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2016 IL App (3d) 150516-U

Order filed February 18, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2016

DEERE EMPLOYEES CREDIT UNION,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
Plaintiff-Appellant/)	Rock Island County, Illinois,
Cross Appellee,)	
)	
v.)	Appeal No. 3-15-0516
)	Circuit No. 15-L-37
BRIAN S. SMITH,)	
)	Honorable Clarence M. Darrow,
Defendant-Appellee/)	Judge, Presiding.
Cross Appellant.)	

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice O'Brien and Justice Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* After properly finding that the restrictive covenants at issue were overly broad and unenforceable as written, the court improperly granted injunctive relief to enforce select provisions of the unenforceable contract.
- ¶ 2 Plaintiff-Appellant Deere Employees Credit Union (DECU) filed a lawsuit against Defendant-Appellee, Brian Smith (Smith), for breach of the restrictive covenants dictating Smith's postemployment business activities set forth in a "Representative Agreement" (Contract)

drafted by DECU. The trial court found the nonsolicitation provisions of the Contract were overly broad and unenforceable as written. Before granting DECU's request for injunctive relief, the court struck certain contractual provisions and modified other language the parties included in the original 2009 Contract.

¶ 3 DECU appeals the trial court's decision refusing to enforce certain restrictive provisions contained in the original Contract. Smith cross-appeals on the grounds that, since the restrictive covenants were overly broad, the trial court erred by granting injunctive relief to enforce any portion of the unenforceable Contract.

¶ 4 **BACKGROUND**

¶ 5 DECU is a closed credit union that offers banking services to approximately 32,000 members. Prior to 2009, DECU and CUNA Brokerage Services executed an agreement that allowed CUNA to station a representative at the main DECU branch in Moline for the purpose of soliciting DECU's customers to purchase certain financial products. CUNA selected and assigned Smith to serve as CUNA's representative at the Moline location from 2002 until 2009.

¶ 6 In 2009, DECU elected to create and staff an in-house investment division. At that time, DECU approached Smith and requested him to continue his business relationship with DECU by agreeing to join DECU's in-house investment division. Smith accepted DECU's offer and terminated his relationship with CUNA. Smith signed a contract drafted by DECU that dictated the terms of his new direct relationship with DECU. After signing the Contract, Smith continued to personally provide investment information to DECU members in his new capacity as a member of the DECU in-house investment division.

¶ 7 The relevant portions of the restrictive covenants contained in the 2009 Contract at issue on appeal are set forth below:

"Representative agrees that for the two (2) year period immediately following the termination of this Contract, Representative shall not for any reason directly or indirectly, by any means or device whatsoever, for himself/herself or on behalf of or in conjunction with any person, partnership, corporation or association, market to, sell to, or solicit for the purpose of selling to or marketing to any of DECU's clients and members which Representative served while employed by DECU within the twenty-four (24) month period immediately preceding the termination of this Contract, any insurance product, annuity, mutual fund, securities brokerage product or service or any other financial product or service that is similar to any product or service marketed through the MEMBERS Financial Services program. As used in this Section Q1, DECU's clients shall include a) any person who has purchased a product or service or established a securities brokerage account through the MEMBERS Financial Services program (whether sold or established by Representative or by another representative); and b) any person who within the thirty (30) day period immediately preceding the termination of this Contract had contact with Representative having as its purpose (or one of its purposes) the discussion of products and/or services (including but not limited to securities brokerage services) offered through the MEMBERS Financial Services program.

Representative further agrees that for the two (2) year period immediately following the termination of this Contract, Representative shall not target members of DECU at which Representative was located or whose members Representative served while employed by DECU within the twenty-four (24) month period immediately preceding the termination of this Contract for the purpose of selling to or marketing to

such DECU members any insurance product, annuity, mutual fund or securities brokerage service or other financial product or service that is similar to any product or service marketed through the MEMBERS Financial Services program."

¶ 8 DECU employed other investment advisors in addition to Smith, but Smith did not have access to any other investment advisor's client files and information. Smith became DECU's senior financial advisor and managed approximately 73% of DECU investment accounts, valued at \$110 million, and served approximately 468 DECU members.

¶ 9 Several years after joining DECU, on Friday, March 27, 2015, Smith placed a resignation letter on his DECU manager's desk. After leaving DECU, Smith began a business relationship with LPL Financial and Vision Point (LPL) as an independent contractor. Smith denied removing documents, lists, business plans, forms or any other DECU documents following his resignation. However, Smith admitted that he created a handwritten list of the names of approximately 200-250 clients that he served at DECU. Smith claimed that he created the list from his own memory and the internet, and without the assistance of any DECU materials. With LPL's assistance, Smith sent "tombstone" letters notifying these 200-250 individuals he personally served during his time with DECU as follows: "I am pleased to announce that as of March 30, 2015, I have joined Vision Point Advisory Group and LPL Financial." Smith included his new contact information in the letter.

¶ 10 On April 7, 2015, DECU filed a verified complaint, seeking monetary damages for breach of the restrictive provisions of the Contract in count I. In an affidavit attached to the complaint the DECU CEO, Kurt Lewin, swore that the restrictions in Smith's Contract were necessary to protect DECU's interests.

¶ 11 Count II of the complaint prepared by DECU requested specific injunctive relief prohibiting Smith from:

"(a) Violating the post-employment restrictions in the Representative Contract;

(b) Directly or indirectly, by any means or device whatsoever, for himself or on behalf of or in conjunction with any other person, partnership, corporation or association, marketing to, selling to or soliciting for the purpose of selling to, or marketing to any of DECU's clients and members including, but not limited to, those whom Smith served while employed by DECU within the 24-month period immediately preceding the termination of his employment as to any insurance product, annuity, mutual fund, securities brokerage product or services or other financial product or service that is similar to any product or services marketed through DECU's financial services program; and

(c) Target persons who were members of DECU within the twenty-four (24) month period immediately preceding the termination of his employment for the purpose of selling to or marketing to such DECU members any insurance product, annuity, mutual fund or securities brokerage service or other financial product or service that is similar to any product or service.

(d) Using any confidential information related or pertaining in any way to DECU and/or its members that he learned or obtained while employed by DECU."

DECU did not amend their pleadings during these proceedings.

¶ 12 Smith resisted the request for preliminary injunctive relief. Smith argued the Contract was unnecessarily broad, unenforceable as a matter of law, and could not be used to grant injunctive relief.

¶ 13 The hearing on the contested preliminary injunction occurred on June 1, 2015. During this hearing, Smith testified that his current clients included approximately 12-17 DECU members. On June 25, 2015, the court granted DECU's request for a preliminary injunction, in part, with an expiration date of March 27, 2017 at 12:01 a.m. On that date, the court found "[t]here is no question that the restrictive covenant is impermissibly overly broad, imposes undue hardship upon Smith and impairs the public's interest in an efficient marketplace, which makes it patently unreasonable and therefore unenforceable." Then, based on equitable considerations, the court entered an order enjoining Smith from marketing to or soliciting a narrower category of persons. The court's order states as follows:

"A. Smith is enjoined from directly or indirectly, by any means or device whatsoever, for himself or on behalf or in conjunction with any person, partnership, corporation or association, market to or solicit for the purpose of selling to or marketing to any of DECU's clients and members which Smith served while employed by DECU. Should any of these persons independently initiate contact with Smith on his/her own volition, then Smith may respond to the contact an equal number of times without violating this order.

B. The court refuses to enforce, and strikes, the provision of the restrictive covenant prohibiting Smith from making sales to any persons.

C. Bond remains at \$25,000.

D. This injunction shall expire on at [*sic*] 12:01 a.m. on March 27, 2017, or upon further order of this Court, whichever first occurs."

DECU filed an interlocutory appeal and Smith subsequently filed his interlocutory cross-appeal.

¶ 14

ANALYSIS

¶ 15

On appeal, DECU emphasizes that DECU is not attempting to enforce the broadest provisions of the restrictive covenants at issue. DECU argues that the narrow scope of the preliminary injunctive relief they requested should have been allowed, without judicial modification.

¶ 16

On the other hand, Smith's cross-appeal argues the restrictive covenants contained in the written agreement invalidate the entire Contract. Therefore, Smith argues the trial court erred by enforcing any part of the overly broad Contract concerning Smith's postemployment activities.

¶ 17

We note that this appeal is interlocutory in nature since the merits of the issues raised in DECU's two-count complaint remain pending. Ill. S. Ct. R. 307 (eff. Feb 26, 2010). In general, a trial judge's decision to grant or deny a preliminary injunction is reviewed for an abuse of discretion. *Callis, Papa, Jackstadt & Halloran, P.C. v. Norfolk & Western Ry. Co.*, 195 Ill. 2d 356, 377 (2001).

¶ 18

However, the Illinois Supreme Court has held that:

"[W]hether injunctive relief should issue to enforce a restrictive covenant not to compete in an employment contract depends upon the validity of the covenant, the determination of which is a question of law. [Citations]

Accordingly, we review that determination *de novo*." *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63 (2006) (citing *Retina Services, Ltd. v. Garoon*, 182 Ill. App. 3d 851, 856 (1989); *The Agency, Inc. v. Grove*, 362 Ill. App. 3d 206, 215 (2005)).

Since DECU sought injunctive relief to enforce some, if not all, of the restrictive covenants set out in the Contract Smith signed in 2009, we conclude the undisputed language of the written

agreement involves a question of law and requires our *de novo* review. *Mohanty*, 225 Ill. 2d at 63; *The Agency, Inc.*, 362 Ill. App. 3d at 215.

¶ 19 As argued by DECU, a trial court may properly grant both injunctive relief and subsequent monetary damages if either remedy would be insufficient alone. *Prairie Eye Center, Ltd. v. Butler*, 329 Ill. App. 3d 293, 304 (2002). The two-count complaint in this case requested both injunctive relief and monetary damages. Further, a preliminary injunction may be required in order to merely preserve the status quo before a trial on the merits occurs. *Office Mates 5, North Shore, Inc. v. Hazen*, 234 Ill. App. 3d 557, 567 (1992) (citing *Label Printers v. Pflug*, 206 Ill. App. 3d 483 (1991)). Consequently, DECU filed additional pleadings requesting an injunction to preserve the status quo until the merits of the complaint could be resolved.

¶ 20 The case law provides that the party seeking this type of judicial intervention to maintain the status quo must establish four considerations before this extraordinary relief is proper. *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1089 (2007) (quoting *Audio Properties, Inc. v. Kovach*, 275 Ill. App. 3d 145, 147 (1995)). The party seeking injunctive relief, in this case DECU, must demonstrate the following: "(1) a clearly ascertained right in need of protection, (2) irreparable injury in the absence of an injunction, (3) no adequate remedy at law, and (4) a likelihood of success on the merits of the case." *Mohanty*, 225 Ill. 2d at 62 (2006) (citing *People ex rel. Klaeren v. Village of Lisle*, 202 Ill. 2d 164 (2002)).

¶ 21 With respect to the first issue, DECU claims that the misuse of restricted confidential information, in part, is one of the reasons DECU requested the court to maintain the status quo by allowing injunctive relief. In this case, we agree DECU had a protectable interest to maintain goodwill, continue ongoing investment relationships with existing DECU members, and to facilitate the confidentiality of their clients' investment preferences.

¶ 22 We would be remiss if we did not address Smith’s claim that he relied on his memory to compile the list of DECU clients and members targeted to receive his tombstone letter. This assertion triggers a healthy amount of skepticism. Nonetheless, it does not matter for purposes of this appeal whether Smith compiled this information based on his memory or by other means. The point is that DECU was entitled to contractually prevent Smith from using this type of information for a reasonable amount of time following Smith’s resignation. We agree DECU has a business interest worthy of protection in the case at bar.

¶ 23 The next consideration for a preliminary injunction involves whether DECU could suffer irreparable harm, during the pendency of the contract action, without the preliminary injunction in place. Based on this record, we conclude DECU made a sufficient showing that irreparable injury could occur from Smith's use of information he obtained during his relationship with DECU members and clients. The existence of this potential irreparable harm also supports DECU’s assertion that there may be an absence of an adequate remedy at law.

¶ 24 Thus, the pivotal issue in this case becomes whether DECU established a likelihood of success on the merits, the fourth requirement for injunctive relief contained in well-accepted case law. At this juncture, we note DECU has not amended its two-count complaint to date. This complaint is based solely on contract law. The injunctive relief requested in count II of the complaint was “not limited to” those clients and members Smith served within the last 24 months of his employment with DECU.¹

¹Count II requested the court enter an order prohibiting Smith from “[d]irectly or indirectly” by any means and on his or some other entity’s behalf “marketing to, selling to or soliciting for the purpose of selling to, or marketing to any of DECU's clients and members *including, but not limited to*, those whom Smith served” during the 24-month period preceding his termination. (Emphasis added.)

¶ 25 Next, we turn to the language of the contract itself. If the contract is not enforceable, then DECU does not succeed in presenting a “fair question concerning the existence of the claimed right.” *Smith v. Department of Natural Resources*, 2015 IL App (5th) 140583, ¶ 21. Without a likelihood that DECU can enforce the contract, as written by DECU, then the grant of a preliminary injunction would not be proper.

¶ 26 The case law recognizes that contractual agreements restricting a person’s ability to compete with and solicit from existing business must be carefully *drafted* because such restrictive covenants infringe on free trade and will be carefully scrutinized by the courts when challenged. *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437, 447 (2007) (citing *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 75 (1992)). Restrictive covenants are not favored because these agreements can be misused to the detriment of the public’s interest in maintaining free trade in the marketplace. *Id.* at 456.

¶ 27 Now we turn to the issue at the heart of this appeal, namely, whether DECU’s Contract is enforceable as a matter of law, making it likely that DECU will prevail once the court reaches the merits of their complaint. Our supreme court has provided helpful guidance by holding that a reasonable restrictive covenant is enforceable when the language is: (1) “no greater than is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public.” *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 17 (citing Restatement (Second) of Contracts § 187 cmt. b, §188(1) & cmts. a, b, c (1981)).

¶ 28 In this case, the trial court obviously considered our supreme court's guidance and found, "There is no question that the restrictive covenant is impermissibly overly broad, imposes undue hardship upon Smith and impairs the public's interest in an efficient marketplace, which makes it

patently unreasonable and therefore unenforceable." The contractual language at issue is set forth below:

"Representative agrees that for the two (2) year period immediately following the termination of this Contract, Representative shall not for any reason directly or indirectly, by any means or device whatsoever, for himself/herself or on behalf of or in conjunction with any person, partnership, corporation or association, market to, sell to, or solicit for the purpose of selling to or marketing to any of DECU's clients and members which Representative served while employed by DECU within the twenty-four (24) month period immediately preceding the termination of this Contract, any insurance product, annuity, mutual fund, securities brokerage product or service or any other financial product or service that is similar to any product or service marketed through the MEMBERS Financial Services program.

Representative further agrees that for the two (2) year period immediately following the termination of this Contract, Representative *shall not target members of DECU at which Representative was located* or whose members Representative served while employed by DECU within the twenty-four (24) month period immediately preceding the termination of this Contract for the purpose of selling to or marketing to such DECU members any insurance product, annuity, mutual fund or securities brokerage service or other financial product or service that is similar to any product or service marketed through the MEMBERS Financial Services program." (Emphasis added.)

¶ 29 The italicized language we have emphasized above clearly expresses an intent to discourage, if not prevent, Smith from targeting any, and therefore *every*, DECU member affiliated with the Moline main branch regardless of whether Smith had any contact with those members. The language before the disjunctive term “or” is not limited only to those “members” of the Moline branch that Smith served.

¶ 30 The agreement also broadly defines who should be considered a DECU client, for purposes of the provisions of the Contract pertaining to “clients and members.” The language defining client reads as follows:

“a) any person who has purchased a product or service or established a securities brokerage account through the MEMBERS Financial Services program (*whether sold or established by Representative or by another representative*); and

b) any person who within the thirty (30) day period immediately preceding the termination of this Contract had contact with Representative having as its purpose (or one of its purposes) the discussion of products and/or services (including but not limited to securities brokerage services) offered through the MEMBERS Financial Services program.” (Emphasis added.)

We observe the contractual definition of a DECU client, set forth above, is *not* limited to the smallest group of persons Smith served in the 24 months preceding his resignation.

¶ 31 DECU seeks to avoid the conclusion that this very broad nonsolicitation language renders the entire Contract unenforceable. In support of this position, DECU urges this court to view the nonsolicitation language in isolation. DECU argues, when viewed separately from the other contractual restrictions, the nonsolicitation provisions are subject to less scrutiny on review. However, the case law provides that, at minimum, a nonsolicitation clause must be narrowly

tailored to apply only to "activities that threaten the employer's interest" and is "reasonably related to the employer's interest in protecting customer relations that its employees developed while working for the employer." *Cambridge Engineering*, 378 Ill. App. 3d at 452, 455 (citing *Lawrence & Allen, Inc. v. Cambridge Human Resource Group, Inc.*, 292 Ill. App. 3d 131, 138, 140 (1997)).

¶ 32 In *Cambridge Engineering*, the court held that a restrictive nonsolicitation covenant was not enforceable where the covenant applied to "any customer" regardless of whether the employee subject to the restrictions had prior contact with the customer. *Id.* at 455. *Cambridge Engineering* provides persuasive authority for the trial court's ruling in this case, which found that this particular Contract was overly broad and unenforceable. We cannot quarrel with the trial court's finding that the Contract, as written, impacted the investment choices for an unnecessarily broad category of members and clients.

¶ 33 In the case at bar, we conclude, as did the trial court, the broad and expansive postemployment restrictions of this Contract render them unenforceable for two reasons. First, the covenants, as written, broadly foreclose Moline DECU members and clients, without any previous professional relationship to Smith, from choosing Smith as their investment advisor until 2017. Second, the covenants, as written, negatively impact Smith's ability to engage in his profession by preventing Smith from accepting new customers who may have been current or past clients or members of the Moline DECU, even when Smith had not provided services to those persons within his last 24 months at DECU. Finally, we hold the broad restrictions in this particular Contract could lead to an inevitable "chilling effect on employee posttermination activities" that would be injurious to the public marketplace and also place an undue hardship upon Smith. *Cambridge Engineering*, 378 Ill. App. 3d at 456.

¶ 34 Therefore, since the Contract was unenforceable as written, DECU did not establish a likelihood of success in the pending lawsuit based on contract law as required to support DECU's request for preliminary injunctive relief. *Mohanty*, 225 Ill. 2d at 62. Consequently, we conclude DECU is not entitled to the expanded injunctive relief they now seek on appeal.

¶ 35 Next, we address Smith's cross-appeal. Smith asserts the trial court erred by granting any or partial injunctive relief in favor of DECU because the Contract, as a whole, is injurious to the public and unenforceable. In response, DECU asserts in their written brief on appeal, as follows: "DECU asked the Court to enforce one provision of Smith's Representative Contract that was much less restrictive than another provision." Consequently, DECU opposes Smith's cross-appeal on the grounds that DECU was entitled to receive the partial injunctive relief that was allowed by the trial court because DECU sought to enforce only the "less restrictive" provisions of the Contract.

¶ 36 Significantly, DECU did not include the severability language necessary to salvage this Contract in the event that the trial court found select provisions of the Contract were overly broad and unenforceable as written. Thus, DECU's argument for selective review of isolated language is not persuasive. Further, the absence of a severability clause distinguishes this case from the case law relied on by DECU to support selective enforcement.

¶ 37 We next consider whether the trial court correctly modified the terms of the Contract before granting injunctive relief. Judicial reformation of the selective, problematic language in this Contract is not favored because it "would give employers an incentive to draft restrictive covenants as broadly as possible, since the courts would automatically amend and enforce them to the extent that they were reasonable in the particular circumstances of each case." *Cambridge Engineering*, 378 Ill. App. 3d at 456. If the court finds, as we do here, that the "unenforceable

term is an essential part of the contract, then the contract is not severable and the entire contract is void.” *Kepple and Co., Inc. v. Cardiac, Thoracic and Endovascular Therapies, S.C.*, 396 Ill. App. 3d 1061, 1066 (2009) (citing Restatement (Second) of Contracts § 184(1), cmt. a, at 30 (1981)). Therefore, we rule in Smith’s favor on his cross-appeal and vacate the preliminary injunction in its entirety.

¶ 38

CONCLUSION

¶ 39

The matter is remanded to the trial court with directions to vacate the preliminary injunction and for further proceedings to determine the merits of the issues raised in plaintiff’s two-count complaint.

¶ 40

Reversed and remanded with directions.