NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

RONALD FERRARO Appellant v. M & M INSURANCE GROUP, INC.	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1133 WDA 2016

Appeal from the Order May 12, 2016
In the Court of Common Pleas of Lawrence County
Civil Division at No(s): 10081 of 2010 C.A.

BEFORE: BOWES, LAZARUS, AND OTT, JJ.

MEMORANDUM BY BOWES, J.: **FILED DECEMBER 12, 2017**

At issue in this interlocutory appeal by permission is whether a liquidated damages clause is enforceable. We conclude that the clause in question is valid, affirm the May 12, 2016 order upholding it, and remand.

In 2005, Appellant Ronald Ferraro sold his insurance business to Appellee M & M Insurance Group, Inc. ("M & M"). Integral to the sales contract was a restrictive covenant that expressly prohibited Ferraro from selling any insurance products to the customer list purchased by M & M. Specifically, the contract stated that Ferraro could not, "With respect to the Insurance Accounts and Clients listed in Exhibit 'A' . . . . sell any insurance policies to, or accept any insurance business (which phrase shall include the writing of insurance policies or other such products) from, or engage in any other insurance activities with any of the" insurance accounts sold to M & M. Contract for Sale and Purchase of Insurance Agency, 7/14/05, at 16 (a). The sales contract included a liquidated damages clause in the event that the restrictive covenant was breached. That provision stated:

> Buyer and Seller agree that this agreement not-to-compete is not subject to precise valuation. Therefore, in the event the Seller breaches this Agreement, Seller shall pay forthwith to the Buyer as liquidated damages, and not as a penalty, a sum equal to three and one-half times the gross commissions, the greater of which the Buyer would have received or which Seller shall have received or which shall be received for all insurance business derived from [the accounts sold by Ferraro to M & M].

Id. at 16(b).

On February 11, 2010, M & M instituted this action claiming that Ferraro had violated the restrictive covenant by accepting business from and selling insurance to Insurance Accounts and Clients listed in Exhibit A to the agreement of sale of Ferraro's insurance business. The matter was scheduled for a jury trial, and, during pretrial proceedings, the trial court preliminarily indicated that it would disseminate a proposed instruction requested by Ferraro that M & M had to prove a causal link between Ferraro's conduct and M & M's loss of the accounts. This instruction was premised upon Ferraro's position that, if clients in the accounts bought by M & M came to him to purchase insurance, he was not responsible for those decisions, and that, instead, poor service from M & M caused the clients to leave that establishment and use Ferraro as their insurance agent.

After initially deciding to give Ferraro's proposed instruction, the trial court changed course, and concluded that, based upon the language in the agreement of sale, M & M did not have to prove that Ferraro's conduct caused any accounts to switch from M & M to Ferraro. After that ruling, Ferraro maintained that the liquidated damages clause was unenforceable as a penalty. The trial court, at first, agreed with Ferraro's position, ruling that the clause was unenforceable. M & M then filed a motion for reconsideration, and the trial court vacated its order. It held that the liquidated damages clause was not an unenforceable penalty, and, in the order ruling that the clause could be enforced, included language permitting an interlocutory appeal on the question. Ferraro applied for permission to file an interlocutory appeal from the certified order. We accepted jurisdiction, and Ferraro raises these issues on appeal:

> [1.] Whether enforcing a provision for liquidated damages when a party's breach does not cause actual harm to the non-breaching party is considered a penalty under the tests outlined in ***Holt's Cigar Co. v. 222 Liberty Associates***, 591 A.2d 743 ([Pa.Super.] 1991).
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> [2.] Alternatively, if the Liquidated Damages provision is not a penalty, is a non-breaching party required to prove that the breaching party caused some harm to the non-breaching party.

Appellant's brief at 8.

To summarize, Ferraro's position on appeal is that, if there is no need for M & M to prove that Ferraro's conduct caused the customers to leave M & M for their insurance needs and to seek insurance products from Ferraro, then the liquidated damages clause is an unenforceable penalty.[1] He therefore insists that the trial court should instruct the jury that M & M must establish that Ferraro's conduct caused the customers to leave M & M and buy insurance from Ferraro. Accordingly, if we resolve the second issue presented on appeal in favor of Ferraro, then the first issue would be rendered moot. Hence, the questions presented will be addressed in reverse order.

We first examine whether the contract provides that the liquidated damages clause is not triggered unless M & M proves that Ferraro's conduct caused the alleged flight of clients from M & M to Ferraro. The interpretation of a contract is a question of law; our standard of review is *de novo* and our scope of review is plenary. ***Genaeya Corp. v. Harco Nat. Ins. Co.***, 991 A.2d 342, 346 (Pa.Super. 2010). As we reiterated in ***Ramalingam v. Keller Williams Realty Grp., Inc.***, 121 A.3d 1034, 1046 (Pa.Super. 2015), the "fundamental rule in interpreting the meaning of a contract is to ascertain and give effect to the intent of the contracting parties," and the parties' intent in an agreement "is to be regarded as being embodied in the

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[1] M & M's position is that the issue of the illegality of the clause was waived since Ferraro did not raise it until the pretrial proceedings. However, Ferraro's assertion before the trial court was that the clause was unenforceable only if M & M did not have to prove causation. The question of whether M & M had to establish causation did not arise until pretrial proceedings, when Ferraro asked for a jury instruction to that effect. In light of the procedural circumstances, we decline to find waiver.

writing itself." This Court is not permitted to either "assume that a contract's language was chosen carelessly," or that "the parties were ignorant of the meaning of the language they employed." ***Id***. Accordingly, "[w]hen a writing is clear and unequivocal, its meaning must be determined by its contents alone." ***Id***. Language is ambiguous solely when "it is reasonably susceptible of different constructions and capable of being understood in more than one sense." ***Id***.

The contract at issue herein stated that Ferraro could not "sell any insurance policies to, or accept any insurance business (which phrase shall include the writing of insurance policies or other such products) from, or engage in any other insurance activities with any of the" accounts Ferraro sold to M & M. The language thus clearly and unambiguously prohibits Ferraro from accepting any insurance business from the accounts in question, and it prohibits Ferraro from selling insurance policies or insurance products to those clients listed in the accounts. Simply put, the contact in question does not require that Ferraro solicit the clients nor does the language, to any extent, suggest that, if the clients are not satisfactorily serviced by M & M, then Ferraro becomes free to accept insurance business from the unhappy clientele.

The contract clearly and unambiguously does not permit Ferraro to accept any insurance business from those client accounts that M & M purchased as part of the sale of Ferraro's insurance business. The manner in which the clients reached Ferraro is simply not relevant. The contract language in question is not susceptible to any other meaning. Accordingly, M & M need not establish that Ferraro's conduct caused the clients to approach him. If Ferraro sold insurance policies or insurance products to or accepted insurance business from the clients in the accounts that he sold to M & M, then he stands in breach of the restrictive covenant.

Ferraro imports concepts of tort causation into a matter that is simply a question of contract construction. "To show a breach of contract, a party must establish: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages." ***York Dev. Ltd. P'ship v. Atl. Wireless Grp., Inc.***, No. 1519 MDA 2016, 2017 WL 4351415, at *4 (Pa.Super. 2017). In the present case, the essential terms of the contract were negotiated by the parties. M & M paid consideration for the accounts and clients listed in Exhibit A to the binding agreement. The contract does not state that, if M & M's conduct resulted in the clients' return to Ferraro for insurance needs, then the restrictive covenant was inapplicable. Hence, we reject Ferraro's position that M & M had to prove that Ferraro caused the clients to return to him for their insurance in order to establish a breach of contract.[2]

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[2] Appellant asserts that, if the contract did not require a causative connection between the clients' use of Ferraro, then it was unenforceable "as
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We now address whether, since M & M does not have to prove that Ferraro caused the switch in clientele, the liquidated damages clause is punitive and unenforceable. A liquidated damages clause that is the equivalent of a penalty is not valid. ***Palmieri v. Partridge***, 853 A.2d 1076 (Pa.Super. 2004). "To be enforceable, liquidated damages must be a reasonable forecast of the possible harm to the non-breaching party." ***Id***. at 1080. The liquidated damage clause at issue in this case provides:

> Buyer and Seller agree that this agreement not-to-compete is not subject to precise valuation. Therefore, in the event the Seller breaches this Agreement, Seller shall pay forthwith to the Buyer as liquidated damages, and not as a penalty, a sum equal to three and one-half times the gross commissions, the greater of which the Buyer would have received or which Seller shall have received or which shall be received for all insurance business derived from [the accounts sold by Ferraro to M & M].

Contract for Sale and Purchase of Insurance Agency, 7/14/05, at 16 (b).

A liquidated damages clause sets forth "the sum a party to a contract agrees to pay if he breaks some promise, and which, having been arrived at by a good faith effort to estimate in advance the actual damage that will

(Footnote Continued)

a matter of public policy." Appellant's brief at 21. He provides not a single legal citation in support of this position. The agreement in question was for the sale of a business. We can perceive of no public policy that would be violated by contract language that provides that the seller of a business may not service client accounts that he sold to the buyer of the business for consideration as part of the business transaction. Indeed, such restrictive covenants are essential so that a party does not buy a business and then immediately face competition in the same market from the seller, who would have a pre-existing relationship with the customer base and an unfair advantage.

probably ensure from the breach, is legally recoverable . . . if the breach occurs." ***Pantuso Motors, Inc. v. CoreStates Bank, N.A.***, 798 A.2d 1277, 1282 (Pa. 2002) (citation omitted). M & M averred in this action that Ferraro breached his promise to M & M by selling insurance policies or products and did insurance business with respect to client accounts that he sold to M & M. The parties to this contract agreed to the formula set forth in the liquidated damages clause as a reasonable estimate of actual damages that would be caused by the breach alleged herein. Furthermore, the parties acknowledged that the clause in question was not a penalty.

In ***Geisinger Clinic v. Di Cuccio***, 606 A.2d 509 (Pa.Super. 1992), this Court affirmed the trial court's decision to uphold a liquidated damages clause in the face of Di Cuccio's challenge that it constituted an invalid, unenforceable penalty clause. Di Cuccio had entered a contract containing the clause in question when he sold his business to Geisinger and went to work for that entity. Therein, we observed, "Early in the history of our court, we delineated the four criteria to differentiate a liquidated damages provision from a penalty or forfeiture term in a restrictive covenant clause of an employment agreement." ***Id***. at 516. Those four benchmarks include:

> (1) 'When, independently of the stipulation, the damages would be wholly uncertain and incapable or very difficult of being ascertained, except by mere conjecture, then the damages will usually be considered liquidated:'
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> (2) 'Where a party binds himself in a sum named not to carry on any particular trade, business or profession, within certain limits

> or within a specified period of time, the sum named will be regarded as liquidated damages and not as a penalty:'
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> (3) 'A sum fixed as security for the performance of a contract containing a number of stipulations of widely different importance, breaches of some of which are capable of accurate valuation, for any of which the stipulated sum is an excessive compensation, is a penalty.'
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> (4) 'When the covenant is for the performance of a single act or several acts, or the abstaining from doing some particular act or acts, which are not measurable by any exact pecuniary standard, and it is agreed that the party covenanting shall pay a stipulated sum as damages for a violation of any of such covenants, that sum is to be deemed liquidated damages and not a penalty:'

Id. (quoting ***Stover v. Spielman**,* 1 Pa.Super. 526, 530–31 (1896)).

In this case, the actual damages from Ferraro's purported breach for continuing to service his old clients is uncertain and difficult to ascertain. It is not merely the loss of the sale of the policies that allegedly have been purchased from Ferraro. Rather, M & M bought an established insurance business, with the associated extant client base and goodwill. The clients that Ferraro may have serviced, in violation of the covenant not to compete, would generate commissions beyond those emanating from the insurance that Ferraro may have already sold to them. That book of business removes from M & M's ambit associated good will and referral of other clients. Those client accounts that Ferraro sold to M & M and allegedly continued to keep as clients will generate business for him far into the future as they could purchase other policies, and could generate new clients for Ferraro by recommendation to other people. When the amount of damages can stretch into the future and increase with the passage of time, the amount of damages cannot be ascertained. ***Id***.

The book of client accounts was the core of the business for which M & M paid consideration. Since the liquidated damages clause is associated with Ferraro's agreement not to compete with M & M with respect to the business that Ferraro sold to that entity, the second and fourth criteria set forth above with respect to establishing whether a liquidated damages clause is a penalty are satisfied. ***Geisinger Clinic***, ***supra***. The sum herein was not security for the performance of various contractual obligations of differing importance. The sum was set to ensure performance of the critical aspect of the sale of the business. Thus element three was satisfied. The liquidated damages clause is not a penalty.

Ferraro relies upon ***Holt's Cigar Co. v. 222 Liberty Associates****,* 591 A.2d 743 (Pa.Super. 1991), wherein we observed that, in determining the validity of a liquidated damages clause, we must consider the extent to which the stipulated sum compares to the actual "injury which may be caused" by the breach in question. Appellant's brief at 12. Herein, Ferraro ignores that M & M will suffer damages for loss of future business as outlined *supra*. His purported action of selling insurance to the client accounts that he already sold to M & M is not the only damages suffered by M & M. Those clients, if they did switch to Ferraro, could continue to look to Ferraro for their insurance needs in the future and could recommend Ferraro to other people. Thus, we do not just examine the policies that Ferraro may or may not have sold. In light of the loss of possibly significant future insurance business, we conclude that three and one-half times the amount of his commission is a fair estimate of the actual damages that Ferraro caused to M & M if he continued to sell clients insurance policies or products in violation of the restrictive covenant. Accordingly, we find that the liquidated damages clause is not a penalty, and the trial court properly ruled that it was enforceable.

Order affirmed. Case remanded for further proceedings consistent with this adjudication. Jurisdiction relinquished.

Judgment Entered.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 12/12/2017