STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. McBAIN & COMPANY, P.C.,

Plaintiff-Appellant,

v

ROBERT A. BOYCE, C.P.A.,

Defendant-Appellee.

UNPUBLISHED
March 10, 1998

No. 197782
Mecosta Circuit Court
LC No. 94-010611-CK

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff Robert J. McBain & Co [McBain] appeals by right from the judgments for defendant Robert A. Boyce [Boyce] following a one-day bench trial. We reverse and remand for further proceedings.

I

McBain purchased Boyce's accounting business located in Big Rapids for $205,000 pursuant to a letter agreement dated January 15, 1991. The agreement included a renewable three-year employment contract under which Boyce agreed to work for McBain for a base salary plus bonuses. The agreement provided that after January 1, 1994, McBain was to make monthly payments through 1994 and 1995 to Boyce "in consideration of your covenant not to compete with our firm . . . in addition to any compensation you might receive as an employee of our firm in those years."

Boyce resigned his position with McBain effective January 3, 1994, and one month later opened an office approximately forty-three miles away in Mount Pleasant. However, Boyce was servicing the same customers that constituted the client base he sold to McBain. In August 1994, McBain ceased making payments to Boyce and filed suit, alleging that Boyce breached the letter agreement's covenant not to compete. Boyce brought a countersuit, arguing that he had not breached the letter agreement and was entitled to the balance of payments due from McBain. In addition, Boyce asserted that McBain breached the agreement by failing to pay Boyce a bonus in 1993 pursuant to the

employment contract portion of the letter agreement. Boyce later amended his countercomplaint to allege, in the alternative, that the parties had never agreed to a covenant not to compete because the payments were denominated in that manner for tax purposes only and asking that the court declare the covenant void and unenforceable.

The trial court determined that there was no covenant not to compete because the parties' did not have a meeting of the minds regarding the terms of the covenant and accepted Boyce's contention that the provision had been included solely as a tax ploy. The court further found that there was a failure of consideration because McBain "in part paid for something which did not exist" and ordered that McBain be credited for all monies paid to Boyce pursuant to the covenant provision, or $6,300. The opinion also stated that the bonus was not discretionary, but did not address the amount of the bonus. On April 5, 1996, the court issued another opinion holding that Boyce was entitled to a bonus equal to five percent of his gross wages for 1993 based on the parties' course of performance during 1991 and 1992. McBain appeals both orders.

II

McBain first contends on appeal that the trial court clearly erred when it concluded that no covenant not to compete existed due to the failure of the parties to have a meeting of the minds.[1] We agree.

A

The trial court's conclusion ignores the plain language of the agreement and the clearly established case law of this state holding that courts will substitute reasonable limits where the terms of a covenant not to compete are unreasonable or unlimited. MCL 445.774a(1); MSA 28.70(4a)(1); *Hopkins v Crantz*, 334 Mich 300, 303; 54 NW2d 671 (1952); *Buck v Coward*, 122 Mich 530, 532; 81 NW2d 328 (1899); *Compton v J Lepak, DDS, PC*, 154 Mich App 360, 368; 397 NW2d 311 (1986). Although the covenant as written is unlimited as to duration and scope, there is no authority holding that it must be for that reason declared invalid.

Moreover, while it may have been advantageous for the parties from a tax standpoint to include a covenant not to compete in the purchase agreement, there is no evidence from which it may be concluded that the parties did not intend at the time of contracting for the covenant to be enforceable. The court placed great emphasis on McBain's written suggestion on January 7, 1991 that the parties structure the balance of the purchase price as "regardless of employment (perhaps a covenant not to compete/consulting arrangement)," stating that "it is more probable than not that the phrase 'covenant not to compete' represented an arbitrary decision, or perhaps it had to do with a greater tax advantage to Boyce." However, there was no testimony to support the trial court's conclusion that the decision to include the covenant was arbitrary; in fact, Boyce admitted that the purchase of his practice could have been accomplished with the same tax advantages without the inclusion of a covenant not to compete.

McBain stated that the covenant was an integral part of the transaction. Thus, we find the trial court's interpretation of the covenant as meaningless outside the context of tax considerations was clear error.

Furthermore, the evidence introduced at trial showed that the parties had a mutual understanding of the terms of the covenant, even if those terms were not discussed. Both parties testified that inclusion of a covenant not to compete is standard practice in contracts for the sale of a professional clientele. Boyce stated that he was familiar with covenants not to compete and admitted at his deposition that he was bound by the covenant in the agreement. He agreed that the duration of the covenant, as evidenced by the payments, was two years. He also affirmed that the geographical scope of the covenant would encompass at least the Big Rapids area. McBain testified consistently as to his understanding of the terms of the covenant. Consequently, we find that the trial court clearly erred in concluding that there had been no meeting of the minds with regard to the existence of the covenant not to compete.

B

McBain next contends that the trial court erred in failing to find that Boyce breached the covenant. The trial court found it unnecessary to reach this issue. Because we find that the parties entered into a covenant not to compete, we remand this case to allow the trial court to determine the reasonable scope of the covenant, to determine whether Boyce breached its terms, and, if so, to determine the extent of McBain's damages.

III

McBain next asserts that the trial court erred in determining that pursuant to the letter agreement Boyce was entitled to a bonus in 1993 or, in the alternative, that if Boyce was entitled to a bonus, that the court's calculation of the bonus was erroneous. Where, as here, the contractual language is clear, its construction is a question of law that this Court reviews de novo. *Dyllon v DeNooyer Chevrolet GEO*, 217 Mich App 163, 166; 550 NW2d 846 (1996).

The letter agreement provided for a "guaranteed minimum base salary of $70,000 per year plus an additional $3,300 in year-end 'perks' (bonus/medical reimbursement/profit-sharing contribution)." In addition, the agreement provided that "[i]n our normal system," Boyce would receive five percent of his pay for additional hours expended in excess of 2,350 "in the year-end 'perks' combination described above." Despite these provisions, the testimony at trial established that in 1991 and 1992, McBain paid Boyce a single bonus of five percent of his gross wages. The trial court found that although the language of the agreement clearly provided for a different bonus arrangement, the course of performance of the parties required that a bonus consistent with that given in previous years be paid. This was error.

A prior course of performance cannot alter the clear and unambiguous language of the contract. *Ditzik v Schaffer Lumber Co*, 139 Mich App 81, 89; 360 NW2d 876 (1984). Here, the agreement clearly provides that only a bonus of $3,300 is guaranteed; the fact that the additional five percent bonus

is discretionary is evidenced by the words, "[i]n our normal system." We therefore vacate the trial court's order and remand for entry of a judgment consistent with the terms of the agreement.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Jane E. Markey

[1] Because the letter agreement states that it is not a complete integration of the contract, parol evidence is admissible to establish the parties' understanding of the agreement. *Schmude Oil Co v Omar Operating Co*, 184 Mich App 574, 581; 458 NW2d 659 (1990).