IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

MASSEY SERVICES, INC.,

Appellant,

v. Case No. 5D19-3116

ALLEN W. SANDERS, JEFF ENGEL
AND SHELL PEST SOLUTIONS LLC,

Appellees.

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Opinion filed February 26, 2021

Appeal from the Circuit Court
for Orange County,
Julie H. O'Kane, Judge,
Patricia L. Strowbridge, Judge.

Jennifer R. Dixon and Melody B. Lynch, of Lowndes, Drosdick, Doster, Kantor & Reed, P.A., Orlando, for Appellant.

Christopher V. Carlyle, of The Carlyle Appellate Law Firm, Orlando, for Appellees.

RECKSIEDLER, J.J., Associate Judge.

Massey Services, Inc. (hereinafter "Massey") appeals the trial court's order granting Final Summary Judgment in favor of the Defendants, Allen W. Sanders (hereinafter "Sanders"), Jeff Engel (hereinafter "Engel"), and Shell Pest Solutions LLC (hereinafter "Shell Pest"), finding no breach of the nonsolicitation, nondisclosure, and

noncompete agreements. On appeal, Massey argues the trial court erred when it failed to enforce the noncompete provision and misconstrued the nonsolicitation and nondisclosure provisions of the agreement. We affirm the trial court's decision as to the nonsolicitation and nondisclosure provisions but reverse and remand with directions as to the noncompete provision.

FACTS

Sanders was an employee of Middleton Pest Control of Volusia ("hereinafter Middleton") when it was purchased by Massey in 2009, while Engel was an employee of Massey at the time of the purchase. Subsequent to the acquisition, on December 17, 2009, Sanders executed employment agreements that contained noncompete, nonsolicitation, and nondisclosure provisions within the agreements. Engel also executed an employment agreement while employed with Massey.[1] These restrictive covenant provisions contained in Massey's employee agreements stated the following:

> 5. RESTRICTIVE COVENANT AND NON-COMPETITION BY EMPLOYEE
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> B. The EMPLOYEE agrees that he will at all times faithfully and diligently perform all the duties the COMPANY may assign him from time to time, and that he will devote his fullest efforts in furtherance of the COMPANY'S business. The EMPLOYEE will not work, either part-time or full-time, with any other person, firm, corporation, partnership or association not authorized by the COMPANY, nor will he be self-employed in any business whatsoever, not authorized by the COMPANY, for so long as the EMPLOYEE continues to work for the COMPANY. The EMPLOYEE will faithfully adhere to and comply with all COMPANY policies and regulations, so far as are applicable to him.

[1] Sanders worked for Middleton Pest Control for over 15 years as an alternative lawn technician in the Daytona and Edgewater office before Massey acquired it, and then continued to work for Massey after the purchase. Engel signed his employment agreement at the time he started with Massey in Volusia County in 2007 as a lawn technician two years before the acquisition.

C. The EMPLOYEE agrees that he will not directly or indirectly solicit work for or accept business from any customer of the COMPANY either for himself or for others during the term of employment with the COMPANY. The EMPLOYEE further agrees that, upon termination of this Employment Agreement, the EMPLOYEE will not engage in the pest prevention, termite protection, and lawn care service business as previously defined herein, either for himself or for any other person, firm, partnership, company, corporation, association, or others for a period of two (2) years within a one hundred (100) mile radius of any of the offices of the COMPANY in which the EMPLOYEE was assigned at any time preceding termination of employment. Nor will the EMPLOYEE solicit any of the COMPANY'S customers or divert or attempt to divert any of the COMPANY'S business to himself or any other firm, person, corporation, partnership, or to anyone else, within any county or counties which were serviced by COMPANY for a similar period of two (2) years.

D. The EMPLOYEE promises that he will not, in connection with any sales or administrative work he may perform, for two (2) years after leaving the employment of the COMPANY, use for his own benefit or for the benefit o[f] others or at any time divulge to others any confidential information about COMPANY'S business, and/or its trade secrets, and/or customer lists or names of customers of which he or others obtained knowledge while in the employment of the COMPANY, nor will the EMPLOYEE hire or solicit other employees from employment of the COMPANY.

In the fall of 2015, Sanders accepted a position from Jeffrey Colian, a former employee of Middleton and now co-owner of Shell Pest. Sanders, now promoted to Service Manager, tendered his resignation to Massey on October 13, 2015, effective October 31, 2015. After resigning, Sanders posted notice that he was "moving on" on the board in the office to inform other employees he was leaving. The notice did not state where he accepted a position. Subsequently, Engel, a lawn specialist who was considering leaving Massey, inquired of Sanders where he was going. Sanders provided the telephone number and point of contact for Shell Pest. Engel contacted and accepted

a position with Shell Pest. He submitted his resignation, which was also effective on October 31, 2015. They each began working for Shell Pest, a Massey competitor, two days later, on November 2, 2015. Shell Pest is located in Volusia County within 100 miles of the offices where Sanders and Engel worked for Massey and serves the same geographic area as Massey.[2]

Before leaving Massey, Sanders also discussed his resignation with at least four other employees in the days between his resignation of October 13, 2015, and his last day of October 31, 2015. None of the employees left Massey's employment after the conversation.

On December 3, 2015, Massey commenced the ensuing litigation against the Defendants, asserting four causes of action seeking injunctive relief and damages. Massey asserted Sanders and Engel breached the employment agreement by violating 5(C) and 5(D) and further that Sanders violated 5(B). Massey asserted Shell Pest had tortiously interfered with its advantageous business relationships and contractual relationships. Massey alleged that Shell Pest was aware of Massey's business interests, by way of its manager who was a former Massey employee, and that, despite that knowledge, Shell Pest still sought to solicit Sanders and Engel and encouraged Sanders to solicit Engel to work for Shell Pest. Massey further asserted Shell Pest intentionally and wantonly procured the breach of Sanders's and Engel's employment contracts.

Two years later, Massey, Sanders, and Shell Pest filed competing motions for summary judgment. The court initially denied all three motions, and Massey, Sanders,

[2] When Sanders and Engel resigned on October 31, 2015, Massey had approximately 300 employees in Volusia County.

and Shell Pest filed a joint motion for reconsideration. In that joint motion, the parties agreed "that there are no material facts in dispute, and the legal issues are whether or not there is a legitimate business interest that is reasonably necessary to be protected by a noncompete, and whether Sanders's actions constitute solicitation." After the filing of the motion for reconsideration, Engel filed his motion for summary judgment and joined the proceedings.

On April 12, 2019, the trial court entered a Final Summary Judgment in favor of the Defendants finding the Defendants had not violated the noncompete provision, the nondisclosure provision, and nonsolicitation provision. Massey appealed.

ANALYSIS

"Summary judgment is proper only where no genuine issue of material fact exists, and the movant is entitled to judgment as a matter of law." *Scalice v. Orlando Reg'l Healthcare*, 120 So. 3d 215, 216 (Fla. 5th DCA 2013). "[T]he standard of review governing a trial court's ruling on a summary judgment motion posing a pure question of law is de novo." *Id.*

Massey alleged Sanders and Engel breached the nondisclosure provisions of the agreement where an employee shall not use or divulge confidential information, trade secrets or customers within two years of leaving employment. However, the trial court found in favor of the Defendants. The trial court ruled the record was void of any evidence that Sanders or Engel "took, used or divulged any of Massey's protected information to Shell Pest" or that "Shell Pest had possession of any of Massey's confidential, proprietary or trade secret information." Massey does not contest the trial court's finding on appeal, nor does it provide any evidence in the record demonstrating Sanders and Engel

disclosed confidential information. Because Massey fails to challenge the court's finding, it has waived any argument the court's finding was error. *See, e.g.*, *Davis v. State*, 153 So. 3d 399, 401 (Fla. 1st DCA 2014) ("An appellant who presents no argument as to why a trial court's ruling is incorrect on an issue has abandoned the issue—essentially conceded that denial was correct." (quoting *Prince v. State*, 40 So. 3d 11, 13 (Fla. 4th DCA 2010))).

The employment agreements also contained provisions precluding solicitation of Massey's employees and solicitation of its customers after the employee leaves Massey's employ. Massey alleges this restriction is applicable to Sanders's actions after he tendered his resignation on October 13, 2015, to before his last day of employment. Massey asserts the plain language of the nonsolicitation provision contained in paragraph 5(D) of the employment agreement "reveals that the restriction against soliciting employees is not limited to post-termination activities."

"The principles governing contractual interpretation are well settled in Florida." *Waverly 1 & 2, LLC v. Waverly at Las Olas Condo. Ass'n*, 242 So. 3d 425, 428 (Fla. 4th DCA 2018). "Generally, the intentions of the parties to a contract govern its construction and interpretation." *Id.* (quoting *Thomas v. Vision I Homeowner's Ass'n*, 981 So. 2d 1, 2 (Fla. 4th DCA 2007)). "The intent of the parties by their use of such terms must be discerned from within the 'four corners of the document.'" *Id.* (quoting *Emerald Pointe Prop. Owner's Ass'n v. Com. Constr. Indus., Inc.*, 978 So. 2d 873, 877 (Fla. 4th DCA 2008)). "Furthermore, the language being interpreted must be read in conjunction with the other provisions in the contract." *Id.* "Where contractual terms are clear and unambiguous, the court is bound by the plain meaning of those terms." *Id.* (quoting

Emerald Pointe, 978 So. 2d at 877). "In construing the language of a contract, courts are to be mindful that 'the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose.'" *Silver Shells Corp. v. St. Maarten at Silver Shells Condo. Ass'n*, 169 So. 3d 197, 203 (Fla. 1st DCA 2015) (quoting *Taylor v. Taylor*, 1 So. 3d 348, 350 (Fla. 1st DCA 2009)). "To that end, a cardinal principle of contract interpretation is that the conduct must be interpreted in a manner that does not render any provision of the contract meaningless." *Id.*

In reviewing paragraph 5(D) of the employment agreement in its entirety, Massey's argument that the post-termination, two-year limitation does not apply to the nonsolicitation provision is incongruous. To apply the time limitation only to the nondisclosure portion, which would leave the nonsolicitation portion without any temporal limitation, is illogical and unreasonable. *See* § 542.335(1), (1)(d), (1)(e), Fla. Stat. (2018) (stating that the restrictive covenant must be "reasonable in time," and defining time as unreasonable if the restraint is longer than two years (when not predicated on the protection of trade secrets) or ten years (if predicated on the protection of trade secrets)). Based on the clear and unambiguous language of the provision, the temporal limitation applies to both the nondisclosure and nonsolicitation provision.[3]

Massey alleges the conversations Sanders had with co-workers constituted solicitation of employees in violation of the agreement and the trial court's determination

[3] Massey alleged in paragraph 26 of its own complaint "they agreed that during that same period, they would not hire or solicit any of Massey's employees." The time frame refers to the prior paragraphs of 24 and 25 which is two years from the end of their employment. Therefore, Massey's argument fails on its face since the complaint for violation of this paragraph sets forth the time frame as two years *after* their employment.

otherwise was erroneous and failed to cite case law supporting its ruling. The trial court ruled Sanders's actions do not rise to "solicitation" under Florida law. The trial court stated:

> The mere fact that an employee, who is planning to leave his employment to work for a competitive company, has a conversation with a fellow employee about whether the fellow employee will consider a job with the same competitor, does not amount to solicitation under the employment agreements. Moreover, Massey acknowledges that Mr. Sanders's attempts of solicitation failed, as all the targeted employees remained working with Massey.
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> Massey also argues that Mr. Sanders breached this nonsolicitation agreement by: 1) posting of a resignation letter in the employee area during his employment, which stated that Sanders was "moving on" and with no mention of Shell Pest; 2) giving Mr. Engel the phone number for Shell Pest's representative during his employment; and 3) sharing his opinion with Shell Pest's representative that Mr. Engel was a "good guy" sometime after he had offered Mr. Engel a job at Shell Pest. Again, none of these actions constitute solicitation of Massey's employees.

Massey relies on two cases to support its argument. In the first case, *Kohlhauff v. Florida Unemployment Appeals Commission*, 646 So. 2d 799 (Fla. 2d DCA 1994), Kohlhauff's employment was terminated due to work-related misconduct which involved Kohlhauff asking other employees "whether they were satisfied with their jobs" and "whether they would be interested in working for him in a similar business." *Kohlhauff*, 646 So. 2d at 800. Upon learning of his actions, the employer discharged Kohlhauff. *Id.* The question on appeal was whether that conduct constitutes "misconduct," and the Second District stated: "We find it hard to find a clearer example of misconduct than an employee soliciting fellow employees on the job for his own business venture in competition with his current employer." *Id.*

In the second case, *Kforce, Inc. v. Mickenberg*, 846 So. 2d 1190 (Fla. 4th DCA 2003), the employer appealed the denial of its request for a temporary injunction for the

violation of a noncompete provision. *Kforce, Inc.*, 846 So. 2d at 1190. The employee, Mickenberg, after leaving the company, reached out to Kforce's customers via email, saying she was trying to "remain low key" and avoid "conflict of interest" issues but willing "to work with [the client] behind the scenes for a little while," and encouraged the clients "to contact her if she could be of any assistance." *Id.* at 1190–91. The Fourth District Court held that the "e-mails amounted to a direct solicitation of Kforce's customers," and that "Kforce demonstrated entitlement to a temporary injunction." *Id.* at 1191.

These cases are distinguishable from the instant case. In both *Kohlhauff* and *Kforce*, the employees proactively sought out the company's other employees or customers—in *Kohlhauff*, the employee approached the individuals first and asked if they wanted to come work for him; in *Kforce*, the employee approached the customers and offered her assistance. Those are not the facts in the instant case.

Here, the employees, including Engel, approached Sanders to inquire of his reason for leaving and the location of his new employment. Although Sanders gave Engel the telephone number for Shell Pest, it was only after Engel informed Sanders he was quitting to work for another company. There is no evidence in the record reflecting that Sanders proactively sought to entice any employee to leave Massey, as is required for "solicitation." *See, e.g.*, *Scarbrough v. Liberty Nat'l Life Ins. Co.*, 872 So. 2d 283, 285 (Fla. 1st DCA 2004) (holding "that the term 'solicit' in an agreement prohibited the employee from being 'proactive' in such efforts"). Because there is nothing indicating Sanders proactively solicited the recruitment of Engel or other Massey employees, the court properly found that Sanders's actions did not amount to solicitation. In sum, the trial court

properly determined that paragraph 5(D) applies only to post-termination activities and that Sanders's pre-termination activities did not amount to solicitation.

The argument that Sanders and Engel solicited Massey customers also fails. Massey failed to address the issues pertaining to solicitation of customers, disclosure of confidential information, or either of the claims against Shell Pest, so Massey failed to preserve those issues for appeal and has therefore waived these issues for appeal. *See Hagood v. Wells Fargo, N.A.*, 112 So. 3d 770, 770 (Fla. 5th DCA 2013) ("Because we determine that Appellant's counsel waived any viable issue on appeal by failing to assert the issue in the initial brief, we affirm."); *A.B. Enters. V. Gibbons*, 596 So. 2d 1247, 1250 (Fla. 4th DCA 1992) ("[A]n issue not raised in an initial is deemed abandoned and may not be raised for the first time in a reply brief."). This argument is simply inferences based upon speculation as there is no evidence to support the solicitation of customers.

Massey also asserted the trial court erred by failing to enforce the noncompete provision of the employment agreement. The trial court found the noncompete was "reasonable in time, area and line of business" and Massey had proven the existence a legitimate business interest. The trial court concluded that although Massey proved the existence of a legitimate business interest, enforcement was unnecessary to protect those interests because "there is no evidence that Mr. Sanders or Mr. Engel violated the nondisclosure or nonsolicitation provisions of their respective employment agreements even though they became employed with Shell Pest soon after leaving Massey's employ."

It is unclear from the trial court's Final Judgment whether the noncompete agreement was "reasonably necessary to protect the legitimate business interest or interests justifying the restriction" as contemplated by section 542.335(1)(c), Florida

Statutes (2018). The Final Judgment's shortcomings can be remedied by reconsideration of the noncompete issue or by making appropriate findings of fact based on the evidence in the record.

Therefore, we affirm the Final Judgment as to the nonsolicitation and nondisclosure provisions but reverse as to the noncompete issue for reconsideration in light of this opinion.

AFFIRMED in part; REVERSED and REMANDED WITH DIRECTIONS.

EVANDER, C.J., concurs in part; dissents in part, with opinion.
SASSO, J., concurs in result.

EVANDER, C.J., concurring in part; dissenting in part.

I concur in the majority's affirmance of the summary judgment regarding the nonsolicitation and nondisclosure covenants. Because I believe that the trial court's detailed order reflects that it duly considered and determined the issue of whether the noncompete convenants were reasonably necessary to protect Massey's legitimate business interests, I respectfully dissent from the majority's remand for further findings.

Section 542.335(1)(b), Florida Statutes (2018), provides that a person seeking enforcement of a restrictive covenant shall plead and prove the existence of one or more legitimate business interests justifying the restrictive covenant. Here, the trial court found that Massey had shown that it had three legitimate business interests that justified the imposition of some type of restrictive covenant(s)—its relationship with existing customers, its confidential business information, and its customer goodwill.

Section 542.335(1)(c), Florida Statutes (2018), further provides that a party seeking enforcement of a restrictive covenant "also shall plead and prove that the contractually specified restraint is reasonably necessary to protect the legitimate business interest or interests justifying the restriction." If a contractually specified restraint is overbroad, overlong, or otherwise not reasonably necessary to protect the legitimate business interest or interests, section 542.335(1)(c) directs the court to modify the restraint and "grant only the relief reasonably necessary to protect such interest or interests." § 542.335(1)(c), Fla. Stat. (2018).

In the instant case, after giving due consideration to Massey's legitimate business interests, the trial court concluded that those interests were adequately protected by the

nonsolicitation and nondisclosure covenants set forth in Sanders' and Engle's respective employment agreements, and that enforcement of the covenant not to complete was not reasonably necessary to protect those interests:

> [T]here is no evidence that Massey's business interests would be irreparably harmed by Mr. Sanders and Mr. Engel working for a new pest control company as long as they do not violate the other restrictive covenants of the employment agreement. At this point, Massey ha[s] not produced any evidence that Mr. Sanders or Mr. Engel violated the non-disclosure or non-solicitation restrictive covenants or threatened to do so. Under these facts, Massey has not proven that, absent injunctive relief, it has or would suffer irreparable injury to [its] legitimate business interests. Moreover, there is no evidence that Massey suffered any damages based upon Mr. Sanders and Mr. Engel's conduct. Accordingly, enforcing the non-compete agreement against Mr. Sanders and Mr. Engel would only serve to unreasonably suppress competition, a result not permitted by § 542.335.

The trial court's order is consistent with the admonitions set forth by the Florida Supreme Court in *White v. Mederi Caretenders Visiting Services of Southeast Florida, LLC*, 226 So. 3d 774, 785 (Fla. 2017). There, the court emphasized that section 542.335 does not protect covenants "whose sole purpose is to prevent competition per se." *Id.* Furthermore, to be entitled to protection, the employer must establish special facts over and above ordinary competition such that, absent a noncompetition agreement "the employee would gain *an unfair advantage* in further competition with the employer." *Id*.

Here, the record supports the trial court's conclusion that, given Sanders' and Engle's compliance with the nonsolicitation and nondisclosure agreements set forth in their respective employment agreements, enforcement of the covenant not to compete would only serve to unreasonably suppress competition. I would affirm the trial court's order.