UNLV | WILLIAM S. BOYD SCHOOL OF LAW

Scholarly Commons @ UNLV Boyd Law

Nevada Supreme Court Summaries | Law Journals

1-1-2004

Summary of Traffic Control Services v. United Rentals, 120 Nev. Adv. Rep. 19

Christopher Carson
Nevada Law Journal

Follow this and additional works at: https://scholars.law.unlv.edu/nvscs

 Part of the Contracts Commons

Recommended Citation

Carson, Christopher, "Summary of Traffic Control Services v. United Rentals, 120 Nev. Adv. Rep. 19" (2004). *Nevada Supreme Court Summaries*. 708.
https://scholars.law.unlv.edu/nvscs/708

This Case Summary is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

Traffic Control Services v. United Rentals, 120 Nev. Adv. Rep. 19, 87 P.3d 1054 (2004)[1]

CONTRACTS- ASSIGNABILITY OF COVENANTS NOT TO COMPETE

Summary

Philip A. Burkhardt and his employer, Traffic Control Services (Traffic Control) appealed the issuance of a preliminary injunction enforcing a noncompetiton covenant in favor of United Rentals (United), the purchaser of the corporate assets of NES Trench Shoring (NES), Burkhardt's former employer. The main issue on appeal was Burkhardt's contention that the covenant not to compete he made with NES could not be assigned during a corporate sale absent some consideration.

Burkhardt, Traffic Control, United, and NES all specialize in renting and selling trench shoring equipment to underground construction contractors in the greater Las Vegas area. During 1999 and 2000 Burkhardt worked for United as a sales representative. Late in 2000, Burkhardt became dissatisfied with United's customer service policies and left United for a position at NES.

As a condition of his employment with NES, Burkhardt signed noncompetiton and nondisclosure covenants, for doing so Burkhardt received $10,000. Burkhardt alleged that before he took the job with NES the management assured him that they had no plans to sell or be bought out by United.

During his tenure at NES, Burkhardt was promoted from sales representative to branch/sales manager where he gained access to NES's confidential business records including customer and price lists and pricing strategies. Burkhardt's duties led him to become intimately familiar with NES's customer base.

In June of 2002, United and NES reached an agreement where United would purchase NES's corporate assets for three times fair market value. The purchase agreement was limited to certain assets with language stating "[a]ll contracts and agreements that are not listed as 'Assumed Contracts' are 'Excluded Assets.'" While the agreement listed other noncompetiton covenants, Burkhardt's was not among them.

A week before the conclusion of the sale, United requested that a significant number of key employees sign new one-year contracts which included new nondisclosure covenants. Of the eighty-one key employees, nine refused to sign. This group included Burkhardt. However, Burkhardt remained with United/NES as a sales manager through the transition; but again, he quickly became disenfranchised with United's customer service policies.

In August of 2002, Burkhardt began negotiating with Traffic Control, United's direct competitor. Burkhardt did inform Traffic Control about his nondisclosure/noncompetiton covenant that he believed was null and void since he was terminating his employment with United, not NES with whom he made the initial agreement.

Burkhardt began work at Traffic Control on August 10, 2002 at which time he began contacting companies to solicit business on behalf of Traffic Control. United,

---

[1] By Christopher Carson

through counsel, sent Burkhardt written notification that his employment with NES constituted a breach of his noncompetiton covenant.

When Burkhardt did not cease working for NES, United filed a complaint stating that Burkhardt was using NES/United's confidential information to solicit customers for Traffic Control. Ultimately, the district court entered a preliminary injunction enforcing the NES noncompetiton agreement for a period of one year. The district court concluded that Burkhardt's covenant was reasonable in time and scope, assignable as an asset of value, and that NES validly assigned the covenant to United in the asset sale.

On appeal, Burkhardt argued that absent some independent consideration on his behalf, his covenant should not have been assignable during the sale. Burkhardt contended that the agreement was between him and NES and allowing United to assume the covenant would breach his contractual rights. The Nevada Supreme Court agreed with Burkhardt, holding that the agreement was personal to Burkhardt and he only intended to be bound to NES when he signed the covenant. However, the court did hold that one of the main problems with the assignability of the covenant was the lack of a clause in the purchase agreement permitting the assignment to a third party.

Issue and Disposition

Issue

May an employer in a corporate sale assign the rights under an employee's noncompetiton/nondisclosure covenant without the employee's consent?

Disposition

No. An employer may only assign such covenants during a corporate sale with the employee's consent and only when the consent is supported by independent consideration.

Commentary

State of the Law Before *Traffic Control*

This issue was one of first impression in the state of Nevada. While noncompetiton covenants have existed in Nevada jurisprudence for over twenty years[2] the assignability of them had never been at direct issue before the Nevada Supreme Court. Beyond caselaw, NRS 613.200, which governs the requirements for noncompetiton covenants,[3] was the only statute that guided the enforceability of transferred covenants.

---

[2] Ellis v. McDaniel, 95 Nev. 455, 459, 596 P.2d 222, 224 (1979) ("[B]ecause the loss of a person's livelihood is a very serious matter, post employment anti-competitive covenants are scrutinized with greater care than are similar covenants incident to the sale of a business.")

[3] NRS 613.200(4) (2004) permits employers and employees to negotiate and execute enforceable noncompetiton covenants if they are supported by valuable consideration and are reasonable in scope and duration.

However, other jurisdictions have examined the assignability of noncompetiton covenants and have reached mixed results. The majority of the older case law and treatises follow the rule that a noncompetiton covenant can be assigned at any time with or without employee approval.[4] For example, in *Premier Laundry v. Klein*,[5] the court held that an assigned noncompetiton covenant is "a valuable right which the courts will enforce."

Recent trends in caselaw have been away from the assignability of the noncompetiton covenants to place more rights in the hands of employees[6] especially in the absence of assignability clauses in the sales contract.[7] The Nevada Supreme Court latched onto these newer views of the covenant assignability, focusing on the fact that: 1) the assignability clause was absent to Burkhardt's covenant, 2) the sales contract contained language that expressly reserved things not named in the sales contract as 'Excluded Assets' and 3) Burkhardt, based on his testimony about his previous disagreements with United, would have never agreed to a noncompetiton agreement with them.

Effect of *Traffic Control* on Current Law

By limiting the unfettered assignability of noncompetiton covenants the Nevada Supreme Court has followed the trend that Nevada lawmakers started when they passed NRS 613.200.[8] The court also recognized that the allowing the arbitrary transfer of covenant absent some enumerated compensation would be forcing the effected employee to suffer the same restriction—limiting his ability to compete in the free market—for a party who was a total stranger to the original agreement.

However, the court does not wholly prohibit the transfer of noncompetiton covenants. They created a caveat permitting the transfer of the covenants if they are renegotiated, providing the effected party with independent consideration. Essentially, this is nothing more than a renegotiation of the covenant. This ensures a measure of fairness between all parties.

---

[4] *See* J.H. Renarde, Inc. v. Sims, 711 A.2d 410, 412-14 (N.J. Super. Ct. Ch. Div. 1998) (as a matter of law, noncompetiton covenants may be freely assigned in an asset sale like any other contractual right in the absence of some express contractual prohibition); Equifax Services, Inc. v. Hitz, 905 F.2d 1355, 1361 (10th Cir. 1990); Restatement (Second) of Contracts § 317 cmt. D, illus. 6 (1981)

> B sells his business his business to A and makes a valid contract not to compete. A sells the business to C and assigns to C the right to have B refrain from competition. The assignment is effective with the respect to competition with the business derived from B. The good will of the business, with contractual protection against its impairment is treated as an assignable asset.

[5] 73 N.Y.S.2d 60, 61 (N.Y. Spec. term 1947).

[6] *See* Hess v.Gebhard & Co. Inc., 808 A.2d 912, 917 (Pa. 2002) (denying the assignability of a noncompetiton covenant without an employee's consent), Corporate Exp. Office Products v. Phillips, 847 So. 2d 406, 413 (Fla. 2003) ("Thus, when the sale of the assets includes a personal service contract that contains a noncompete agreement, the purchaser can enforce its terms only with the employee's consent to assignment.").

[7] Securitas Security Services USA , Inc. v. Jenkins, 16 Mass L. Rptr. 486 (Mass. Super. Ct. 2003) *available at* 2003 WLW 21781385 at *5 (covenant did not contain assignment clause; employee did not covenant with successor company not to compete with it)

[8] NEV. REV. STAT. 614.200 (2004) (ensuring that noncompetiton covenants meet basic requirements that protect the rights of the individual).

Conclusion

After *Traffic Control*, any corporate entity that chooses to engage in a corporate buyout or sale must proceed with caution. By prohibiting the unrestricted assignability of noncompetiton covenants unless they are supported by new independent consideration, the Nevada Supreme Court protected the rights of workers at the expense of large businesses. From this point on, the costs of a buyout or sale may increase well beyond the simple assets. Now companies must include the price of renegotiating all of the employees' restrictive covenants into the overall price of the corporate sale.

However, there may be one avenue that this decision could be challenged. An enterprising attorney could argue that the true issue here was not the assignability of covenants, but rather the lack in this instance of an express clause permitting assignment. In fact, this was one the main supporting reasons pointed to by the court. The court cited to *All Star Bonding v. State of Nevada*,[9] for the idea that the court could not "interpolate in a contract what the contract does not contain." But this argument is weak at best due to the strong language of the court emphasizing the need for the arms-length renegotiation of the covenants for independent consideration.

[9] 62 P.3d 1124, 1125 (2003).