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HD Supply Facilities Maint. v. Bymoer, 125 Nev. Adv. Op. No. 20 (June 11, 2009)¹

EMPLOYMENT/CONTRACTS- NONCOMPETITION COVENANTS

Summary

Certified questions from the United States District Court, District of Nevada, arising from a action by HD Supply Facilities Maint., Ltd. (“HDS”), seeking enforcement of restrictive employment covenants against its former employee, Leif Bymoer (“Bymoer”) and Bymoer’s current employer AZ Partsmaster, Inc. (“AZP”). The questions each relate to whether the Nevada rule, set forth by the Nevada Supreme Court in Traffic Control Servs. v. United Rentals,² prohibiting the assignment of noncompetition covenants in asset purchase transactions “applies when a successor corporation acquires covenants of noncompetition, nonsolicitation, or confidentiality as a result of a merger.”

Disposition/Outcome

The Nevada Supreme Court held that the Traffic Control rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants in a merger.

Factual and Procedural History

HDS is one of the largest maintenance, repair, and operations supplies distribution firms in the United States. The company is the product of two separate mergers. In the first merger, Hughes Supply, Inc. acquired Bymoer’s original employer, Century Maintenance Supply, Inc. (“Century”). Hughes then merged with a subsidiary of The Home Depot, Inc. to form HDS.

In his contract with Century, Bymoer entered into covenants of nonsolicitation, confidentiality and agreed not to “engag[e] in any business activity, directly or indirectly, whether for profit or otherwise, which is similar to or competitive with the business of Century in any market area then being served by Century.” The agreement did not contain an assignability clause.

During the course of the mergers, Bymoer continued in his position as a sales representative. Then, on September 22, 2006, Bymoer voluntarily resigned from HDS and took a sales position with HDS competitor, AZP. Shortly thereafter Bymoer began soliciting business from his former HDS clients. After learning this, HDS notified AZP that Bymoer was in breach of the restrictive covenants contained in his contract with Century. Despite this, AZP continued to employ Bymoer. Thereafter, HDS filed suit against Bymoer and AZP in federal court alleging, inter alia, breach of contract.

Bymoer moved to dismiss the action relying on Traffic Control because he did not consent to assignment of the restrictive covenants. HDS responded that Traffic Control was

¹ Summarized by Casey G. Perkins

² 87 P.3d 1054 (Nev. 2004).

limited to its facts: prohibition on assignment applied only in asset purchase transactions, and further that the rule did not apply to covenants of nonsolicitation and confidentiality. Finding that Traffic Control was not clearly controlling precedent because it did not directly address the issue before the court, the federal court certified the questions to the Nevada Supreme Court.

Discussion

Traffic Control's rule of nonassignability

In Traffic Control, the Nevada Supreme Court held that an employer in a corporate sale could not assign rights under an employee's covenant not to compete unless there was an agreement "negotiated at arm's length, which explicitly permits assignment and which is supported by separate consideration."³

Limiting Traffic Control

In limiting the Traffic Control rule, the court focused primarily on employees' contractual rights under the common law, and the distinctions between asset purchases and mergers.

First, the court noted that its decision in Traffic Control was grounded in the common law rules governing contractual assignments. Because "[C]ovenants are 'personal' in nature and replacing a former employer with another obligee could fundamentally change the nature of an employee's obligation" the court reasoned, employee consent was required before an employer could assign a covenant.⁴ The court noted that the Traffic Control court further protected employee rights by requiring arm's length negotiations and separate consideration for an assignability clause. In light of this, the court held that the Traffic Control decision stood for the general proposition that personal services contracts are not assignable without employee consent.

Next, the court distinguished mergers from asset purchases. Citing a Florida Supreme Court decision⁵ the court relied on in Traffic Control, and a recent Nebraska Supreme Court decision⁶ addressing the same issue, the court noted that "[u]nlike in a merger, in which 'two corporations... unite into a single corporate existence' the acquiring corporation in an asset purchase becomes, in effect, a wholly new employer."⁷ Further, the court noted that when a relevant merger statute exists, covenant assignability is not controversial, and that a majority of courts have concluded that "the right to enforce the restrictive covenants of a merged corporation normally vests in the surviving entity."⁸ Finally, the court recognized the "hard-and-fast

³ Id. at 1057.

⁴ Id. at 1058-59.

⁵ Corporate Express Office Prods. v. Phillips, 847 So. 2d 406 (Fla. 2003) (holding that under Florida's merger statute, "the surviving corporation... assumes the right to enforce a noncompete agreement entered into with an employee of the merg[ing] corporation.").

⁶ Aon Consulting v. Midlands Financial, 748 N.W. 2d 626 (Neb. 2008)(holding that a nonsolicitation covenant is a corporate asset that passes to the successor corporation by operation of law).

⁷ HD Supply Facilities Maint. v. Bymoan, 125 Nev. Ad. Op. No. 20, 9 (2009) (quoting Corporate Express, 847 So. 2d at 412-14).

⁸ Id. at 10.

distinction” it has historically recognized between mergers, which are governed by statute, and asset purchases, which are not.⁹

This distinction was critical to the court. Because a corporate merger, unlike an asset purchase, did not place an employee under the control of an entirely new employer, the court held that the reasoning present in Traffic Control does not apply to corporate mergers. Accordingly, “Traffic Control’s rule of nonassignability does not apply when a successor corporation acquires restrictive employment covenants as a result of the merger.”¹⁰

Concurring Opinion

Justice Pickering concurred in the result and, but for the stare decisis respect due Traffic Control, would have analyzed the question under NRS 613.200(4) which provides that restrictive covenants in employment agreements are enforceable so long as “the agreement is supported by valuable consideration and is otherwise reasonable in scope and duration.

Conclusion

Court concluded that Traffic Control’s rule of nonassignability of restrictive employment covenants does not apply when a successor corporation acquires the restrictive covenants as the result of a merger, rather than an asset purchase transaction.

⁹ Lamb v. Leroy Corp., 454 P.2d 24, 26 (Nev. 1969).

¹⁰ HD Supply, 125 Nev. Adv. Op. at 11.