IN THE SUPREME COURT OF THE STATE OF NEVADA

LANDON SHORES,

Appellant,

vs.

GLOBAL EXPERIENCE SPECIALISTS, INC.,

Respondent,

Supreme Court No. 72716
District Court Case No. A750273

RESPONSE TO APPELLANT LANDON SHORES' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL

JOLLEY URGA WOODBURY & LITTLE
William R. Urga, Esq., Nevada Bar No. 1195
David J. Malley, Esq., Nevada Bar No. 8171
330 S. Rampart Blvd., Suite 380
Las Vegas, Nevada 89145
Telephone: (702) 699-7500
Facsimile: (702) 699-7555
Attorneys for Respondent

The District Court enjoined Appellant Landon Shores ("Shores") from competing with his former employer, Respondent Global Experience Specialists, Inc. ("GES"), for one year based on what the court preliminarily found to be an enforceable non-compete agreement. In the present Motion to Stay Preliminary Injunction Pending Appeal (the "Motion"), Shores claims that this Court is likely to hold that the non-compete agreement is unenforceable because GES' preliminary evidence failed to justify its nationwide geographic scope. In so arguing, Shores does not quibble with the court's factual findings or its conclusions of law. Instead, Shores claims as error the court's application of the law to the facts. Under the applicable standards of review, this Court will not reverse a preliminary injunction simply because it may arrive at a different result if it had applied the law to the facts. Moreover, because a final determination as to the reasonableness of the agreement's geographic scope based on complete evidence has not yet been made, the ultimate issue of the enforceability of the agreement is not ripe. The Motion should be denied because none of the NRAP 8(c) factors weigh in favor of a stay.

I. Factual background

GES is engaged in the business of, among other things, designing, fabricating, and installing trade show exhibits for customers' use at trade shows, conventions, exhibits, and other venues, as well as contracting with trade show

organizers to provide load-in/load-out services, and convention area preparation and set-up. *See* Shores' Appendix, Ex. 2, ¶ 1. From June 2013 until January 2017, Shores was an employee of GES, working first as a Sales Associate and later as a Sales Manager. *Id.* at ¶¶ 2-3. In connection with his employment, Shores signed a Confidentiality and Non-Competition Agreement (the "Agreement") in which he agreed not to "compete against [GES] . . . by performing services . . . on the behalf of any third party that are competitive with and/or similar to the services that Employee performed for [GES] during the last twelve (12) months of his/her employment with [GES]". *Id.* at ¶ 4. Because GES conducts business on an international basis and has customer and vendor accounts throughout the United States, Shores agreed "that a geographical restriction on competitive employment in the United States . . . is reasonable and necessary to protect [GES'] legitimate business interests." *Id.*

Despite the obligations and restrictions contained in the Agreement, Shores terminated his employment with GES in January 2017 and immediately began working for Freeman Expositions, Inc. ("Freeman") – a direct competitor of GES – doing the exact same type of work he did for GES. *Id.* at ¶¶ 9-10.

In late January 2017, GES filed its Complaint and Motion for Preliminary Injunction, seeking to enjoin Shores from engaging in competitive employment for

a period of twelve months pending a full trial on the merits.[1] Shores opposed that motion, but did not dispute that he signed the Agreement, that the duration of the Agreement is reasonable, that the scope of the prohibited competitive conduct is reasonable, that he was aware of the Agreement and its covenants when he accepted employment with Freeman, or that the services he provides in his employment with Freeman are competitive with and similar to those he provided to GES. *Id.* at ¶ 21. Instead, Shores claimed that GES failed to demonstrate that it had customers and goodwill in every state sufficient to support the Agreement's nationwide geographic scope. The District Court disagreed and entered its Findings of Fact, Conclusions of Law, and Order Granting Plaintiff's Motion for Preliminary Injunction (the "Preliminary Injunction"), enjoining Shores from soliciting certain of GES' clients and from engaging in specified competitive conduct for a period of twelve months beginning January 1, 2017. *See* Shores' Appendix, Ex. 2.

Shores has now appealed the entry of the Preliminary Injunction and sought to stay it pending resolution of the appeal. As set forth below, the Motion should be denied because none of the factors to be considered in deciding whether a stay should issue weigh in Shores' favor. *See* NRAP 8(c) (identifying the four factors for consideration of a stay as (1) whether the object of the appeal will be defeated

[1] The hearing on GES' Motion for Preliminary Injunction was not consolidated with a trial on the merits under NRCP 65(a)(2).

if a stay is denied, (2) whether Shores will suffer irreparable injury if a stay is denied, (3) whether GES will suffer irreparable injury if a stay is granted, and (4) whether Shores is likely to prevail on the merits of his appeal).

II. Shores is unlikely to prevail on the merits of his appeal.

The District Court's decision to grant the Preliminary Injunction is reviewed for abuse of discretion, its findings of fact will only be set aside if clearly erroneous, and questions of law are reviewed de novo. *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 407, 23 P.3d 243, 246 (2001). Applying the same standards, the Ninth Circuit Court of Appeals has stated, "As long as the district court got the law right, it will not be reversed simply because [we] would have arrived at a different result if [we] had applied the law to the facts of the case." *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1096 (9th Cir. 2002).

Shores claims that the nationwide geographic scope of the non-compete clause is unreasonable as a matter of law such that the entire Preliminary Injunction will be reviewed under the de novo standard.[2] Motion, 5-6. But Shores never actually argues that all nationwide geographic restrictions are *per se*

[2] Shores also argues that it would be unreasonable to prevent him from working in Los Angeles/Anaheim because he did not develop those markets for GES. But Shores does not deny that GES has a presence in those markets, and Shores admitted that he had sales with clients for trade shows in at least one nearby city (San Diego). *See* Shores' Appendix, Ex. 2, ¶ 11. The standard in *Camco, Inc. v. Baker*, 113 Nev. 512, 520, 936 P.2d 829, 834 (1997) in this regard is not where Shores, as the employee developed customers, but rather where the *employer* established customer contacts and goodwill.

verboten, nor does he claim as error the District Court's conclusion that "a nationwide restriction is reasonable if it is justified by the nationwide nature of the employer's business." *See* Shores' Appendix, Ex. 2, ¶ 22. He also does not claim as error the court's factual findings regarding the various locations throughout the U.S. where GES does business.

Instead, Shores argues that GES failed to present evidence that it had a nationwide presence sufficient to support this particular nationwide restriction. In other words, Shores claims that the District Court erred in its application of the law to the facts. But as noted above, as long as the District Court was correct on the law, this Court will not reverse simply because it may have applied the law to the facts differently. *A&M Records, Inc.*, 284 F.3d at 1096.

Moreover, at this point, the District Court's factual findings are preliminary.[3] The ultimate issue of whether the nationwide geographic scope is reasonable is not yet ripe for review. A final determination based on complete evidence submitted from both parties will be made at the time of trial.[4] A ruling

[3] Notably, the District Court highlighted by interlineation that its findings of fact were preliminary. *See generally* Shores' Appendix, Ex. 2. Thus, the court recognized that additional or different information may be presented by the parties at the time of trial. But the District Court was satisfied that the evidence presented so far supports a legal conclusion that the parties' non-compete agreement is enforceable.

[4] This situation is different from the one presented in *Camco*. In that case, the District Court *denied* a preliminary injunction. On review, this Court affirmed,

from this Court at this juncture that the Agreement is unenforceable is akin to entering summary judgment against GES without notice and on incomplete evidence. Such a ruling would be inappropriate. *See Arce v. Douglas*, 793 F.3d 968, 976 (9th Cir. 2015) (recognizing that "it is unlikely that the merits of a claim will be fully ventilated at the early stage of a litigation at which a preliminary injunction is normally addressed" and holding that the district court erred by converting the preliminary injunction motion into a basis to grant summary judgment.) The U.S. Supreme Court has held similarly:

> The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held. Given this limited purpose, and given the haste that is often necessary if those positions are to be preserved, a preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits. A party thus is not required to prove his case in full at a preliminary-injunction hearing. . . and the findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits . . . . In light of these considerations, it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits.

---

finding that the agreement's restriction applying to areas where the employer targeted for corporate expansion was unreasonable as a matter of law because it was not limited to territory where the employer already established customer contacts and goodwill. Here, Shores acknowledged GES' national and international presence when he signed the non-compete agreement, and GES presented preliminary evidence of its national presence. *See* Shores' Appendix, Ex. 2, ¶¶ 4, 11.

Univ. of Texas v. Camenisch, 451 U.S. 390, 395 (1981) (internal citations omitted).

Here, the District Court found (and Shores does not dispute) that between December 2015 and March 2017, GES operated in at least 33 states plus Washington D.C. and Puerto Rico, in 119 different cities, with at least 18 events in Anaheim where Shores presently works for Freeman. *See* Shores' Appendix, Ex. 2, ¶ 11. Based on these preliminary findings, the District Court concluded that a nationwide restriction is reasonable, and cited cases from across the country supporting that conclusion. *Id.* at ¶¶ 22-23. Shores' challenge is not to the law the District Court cited or the facts it found, but to the application of the law to the facts. Because this Court should not reverse the District Court's decision on that basis, Shores is unlikely to succeed in his appeal. Moreover, because GES was not required to prove its case in full at this stage, it would be error to enter a final judgment holding the Agreement unenforceable on the present record.

III. The object of the appeal will not be defeated if a stay is denied.

The object of the appeal is whether Shores should be enjoined from competing with GES for twelve months. That object is not lost if Shores is required to abide by the terms of the Preliminary Injunction pending appeal because if he is successful, Shores can seek to recover any damages against the bond. In other words, the issue of whether Shores was wrongfully enjoined does not become moot upon expiration of the twelve month period of the injunction.

III. Shores will not suffer irreparable or serious injury if the stay is denied.

Any harm to Shores is not irreparable if compensatory damages would be adequate. *Dixon v. Thatcher*, 103 Nev. 414, 415 (1987)." Here, GES posted a bond in the amount of $100,000 (the high end of what was represented to be Shores' annual salary) as security in the event that Shores is later found to have been wrongfully enjoined. *See* Shores' Appendix, Ex. 7, at 19:19-20. Thus, if the stay is denied and this Court reverses the Preliminary Injunction, not only would compensatory damages be adequate and calculable, but security for those damages has already been posted.

Moreover, Shores will not be irreparably harmed by being temporarily restrained from engaging in his chosen profession because that is what he agreed to when he executed the Agreement, which forms the basis for the terms of the Preliminary Injunction. If Shores' argument about irreparable harm in this regard is accepted, every non-compete agreement would be invalidated upon a claim by the employee of an inability to work in his chosen trade. That is certainly not what this Court or the Legislature intended when they permitted such agreements. *See* NRS 613.200(4).

Finally, the restraint on Shores' employment is not serious or undue. "[A]ny person who is prevented from practicing his profession for a period of time in an area in which it has been practiced, suffers some hardship." *Basicomputer Corp. v.*

Scott, 791 F. Supp. 1280, 1289 (N.D. Ohio 1991). The test, however, is not whether there was "just some hardship," but rather whether the restriction is *unduly* harsh which "requires excessive severity." *Id.* Shores has not shown how any harm would be excessively severe, especially when he can work for anyone, including Freeman, doing any task other than what is prohibited by the Preliminary Injunction and when security has been posted in the event he is later found to have been wrongfully restrained.

IV. GES will suffer irreparable or serious injury if the stay is granted.

The District Court found that GES demonstrated that it will suffer irreparable harm because Shores did not dispute that within a month of terminating his employment with GES, he was actively marketing to customers in competition with GES. *See* Shores' Appendix, Ex. 2 at ¶¶ 24-26. The court further recognized that customers and potential customers build relationships with GES through its salespeople and that Shores obtains an unfair advantage, and GES suffers a corresponding unfair disadvantage, when Shores takes advantage of those relationships and associated goodwill on behalf of a third party in competition with GES. *Id.* at ¶ 26. The Preliminary Injunction alleviates the irreparable harm to GES. If it is stayed, it is axiomatic that GES would be irreparably harmed by the same conduct that the Preliminary Injunction is designed to prevent. Shores' offer of minimal security does nothing to temper this harm.

Moreover, the harm GES would suffer from a stay would not be relieved by succeeding on appeal. The immediate twelve month period following termination is an important and sensitive time when GES needs to secure, strengthen, and maintain the relationships with its customers who were previously served by Shores. *See* Shores' Appendix, Ex. 5 at 13:4-6, Ex. 9 at 9:15-19. That period following termination is a snapshot in time that cannot be replaced by a different twelve month period commencing after resolution of this appeal. It does GES no good to have Shores stop competing with it years after the damage has been done.

V. CONCLUSION

Based on the foregoing, the Court should deny Shores' Motion to Stay Preliminary Injunction Pending Appeal.

Dated this 13th day of April, 2017.

JOLLEY URGA WOODBURY & LITTLE

By: /s/ David J. Malley

William R. Urga, Esq.
David J. Malley, Esq.
330 S. Rampart Blvd., Suite 380
Las Vegas, Nevada 89145
Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 2017, the foregoing **RESPONSE TO APPELLANT LANDON SHORES' MOTION TO STAY PRELIMINARY INJUNCTION PENDING APPEAL** was filed electronically with the Nevada Supreme Court and served on all parties through the electronic service system, and via U.S. Mail to the following:

Thomas J. Tanksley
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145

/s/ Debbie Rosewall

An Employee of JOLLEY URGA
WOODBURY & LITTLE