2014 IL App (2d) 130686-U
No. 2-13-0686
Order filed April 7, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ELIZABETH BERG, as Chapter 7 Bankruptcy Trustee for the Bankruptcy Estate of Lisa Alvernia, Plaintiff-Counter-Defendant-Appellee, v. GROOMSMART, INCORPORATED, Defendant-Counter-Plaintiff-Third-Party Plaintiff-Appellant, (Lisa Alvernia, Third-Party Defendant.).	)	Appeal from the Circuit Court of Kane County. No. 2012-MR-0464 Honorable David R. Akemann, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's grant of summary judgment in favor of plaintiff and against defendant was affirmed where the restrictive covenant in the parties' purchase-and-sale agreement did not bind a non-party to the contract; the appellate court did not consider extrinsic evidence, because, what defendant urged under the guise of contract construction was in reality a rewriting of the contract.

¶ 2 We first must clarify who the parties are. The original plaintiff in this action was Lisa's Pet Spaw, Inc. The president and sole shareholder of Lisa's Pet Spaw, Inc., was Lisa Alvernia.

Lisa Alvernia filed for chapter 7 bankruptcy protection during the proceedings, and Elizabeth Berg, the bankruptcy trustee, was allowed to substitute as plaintiff on April 3, 2013. On January 24, 2013, prior to the trustee's substitution as plaintiff, Lisa's Pet Spaw, Inc., filed a motion for summary judgment. On May 16, 2013, the trial court granted Lisa's Pet Spaw, Inc.'s motion for summary judgment, even though, technically, it was no longer the plaintiff. In order to avoid confusion and to be consistent with the trial court's nomenclature, when we refer to "plaintiff" in this order, we are referring to Lisa's Pet Spaw, Inc.

¶ 3 BACKGROUND

¶ 4 On July 2, 2010, plaintiff and defendant entered into a written agreement for the purchase and sale of a dog grooming business. The agreement identified the seller as "Lisa's Pet Spaw, Inc." and identified the buyer as "Groomsmart, Inc." Lisa Alvernia was the president and sole shareholder of plaintiff. Lisa Alvernia signed the agreement as president of plaintiff, not individually. Under the agreement, all of plaintiff's assets, including its goodwill and client lists, were sold to defendant. The purchase price was $45,000. Defendant was to pay $4,500 at closing, and the balance of the purchase price was to be paid in monthly installments with a balloon payment due at the end of 24 months.

¶ 5 Article XV of the agreement was entitled "Restrictive Covenants" and provided as follows:

> "15.01. The Seller expressly agrees that for a period of 2 years following the execution of this Agreement, the Seller will not, directly or indirectly, as an employee, agent, proprietor, partner, stockholder, officer, director, member, independent contractor, or otherwise, render any services to, or on his/her own behalf engage in or own a part or all of any business which is the same as, similar to, or competitive with the Business

which is being sold to the Buyer, anywhere within a 15 mile radius from the current principal location, (excluding Schaumburg, Illinois) of the Business that is being sold without the prior written consent of the Buyer.

15.02. The Seller shall not for a period of 2 years immediately following the execution of this Agreement, regardless of any reasons or cause, either directly or indirectly:

(a) Make known to any person, firm, or corporation the names and addresses of any of the former and current customers of the Seller or the Buyer or any other information pertaining to them; or

(b) Call on, solicit, or take away, or attempt to call on, solicit, or take away any of the former and current customers of the Seller on whom the Seller called or with whom he became acquainted during ownership of this Business either for the Seller or for any other person, firm, or corporation.

15.03. Should the Seller violate any provision of this Article, any remaining amounts now due, or which shall become due, from the Buyer to the Seller shall be considered paid in full as liquidated damages.

15.04. In the event of a default by Buyer, this Restrictive Covenant terminates."

¶ 6 Paragraph 17.01 was entitled "Parties Bound" and provided that "[t]his Agreement shall be binding upon and inure to the benefit of the Parties to this Agreement and their respective heirs, executors, administrators, legal representatives, successors, and assigns."

¶ 7 On August 22, 2012, plaintiff filed a complaint for declaratory judgment against defendant alleging that defendant withheld the final balloon payment on the ground that Lisa Alvernia, individually, violated the restrictive covenant by working as a receptionist at a dog-

boarding facility that was within the proscribed 15-mile radius. The complaint further alleged that the corporation, Lisa's Pet Spaw, Inc., was bound by the restrictive covenant but that Lisa Alvernia, individually, was not. Plaintiff also alleged that, even if it violated the restrictive covenant, the liquidated damages clause was a penalty clause and was void. Plaintiff asked the court to construe the agreement accordingly and to enter judgment in plaintiff's favor and against defendant, including reasonable attorney fees and costs.

¶ 8 Defendant answered the complaint and filed a counterclaim for declaratory judgment. The counterclaim asserted that Lisa Alvernia signed the agreement on behalf of plaintiff and that Lisa Alvernia personally was bound by its terms as the legal representative of the corporation. The counterclaim further alleged that the entity for which Lisa Alvernia was working, Pampered Pets Resort, engaged in the same business as defendant and that Lisa Alvernia had solicited or called on defendant's customers in violation of the restrictive covenant. Defendant simultaneously filed a third-party complaint for declaratory relief against Lisa Alvernia, which alleged that Lisa Alvernia was aware that she was personally bound by the restrictive covenant, as evidenced by her written request to defendant that the parties amend the restrictive covenant to allow her to work at a competing facility within the proscribed 15-mile radius.[1]

¶ 9 The parties filed cross-motions for summary judgment. Each party posited that the language of the agreement was clear and unambiguous. However, defendant argued, in the alternative, that the language was ambiguous and that the court should consider the extrinsic

[1]The third-party complaint was not resolved before this appeal was filed because of the bankruptcy court's automatic stay. Defendant's appeal was taken pursuant to the trial court's written 304(a) finding. Ill. S.Ct. R. 304(a) (eff. Feb. 26, 2010).

evidence of Lisa Alvernia's correspondence to defendant requesting a modification of the restrictive covenant, which, defendant argued, proved the parties' intent to bind Lisa Alvernia individually. Defendant also requested that the court consider that defendant made its payments to the "seller" in the form of checks made out to Lisa Alvernia personally and that the substitution of the bankruptcy trustee was evidence that Lisa Alvernia was bound by the agreement. In its written ruling, the trial court found that the contract language clearly and unambiguously bound plaintiff, not Lisa Alvernia individually, and that defendant breached the purchase-and-sale agreement by failing to make the final balloon payment. Defendant moved to reconsider, which motion was denied, and defendant timely appealed.

¶ 10 ANALYSIS

¶ 11 Defendant contends that the trial court erred in granting summary judgment in plaintiff's favor, because the restrictive covenant unambiguously binds Lisa Alvernia individually. Alternatively, defendant contends that the language of the restrictive covenant is ambiguous and that the trial court should have considered extrinsic evidence.

¶ 12 The primary objective in construing a contract is to give effect to the parties' intent. *Gallagher v. Lenart*, 226 Ill. 2d 208, 232 (2007). Initially, we look to the language of the contract, as the language is the best indication of the parties' intent. *Gallagher*, 226 Ill. 2d at 233. A contract must be construed as a whole, viewing each part in light of the others. *Gallagher*, 226 Ill. 2d at 233. The intent is not to be determined from detached portions of the contract or from any clause or provision standing by itself. *Gallagher*, 226 Ill. 2d at 233. If the contract language is susceptible to more than one meaning, it is ambiguous. *Gallagher*, 226 Ill. 2d at 233. In that event, a court may consider extrinsic evidence to ascertain the parties' intent. *Gallagher*, 226 Ill. 2d at 233. We review a question of contract construction *de novo*. *St. Paul*

Mercury Insurance v. Aargus Security Systems, Inc., 2013 IL App (1st) 120784, ¶ 59. Also, we review summary judgment rulings *de novo*. *St. Paul*, 2013 IL App (1st) 120784, ¶ 57.

¶ 13 We first examine defendant's contention that the restrictive covenant binds Lisa Alvernia individually. Indisputably, Lisa Alvernia signed the agreement as president of plaintiff. She did not sign in her individual capacity. Faced with this conundrum, defendant posits a variety of solutions. Defendant offers four theories: (1) a corporation can act only through individuals who are its officers, directors, employees, and agents; (2) under the terms of the agreement, Lisa Alvernia is bound as a "legal representative" or as an "assign" of plaintiff; (3) the restrictive covenant intended to prohibit certain activities that only an individual could perform; and (4) the trial court's interpretation of the restrictive covenant deprived defendant of the goodwill it purchased.

¶ 14 First, defendant proposes that we ignore the corporate entity, Lisa's Pet Spaw, Inc., that is a party to the agreement. While it is true that a corporation is only a legal entity and can act only through a person (*Rasgaitis v. Waterstone Financial Group, Inc.*, 2013 IL App (2d) 111112, ¶ 51), it is even more fundamental that a contract cannot bind a nonparty. *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) ("It goes without saying that a contract cannot bind a nonparty.").

¶ 15 Defendant relies on *Rao v. Rao*, 718 F.2d 219 (7th Cir. 1983). In *Rao*, an employee asserted a claim against the defendant corporation's sole officer, director, and shareholder, for tortiously inducing the corporation's breach of an employment contract between the corporation and the employee. *Rao*, 718 F.2d at 225. The court of appeals first noted that only a third party, separate from the contracting parties, can be liable for such a tort. *Rao*, 718 F.2d at 225. In denying that claim, the court of appeals stated that the corporation, which was the contracting

party, could not form or breach contracts without the involvement of the corporation's sole officer, director, and shareholder, so that the sole officer, director, and shareholder would not be considered a separate entity capable of inducing a breach. *Rao*, 718 F.2d at 225. From this, defendant in the present case draws the conclusion that Lisa Alvernia was Lisa's Pet Spaw, Inc., and must be considered a party to the agreement. What defendant argues, in essence, is that any time an officer of a corporation signs a contract in his or her corporate capacity, he or she is personally bound. That is not what *Rao* held, and as we shall see, it emphatically is not Illinois law. In *Rao*, the issue was not whether the sole officer, director, and shareholder was personally bound by the employment contract; rather, the issue was whether the sole officer, director, and shareholder could tortiously induce a breach of the contract. Even if *Rao* could be stretched to apply to our facts, we believe that *Rao* is not a correct statement of Illinois law.[2] In determining whether a corporate officer has contracted in his own behalf, we apply the general rules of agency. *Carollo v. Irwin*, 2011 IL App (1st) 102765, ¶ 50. A corporate officer who signs his or her name on a contract, without more, is individually liable on the contract. *Carollo*, 2011 IL App (1st) 102765, ¶ 50. On the other hand, when an agent signs a document and indicates his or her corporation affiliation next to his or her signature, the agent is not personally bound. *Carollo*, 2011 IL App (1st) 102765, ¶ 51.

¶ 16 Second, defendant argues that Lisa Alvernia was plaintiff's legal representative or its assign within the meaning of the "Parties Bound" clause of the agreement. According to defendant, "legal representative" can be broader than executors or administrators. That may be, but defendant points to nothing in the agreement to show that the parties intended for Lisa

[2] In predicting how Illinois courts would rule, *Rao* cited a Florida case.

Alvernia to be bound as plaintiff's legal representative. Defendant also asserts that Lisa Alvernia was plaintiff's assignee, because defendant made the monthly payments under the agreement to Lisa Alvernia personally. Plaintiff responds that, under the agreement, it had to approve any assignment in writing, which it did not. A chose in action, in this case the debt defendant owed to plaintiff, is personal property and is assignable regardless of a contractual nonassignability clause. *Village of Westville v. Loitz Brothers Construction Co., Inc.*, 165 Ill. App. 3d 338, 339-40 (1988). However, defendant presents no evidence of either an oral or a written assignment, and the agreement says nothing about an assignment.

¶ 17 Third, defendant contends that Lisa Alvernia is individually bound by the agreement, because certain of the prohibited activities listed in the restrictive covenant could be performed only by a person, not a corporation. Specifically, defendant argues that plaintiff could not act as an "employee," or "officer," or a "director" of a competitor, so that those terms must refer to Lisa Alvernia.

¶ 18 The two cases on which defendant relies are distinguishable. In *Western Casualty & Surety Co. v. Bauman Insurance Agency, Inc.*, 81 Ill. App. 3d 485 (1980), a personal guaranty was at issue. The plaintiffs entered into a contract with a corporate insurance agency, and the president of the corporation signed an indemnity agreement with his signature followed by the words "of Bauman Insurance Agency, Inc." *Western Casualty*, 81 Ill. App. 3d at 485-86. The issue on appeal was whether Bauman signed the indemnity agreement in his individual capacity, rather than in a corporate capacity, and whether he was personally bound by its terms. *Western Casualty*, 81 Ill. App. 3d at 486. The appellate court held that Bauman was personally bound, because the indemnity agreement identified the signatory as being a stockholder or officer of the agency who expressly bound himself to indemnify the plaintiffs for any loss or expense incurred

by reason of the corporation's failure to perform its duties. *Western Casualty*, 81 Ill. App. 3d at 487. Moreover, the language following Bauman's signature, "of Bauman Insurance," was merely descriptive of the person signing the indemnity rather than an indication of the capacity in which he signed. *Western Casualty*, 81 Ill. App. 3d at 487. Here, the body of the restrictive covenant nowhere identifies Lisa Alvernia, and her signature on the agreement was in her capacity as plaintiff's president. Her signature on the agreement appears as follows: "Seller's Signature: BY /s/ Lisa Alvernia Its President." "It is well established that an agent is not individually bound by the terms of a contract which he executes on behalf of his principal where the agency relationship is known to the other party at the time of contracting unless he agrees to be personally liable." *Western Casualty*, 81 Ill. App. 3d at 486.

¶ 19 The second case defendant cites is *Mid-City Industrial Supply Co. v. Horwitz*, 132 Ill. App. 3d 476 (1985), which also involved a guaranty. The issue was whether the guaranty document bound the defendant personally. The appellate court held that it did, despite the defendant having signed in his corporate capacity, because extrinsic evidence showed that the plaintiff refused to deliver its goods unless the defendant signed a personal guaranty, and the evidence further showed that the defendant signed a separate agreement that made his personal guaranty part of the agreement. *Mid-City*, 132 Ill. App. 3d at 481-82. Here, nothing in the agreement evinced Lisa Alvernia's intent to be bound personally. As we stated above, the body of the restrictive covenant nowhere identifies Lisa Alvernia.

¶ 20 Fourth, defendant asserts that the trial court's construction of the agreement rendered the restrictive covenant a nullity and deprived it of the goodwill it purchased. A noncompetition agreement ancillary to the sale of a business protects the goodwill purchased by the buyer. *InsureOne Independent Insurance Agency, LLC v. Hallberg*, 2012 IL App (1st) 092385, ¶ 70. A

restrictive covenant ensures that the former owner will not walk away from the sale with the company's customers and goodwill, leaving the buyer with a chimerical acquisition. *Insureone*, 2012 IL App (1st) 092385, ¶ 70. None of that changes the facts. The parties to the instant agreement are two corporations. The "Seller," as defined by the agreement, is plaintiff. None of the provisions of the restrictive covenant identify Lisa Alvernia. Lisa Alvernia clearly signed the agreement in her capacity as president of plaintiff. When a contract is clear and unambiguous, a court will not add terms in order to reach a result more equitable to one of the parties. *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 165 (2004).

¶ 21 We move on to consider defendant's alternative argument, that the language of the restrictive covenant is ambiguous and that the trial court should have resorted to extrinsic evidence consisting of (1) Lisa Alvernia's email to defendant requesting a modification to the restrictive covenant allowing her to take a job with a competitor within the proscribed radius; (2) defendant's payments to Lisa Alvernia individually; and (3) the substitution of Lisa Alvernia's personal bankruptcy trustee as plaintiff as evidence of the parties' intent to bind Lisa Alvernia personally. We have already established that the parties to the agreement are plaintiff and defendant. The agreement cannot bind a nonparty (see *Waffle House*, 534 U.S. at 294), so, essentially, defendant's argument is that the court should add Lisa Alvernia as a party to the contract.

¶ 22 In *Northwest Podiatry Center, Ltd. v. Ochwat*, 2013 IL App (1st) 120458, the court held that a restrictive covenant ancillary to an employment agreement was overbroad because it did not contain a temporal limitation. *Ochwat*, 2013 IL App (1st) 120458, ¶ 43. The plaintiffs urged the court to read into the restriction a temporal limitation based on parol evidence of the intent of the parties. *Ochwat*, 2013 IL App (1st) 120458, ¶ 47. The court declined, saying that to do so

would be an impermissible rewriting of the covenant under the guise of construction. *Ochwat*, 2013 IL App (1st) 120458, ¶ 47. In *MHM Services, Inc. v. Assurance Company of America*, 2012 IL App (1st) 112171, the plaintiff attempted to cobble together two unrelated provisions of an insurance policy to create new terms in a notice provision. *MHM*, 2012 IL App (1st) 112171, ¶ 59. The appellate court rejected the plaintiff's argument and said, "We may not, under the guise of construction, rewrite the notice clause to suit [the plaintiff]." *MHM*, 2012 IL App (1st) 112171, ¶ 59.

¶ 23 In *Terry v. State Farm Mutual Automobile Insurance Co.*, 287 Ill. App. 3d 8, 14 (1997), the plaintiff, a Village of Carpentersville police officer, was injured in an accident with another motorist while he was operating a police car. *Terry*, 287 Ill. App. 3d at 9. The plaintiff recovered the policy limits of the other driver's insurance policy, the proceeds of which were paid to the Village. *Terry*, 287 Ill. App. 3d at 9. The plaintiff filed a worker's compensation suit against the Village and received a settlement. *Terry*, 287 Ill. App. 3d at 9. The plaintiff also filed an underinsured motor vehicle claim under a State Farm policy in which the Village was the named insured on the declarations page and for which the Village paid the premiums. *Terry*, 287 Ill. App. 3d at 9-10. The Village asserted a lien against any recovery under the policy for the worker's compensation payments it made to the plaintiff. *Terry*, 287 Ill. App. 3d at 10. Under a policy provision, State Farm asserted its right to reduce any payments it made under the underinsured motorist policy by the amount of the worker's compensation payments. *Terry*, 287 Ill. App. 3d at 10. Our supreme court had held that such a set off was valid. *Terry*, 287 Ill. App. 3d at 14. Nevertheless, the trial court found that the result should be different because the policy was ambiguous, and the trial court found that the policy should provide coverage to the Village, as the Village reasonably expected that the policy would cover it under the circumstances of the

case. *Terry*, 287 Ill. App. 3d at 14. The appellate court reversed, holding that the plaintiff was unambiguously the insured under the policy, despite the declarations page naming the Village as the insured, and said, "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." *Terry*, 287 Ill. App. 3d at 14. ¶ ¶ 24 Here, the parties to the agreement unambiguously are plaintiff and defendant. We would be rewriting the contract under the guise of construction if we were to add Lisa Alvernia as a party. Accordingly, we affirm the judgment of the circuit court of Kane County.

¶ 25 Affirmed.