STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

UNITED ELECTRICAL
CONTRACTORS, INC.

Plaintiff,

V

MATTHEW J. BOWLIN and
TESLA ELECTRICAL CONTRACTORS,
LLC

Defendants.
_____/

Case No. 16-617-CB

FINDINGS OF FACT AND CONCLUSIONS OF LAW

At a session of said Court held in Lansing, Ingham County, Michigan, on October 5, 2018

PRESENT: Honorable Joyce Draganchuk
Circuit Judge

This case is before the Court following a bench trial on July 16 and 17, 2018. The final post-trial brief was submitted on September 4, 2018. The Complaint originally contained five counts, including breach of a non-competition agreement, and it sought injunctive and monetary relief. A preliminary injunction was entered on September 14, 2016. The Court found irreparable injury along with the other required elements for an injunction. Defendant was present in the courtroom when the injunction was granted. On July 5, 2017, Defendant was defaulted for repeated refusals to comply with discovery.

The case was stayed by the Bankruptcy Court on July 19, 2017. Two orders granting Plaintiff relief from the automatic stay were entered. Plaintiff was allowed to proceed in this case only to enforce or modify the preliminary injunction and to enforce

the non-competition and non-solicitation agreement. The parties agreed that there were only two issues before the Court at trial: (1) the relief to which Plaintiff is entitled for Defendant's breach of the non-competition and non-solicitation agreement, and (2) whether Defendant should be held in criminal contempt of court for violations of the preliminary injunction. Plaintiff is seeking no money damages. Instead, Plaintiff requests that the term of the non-competition and non-solicitation agreement be extended and that Defendant be sanctioned in the discretion of the Court for criminal contempt of court.

The Court has heard and considered all of the testimony provided at trial and has also considered the exhibits admitted into evidence. Argument of counsel at trial and in subsequent briefing has also been considered. The Court applies the preponderance of the evidence burden of proof on Plaintiff, except for the requested relief of a finding of criminal contempt. To that request, the Court applies the burden of proof beyond a reasonable doubt.

The non-competition/non-solicitation agreement provides that for a period of two years from termination of employment, Defendant Matthew Bowlin

> shall not directly or indirectly engage in any line of business that is similar to or competitive with that then being conducted by [Plaintiff] in any geographical area in which [Plaintiff] has done business during the previous four (4) years . . . and, in particular, shall not in any way, directly or indirectly, (a) solicit or attempt to solicit any customers or clients of [Plaintiff]; (b) solicit or attempt to solicit for any business endeavor any employee of [Plaintiff]; or (c) otherwise divert or attempt to divert from [Plaintiff] any business whatsoever or interfere with any business relationship between [Plaintiff] and any other person, without the written consent of [Plaintiff]; provided, however, that this covenant not-to-compete and non-solicitation agreement shall not act to prohibit Bowlin from working as a journeyman electrician provided that Bowlin does not in any way violate provisions (a), (b), or (c) above (Ex. 1).

The preliminary injunction tracked most of the language of the Agreement and also specifically restrained Defendant from "offering electrical contracting services in any county in which Plaintiff has done business during the prior four years [in] any adjacent county" (Ex. 2). The injunction also carried forward the provision from the non-compete agreement that Defendant was not prohibited from working as a journeyman electrician.

Defendant's employment with Plaintiff ended on June 22, 2016. On that same day, Defendant, with his own attorney present, met with Plaintiff's attorney and had a discussion about the non-compete agreement. In that conversation, Plaintiff's attorney told Defendant that he could still do some work that might violate the terms of the non-compete agreement, such as a basement remodel, but as long as he didn't "poke the bear," Plaintiff would look the other way.

Defendant testified at trial that he understood this agreement to mean that (1) he could only work as a journeyman, (2) he could not take any of Plaintiff's customers or employees or divert any business from Plaintiff, and (3) he could only take small jobs that Plaintiff would not want.

By July 12, Defendant Matthew Bowlin had filed Articles of Organization for Tesla Electrical Contractors, LLC (Ex. 3). Mr. Bowlin was the sole member and employee of Tesla Electrical Contractors, LLC. He created business cards (Ex. 4) and testified at trial that his intent was to create a small electrical contracting company that would provide commercial, industrial, and residential contracting services.

Plaintiff requests an extension of the non-compete beyond its expiration date. Under *Thermatool* v *Borzymm*, 227 Mich App 366; 575 NW2d 334 (1998), extension of the covenant not to complete may be appropriate where a party has flouted its terms by

way of continuous and systematic activity in violation of the agreement.[1] Id at 339. Defendant maintains that he has not flouted the terms of the non-compete, but rather made a mistake about its terms. Defendant explains his mistaken belief that he was acting within the confines of the agreement with two arguments: (1) the use of the term "journeyman" in the agreement is ambiguous, and (2) he believed he was staying within the boundaries that were set for him in the meeting with the attorneys because he only took small jobs and jobs that Plaintiff would not want.

First, the Court rejects any notion that Defendant could have been unclear or confused about the use of the term "journeyman" in the non-compete agreement. The distinction between a journeyman and an electrical contractor is provided by the Skilled Trades Act. Electrical contracting requires an electrical contractor's license. MCL 339.5701(d). An electrical contractor is engaged in a business, while a journeyman is an individual engaged in the occupation of installing or altering electrical wiring. MCL 339.5701(d). A licensed journeyman must be employed by and work under the direction of a licensed electrical contractor. MCL 339.5737(2).

Defendant is licensed as a journeyman and, although he says that the definition in the Skilled Trades Act should not be considered, that is the very law under which he is licensed. He was licensed as a journeyman when he worked for Plaintiff, although his position was project manager. The term journeyman is unambiguous and it strains belief that when Plaintiff and Defendant made the non-compete agreement they would have had any doubts about what a journeyman does.

[1] When the default was entered, it established liability for the allegations in the Complaint. Therefore, breach of the non-compete agreement is established and the question before the Court is whether Defendant has violated it continuously and systematically so as to have flouted the agreement.

A journeyman must be employed by an electrical contractor. The non-compete agreement unambiguously provides that Defendant is not restricted from going out and finding other employment in the same line of business as Plaintiff. However, Defendant would have to be employed by an electrical contractor. To the contrary, it is patently obvious that Defendant began an electrical contracting business of his own just weeks after his termination. Defendant repeatedly testified that the jobs he performed all involved journeyman work, but that is inaccurate. The Court concludes that Defendant's testimony was not borne out of confusion surrounding the term journeyman but rather out of a consciousness of guilt.

The only point at which Defendant could arguably have been employed by an electrical contractor was in the April to September of 2017 time frame when he was working with Rodney Palatka, a licensed electrical contractor. However, Mr. Palatka's testimony reveals otherwise. Defendant contacted Mr. Palatka about working together, but more for the purpose of cover during the pendency of this case than for any real employment purpose. In fact, Mr. Palatka testified that Defendant was never a W-2 employee and was paid as an independent contractor with a 1099. Defendant received money from draws during their work together rather than receiving an hourly rate. Mr. Palatka testified that Defendant never intended to continue working with him, but was merely waiting for this lawsuit to end so he could return to work on his own. Mr. Palatka admitted that Defendant was never on his payroll as a W-2 employee. The Court concludes that Defendant was never an employee of Palatka Electric.

Defendant has also argued that all the jobs he worked on after his termination were acceptable because they were too small for Plaintiff to want. This argument misses the

mark for several reasons. First, there is nothing in the non-compete about Defendant being free to take small jobs. Second, even if Defendant understood after the verbal agreement that he could take small jobs, he also understood that he could not take Plaintiff's customers or divert business from Plaintiff. He also understood that he could only do journeyman work. Third, once the preliminary injunction was entered, any agreement or acquiescence that was promised by Plaintiff became irrelevant. It should go without saying that the preliminary injunction is the order of the Court and not subject to modification or side agreements by any party.

The first two projects Defendant took – The Lodges and Tequila Cowboy – were small jobs, but Defendant was not employed by an electrical contractor at the time. He was working as an (unlicensed) electrical contractor engaging in the business of electrical contracting. Defendant understood that he could only do journeyman work under the non-compete agreement. These two projects violated the non-compete agreement.

The third project – Dow Ridge – was admitted by Defendant not to be a small project. Furthermore, he was working on the project as an electrical contractor. Likewise, the JAC Development and Medi-Weight Loss projects were taken on by Defendant as an electrical contractor, Tesla Electrical Contracting, LLC, and were for a complete scope of work. Moreover, this project began before the preliminary injunction was entered but continued after Defendant was enjoined from this work. This project violated both the non-compete agreement and the preliminary injunction.

The next two projects were for Sunrise Restoration. Defendant was aware that Plaintiff had previously done work for this restoration company, but testified that he was of the belief that Plaintiff was no longer interested. There is no support for Defendant's

belief and it will not suffice to insulate Defendant from the non-compete agreement or the preliminary injunction.

The Van Atta Road project was indeed small. However, once again Defendant was not employed by an electrical contractor but was acting as an electrical contractor himself. It was also post-preliminary injunction, so even if Defendant really did have a faulty belief about what he was told by Plaintiff he could do, there can be no such excuse for violating the preliminary injunction.

The Bosco Building projects and the H&M clothing store were blatant diversions of business from Plaintiff. There were as many as five projects for Bosco Building. The H&M project was for a new store in Genesee Mall. All of these projects were performed by Rodney Palatka. Both of these customers had previously been customers of Plaintiff. Both of these customers were brought to Mr. Palatka by Defendant. Defendant brought the H&M project to Mr. Palatka because he wanted to help Mr. Palatka grow his business. Mr. Palatka had never done work for either before and had no previous association with them. Tellingly, Plaintiff has never had work with them since.

Likewise, Central Contracting was a customer of Plaintiff, but Defendant provided a complete scope of work for them to remodel an office. He was both working as an electrical contractor and diverting business from Plaintiff when he completed this project.

The only project that the Court cannot conclude was in violation of the non-compete agreement or the preliminary injunction was the CapCon Construction project. That project came to the attention of Selleck Electric because they had previously wired the home of CapCon's project manager. The project manager suggested that Selleck Electric bid on the new project. Jefferson Selleck then asked Defendant to help him

prepare an estimate. Defendant did as requested, but Selleck Electric was not successful in getting the project.

Defendant has argued no further injunctive relief is warranted because Plaintiff has made no showing of irreparable harm. The Court disagrees. A particularly disturbing example of irreparable harm is illustrated in the Bosco Building situation described above. Mr. Palatka was a stranger to Bosco Building until Defendant connected them. Plaintiff has not had a relationship with Bosco Building since then. Damages from the loss of a customer relationship such as this are both non-monetary and impossible to measure. Likewise, Defendant brought H&M to Mr. Palatka's attention because he thought it would be good to grow the Palatka Electric business. Mr. Palatka did have a success with H&M, completing the job on his own after Defendant could not. How much that indeed grows the business of Palatka Electric and in turn hurts the business of Plaintiff is incapable of being measured and irreparable.

Given the above findings of continuous and systematic activity in violation of the non-compete agreement, the Court finds that Defendant has flouted the agreement. Under *Termatool*, the Court concludes that Plaintiff is entitled to relief by way of a permanent injunction that extends the term of the non-compete agreement through January 29, 2020.

The Court also concludes beyond a reasonable doubt that Defendant Matthew Bowlin is in contempt of Court for willfully violating the preliminary injunction.

IT IS HEREBY ORDERED that Plaintiff shall submit a permanent injunction for entry by the Court that extends the term of the non-compete agreement through January 29, 2020.

IT IS FURTHER ORDERED that Defendant, with counsel, shall appear before the Court on Wednesday, October 24, 2018 at 2:00 p.m. for sentencing on the Court's finding of contempt of court.

/S/

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Hon. Joyce Draganchuk (P39417)
Circuit Judge

PROOF OF SERVICE

I hereby certify that I served a copy of the above Findings of Fact and Conclusions of Law upon the attorneys of record by placing said document in sealed envelopes addressed to each and depositing same for mailing with the United States Mail at Lansing, Michigan, on October 5, 2018.

/S/

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Michael Lewycky
Law Clerk/Court Officer