**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

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| PETER ZIMMERMAN ARCHITECTS, INC.<br><br>Appellant<br><br>v.<br><br>JOHN F. TOATES AND JOHN TOATES ARCHITECTURE & DESIGN, LLC<br><br>Appellee | IN THE SUPERIOR COURT OF PENNSYLVANIA<br><br><br><br><br><br><br>No. 3022 EDA 2013 |

Appeal from the Order October 4, 2013
In the Court of Common Pleas of Chester County
Civil Division at No(s): 2013-01074-IR

BEFORE: FORD ELLIOTT, P.J.E., MUNDY, J., and MUSMANNO, J.

MEMORANDUM BY MUNDY, J.: **FILED AUGUST 19, 2014**

Appellant, Peter Zimmerman Architects, Inc. (PZA), appeals from the October 4, 2013 order granting its preliminary injunction filed against Appellees, John F. Toates and John Toates Architecture & Design, LLC (JTAD), but determining that a two-year temporal competition restriction within a 15-mile radial territory was sufficient to protect PZA's legitimate business interests.[1] After careful review, we affirm.

The trial court set forth the relevant facts and procedural history as follows.

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[1] An order granting, denying, modifying, or refusing to modify a preliminary injunction is appealable as of right pursuant to Pennsylvania Rule of Appellate Procedure 311(a)(4).

> [PZA], a for-profit Pennsylvania corporation, is a full service residential design firm specializing in custom, residential architecture in the Mid-Atlantic and Northeastern regions of the United States. Its principal place of business is at 828 Old Lancaster Road, Berwyn, Pennsylvania. Peter H. Zimmerman is the principal and President of PZA. [Appellee], John F. Toates (hereinafter "Toates"), is an adult individual residing in Devon, Pennsylvania. [JTAD], is a limited liability company organized under the laws of the Commonwealth of Pennsylvania with its principal place of business located at 119 East Lafayette Street, Norristown, Pennsylvania. JTAD is a company that engages in the custom, residential architecture business. For almost sixteen years, Toates was employed by PZA and ultimately became a part owner of PZA. Toates is now a member and the principal of JTAD. PZA and JTAD are competitors in the residential architecture industry.
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> In 1996, PZA hired Toates as an employee, and he eventually was in the position of project architect. On or about January 1, 2001, Toates, Zimmerman and PZA entered into a written Stock Purchase Agreement (hereinafter "SPA") for Toates to purchase ten percent (10%) of the then issued and outstanding shares of PZA stock. Pursuant to the terms of the SPA, Toates, PZA, and Zimmerman agreed to execute and did execute a shareholders agreement, which contained a performance non-disclosure, and a non-competition agreement ("PNNA"). The issue of the use/utilization of PZA photographs, should Toates leave PZA, was of importance to both PZA and Toates at the time the parties agreed upon the following provision: Toates shall be permitted to utilize photographs, of projects on which Toates performed substantive architectural design while in the employment of PZA provided that Toates shall provide typed written credit centered at the bottom of the face of each such photograph (with such type not to be less than fourteen (14) point type) attributing such project to PZA.

> In 2004, Toates agreed to purchase from Zimmerman an additional ten percent (10%) of then outstanding shares of PZA stock. Accordingly, Toates, Zimmerman and PZA entered into a second SPA. Pursuant to this agreement, Toates and PZA agreed to execute a Second Amendment to the PNNA. The amendment to the PNNA provides for an additional limitation on Toates' post-employment activities, namely that for a period of three (3) years following the date of termination of Toates' relationship with PZA, Toates shall not "engage in the practice, profession and/or business of residential architecture" within the "Restricted Territory." The Restricted Territory is defined in the PNNA Amendment as the area extending 25 miles in all directions from PZA's home office located at 828 Old Lancaster Road, Berwyn, Pennsylvania.
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> On or about August 10, 2012, Toates voluntarily separated from PZA and, as of the date, ceased to be an employee of PZA. Toates provided advance notice of his intention to leave PZA. Thereafter and unbeknownst to PZA at that time, on August 22, 2012, Toates formed [Appellee] JTAD. Toates promotes on several websites and social media outlets that JTAD provides comprehensive residential architectural design services. Following Toates' notice of his intended departure with PZA, PZA and Toates attempted to negotiate the buyout terms of his twenty percent (20%) of PZA stock. The parties agreed to structure the transaction in accordance with the original SPA and PNNA.

Trial Court Opinion, 1/16/14, at 1- (citations and footnotes omitted).

On February 5, 2013, PZA filed a complaint against Toates and JTAD requesting injunctive relief pursuant to Pennsylvania Rule of Civil Procedure 1531 and raising claims of breach of restrictive covenants, breach of contract, breach of fiduciary duties, tortious interference with contractual relationships, and violations of The Pennsylvania Uniform Trade Secrets Act,

12 Pa.C.S.A. §§ 5301-5308. On February 8, 2013, the trial court issued a rule to show cause on Toates and JTAD as to why PZA is not entitled to the relief requested. Thereafter, on February 27, 2013, Toates and JTAD filed an answer, new matter, and counterclaim asserting claims for breach of contract and intentional interference with prospective contractual relations. On March 22, 2013, PZA filed its reply to Toates and JTAD's new matter and counterclaim, and also raised new matter. On April 12, 2013, Toates and JTAD filed an answer to PZA's new matter.

Thereafter, on May 2, 2013, PZA filed its brief in support of the issuance of a preliminary injunction, and on May 3, 2013, Toates and JTAD filed its brief in opposition to PZA's petition for preliminary injunction. A preliminary injunction hearing was held on May 3, 2013. On October 4, 2013, the trial court granted PZA's petition for preliminary injunction and placed the matter on the trial court's next trial list. Pending said trial, the trial court ordered as follows.

> [U]ntil a final disposition of this case or until the [trial court] modifies this Order, [Appellees] John F. Toates and John Toates Architecture and Design, LLC, are hereby ORDERED to refrain from:
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> 1) Appropriating [PZA]'s clients, client list, and confidential, proprietary, and/or trade secret information.
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> 2) Violating, breaching or interfering in any manner with the non-solicitation, non-disclosure, non-competition and confidentiality agreements entered into between [PZA] and [Toates and JTAD].

3) Directly or indirectly in any capacity, manner or form, participating in, engaging in or in any way assisting any company, corporation, organization, individual or otherwise, in the practice, profession and/or business of residential architecture within the Restricted Territory. The term Restricted Territory is modified by the Court to mean the area encompassing a fifteen (15) mile radius and extending in all directions from 828 Old Lancaster Road, Berwyn, Pennsylvania, for a period of two (2) years after severance with PZA.

4) Directly or indirectly, in any capacity, manner or form, participating in, engaging in, or in any way assisting any company, corporation, organization, individual or otherwise, engaging in the practice, profession and/or business of architecture for the purpose of preparing, developing, and/or completing designs for the renovation of new construction of unique, one-of-a-kind, client and/or site specific designs for residences and/or residential properties of a kind of work which has been customarily performed by PZA within the Court modified fifteen (15) mile Restricted Territory for a period of two (2) years after severance with PZA.

5) From further use, utilization and disclosure of [PZA]'s confidential information including marketing materials and/or photographs owned by PZA and/or photographs of PZA projects for which Toates did not perform substantive architectural design without proper attribution.

6) From misrepresenting that John F. Toates has won certain specific architectural awards and recognition, when in fact such architectural awards and recognition were awarded to PZA,

> including but not limited to the 2004 Palladio Awards and the 2010 HOBI Award.
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> 7) This preliminary injunction shall become effective upon Plaintiff posting an appropriate bond of ten thousand dollars ($10,000) with the Prothonotary of Chester County.

Trial Court Order, 10/4/13, at 1-2. On November 1, 2013, PZA filed a timely appeal.[2]

On appeal, PZA raises the following two issues for our review.

> A. Did the [trial] court err and abuse its discretion by modifying the geographic scope of the restrictive covenant, as set forth in the first amendment to performance and non-disclosure and non-competition agreement (the "PNNA Amendment"), from the stated and agreed twenty-five (25) mile radial restricted territory to a fifteen (15) mile radial restricted territory and in finding that the "restricted territory" was unreasonable and beyond necessary to protect the business of Peter Zimmerman Architects, Inc. ("PZA") given: (i) the expanse of the geographic area in which PZA conducts business; (ii) that said finding was based upon the lower court's erroneous determination that ninety percent (90%) of PZA's business is concentrated within a fifteen (15) mile radius of PZA's office; (iii) that the undisputed, uncontroverted evidence proved that only 68.5% of PZA's overall gross fees and 56.7% of PZA's projects over the past five (5) years were earned on projects located within fifteen (15) miles of PZA's office; (iv) that the

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[2] PZA and the trial court have complied with Pa.R.A.P. 1925. Further, we note, PZA posted a bond pursuant to the trial court's October 4, 2013 order. ***See*** Pa.R.C.P. 1531(b).

undisputed, uncontroverted evidence proved that only 75.6% of PZA's overall gross fees and 67.8% of PZA's projects over the past five (5) years were generated within twenty-five (25) miles of PZA's office, with the balance of fees and projects located beyond twenty-five (25) miles from PZA's office; and (v) that Toates was represented by counsel when negotiating the agreements at issue herein, confirmed that he agreed to adhere in all respects to said agreements, and had he[, he] would have been paid in excess of $1.05 million [dollars]?

B. Did the [trial] court err and abuse its discretion by reducing the temporal restriction of the restrictive covenant of three (3) years, plus an additional two (2) years, as stated and agreed to in the PNNA Amendment, to a period of two (2) years in toto from the date of Toates' separation from PZA given: (i) that Toates was not just an employee, but also a former part owner of PZA who was to be paid in excess of $1.05 million dollars for the repurchase of his shares and for his adherence to the PNNA and PNNA Amendment; (ii) the substantial legal authority supporting enforcement of restrictive covenants of five (5) years and longer; and (iii) that Toates was represented by counsel when negotiating the agreements at issue herein, confirmed that he agreed to adhere in all respects to said agreements, and had he[, he] would have been paid in excess of $1.05 million [dollars]?

PZA's Brief at 13 (emphasis in original).

In reviewing PZA's claims, we are guided by the following.

> Appellate courts review the grant of a preliminary injunction for an abuse of discretion.
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> > The standard of review applicable to preliminary injunction matters … is highly deferential. This highly deferential standard of

> review states that in reviewing the grant or denial of a preliminary injunction, an appellate court is directed to examine the record to determine if there were any apparently reasonable grounds for the action of the court below.

***Duquesne Light Co. v. Longue Vue Club***, 63 A.3d 270, 275 (Pa. Super. 2013) (citation and internal quotation marks omitted), *appeal denied*, 77 A.3d 1260 (Pa. 2013).

> We have explained that this standard of review is to be applied within the realm of preliminary injunctions as follows:
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> > [W]e recognize that on an appeal from the grant or denial of a preliminary injunction, **we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below**. Only if it is plain that no grounds exist to support the decree or that the rule of law relied upon was palpably erroneous or misapplied will we interfere with the decision of the [trial court].

***Summit Towne Ctr., Inc. v. Shoe Show of Rocky Mount, Inc.***, 828 A.2d 995, 1000 (Pa. 2003), *quoting* ***Roberts v. Bd. of Dirs. Of Sch. Dist. of City of Scranton***, 341 A.2d 475, 478 (Pa. 1975) (emphasis added).

In determining whether "reasonable grounds" for relief exist, "[a] petitioner seeking a preliminary injunction must establish every one of the following prerequisites; if the petitioner fails to establish any one of them,

there is no need to address the others." ***Duquesne Light Co.***, ***supra*** at 275.

> First, a party seeking a preliminary injunction must show that an injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages. Second, the party must show that greater injury would result from refusing an injunction than from granting it, and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings. Third, the party must show that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct. Fourth, the party seeking an injunction must show that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the wrong is manifest, or, in other words, must show that it is likely to prevail on the merits. Fifth, the party must show that the injunction it seeks is reasonably suited to abate the offending activity. Sixth and finally, the party seeking an injunction must show that a preliminary injunction will not adversely affect the public interest.

***Id.***, *citing* ***Kessler v. Broder***, 851 A.3d 944 (Pa. Super. 2004).

Instantly, as PZA notes, the trial court "determined that a preliminary injunction was warranted, with which determination PZA agrees." PZA's Brief at 31. Therefore, the crux of PZA's argument on appeal is that despite the trial court's grant of a preliminary injunction in its favor, "based upon the undisputed and uncontroverted evidence presented at the May 3, 2013 [hearing], the [trial] court's modification of the geographic and temporal restrictions of the PNNA Amendment was error and an abuse of discretion." ***Id.*** at 29. Accordingly, PZA asks this Court to determine whether the trial

court abused its discretion in modifying the geographic and temporal restrictions of the PNNA Amendment.

Our review is guided by the following.

> To establish a clear right to relief on a claim for breach of restrictive covenants of an employment contract, a party must, *inter alia,* demonstrate the following:
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> > In Pennsylvania, restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent. Our law permits equitable enforcement of employee covenants not to compete only so far as reasonably necessary for the protection of the employer. However, restrictive covenants are not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living.
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> ***Hess v. Gebhard & Co.,*** 570 Pa. 148, 157, 808 A.2d 912, 917 (2002) (citations and quotation marks omitted); ***All–Pak, Inc.,*** 694 A.2d at 350–51 (noting restrictive covenants are strictly construed against employer). "Pennsylvania cases have recognized that trade secrets of an employer, customer goodwill and specialized training and skills acquired from the employer are all legitimate interests protect[a]ble through a general restrictive covenant." ***Thermo–Guard, Inc. v. Cochran****,* 408 Pa. Super. 54, 596 A.2d 188, 193–94 (1991) (citation omitted). In essence, the court must examine and balance the employer's legitimate business interest, the "individual's right to work, the public's right to unrestrained competition, and the

> right to contract … in determining whether to enforce a restrictive covenant." ***Hess,*** 570 Pa. at 158, 808 A.2d at 917 (citation omitted); ***see Albee Homes, Inc. v. Caddie Homes, Inc.,*** 417 Pa. 177, 184, 207 A.2d 768, 772 (1965); ***Thermo–Guard, Inc.,*** 596 A.2d at 193.

***Synthes USA Sales, LLC v. Harrison***, 83 A.3d 242, 250 (Pa. Super. 2013). "When the restrictive covenant is contained in the initial contract of employment, the consideration is the job itself. But when the restrictive covenant is added to an existing employment relationship, however, to restrict himself[,] the employee must receive a corresponding benefit or a change in job status." ***Socko v. Mid-Atl. Sys. of CPA, Inc.***, --- A.3d ---, 2014 WL 1898584, *7 (Pa. Super. 2014). Furthermore, our Supreme Court has specifically held that when "the covenant imposes restrictions broader than necessary to protect the employer, … that a court of equity may grant enforcement limited to those portions of the restrictions that are reasonably necessary for the protection of the employer." ***Hess***, ***supra*** at 920, *citing* ***Jacobson & Co. v. International Environment Corp.,*** 235 A.2d 612 (Pa. 1967).

Instantly, in determining a preliminary injunction was necessary, the trial court reasoned as follows.

> [T]he [trial c]ourt must now balance the employer's interest in protecting its legitimate business interest against the employee's interest in further employment. Here, the record indicates that PZA demonstrated that restrictive covenants are necessary to protect its legitimate business interest. As a shareholder in a small closely held corporation,

> Toates was privy to corporate information either through attendance at meetings or review of corporate records. Furthermore, Toates possessed specialized training and skills unique to the residential architect industry. Moreover, during his tenure at PZA, Toates learned the carefully guarded methods of doing business with the corporation, was exposed to the intricate inner workings of the business, and had access to PZA's marketing materials and client list, which are the trade secrets of this particular enterprise. In response, PZA was reasonable in wanting to protect this information from its competitors. Consequently, PZA entered into the aforesaid covenants to protect a legitimate business interest.

Trial Court Opinion, 1/16/14, at 9 (internal citation omitted).

However, the trial court determined the temporal and geographic restrictions were unreasonable.

> [T]he noncompetition covenant contained in the PNNA and PNNA Amendments are excessively broad and not reasonably necessary to protect PZA's legitimate business interests. Although [PZA] contends that the agreed upon noncompetition covenant is necessary to protect PZA's business interests, this contention is belied by the record. As written, the restrictions operate to unlawfully restrain trade and competition. In essence, the restrictive covenant prohibits Toates and JTAD from participating in the business of residential architecture for three (3) years within the Restricted Territory and from engaging in residential architecture for the renovation or new construction of unique, one-of-a kind properties anywhere for five (5) years. The restrictive territory encompasses an area covering nearly 2,000 square miles. … Moreover, a nexus between such a broad restriction and PZA's legitimate business interest is not supported by the record. Approximately, only seven percent (7%) of PZA's total gross revenue originally protected by the twenty-five (25) mile Restricted

> Territory is derived from the area located within a fifteen (15) to twenty-five (25) mile radius of its home office. Consequently, PZA's attempt to protect an additional seven percent (7%) of its gross revenue by extending the Restricted Territory to encompass the customer market located within a fifteen to twenty-five (15-25) mile radius of its home office creates an undue hardship on Toates. Furthermore, extending the radius an additional ten (10) miles, further restricts Toates by an additional 1[,]257 square miles and is in direct derogation to public policy. Accordingly, the [trial c]ourt determined that a modified Restricted Territory of a fifteen mile radius extending in all directions from PZA's home office which encompasses all residential architecture work that is the type of work customarily performed by PZA is sufficient to protect PZA's interests. This restriction comports with public policy and provides Toates and JTAD the opportunity to make a living by engaging in commercial architecture anywhere or performing residential architecture outside the modified Restricted Territory.

***Id.*** at 13-14 (footnote omitted).

As noted, this Court's standard of review is highly deferential and we may only disturb the trial court's ruling if there is an abuse of discretion. ***Duquesne Light Co.***, ***supra***. After a thorough examination of the record, we conclude the trial court has set forth reasonable grounds for limiting the scope of the preliminary injunction.[3] ***Summit Towne Centre, Inc.***, ***supra*** at 1000. Further, the trial court's decision to modify the temporal and

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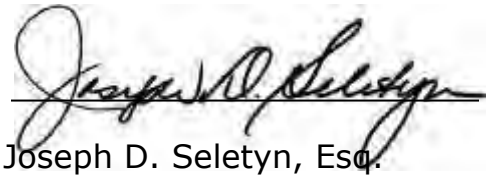
[3] This Court need not address the reasonableness for the grant of the preliminary injunction in greater detail as Toates and JTAD have not appealed the entry of the October 4, 2013 preliminary injunction, and PZA has not challenged the preliminary injunction as unreasonable.

geographic restrictions of the PNNA Amendment was in accordance with Pennsylvania law. ***See Hess***, ***supra***. Accordingly, our inquiry must end here. This Court may not reach the merits of PZA's claims regarding the trial court's findings of fact as PZA asserts in both issues raised in its brief. PZA's Brief at 30-44; ***see Summit Towne Centre, Inc.***, ***supra*** (holding "we do not inquire into the merits of the controversy, but only examine the record to determine if there were any apparently reasonable grounds for the action of the court below[]"). Rather, such issues will be litigated fully at trial and may be raised on appeal following the entry or denial of a permanent injunction.

Therefore, based on the foregoing, we conclude the trial court did not abuse its discretion in granting PZA's motion for a preliminary injunction and determining that a two year temporal restriction and 15 mile radial territory were sufficient to protect PZA's legitimate business interest. Accordingly, we affirm the trial court's October 4, 2013 order.

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/19/2014