STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of FRANCIS CHARLES DENONVILLE, Deceased.

ROBERT PASEK,

Petitioner-Appellant,

v

Estate of FRANCIS CHARLES DENONVILLE, Deceased,

Respondent-Appellee.

UNPUBLISHED
August 27, 2009

No. 279224
LC No. 2007-714148-DE

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Petitioner appeals as of right from the probate court's order granting partial summary disposition for respondent, the estate of Francis Charles Denonville ("the estate"), in this contract dispute. We affirm.

This dispute arises out of an alleged oral buy-sell agreement between petitioner and Francis Denonville.[1] According to petitioner, he declined a lucrative cleaning services contract offered to him by Detroit Edison because he was a party to a covenant not to compete entered into with his former employer on May 1, 2002. He referred the proffered contract to Blast & Vac, Inc., a new entity in which he made capital contributions. Petitioner alleged that he and Denonville agreed that Denonville would hold petitioner's shares of the company in his name until the expiration of petitioner's two-year noncompete agreement. At that time, Denonville was to transfer the shares to petitioner. In exchange, petitioner agreed to compensate Denonville by paying him the increase in value of the company during the time in which Denonville managed the company. After the noncompete agreement expired, Denonville refused to transfer the shares to petitioner in accordance with the agreement.

[1] The estate does not deny the existence of an oral buy-sell agreement for purposes of this appeal.

Following Denonville's death on March 18, 2006, petitioner filed a petition for determination of ownership of the shares (Petition). The probate court granted summary disposition for the estate on petitioner's claims for breach of contract and an accounting[2] on the bases that the oral buy-sell agreement was unenforceable because it could not have been performed within one year and thus violated the statute of frauds, and further because the oral buy-sell agreement violated public policy.

This Court reviews de novo a trial court's decision to dismiss a claim under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party. *Id*. at 30-31.

Petitioner argues that the probate court erred by determining that his claim was barred on the basis that the oral agreement violates public policy. We disagree.

"[A] contract is valid only if it involves a proper subject matter[,]" and "[a] proposed contract is concerned with a proper subject matter only if the contract performance requirements are not contrary to public policy." *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 54; 672 NW2d 884 (2003) (internal quotations, citations, and emphasis omitted). Regarding the term "public policy," our Supreme Court has stated that

> it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not to simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. [*Terrien v Zwit*, 467 Mich 56, 66; 648 NW2d 602 (2002).]

Thus, "[i]n identifying the boundaries of public policy," the Court determined that "the focus of the judiciary must ultimately be upon the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law."[3] *Id.* at 66-67. Further, quoting *Muschany v United States*, 324 US 49, 66; 65 S Ct 442; 89 L Ed 2d 744 (1945), our Supreme Court has recognized that "'there must be found definite indications in the law of the sovereign to justify the invalidation of a contract as contrary to that policy.'" *Id.* at 68.

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[2] The probate court denied summary disposition for the estate on petitioner's claim alleging unjust enrichment, which remained pending at the time that petitioner filed his claim of appeal with this Court.

[3] The Court further indicated that administrative rules and regulations as well as public rules of professional conduct may also be indicative of public policy. *Terrien, supra* at 67 n 11.

Here, the probate court properly determined that the buy-sell agreement was unenforceable because it violates public policy. Michigan common law recognizes an implied "covenant of good faith and fair dealing" in every contract requiring "that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Hammond v United of Oakland, Inc*, 193 Mich App 146, 151-152; 483 NW2d 652 (1992). In clear violation of the covenant of good faith and fair dealing, petitioner entered into the oral buy-sell agreement for the specific purpose of facilitating a breach of the noncompete agreement he had with his previous employer.

According to the petition, Detroit Edison offered petitioner a lucrative contract in April 2002, which petitioner declined to accept because he could not do so under the terms of the noncompete agreement with his previous employer. Instead, petitioner referred the contract proposal to Blast & Vac, Inc., a company incorporated on April 30, 2002, pursuant to the referral, and made capital contributions to the company. Petitioner alleged that, under the buy-sell agreement negotiated with Denonville in approximately March 2002, Denonville agreed to hold legal title to petitioner's shares of stock in the company and agreed to transfer the shares to petitioner after the expiration of the two-year noncompete agreement.

Accepting petitioner's own allegations as true, he violated the covenant of good faith and fair dealing by destroying his previous employer's right to receive the fruits of the noncompete agreement. Under the noncompete agreement, his previous employer agreed to pay petitioner approximately $165,000 in exchange for petitioner's agreement not to "directly or indirectly, own, . . . finance, support, . . . consult with respect to, be employed by, invest or engage in any business which performs industrial and environmental services . . . or have any interest in any business which provides those services[.]" Petitioner's allegations establish that he entered into the buy-sell agreement for the sole purpose of facilitating indirect competition with his previous employer, in violation of the agreement not to compete.

We reject petitioner's assertions in his affidavit filed below that he was unaware of the terms of the noncompete agreement at the time that he entered into the buy-sell agreement with Denonville, specifically because his affidavit contradicts the allegations in his petition that he specifically did not accept the Detroit Edison contract because of the terms of the noncompete agreement. Petitioner cannot have his cake and eat it too; his own petition allegations demonstrate that he entered into the buy-sell agreement with Denonville in order to create a "strawman" to manage Blast & Vac, Inc., for the sole purpose of indirectly competing with his previous employer. Because petitioner's actions to enter into the buy-sell agreement for an improper purpose were contrary to recognized Michigan common law, see, e.g., *Cook v Wolverine Stockyards Co*, 344 Mich 207, 209; 73 NW2d 902 (1995), it therefore violates public policy and is unenforceable. *Terrien, supra* at 66-67.

Given our resolution of this issue, we need not address petitioner's remaining arguments on appeal.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens