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Summary of Excellence Cmty. Mgmt. v. Gilmore, 131 Nev. Adv. Op. 38 (June 25, 2015)

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Excellence Cmty. Mgmt. v. Gilmore, 131 Nev. Adv. Op. 38 (June 25, 2015)[1]

CONTRACT LAW: RESTRICTIVE COVENANTS

Summary

The Court held the sale of a 100 percent membership interest in a limited liability company does not affect the enforcement of an employee's employment contract containing a restrictive covenant because the sale does not create a new entity. An employer limited liability company may enforce a restrictive covenant in an employment contract without its employee's consent of assignment.

Background

Excellence Community Management (ECM), a provider of condominium and homeowners' association management (HOA) services employed Krista Gilmore as a community association manager. Gilmore directly managed multiple associations. In April 2011, Gilmore signed an employment agreement that included a 24-month prohibition from revealing trade secrets as well as an 18-month nonsolicitation and noncompetition clause to prevent Gilmore from soliciting persons or entities contractually engaged in business with ECM.

In May 2011, the owners of ECM sold 90 percent of their membership interest to First Service Residential Management Nevada (FSRM). One year later FSRM obtained the remaining 10 percent interest. The purchase agreement specificially stated that the sellers "will sell, assign, and transfer the [p]urchased [i]nterest to [FSRM], and [FSRM] will purchase the [p]urchased [i]nterest from the [sellers], free and clear of any [e]ncumbrance."

In June 2012, Gilmore submitted her resignation to ECM and notified ECM she would begin employment at Mesa Management, LLC. ECM terminated Gilmore and sent a cease-and-desist letter alleging Gilmore violated the employment agreement by notifying ECM's clients of Gilmore's change in employment and soliciting business for Mesa. Regardless, Mesa sent a solicitation letter to numerous HOA boards announcing Gilmore's employment with Mesa.

ECM filed a complaint seeking damages and injunctive relief, and subsequently filing a motion for a preliminary injunction to enforce the employment agreement. The district court denied the motion for a preliminary injunction because the employment agreement was not assignable to FSRM absent language permitting the assignment or consent by the employment. Also, the district court determined a preliminary injunction was unwarranted because ECM failed to show irreparable harm for which compensatory damages were not an adequate remedy.

Discussion

The 100-percent membership sale of the LLC did not result in the creation of a new entity

The district court relied on *Traffic Control Services, Inc. v. United Rentals Northwest, Inc.,* 120 Nev. 168, 87 P.3d 1054 (2004) in concluding the employment agreement was not assignable to FSRM absent a clause permitting the assignment because a new entity was introduced after the sale. ECM argued that *HD Supply Facilities Maintenance, Ltd. v. Bymoen*,

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125 Nev. 200, 210 P.3d 183 (2009) and *Corporate Express Office Products, Inc. v. Phillips*, 847 So. 2d 406 (Fla. 2003) were more applicable because both cases concluded that a 100-percent interest is sold, the enforceability of any restrictive covenants are unaffected because there is no new employer.

The Court concluded in *HD Supply* that the rule of nonassignability of an employee's covenant not to compete was limited to asset purchase transactions because asset purchases create a wholly new employer whereas other corporate transactions, such as mergers, do not change the employer. The court in *Corporate Express* analyzed the difference between asset sales and mergers and determined that a 100-percent stock sale does not create a new entity because "the existence of a corporate entity is not affected by changes in its ownership," and, instead, "the corporation whose stock is acquired continues in existence, even though there may be a change in its management."[2]

Here, there was a 100-percent membership sale of an LLC, not a 100-percent stock sale. Gilmore argued that a membership sale of an LLC is more equivalent to an asset sale than a stock sale. The Court disagreed. LLCs, like corporations, have a perpetual existence and are distinct from their managers and members;[3] therefore, we treat the assignability of employment agreements in the sale of a LLC membership interest like those in a stock sale.[4] Thus, the district court erred because since no new entity was introduced, the employment agreement was enforceable by ECM without an assignment clause.

ECM failed to show it would suffer irreparable harm for which compensatory damages would not suffice

Irreparable harm is an injury "for which compensatory damage is an inadequate remedy.[5] Other jurisdictions may presume irreparable harm when a restrictive covenant is breached.[6] This presumption is used when it is difficult to calculate money damages due to a loss of business due to a loss in client relationships; however, when the loss to the employer can be quantified in terms of a specific amount of lost sales, then there is no irreparable harm.[7]

Damages are awarded depending on the underlying facts and circumstances of the case. When a former employee solicits and, in some cases, obtains contracts with the former employer's customers, then irreparable harm can be found. Further, a loss of client relationships is found when the employee provided unique services. Although ECM employed Gilmore for seven years, it does not appear that Gilmore possessed any "unique" skills required to do her job. Additionally, there is conflicting evidence whether Gilmore solicited or directly provided services to any of ECM's customers. ECM alleges Gilmore solicited business and disclosed confidential information and presented evidence of e-mail exchanges between Gilmore and a client. Mesa countered by providing declarations from various HOAs that stated they terminated their contracts because of the change in ownership to FSRM. In regards to the e-mail between Gilmore and the client, it was disclosed that the client had already decided to terminate business with ECM and was in the process of soliciting proposals from other management companies.

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[2] 847 So. 2d at 411–12.

[3] NEV. REV. STAT. § 86.155; NEV. REV. STAT. § 86.201(3).

[4] *See* Missett v. Hub Int'l Pa., LLC, 6 A.3d 530, 537 (Pa. Super. Ct. 2010).

[5] Dixon v. Thatcher, 103 Nev. 414, 415, 742 P.2d 1029, 1029 (1987).

[6] *See* Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc., 323 F. Supp. 2d 525, 532 (S.D.N.Y. 2004); Hillard v. Medtronic, Inc., 910 F. Supp. 173, 179 (M.D. Pa. 1995).

[7] Johnson Controls, 323 F. Supp. 2d at 532.

Confidential information was not shared because the alleged confidential information was publicly available on the Secretary of State's website.

Conclusion

The district court properly concluded there was insufficient evidence to demonstrate irreparable harm and denied the preliminary injunction. The Court affirmed the decision of the district court to deny the motion for a preliminary injunction and found the district court did not abuse its discretion.