IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

DAWSON INSURANCE, INC.	)	**CASE NO: CV 09 687900**
	)	
Plaintiff	)	**JUDGE JOHN P. O'DONNELL**
	)	
- vs -	)	
	)	
THOMAS J. FREUND	)	**JOURNAL ENTRY**
	)	
Defendant	)	

John P. O'Donnell, J.:

Dawson Insurance, Inc., filed this declaratory judgment lawsuit to keep its former agent, defendant Thomas J. Freund, from violating a covenant not to compete. The complaint filed March 19, 2009, includes a request for a preliminary injunction. After a hearing, the motion for a preliminary injunction was denied by a journal entry dated October 8. A bench trial on counts one and two of the complaint only then went forward on November 16 and 17. This decision follows.

FACTS

The parties stipulated to the incorporation of all of the evidence from the preliminary injunction hearing into the trial evidence. That evidence included testimony by: Michael Sherman, chief executive officer of plaintiff Dawson; defendant Thomas Freund; Robert W. Lampus, chief operating officer and general counsel to Dawson; Alexander Hahn, director of the employee benefits division of Dawson; Randy Harvey, treasurer of Ontario (O.) Local Schools; and Kevin Nestor, president of the Mansfield-Richland Area Chamber of Commerce. Plaintiff's

exhibits 1 through 19 (except 16) and defendant's exhibits 2 through 10, 13 through 15, 17, 20, 21, 26 through 32, 34, and 35 were admitted.

Additional evidence received during the trial included testimony by Michael J. Kmetz, Dawson's chief financial officer, additional testimony by Lampus and Freund, plaintiff's exhibits 20 and 23-26, and defendant's exhibits 39, 40 and 43.

Plaintiff Dawson Insurance, Inc., is an Ohio-based company engaged in the sale of insurance products, including property and casualty and employee benefits insurance. Employee benefits includes group health, dental, and disability insurance. The largest component of employee benefits insurance is the group health insurance.

Defendant Freund is a Mansfield native. In 1988, as a new college graduate, he began working as an insurance agent on a commission-only basis for Konstam, Massa & Upham, Inc., a Mansfield insurance agency. Over the years, Freund became a successful salesman of group health insurance to the point where he was responsible for nearly half of the KMU agency's production.

Because of his high production, Freund had a unique compensation structure in his later years at KMU. Not only would he receive commissions on sales, but he would also receive an override commission from sales of Medical Mutual of Ohio group health policies. The overrides were essentially bonuses that Medical Mutual of Ohio offered based upon a high volume of sales. The insurance carrier normally pays the override to an agency as a whole, but for Freund the override was paid by the insurance carrier, through the agency, to him because he was responsible for the largest portion of the agency's total volume of Medical Mutual of Ohio sales. While at KMU, Freund was an employee at will and he and the agency did not have a non-competition agreement.

In 2002, Dawson bought KMU by way of a stock purchase agreement with Robert W. Eutzy, the owner of KMU. Eutzy was paid three million dollars. Freund, who was not a shareholder of KMU, was paid nothing.

Sherman testified that Dawson bought KMU because it had a long-standing presence and good reputation in the Richland County area. This presented Dawson an opportunity to penetrate that market. Sherman testified that the three million dollar purchase price was primarily to secure KMU's "book of business." An agency's "book of business" was described as its ongoing customer account relationships.

To stay in the insurance industry after KMU was bought by Dawson, Freund had three choices. He could open his own agency, hire on as an employee of a different agency, or accept an offer of employment with Dawson. He chose the latter, and on August 28, 2002, he signed a group insurance producer compensation agreement and a nondisclosure and non-competition agreement with Dawson. The compensation agreement was similar in form, but not content, for all of Dawson's insurance agents. It described a commission schedule depending, among other things, on the nature of the insurance sold and the origin of the customer referral. The agreement also required that "all producers are bound by the terms of the nondisclosure and non-competition agreement." Freund's agreement contained the following unique provision:

> Note – with respect to Section I, Production Formula, all new business will be paid at 40% and renewal business at 30%, including overrides.

Sherman testified that Dawson's producers ordinarily do not share in the override commission because it is generally not paid as a result of the efforts of any particular producer. However, in Freund's case, the override paid to the agency by Medical Mutual of Ohio was due almost solely to Freund's sales. Freund testified that he and Sherman orally agreed that he would be paid the Medical Mutual override "for as long as I'm employed at Dawson." Sherman

denied that Freund's compensation would always include overrides and Dawson asserts that it retained the discretion to eliminate overrides at any time.

Successive annual compensation agreements in evidence do not contain specific reference to the payment of overrides, but there is no doubt that overrides were included in the defendant's "total production goal" and, despite the absence of express reference to overrides in subsequent agreements, the overrides were paid until July, 2008.

The August 28, 2002, nondisclosure and non-competition agreement provides, in part, as follows:

NONDISCLOSURE AND NON-COMPETITION AGREEMENT

***

RECITALS:

***

> **WHEREAS**, as a material inducement for Employer to employ Employee, and in consideration of participation in the Producer Compensation Plan, . . . Employee agrees to refrain from . . . competing with Employer.
>
> **NOW, THEREFORE**, . . . the parties agree as follows:
>
> ***
>
> 3. **Non-Competition.** . . .Employee hereby covenants and agrees that, during the term of his or her employment and for a period of two (2) years thereafter, neither Employee nor any . . . other business controlled by him or her will, . . . accept, contract, solicit, service, or offer to service any account or customer to which Employer has provided services or products at any time during the term of Employee's employment by Employer, including . . . any and all insurance accounts serviced by Employer . . . notwithstanding the fact that such account may have been originally procured by the Employee. This restriction shall be limited to those geographical areas in which, and those customers with whom, Employer . . . ha(s) actually conducted business during the term of Employee's employment.
>
> ***
>
> 6. **Book of Business.** It is understood and agreed by Employee that every insurance customer or account which Employee develops at any time

during the term of Employee's employment by Employer, . . . shall belong to and be the exclusive property of Employer, without further consideration.

***

9. **Exclusive Agreement.** This Agreement contains the entire agreement between the parties concerning the subject matter hereof and may be changed only by a written agreement signed by the party against whom enforcement of any waiver, change, modification, or discharge is sought. This Agreement, however, does not, nor does it intend to, define any other terms or conditions of the employment of Employee, including the Producer Compensation Plan adopted and/or utilized by Employer from time to time.

***

13. **Recitals.** The Recitals at the beginning of this Agreement are incorporated herein and made a part hereof by this reference.

***

On January 11, 2007, Freund was still working at Dawson. He was then required to sign an amended nondisclosure and non-competition agreement. The amended agreement was nearly the same as the 2002 agreement but with the following changes:

***

1. Definitions. ***

(b) "Account" means any person or entity that purchased any Product or Service from Employer or any Affiliate at any time during the term of Employee's employment with Employer, including but not limited to, any and all insurance accounts serviced by Employer. . . notwithstanding the fact that such account may have been originally procured by Employee. . . .

(c) "Prospect" means any person or entity to whom Employee has presented a written proposal, on behalf of Employer, at any time during the period two years preceding the last day on which Employee's employment with Employer ceased.

***

4. Non-Competition. . . .Employee hereby covenants and agrees that, during the term of his or her employment and for a period of two (2) years thereafter, neither Employee nor any . . . other business

> controlled by him or her will . . . accept, contract, solicit, service, or offer to service any Account or Prospect to which Employer has provided or offered to provide services or products.
>
> ***

Like the 2002 agreement, the consideration for the amended agreement was "participation in the producer compensation plan."

Dawson continued to pay Freund the overrides after the amended non-competition agreement for over a year. In July, 2008, Dawson stopped paying the overrides. Why Dawson terminated the overrides is the subject of some dispute between the parties. Freund claims they were taken back because Sherman was under some pressure from other producers who resented Freund getting what they perceived as special treatment. Sherman and other Dawson witnesses claim Freund agreed that the overrides shouldn't be paid if he didn't meet his "total production goal." That explanation is not credible since the total production goal always included a credit for overrides. In any event, the reason Dawson discontinued the overrides is not as important in the context of the declaratory judgment claims in the complaint as the fact that it was Dawson's decision, not Freund's, to remove the overrides as an element of the producer compensation plan.

Freund kept working for Dawson through 2008 and into the early part of 2009 until he was fired by Sherman for "insubordination" when he refused to sign a new compensation agreement before having the chance to review it with counsel.

LAW

Count one of the plaintiff's complaint asks for a declaratory judgment by this court that the non-competition agreement is enforceable. Count two is labeled as a claim for breach of contract because the defendant "has indicated that he will not abide by the

non-competition agreement." For a remedy on this count, the plaintiff asks that the defendant be enjoined from conduct that would violate the non-compete agreement. As a practical matter, the relief sought on both counts one and two is the same.

Ohio Revised Code section 2721.03 provides, in pertinent part, that "any person interested under a . . . contract . . . may have determined any question of . . . validity arising under the . . . contract . . . and obtain a declaration of rights, status, or other legal relations under it." Additionally, O.R.C. section 2721.04 authorizes the court to construe a contract "by a declaratory judgment or decree either before or after there has been a breach of the contract." Since a covenant not to compete is a contract, a declaratory judgment is an appropriate method to resolve the dispute in this case.

Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.[1] Failure of consideration exists when a promise has been made to support a contract, but that promise has not been performed.[2] Where a failure of consideration exists, the other party is thereby excused from further performance.[3]

The contract[4] at issue here describes the consideration as "participation in the producer compensation plan."[5] In turn, the salient feature of Freund's producer compensation plan is the payment of overrides. Based upon all of the facts in evidence, the court finds that Dawson's continued payment of overrides was the consideration for Freund's covenant not to compete, and that once the overrides were taken away and

[1] *Minster Farmers Coop. Exchange Co., Inc. v. Meyer,* 117 Ohio St.3d 459, 2008-Ohio-1259, ¶ 28.
[2] *Rhodes v. Rhodes Industries, Inc.* (1991), 71 Ohio App. 3d 797, 807.
[3] *Id*.
[4] Both the 2002 and 2007 non-compete agreements.
[5] Plaintiff's exhibit 2, p. 1 and p. 4, section 13; plaintiff's exhibit 7, p. 1 and p. 4, section 14.

Freund still remained a Dawson employee, the consideration for his promise not to compete was lacking and the non-compete agreement was unenforceable when he was fired nearly a year later.

Dawson presents several reasons, expressly and by implication, why the non-compete did not lack consideration. While ultimately unavailing, these arguments are worth addressing.

The plaintiff cites the integration clause of the covenant not to compete to argue that the court is prohibited from considering evidence beyond the bounds of the writing to determine whether consideration exists. The integration clause is reproduced above and provides, in pertinent part, that "this agreement contains the entire agreement between the parties concerning the subject matter hereof." This kind of integration clause normally precludes the admission of evidence outside the contract. As the Ohio Supreme Court has explained:

> When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.[6]

However, the presence of an integration clause makes the final written agreement no more integrated than does the act of embodying the complete terms in the writing.[7] In this case the complete terms are not embodied in the writing, notwithstanding the integration clause. The contract states that it is "in consideration of participation in the producer compensation plan," but goes on, at the so-called integration clause, to say that "this agreement, however, does not, nor does it intend to, define any other terms or

[6] *Ed Schory & Sons v. Society Natl. Bank* (1996), 75 Ohio St.3d 433, 440, quoting 3 Corbin, Corbin on Contracts (1960) 357, Section 573.
[7] *Galmish v. Cicchini* (2000), 90 Ohio St. 3d 22, 28.

conditions of the employment of employee, including the producer compensation plan." The contract cannot recite that the producer compensation plan is the consideration for the agreement but then preclude the court from inquiring into the terms of that plan, which is expressly not part of the written covenant not to compete, by means of an "exclusive agreement" recital that, one sentence later, invites an examination of the compensation plan by acknowledging that the contract does not contain all of the terms of the agreement between the parties.

Moreover, the parol evidence rule is ordinarily used to prevent consideration of evidence outside the contract that is contrary to the written agreement. Here, evidence of the producer compensation plan and the payment of overrides is not received to vary the terms of the contract but to establish the contract element of consideration. The parol evidence rule does not exclude evidence with respect to proof of consideration on a written instrument.[8] As long as the evidence of consideration is not inconsistent with or contradictory of the writing, the parol evidence rule is not violated.[9]

Dawson also argues that the court may not examine the sufficiency of consideration. Generally, courts will not inquire into the adequacy of consideration once it is found to exist.[10] However, the question here is not into the sufficiency of consideration but whether it exists and, if so, its terms. The evidence supports the conclusion that the continued payment of overrides was the consideration for Freund's promise not to compete with Dawson when his employment ended. The amount of overrides doesn't bear on that finding, only the fact that they were paid as consideration for the non-compete.

---

[8] *Paul Ford, Inc. v. Rupe* (1993), 90 Ohio App.3d 638, 644.
[9] *Id*.
[10] *Lechli v. Csanad*, 2007-Ohio-3649, Cuyahoga App. No. 88277, at ¶17.

This leads to Dawson's next objection: that continued employment, not the indefinite payment of overrides, was the consideration for the non-compete. While it is certainly true that consideration, in the form of continuing an at-will employment relationship that an employer may otherwise terminate, may exist to support an employee's agreement not to compete,[11] the question of what constitutes consideration is necessarily a factual one in any given case. The court concludes on the facts presented here that the payment of overrides was meant as the consideration for Freund's forbearance from competing with Dawson when he left. No other conclusion makes sense. The purchase price of the KMU agency did not include any assurance that Freund's book of business would stay with Dawson after it absorbed KMU; only the payment of overrides provided that assurance and served as Freund's motivation to waive his ability to compete with Dawson.

If Dawson had simply terminated Freund when it stopped paying the overrides in 2008 the result would be different. That would have presented a situation where Dawson met its continuing obligation to provide consideration for Freund's agreement not to compete. Once the consideration for the non-compete was discontinued, but Freund remained employed, he was released from his obligation not to compete after his employment ended.

CONCLUSION

As consideration for the defendant's promise not to compete with the plaintiff once he no longer worked for Dawson, Dawson agreed to pay Freund override commissions for the duration of his employment there. Dawson stopped paying overrides but did not terminate Freund, resulting in a want of consideration for Freund's

[11] See *Lake Land Emp. Group of Akron, LLC v. Columber*, 101 Ohio St. 3d 242, 2004-Ohio-786, at syllabus.

promise to forbear from competing. The court therefore finds, and declares pursuant to O.R.C. §2721.02 *et seq.*, that defendant Thomas Freund is not bound by either the 2002 or 2007 non-competition agreements and is free to solicit insurance business from any potential customer without regard to that customer's current or past status as a Dawson account or prospect, as those terms are used in the 2007 non-competition agreement.

IT IS SO ORDERED:

_____ Date: _____
Judge John P. O'Donnell

SERVICE

A copy of this Journal Entry was sent by regular U.S. mail, this _____ day of January, 2010, to the following:

Keith A. Savidge, Esq.
26600 Detroit Road
Westlake, OH 44145
Attorney for Plaintiff

John S. Kluznik, Esq.
The Tower at Erieview, Suite 1900
1301 East 9th Street
Cleveland, OH 44114
Attorney for Defendant

_____
Judge John P. O'Donnell