RENDERED: OCTOBER 31, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001815-MR

AIR RELIEF, INC. APPELLANT

v. APPEAL FROM GRAVES CIRCUIT COURT
HONORABLE TIMOTHY C. STARK, JUDGE
ACTION NO. 07-CI-00115

CENTRIFUGAL TECHNOLOGIES, INC.,
AND MICHAEL SHEEHAN APPELLEES

ORDER AND OPINION
DISMISSING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

ACREE, JUDGE: Air Relief, Inc., a Kentucky corporation, appeals from a judgment of the Graves Circuit Court finding provisions of a non-compete and

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statute (KRS) 21.580.

non-disclosure agreement between itself and its former employee, Michael Sheehan, to be unreasonable. We dismiss this case as moot.

Beginning in October 1999, Sheehan worked as a sales representative for Air Relief. On July 19, 2004, Air Relief and Sheehan entered into a non-compete and non-disclosure agreement with a term ending one year from the effective date of Sheehan's termination of employment.

On February 19, 2007, Sheehan resigned with the intention of taking a similar position at Centrifugal Technologies, Inc. (CTI), a direct competitor of Air Relief. The effective date of that resignation was February 28, 2007. CTI and Sheehan filed the underlying declaratory judgment action seeking to have the non-compete and non-disclosure agreement declared invalid.

The trial court determined that the non-compete and non-disclosure agreement was overly broad and reformed certain of its provisions. Seeking to appeal that determination, Air Relief filed a Notice of Appeal on September 6, 2007.

On February 28, 2008, the non-compete and non-disclosure agreement expired by its own terms thereby eliminating the controversy between the parties. CTI and Sheehan therefore argue that the issue before us is moot and should be dismissed. We agree.

An appellate court is required to dismiss an appeal when a change in circumstance renders that court unable to grant meaningful relief to either party.

Brown v. Baumer, 301 Ky. 315, 321, 191 S.W.2d 235, 238 (Ky. 1946). Unless there is "an actual case or controversy," this Court has no jurisdiction to hear an issue and is prohibited from producing mere advisory opinions. *Commonwealth v. Hughes*, 873 S.W.2d 828, 829 (Ky. 1994); KY. CONST. § 110.

Air Relief notes the well-known exception to the mootness doctrine where an issue is "capable of repetition, yet evading review." *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658, 661 (Ky. 1983), *quoting Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 546, 96 S.Ct. 2791, 2797, 49 L.Ed.2d 683 (1976); *see also Woods v. Commonwealth*, 142 S.W.3d 24, 31 (Ky. 2004); *Commonwealth v. Hughes*, 873 S.W.2d 828, 830 (Ky. 1994). A two-part test governs the application of this exception: "(1) is the 'challenged action too short in duration to be fully litigated prior to its cessation or expiration and (2) [is there] a reasonable expectation that the *same complaining party would be subject to the same action again*.' " *Hughes*, 873 S.W.2d at 830 (emphasis supplied), *quoting In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988). Covenants not to compete are typically addressed by pursuing injunctive relief which, even in this case, would allow full resolution before the cessation or expiration of the challenged action. Therefore the first prong is not met. Because this same complaining party will not be subject to this action again, the second prong is not met.

As we have concluded that the issue in this case is nonjusticiable and not subject to the "capable of repetition, yet evading review" exception to the mootness doctrine, we dismiss this appeal.

ALL CONCUR.

ENTERED: October 31, 2008

/Glenn E. Acree
JUDGE, COURT OF APPEALS

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