Third District Court of Appeal

State of Florida, January Term, A.D. 2011.

Opinion filed May 4, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D10-178
Lower Tribunal No. 09-67469

Avisena, Inc.,
Appellant,

vs.

Alberto C. Santalo, and Carecloud Corporation,
Appellees.

An Appeal of a Non-Final Order from the Circuit Court for Miami-Dade County, Eugene J. Fierro, Acting Circuit Court Judge.

Proskauer Rose and Allan H. Weitzman and Andrea R. Bernstein, for appellant.

Coffey Burlington and Kevin C. Kaplan, for appellees.

Before SUAREZ and ROTHENBERG, JJ., and SCHWARTZ, Senior Judge.

SUAREZ, J.

Avisena, Inc., ("Avisena"), a Florida corporation, appeals from a non-final order denying its motion for a preliminary injunction against Alberto C. Santalo

("Santalo") and CareCloud Corporation ("CareCloud") for alleged violation of a non-competition agreement. We affirm, as Avisena cannot prove a likelihood of success on the merits.

The parties have stipulated that Santalo, the founder, former president, and chief executive officer of Avisena, was terminated without cause on September 15, 2008. While with Avisena, Santalo entered into an employment agreement which contains the post-employment non-competition provisions in question. The period of time in which the employee could be restricted from competing was dependent upon whether, and for what reason, the employee was either terminated by Avisena or chose to leave the company's employ. Santalo interpreted the non-competition provisions of his employment agreement to mean that, because he was terminated by Avisena without cause, a twelve-month "Restricted Period" applied pursuant to the express wording of section 8.9 of the employment agreement. Avisena disagreed, claiming that the general, two-year non-competition provision of section 8.1 applied.

After leaving Avisena, Santalo formed CareCloud and on September 16, 2009, one year and three days after being terminated from Avisena, started directly competing with Avisena. Avisena filed the present complaint and request for a temporary injunction. Santalo testified at the temporary injunction hearing that he incorporated CareCloud in January, 2009, and began competing with Avisena on

September 16, 2009, two days after what he claimed was the end of the twelve-month Restricted Period. The trial court refused to grant the temporary injunction and this appeal followed.

A party seeking a temporary injunction must establish all four of the following elements: (1) a likelihood of irreparable harm and the unavailability of an adequate remedy at law; (2) a substantial likelihood of success on the merits; (3) the threatened injury to the petitioner outweighs any possible harm to the respondent, and (4) the granting of a temporary injunction will not disserve the public interest. The burden of persuasion rests on the applicant. See Cordis Corp. v. Prooslin, 482 So. 2d at 489, 490 (Fla. 3d DCA 1986). The essential issue in this appeal is whether Avisena met its critical burden of establishing a substantial likelihood of success on the merits. Specifically, Avisena must prove that the two-year non-competition clause of the employment agreement applied to the facts of Santalo's termination without cause, and not the one-year non-competition provision. The trial court properly denied the temporary injunction as Avisena cannot, as a matter of law, demonstrate substantial likelihood of success on the merits; the plain wording of the employment agreement provides that the one-year, and not the two-year, non-competition restriction applies.

First, the clear and unambiguous provisions of the employment agreement provide for a twelve-month non-competition period following a termination of the

employee without cause by the company, as happened here.[1] Based on that fact alone, Avisena cannot demonstrate substantial likelihood of success on the merits. The employment agreement first states in Section 5, Termination of Employment, the following three reasons that an employee's employment may be terminated either by the company or by the employee: 1) Subsection 5.2, Termination by Company For Cause, states how and why the company could terminate an employee "for cause" and what actions by the employee constitutes "for cause"; 2) Subsection 5.4, Termination by Employee for Cause, states how and why an employee could terminate his or her own employment "for cause" and what actions by the company constitutes "for cause"; and 3) Subsection 5.5, Termination by Company without Cause, states that the employee may be terminated by the company for any reason or for no reason. The employment agreement next specifies varying lengths of non-competition periods depending on which of the three subsections of Section 5 applied to the employee's departure from the company. The parties stipulated that Santalo was terminated without cause pursuant to subsection 5.5.

[1] The mere fact that a contract is complex and requires some analysis to interpret it does not, by itself, render the agreement ambiguous. See Swire Pac. Holdings, Inc. v. Zurich Ins. Co., 845 So. 2d 161, 165 (Fla. 2003).

Section 8 of the Employment agreement, entitled Exclusive Employment and Non-Competition, specifically in subsection 8.9, Restricted Period,[2] states that

> The "Restricted Period" shall mean that eighteen-month period of time immediately following the Employee's termination from the Company if the employee is terminated With Cause pursuant to Section 5.2 of this Agreement. If the Employee is terminated Without Cause pursuant to Section 5.4 of this Agreement or terminates this Agreement for Cause pursuant to Section 5.3 of this Agreement, the Restricted Period shall be the twelve-month period immediately following the Employee's termination from the Company.

As Santalo was terminated without cause pursuant to subsection 5.5[3], then according to subsection 8.9 the applicable period of non-competition was twelve months from the date of termination.

The next question is whether Santalo violated the non-competition provision during the twelve months following his termination. There is no evidence in the record that CareCloud solicited Avisena's customers or employees prior to expiration of the twelve-month Restricted Period. See, e.g., Harllee v. Professional Serv. Indus., Inc., 619 So. 2d 298 (Fla. 3d DCA 1992) (holding that mere preparation to open a competing business, such as assisting in the opening of a bank account, the obtaining of office space and other services with respect to the future employer are insufficient to demonstrate a breach) (citing to Fish v. Adams,

[2] We note that the references made in subsection 8.9 to subsections 5.3 and 5.4 are clearly scrivener's errors, and should be read as referring instead to subsections 5.4 and 5.5 of the Employment agreement.

[3] Mis-identified in subsection 8.9 as subsection 5.4.

401 So. 2d 843 (Fla. 5th DCA 1981)); see also Furmanite America, Inc. v. T.D. Williamson, Inc., 506 F. Supp. 2d 1134 (M.D. Fla. 2007) (same); Grant v. Robert Half Intern., Inc., 597 So. 2d 801 (Fla. 3d DCA 1992) (finding temporary injunction appropriate where employer proved that former employee solicited employer's clients and damaged its goodwill and business reputation). There is no evidence in this record that Santalo violated the non-competition provision of his employment agreement. As such, Avisena cannot prove a substantial likelihood of success and the trial court correctly denied Avisena's motion for a temporary injunction.

Avisena argued below and on appeal that subsection 8.1 applies and not subsection 8.9; alternatively, Avisena argued that the contract is ambiguous. We disagree with both arguments.[4] Subsection 8.1 states that "Employee shall not for a period of two (2) years during the period of time immediately following the Employee's termination of employment with the company . . . ." The language of this provision, "*Employee's termination of employment* with the company," unambiguously refers to the employee's own termination of his or her employment. As stated earlier in this analysis, Section 5 specifically refers to only three termination events—when *the Company terminates* the employee with and without cause, and when *the employee terminates* the employment *for cause*. The

[4] See Footnote 1, above.

only scenario not covered in Section 5 is when *the employee* terminates his or her employment *without cause*. That event is clearly provided for by subsection 8.1, and requires a harsher, two-year period of non-competition. It does not, however, apply to the facts presented here.

Affirmed.

ROTHENBERG, J., concurs.

SCHWARTZ, Senior Judge (dissenting).

I would reverse with directions to enforce a two year non-compete requirement.

I

The Agreement

First, I think that Section 8.1 of the agreement unambiguously so provides. It says:

> 8.1 Non-Competition Covenant. Employee shall not for a period of two (2) years during the period of time immediately following the Employee's termination of employment with the Company, in any and all places or areas within the continental United States ("Restricted Territory"),: (i) engage in any activity which ….

The word "termination" is a noun[5] which simply means the end of a given period of time or relationship, regardless of how it occurs—that is, the promise made was that after termination—whether caused by the employee or employer, the employee would not engage in the enumerated activities. Plainly put, the words "Employee's termination" describe *whose* termination not *who* was doing the terminating, to hold otherwise is to read language into the parties' agreement that simply is not there. See Emergency Assocs. of Tampa, P.A. v. Sassano, 664 So. 2d 1000, 1003 (Fla. 2d DCA 1995) ("[A] court is powerless to rewrite the contract to make it more reasonable or advantageous for one of the contracting parties.").

Moreover, section 8.9, upon which the court relies, has no application. Section 8.1 prohibits a number of activities by the employee for a two year period;

[5]Black's Law Dictionary (9th ed. 2009) **("[T]ermination,** *n.* (15c) **1.** The act of ending something; EXTINGUISHMENT < termination of the partnership by winding up its affairs>."); see La Fata v. Raytheon Co., 302 F.Supp.2d 398, 409 (E.D.Pa. 2004) ("When the relevant statute failed to define the term 'employment termination,' the Third Circuit defined the word 'terminate' in an employment context as: 'To discontinue the employment of.' Moore v. Warehouse Club, 992 F.2d 27, 29 (3d Cir.1993) (citing American Heritage Dictionary, 2nd Edition 1254 (1982)). Black's Law Definition of 'termination' is used in this opinion as opposed to the Third Circuit's definition in Moore of "terminate" because the Severance Pay Policy and the Termination of Employment Policy use the noun "termination." The difference between the noun "termination" and the verb "terminate" is material in the instant case because a verb implies that an actor and an object is required, whereas a noun does not. Moore' s definition of the verb "terminate" is less applicable.").

this section is a broad prohibition of activities and does not use the term "restricted period" as defined in section 8.9 at all; section 8.1.1 prohibits a narrow range of activities for a "restricted period," and it is a violation of that section which would require reference to section 8.9. The employer claimed a violation of section 8.1, therefore, section 8.9 had no application and the real and only question for the trial court was whether that provision as written was enforceable. Because there was no violation of section 542.335, Florida Statutes (2010), either in terms of the activity or the time period prohibited, the preliminary injunction sought should have been granted. See Excelsior Ins. Co. v. Pomona Park Bar & Package Store, 369 So. 2d 938, 941 (Fla. 1979) ("Every provision in a contract should be given meaning and effect and apparent inconsistencies reconciled if possible."); Transport Rental Sys., Inc. v. Hertz Corp. 129 So. 2d 454, 456 (Fla. 3d DCA 1961) ("If a contract contains clauses . . . must be given such an interpretation as will reconcile them if possible."); see also Izadi v. Machado (Gus) Ford, Inc., 550 So. 2d 1135, 1138 (Fla. 3d DCA 1989) (same).

II

The Intent of the Parties

Thus, on either or both grounds, I do not believe the contract, taken either as a whole or in part, is ambiguous. If, however, as shown by the fact that both the majority and I believe it unambiguously provides two direct opposites, the

resulting conflict must be resolved by considering the parties' mutual intentions as to the term in question. Gulf Cities Gas Corp. v. Tangelo Park Serv. Co., 253 So. 2d 744, 748 (Fla. 4th DCA 1971) ("Where the language of a contract is ambiguous or unclear as to a particular right or duty, the court may receive evidence extrinsic to the contract for the purpose of determining the intent of the parties at the time of the contract."); see also Crespo v. Crespo, 28 So. 3d 125, 128 (Fla. 4th DCA 2010) (same); Killearn Homes Ass'n, Inc. v. Visconti Family Ltd. P'ship, 21 So. 3d 51, 54 (Fla. 1st DCA 2009) ("When the terms of a written document are ambiguous and susceptible to different interpretations, extrinsic evidence may be considered by the court to ascertain the intent of the parties or to explain or clarify the ambiguous term.").

On that issue, the principals of the appellant specifically testified that their financial investor insisted on an unqualified two year period of non-competition by the employee and that he in turn, unequivocally replied "no problem." (The last minute change from the one year period that had previously been contained in section 8.1 to the two year term, which was not reflected in changes to the other terms of the draft agreement, is undoubtedly responsible for whatever confusion may exist among the final sections.) In discovery, Mr. Santalo could only offer the familiar, lame response that he "didn't recall the incident." Such a statement does not create a cognizable

contradiction to clear evidence as to what actually occurred. See e.g., Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) ("A witness' testimony that he or she does not remember an incident does not constitute competent, substantial evidence that the incident did not occur."); Home Ins. Co. v. C & G Sporting Goods, Inc., 453 So. 2d 121, 123 (Fla. 1st DCA 1984) ("As C & G conceded in its own motion, the depositions of its employees showed only that its employees did not *recall* receiving the letters. That testimony was not competent to prove the negative.").

III

As we have said,

> Contract interpretation is for the court as a matter of law, rather than the trier of fact, only when the agreement is [a] totally unambiguous, or [b] when any ambiguity may be resolved by applying the rules of construction to situations in which the parol evidence of the parties' intentions is undisputed . . . . [e.s.]

Land O' Sun Realty Ltd. v. REWJB Gas Invs., 685 So. 2d 870, 872 (Fla. 3d DCA 1996). I believe that both of these principles apply. Each requires a decision contrary to that of the court.