2015 IL App (1st) 140786-U

No. 1-14-0786

Fourth Division
March 12, 2015

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ARTHUR J. GALLAGHER & CO.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
v.	)	
	)	No. 14-CH-3232
LOUIS ROI,	)	
Defendant-Appellee.	)	Honorable
	)	Neil Cohen,
	)	Judge, presiding.
	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's order granting defendant's motion to dismiss is reversed where contractual terms of an employment agreement survived the expiration of a term of employment when it included the conversion to an at will status.

¶ 2 Plaintiff, Arthur J. Gallagher & Co., (Gallagher) brought this action to obtain equitable relief and to recover damages against defendant, Louis Roi (Roi), caused by the alleged solicitation of Gallagher's clients in breach of a non-solicitation provision in their employment agreement (Agreement).

¶ 3 Roi was an employee of Gallagher, an insurance brokerage and risk management services firm, from 2000 until Roi resigned in January 2014 and went to work for Gallagher's competitor, Hylant. In February, 2014, Gallagher received letters from three long-term customers informing Gallagher that they were moving their insurance business to Hylant. Roi had managed these accounts. Gallagher filed a verified complaint against Roi seeking injunctive and other relief. Count I of the complaint alleged that Roi violated a non-solicitation provision in his employment agreement, which Roi and Gallagher had entered into in 2000. The circuit court denied Gallagher's emergency motion seeking injunctive relief and later granted Roi's motion to dismiss count I of the complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619 (West 2012). Gallagher appeals the dismissal of count I. For the reasons that follow, we reverse.

¶ 4 BACKGROUND

¶ 5 Gallagher and Roi entered into an employment agreement dated June 5, 2000 (Agreement); the Agreement defines Gallagher as the "Corporation" and Roi as the "Executive." Section 1 of the Agreement states:

> "Section 1. Employment and Term.
>
> The Corporation employs the Executive and the Executive agrees to serve as an employee of the Corporation with the duties set forth in Section 2 for a term (the "Term of Employment") beginning on June 5, 2000 and ending on May 31, 2002 unless earlier terminated under Section 4 or 5. Employment of the Executive shall not necessarily cease as of the expiration of the Term of Employment: however, employment thereafter shall be on at will basis."

¶ 6 Section 2 of the Agreement describes Roi's duties "during the Term of Employment." Section 3 provides Roi with, among other things, an annual base salary of $175,000 "during the Term of Employment." Section 4 lists various circumstances under which the "Corporation shall have the right to terminate the employment of Executive prior to the end of the Term of Employment and with no liability on the part of Corporation." Section 5, entitled "Early Termination by Executive," provides that the "Executive shall have the right to terminate his employment with Corporation prior to the end of the Term of Employment and with no liability on the part of the Executive upon the material breach of this agreement by Corporation after having given Corporation notice of such breach and a reasonable opportunity to cure such breach."

¶ 7 Section 6 of the Agreement provides, in part, that:

> "[t]he Executive acknowledges that the Executive's services to the Corporation are of a unique character which gives them a special value to the Corporation, the loss of which cannot reasonably or adequately be compensated in damages in an action at law, and that breach of this Agreement will result in irreparable and continuing harm to the Corporation and that therefore, in addition to any other remedy which the Corporation may have at law or in equity, the Corporation shall be entitled to injunctive relief for a breach of this Agreement by the Executive."

¶ 8 In section 7 of the Agreement, entitled "Trade Secrets and Confidential Information," Roi acknowledged that Gallagher's business "depends [*sic*] to a significant degree upon the possession of information which is not generally known to others, and that the profitability of the Corporation's business requires that this information remain proprietary to the Corporation." After defining "Confidential Information," the Agreement provides that "the

Executive agrees that he will not, at any time during his employment by the Corporation, divulge such Confidential Information or make use of it for his own purposes or the purposes of another." Section 7 further states:

> "The Executive recognizes the highly sensitive nature of the Confidential Information to which he will have access during his employment, and acknowledges the Corporation's legitimate interest in safeguarding same from disclosure. Accordingly, the Executive agrees that, for a period of two (2) years following the termination of his employment for any reason whatsoever, he will not divulge the Corporation's Confidential Information or make use of it for his own purposes or the purpose of another."

¶ 9 Section 8 of the Agreement, entitled "Protection of Corporation's Business," provides:

> "The Executive recognizes the Corporation's legitimate interest in protecting, for a reasonable period of time following the termination of the Executive's employment, those Corporation accounts with which the Executive will be associated during his employment. Accordingly, the Executive understands and agrees that for a period of two (2) years following the termination of his employment for any reason whatsoever, he will not, directly, or indirectly, solicit, place, market, accept, aid, counsel or consult in the renewal, discontinuances or replacement of any insurance (including self-insurance) by, or handle self-insurance programs, insurance claims, risk management services or other insurance administrative or service functions for, any Corporation account for which he performed any of the foregoing functions during the two-year period immediately preceding such termination."

¶ 10 Section 9 of the Agreement provides, in part, that the "Agreement shall not be affected by any merger or consolidation or other reorganization of the Corporation and this Agreement shall be binding upon and shall inure to the benefit of the continuing entity or to any successor in interest to the Corporation." Section 10, entitled "Release of Certain Obligations," begins: "Notwithstanding anything contained herein to the contrary, the obligation of the Executive contained in Section 8 shall become null and void and have no further effect immediately upon a Hostile Change in Control of the Corporation as defined herein." The remainder of section 10 includes various definitions, including what constitutes a "Hostile Change in Control."

¶ 11 Section 11 of the Agreement titled Indemnification provides, in part, that:

> "During the term hereof if the Executive is a defendant or threatened to be made a defendant in any litigation because the Executive is an employee of the Corporation, Corporation shall indemnify Executive against all expenses, judgment [*sic*], fines or penalties,*** provided that it is determined by the Corporation, in its sole judgment, that the Executive acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the Corporation."

The Agreement concludes with section 12, which includes various general provisions.

¶ 12 On February 24, 2014, Gallagher filed a verified complaint for injunctive and other relief in the circuit court of Cook County. The complaint alleges, in part, as follows. Roi was an employee of Gallagher until he resigned in January 2014 to accept employment with Hylant. From 2000 through his last day of employment, Gallagher paid Roi $4,149,197 in compensation, including 2013 income of more than $300,000. In February, 2014, Gallagher received "Broker-of-Record" letters from three long-term customers; Roi had managed and

supervised those three accounts. The letters informed Gallagher that the customers were discontinuing their relationships with Gallagher and moving their accounts to Hylant.

¶ 13 The complaint further alleged that:

> "On or around February 7, 2014, Patrick M. Gallagher [Mr. Gallagher's] Executive Vice President-Midwest Region, called Roi, and reminded him about the restriction in his Agreement relating to nonsolicitation of [Gallagher] customers that he worked with at [Gallagher]. [Patrick] Gallagher asked Roi if he had solicited or participated in efforts to bring [Gallagher] insurance customers to Hylant. Roi responded by laughing, and admitted that he had been in contact with several of his [Gallagher] client contacts. Roi admitted that he had instructed his [Gallagher] clients to call his Hylant colleague (named Stuart Scott or Scott Stewart) to obtain insurance from Hylant instead of working directly with Roi."

¶ 14 Gallagher further alleged that, on information and belief, Roi had communications with other Gallagher customers, both before and after he left Gallagher, "soliciting their business for Hylant and directing them about how to discontinue their insurance business" from Gallagher and "bring it to Hylant by working through Scott or other Hylant employees."

¶ 15 Count I of the complaint alleged that Roi breached the Agreement by "soliciting his former [Gallagher] customers and directing them to other Hylant representatives for purposes of discontinuing their business with [Gallagher] and instead purchasing insurance products from Hylant." In count I, Gallagher sought, among other things, (a) a temporary restraining order and preliminary and permanent injunction against Roi enforcing the restrictive covenants in the Agreement and (b) compensatory damages. Count II of the complaint

alleged Roi's breach of two stock option agreements with Gallagher, entered into in 2004 and 2005 respectively. This appeal relates solely to count I.[1]

¶ 16 On the same date that it filed the complaint, Gallagher filed a memorandum of law in support of its emergency motion for a temporary restraining order, preliminary injunction and other relief (the TRO motion). Gallagher argued that the customer non-solicitation provision in section 8 of the Agreement is enforceable, is "no greater than required" to protect Gallagher's legitimate business interest, "does not impose an undue hardship to Roi" and "is not injurious to the public." Appended to the memorandum is an affidavit of Mr. Gallagher regarding his communications with Roi after Roi's resignation, as well as the movement of business to Hylant from Gallagher by three customers whose accounts had been managed at Gallagher by Roi. Mr. Gallagher stated, in addition to the loss of at least $750,000 in annual revenue "[i]f Roi succeeds in moving all of the [Gallagher] accounts he worked on to Hylant, that "[w]hen former employees go to work for [Gallagher's] competitors and steal [Gallagher's] customers without consequences," Gallagher suffers other losses, including damage to its relationships with potential merger partners and shareholders.

¶ 17 On February 26, 2014, Roi filed a verified answer, a response to the TRO motion, and a motion to dismiss count I of the complaint pursuant to section 2-619 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-619 (West 2012). Roi asserted one affirmative defense in his verified answer: "Plaintiff's claims are barred because the restrictive covenant at issue and contained within the 2000 Employment Agreement is not enforceable in 2014 under Illinois law and public policy as the Employment Agreement of which that restrictive covenant was a part expired in 2002."

[1] Roi has represented in his appellate brief that he and Gallagher "recently resolved" the alleged breach that was the basis of count II.

¶ 18 In his motion to dismiss, Roi stated that the Agreement expired twelve (12) years prior to the alleged breach. Contending that under Illinois law, "a non-compete covenant in an expired employment agreement is unenforceable," Roi asserted that "the two year restrictive covenant in Section 8 would be at best valid only until 2004 and therefore not enforceable ten years later in 2014." Arguing that "there is nothing for this Court to enforce," Roi sought dismissal of count I of the complaint.

¶ 19 In his response to the TRO motion Roi argued that, "[t]here is no extreme emergency here to invoke the Court's equitable injunctive power," that Gallagher had adequate legal remedies and "has not pled any irreparable injury," that the Agreement had expired, and that even if Gallagher "can allege a valid and enforceable restrictive covenant," it "has completely failed to allege any actionable conduct under such a covenant." In his affidavit in support of his response, Roi averred, in part, that during and after his employment with Gallagher, "I did not solicit business for Hylant from any [Gallagher] insurance customer nor did I direct them about how to discontinue their insurance business from [Gallagher]."

¶ 20 On February 26, 2014, the circuit court held a hearing on, among other things, the TRO motion. After hearing argument from counsel for Gallagher and Roi, the court denied the motion.

¶ 21 On March 19, 2014, the circuit court heard arguments from counsel for Roi and Gallagher on the motion to dismiss count I of the complaint. The court granted the motion, stating in part: "The termination of employment under this agreement by its own terms using the term of employment, is on May 31, 2002. Here the restrictive covenant in the agreement between Gallagher and Roi is no longer enforceable because the employment agreement had expired per its own terms. [Gallagher's] reading of the contract requests this Court to impose

a potentially indefinite restrictive covenant of unlimited duration based on the plaintiff's at-will status." The court further stated "I am convinced that because there is no language in the employment agreement, providing that any of the terms of the employment agreement, as it defines itself, would remain in effect after May 31, 2002." It is from this order that Gallagher appeals.

¶ 22 ANALYSIS

¶ 23 Gallagher contends on appeal that the circuit court erred in ruling that the entire agreement expired, including the non-solicitation provision contained within, because of the language in section 1. Gallagher contends that Illinois law supports the enforcement of the agreement after Roi's employment contractually converted from a Term of Employment to at will status.

¶ 24 Initially, we note Roi's observation that Gallagher did not appeal the denial of its motion for a TRO. See Ill. S. Ct. R. 307(d) (eff. Feb. 26, 2010) (providing that petitions for review of the denial of a TRO must be filed within two days of the denial or entry of the order from which review is sought). Roi contends that since the circuit court "held, as a basis for denying the TRO, that the restrictive covenant clause in the 2000 Employment Agreement was not enforceable in 2014, [Gallagher's] instant appeal is subject to the *res judicata* effect of the TRO ruling. As discussed below, we reject this argument.

¶ 25 The doctrine of *res judicata* provides that a "final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008) (Internal citation omitted). Three requirements must be satisfied for the doctrine to apply: "(1) a final judgment on the merits has been rendered by a court of competent jurisdiction;

(2) an identity of cause of action exists; and (3) the parties or their privies are identical in both actions." *Id*.

¶ 26 We disagree with Roi's contentions that the circuit court's denial of the TRO "is a final judgment on the merits" and that "there is an identity of causes of action." Based on our review of the transcript of the February 26, 2014 hearing on the TRO motion, we conclude that the circuit court's denial of the TRO was based not only on its review of the Employment Agreement, but also other factors such as the adequacy of money damages and Roi's affidavit denying that he had solicited Gallagher's customers. While the circuit court expressed skepticism about the continued viability of the Employment Agreement during the hearing, the court expressly declined to decide such issue because it recognized that it had yet to rule on the section 2-619 motion. 735 ILCS 5/2-619 (West 2010).

¶ 27 In discussing the likelihood for success on the merits as part of its TRO analysis, the court stated, "I remain open to be illuminated by [Gallagher's counsel] as to that with respect to the motion to dismiss, but I have a different analysis now." Although the court found that "there's not necessarily for purposes of the TRO a sufficiently ascertainable claim for relief or protectable interest," the court continued "[a]nd by that I mean what I said with regard to the construction for purposes of a TRO only of Section 1 and Section 8." At the conclusion of the February 26 hearing, the court set a briefing schedule and a March 19, 2014 hearing date on the motion to dismiss, a seemingly unnecessary step if, as Roi asserts, the court's "basis for denying the TRO was the unenforceability of the restrictive covenant." Further, during the March 19 hearing, Roi's counsel never asserted that the issue had already been decided by the court's February 26 ruling.

¶ 28 Furthermore, the cases cited by Roi are inapposite. In *Strata Marketing, Inc. v. Murphy*, 317 Ill. App. 3d 1054, 1056 (2000), an employer sued its former sales representative and the representative's prospective new employer, alleging violation of an employment agreement and the Illinois Trade Secrets Act. 765 ILCS 1065/1 *et seq*. (West 1998). At a single hearing, the court denied the employer's request for a TRO and granted defendants' motion to dismiss; the court stated during the hearing that the agreement was "totally unenforceable." *Id.* at 1060-61. The plaintiff appealed only the grant of the dismissal motion. *Id.* at 1061. The defendants filed a motion to dismiss the appeal, contending the appellate court lacked jurisdiction because the plaintiff failed to appeal the denial of the TRO. *Id*. According to the defendants, the trial court's judgment on the TRO was the law of the case and judgment was *res judicata* because the only issue raised in the appeal also formed the basis for the denial of the TRO. *Id*. The appellate court concluded that it had jurisdiction because "[a]ppeal from the denial of a TRO and from the granting of a motion to dismiss are separate appeals." *Id.* at 1065. However, the appellate court also held that the circuit court's ruling on the validity of the restrictive covenant in the agreement was the law of the case. *Id.* at 1066. The court thus found that any issues with respect to the employment agreement were barred by *res judicata*. *Id*. at 1067.

¶ 29 The instant case differs significantly from *Strata Marketing*. Whereas the *Strata Marketing* trial court expressly and unequivocally ruled that the restrictive covenant at issue was unenforceable, the circuit court did not make a similar ruling during the hearing on Gallagher's TRO motion. In fact, the circuit court stated, in part: "I need and will keep an open mind about Count I in light of the response to the motion to dismiss." Furthermore, the *Strata* court's denial of the TRO appears to have been based solely on the unenforceability of

the contract, whereas the circuit court in the case at bar addressed various other considerations in support of its decision.

¶ 30 The other cases cited by Roi are equally unavailing. For example, in *Bradford v. Wynstone Property Owner's Association*, 355 Ill. App. 3d 736, 737 (2005), the plaintiffs filed three essentially identical motions for a TRO, all of which were denied, but only appealed from the denial of the third motion. The appellate court affirmed the denial of the TRO, concluding that the plaintiffs improperly attempted to extend the period for filing an interlocutory appeal under Supreme Court Rule 307(d) by filing successive motions seeking the same relief. *Id.* While the *Bradford* court held that the denial of the initial TRO motion became the law of the case, the *Bradford* facts are dissimilar from those of this case. As the circuit court recognized, the factual and legal considerations relating to Gallagher's TRO motion differ from those with respect to Roi's dismissal motion. Moreover, as noted above, the circuit court did not rule on the validity of the Employment Agreement during the TRO hearing, unlike the *Bradford* court, which denied requests for identical relief during multiple hearings.

¶ 31 Based on the foregoing, we reject Roi's *res judicata* argument. Gallagher's failure to appeal the circuit court's denial of their requested TRO does not affect our resolution of the instant appeal. We thus turn to the merits.

¶ 32 Gallagher argues that the trial court erred in granting defendant's motion to dismiss, because the employment agreement between the parties was enforceable after defendant's employment contractually converted to at will status. Gallagher maintains that the entire agreement did not expire and continued throughout Roi's employment. Roi responds that the trial court correctly dismissed count I of Gallagher's complaint because the entire agreement

including the non-solicitation provision contained within, expired on May 31, 2002. Roi further maintains that Illinois law does not permit enforcement of non-compete provisions in expired employment agreements.

¶ 33 A motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2000)) admits the legal sufficiency of the plaintiff's claim, but asserts certain defects or defenses outside the pleading to defeat the claim. *Provenzle v. Forister*, 318 Ill. App. 3d 869, 878 (2001). The questions a court must consider where a 2-619 dismissal is challenged on appeal are whether a genuine issue of material fact exists and whether the defendant is entitled to judgment as a matter of law. 735 ILCS 5/2-619 (West 2000); *Saichek v. Lupa*, 204 Ill. 2d 127, 134 (2003); *Novak v. St. Rita High School*, 197 Ill. 2d 381, 389 (2001). Our review of a dismissal under section 2-619 is de novo. *Id.*; *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill., 2d 475, 479 (2002). When reviewing a dismissal under the *de novo* standard of review, the appellate court performs the same analysis a trial court would perform: it reviews the documentary evidence and reaches its own conclusions and owes no deference to whatever decision the trial court did, or did not make. *A.M. Realty Western L.L.C. v. MSMC Realty, L.L.C.*, 2012 IL App (1st) 121183, ¶ 37; *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 579 (2011).

¶ 34 The following principles are generally relevant to this appeal. The Illinois Supreme Court has long held that when interpreting a contract, rather than focusing on one clause or provision in isolation, the court must read the entire contract in context and construe it as a whole, viewing each provision in light of the other ones. *Gallagher v. Lenart*, 226 Ill. 2d 208, 233 (2007); *Board of Trade of the City of Chicago v. Dow Jones & Co., Inc.*, 98 Ill. 2d 109, 122 (1983) (the contract must be viewed as a whole by viewing each part in light of the

others). The primary objective is to give effect to the intent of the parties. *Gallagher*, 266 Ill. 2d at 233. The intent of the parties is not to be gathered from detached portions of a contract or from any clause or provision standing by itself. *Id*. (citing *Martindell v. Lake Shore National Bank*, 15 Ill. 2d 272, 283 (1958)).

¶ 35 We first consider Gallagher's contention that the Agreement granted Roi an initial two-year period of guaranteed employment, after which his employment converted to at will status. Gallagher maintains that applying contract construction principles in the context of the language in the Agreement refutes the trial court's ruling that the entire Agreement expired after two years when the initial for-cause Term of Employment ended. Gallagher argues that contrary to the holding in *Gallagher*, the trial court focused on section 1 in isolation, without reference to other language in the Agreement.

¶ 36 Gallagher contends that the clear and plain meaning of the language in section 1 of the Agreement is that Gallagher provided Roi with a two-year Term of Employment and that during that term, Roi would not be fired except for certain listed causes. Gallagher points to section 1 which additionally states; "Employment of Executive shall not necessarily cease as of the expiration of the Term of Employment; however, employment thereafter shall be on an at will basis." Gallagher asserts that after two years, the for-cause guarantee ended, but Roi's employment converted to at will status, still governed by all the remaining terms of the Agreement. Gallagher asserts that Roi's employment continued after the initial for-cause term and did not end for another 12 years. Gallagher maintains that the at will language serves no other purpose than that the parties intended the employment to continue under the written Agreement after the term of employment ended.

¶ 37 In further support, Gallagher points out that the language in section 7 and 8 of the agreement were both drafted to survive the two year "for-cause" guarantee and to run concurrent with the contractual conversion to at will employment. Specifically, the language in section 7 provides "that the [Roi's] confidentiality obligations run from two (2) years following the termination of his employment for any reason whatsoever ***" and the language in section 8 provides "that for a period of two (2) years following the termination of his employment for any reason whatsoever, he will not, directly, or indirectly, solicit, place, market, accept, aid, counsel or consult in the renewal, discontinuance or replacement of any insurance ***."

¶ 38 Roi contends that the Agreement expired on May 31, 2002 because it contains the following language as to its duration: "beginning on June 5, 2000 and ending on May 31, 2002 unless earlier terminated under section 4 or 5." Roi maintains that Illinois law does not allow an employer to enforce a restrictive covenant from a long since expired employment agreement, especially where the agreement contains no survival language. Roi argues that the restrictive covenant was unenforceable in 2014 because the Agreement had expired in 2002 and the restrictive covenant clause could only have lasted for two years thereafter, *i.e.* 2004.

¶ 39 Roi relies on *Marwaha v. Woodridge Clinic, S.C.,* 339 Ill. App. 3d 291, 294 (2003) for the proposition that a restrictive covenant in an expired employment agreement is unenforceable. In *Marwaha,* plaintiff was a medical doctor and defendant was a medical clinic. *Id.* at 292. Plaintiff entered into an employment contract with defendant which provided that "[t]he employment contract of the [plaintiff] shall be for the period beginning July 1, 1993 and ending on June 30, 1996." *Id.* The employment agreement contained a covenant not to compete clause which stated the provision shall survive the termination of

this agreement, and no matter what, shall continue to be enforceable against the [plaintiff]. *Id*. Plaintiff continued to work for defendant until he received a notice of termination on November 24, 2001. *Id*. at 293. During the interim, plaintiff and defendant were engaged in a dispute over whether and under what terms plaintiff would become a partner in the medical practice. *Id*. Defendant contended that the termination on November 24, 2001, triggered the noncompete clause because the noncompete clause provided that it survived the termination of the agreement. *Id*. The trial court held that the word "employment" as used in the phrase "upon termination of the [plaintiff's] employment" in the noncompete clause, referred to employment under the employment agreement. *Id*. Plaintiff's employment under the agreement terminated on June 30, 1996. *Id*. Thus, the clause was not triggered by the November 24, 2001, termination that took place five years after the expiration of the employment agreement. *Id.* The appellate court affirmed stating that the covenant not to compete was triggered only by the termination of the employment agreement, not by the termination of subsequent employment under a different agreement. *Id.* at 294.

¶ 40 Similarly, Roi relies on *Virendra S. Bisla M.D., Ltd. v. Parvaiz*, 379 Ill. App. 3d 567, 568 (2008), which followed the *Marwaha* decision. In *Bisla*, defendant entered into a three year employment agreement to work as a cardiologist in the medical offices of plaintiff. *Id*. The agreement provided that after three years of employment, defendant would be offered the option to acquire a 50% equity interest. *Id*. at 570. The employment agreement also contained a covenant of employment prohibiting defendant from practicing medicine within a 10-mile radius of plaintiff for 12 months after termination of the agreement. *Id*. The defendant continued to work for plaintiff after expiration of the written agreement. *Id*. at 572. The plaintiff failed to offer defendant the option to acquire the agreed upon 50% equity

interest and instead presented documents changing the terms of the original employment agreement. *Id*. Defendant refused to sign the new agreements. *Id*. The court found that defendant's continued employment constituted a subsequent oral agreement rather than an extension of the original written agreement. *Id.*

¶ 41 Gallagher responds that *Marwaha* and *Bisla* are distinguishable because both deal with agreements that had specific end dates and thus the agreements had terminated. Gallagher further maintains that the agreements did not contain any language indicating that the agreements would remain enforceable after the expiration of the contractual term. However, in the case at bar, the Term of Employment terminated but the Agreement as a whole survived. Gallagher maintains that the parties from the outset provided in section 1 that the Agreement was to continue past the two year "for-cause" Term of Employment and that the inclusion of at will status in the written agreement is evidence of this intent. Further, in distinguishing *Marwaha* and *Bisla*, Gallagher contends that the parties in both cases contemplated material changes with respect to the employment relationships after the expiration of the contractual term of the employment agreement, which is not present in the instant case.

¶ 42 We agree and find factual distinctions between the case at bar and the cases upon which Roi relies. In *Marwaha* and *Bisla*, the employment agreement and the noncompete provisions contained in them, were unenforceable because they expired on their face and the agreements contained no provision for automatic extension or continuation. By contrast, in the case at bar, the Agreement contemplated and included continued employment. We find that the provisions in the Agreement state that they continue for as long as Roi's employment continued, thus, those provisions only make sense in the context of Roi's entire employment

tenure, and not merely the initial two-year Term of Employment. Further, when parties agree to and insert language into a contract, it is presumed that it was done purposefully, so that the language employed is to be given effect. *Thompson v. Gordon*, 241 Ill. 2d 428, 442 (2011). Because the parties used "Term of Employment" in section 1 of the contract and "termination of his employment for any reason whatsoever" in sections 7 and 8 of the contract, we presume that the parties chose the language purposely, and thus we will give effect to that language. See *Gateway Systems, Inc. v. Chesapeake Systems Solutions, Inc*., 836 F. Supp. 2d 625, 639-40 (2011) (holding language used in agreement conveyed that the parties contemplated that certain of the parties rights and obligations would survive termination of the agreement even though agreement did not contain a survival clause).

¶ 43 We next turn to Gallagher's contention that the Agreement continued to govern after May 31, 2002 when Roi's employment contractually converted to at will status, and therefore the non-solicitation provision was enforceable. Gallagher argues Illinois law holds that an employee's continued employment is sufficient consideration for the ongoing enforcement of an employment agreement. See *Abel v. Fox*, 274 Ill. App. 3d 811, 820 (1995) (holding no public policy renders restrictive covenants made during an oral or written at-will employment relationship invalid *per se*).

¶ 44 Roi responds that the restrictive covenant, along with the Agreement, expired in 2002. Roi argues Gallagher had the opportunity when drafting the contract to include a survival clause. In the absence of the same, the Agreement expired in 2002 and subsequent employment was under a different at will agreement without any restrictive covenant.

¶ 45 The law regarding restrictive covenants is for the most part well settled. *Abel*, 274 Ill. App. 3d at 813. A post employment restrictive covenant is generally held to be enforceable if

it is reasonable in geographic and temporal scope and it is necessary to protect a legitimate business interest of the employer. *Id.* Prior to analyzing the reasonableness of a covenant not to compete, the court must make two determinations. *Id*. First, the court must find the covenant is ancillary to a valid contract. *Id.* at 814. The covenant must be subordinate to the contract's main purpose. *Id*. Second, the court must determine whether there is adequate consideration for a post-employment covenant not to compete. *Id*. Continued employment constitutes adequate consideration for a post-employment covenant not to compete. *Id*. (citing *Millard Maintenance Service Company v. Bernero*, 207 Ill. App. 3d 736, 745 (1990).

¶ 46 In the employer-employee relationship, the employer might, depending on the circumstances, have a protectable interest in confidential information or in its existing relationships with its customers. *Abel*, 274 Ill. App. 3d at 819. In Illinois, confidential information and customer relationships can be protectable interests of an employer. *Abel*, 274 Ill. App. 3d at 819 (citing *Springfield Rare Coin Galleries, Inc v. Mileham*, 250 Ill. App. 3d 922, 930 (1993)). Therefore, a noncompetition covenant entered into by an at will employee, whether the employee is employed under a written contract or oral contract, complies with the requirement of ancillary. *Abel*, 274 Ill. App. 3d at 820. This is because a covenant in such a situation is not a "naked" restraint on trade, but instead is merely ancillary to the primary purpose of the relationship: an employer-employee relationship. *Id*.

¶ 47 A covenant not to solicit that prohibits an employee from soliciting any of the employer's clients is less likely to be upheld as a reasonable restraint on trade than a covenant not to solicit which prohibits an employee only from soliciting clients with which the employee has had contact while he or she was employed with the employer. *Lawrence And Allen, Inc. v. Cambridge Human Resource Group*, 292 Ill. App. 3d131 138 (1997) (citing *Abbott-Interfast*,

250 Ill. App. 3d 13, 19 (1993). Further, in *Millard*, the court found that there was no unreasonable hardship for the employee because the employee was free to solicit any customer except those with whom the employer had established a relationship. 207 Ill. App. 3d at 750.

¶ 48 Roi argues that his at will status allows Gallagher the freedom to alter employment terms and to terminate him at will, while he must be bound by certain provisions, notably the non-solicitation provision. *Kraftco Corp v. Kolbus*, 1 Ill. App. 3d 635, 638-39 (1971) (holding that mutuality of obligation in a contract requires that "both parties to an agreement are bound or neither is bound"). Roi argues that an employer being able to terminate without cause and to unilaterally modify terms of employment while still attempting to saddle an employee with a restrictive covenant is unjust. Roi relies on *Rao v Rao*, 718 F. 2d 219 (1983), for the proposition that a restrictive covenant was unenforceable where the employer terminated the employee without cause. Gallagher maintains that Roi misrepresents the decision in *Rao.*

¶ 49 In *Rao*, defendant, a thoracic surgeon entered into an employment agreement with plaintiff, a medical service corporation on December 20, 1977. 718 F. 2d at 221. This agreement was for a term of two years and, absent a timely notice, was automatically renewed for two successive terms of one year each. *Id*. The agreement specified defendant's compensation for the four years and provided that at the completion of four years of service defendant was entitled to purchase 50% of plaintiff's corporation's shares for one dollar. *Id*. The agreement included a restrictive covenant. *Id*. On December 21, 1979, plaintiff sent defendant a letter noticing plaintiff's intention to terminate defendant's current employment relationship. *Id*. Pursuant to the provisions of the employment agreement, this termination

became effective in ninety days, ten days before defendant would have obtained a 50% interest in plaintiff corporation for one dollar. *Id*. Subsequently, plaintiff brought an action against defendant seeking enforcement of the employment agreement's restrictive covenant. *Id.* The court held that plaintiff's failure to act in good faith in terminating defendant's employment precluded the application of the restrictive covenant. *Id.* at 223. The appellate court affirmed. *Id.*

¶ 50 A fair reading of *Rao* makes clear that the court's refusal to enforce the restrictive covenant there was based upon its finding of bad faith. As Gallagher points out here, there have not, here to fore, been any allegations of bad faith. Further, unlike in *Rao*, Roi was not terminated, he resigned.

¶ 51 We find that the restrictive covenant is reasonably necessary to protect Gallagher's business interests. To state the obvious, an employer bargains for a restrictive covenant out of a concern that an employee will in the future compete with the employer and capture the employer's traditional business. *Rao*, 718 F. 2d at 224 (citing *Gorman Publishing Company v. Stillman*, 516 F. Supp 98, 103 (1980)). A restrictive covenant that becomes effective when an employee quits his job may be enforceable as reasonably necessary to protect the employer's good will. *Id*.

¶ 52 Moreover, we find mutuality of obligation between the parties. Gallagher was bound to indemnify Roi under section 11, which provides; "[d]uring the term hereof if the Executive is a defendant or threatened to be made a defendant in any litigation because the Executive is an employee of the Corporation, Corporation shall indemnify Executive against all expenses, judgment [*sic*], fines or penalties,*** provided that it is determined by the Corporation, in its sole judgment, that the Executive acted in good faith and in a manner which he reasonably

believed to be in and not opposed to the best interests of the Corporation." Further, the Agreement protected Roi in case of a hostile takeover in section 10, which provides; "Notwithstanding anything contained herein to the contrary, the obligation of the Executive contained in section 8 shall become null and void and have no further effect immediately upon a Hostile Change in Control of the Corporation as defined herein." Therefore, we find the non-solicitation provision of the parties Agreement enforceable. See *Corroon & Black of Illinois, Inc. v. Magner*, 145 Ill. App. 3d 151, 163 (1986) (restrictive covenant enforceable where supported by plaintiff's four years of continued at-will employment).

¶ 53 Finally, we turn to Gallagher's contention that the non-solicitation provision does not extend in perpetuity. Gallagher argues that the non-solicit restriction was neither open-ended nor perpetual because it was expressly limited to two years. Gallagher points out that the language in the non-solicitation provision in section 8 provides that the restriction commences "following termination of [Roi's] employment for any reason whatsoever" and ends after the defined period of two years. Further, Gallagher contends that it is lawful and reasonable for an employer and employee to agree to a covenant that is triggered when employment ends.

¶ 54 Roi responds that a restrictive covenant does not survive the expiration of the employment agreement. Roi notes the comment of the trial court which found that the restrictive covenant was potentially indefinite and of unlimited duration based on [Roi's] at will status. Roi further observes that the court in *Marwaha* stated "it would be strange to permit a noncompete provision to be triggered indefinitely after expiration of the agreement term, as the non-solicitation would then govern the terms of other not-yet existent employment contracts between the same parties." 339 Ill. App. 3d at 294.

¶ 55 As noted above, we distinguished the holding in *Marwaha,* which dealt with an expired agreement by its terms as opposed to the case at bar which contractually converted to at will status at the end of a Term of Employment for-cause. See *Woodfield Group, Inc v. DeLisle,* 295 Ill. App. 3d 935, 941 (1998) (holding a restrictive covenant agreement that was triggered upon "any termination of [at-will employee's] employment" was valid and enforceable). We cannot accept Roi's argument that the noncompete clause remained effective only for the two-year "for cause" employment plus the two years thereafter, during which solicitation was forbidden. We find that the Agreement survived the expiration of the Term of Employment and that the non-solicitation provision is enforceable. See *Curtis 1000, Inc. v. Suess,* 24 F. 3d 941, 943 (1994) (employment at will is of course a contractual relationship*** differing from a term or tenure contract only in being terminable by either party at any time). Moreover, this court has held that an employer may have a protectable interest in its customers and bar solicitation of those customers with post-employment covenants not to compete. *Millard,* 207 Ill. App. 3d at 750.

¶ 56 We note that the two-year period in the restrictive covenant has no application at all until other events would evoke operation of the clause. Thereafter, it merely measures the term during which solicitation is restricted. It is well-settled in Illinois that "when parties agree to and insert language into a contract, it is presumed that it was done so purposefully, so that the language employed is to be given effect." See *Thompson v. Gordon,* 241 Ill. 2d 428, 442 (2011); see also *Coles-Moultrie Electric Coop v. City of Sullivan*, 304 Ill. App. 3d 153, 159 (1999) (when interpreting a contract, the meaning and effect must be given to every part of the contract, including all its terms and provisions, because it is presumed that the provisions are purposefully inserted and the language is not idly employed).

¶ 57 We further note that the Illinois Supreme Court has repeatedly reaffirmed that continued employment is sufficient consideration for the continued enforcement of an employment agreement. See *Fellauer v. City of Geneva*, 142 Ill. 2d 495, 512 (1991) ("[w]here the contract is one of employment, it is immaterial whether it is for a fixed period or is one which is terminable by either party at will, both parties being willing and desiring to continue the employment under that contract for an indefinite period") (quoting *London Guarantee & Accident Company v. Horn*, 206 Ill. 493, 512 (1903)). *Melena v. Anheuser-Busch, Inc.*, 210 Ill. 2d 135, 152 (2006) ("continued employment is sufficient consideration for the enforcement of employment agreements").

¶ 58 CONCLUSION

¶ 59 The judgment of the circuit court is accordingly reversed, and the cause is remanded to the circuit court of Cook County for further proceedings consistent herewith.

¶ 60 Reversed.