2012 IL App (2d) 111027-U
No. 2-11-1027
Order filed June 21, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JOSEPH KAIRIES,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10-MR-1736
	)	
ALL LINE, INC.,	)	Honorable
	)	Robert G. Gibson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

Held: The trial court properly entered judgment on the pleadings for plaintiff, declaring that nonsolicitation and noncompetition covenants in the parties' employment agreement were unenforceable: the nonsolicitation covenant was not restricted to clients who had had direct contact with plaintiff, and the noncompetition covenant was not restricted to competitive capacities.

¶ 1 Plaintiff, Joseph Kairies, sought a declaration that the nonsolicitation and noncompetition covenants in his employment contract with defendant, All Line, Inc., were overbroad and unenforceable. The trial court granted plaintiff's motion for judgment on the pleadings, and defendant now appeals. We affirm.

¶ 2 BACKGROUND

¶ 3 Plaintiff sued defendant for a declaratory judgment. In his amended complaint, he alleged as follows. Defendant was in the business of selling braided cords and rope. On January 21, 1999, plaintiff entered into an employment contract with defendant, for which he would work as a salesperson. The contract contained both nonsolicitation and noncompetition covenants, which stated:

> "Employee agrees that for a period of two years following the termination of this Employment Agreement, Employee shall not directly or indirectly solicit or sell to any customer of All Line or participate directly or indirectly, for himself or as the agent of employee of another, in the ownership, management, operation or control of any business similar to the type of business conducted by All Line at the time of termination of employment."

Defendant's customers often purchased products from both defendant and its competitors, and the customers' identities were readily available. At some point in 2008, defendant reassigned several customers from plaintiff to another employee. On the whole, plaintiff had contact with only 200 to 250 of defendant's roughly 800 customers. In August 2010, plaintiff resigned, and he went on to seek employment with defendant's competitors. However, he refrained from accepting any such employment, in light of the restrictive covenants. Plaintiff sought a declaratory judgment that the covenants were "overly broad and unreasonable as a matter of Illinois law."

¶ 4 In its answer, defendant denied most of plaintiff's allegations, including those pertaining to the scope of the employment agreement. In its affirmative defenses, defendant alleged as follows. In 30 years of business, it had developed a focus on "selling specialty products to a loyal clientele,"

whose identities were "not subject to discovery from any public source." Further, defendant maintained a compilation of confidential information concerning its clients, which information "would be extremely valuable to a competitor." As defendant's sales manager, plaintiff "was entrusted with all of All Line's confidential *** information." By virtue of his employment with defendant, plaintiff also developed personal relationships with its long-term customers.

¶ 5 Defendant noted that the restrictive covenants defined a "customer" as "any company or entity that has made a purchase from All Line within the two years prior to the date of termination of employment." The covenants further were "limited to the geographic area actually serviced by Employee during his tenure at All Line."

¶ 6 Defendant alleged that plaintiff had sought employment with Erin Rope Corporation, which was owned by another of its former employees, who had been enjoined from breaching his restrictive covenants with defendant "upon All Line's showing that [he] improperly siphoned away business from All Line's most important customers while using All Line's confidential information." Defendant asked for a declaration that the covenants were enforceable to protect its interests in its confidential information and customer relationships. Defendant also filed a counterclaim for damages caused by plaintiff's breaches of the covenants.

¶ 7 Plaintiff moved for judgment on the pleadings, arguing that the covenants were "unenforceable as a matter of law," such that there was "no need to develop any facts in this case." Plaintiff asserted that the covenants were facially overbroad, in that the nonsolicitation covenant prevented him from soliciting "any customer of All Line, whether he had any contact with the customer while at All Line or not," while the noncompetition covenant prevented him "from working

for a competitor *in any capacity*, even if he were to work in a capacity completely unrelated to sales." (Emphasis in original.) In its response, defendant disagreed with all of the above.

¶ 8 The trial court granted plaintiff's motion and declared that the "restrictions in the agreement are unenforceable under Illinois [law]." The court noted that this "is an extreme case, where the restrictive covenant is facially invalid." Defendant timely appealed.

¶ 9 ANALYSIS

¶ 10 Judgment on the pleadings is proper where the pleadings disclose no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. In ruling on such a motion, a court may consider only those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. All well-pleaded facts and reasonable inferences therefrom are taken as true. Our review is *de novo*. *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill. 2d 381, 385 (2005).

¶ 11 The specific issue here is the facial validity of postemployment restrictive covenants. This is a question of law, also subject to *de novo* review. See *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 63 (2006).

¶ 12 Before addressing the merits of defendant's contentions, we first address its motion to cite as additional authority *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871. Defendant's motion is granted, although the applicability of *Reliable Fire* to the present case is limited. The primary issues in *Reliable Fire* were whether the existence of a legitimate business interest on the part of the employer was a necessary component of the reasonableness of postemployment restrictive covenants and how to determine whether such an interest existed. *Reliable Fire*, 2011 IL 111871. Here, however, there is no dispute over the necessity or existence of a legitimate business interest.

Rather, plaintiff contended that, even assuming defendant possessed a legitimate business interest, the restrictive covenants were overbroad as a matter of law. The principles governing the determination of this issue are well settled and predate *Reliable Fire*.

¶ 13 Postemployment restrictive covenants are restraints on trade and will be enforced only if they are reasonable. *Dam, Snell & Taveirne, Ltd. v. Verchota*, 324 Ill. App. 3d 146, 151 (2001). Such a covenant is reasonable only if it "(1) is 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*, 2011 IL 111871, ¶ 17. As noted, plaintiff argued that, even if defendant had a legitimate business interest, the covenants were facially greater than necessary to protect it. The trial court agreed, and so do we.

¶ 14 First, the nonsolicitation provision stated that, "for a period of two years following the termination" of his employment with defendant, plaintiff "shall not directly or indirectly solicit or sell to customers of [defendant]," with a "customer" defined as "any company or entity that has made a purchase from [defendant] within two years prior to the date of termination of employment." The difficulty is that "[c]ourts are hesitant to enforce [nonsolicitation] agreements that prohibit employees from soliciting or servicing not only customers with whom they had direct contact, but also customers they never solicited or had contact with while employed." *Eichmann v. National Hospital & Health Care Services, Inc.*, 308 Ill. App. 3d 337, 345 (1999). A typical case that plaintiff cites is *Cambridge Engineering, Inc. v. Mercury Partners 90 BI, Inc.*, 378 Ill. App. 3d 437 (2007). There, the nonsolicitation covenant, much like the one here, prohibited an employee from soliciting " 'any customer' " of the employer, "regardless of whether [the employee] had contact with them"

while working for the employer. *Id.* at 455. The court deemed the provision "invalid on its face." *Id.*

¶ 15 Here, the same result must obtain. Although the provision here limited the range of customers to those who had dealt with defendant within two years of plaintiff's departure, it did nothing to limit the range of customers to those who had dealt with *plaintiff*. Thus, the provision was "far broader than necessary to protect [defendant's] interest in preventing [plaintiff] from abusing the specific client relationships he built up during his time with the company." *Id.* That is to say, it was unreasonable and unenforceable as a matter of law.

¶ 16 In attempting to defend the nonsolicitation covenant, defendant first asserts that, because the covenant was "limited to the geographic area actually serviced by [plaintiff] during his tenure [with defendant]," the trial court "should have construed" the covenant "as limited to those customers whom [plaintiff] actually serviced during his tenure [with defendant]." However, what defendant urges here is not construction at all, but rather a rewriting of the covenant. This we may not do. See *Terry v. State Farm Mutual Automobile Insurance Co.*, 287 Ill. App. 3d 8, 14 (1997) ("It is the function and duty of the reviewing court to construe the contract and not to make a new contract under the guise of construction.").

¶ 17 Defendant next asserts that, "even if the nonsolicitation covenant extended to all of [its] customers, it was reasonable under the particular circumstances of this case," where plaintiff, as defendant's sales manager, "had access to confidential information concerning all of [defendant's] customers." Plaintiff seems to dispute this description of his access, but the contract itself acknowledged that, in working for defendant, plaintiff would gain "commercially valuable proprietary information which is vital to the success of [defendant's] business, including *** the

names and addresses of the customers of [defendant] and the marketing needs, habits and strategies of the customers of [defendant]." Defendant concludes that, "[w]hether the employee had personal contact with certain customers or not, an employer should be able to reasonably restrict an employee from *using the information* to solicit customers following his or her employment." (Emphasis added.) But this conclusion reveals the defect in the argument. Plaintiff was not seeking to strike down any preclusion on his *use of confidential information* to solicit customers; rather, he was seeking to strike down a preclusion on *any* solicitation of customers, and the latter, at least in the absence of some other narrowing of the activity restriction, must be tailored to customers with whom the employee had "direct contact." *Eichmann*, 308 Ill. App. 3d at 345.

¶ 18 It is true that, in *Dam, Snell & Taveirne*, 324 Ill. App. 3d at 153, we rejected an argument that a covenant was "overly broad because it prevented [an accountant] from providing accounting services to all of [the employer's] clients, regardless of whether [the accountant] had provided services for such clients during her employment." However, as plaintiff points out, that provision did not prevent the accountant from making *any* solicitation or providing *any* service to any client of the employer; instead the accountant was prevented only from "providing accounting services." That is, the range of clients might have been as broad as in the provision here, but the provision there compensated with a narrower activity restriction. *Dam, Snell & Taveirne* is thus distinguishable.

¶ 19 For similar reasons, the noncompetition provision fails as well. That provision stated that, for the same two years after the termination of his employment with defendant, plaintiff could not "participate directly or indirectly, for himself or as the agent or employee of another, in the ownership, management, operation or control of any business similar to the type of business conducted by [defendant] at the time of termination of employment." Again we refer to *Cambridge*

Engineering. There, the noncompetition covenant, much like the one here, prohibited the employee from " 'engag[ing] in any activity for or on behalf of Employer's competitors.' " *Cambridge Engineering*, 378 Ill. App. 3d at 450. The appellate court agreed with the trial court's interpretation that the provision prevented the employee "from taking 'any job, even as a janitor, with any of [the employer's] competitors.' " *Id.* The appellate court then held that the employer could not prevent the employee from working for a competitor "in an entirely noncompetitive capacity, [when] no interest of [the employer's] would be harmed." *Id.* at 452. "Such blatant overbreadth goes far beyond the standard for acceptable activity restrictions," and thus the provision was "unenforceable as a matter of law." *Id.*; see also *Telxon Corp v. Hoffman*, 720 F. Supp. 657, 665 n.7 (N.D. Ill. 1989) ("agreements which restrict the signor's ability to work for a competitor without regard to capacity have repeatedly been declared contrary to law").

¶ 20 Here, again, the same result must obtain. The provision here prevented plaintiff from participating in the same type of business, "even if [his] job *** had absolutely nothing to do with sales or purchasing." *North American Paper Co. v. Unterberger*, 172 Ill. App. 3d 410, 413 (1988). Defendant simply cannot enforce this provision.

¶ 21 Defendant responds that the provision was limited in that it did not prevent plaintiff from participating in *any* capacity; instead it prevented him from taking a position of "ownership, management, operation or control." This argument is pure sophistry. Although the provision did not use the phrase "any capacity," its listing of virtually *every* capacity in which plaintiff (or anyone else) could work for an employer hardly constituted a limit. In any event, any such limit was not a limit to strictly competitive capacities, particularly sales. Defendant only adds to its subtle deception by citing *Millard Maintenance Service Co. v. Bernero*, 207 Ill. App. 3d 736 (1990). In that case,

although the provision at issue was similarly worded and indeed was upheld, the employee simply made no issue of the range of capacities in which he was precluded from working for a competitor.

¶ 22 Defendant further contends that plaintiff actually *did* seek a position in sales, "not a position in research and development or information technology," and did so with a direct competitor. This contention dovetails with defendant's overarching assertion that the trial court erred in assessing the provisions in a vacuum, without regard to the particular facts, as developed by an evidentiary record. Defendant relies primarily on *Abbott-Interfast Corp. v. Harkabus*, 250 Ill. App. 3d 13 (1993). There, we did reverse a judgment on the pleadings, noting that, without such facts, it was "impossible to ascertain" the validity of the agreement. *Id.* at 20. However, we did not deny that, at least in "extreme" cases—a standard that the trial court here properly applied—an agreement may be deemed "invalid on its face," *i.e.*, without regard to the particular facts. *Id.*; see also *Cambridge Engineering*, 378 Ill. App. 3d at 452 (finding the provision "unenforceable as a matter of law" even though the employee's actual alleged activities "could indeed be detrimental" to the employer). Further, in *Abbott-Interfast*, the agreement provided that the employee could not " 'canvass, solicit, divert, take away, accept orders, or interfere with any of the business, customers, trade, or patronage of Employer.' " *Abbott-Interfast*, 250 Ill. App. 3d at 20. That is, the provision prohibited literal competition; it did not, as here, encompass even noncompetitive capacities.

¶ 23 CONCLUSION

¶ 24 In sum, we agree with the trial court's judgment that the restrictive covenants here were facially greater than necessary to protect defendant's legitimate business interest. Thus, we affirm the judgment of the circuit court of Du Page County.

¶ 25 Affirmed.