

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

P1
634

NUMBER: 728-499

DIVISION "I"

H2O HAIR INC. d/b/a H2O SALON AND SPA

VERSUS

KRISTIN ROMANS BULLARD

FILED: _____

DEPUTY CLERK

JUDGMENT

This matter came for judge trial on the merits on August 21, 2018. The matter was taken under advisement.

Present: Kenneth C. Fonte, Attorney for Plaintiff; and
Alexandre E. Bonin and Kenneth C. Bordes, Attorneys for Defendant.

After hearing arguments, testimony, reviewing all memoranda of counsel, the entire record in this matter and considering the law and the evidence, for written reasons this day assigned:

IT IS ORDERED, ADJUDGED AND DECREED that H2O Hair Inc. d/b/a H2O Salon and Spa's Petition for Breach of Contract, Specific Performance, Injunctive Relief and Damages is hereby **DENIED and DISMISSED** with prejudice; and that Kristin Romans Bullard's Reconventional Demand is also hereby **DENIED and DISMISSED** with prejudice; each party to bear their own costs.

JUDGMENT READ, RENDERED AND SIGNED at Gretna, Louisiana, this 30th day of August, 2018.



JUDGE

TWENTY-FOURTH JUDICIAL DISTRICT COURT

PARISH OF JEFFERSON

STATE OF LOUISIANA

PI
450

NUMBER: 728-499

DIVISION "I"

H2O HAIR INC. d/b/a H2O SALON AND SPA

VERSUS

KRISTIN ROMANS BULLARD

FILED: _____

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REASONS FOR JUDGMENT

This matter came for judge trial on the merits on August 21, 2018. The matter was taken under advisement.

Present: Kenneth C. Fonte, Attorney for Plaintiff; and

Alexandre E. Bonin and Kenneth C. Bordes, Attorneys for Defendant.

After hearing arguments, testimony, reviewing all memoranda of counsel, the entire record in this matter and considering the law and the evidence,

IT IS ORDERED, ADJUDGED AND DECREED that this Court finds the following:

This matter arises from the breach of a noncompetition agreement. At issue before the Court is the enforceability of that agreement, which turns on whether the defendant, Kristin Romans Bullard, was an employee or independent contractor of the plaintiff, H2O Salon and Spa.

Ms. Bullard is a licensed massage therapist who began working at H2O in February, 2009. Pursuant to that engagement, Ms. Bullard signed a Non-Competition Agreement which provides that she will not engage in any business which competes with H2O, nor solicit any of H2O's employees or customers within the parishes of Jefferson, Orleans, or St. Tammany, for a period of two years after her last day with H2O. (Pl. Ex 1). It was uncontested that immediately after leaving H2O in December, 2011, Ms. Bullard opened Nature's Escape Spa in Jefferson Parish, and that Nature's Escape Spa provided services which are substantially similar to those offered by H2O.

H2O filed suit in July, 2013, seeking specific performance of the Non-Competition Agreement and damages for lost revenue. Ms. Bullard denied those allegations and contended

that the agreement was unenforceable. She also reconvened seeking damages under the Louisiana Unfair Trade Practices Act for H2O's attempt to enforce an invalid noncompetition agreement.

LAW & ANALYSIS

Louisiana public policy has long disfavored noncompetition agreements. *SWAT 24 Shreveport Bossier, Inc. v. Bond*, 808 So.2d 294, 298 (La. 6/29/01). Because such agreements are in derogation of the common right, they must be strictly construed against the party seeking their enforcement. *Id.* Accordingly, La. R.S. 23:921, which governs noncompetition agreements, begins with the proposition that “[e]very contract or agreement, or provision thereof, by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, except as provided in this Section, shall be null and void.” La. R.S. 23:921 A.(1). The statute goes on to provide those requirements that must exist for a noncompetition agreement to fall under an exception to the rule of nullity. At issue in this case is paragraph C, which states:

Any person, including a corporation and the individual shareholders of such corporation, who is employed as an agent, servant, or employee may agree with his employer to refrain from carrying on or engaging in a business similar to that of the employer and/or from soliciting customers of the employer within a specified parish or parishes, municipality or municipalities, or parts thereof, so long as the employer carries on a like business therein, not to exceed a period of two years from termination of employment. An independent contractor, *whose work is performed pursuant to a written contract*, may enter into an agreement to refrain from carrying on or engaging in a business similar to the business of the person with whom the independent contractor has contracted, on the same basis as if the independent contractor were an employee, for a period not to exceed two years from the date of the last work performed under the written contract.

La. R.S.23:921 C. (emphasis added).

Ms. Bullard was not working at H2O pursuant to a written contract. Therefore, if Ms. Bullard was an independent contractor as she contends, the Non-Competition Agreement herein is null and void for failure to comply with La. R.S. 23:921.

The distinction between an employee and an independent contractor is a factual determination that must be decided on a case-by-case basis. *Jeansonne v. Schmolke*, 40 So.3d 347 (La. App. 4th Cir. 5/19/10). The term independent contractor connotes a freedom of action and choice with respect to the undertaking in question, the independent nature of the contractor's business, and the nonexclusive means the contractor may employ in accomplishing the work. *Hickman v. Southern Pacific Trans. Co.*, 262 So.2d 385, 390 (La. 6/5/1972). Therefore, the

primary factor for consideration is the degree of control that the principal retains over the work. *Reynolds v. Paulson*, 871 So.2d 1215, 1218 (La. App. 4th Cir. 3/31/04).

There were facts presented at trial which support both the plaintiff and the defendant's arguments regarding whether Ms. Bullard was an employee or an independent contractor. Having considered the evidence and testimony in this matter, the Court finds that the evidence weighs in favor of Ms. Bullard's assertion that she was an independent contractor of H2O.

Unlike all other service positions at H2O, massage therapists were treated as Form 1099 independent contractors for purposes of tax compliance. H2O did not withhold income taxes, Social Security, or Medicare taxes from Ms. Bullard's check. Nor did H2O pay Workers Compensation or unemployment taxes on Ms. Bullard.

H2O provided no training, instructions, or guidelines in massage therapy. Nor did it pay for continuing CEU training or licensing for Ms. Bullard. Ms. Bullard was allowed to set her own appointments and frequently did so for her regular clients. She was also allowed to maintain outside clients so long as she did not service H2O customers outside of H2O's spa.

Ms. Bullard initially agreed to be available at H2O to provide massage services for approximately 40 hours per week. However, she later changed her work schedule to fall below 35 hours per week with no change to her status at H2O. Ms. Bullard could leave for the day at her discretion, as long as she had completed her book of clients and arranged with the other massage therapists to have someone available for walk-in clients.

Especially significant was the absence of control over how Ms. Bullard performed her duties. H2O retained control of certain peripheral aspects of massage therapy such as room aesthetics and music. However, H2O did not control any aspect of the actual massage service, nor did it have the authority to do so given Ms. Bullard's licensing.

For all of the foregoing reasons, the Court finds that the Non-Competition agreement at issue in this case is null for failure to comply with La. R.S. 23:921 C, and H2O's Petition for Breach of Contract was denied.

REASONS READ, RENDERED AND SIGNED at Gretna, Louisiana, this 30th day of August, 2018.



JUDGE

(410) Notice of Cost Due

Jon A. Gegenheimer
Jefferson Parish Clerk of Court

August 31, 2018

Case: 728499 Div: I
P 1 H2O HAIR INC



24th Judicial District Court

H2O HAIR INC, H2O SPA AND SALON vs KRISTIN ROMANS BULLARD, KRISTIN ROMANS

To:
H2O HAIR INC
through
KENNETH C. FONTE
STE 1822
1 GALLERIA BLVD
METAIRIE LA 70001

In order to bring your account balance current, we will need additional funds in the amount of \$334.14, for EACH PARTY TO BEAR THEIR OWN COSTS PER JUDGMENT SIGNED ON 8/30/18 .

If you have any questions concerning this matter, please call (504)364-2999 and ask for Schlise S Borne, Deputy Clerk of Court between the hours of 8:30 AM and 4:30 PM.

Thank you for your cooperation.

/s/Schlise S Borne

Deputy Clerk of Court for
Jon A. Gegenheimer - Clerk of Court
P.O. Box 10
Gretna LA 70054-0010

www.jpclerkofcourt.us
Telephone: (504) 364-2987
FAX: (504) 364-3780

*****IMPORTANT*****

Failure to pay this amount within 30 days will result in additional fees for each Notice of Costs Due issued.

Fees for this Notice of Costs Due are provided for in La. R.S. 13:841.