

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

WE SELL RESTAURANTS, INC.,)	
Plaintiff,)	
)	CIVIL ACTION
v.)	
)	
)	FILE NO. 2019-CV-329269
)	
DOMINIQUE MADDOX and)	
EATS RESTAURANT BROKERS, LLC,)	
Defendants.)	

ORDER STRIKING ANSWER AND IMPOSING PERMANENT INJUNCTION

Upon notice of Defendants’ continued refusal to comply with their discovery obligations and review of the record, the Court finds as follows:

1. Plaintiff We Sell Restaurants, Inc. (WSR), filed this action on November 13, 2019, seeking to enforce the provisions of the Confidentiality, Non-Competition, and Non-Solicitation Agreement at issue in this case (the “Agreement”) and for damages for violations of the Agreement and misappropriation of trade secrets.
2. The Court entered an initial *Temporary Restraining Order* on November 22, 2019, following notice and oral argument. On December 23, 2019, the Court entered a *Consent Temporary Order* extending certain provisions of the *TRO*, including a provision restricting Defendant Dominique Maddox from soliciting (or attempting to solicit) any of WSR’s customers or prospective customers with whom he had material contact during the two (2) years prior to his termination.
3. On February 11, 2020, WSR served Defendants with comprehensive discovery, including Requests for Admission, Interrogatories, and Requests for Production related to Maddox’s suspected contact with both witnesses and WSR’s customers, including 33 customers identified by name. Defendants’ responses to this discovery were due on

March 12, 2020, but they served only responses to the Request for Admission and ignored the remaining discovery.¹

4. WSR engaged in good faith efforts to resolve Defendants' failure to respond to discovery but received no response to these efforts. On April 24, through calls with Counsel, the Court intervened to informally address the dispute as well as Defendants' failure to respond.
5. In June, Defendants refused to produce documents in the absence of a protective order based on Robin Gagnon's alleged obstructionist behavior with witnesses identified in WSR's discovery materials. WSR wrote to Defendants noting, *inter alia*, Defendants were trying to delay the matter as they were aware of this alleged obstructionist behavior in December 2019 but failed to raise objections-other than oblique references to Covid-19- to discovery served 2 months later. On June 4, Defendants' counsel emailed the Court asserting that a protective order was needed before they would produce Defendant Maddox's communications with witnesses or WSR customers.
6. The Court held a conference call on June 11, wherein Defendants made various allegations of witness obstruction against WSR's principal. WSR responded and reiterated this was interposed for delay so that Defendant Maddox's solicitation of WSR customers, and Defendants' failure to produce evidence supporting their allegations of fraud would not be revealed. The Court reiterated that delay only benefits the Defendant in these cases; WSR was directed to file its motions, and Defendants were directed to file a *Motion for Protective Order* and counsel for Defendants stated that he would.
7. Defendants never filed a *Motion for Protective Order* or produced any evidence to support either the forgery allegations against WSR or Ms. Gagnon's alleged obstructionist acts which gave rise to Defendants' refusal to produce documents. After abandoning these allegations, Defendants never attempted to supplement or resolve the pending discovery - resulting in further delay, motions practice, and unnecessary litigation. Later, at the hearing on September 9, 2020, Maddox testified that he had no communications in his possession to produce as of June - at the same time that

¹ The Court was scheduled to hold an evidentiary hearing on March 16, 2020 on Plaintiff's request for interlocutory injunction, but it was continued due to emergency orders entered on March 13, 2020.

Defendants' counsel was seeking a protective order. Defendants' actions in misleading the Court regarding the existence of discovery and the need for protection, further delaying discovery and inhibiting progression of this matter, amounts to wilful abuse of the discovery processes for which sanctions are appropriate.

8. On June 25, 2020, WSR filed a *Motion to Compel Discovery* and a *Motion for Sanctions and to Strike Defendants Forgery-Related Counterclaims and Defenses*. WSR delayed immediate filing of its motions so that it would have the benefit of the evidence Defendants referred to during the June call with this Court. On August 7, 2020, after two months of no activity from Defendants regarding the discovery materials yet to be produced, and no opposition to WSR's *Motion to Compel Discovery*, the Court entered an *Order Granting Plaintiff's Motion To Compel* and directed Defendants to provide complete document production and specific written responses regarding the matters addressed in WSR's *Motion* within seven (7) days of the Order.
9. Defendants ultimately served supplemental discovery responses on August 17, 2020. Defendants failed to supplement all discovery ordered by the Court. In fact, Defendants served only 27 pages of new documents and served nothing to support the forgery allegations, the allegations of witness intimidation, and none of the communications that Defendants were ordered to produce. For the first time, WSR learned that Defendant Maddox had not preserved his communications with his own witnesses or with any of WSR's customers with whom he communicated during the pendency of this action despite WSR reminding their counsel of Mr. Maddox's obligations to preserve evidence with his own witnesses.
10. On September 2, 2020, WSR filed a *Motion for Contempt, Sanctions, And Permanent Injunctive Relief* requesting that the Court strike Defendants' responsive pleadings, enter default judgment and permanent injunctive relief based on Defendants' continued discovery violations and failure to produce or otherwise preserve evidence of their compliance with both the *TRO* and *Consent Order*.
11. On September 9, 2020, the Court held a hearing on various motions, including WSR's *Motion for Sanctions*. At the hearing, Defendants requested time to file a substantive

response to WSR's *Motion for Contempt*, and the Court agreed and limited the scope of the hearing to the matters addressed in WSR's previous motions to afford Defendants the time they requested to file a written response and present evidence in opposition to the Motion for Contempt.

12. On September 24, 2020, the Court entered an Order which, in relevant part, found that Defendants were dilatory and obstructive in their responses to discovery, granted WSR's *Motion for Sanctions*, and prohibited Defendants from changing their discovery responses or introducing new evidence not produced to WSR prior to September 9, 2020.
13. The deadline for Defendants' response to WSR's *Motion for Contempt* was October 5, 2020, but Defendants filed no response to the *Motion* despite requesting time to do so. *See* Unif. Sup. Ct. R. 6.2; *Rudd v. Paden*, 279 Ga. App. 141, 143 (2006).
14. The Court has reviewed relevant portions of Defendants' discovery responses served on August 17 and attached to the *Motion for Contempt*. In response to Plaintiff's Requests for Production seeking Maddox's communications with witnesses and WSR's customers, Maddox again failed to produce any of the communications sought. Instead, Maddox served a sworn response including narrative responses about his communications with some, but not all, of the individuals identified. Maddox stated that he had no documents in his possession to produce. Maddox did not explain his failure to preserve his responsive communications. At the hearing on September 9, 2020, Maddox testified that his cellular plan is subject to a data limit, but did not explain why he failed to download, print, or otherwise preserve the responsive communications from his cell phone after he had been reminded to preserve his communications with witnesses.
15. The Court finds that Maddox failed to preserve or produce his communications after he was served with discovery and even after he was ordered to produce his communications. Further, Maddox failed to respond or rebut the evidence submitted by WSR, including Maddox's sworn discovery responses and certified phone records, showing that Maddox had numerous contacts (including text messages) with the customers identified by WSR following entry of the *TRO* and *Consent Order*.

16. The Court further finds Maddox refused to identify the dates or time frames of his prior contacts with the customers who now have listings with his new business, Eats Restaurant Brokers, LLC. Maddox's refusal to respond to WSR's interrogatory about his prior contacts with customers who now have listings with Eats and his failure to produce same in response to WSR's document requests constitute wilful disregard for this Court's Orders.
17. The Court finds that, upon this record, Defendants' are in wilful contempt of the Court's August 7, 2020 *Order* compelling discovery and a hearing is not warranted given Defendants' failure to respond or rebut WSR's *Motion for Contempt*. *See Cochran v. Kelly*, 306 Ga. App. 838, 839-842 (2010). Further, the Court finds that Defendants deliberately misrepresented the facts to this Court in an effort to delay and avoid their discovery obligations and disregarded their duty to preserve evidence, including evidence necessary to confirm compliance with this Court's Orders. *See Howard v. Alegria*, 321 Ga. App. 178, 190 (2013).
18. The Court further finds that WSR has established its legitimate business interests to support the restrictive covenant. *See Verified Petition*, ¶¶ 6 - 14; O.C.G.A. § 13-8-55.
19. The Court finds that WSR has established a prima facie case that the restrictive covenants in the Agreement are in compliance with O.C.G.A. § 13-8-53.
 - a. The two-year term of the restrictive period is presumptively reasonable under § 13-8-57(b). *See Verified Petition*, Exhibit A, Section 3(f).
 - b. The "Restricted Territory" applicable to the non-compete provision is likewise reasonable. The "Restricted Territory" is defined in two parts. The first part consists of "the entire metropolitan Atlanta area" and lists the counties included within that area. *See Verified Petition*, Ex. A, Section 3(g)(i) and 6(d). The first part is reasonable based on WSR's established presence in metropolitan Atlanta, and Defendants' immediate advertisement of competing services in that same area after his termination from WSR. *See Verified Petition*, ¶¶ 6, 23-24. The second part of the restrictive area consists of "any area that lies within a fifteen (15) mile radius of any facility or location where Broker authorized, offered, provided or

conducted Competitive Services within two (2) years immediately prior.” *See* Verified Petition, Ex. A, Section 3(g)(ii) and 6(d). The second part is reasonable under § 13-8-56(2), because it relates to the geographic area in which WSR conducted business during its relationship with Maddox and is limited to a reasonable distance from each such location.

- c. The definition of “Competitive Services” under the Agreement is reasonable under § 13-8-53(c)(2), because the definition refers to the services provided by WSR in the two years prior to termination and includes qualifying language consistent with the statute. *See* Verified Petition, Ex. A, Section 3(b) and 6(d).
 - d. The scope of the non-solicitation provision barring solicitation of “any business from any of Broker’s customers or clients or Broker’s actively sought prospective customers or clients . . . with whom [Defendant Maddox] had material contact during his relationship with Broker” is reasonable under § 13-8-53(b). *See* Verified Petition, Ex. A, Section 6(e).
20. The Court further finds that Defendants have failed to rebut the evidence of their failure to comply with the Court’s *TRO* and *Consent Order*. As such, the time periods applicable to the non-competition and non-solicitation provisions of the Agreement are tolled pursuant to Section 6(h) of the Agreement. *See* Verified Petition, Ex. A.
21. The Court finds that, based on both the allegations in WSR’s Verified Complaint and the entire record in this case, WSR has no adequate remedy at law and an injunction is necessary to ensure Maddox’s compliance with the Agreement. *See* O.C.G.A. § 9-5-8.

Accordingly based on the entire record, WSR’s arguments and citations of law, and the above findings of fact:

IT IS HEREBY ORDERED AND ADJUDGED, pursuant to both this Court’s inherent authority, O.C.G.A. § 15-1-3, and the Court’s authority under § 9-11-37(b)(2) and (d), to impose sanctions for wilful violations of discovery and this Court’s orders, that Defendant Dominique Maddox is in **WILFUL CONTEMPT** of this Court’s *Order Compelling Discovery* and WSR’s

Motion for Contempt, Sanctions, and Permanent Injunction is **GRANTED**, Defendant's *Answer, Counterclaims, and Defenses* shall be stricken in its entirety, and **DEFAULT JUDGMENT** shall be entered in favor of Plaintiff.

IT IS HEREBY FURTHERED ORDERED AND ADJUDGED that Defendants are **ENJOINED** from violating the terms of the Agreement, including the Non-Competition (Section 6(d)) and Non-Solicitation (Section 6(e)) provisions set forth therein.

The Court will set a hearing at a later date to hear evidence on damages related to WSR's claims for money damages and request for attorneys' fees and costs

SO ORDERED, this 29th day of October, 2020.



The Honorable Jane C. Barwick
Superior Court of Fulton County
Atlanta Judicial Circuit

Prepared and presented by:

WORTH JARRELL, LLC

/s/ Katy E. Aultman

Kimberly A. Worth

Georgia Bar No. 500790

kworth@thrasherworth.com

Katy E. Aultman

Georgia Bar No. 359702

kaultman@thrasherworth.com

Five Concourse Parkway Suite 3200

Atlanta, GA 30328

Telephone: (404) 760-6016

Facsimile: (404) 662-2391

Attorneys for Plaintiff