

COURT OF APPEALS  
RICHLAND COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

SCOTT BOBST	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellant	:	Hon. William B. Hoffman, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	Case No. 2010-CA-0104
CHEM-TECH CONSULTANTS, INC.	:	
	:	
Defendant-Appellee	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Civil appeal from the Richland County Court of Common Pleas, Case No. 2010CV0541

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY: November 22, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendant-Appellee

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*Gwin, P.J.*

{¶1} Plaintiff-appellant Scott Bobst appeals a judgment of the Court of Common Pleas of Richland County, Ohio, which dismissed his complaint with prejudice. Appellant assigns a single error to the trial court:

{¶2} “THE TRIAL COURT ERRED IN DISMISSING THE COMPLAINT UNDER RULE 12(b)(6).”

{¶3} The trial court erred in dismissing the complaint under Rule 12 (b)(6).

{¶4} Appellee is Chem–Tech Consultants, Inc. Appellant is a former employee of Chem-Tech who filed an action for declaratory judgment asking the court to construe the severance agreement and the non-competition agreement between the parties.

{¶5} The record indicates several years before Chem-Tech terminated appellant’s employment, the parties entered into a confidentiality non-competition agreement. Appellant’s complaint alleges Chem-Tech did not pay any consideration for the agreement, except that it sold appellant stock pursuant to a shareholder agreement.

{¶6} When appellant was terminated, he signed a severance agreement which contained a number of paragraphs dealing with a covenant not to sue. Paragraph Five states: “In consideration for the promises and payments contained herein, Scott Bobst, on behalf of himself and his successors and assigns in any person or entity whose claim may arise by and/or through him, hereby:

{¶7} (A) Releases Premises And Forever Discharges any and all claims, actions, causes of action, demands, damages, judgment, grievance, promises, debts, offsets, liabilities, and recoupments of any nature or kind whatsoever, however arising, whether at law or inequity, direct or indirect, which he now has or hereafter may have or

claim to have against Chem-Tech Consultants, Inc.\*\*\* as a result of any and all actions relating to his employment by Chem-Tech Consultants, Inc. or shareholder's status with Chem-Tech Consultants, Inc., whether known or unknown to him that occurred prior to the date of this agreement, including, but not limited to, any claims arising out of any employment contract, shareholder agreement or other agreement [express or implied], policies, procedures or practices of Chem-Tech Consultants, Inc.\*\*\*

{¶18} (B) Shall Forever Refrain from bringing any suit, lawsuit, claim, cause of action, grievance, or other legal action of any kind against Chem-Tech Consultants, Inc.\*\*\* arising out of any actions relating to his employment by Chem-Tech Consultants, Inc. or shareholder status with Chem-Tech Consultants, Inc. whether known or unknown to him that occurred prior to the date of this agreement, including, but not limited to any claims arising out of any employment contract, shareholder agreement or other agreement [express or implied], policies, procedures or practices of Employer, state or federal statute\*\*\* or common law\*\*\*.”

{¶19} Paragraph 6 of the Severance Agreement is “Unknown Claims” and provides: “Employee/shareholder intends that this agreement is final and complete and therefore shall bar each and every claim, demand and cause of actions classified herein, whether known or unknown to him at the time of execution of this agreement. As a result, employee/shareholder acknowledges that he might later discover pre-existing claims or facts in addition to or different from those which he now knows or believes to exist with respect to the subject matters of this agreement in which, if known or suspected at the time of the executing of this agreement, may have materially affected this settlement. Nevertheless, employee/shareholder hereby waives any right,

claim, or cause of action that might arise as result of such different or additional claims or facts.”

{¶10} Paragraph 16 of the Severance Agreement provides: “This agreement embodies the entire agreement and understanding of the parties with regard to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants, or undertakings other than those expressly set forth or referred to herein.”

{¶11} Appellant’s complaint for declaratory judgment alleged the integration clause cited supra, rendered the prior non-competition non-disclosure agreement void. Appellant attached the severance agreement, the non-competition agreement, and the shareholder agreement to his complaint.

{¶12} Chem-Tech filed a motion to dismiss pursuant to Civ. R. 12 (B)(6), asserting the covenant not to sue barred this action. The trial court agreed.

{¶13} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted pursuant to Civ. R. 12 (B)(6), it must appear beyond a doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. *O’Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St. 2d 242, 71 O. 2d 223, 327 N.E. 2d 753, syllabus by the court. In ruling on a motion made pursuant to Civ. R. 12 (B)(6) the trial court must construe the factual allegations of the complaint and any items that are properly incorporated therein as true, and must afford the plaintiff all reasonable inferences possible. *Vail v. Plain Dealer Publishing Company*, 72 Ohio St. 3d 279, 280, 1995-Ohio-187, citing *Mitchell v. Lawson Milk Company* (1988), 40 Ohio St. 3d 190, 192, 532, N.E. 2d 753.

{¶14} Our review of a trial court's decision to dismiss a case pursuant to Civ. R. 12 (B)(6) is de novo. *Crestmont Cleveland Partnership v. Ohio Department of Health* (2000), 139 Ohio App. 3d 928, 936, 746 N.E. 2d 222, citing *Shockey v. Fouty* (1995), 106 Ohio App. 3d 420, 424, 666 N.E. 2d 304; *Hunt v. Marksman Products Division of S/R Industries, Inc.* (1995), 101 Ohio App. 3d 760, 762, 656 N.E. 2d 726. When we review a decision de novo, we apply the same standards the trial court used. *Broadnax v. Greene Credit Services* (1997), 118, Ohio App. 3d 881, 887, 694 N.E. 2d 167.

{¶15} Appellant's complaint alleged the parties to the action are not able to agree between themselves concerning the proper interpretation of the Severance Agreement, and therefore it is necessary to resolve the matter through a declaratory judgment action to interpret and explain to the parties their respective rights under the terms of this agreement.

{¶16} At the outset, we note the trial court relied on language in the contract to find it could not construe the contract, which is an odd result.

{¶17} Appellee cites us to no case law wherein a court found Civ. R. 12 (B)(6) was invoked to dismiss an action based upon a covenant not to sue. This court's research uncovered no such case. To the contrary, there is extensive case law wherein contracts containing covenant not to sue were litigated at least to the extent of determining whether or not that clause of the agreement was valid and enforceable. In most, but not all cases, the covenant not to sue bars the plaintiff's recovery.

{¶18} In order for the court to find the action is barred by the covenant not to sue, it must make the threshold finding that clause is enforceable and valid. The court cannot make any such determination from the four corners of the complaint and the

attachments. Before the court makes this determination, and precludes the law of the case or collateral estoppel any further action brought by appellant, but not by Chem-Tech, the court must determine the meaning of the contract. We conclude Civ. R. 12 ((B)(6) was not the appropriate vehicle to determine this action.

{¶19} The assignment of error is sustained.

{¶20} For the foregoing reasons, the judgment of the Court of Common Pleas of Richland County, Ohio, is reversed, and the cause is remanded to the court for further proceedings in accord with law and consistent with this opinion.

By Gwin, P.J., and

Wise, J., concur;

Hoffman, J., dissents

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE

WSG:clw 1103

*Hoffman, J., dissenting*

{¶21} I respectfully dissent from the majority opinion.

{¶22} I do not find the trial court was requested to construe whether the severance agreement was valid. Rather, it merely enforced it. The severance

agreement unambiguously prohibits Appellant from bringing any action or claim against Appellee.

{¶23} The core issue - whether the severance agreement extinguishes or supersedes the previously executed covenant not to complete - is not yet a case in controversy. When Appellant elected to execute the severance agreement without specific reference to the prior covenant not to complete, he placed himself at risk of a subsequent action by Appellee to attempt to enforce it. Hindsight does not now warrant ignoring the unambiguous terms of the severance agreement.

{¶24} I would affirm the trial court's decision.

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HON. WILLIAM B. HOFFMAN

