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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000770-MR

MARILYN KLEE BRADLEY — APPELLANT

v. — APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 10-CI-00099

BETH SAMMET — APPELLEE

OPINION
REVERSING

** ** ** ** **

BEFORE: STUMBO AND THOMPSON, JUDGES; SHAKE,[1] SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Marilyn Klee Bradley appeals from the February 8, 2010, March 1, 2010, and March 26, 2010, orders of the Oldham Circuit Court. Those orders denied Bradley's motion for a temporary injunction against Beth Sammet, denied Bradley's motion for reconsideration, and granted Sammet's

[1] Senior Judge Ann O'Malley Shake 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.

motion for summary judgment, respectively, in Bradley's action against Sammet for the alleged violation of a noncompetition agreement. Because we hold that the trial court improperly granted summary judgment in favor of Sammet, we reverse.

In September of 2007, Bradley entered into a sale and purchase agreement ("agreement") with Louis T. Vance, Inc., Louis T. Vance, Amy Jolly, and Sammet for the purchase of an H&R Block franchise ("franchise"). The agreement provided that Sammet would not:

> directly or indirectly compete with Purchaser in the business of preparing income tax returns, electronic filing of returns, or providing Refund Anticipation Loan products in or within a [sic] 25 miles of the city limits of LaGrange or Crestwood, Kentucky [for a period of] two (2) years from the Effective Date.

The agreement identified Bradley as the purchaser and "the date H&R Block's corporate office approves of the transfer of the franchise" as the "effective date." The agreement also contained an "Addendum C – Non-Competition Agreement" ("addendum agreement"), which provided that the covenantor, in this case Sammet, would not compete with "Bradley or the franchise purchased by Marilyn Klee Bradley for a minimum of two (2) years." The addendum agreement further provided:

> [t]he "Noncompetition Period" shall be either two (2) years from the "Effective Date" described in the Sale and Purchase Agreement, that is, the date H&R Block's corporate office approves of the transfer of the franchise from Louis T. Vance, Inc. to Marilyn Klee Bradley, or one (1) year from the date of Covenantors termination of employment with Marilyn Klee Bradley, *which ever* [sic] *date occurs later*.

(Emphasis in original).

On October 4, 2007, Bradley created Marilyn Klee Bradley, Inc. ("MKBI"). H&R Block's corporate offices approved of the transfer of the franchise on October 29, 2007. Also on October 29, 2007, the addendum agreement was signed by Sammet. On November 7, 2007, MKBI added the assumed name of "H&R Block."

Sammet remained employed with the franchise until December 8, 2009. Sometime in January of 2010, it came to the attention of Bradley that Sammet had sent letters to franchise clients offering her services. Those letters read:

> I will not be able to prepare or file income tax returns from my Pewee Valley office during the calendar year 2010. Therefore, I have also opened an office in Elizabethtown from which I am available, by appointment, to perform full accounting services, including the preparation and filing of income tax returns.

Sammet testified that she rented a hotel room at the Holiday Inn Express in Elizabethtown, and drove back and forth to the room twice a week. Any 2009 tax return documentation she received from clients at her Peewee Valley office was placed into an envelope and mailed to a post office box in Elizabethtown. Sammet also testified that any documents in her possession that are related to the tax return preparations are left in her car as she drives back and forth from Peewee Valley to Elizabethtown. Sammet would then complete the tax returns in her Elizabethtown

hotel room, with the use of her laptop, and either fax, e-mail, or mail them, and then return any documentation to the client.

Bradley filed a motion for injunctive relief in Oldham Circuit Court to enforce the noncompetition agreement. A hearing was held and an order was entered on February 8, 2010. In that order, the trial court found that Sammet was engaging in conduct prohibited under the noncompetition agreement. However, the trial court also found that the noncompetition agreement had expired with regard to its restrictions on Sammet, and the motion for injunctive relief was therefore denied. Bradley then filed a motion for reconsideration which was subsequently denied in a March 1, 2010, order. Sammet also filed a motion for summary judgment. That motion was granted in a March 26, 2010, order which cited to the expiration of the noncompetition period as the controlling reason for summary judgment. This appeal followed.

Our standard of review for an 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. CR[2] 56.03. "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 Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991). Summary "judgment is only proper where the movant shows that the adverse party could not prevail under any circumstances." *Id.* "Only when it appears impossible

[2] Kentucky Rules of Civil Procedure.

for the nonmoving party to produce evidence at trial warranting a judgment in his favor should the motion for summary judgment be granted." *Id.* at 482.

On appeal, Bradley argues that the trial court provided a narrow construction of the noncompetition agreement and that the intent of the parties is determinative of the scope and enforcement of the noncompete agreement. In support of its finding that the noncompetition agreement had expired, the trial court focused on the language of the noncompetition agreement that read "termination of employment with Marilyn Klee Bradley." The trial court found that Sammet was never employed by Bradley individually, but was instead employed by MKBI as evidenced by a Form W-2 issued to Sammet. Therefore, the trial court concluded, the noncompetition period expired two years from the "effective date" of the agreement, October 29, 2007, and not one year from the date of Sammet's termination of employment with the franchise. Bradley argues that the phrase "employment with Marilyn Klee Bradley" would be applicable to the franchise, the business, or MKBI.

Generally, the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to *de novo* review. *First Commonwealth Bank of Prestonsburg v. West*, 55 S.W.3d 829, 835-836 (Ky.App. 2000); *Morganfield Nat'l Bank v. Damien Elder & Sons*, 836 S.W.2d 893, 895 (Ky. 1992); *Fay E. Sams Money Purchase Pension Plan v. Jansen*, 3 S.W.3d 753, 757 (Ky.App. 1999). Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort

to extrinsic evidence. *Hoheimer v. Hoheimer*, 30 S.W.3d 176, 178 (KY. 2000). A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. *Transport Ins. Co. v. Ford*, 886 S.W.2d 901, 905 (Ky.App. 1994).

The trial court maintains that, although its interpretation of the noncompetition agreement between Bradley and Sammet "may be considered a technicality and is not truly indicative of the intent of the parties," it is nonetheless sound, because noncompetition agreements are strictly construed. We disagree. The interpretation of a noncompetition agreement is to be determined by the intentions of the parties. *See Ceresia v. Mitchell*, 242 S.W.2d 359 (Ky. 1951); *Hodges v. Todd*, 698 S.W.2d 317 (Ky. App. 1985). Under the trial court's interpretation, Sammet would have never been employed with Bradley, making the language at question extraneous to the contract. We do not believe this was the intention of the parties and we, therefore, disagree with the trial court's interpretation of the noncompetition agreement.

Only when a contract is ambiguous or silent on a vital matter, a court may consider extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties. *See, e.g., Reynolds Metals Co. v. Barker*, 256 S.W.2d 17, 18 (1953); *Dennis v. Watson*, 264 S.W.2d 858, 860 (Ky. 1953). A noncompetition agreement which is admittedly interpreted against the intention of the parties illustrates the presence of an ambiguity. The trial court implied the

noncompetition agreement to be unambiguous, but nonetheless relied, for the most part, on extrinsic evidence, Sammet's Form W-2. No other extrinsic evidence, such as the great measures Sammet took to avoid competing in the restricted area, was considered. Disagreements as to the extrinsic evidence are factual issues and construction of the contract becomes subject to resolution by the fact-finder. *See Cook United, Inc. v. Waits*, 512 S.W.2d 493, 495 (Ky. 1974). Therefore, if the phrase at issue is ambiguous, summary judgment would still be inappropriate.

For the forgoing reasons, the February 8, 2010, summary judgment of the Oldham Circuit Court is reversed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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