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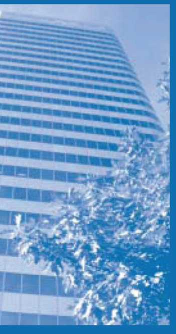

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REMEDIES FOR BREACH OF NON-COMPETITION AGREEMENTS

by James V. Irving

In the case of FBR Capital Markets & Co. v. Karen Short, Plaintiff investment bank brought an action in the U.S. District Court for the Eastern District of Virginia against its former employee to enforce anti-competition protections contained in her employment agreement and established by law.

FBR, an Arlington-based entity, had employed Short as a Senior Analyst and Senior Vice President. Short signed an employment contract that included a covenant not to compete and a non-solicitation provision (the "Agreement"). The Agreement required Short to provide ninety days notice before resigning and stated that during that Notice Period, Defendant would not be employed "in any business that competes with FBR in the capital markets, financial advisory and/or institutional sales and trading business." The Agreement provided parallel restrictions if she was terminated.

In July of 2009, Short advised her supervisor that she was taking a job with Bank of Montreal ("BMO"), a competitor of FBR. Accordingly, Short was terminated. The next day, she began her new job with BMO, in apparent violation of the 90 day limit on competition contained in the Agreement.

FBR sued Short for breaching the non-competition and non-solicitation provisions of the Agreement; for violating FBR's confidential and proprietary information policy, and for misappropriating trade secrets in violation of the Uniform Trade Secret Act. On September 9, the date the suit was filed, FBR also applied for a Temporary Restraining Order prohibiting Short from working at BOM. A month later, The Honorable Liam O'Grady denied the injunction.

In light of the alleged conduct, it might be assumed that Judge O'Grady would readily issue the injunction. It may be that FBR thought the same thing. Judge O'Grady did not deny the injunction because he found Short's conduct acceptable, but because FBR had failed to establish one of the prerequisites to injunctive relief under federal law: they had failed to "make a clear showing of immediate irreparable injury." In fact, according to Judge O'Grady, they had failed to show any harm at all. FBR's proof of damages was limited to allegations that Short's departure "might" result in lost customers and income; not that they would or had.

Additionally, Judge O'Grady found a second reason to deny the injunction: that any

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REMEDIES FOR BREACH OF NON-COMPETITION AGREEMENTS
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damages suffered, or to be suffered, by FBR could be adequately compensated by money.

Judge O'Grady's second conclusion is an eye-opener, as it would seem that the loss of customers and the stream of revenue that they represent (if proven) is not subject to ready or accurate calculation. However, his first conclusion is solidly based in the law, reminding us that favorable facts don't assure a favorable result unless the elements of the tort are proven.

NON-COMPETITION IN STATE COURT

by James V. Irving

FBR is not the only recent non-competition case with bad facts for the former employee, but the preliminary ruling in Virginia Academy of Fencing, Inc. v. Sintchinov was considerably less favorable to the former employee. On August 27, Fairfax Circuit Court Judge Jonathan Thatcher overruled defendants' Demurrer to most of a six-count complaint arising from the alleged breach of a contract containing a non-competition agreement.

Between 2005 and 2008, Alexei Sintchinov was employed by the Virginia Academy of Fencing ("VAF") as a fencing instructor. Sintchinov's employment contract provided that "Employees do not sell equipment or teach fencing outside of [VAF]." Despite the Agreement, and during its term, Sintchinov began teaching at competitor academies and solicited and accepted direct payments from VAF's students. He also assisted two individuals in organizing International Fencer Council ("IFC"), an academy that competed directly with VAF.

VAF learned of Sintchinov's conduct in December of 2008 and confronted him. Sintchinov admitted his conduct and refused to assure VAF that he'd cease competition. Thereafter, he continued to solicit VAF's students on behalf of IFC, an entity in which he allegedly had a hidden interest.

VAF sued Sintchinov, IFC and IFC's principals. The claims included Breach of Contract, Breach of Fiduciary Duty, and Injunctive Relief against Sintchinov; and Tortious Interference with a Business, Statutory Conspiracy, and Civil Conspiracy against all defendants. Defendants demurred to all counts.

Judge Thatcher overruled the Demurrer to the Tortious Interference and both Conspiracy Counts as to all Defendants.

As to Sintchinov, the Court found the non-competition agreement to be unenforceable as overbroad, but ruled the Fiduciary Duty claim to have been sufficiently pled to support a claim for punitive damages because Sintchinov's contract, if broken as alleged, was sufficiently willful or wanton to support a claim for punitive damages.

Much like Ms. Short in FBR, Sintchinov argued that injunctive relief is not available absent a showing of irreparable harm. Judge Thatcher noted that Plaintiff had alleged that "Sintchinov has acquired the names and addresses of many of Plaintiff's students and has solicited them to leave Plaintiff's instruction and take instruction from him, or from Plaintiff's competitors"; an allegation that Judge O'Grady surely would have viewed as insufficient, since no actual harm was alleged. He also found that "in the agreement the parties appear to agree that breach of the agreement will result in irreparable harm." Most well drafted non-competition agreements include similar language. One wonders if Judge O'Grady would have felt constrained to accept a conclusory, pre-breach representation of this sort without close inspection of the facts. It seems doubtful that Judge O'Grady would have granted the injunction based upon these facts.

For more information on Non-Competition agreements please contact Jim Irving at JIrving@beankinney.com or (703) 525-4000.

LATEST MECHANICS LIEN MALPRACTICE TRAP
NO PERFECTION WITHOUT "STATEMENT OF INTENT"

by Thomas Repczynski

The recent Fairfax Circuit Court ruling in the case of Peed Plumbing, Inc. v. Behzad Jarrahi, et al., CL2008-12754, confirms that the longstanding Section 43-4 "statement of intent" obligation in mechanics' lien memoranda requires an affirmative statement

LATEST MECHANICS LIEN MALPRACTICE TRAP: NO PERFECTION WITHOUT "STATEMENT OF INTENT"

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regarding intent. No longer can a claimant rely on opinions predating the 2007 amendment to the Section 43-"safe-harbor" form to the effect that merely titling one's memorandum to include reference to a mechanics lien suffices as such a statement in satisfaction of this element of perfection. No longer can a claimant's counsel who ignores this obligation in preparing a client's claim memorandum be said to satisfy the standard of care.

In the recent Fairfax case, Peed Plumbing filed a mechanics' lien memorandum against Mr. Jarrahi's residence for unpaid plumbing work. In defense of the lien enforcement action, the deed of trust lender demurred to the lien claim on the theory that the lien failed to include one of the requisites for perfection, namely the "statement of intent" required by Section 43-4. In sustaining the demurrer, Circuit Judge Gaylord Finch accepted the lender's position that the contractor's failure to include such a statement was sufficient grounds for voiding the lien. This result is appropriate notwithstanding earlier decisions upholding perfection despite the claimant's failure to have included such a statement. The only relevant difference is the 2007 change to the sample lien form.

The Supreme Court recently reaffirmed, in the 2006 Britt Construction case, that the mechanics lien statutory perfection requirements must be strictly construed. Among other things, Section 43-4 requires that the lien claimant's memorandum include "a statement declaring his intention to claim the benefit of the lien." This requirement has been part of the statute for many years. However, until 2007, the safe-harbor form in Section 43-5 did not include any particular statement regarding an intention to claim the benefit of a lien. In fact, other than the title of the sample form proposed by the "safe harbor" provision, the form was formerly devoid of reference to mechanics liens.

In earlier (i.e. pre-2007) opinions upholding memoranda in substantial compliance with the sample form, Judge Stevens in Fairfax and Judges Chamblin and Horne in Loudoun had been willing to assume some leniency in the perfection process by overlooking the separate statement requirement and allowing the lien claimant to rely on the "lien claimed" language in the title to the memorandum. In each of these earlier cases, the lien claimant's memorandum had been challenged, at least in part, on the failure to comply with the "statement of intent" portion of the lien perfection statute.

In the 1995 J.S.C. Concrete case, in particular, Judge Chamblin's opinion makes clear his recognition that a "statement of intent" requirement implied that there actually be a statement: "I do not necessarily agree that the statement of intent requirement is only met by a heading of the memorandum." Nevertheless, without a separate statement in the safe-harbor form at that time, Judge Chamblin articulated the general sentiment of the courts of feeling compelled to find the statement requirement met by the title of the document itself, since it was the only thing close to such a statement in the sample form provided by the General Assembly. Again, Judge Chamblin didn't mince words in this regard: "[J]ust plain compliance with the requirements of Section 43-5 is enough." Titling a lien memorandum in accordance with the form, "Memorandum for Mechanics Lien Claimed by General Contractor" was all that was needed at that time, because the approved form included nothing more relating to the "statement of intent" requirement.

In 2007, in a much delayed response to Judge Chamblin's observations (and implicit criticism) in J.S.C. Concrete, the General Assembly finally revised the sample form by clarifying that a formal statement is, in fact, both intended and required by the language of Section 43-4. However, one need only state simply: "It is the intent of the claimant to claim the benefit of a lien."

It is simple, straightforward and by no means an onerous task. Nevertheless, it is yet another box to be checked on the would-be claimant's already lengthy perfection checklist. And, as the Supreme Court continues to affirm the strictness with which the perfection statute is to be construed with the likes of Britt Construction, this checklist presents a series of traps for the unwary lien claimant and counsel.

For more information on Mechanic's Liens please contact Tom Repczynski at TRepczynski@beankinney.com or (703) 525-4000.

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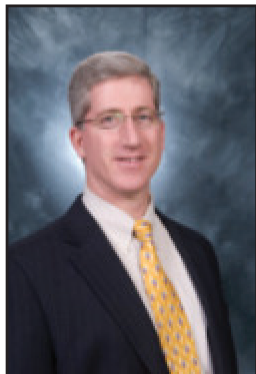

David A. Temeles, Jr. is a shareholder of the firm and has been representing individuals and emerging businesses for over 16 years. He handles litigation and transactions in a broad range of intellectual property, corporate, tax and estate planning matters.

Dave has litigated extensively in state and federal courts and has argued before the Virginia Supreme Court and the Fourth Circuit Court of Appeals. Dave is admitted to practice in Virginia including the United States District Courts for the Eastern and Western Districts and also the United States Tax Court. Dave has served as an instructor for the Intellectual Property Section of the DC Bar for the past 7 years teaching on licensing matters, and has served in other IP and business related seminars as well.

Dave graduated from the University of Notre Dame with a Bachelor of Business Administration (Concentration in Accounting) in 1990. He received his Juris Doctor from Washington & Lee University Law School (magna cum laude, Order of the Coif) in 1993. He can be reached at DTemeles@beankinney.com.

This newsletter was prepared by Bean, Kinney & Korman, P.C. as a service to clients and friends of the firm. The purpose of this newsletter is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney & Korman, P.C. 2009.

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