[J-94-2012]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

PULSE TECHNOLOGIES, INC.,	: No. 6 MAP 2012
	:
Appellant	: Appeal from the order of the Superior
	: Court at No. 2424 EDA 2010 dated
	: 5/23/2011, reconsideration denied
v.	: 7/26/2011, which reversed, vacated, and
	: remanded the order of the Bucks County
	: Court of Common Pleas, Criminal Division,
PETER NOTARO AND MK PRECISION LLC,	: at No. 2010-02706-36-5 dated 7/29/2010.
	:
	: ARGUED: September 12, 2012
Appellees	:

OPINION

MR. JUSTICE EAKIN **DECIDED: MAY 29, 2013**

We granted allocatur to determine whether the Superior Court erred by declining to validate a restrictive covenant contained in an employment agreement, solely because the restrictive covenant was not expressly referenced in an initial offer letter which conditioned employment on the execution of the employment agreement. Upon concluding the Superior Court did not properly characterize the offer letter, we vacate and remand for further proceedings.

In 2005, Pulse Technologies, Inc. had an opening for an experienced Swiss Screw engineer (a machinist with special expertise in operating metalworking machines for the manufacture of high-precision components). Pulse hired MSK East, a national search firm specializing in recruiting technical and professional individuals for the Swiss

Screw machine industry. MSK East identified Peter Notaro as a candidate for the Pulse position.

After a preliminary telephone interview, Pulse invited Notaro to its facility for a tour and an in-depth interview. On July 25, 2005, following two interviews, Joseph C. Rosato, Jr., President of Pulse, sent Notaro a two-and-one-half-page formal offer of employment letter, which contained a "summary" of Notaro's "intended position with [Pulse]." Offer Letter of Joseph C. Rosato Jr., President of Pulse, to Peter Notaro (Offer Letter), 7/25/05, at 1. The letter set forth a description of the position, responsibilities, location, base salary, benefits, effective date, and confidentiality. The letter also stated: "You will also be asked to sign our employment/confidentiality agreement. We will not be able to employ you if you fail to do so," and "[i]n addition, the first day of employment you will be required to sign an Employment Agreement with definitive terms and conditions outlining the offer terms and conditions contained herein." Id., at 2, 3. The letter did not mention a restrictive covenant.

Notaro signed the letter as instructed, and sent it back to Pulse. Consistent with the offer letter, on the start date, August 15, 2005, Notaro was asked to sign an employment/confidentiality agreement, which contained a non-competition restrictive covenant. Notaro read and understood the non-competition covenant; he "did not voice any objection to his recruiter, human resources, or anyone else at Pulse." Trial Court Opinion, 11/17/10, at 6, 11. "Prior to this point, Notaro was not performing any work, nor was he receiving any benefits." Id., at 6.

In January, 2010, still employed at Pulse, Notaro learned of a position available at MK Precision, LLC, a competitor of Pulse. "Prior to his offer of employment with MK Precision, Notaro informed [MK Precision] of his non-compete. Based on MK Precision's promise to indemnify Notaro from all legal fees associated with the instant

litigation, Notaro accepted [MK Precision's] offer." Id., at 7 (citations to record omitted). In February, 2010, Notaro resigned from Pulse. After several meetings with Pulse's human resources personnel, Notaro informed Pulse he would not take the job at MK Precision but would still resign from Pulse. In fact, Notaro accepted the position with MK Precision as general manager of Swiss Screw products, the same work he performed at Pulse. This litigation followed, in which Pulse sought a preliminary injunction enjoining MK Precision from employing Notaro.

The trial court granted Pulse's injunction. The Superior Court vacated the injunction and remanded for further proceedings. Applying the standard of review for preliminary injunctions, the Superior Court noted the trial court order lacked a bond requirement and addressed only four of the six prerequisites for the issuance of a preliminary injunction, as set forth in Summit Towne Centre, Inc., v. Shoe Show of Rocky Mount, Inc., 828 A.2d 995, 1001 (Pa. 2003). The Superior Court concluded the trial court erred in granting the relief, and remanded; it gave "only a brief outline of our additional reasons for reversal, reserving further discussion until appeal, should there be one, from final judgment or decree in law or equity." Pulse Technologies, Inc. v. Notaro, No. 2424 EDA 2010, unpublished memorandum at 12 (Pa. Super. filed May 23, 2011). Regarding the additional reasons for reversal, the Superior Court stated:

> Most obviously, the restrictive covenant Pulse sought to impose on Notaro after he had commenced employment is precluded by the express limitation in the formal offer letter that the employment agreement to be signed on the first day of employment would only "outline[ ] the offer terms and conditions contained herein."

Id. (emphasis in original).

We disagree. First, the Superior Court's paraphrasing of the relevant language is misleading. The actual clause reads: "In addition, the first day of employment you will be required to sign an Employment Agreement with definitive terms and conditions

outlining the offer terms and conditions contained herein." Offer Letter, at 3. The Superior Court added the word "only," and disregarded the statement that the employment agreement would contain the "definitive terms and conditions" of the agreement.

Second, a review of the offer letter reveals it was part of the hiring process, and was not the employment contract. In George W. Kistler, Inc. v. O'Brien, 347 A.2d 311 (Pa. 1975), this Court held:

> Under the law of this Commonwealth it has been held that even where a later formal document is contemplated, parties may bind themselves contractually prior to the execution of the written document through mutual manifestations of assent. Thus evidence of mutual assent to employ and be employed which contains all the elements of a contract may be construed as a binding contract of employment though not reduced to writing.

Id., at 315 (internal citations omitted). Under this authority, it is clear the offer letter was not intended as nor sufficient to comprise the employment contract.

The offer letter specifically stated: (i) it was intended to summarize Notaro's position with Pulse ("Below is a summary of your intended position at [Pulse] . . . ." Offer Letter, at 1); (ii) Notaro was required to sign an employment/confidentiality agreement as a condition for his employment ("You will also be asked to sign our employment/confidentiality agreement. We will not be able to employ you if you fail to do so." Id., at 2); and (iii) the terms and conditions contained in the Offer Letter would be outlined with definitive terms in the employment agreement ("[Y]ou will be required to sign an Employment Agreement with definitive terms and conditions outlining the offer terms and conditions contained herein." Id., at 3). The clear references to future specific terms show the offer letter is not a contract, but only evidence of negotiation. See Goldman v. McShain, 247 A.2d 455, 458 (Pa. 1968) (This Court "has long recognized the principle that documents[ ] having the surface appearance of contracts

may be in fact evidence of mere negotiating by parties with a view toward executing a binding contract in the future. Should this be the case, of course, [such] documents cannot form the basis for recovery.")

Third, it is clear from the language of the offer letter that execution of the actual employment agreement, and hence the restrictive covenant, was ancillary to taking employment. "In Pennsylvania where a contract of employment, which is ancillary to the taking of employment, contains reasonable restrictive covenants that do not constitute illegal restraints of trade, the restrictive covenants are valid and enforceable[.]" Beneficial Finance Co. of Lebanon v. Becker, 222 A.2d 873, 875 (Pa. 1966). "As long as the restrictive covenants are an auxiliary part of the taking of regular employment, and not an after-thought to impose additional restrictions on the unsuspecting employee, a contract of employment containing such covenants is supported by valid consideration, and is therefore enforceable." Id., at 876 (citation omitted).

Because the restrictive covenant at issue was contained within the employment agreement, it was ancillary to Notaro's taking of employment and therefore supported by consideration. The panel apparently believed the covenant was not ancillary and thus was not enforceable because it was not supported by new, independent consideration. To the extent the Superior Court relied on Maintenance Specialties, Inc. v. Gottus, 314 A.2d 279 (Pa. 1974) and Kistler, such reliance is misplaced.

In Gottus, the employee began working pursuant to an oral agreement. During the following year, the parties entered into a written agreement which included a non-compete covenant. After noting "a restrictive covenant is enforceable if supported by new consideration, either in the form of an initial employment contract or a change in the conditions of employment," this Court held the covenant at issue was not

enforceable because the employee's status did not change beneficially when the parties reduced their agreements to writing. Gottus, at 281 (emphasis added). In the present matter, the covenant was not executed after commencement of employment, but simultaneously with employment. Under Gottus, the consideration is therefore present.

In Kistler, the employee reached an oral agreement with the employer, and on or about the day the employee began working, he was given various forms to sign, including an employment agreement containing a non-compete covenant. Upon the employee leaving employment, the employer sought to enforce the covenant. The employee argued the covenant was not supported by adequate consideration. This Court noted:

> While a restrictive covenant, in order to be valid need not appear in the initial contract, if it is agreed upon at some later time it must be supported by new consideration. See Maintenance Specialties Inc. v. Gottus, 455 Pa. 327, 331, 314 A.2d 279, 281 (1974); [Jacobson & Co. v. International Environment Corp., 235 A.2d 612 (Pa. 1967)]. As stated by the Supreme Court of North Carolina:
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> > ". . . when the relationship of employer and employee is already established without a restrictive covenant, any agreement thereafter not to compete must be in the nature of a new contract based upon a new consideration." James C. Greene v. Kelley, 261 N.C. 166, 168, 134 S.E.2d 166, 167 (1964).
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> Furthermore, we have stated that continuation of the employment relationship at the time the written contract was signed was not sufficient consideration for the covenant despite the fact that the employment relationship was terminable at the will of either party. See particularly, Maintenance Specialties Inc. v. Gottus, supra. (Concurring Opinion, Jones, C.J., joined by Eagen, Pomeroy, Nix, JJ.).

Kistler, at 316 (footnote omitted). Applying these principles, this Court agreed with the employee and concluded "a valid oral contract of employment, without a covenant to compete, existed prior to the written contract of employment," and continued

employment did not constitute consideration for the subsequent written covenant. Id. Specifically, this Court found the oral contract contained all elements of an employment contract, including a mutual manifestation of assent regarding employment. Id., at 315-16. There being no new consideration for the additional covenant, it was held to be unenforceable.

The applicability of both Gottus and Kistler depends on the existence of a contract prior to the addition of the non-complete covenant. In this case, no such contract existed. The offer letter specifically stated Notaro had to execute the employment contract as a condition of employment; the employment agreement, not the offer letter, contained the definitive terms and conditions of employment. The letter, therefore, was not a binding employment contract.

In light of the foregoing, we conclude the Superior Court erred in finding the offer letter constituted a binding agreement. Given the limited scope of review granted in the instant matter, we do not address any of the Superior Court's other conclusions, and we express no opinion as to their propriety.

Order vacated; case remanded to the Superior Court for further proceedings. Jurisdiction relinquished.

Former Justice Orie Melvin did not participate in the consideration or decision of this case.

Mr. Chief Justice Castille and Messrs. Justice Baer and McCaffery join the opinion.

Mr. Justice Saylor files a concurring opinion.

Madame Justice Todd files a concurring opinion.