title failed to demonstrate loss of business to Anderson in violation of Section 6.1 of the Employment Agreement, (2) the probability of success on the merits did not lie with Pacific Title, and (3) although serious questions were raised, Pacific Title did not show any threat of immediate loss of business. Order at 3-4. Pacific Title timely appealed.

ANALYSIS

¶8 **[6]** The basic purpose of a preliminary injunction is to preserve the status quo between the parties pending a final determination of the action on the merits. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). The status quo is the last uncontested status preceding the pending controversy. *Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 809 (9th Cir. 1963).

¶9 **[7]** In determining whether to grant a preliminary injunction, Commonwealth courts follow two interrelated tests used in the Ninth Circuit. Under the first test, the moving party must show both a probability of success on the merits and the possibility of irreparable injury. *Marianas Pub. Land Trust v. Commonwealth*, 2 CR 999, 1002 (1987). Alternatively, under the second test, the moving party is required to show that serious legal questions are raised and that the balance of hardships tips sharply in its favor. *Id.* at 1002-03. The Ninth Circuit Court of Appeals has noted that these "are not separate tests, but the outer reaches 'of a single continuum.'" *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

¶10 **[8]** We must emphasize that this Court's review in this appeal is very limited. We are only reviewing the denial of a preliminary injunction, not a final decision on the merits.

> We may not reverse the [lower] court's denial of the preliminary injunction unless the [lower] court abused its discretion or relied on an erroneous legal premise. We must therefore determine whether 'the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment,' as well as whether the [lower] court followed the appropriate legal standard governing the issuance of preliminary injunctions, or misapprehended the law with respect to the underlying issues in applying those standards.

Martin v. International Olympic Comm., 740 F.2d 670, 674 (9th Cir. 1984) (citations omitted).

I. Whether, in balancing the hardships, the trial court erred in finding that Pacific Title would have an adequate remedy at law should it lose its customers to Anderson

¶11 **[9,10,11]** Under the balance of hardships test for injunctive relief, the moving party must show that serious questions going to the merits have been raised and that the balance of hardships tips sharply in its favor. *Marianas Pub. Land Trust*, 2 CR at 1002. Thus, the moving party must demonstrate that it would suffer significantly greater hardship if the injunction does not issue than the defendant would suffer if the injunction were to issue.

Here, the trial court found that although serious questions were raised;

> Pacific Title has not shown any threat of immediate loss of business. In addition, the loss of business which Pacific Title is concerned about is something for which it has an adequate remedy at law. Therefore, this Court finds that the Defendants will be subjected to greater hardship than Pacific Title should the preliminary injunction be granted.

Order at 4. On appeal, Pacific Title challenges the finding that its alleged loss of business can be adequately remedied at law. Under the clearly erroneous standard for factual findings, we may not reverse unless we are left with a firm and definite conviction that the trial court made a mistake. *Camacho*, 4 N.M.I. at 325.

¶12 **[12]** Pacific Title contends that, regardless of whether an employment agreement contains a non-compete or non-solicitation clause, loss of customers and goodwill comprise irreparable injury because such injury is not compensable solely with money damages. This argument, however, ignores the trial court's main finding that Pacific Title did not show "*any* threat of immediate loss of business." Order at 4 (emphasis added). It was therefore unnecessary for the court to make the additional finding that Pacific Title would have an adequate remedy at law should it suffer any loss of business. Even if the trial court had erred in finding there would be an adequate remedy at law, such error would not warrant reversal because Pacific Title still did not show that it faced the threat of immediate loss of business.

¶13 **[13]**As noted by the trial court, Pacific Title's allegation that Anderson has been taking away its customers in violation of the Employment Agreement was based upon information and belief. *See* Verified First Amended Complaint, ¶ 14, E.R. at 6. We agree with the trial court that Pacific Title was only speculating as to the possibility that it would lose business in violation of Section 6.1 of the Employment Agreement. "Speculative injury does not constitute irreparable injury." *Goldies Bookstore, Inc. v.*

Superior Court of the State of California, 739 F.2d 466, 472 (9th Cir. 1984).

¶14 Thus, the trial court did not err in finding that the balance of hardships tipped in favor of Anderson because Pacific Title had not shown a threat of immediate loss of business. It was therefore irrelevant whether any alleged injury could or could not be adequately remedied at law.

II. Whether, in determining the probability of success on the merits, the trial court erred in finding that the Employment Agreement only prohibits Anderson from actively soliciting Pacific Title's customers

¶15 **[14]** Pacific Title also challenges the trial court's findings concerning the irreparable harm test, under which the moving party must demonstrate probability of success on the merits and the possibility of irreparable harm. *Marianas Pub. Land Trust*, 2 CR at 1002. The trial court concluded that Pacific Title proved neither element to be entitled to preliminary injunctive relief. Specifically, the court first found that Pacific Title did not demonstrate irreparable injury because it failed to show that it lost business to the defendants in violation of Section 6.1 of the Employment Agreement. Order at 3. Although not necessary, the court then proceeded to make the additional finding that Pacific Title did not show probability of success on the merits because it failed to establish that the Employment Agreement prohibits Anderson from accepting business from Pacific Title's customers. *Id.* Pacific Title contests this latter finding that the Employment Agreement only prohibits Anderson from actively soliciting its customers.

¶16 The relevant paragraphs of the Employment Agreement are Sections 6.1.1 and 6.1.2. Under these paragraphs, Anderson agreed that for a period of two years after termination of her employment she would not directly or indirectly:

> 6.1.1. call on any of the customers of [Pacific Title] for the purpose of soliciting and/or providing to any of such customers any title insurance, escrow, abstract, title search or similar services;
>
> 6.2.2. solicit, divert, or take away any customer of [Pacific Title.]

E.R. at 30.

¶17 **[15]** Pacific Title contends that the language of these paragraphs not only prohibits Anderson from actively soliciting its customers, but also from *accepting* business from its customers. At the same time, Pacific Title readily admits that the Employment Agreement does not prevent Anderson from competing in the same market. Accordingly, the trial court interpreted the agreement as a covenant not to solicit, rather than a covenant not to compete. The trial court distinguished the case of *Manuel Lujan Ins., Inc. v. Jordan*, 673 P.2d 1306 (N.M. 1983), which Pacific Title relied upon as support for its argument that

Anderson agreed to a complete ban on accepting business from Pacific Title's customers. The court noted that the employee in *Lujan* agreed not to "directly or indirectly enter into competition with" the employer. Order at 3 (quoting *Lujan*, 673 P.2d at 1308). Thus, *Lujan* made clear that it is the covenant not to compete, "not merely a narrow promise not to solicit" which prohibits an employee from accepting business from a former employer's customers. *Lujan*, 673 P.2d at 1309-10.

¶18 **[16]** Here, there was no dispute that Anderson agreed not to solicit Pacific Title's customers, but that she was free to compete. Accordingly, we cannot say that the trial court's interpretation of Sections 6.1.2 and 6.1.3 as a covenant not to solicit was unreasonable or unsupported by the evidence. Therefore, the trial court did not clearly err in finding that the Employment Agreement only prohibited Anderson from actively soliciting Pacific Title's customers.

III. Whether the denial of the preliminary injunction should be reversed if the trial court committed either or both of the errors alleged by Pacific Title

¶19 As we have determined that the trial court did not commit either of the errors alleged by Pacific Title, we hold that the court did not abuse its discretion and that denial of preliminary injunctive relief should not be reversed.

¶20 **[17]** In addition, we note that granting of the injunction would not have been proper because it would have effectively given Pacific Title the full relief it hopes to obtain after a trial on the merits. Since the function of a preliminary injunction is to preserve the status quo, it is generally improper to grant a moving party the full relief to which it might be entitled if successful at trial. *Tanner Motor Livery*, 316 F.2d at 808. "This is particularly true where the relief afforded, rather than preserving the status quo, completely changes it." *Id.* at 808-09. Here, the status quo, or the last uncontested status prior to the pending controversy, was that both parties were engaging in the title insurance business. Due to the extensive list of Pacific Title customers and the limited market for title services in the Commonwealth, granting the injunction would have essentially put Anderson out of business and changed the status quo.

CONCLUSION

¶21 For the foregoing reasons, the Order of the trial court denying Pacific Title's application for a preliminary injunction is hereby **AFFIRMED**.