

STATE OF MICHIGAN
COURT OF APPEALS

GEORGII B. LOUTTS,

Plaintiff-Appellee,

v

IRINA V. LOUTTS,

Defendant-Appellant.

FOR PUBLICATION
September 20, 2012

No. 297427
Washtenaw Circuit Court
LC No. 08-002970-DM

Advance Sheets Version

Before: RONAYNE KRAUSE, P.J., AND DONOFRIO AND FORT HOOD, JJ.

DONOFRIO, J. (*concurring*).

I concur in the majority opinion affirming in part, reversing in part, and remanding this case for further proceedings. I write separately to explain why the noncompete restriction was necessary for an equitable property distribution in the circumstances of this case.

The provision in the judgment of divorce prohibiting defendant from competing with QPhotonics, LLC, was part and parcel of the trial court’s awarding defendant one-half of the value of the company. The restriction was equitable because without it defendant could have received her share of the value of QPhotonics and thereafter formed a company to compete with QPhotonics, thereby adversely affecting the value of plaintiff’s property distribution. In fact, the record shows that the noncompete restriction was necessary. Defendant testified that while she had no plans to start a business that competed with QPhotonics, she did plan to start a “complementary” business that uses certain diodes or other products that QPhotonics sells. Defendant further testified that she had already traveled to Russia to meet with two suppliers regarding her business plan. The trial court appropriately determined that “the line between what is a competing business versus a complementary business is blurred at best[,]” and that, accordingly, “plaintiff is entitled to some form of protection from a business competing with QPhotonics” The trial court expressed concern that defendant could receive her one-half share of the value of QPhotonics and then create a competing business that would reduce the value of the company and dilute plaintiff’s property distribution. Moreover, the record shows that defendant had the ability to compete directly with QPhotonics. Defendant’s father was an expert in the area of fiber optics and two of his former students are also experts in the field and work at Wayne State University. Defendant also testified that she has two friends who are physicists and work for the University of Michigan, one of whom had volunteered to assist defendant. Therefore, considering the facts of this case, the noncompete restriction was fair and just and was necessary for an equitable distribution of property.

This case does not present a scenario involving like professionals engaged in a service-oriented business. For example, if two doctors married, formed a medical practice specializing in one area of medicine, and then divorced, a noncompete restriction prohibiting one of the doctors from competing with the other would deprive that person of his or her ability to earn a living. That is not the situation presented in this case where plaintiff formed QPhotonics and operated the business. Unlike plaintiff, defendant was not educated in physics and worked for the business only in the capacity of an accountant or bookkeeper. Notwithstanding defendant's lack of education and training in physics, she nevertheless had the ability to compete directly with QPhotonics, as previously discussed, considering that her father and acquaintances worked in the field and were able to assist her. Moreover, defendant indicated her intent to form her own business in the industry. Thus, the facts of this case presented a situation where a noncompete restriction did not deprive defendant of her ability to earn a living and there was a legitimate concern that the value of plaintiff's property distribution would be destroyed without the restriction.

Further, the noncompete restriction was reasonable. In an analogous situation, MCL 445.774a(1) "explicitly permits reasonable noncompetition agreements between employers and employees." *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 494; 650 NW2d 670 (2002). That statute provides:

An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is *reasonable as to its duration, geographical area, and the type of employment or line of business*. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [Emphasis added.]

"Thus, a restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006).

Here, the duration of the restriction is reasonable. The restriction was implemented on the date that the trial court entered the judgment of divorce and will be in effect for three years. Thus, it will expire on March 9, 2013. In *Follmer, Rudzewicz & Co, PC v Kosco*, 420 Mich 394, 398 n 1; 362 NW2d 676 (1984), and its companion case, *Nolta-Quail-Sauer & Assoc v Roche*, our Supreme Court upheld noncompete agreements lasting three and five years, respectively. In addition, this Court has upheld an agreement requiring no contact or solicitation for a period of two years. *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 41-42; 466 NW2d 325 (1991). Under the circumstances of this case, three years is not an unreasonable length for the duration of the restriction.

The geographical area of the restriction is also reasonable. QPhotonics is an Internet business that conducts the majority of its business in the global market through its website and

delivers products worldwide. Thus, the restriction appropriately prohibits defendant from competing with QPhotonics in the global market. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 847 (ED Mich, 1994) (an unlimited geographic scope of a restrictive covenant is reasonable if the employer operates on a worldwide basis).

Further, the noncompete restriction is not unreasonable with respect to the type of employment or line of business. The restriction is not overbroad. It neither prevents defendant from working with all lasers in any manner nor does it prevent her from starting a complimentary business. The trial court did not decide what a complementary business, as opposed to a competing business, would entail and left that issue to be decided at a later time, if necessary. In addition, the prohibition against speaking to or hiring QPhotonics employees is limited because, other than plaintiff, there are only three QPhotonics employees, a bookkeeper and two test engineers. The prohibition against communicating with QPhotonics's suppliers and customers is also reasonable. Moreover, the restriction is limited to specific laser items and components, and plaintiff testified that he had no objection to defendant's selling systems that include the component parts that QPhotonics sells. Rather, he maintained that defendant should not be permitted to sell the same components and thus directly compete with QPhotonics. Accordingly, nothing in the restriction prevents defendant from working with lasers, working as a bookkeeper at a company that works with lasers, or utilizing whatever knowledge she has of lasers to manufacture and sell systems that incorporate laser components. Therefore, the noncompete restriction is not overbroad and is narrowly tailored to protect plaintiff's property distribution. Because the imposition of the restriction was within the trial court's equitable authority and was necessary to an equitable property distribution considering the particular facts of this case, I would uphold the restriction on those grounds.

/s/ Pat M. Donofrio