

NOTICE
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2012 IL App (4th) 111139-U

Filed 1/4/12

NO. 4-11-1139

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

VVV CORPORATION, an Illinois Corporation,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
TIMOTHY R. BROWN,)	No. 11CH1515
Defendant-Appellant,)	
and)	
FIRE WATER, INC., an Illinois Corporation, a/k/a)	Honorable
VITAL RESTORATION; and JOSHUA RUSSELL,)	Leo J. Zappa, Jr.,
Defendants.)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* Where the trial court's order simply stated the temporary restraining order was granted, the order's total noncompliance with section 11-101 of the Code of Civil Procedure requires reversal of the TRO.

¶ 2 On November 21, 2011, plaintiff, VVV Corporation, filed a verified complaint for injunctive relief against defendants, Fire Water, Inc. (Fire Water), Timothy R. Brown, and Joshua Russell. Along with the complaint, plaintiff filed a motion for a temporary restraining order (TRO) pursuant to section 11-101 of the Code of Civil Procedure (Procedure Code) (735 ILCS 5/11-101 (West 2010)) against defendants. On December 19, 2011, plaintiff filed an amended verified complaint for injunctive relief against defendants. On December 20, 2011, Brown filed a motion to dismiss the amended complaint. On December 22, 2011, the Sangamon County circuit court entered a TRO against only Brown and refused to order plaintiff to post an

injunction bond.

¶ 3 In this interlocutory appeal, Brown argues the trial court abused its discretion in (1) granting the TRO and (2) failing to require plaintiff to post an injunction bond. We reverse the TRO and remand.

¶ 4 I. BACKGROUND

¶ 5 Plaintiff's November 2011 motion for a TRO prayed for a TRO, without bond, that enforced the employment agreements of Brown and Russell, restrained Brown and Russell from employment at Fire Water, and restrained Fire Water from employing Brown and Russell, pending hearing on a preliminary injunction.

¶ 6 The December 2011 amended verified complaint alleged Brown began his employment with Evans Services, Inc. (ESI), a cleaning and disaster restoration business, in July 2007. The employment agreement between ESI and Brown (ESI agreement) included a noncompetition agreement for a period of 18 months from the date of Brown's termination of employment, a nonsolicitation (customers) agreement for a period of 18 months after termination, and a nonsolicitation agreement (employees) for a period of 5 years after termination. It was alleged that Brown acknowledged and agreed ESI was engaged in professional services related to disaster recovery, had confidential processes and methods, and worked closely and had longstanding relationships with its customers. A complete copy of Brown's employment agreement with ESI was attached to the amended complaint.

¶ 7 According to the amended complaint, ESI sold substantially all of its cleaning and disaster restoration business, including Brown's employment agreement, to plaintiff under a June 1, 2011, asset purchase agreement, which was finalized with a June 6, 2011, bill of sale.

Incomplete copies of both documents were attached to the amended complaint. Thereafter, Brown began his employment with plaintiff and worked as an operations manager. On or about August 26, 2011, Brown terminated his employment relationship with plaintiff.

¶ 8 On or about August 7, 2011, Brown submitted articles of incorporation to the Illinois Secretary of State to incorporate Fire Water, Inc. The amended complaint alleged Brown used his knowledge of plaintiff's products, pricing lists, customer lists, accounts, and other confidential information to benefit a direct competitor of plaintiff.

¶ 9 The amended complaint also noted that, on September 26, 2011, Brown filed a wage-claim application with the Illinois Department of Labor (Department), requesting payment of commission he earned after the asset purchase agreement. In his wage-claim letter to the Department, Brown asserted plaintiff had verbally promised to keep ESI's employees at the same rate of pay and commission plan they had before the sale. However, plaintiff did not pay Brown his commission for the second quarter because he refused to sign an employment agreement that contained a noncompete clause. Plaintiff received a notice of the claim from the Department and paid the claim on November 21, 2011. Copies of all three documents are attached to the amended complaint. Included with the wage-claim material is the agreement plaintiff sought to have Brown sign and the document showing the amount of the commission he was to receive upon signing the agreement. The other documents attached to the amended complaint are the August 15, 2011, commission employment agreement between plaintiff and Russell, and promotion materials of Fire Water doing business as Vital Restoration, which list Brown as the owner.

¶ 10 In count I of the amended complaint, plaintiff sought an injunction against Brown

based on the noncompetition provision in the ESI employment agreement. Plaintiff alleged Brown, within 18 months following the date of his termination of employment with plaintiff, was a shareholder, employee, and officer of Fire Water. Plaintiff claimed Fire Water contacted plaintiff's customers and entered into contracts with them. Plaintiff claimed it will continue to suffer irreparable harm if injunctive relief was not entered against Brown to enforce the noncompetition provision of the ESI agreement.

¶ 11 In count II of the amended complaint, plaintiff sought an injunction against Brown based on the nonsolicitation provision (customers) in the ESI employment agreement. Plaintiff alleged Brown solicited its customers following his termination and entered into contracts with them to provide cleaning and disaster restoration services. Plaintiff claimed it would continue to suffer irreparable harm if injunctive relief was not entered against Brown, and it was likely to prevail on the merits.

¶ 12 In count III of the amended complaint, plaintiff sought an injunction against Brown based on the nonsolicitation provision (employees) in the ESI employment agreement. Plaintiff alleged Brown solicited, induced, or caused Joshua Russell to become an employee of Fire Water while Russell was employed with plaintiff. Plaintiff sought a permanent injunction prohibiting Brown from soliciting plaintiff's employees.

¶ 13 On December 20, 2011, Brown filed a motion to dismiss the amended complaint pursuant to section 2-619.1 of the Procedure Code (735 ILCS 5/2-619.1 (West 2010)). Brown argued plaintiff failed to attach relevant portions of the asset purchase agreement and failed to state a claim for injunctive relief. Brown also argued dismissal of the amended complaint was warranted because of plaintiff's material breach of the ESI agreement, the ESI agreement was not

fully assignable without Brown's permission, plaintiff was estopped from asserting any of its purported rights under the ESI agreement, and Brown did not improperly solicit employees under the ESI agreement.

¶ 14 In the affidavit attached to his motion to dismiss, Brown stated he was employed as an operations manager by ESI from July 9, 2007, until June 1, 2011. He admitted signing the ESI agreement and stated he earned commissions pursuant to that agreement. After June 1, 2011, Brown worked as an employee of plaintiff and received regular payroll checks. On August 7, 2011, Brown was asked to sign a new employee agreement with plaintiff but declined. On August 15, 2011, plaintiff's chief financial officer, Chris Veldman, allegedly informed Brown that the ESI agreement was no longer in existence. Brown told Veldman he was still owed commissions on work he performed prior to plaintiff's acquisition of ESI. Veldman told Brown he would have to seek commissions directly from ESI owner Rusciolelli, which Brown successfully did. Brown also claimed he was owed commissions from work he performed after June 1, 2011, for plaintiff. Veldman told Brown the purchase of ESI by plaintiff was an asset purchase only and that his old contract from ESI had not transferred to plaintiff so plaintiff would not pay any commissions unless he signed a new agreement. Brown left his employment on August 26, 2011.

¶ 15 To the motion to dismiss, Brown also attached, *inter alia*, a more complete copy of the June 2011 asset purchase agreement that only lacked the agreement's exhibits; e-mail correspondence between him and Veldman; and the letter by his counsel, in which he returned the November 21, 2011, check from plaintiff on the wage claim.

¶ 16 On December 22, 2011, Brown filed (1) a response to the TRO, which incorpo-

rated his motion to dismiss. That same day, the trial court heard plaintiff's TRO request. Shortly after Brown's counsel began his argument, the court stopped him and asked the following: "This guy, this Plaintiff, buys a company, and your client, who signs a Noncompete Clause behind his back, decides to start a new company and then flaunt this Noncompete Clause." Following arguments by the parties, the court first noted it had considered the documents submitted by the parties. The court granted the TRO against Brown and denied it as to Russell and Fire Water. The court gave little explanation for its ruling, noting the TRO was not requested against Fire Water and noting the existence of "some problems as far as the TRO goes" regarding Russell.

¶ 17 Thereafter, Brown raised his written motion for an injunction bond pursuant to section 11-103 of the Procedure Code (735 ILCS 5/11-103 (West 2010)) and requested a bond in the amount of \$215,000. In the written motion, Brown argued plaintiff had made no showing of good cause for issuance of a TRO without a bond. Moreover, Brown claimed he would incur "tremendous losses and suffer extreme damage" as a result of a TRO. The trial judge decided against ordering plaintiff to post a bond, asking "[w]hy would I have the Plaintiff put up a bond when I just ruled in their favor?" The trial court set a hearing on the motion to dismiss for January 5, 2012, and the hearing on a preliminary injunction for February 8, 2012. Later that day, the court entered a written order, noting the TRO was granted as to Brown and denied as to Fire Water and Russell and listing the dates of the upcoming hearings. Brown filed an interlocutory appeal pursuant to Illinois Supreme Court Rule 307(d) (Ill. S. Ct. R. 307(d) (eff. Feb. 26, 2010)).

¶ 18 II. ANALYSIS

¶ 19 While neither party raises this issue, the trial court's order in this case is clearly

noncompliant with statutory requirements. Section 11-101 of the Procedure Code (735 ILCS 5/11-101 (West 2010)) contains specific requirements for orders granting TROs and provides, in pertinent part, the following:

"Every order granting an injunction and every restraining order shall set forth the reasons for its entry; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."

¶ 20 In this case, the trial court's written order simply states the TRO against Brown is granted and sets the hearing dates for the motion to dismiss and the preliminary injunction. The court's remarks at the hearing on the TRO provide little more information. The court again simply stated the TRO against Brown was granted, discussed dates for hearings, denied the bond request, and noted the TRO would go into effect when the written order was signed. Thus, we have before us a TRO for which we cannot discern the reasons behind its entry, its duration, and what acts of Brown's are being restrained. Even an examination of the TRO petition to help understand the order, which is expressly prohibited by section 11-101, provides little help as the petition had a vague prayer for relief. It sought enforcement of the employment agreements, the restraint of Brown and Russell from employment at Fire Water, and the restraint of Fire Water from employing Brown and Russell. However, Brown is a shareholder of Fire Water and is

advertised as the owner of Vital Restoration. Thus, the entire record is unclear as to what Brown can and cannot do. Additionally, the lack of insight into why the trial court ruled as it did is particularly troublesome in this case. Here, the court issued the TRO against Brown but denied it as to Russell, and at one point during oral arguments, the court appeared to confuse the two as Russell did sign a noncompete clause after the sale of ESI but Brown refused to sign one. While we appreciate the fact the court had a busy schedule at the holidays, its order provided Brown and his attorneys no guidance on his prohibited actions, how long he would be subject to the order, or what reasons to specifically challenge on appeal. See *Sports Unlimited, Inc. v. Scotch & Sirloin of Woodfield, Inc.*, 58 Ill. App. 3d 579, 584, 374 N.E.2d 916, 921 (1978) (noting the trial judge made known to the defendants what was required of them and provided its reasons with enough explanation so that they could prosecute their appeal).

¶ 21 "[T]he provisions in section 11-101 regarding specificity of acts enjoined are not mere technicalities which the courts may waive where the circumstances may indicate the equity of some other result." *Cameron v. Bartels*, 214 Ill. App. 3d 69, 77, 573 N.E.2d 273, 278 (1991). While reviewing courts have differed on whether an injunction or TRO should be reversed for noncompliance with section 11-101 (see *Cameron*, 214 Ill. App. 3d at 77, 573 N.E.2d at 278 (discussing the various cases on the issue)), the total noncompliance in this case requires reversal and remand.

¶ 22 As an aside, we also point out the fact the record is unclear regarding what documents the trial court considered in ruling on the TRO. The TRO was heard a month after it was filed, which allowed Brown to file a response and a motion to dismiss with numerous attachments. Plaintiff had also filed numerous attachments to its amended complaint.

