

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000106-MR

TODD REYNOLDS

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE KIMBERLY N. BUNNELL, JUDGE
ACTION NO. 07-CI-04813

SONITROL OF LEXINGTON, INC.

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: Todd Reynolds appeals from a judgment of the Fayette Circuit Court dismissing his claim against Sonitrol of Lexington, Inc., for tortious interference with contractual relations and awarding liquidated

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

damages and attorney's fees to Sonitrol on its counterclaim. Reynolds argues that: (1) there were genuine issues of material fact that precluded dismissal of his complaint; (2) he was denied his right to discovery; (3) the trial court abused its discretion by awarding Sonitrol costs; (4) the trial court abused its discretion by granting a temporary injunction; (5) the trial court erroneously awarded Sonitrol liquidated damages; and (6) the award of attorney's fees was contrary to law. We affirm.

Sonitrol provides home and business security services as an alarm system installer and is located in Lexington, Kentucky. Reynolds began working for Sonitrol in 2003. On May 14, 2003, Reynolds and Sonitrol entered into a non-compete agreement. The agreement states in pertinent part:

Employee hereby expressly covenants and agrees, which covenant and agreement is the essence of the Employer/Employee relationship, that at no time during the term of his/her employment or for a period of three (3) years immediately following the termination thereof, whether said termination is occasioned by the Employer, the Employee, the mutual agreement of said parties or otherwise, will be (sic) for himself/herself, or on the behalf of any other person, persons, firm, partnership, corporation or company, directly or indirectly:

(c) Engage in, directly or indirectly, the Employer's business or any other business in competition with the active business activities of the Employer within a radius of one hundred (100) miles from Lexington, Kentucky.

The agreement further provided remedies for its breach:

The Employee agrees that upon breach of the provisions of this agreement set forth above, he/she will pay Employer the sum of Ten Thousand and No/100 dollars

(\$10,000). It is further agreed that the Employer will be irreparably damaged in the event of breach by Employee and that the payment of Ten Thousand and No/100 dollars (\$10,000) as aforesaid will not fully nor adequately compensate the Employer for damage . . .

In the event of action brought by Employer by the terms of this Agreement, Employer shall be entitled to receive from Employee reasonable attorney's fee including attorney's fees through the appellate level and costs of the action.

Although Reynolds stated that he had no recollection of the agreement, he did acknowledge that the signature on it "appears to be mine."

In 2006, Reynolds's job duties with Sonitrol changed from alarm system installation to maintenance and repair. In August 2006, Reynolds voluntarily resigned from Sonitrol and took a job with ADT Security Services, Inc. Upon learning that Reynolds was employed by ADT, Sonitrol sent Reynolds a letter stating that his employment with ADT violated the non-compete agreement. ADT terminated Reynolds's employment after learning of the existence of the agreement.

Subsequently, Reynolds filed a complaint against Sonitrol for tortious interference with contractual relations and simultaneously pursued a grievance before an arbitrator under his union's collective bargaining agreement. The sole issue before the arbitrator was whether ADT had terminated Reynolds for cause. The arbitrator found that Reynolds's statements regarding the existence of the non-compete agreement on his application to ADT was not an intentional misrepresentation, that Reynolds was not contractually barred from working for

ADT, and that his termination was without cause. Reynolds was then temporarily reinstated by ADT. Sonitrol was not a party to the arbitration proceedings. The arbitrator's decision was placed into the record before the trial court.

Meanwhile, Sonitrol filed a motion to dismiss Reynolds's complaint based on the existence and enforceability of the non-compete agreement. Reynolds then filed an amended complaint which referenced the arbitration decision and asked the court to declare the non-compete agreement unenforceable. Upon learning that Reynolds was reinstated by ADT, Sonitrol joined ADT as a third-party defendant and filed a counterclaim and third-party complaint asserting claims against Reynolds and ADT.

Following a hearing on November 9, 2007, the court dismissed Reynolds claims against Sonitrol and ruled that Sonitrol's claims against Reynolds and ADT would remain on the docket. At the hearing Reynolds admitted that he was still working for ADT and that ADT and Sonitrol were competitors. Sonitrol then filed a motion for a temporary injunction and a judgment on its claim for liquidated damages under the non-compete agreement.

Following a second hearing, the trial court granted Sonitrol's motion for a temporary injunction and required a \$5,000 bond, which was to be paid by Sonitrol. The court also awarded costs to Sonitrol. Subsequently, Sonitrol filed an affidavit with the court delineating the costs it had incurred, and the trial court award Sonitrol \$1,000 in costs.

Reynolds then filed motions in this Court for emergency relief and interlocutory relief. This Court found that Reynolds failed to demonstrate irreparable injury and denied his motion for emergency relief. This Court also denied Reynolds's motion for interlocutory relief because the bond was not yet posted by Sonitrol and because the absence of the bond meant that there was no injunction in place. Sonitrol had not posted the bond because ADT had terminated Reynolds employment for the second and final time after the entry of the order granting the motion for temporary injunction.

On October 28, 2008, Sonitrol filed a motion for summary judgment on its claims against Reynolds. The court granted summary judgment and awarded Sonitrol \$10,000 in liquidated damages pursuant to the terms of the non-compete agreement. The court later awarded Sonitrol \$9,680.50 for attorney's fees pursuant to the agreement. Reynolds filed a motion to dissolve the temporary injunction, which the court granted. This appeal by Reynolds followed.

Reynolds argues that he raised several issues of material fact sufficient to overcome summary judgment and that the trial court assumed facts not in the record.

“The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law.”

Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky. App. 1996). “The record must be viewed in a light most favorable to the party opposing the motion for summary

judgment and all doubts are to be resolved in his favor.” *Steelvest, Inc. v. Scansteel Serv. Ctr.*, 807 S.W.2d 476, 480 (Ky. 1991). “Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary judgment if there is any issue of material fact.” *Id.* Further, “the movant must convince the court, by the evidence of record, of the nonexistence of an issue of material fact.” *Id.* at 482. “The standard of review on appeal of a summary judgment is whether the circuit judge correctly found that there were no issues as to any material fact and that the moving party was entitled to a judgment as a matter of law.” *Pearson ex rel. Trent v. Nat’l Feeding Sys., Inc.*, 90 S.W.3d 46, 49 (Ky. 2002).

Reynolds states that an issue of material fact was raised because he stated that he did not recall signing the non-compete agreement. Whether or not Reynolds remembers signing the document is immaterial because he admitted that the signature “appears to be mine.” When a party admits that their signature appears on a document, lack of recollection of signing is not sufficient to raise an issue of fact. *Payne v. Terry*, 367 S.W.2d. 277, 279 (Ky. 1963).

Reynolds also argues that there is an issue of fact regarding whether Regina Hoover, whose signature appears on the non-compete agreement, had the authority to bind Sonitrol to the agreement. We disagree. Even if Hoover was unauthorized to bind Sonitrol, Sonitrol had ratified the agreement. In *Capurso v. Johnson*, 248 S.W.2d 908 (Ky. 1952), the former Court of Appeals stated:

It is a well-established rule of law that if one, not assuming to act for himself, does an act for or in the name of another upon an assumption of authority to act as the agent of the latter, even though without any precedent authority whatever, if the person in whose name the act was performed subsequently ratifies or adopts what has been so done, the ratification relates back and supplies original authority to do the act. In such cases, the principal, whether a corporation or an individual, is bound to the same extent as if the act had been done in the first instance by his previous authority; this is true whether the act is detrimental to the principal or to his advantage, whether it sounds in contract or tort, or whether the ratification is express or implied.

Id. at 910 (quoting 2 Am.Jur., Agency, § 209, p. 166). There is no question that Sonitrol ratified the agreement.

Reynolds argues that there are issues of fact regarding Sonitrol's justifications and motivations behind the non-compete agreement. This Court recently held, in the context of non-compete agreements, that resort to parol evidence is inappropriate when the terms of the agreement are clear and unambiguous on their face. *New Life Cleaners v. Tuttle*, 292 S.W.3d 318, 323 (Ky. App. 2009). In the present case, we conclude that the terms of the non-compete agreement are clear and unambiguous. We also conclude that the terms are not unconscionable. *See Lareau v. O'Nan*, 355 S.W.2d 679 (Ky. 1962) (upholding a non-compete agreement with a restriction of five years and a geographic restriction of one county).

Reynolds next argues that the trial court erred by denying his right to discovery. Kentucky Rules of Civil Procedure (CR) 56.06 states:

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The decision to allow or deny additional discovery is committed to the discretion of the trial court. *Ford v. Courier-Journal Job Printing Co.*, 639 S.W.2d 553, 557 (Ky. App. 1982).

The trial court had sufficient evidence in the record before it to dismiss Reynolds's claims as a matter of law. The agreement was in the record, and Reynolds admitted in his affidavit that the signature on the agreement appeared to be his. Investigations into Sonitrol's motivations behind entering into the agreement would have been irrelevant. The trial court did not abuse its discretion.

Reynolds next argues that the trial court committed various errors in granting Sonitrol's motion for a temporary injunction. The temporary injunction was never actually in effect, and the trial court dissolved the injunction in an order entered on January 5, 2009. Thus, we conclude that any argument in this regard is moot.

Reynolds also argues that the trial court erred in awarding Sonitrol its costs incurred in bringing the motion for temporary injunction. The court granted Sonitrol its costs without explanation.

Reynolds argues that he never violated any orders of the court and that sanctions were inappropriate. However, the non-compete agreement states:

In the event of action brought by Employer by the terms of this Agreement, Employer shall be entitled to receive from Employee reasonable attorney's fees including attorney's fees through the appellate level and costs of the action.

We conclude that the trial court did not abuse its discretion in awarding Sonitrol its costs incurred by bringing the motion for temporary injunction because Reynolds had clearly violated the agreement and the agreement provided for such costs.

Reynolds next argues that the trial court erred by awarding Sonitrol liquidated damages pursuant to the agreement without discovery or an evidentiary hearing. The Kentucky Supreme Court has explained the rule on liquidated damages as follows:

Historically contract provisions specifying liquidated damages were viewed with disfavor, as devices to extract penalties and forfeitures and against public policy. In time the rule evolved that such devices would be recognized as a useful commercial tool to avoid litigation to determine actual damages. But two restrictions remain: they should be used only (1) where the actual damages sustained from a breach of contract would be very difficult to ascertain *and* (2) where, after the breach occurs, it appears that the amount fixed as liquidated damages is not grossly disproportionate to the damages actually sustained.

Mattingly Bridge Co., Inc. v. Holloway & Son Const. Co., 694 S.W.2d 702, 705 (Ky. 1985) (emphasis in original, internal citations omitted). This Court has also found that the enforcement of liquidated damage provisions is particularly

appropriate in the context of non-compete agreements. *Daniel Boone Clinic, P.S.C. v. Dahhan*, 734 S.W.2d 488, 491 (Ky. App. 1987).

We conclude that actual damages would be difficult to ascertain under the circumstances of this case. Reynolds possessed, by his own admission, unique skills related to the installation and maintenance of security systems. We cannot conclude that the \$10,000 damage award is so disproportionate as to constitute a penalty. *Id.* (upholding the enforcement of a \$75,000 liquidated damages provision).

Reynolds next argues that the trial court erred by awarding Sonitrol its attorney's fees.

Attorney's fees are allowable when expressly provided for by contract or statute. *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998). The agreement clearly provided for Sonitrol's attorney's fees. However, Reynolds also argues that a portion of the award of attorney's fees relating to Sonitrol's defense of his tort claims and its pursuit of claims against ADT were not contemplated by the express language of the agreement.

In *Young v. Vista Homes, Inc.*, 243 S.W.3d 352, 368 (Ky. App. 2007), this Court held:

Generally, attorney fees must be apportioned between claims for which there is statutory authority for an award of attorney fees and those for which there is not. But where all of plaintiff's claims arise from the same nucleus of operative facts and each claim was "inextricably interwoven" with the other claims, apportionment of fees is unnecessary.

(Citations omitted).

While *Young* dealt with the issue in the context of statutorily authorized attorney's fees, we find that the same reasoning applies to the present case. We conclude that the fees claimed by Sonitrol arose from the same nucleus of operative facts and were inextricably intertwined with the other claims. The trial court did not abuse its discretion by failing to apportion the award of attorney's fees.

Finally, Reynolds argues that the trial court erred by denying his motion to compel discovery and by denying his motion for a pretrial conference and trial relating to the award of liquidated damages. We are cited to no authority in support of this argument. Based on our review of the record and given our conclusions above, we cannot conclude that the trial court abused its discretion.

The judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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