STATE OF MICHIGAN

COURT OF APPEALS

TEACHOUT SECURITY SERVICES, INC.,

Plaintiff-Appellant,

v

WHITTNEY THOMAS, JACQUELINE GREEN, JOHN THOMAS, TRYWAN JAMUL WALLS, a/k/a TIAWAN WALLS, ANTHONY LEWIS, and JIMMIE LEE MOORE, JR.,

Defendants-Appellees.

UNPUBLISHED
October 19, 2010

No. 293009
Genesee Circuit Court
LC No. 08-089041-CK

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

In this contract dispute involving a non-compete agreement, plaintiff appeals as of right an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition because it relied on the common law standard in *Follmer, Rudzewicz & Co, PC v Kosco*, 420 Mich 394; 362 NW2d 676 (1984) ("*Follmer*"), which plaintiff contends has been abrogated by MCL 445.774a. Plaintiff argues that, when applying the proper standard of reasonableness, the non-compete agreement is reasonable because it was designed to protect the competitive business interest of the knowledge and training plaintiff provided to its security officers, as well as protecting itself from disintermediation, or, put more simply, being cutout as the middleman. We disagree.

We review a trial court's decision on a motion for summary disposition made under MCR 2.116(C)(10) de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). In addition, we review de novo both contract and statutory interpretation. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003); *Renny v Mich Dep't of Trans*, 478 Mich 490, 495; 734 NW2d 518 (2007).

As a general matter, courts presume the legality, validity and enforceability of contracts. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 507; 741 NW2d 539 (2007). Non-competition agreements, however, "are disfavored as restraints of commerce and are only enforceable to the extent they are reasonable." *Id*. MCL 445.774a provides:

> (1) An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.
>
> (2) This section shall apply to covenants and agreements which are entered into after March 29, 1985.

"[T]he history of restraint of trade law in Michigan makes clear, the common law in Michigan contemplated the enforceability of noncompetition agreements that qualified as reasonable." *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 495; 650 NW2d 670 (2002). The Legislature's enactment of former MCL 445.761, which prohibited the enforcement of non-compete agreements unless necessary to prevent the theft of customers and limited in duration to 90 days after employment ended, altered the common-law rule from 1905 until 1985. *Id*. The Legislature's subsequent "repeal of and decision not to reenact former MCL 445.761, which was in derogation of the common law, clearly demonstrates the Legislature's intent to revive the common-law rule . . . that the enforceability of noncompetition agreements depends on their reasonableness." *Id*. In addition, "absolutely nothing within the legislative history of [MCL 445.774a] . . . or within the language of that section itself suggests that the Legislature intended to prohibit, as it had in 1905, the application of the common-law rule of reason to noncompetition agreements." *Id*. at 496.

In evaluating a non-competition clause for reasonableness, we generally examine the clause's duration, geographic scope, and the type of employment prohibited. MCL 445.774a(1). We also consider the reasonableness of the competitive business interests justifying the clause. *St Clair Med, PC v Borgiel*, 270 Mich App 260, 266; 715 NW2d 914 (2006). "To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." *Coates*, 276 Mich App at 507. In the instant case, only whether plaintiff had a reasonable competitive business interest to justify the non-compete agreement is at issue.

In *Follmer*, with its sister case *Nolta-Quail-Sauer & Assoc v Roche*, the Michigan Supreme Court upheld the enforcement of two non-compete clauses, provided it could be shown on remand that the defendants, who were an accountant and an insurance agent, respectively, had access to confidential information. *Follmer*, 420 Mich at 397, 405-408. The Court in *Follmer* stated, "While an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily

ascertainable, confidential information, including information regarding customers, constitutes property of the employer and may be protected by contract." *Id*. at 402-403. The Court also quoted with approval language from Blake, *Employment Agreements Not to Compete*, 73 Harv L Rev 625, 652 (1960), as follows:

> It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertain exclusively to the employee. The fact that they were acquired or developed during the employment does not, by itself, give the employer a sufficient interest to support a restraining covenant, even though the on-the-job training has been extensive and costly. [*Id*. at 402 n 4.]

It is this language from *Follmer* that the trial court relied on in determining that plaintiff did not have a reasonable competitive business interest to justify its non-compete agreement with defendants.

Plaintiff, in arguing that *Follmer* is inapplicable relies on an unpublished case from the Fourth Circuit, where a panel of that circuit, applying Michigan law, noted that although the defendant's "contention that non-competition agreements do not apply to common knowledge has support in prior Michigan law, the dramatic change in Michigan law made by section 445.774a(1) precludes us from simply relying on [*Follmer*]." *Paws With A Cause, Inc v Crumpler*, unpublished opinion of the Fourth Circuit Court, issued January 3, 1996 (Docket No. 94-1968). The Fourth Circuit went on to state that:

> [by] its plain terms, section 445.774a(1) is not confined exclusively to trade secrets or confidential information. Rather, the statute permits the use of non-competition agreements, the sole restriction being that such agreements must be reasonable. Crumpler's cramped interpretation is contrary to the language of the statute. Section 445.774a(1) has simply not been given a confined interpretation. [*Id*.]

As an initial matter we note that foreign case law is not binding precedent. *Miller-Davis Co v Ahrens Constr*, 285 Mich App 289, 312; 777 NW2d 437 (2009). Although the Fourth Circuit decision correctly concluded that non-compete agreements are not necessarily limited to trade secrets or confidential information, its decision, contrary to plaintiff's argument, is not persuasive on the applicability of *Follmer* in the instant case. The trial court did not err in relying on the standard set forth in *Follmer* because, as held in *Bristol Window & Door, Inc*, 250 Mich App at 495, the Legislature did not intend to prohibit the application of the common-law rule of reason to non-compete agreements in adopting MCL 445.774a. Thus, the trial court, in considering whether plaintiff had a reasonable competitive business interest justifying the non-compete agreement, properly considered Michigan common law, as articulated in *Follmer*, regarding the standard under which a non-compete agreement is reviewed.

Next, plaintiff argues that regardless of whether *Follmer* applies, there is still a material question of fact regarding whether plaintiff had a reasonable competitive business interest in limiting the competition of defendants. We disagree.

The evidence, viewed in the light most favorable to plaintiff, shows that all of its employees hired as security officers went through a training and orientation day that lasted no more than eight hours. Those employees assigned to work at the Mass Transit Authority Transit Center in Flint, Michigan ("MTA") went through an additional 16 hours of training at that site. However, defendants, who each signed a non-compete agreement restricting them for 12 months from working for a competing security firm at the same site they had worked for plaintiff, went to work for a competing security firm, Securitas Security Services, Inc. ("Securitas"), after that firm underbid plaintiff for the contract of providing security at the MTA.

As discussed above, the Michigan Supreme Court stated in *Follmer*, 420 Mich at 402-403, that "[w]hile an employee is entitled to unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable, confidential information, including information regarding customers, constitutes property of the employer and may be protected by contract." In addition, as stated above, "[t]o be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill." *Coates*, 276 Mich App at 507.

Preventing the anti-competitive use of confidential information is a legitimate business interest. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007). Likewise, an employer has a reasonable business interest in protecting its goodwill because an employee who establishes client contacts and relationships as the result of the goodwill of his employer's business is in a position to unfairly appropriate that goodwill and thus unfairly compete with a former employer upon departure. *St Clair Med, PC*, 270 Mich App at 268.

Plaintiff, in arguing that it has a reasonable competitive business interest in protecting the specialized knowledge of defendants and of protecting itself from disintermediation primarily relies on *Borg-Warner Protective Servs Corp v Guardsmark, Inc*, 946 F Supp 495 (ED Ky, 1996), where, applying Kentucky and Tennessee law, the court enforced a non-compete agreement between Guardsmark, a security firm, and its former employees, where Borg-Warner obtained one of Guardsmark's contracts, and sought to hire the Guardsmark security guards already working at that site. *Id*. at 497. The court found that protecting Guardsmark's role as the middleman is a legitimate interest that deserves protection against disintermediation and emphasized that the middleman must find a contractual means to protect itself or the employees, clients or competitors will opportunistically take its work product without paying for the full value of its services. *Id*. at 502.

Although plaintiff partly frames the issue as one in which defendants' specialized knowledge needed to be protected, the evidence shows that defendants, in their training as security officers, partook in only two days of training designed for the MTA site. The knowledge they acquired about the personnel of the MTA, the people who frequented it, and the criminal elements present was merely general knowledge acquired through their experience of working at the MTA. There is no evidence that defendants' positions allowed them access to confidential information or put them in a position to appropriate any goodwill associated with plaintiff's business. Further, general knowledge acquired by defendants as security officers, while working for plaintiff appertain exclusively to defendants, *Follmer*, 420 Mich at 402-403,

and enforcement of the non-compete agreement would inappropriately prohibit defendants from using that general knowledge, *Coates*, 276 Mich App at 507.

Further, although plaintiff also frames its reasonable competitive business interest as a protection against disintermediation, no Michigan court has cited "disintermediation" as a reasonable competitive business interest for limiting competition of former employees. Although, as plaintiff argues, other jurisdictions have adopted this position of the court in *Borg-Warner Protective Servs Corp* regarding how protection from disintermediation is a reasonable competitive business interest, we conclude that, under the circumstances of this case, where the knowledge acquired by defendants in providing security at the MTA is merely general knowledge accumulated in their day to day positions, recognizing plaintiff's claim of disintermediation as a reasonable interest would come into conflict with the binding Michigan common law precedent articulated in *Follmer*. To conclude otherwise would unreasonably prohibit defendants from using the general knowledge acquired in their positions. Thus, the trial court did not err in granting defendants' motion for summary disposition because there is no material question of fact regarding whether plaintiff had a reasonable competitive business interest in limiting the competition of defendants.

Lastly, plaintiff argues under Michigan's doctrine of freedom to contract, a party can contract away common law defenses to non-compete agreements. Plaintiff contends that, pursuant to the language of the non-compete agreement, defendants agreed that the terms of the agreement were reasonable and that plaintiff had a reasonable interest in restricting competition. As a result, plaintiff argues that defendants cannot argue that the non-compete agreement is unreasonable because they waived this defense in agreeing that the agreement is reasonable. We disagree.

The non-compete agreement, in relevant part provides that "Employee acknowledges that the covenants and agreements which Employee has made in this Agreement are reasonable and required for the reasonable protection of Teachout and its respective relationships to customers, employees and agents." That contracts are enforced according to their terms is a corollary of the parties' liberty to contract. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). The Legislature has the power to limit or eliminate parties' freedom to contract on certain matters. In particular, specific statutory language and overriding public policy are bases to negate contractual language. See *Zahn v Kroger Co of Mich*, 483 Mich 34, 39-40; 764 NW2d 207 (2009) (stating that "to adopt the position that MCL 600.2956 renders express contractual indemnification clauses unenforceable would require that we negate the parties' contract. We find no language in the statute, nor any compelling public policy, that would require us to do so.").

In support of its position, plaintiff primarily relies on *Coates*, 276 Mich App at 510-511, in which this Court held that the parties were free to avoid, by contract, what might otherwise be an applicable rule of law, where the parties opted out of the first-breach doctrine in their non-compete agreement. In support of its holding, the *Coates* panel cited to *Rory*, 473 Mich at 470, which previously held that "an unambiguous contractual provision providing for a shortened period of limitations is to be enforced as written unless the provision would violate law or public policy."

However, the scenario presented in the instant case, where plaintiff argues that the parties contracted away their right to have judicial scrutiny over whether the terms of the non-compete agreement are reasonable, is distinguishable from *Coates*. As held in *Bristol Window & Door, Inc*, 250 Mich App at 495, the repeal of the former MCL 445.761 and the adoption of MCL 445.774a showed the Legislature's intent to have courts apply the common law of reasonableness in scrutinizing non-compete agreements. Further, as noted above, non-compete agreements "are disfavored as restraints of commerce and are only enforceable to the extent they are reasonable." *Coates*, 276 Mich App at 507. Thus, unlike the facts in *Coates* where the parties opted out of the first-breach doctrine, the compelling public policy disfavoring non-compete agreements presents the situation where judicial scrutiny of the agreement's reasonableness is required, despite that the parties contracted that the terms of the non-compete were reasonable. Therefore, defendants did not waive their right to raise the argument regarding the reasonableness of the non-compete agreement, and thus, based on the above analysis, the trial court did not err in granting defendants' motion for summary disposition.

Affirmed.

/s/ Stephen L. Borrello
/s/ Mark J. Cavanagh
/s/ Donald S. Owens