

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

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Mark

Richmond Division

THE EARLE PALMER BROWN COS.,)
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 Plaintiff,)
)
v.) Civil Action No. 89-0236-R
)
DAVID LIVESAY, et al.,)
)
 Defendants.)

MEMORANDUM OPINION

This case is before the Court on the plaintiff's motion for a preliminary injunction to enjoin the defendants from providing advertising services to A.H. Robins Company and from soliciting advertising business from current clients of the plaintiff. On April 18, 1989, the Court granted the plaintiff's motion for a temporary restraining order. After considering the testimony of all the witnesses at the preliminary injunction hearing on April 24, 1989, the exhibits introduced and the parties' stipulations, the Court DENIES the preliminary injunction but grants the plaintiff's motion to order that funds be placed in a constructive trust.

The plaintiff ("EPB") is an advertising company based in Maryland. The defendants, David Livesay, Calvin West and Michael Wilson became employees of EPB's Richmond branch when EPB purchased the Campbell-Ewald agency, for whom the defendants had worked for several years. Each of the defendants had worked principally for A.H. Robins' Pharmaceutical Division, and continued to devote the majority of their time to the Robins

account after EPB took over. The defendants enjoyed substantial autonomy in their work for Robins, and became very familiar with Robins' needs.

EPB's work for the Pharmaceutical Division of Robins was central to the health of the Richmond branch, providing fifty to seventy percent of the branch's profits. After Livesay demanded and received a pay raise in early 1989, he was given an employment agreement to review and presumably to sign. The contract contained a covenant preventing the employee from competing with EPB for one year after leaving the company. Livesay never signed the agreement, though he did receive the raise. No such contract was ever presented to West or Wilson.

Shortly thereafter, the defendants began to discuss leaving EPB to establish a competing agency. Lacking sufficient assets to start a new business, they concluded that before leaving they had to ensure that Robins would commit to work with them. They met secretly with a Robins representative, who agreed to terminate Robins' agreement with EPB and contract with the defendants instead.

Using this commitment, the defendants incorporated an agency under the name "MCD, Inc." Though the defendants planned from the beginning to name the corporation "Wilson West Livesay, Inc.," they admit that they initially used the more cryptic "MCD" to prevent EPB from discovering their plan. Even after incorporating, the defendants continued to service the Robins account on EPB's payroll. They also used Robins' commitment to obtain bank financing, and rented office space and equipment.

The oral commitment from Robins became a signed contract on March 28, 1989. The contract was nearly identical to the agreement between Robins and EPB.

On March 31, 1989, with all preparations in place, each defendant tendered his resignation to EPB and Robins gave the 90 days' notice of termination provided for in the agreement between Robins and EPB. There is no dispute that Robins was entitled to terminate its agreement with EPB, and Robins officials testified at the April 24 hearing that Robins would not do further business with EPB.

The plaintiffs seek a preliminary injunction preventing the defendants from doing any business with Robins and from soliciting current EPB clients. In Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977), the Fourth Circuit enumerated the factors to consider in deciding a motion for a preliminary injunction. The primary issue is whether the plaintiff will suffer greater harm without the injunction than the defendant will suffer if the injunction is granted. Courts should also consider the plaintiff's likelihood of success on the merits and the public interest.

Balancing the relative harms, the Court finds that an injunction forbidding the defendants from doing business with A.H. Robins would severely burden the defendants, whose fledgling company undoubtedly could not survive such a ban. More importantly, the plaintiff has nothing to gain from such an injunction. Robins has terminated its agreement with EPB and stated unequivocally that it will do no further business with EPB.

Robins was free to make such a decision and preventing the defendants from working for Robins does not restore EPB's lost revenues or goodwill; it merely punishes the defendants for their wrongful conduct. The damage to EPB is complete, and injunctive relief will not prevent any injury to EPB but merely cause harm to the defendants. While the plaintiff appears to have a powerful case on the merits, therefore, a preliminary injunction now comes too late to prevent the harm that EPB alleges is irreparable, and EPB must seek its compensation in damages.

Nor does the Court have the power to prevent the defendants from soliciting current clients of EPB. Now that the defendants have left EPB, they are free to solicit business from other companies, and EPB does not appear to allege any meritorious cause of action against the defendants concerning any other company.

Finally, the public interest also weighs against granting the injunction the plaintiff seeks. Even if the Court grants the injunction, Robins will not return to EPB, and an injunction would therefore only drive Robins' substantial advertising needs out of Virginia. For these reasons, the injunction as requested by EPB is denied.

However, the parties also agree that the defendants could not now satisfy a monetary judgment against them, and the Court is reluctant to permit the defendants to profit from what appears to be a clear breach of their fiduciary duty to their employer. See, e.g., Community Counseling Service, Inc. v. Reilly, 317 F.2d 239 (4th Cir. 1963). Therefore, the Court will impose a

constructive trust on the defendants in an effort to establish some means of satisfying a judgment. Imposing such a trust on all monies the defendants receive from Robins would be overbroad, however. The defendants have to cover the expense of providing advertising, and such a broad ruling would prevent the defendants from doing any business for Robins at all. The Court will therefore impose the trust only on profits received from work by the defendants for the A.H. Robins Company.

The temporary restraining order granted on April 18 and extended on April 28 is lifted, and the defendants may begin providing advertising services to A.H. Robins, but 50% of all monies that the defendants have already received or will receive from Robins are to be placed in trust pending a final decision in this case. If the defendants believe that the 50% figure overestimates their profit margin, they may file an accounting and the Court will consider changing the amount, but until further order of the Court the defendants will place 50% of all Robins revenues in trust.

Let the Clerk send a copy of this Memorandum Opinion to all counsel of record.

DATE



UNITED STATES DISTRICT JUDGE