

Rel: September 20, 2019

STATE OF ALABAMA -- JUDICIAL DEPARTMENT
THE SUPREME COURT
SPECIAL TERM, 2019

1180344

Elizabeth Zimmerman v. DealNews.com, Inc. (Appeal from Madison
Circuit Court: CV-18-902313).

STEWART, Justice.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(F), Ala. R. App. P.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers,
Mendheim, and Mitchell, JJ., concur.

State of Alabama Unified Judicial System Form ARAP-1 (front) Rev.197	NOTICE OF APPEAL TO THE (Check appropriate block) <input type="checkbox"/> SUPREME COURT OF ALABAMA <input checked="" type="checkbox"/> COURT OF CIVIL APPEALS OF ALABAMA	Civil Action Number: 47-CV-2018-902313.00
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IN THE Circuit COURT OF Madison COUNTY, ALABAMA

APPELLANT	Elizabeth Zimmerman
V. APPELLEE	DealNews.Com, Inc.
TRIAL JUDGE	Ruth Ann Hall
DATE OF JUDGMENT:	January 2, 2019
DATE OF POST -- JUDGMENT ORDER:	January 7, 2019

NOTICE IS HEREBY GIVEN THAT Elizabeth Zimmerman appeal(s) to the above-named court from the Final Judgment Order granting a preliminary injunction entered in this cause. (describing it)

CHECK THE PROPER DESCRIPTION OF THE APPEALED CASE UNDER THE APPROPRIATE COURT:

<p>SUPREME COURT</p> <p>1 <input type="checkbox"/> Summary Judgment, amount claimed more than \$ 50,000</p> <p>2 <input type="checkbox"/> Judgment Amount exceeds \$50,000</p> <p>3 <input type="checkbox"/> Amount Sought in trial court more than \$50,000, Judgment for defendant</p> <p>4 <input type="checkbox"/> Equitable Relief, except for domestic relations</p> <p>5 <input type="checkbox"/> Other: _____</p>	<p>COURT OF CIVIL APPEALS</p> <p>1 <input type="checkbox"/> Summary Judgment, amount claimed \$ 50,000 or less</p> <p>2 <input type="checkbox"/> Judgment Amount \$50,000 or less</p> <p>3 <input type="checkbox"/> Amount Sought \$50,000 or less, judgment for defendant</p> <p>4 <input type="checkbox"/> Workmen's Compensation</p> <p>5 <input type="checkbox"/> Domestic Relations</p> <p>6 <input checked="" type="checkbox"/> Other: <u>Order granting preliminary injunction</u></p>
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APPELLANT FILES WITH THIS NOTICE OF APPEAL:

1. Security for costs of appeal

2. A supersedeas bond in the amount of \$ _____

3. Deposited cash security in the amount of \$ _____

4. Is exempted by law from giving security for costs of appeal by virtue of _____

Filed January 17, 2019 (Date)

Address 505 20th Street North, Suite 1650
Birmingham, AL 35203

Telephone Number 205-265-1880

Anthony D. Michel
Appellant or Attorney for Appellant
Email: anthony@wmalabamalaw.com

SECURITY FOR COSTS

We hereby acknowledge ourselves security for costs of appeal. For the payment of all costs secured by this undertaking, we hereby waive our right of exemption as to personal property under the Constitution and laws of the State of Alabama.

Executed with our seals this 17 day of January 2019

Filed and approved: Debra Kizer (Date)
Circuit Clerk
(Amended November 9, 1976; October 1, 1991.)

Elizabeth Zimmerman
Appellant-principal

Surety _____

Surety _____

SUPERSEDEAS BOND

We, the undersigned principal and sureties, hereby acknowledge ourselves bound unto _____ Dollars, for the payment of which we bind ourselves, and each other, our heirs, executors, (for amount of bond see Rule 6(a) and administrators, jointly and severally, and as part of this undertaking we hereby waive our rights of exemption as to personal property under the Constitution and laws of the State of Alabama.

FILED IN OFFICE
 CIRCUIT COURT DIVISION
 MADISON COUNTY ALABAMA
 2019 JAN 17 5:07 PM
 DEBRA KIZER
 CIRCUIT CLERK



IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

DEALNEWS.COM, INC.,)	
)	
Plaintiff,)	
)	
v.)	CV-2018-902313
)	
ELIZABETH ZIMMERMAN,)	
)	
Defendant.)	

PRELIMINARY INJUNCTION

This matter came before the Court for hearing on January 2, 2019 on the motion of plaintiff Dealnews.com, Inc. ("Dealnews"), seeking a preliminary injunction against defendant Elizabeth Zimmerman ("Zimmerman"). . This matter was initiated by the Plaintiff filing a Complaint for breach of contract and declaratory judgment. Both parties were present at the call of the case, the Plaintiff Dealnews.com, Inc.(hereinafter referred to as "Dealnews") through its Chief Operating Officer and counsel and the Defendant Elizabeth Zimmerman (hereinafter referred to as "Zimmerman") was likewise present along with her attorney of record, Anthony Michael. Prior to the hearing, Dealnews submitted a motion and brief in support of its request for a preliminary injunction, as well as an affidavit offering evidence of Zimmerman's violation of her non-compete agreement. At the hearing, the Court received testimony *ore tenus* from Zimmerman and from Jeff Morgan, Dealnews' Chief Operating Officer. The Court also admitted into evidence several documents, including the non-compete agreement, relevant website postings, and related information.

Dealnews is an internet based company that offers discounted prices for merchandise sold by third party vendors to consumers. The merchandise normally consists of consumer products and services. Dealnews receives its income through a variety of methods including budgeted amounts for advertising from third party vendors, CPC or cost per click traffic for third party vendors or other hybrid

arrangements. The Defendant Zimmerman was employed by the Plaintiff Dealnews initially as a writer and later as an Associate Editor from approximately August 10, 2011 until November 9, 2018. Immediately following her hire by the plaintiff, the Zimmerman signed a contract which included a noncompete and confidentiality clause. This agreement was signed on August 11, 2011. The Defendant left the employment of the Plaintiff on November 9, 2018. The testified that she was contacted by a recruiter and received a substantial increase in salary as a result of her employment with Kinja Deals, a competitor of the Plaintiff.

Upon consideration of Dealnews' motion and brief in support of its motion for preliminary injunction, the testimony and documents received at the hearing, and the relevant case law and statutes, the Court finds that the motion for preliminary injunction is due to be, and is hereby **GRANTED**.

Pursuant to Rule 65(d)(2) of the Alabama Rules of Civil Procedure, the Court sets forth the following reasons for issuing this preliminary injunction:

To obtain a preliminary injunction under Rule 65 of the Alabama Rules of Civil Procedure, the moving party must prove the following elements: (1) the plaintiff would suffer immediate and irreparable injury without the injunction; (2) the plaintiff has no adequate remedy at law; (3) the plaintiff has at least a reasonable chance of success on the ultimate merits; and (4) the hardship imposed upon the defendant by the injunction would not unreasonably outweigh the benefit to the plaintiff. Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003); Jacobs Broadcast Group, Inc. v. Jeff Beck Broadcasting Group, LLC, 160 So. 3d 345, 349 (Ala. Civ. App. 2014). As the Alabama Supreme Court has made clear, "the issuance of injunctive relief is within the sound discretion of the trial court, especially when . . . the facts are in dispute and the evidence is presented ore tenus." Gross v. QMS, Inc., 613 So. 2d 331, 332-33 (Ala. 1993) (quoting Davis v. Hester, 582 So. 2d 538, 540 (Ala. 1990)). This Court determines that Dealnews has met its burden of proof as to each element.

Dealnews has established that it has a reasonable chance of success on the merits. Dealnews has asserted a claim for breach of contract in this case. To prevail on a breach of contract claim, Dealnews must establish: "(1) the existence of a valid

contract binding the parties; (2) the plaintiff's performance under the contract; (3) the defendant's nonperformance; and (4) damages." Capmark Bank v. RGR, LLC, 81 So. 3d 1258, 1267 (Ala. 2011) (citing Reynolds Metals, Co. v. Hill, 825 So. 2d 100, 105 (Ala. 2002)). When the contractual obligation at issue is a covenant not to compete by an employee, such as in this case, the agreement must (1) be in writing; (2) be signed by all parties, (3) be supported by adequate consideration; (4) be executed after the employee began her employment; (5) preserve a "protectable interest" as defined by Ala. Code § 8-1-191; and (4) be reasonable in time and geographic scope. Ala. Code §§ 8-1-190(b)(4), 8-1-192; Clark Substations, LLC v. Ware, 838 So. 2d 360, 363 (Ala. 2002).

Dealnews has made a strong showing that the non-compete agreement ("the Agreement") presented to the Court in this case is valid and enforceable. The Agreement was in writing, signed by Zimmerman after she began her employment, and was supported by adequate consideration – specifically, her continued employment with Dealnews. In its brief and in Morgan's testimony, Dealnews established numerous examples of "protectable interests" that the Agreement preserved, including confidential information such as its pricing, pricing methods, prospective customer information, and business strategy (including Dealnews' three-year business plan, which included a pivot in its business model toward a new set of merchants). Zimmerman had access to this confidential information during her employment and used it on a regular basis while performing her job for Dealnews. Dealnews has likewise presented undisputed evidence that Zimmerman breached the Agreement. Specifically, Zimmerman accepted a position for the company operating the Kinja Deals website (accessible at kinjadeals.theinventory.com), a direct competitor of Dealnews, two days after voluntarily leaving her employment with Dealnews. Based on the testimony presented, Zimmerman is performing substantially the same work for a company with a similar business model to Dealnews. This conduct falls clearly within the terms of paragraph 3.2 of the Agreement.

At the hearing, counsel for Zimmerman argued that Dealnews lacked a "protectable interest" because his client allegedly did not remember certain

confidential pricing information she gained during her employment with Dealnews. The Court finds this argument unpersuasive and inconsistent with Ala. Code. § 8-1-190. That statute only requires that the party seeking enforcement of a non-compete agreement have a “protectable interest” at the time the parties execute that agreement. However, even if Ala. Code § 8-1-190 could be construed to require that Zimmerman retain knowledge of the confidential information she gained during her employment for Dealnews to have a “protectable interest,” the Court specifically finds that Zimmerman had such knowledge after leaving her employment. Zimmerman admitted in her testimony that she continued to have knowledge of Dealnews’ three-year business plan and pivot toward a new set of merchants -- which information Dealnews treats as highly confidential -- even without continuing access to Dealnews’ computer system or proprietary PHEWS database. Additionally, the Court finds that Zimmerman had knowledge of Dealnews’ pricing scheme with various merchants, even after leaving her employment. Zimmerman testified that for the majority of her seven years with Dealnews, she accessed confidential pricing information hundreds of times each day. Morgan also testified that he and other Dealnews employees viewed Zimmerman performing her job through memory recall of pricing information, without consulting the PHEWS system. Furthermore, the Court find there is a very close temporal proximity -- just two days -- between Zimmerman leaving her employment with Dealnews and starting with the company that operates Kinja Deals. The Court is unpersuaded by Zimmerman's testimony that she forgot, almost overnight, confidential information obtained over the course of approximately seven years.

The Court also finds Dealnews is likely to prevail on its argument that the Agreement is reasonable in time and geographic scope. Pursuant to Ala. Code. § 8-1-190(b)(4), a non-compete agreement of two years or less is presumed reasonable in time. This Agreement features an 18-month restriction. Zimmerman has not offered any evidence to rebut the presumption that this 18-month restriction is valid, and the Court finds that it is valid. Additionally, based on the nature of Dealnews' Internet business, the Court finds that the scope of the Agreement is likewise reasonable.

Indeed, the Court can conceive of no more restricted scope that would be sufficient to serve Dealnews' protectable interests. As a result of the nature of the internet and the business at issue before this Court, the cases dealing with a mileage radius or city or county restriction that have been cited in earlier case law. The internet business world has resulted in such "geographical areas" being too narrow.

Dealnews has presented substantial evidence that, in the absence of this injunction, it could suffer immediate and irreparable injury for which it has no adequate remedy at law. An irreparable injury is one "that is not redressable in a court of law through an award of money damages." Ormco Corp. v. Johns, 869 So. 2d 1109, 1113 (Ala. 2003); Searle v. Vinson, 42 So. 3d 767, 773 (Ala. Civ. App. 2010). In other words, where "the methods of repair (remedies at law) are inadequate," the injury is deemed irreparable. Water Works and Sewer Bd. of the City of Birmingham v. Inland Lake Investments, LLC, 31 So. 3d 686, 692 (Ala. 2009) (quoting Fleet Wholesale Supply Co. v. Remington Arms Co., 846 F.2d 1095, 1098 (7th Cir. 1988)); see also Ormco Corp., 869 So. 2d at 1116 (recognizing that "customer relationships and confidential business information" are interests which, "[b]y their very nature, . . . when damaged through competition in violation of a noncompetition agreement, are not always easily repaired."). Moreover, where an injury is indefinite and difficult to quantify or prove, it is deemed irreparable. See Ormco Corp., 869 So. 2d at 1117-18 (recognizing irreparable losses to reputation, customer goodwill, and confidential business information are difficult to measure).

In his testimony, Morgan presented numerous examples of immediate and irreparable harm that Dealnews could suffer if an injunction is not issued. Morgan testified that its pricing schemes with retailers are confidential and not shared with competitors. Additionally, Dealnews has some unique pricing arrangements with large retailers that competitors do not use. If a competitor had access to this information, the competitor could seek to undercut Dealnews' pricing and could seek to capture part or all of a merchant's budget that would otherwise be allocated to Dealnews. Because Dealnews is unlikely to become immediately aware of the sharing of confidential information, it is difficult if not impossible for it to quantify how much such

a situation could cost the company or to determine when the losses will be realized. Similarly, the Court finds that disclosure of Dealnews' three-year business model and its pivot toward a new set of merchants could cause it immediate and irreparable harm. Morgan testified that Dealnews is currently ahead of its competitors in this market. Disclosure of its strategy for securing business relationships with these new merchants could cost Dealnews its competitive advantage. Because this is an emerging market for Dealnews and its competitors, it is difficult to quantify how much a loss of competitive advantage could cost the company. Accordingly, monetary damages would not adequately compensate that injury.

Finally, this Court determines that the hardship imposed upon Zimmerman by this injunction does not unreasonably outweigh the benefit to Dealnews. Though this injunction prevents Zimmerman from working for the company that operates Kinja Deals website, it does not prevent her from pursuing gainful employment that uses her skills as a writer and editor. Based on her experience and training with Dealnews, Zimmerman may pursue technical writing positions with one of the numerous businesses, both inside and outside of Madison County, with such a need. Alternatively, she may pursue employment with print media companies such as the Decatur Daily or the Alabama Media Group, both of which Morgan stated were not presently Dealnews' competitors. Likewise, this injunction does not prevent Zimmerman from pursuing employment in an unrelated industry. Based on these facts, the Court determines that the hardship imposed on Zimmerman does not unreasonably outweigh the benefit to Dealnews.

Accordingly, it is **ORDERED, ADJUDGED AND DECREED** that Elizabeth Zimmerman is hereby immediately **ENJOINED**, now and during the pendency of this action, from engaging in the following activities:

- (1) Being employed by, working for, supporting, or providing labor or services to, whether directly or indirectly, as an employee or independent contractor, the Kinja Deals website (kinjadeals.theinventory.com) and/or any company which owns or operates the Kinja Deals website;

- (2) Accepting employment with any other Dealnews competitor that provides buying advice, purchasing information, coupons or related information for consumer or business products or services on the Internet;
- (3) Using or disclosing any of Dealnews' confidential information, to include pricing information and methodology; prospective customer information; management and marketing plans; business strategy and methodology; future business plans; and/or trade secrets.

Pursuant to Rule 65(c) of the Alabama Rules of Civil Procedure, Dealnews is hereby **ORDERED** to provide a bond in the total amount of Twenty-Five Thousand dollars (\$25,000.00) within seventy-two (72) hours of the entry of this Order.

As noted Ms. Zimmerman has appeared in this action through counsel, who is hereby **ORDERED** to serve this Preliminary Injunction upon her forthwith.

ENTERED this the 7th day of January, 2019 at 1:45 o'clock p.m.



CIRCUIT JUDGE