Case Western Reserve Law Review

Volume 6 | Issue 1 Article 8

1954

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assert his privilege to be tried in the county in which the venue would be proper if the action had been brought only against him.

In any event the "good faith rule" would not seem to be of much value to a plaintiff who is forced to prosecute his action against several defendants who, if sued alone, would be entitled to be sued in different counties. For example, in Kansas, which is the leading "good faith rule" jurisdiction, there was a verdict and judgment against both the resident and the non-resident defendants in a court of general original jurisdiction; yet the Kansas Supreme Court found that the plaintiff had not commenced his action against the resident and the non-resident defendant in good faith.[63]

V. CONCLUSION

The Ohio courts favor the right of a defendant to be sued at a place which is convenient to him even though this policy may lead to a multiplicity of suits. In their zeal to curb the unscrupulous plaintiff, these courts have formulated a rule which penalizes the honest plaintiff where the place of trial is determined by the residence of one of several defendants, who, if sued separately would be entitled to be sued in different counties. The fault of any "good faith rule" lies in its inherent lack of objectivity, and in the resultant raising of collateral issues. Rules of law should be certain. A rule which would result in both certainty and fairness to such a plaintiff, while adequately preserving the rights of a defendant as to the place of trial is one which would foreclose any objections of a defendant to improper venue on the basis of further proceedings if the plaintiff presents a prima facie case against the resident defendant.

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Equitable Enforcement of Negative Covenants In Employment Contracts

The growing complexity of modern business has created an increasing volume of litigation concerning the use of negative covenants in employment contracts. As competition becomes keener employers seek methods of maintaining their competitive positions by such covenants. Although the reported cases in this field are legion, few concrete principles can be derived from them, thereby creating a problem for the attorney involved in such litigation. His research often will only establish the time-honored proposition, "Each case depends upon its own facts." For every group of cases he will discover holding one way on a given set of facts he can find almost as many taking the opposite view. For this is a field of law in

[63] Schoonover v. Clark, 155 Kan. 835, 130 P.2d 619 (1942).

which it is frequently impossible to reconcile the position of different courts.

The typical negative covenant situation occurs where X Co. sells aluminum siding in the city of Mudflats. They hire Y as their salesman and agent for the eastern section of the city. When Y is hired he signs a contract of employment. The contract includes a provision by which Y agrees not to engage in the same business for himself, or another in competition with X Co. in this area, for a period of two years. Subsequently X Co. sends Y to their home office where he is taught how the product is made, and how to demonstrate and sell it. X Co. provides Y with a list of prospective customers, and he is launched on the way toward a successful selling career. After working for six months, Y receives a better offer from Z Co. and goes to work for them selling a similar product. X Co. now seeks by injunction to enforce the negative covenant in the contract of employment. How does X Co. establish a cause of action for injunctive relief?

One thing which must be remembered is that this action is an equitable one and much discretion is left in the hands of the trial judge. He is practically free to decide each case as he sees fit, if he can find an equitable maxim to support his conclusion. Irreparable injury must be shown by the plaintiff,[1] and a Pennsylvania court has held that contracts in partial restraint of trade are enforceable in equity if all other equitable requirements have been met.[2]

In very early times contracts in restraint of trade were void.[3] Gradually inroads were made on this theory until its complete abrogation by the celebrated English case of *Mitchell v. Reynolds*.[4] In this case the defendant assigned to the plaintiff the lease of a bakehouse and gave bond promising to pay a penalty if he exercised the baking trade in the parish during the term of the lease. In a suit on the bond the court gave judgment for the plaintiff stressing the legality of the enterprise and the reasonableness of the limits as to time and space. The instant case also made a distinction between total and partial restraints of trade, holding the latter valid if based on good consideration, not contrary to public policy, and ancillary to the sale of a business or dissolution of a partnership. The tendency in England subsequently became not to enforce negative covenants in employment contracts unless the employee is about to reveal confidential information, or interfere wrongly with the employer's customers and trade connections.[5]

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[1] Peterson v. Johnson Nut Co., 204 Minn. 300, 283 N.W. 561 (1939).
[2] Easton Laundries v. Smith, 26 North 324 (Pa. Com. Pl. 1938).
[3] 5 WILLISTON, CONTRACTS § 1634 (Williston and Thompson ed. 1937). For a history and general discussion of negative covenants see 28 COL. L. REV. 81.
[4] Mitchel v. Reynolds, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).
[5] Atwood v. Lamont, 3 K.B. 571 (1920); Bowler v. Lovegrove, I Ch. 642 (1921).

Negative covenants in restraint of employment are usually treated as partial restraints of trade. But some courts are reluctant to enforce restraints on employment and so they distinguish between covenants in partial restraint of trade and those in restraint of employment.[6]

Courts generally distinguish three types of interests when negative covenants in employment contracts are sought to be enforced.[7] The three interests are the employer's protection of his business, the employee's right to earn a living, and the welfare of the public.[8]

Included in the first interest is the principle that an employer has a legitimate interest in maintaining the success of his business, and anything which is unfairly done to harm his business should not be allowed.[9] What the courts insist on is fair play in that an employee should not take unfair advantage of his employer. Conversely, if the primary purpose of the contract is to stifle competition and secure an unfair advantage, the contract is not enforceable.[10]

Courts are less hesitant to enforce contracts not to compete when the sale of a business or the dissolution of a partnership is involved than when an employee is sought to be prevented from working for a competitor.[11] This distinction is logical. When a party sells a business he generally receives additional payment for the good will of that business. To let him disregard his promise not to compete would be unjust since the parties are on equal footing and should abide by their promises.

The second interest we are concerned with is the rights of the employee. Every person has the right to earn a living. The question arises as to whether the law should allow a person to contract away this right? Here the all-inclusive test of reasonableness is used.[12] The law will not allow a person to agree not to seek his livelihood.[13] The law will allow, however, as consideration for his being hired, a person to contract that he will not take unfair advantage of his employer by working for him now and against him later.[14]

We must keep in mind that the employer and the employee are not on an equal bargaining level.[15] Employers will often include provisions in the

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[6] Granger v. Craven, 159 Minn. 296, 199 N.W. 10 (1924).

[7] Smithereen Co. v. Renfroe, 325 Ill. App. 229, 59 N.E.2d 545 (1945).

[8] Grand Union Tea Co. v. Walker, 208 Ind. 245, 195 N.E. 277 (1935).

[9] Becker College v. Gross, 281 Mass. 355, 183 N.E. 765 (1933).

[10] Handel v. Knepper, 269 App. Div. 967, 58 N.Y.S.2d 132 (1945).

[11] May v. Lee, 28 S.W.2d 202 (Tex. Civ. App. 1930).

[12] Laundry Co. v. Derrisseaux, 204 Ark. 843, 165 S.W.2d 598 (1942).

[13] Briggs v. Butler, 140 Ohio St. 499, 45 N.E. 2d 757 (1942).

[14] White Baking Co. v. Snell, 28 Ohio N.P. (N.S.) 172 (Montgomery Com. Pl. 1930).

[15] Brecher v. Brown, 235 Iowa 627, 17 N.W.2d 377 (1945).

employee's contract which are not necessary for the reasonable protection of the employer. Courts, therefore, quite often will place the burden upon the employer to prove that the conditions he seeks to have enforced are necessary and reasonable.[16]

The third and most elusive factor is the right of the public. This means that any restraint upon an individual's freedom to move about must pass the test of public sanction.[17] If the restriction offends the public concept of what is proper it will not be allowed. When the public is held to be injured, the reasons usually given are that the public will be deprived of the individual's skills and labor if the injunction is granted and the employee and his family may become public charges.[18] Usually if a proper balance is struck between the rights of the employer and the rights of the employee, the rights of the public will not be offended.

An attempt will now be made to give a sampling of the tests that various courts have applied in granting or refusing to grant injunctions against competing employees.

Some states have statutes which declare that certain contracts are against public policy.[19] Typical of these statutes is the Oklahoma statute which states:

> Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than as provided by the next two sections, is to that extent void.

The next two sections mentioned in the statute allow one who sells the good will of a business to be restrained from carrying on a like business in the same area, and partners upon anticipation of dissolution may agree that none of them should carry on the business within the area where the partnership transacted business.[20]

Georgia has a statute which states that contracts in general restraint of trade are against public policy and cannot be enforced.[21] A case arose in Georgia where defendant, a veteran trainee, after beginning work with the plaintiff was required to sign a contract in which he covenanted not to en-

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[16] May v. Lee, 28 S.W.2d 202 (Tex. Civ. App. 1930). However *Dyar Sales and Machinery Co. v. Bleiler,* 106 Vt. 425, 175 Atl. 27 (1934) held that the employee who resisted enforcement of the covenant had the burden of proving that the contract was contrary to public policy, unnecessary for the employer's protection, and unnecessarily restrictive of the rights of the employee.

[17] Grand Union Tea Co. v. Walker, 208 Ind. 245, 195 N.E. 277 (1935).

[18] 36 AM. JUR. 533.

[19] 15 OKLA. STAT. § 217 (1941). North Dakota has a statute discussed in *Olson v. Swendiman,* 62 N.D. 649, 244 N.W. 870 (1932), and South Dakota has another example of a statute discussed in *Prescott v. Bidwell,* 18 S.D. 64, 99 N.W. 93 (1904).

[20] 15 OKLA. STAT. § 217 (1941).

[21] GA. CODE § 20-505.

gage in the same line of business, within a seventy-five mile radius of certain cities, for a period of one year after his employment was terminated.[22] Defendant subsequently resigned and took a job with a competitor. In his bill to enjoin, plaintiff alleged defendant was soliciting customers within the seventy-five mile radius. The contract was held unenforceable because it was unreasonable and contrary to public policy. An earlier Georgia case held that contracts in restraint of trade are valid if reasonable as to time and place.[23]

In the North Carolina case of *Noe v. McDevitt*,[24] plaintiff, a barber supply company, employed defendant who signed a contract not to operate the same type of business for five years in North and South Carolina, and further agreed not to contact any account handling this kind of merchandise. Defendant terminated the contract and entered the employment of a competitor in the same area where he began soliciting business from some of the same people he had contacted while in plaintiff's employment. When the plaintiff attempted to get an injunction, the defendant raised the defense of unreasonable restraint of trade. It was held that the area of restriction was unreasonable, because the plaintiff did not prove an established business throughout the area. The court rejected the doctrine of severability and refused to sustain the contract provisions even as to the area of plaintiff's operations.[25] Ordinarily that doctrine would have allowed the contract to be enforced within the area in which plaintiff could prove an established business, or if the area included in the contract was unreasonable, the contract would be enforced as to a reasonable area.[26]

Where salesmen and solicitors have personal contact with customers, many courts allow a reasonable injunction.[27] Thus where an employee gains knowledge of, and contact with plaintiff's customers, a negative covenant will be enforced.[28]

Some courts hold that the permissible scope of covenants between employer and employee is limited to the protection of trade secrets and the prevention of direct solicitation of the employer's customers.[29] Where the

[22] Orkin Exterminating Co. v. Dewberry, 204 Ga. 794, 51 S.E.2d 669 (1949).
[23] National Linen Service Corp. v. Clower, 179 Ga. 136, 175 S.E. 460 (1934).
[24] 228 N.C. 258, 45 S.E.2d 121 (1948).
[25] 45 HARV. L. REV. 751.
[26] Where the contract is too broad as to area, some courts will apply the doctrine of severability and enforce it as to the reasonable area. McAnally v. Person, 57 S.W. 2d 945 (Tex. Civ. App. 1933). However, if the area is too broad and there is no basis for dividing the territory, the injunction may be denied. Wisconsin Ice and Coal Co. v. Lueth, 213 Wis. 42, 250 N.W. 819 (1933).
[27] French Bros. Bauer Co. v. Townshend Bros. Milk Co., 21 Ohio App. 177, 152 N.E. 675 (1925).
[28] Love v. Miami Laundry Co., 118 Fla. 137, 160 So. 32 (1935).
[29] Kaumagraph Co. v. Stampagraph Co., 235 N.Y. 1, 138 N.E. 485 (1923); Clark Paper and Mfg. Co. v. Stenacher, 236 N.Y. 312, 140 N.E. 708 (1923).

employee is trained in only one occupation, the injunction may be denied on the basis of undue hardship.[30] Inequality of bargaining power is often used by courts as a reason for denying injunctive relief.[31] When an employer has defaulted in some way, as when he breaches his contract in regard to the payment of wages, he cannot enforce the contract.[32]

It has been said that there is no reason why public policy should forbid an employer from protecting himself and his business by contracting with his employees.[33] Two reasons are the most frequently used to support this tenet. The first is that where the employee has acquired an intimate knowledge of the employer's methods and customers, irreparable injury is caused when this knowledge is wrongfully used.[34] The second is that an employee may be restricted in his future employment only when the restrictions are reasonable and necessary to protect the employer.[35] Much confusion results when these makeshift reasons are used. They can be twisted to sustain any conclusion the court desires.

The better rule seems to be that the court should consider the contract in relation to the nature of the business, the intention of the parties, and the circumstances under which the contract was made. The restraint on the other hand must be for a just and honest purpose, for the protection of legitimate interests, reasonable as to the parties, and not adverse to public interest.[36]

Thus, in spite of the general language in the cases, to state a cause of action in the employment contract area the plaintiff must establish three things. First, the employer must be free from fault. It seems, however, that the employer need not plead freedom from violation of the employment contract, as this is properly a matter of defense.[37] Secondly, the relief sought must be completely necessary, and must not include unreasonable restrictions upon the employee.[38] Third, and most important, the employer must show that he has been injured by the breach of the employment contract

[30] Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944).

[31] Brecher v. Brown, 235 Iowa 627, 17 N.W.2d 377 (1945).

[32] Langdon v. Progress Laundry and Cleaning Co., 105 S.W. 2d 346 (Tex. Civ. App. 1937). In *Economy Grocery Stores Corp. v. McMenamy*, 290 Mass. 549, 195 N.E. 747 (1935) injunction was denied where the employee was discharged without cause.

[33] Becker College v. Gross, 281 Mass. 355, 183 N.E. 765 (1933).

[34] Dyar Sales Mach. Co. v. Bleiler, 106 Vt. 425, 175 Atl. 27 (1934).

[35] Super Maid Cook-Ware Corp. v. Hamil, 50 F. 2d 830 (5th Cir. 1931), *cert. denied*, 284 U.S. 677, 52 Sup. Ct. 138 (1931).

[36] Scott v. Hall, 56 Ga. App. 467, 192 S.E. 920 (1937).

[37] Economy Grocery Stores Corp. v. McMenamy, 290 Mass. 549, 195 N.E. 747 (1935).

[38] Wisconsin Ice and Coal Co. v. Lueth, 213 Wis. 42, 250 N.W. 819 (1933).

and that he will continue to be irreparably injured unless he is given equitable relief.[39] There is some dispute as to the kind of injury which will suffice, but it should be an injury that causes the employer loss of customers, or business, or both.[40] This injury must be proved by facts, and will not be presumed because the employer has the burden of establishing his right to relief.[41]

The type of situation in which sufficient injury occurs in most instances is where the employee has gained personal contact with the customers of the employer, and subsequently solicits the same customers while competing with the former employer.[42] The next most numerous class of cases is where the employee has gained knowledge of trade secrets and other confidential information, and is now using that knowledge in competition with his former employer.[43]

There are several defenses available to the employee. The most common defenses are the initial breach of the employment contract by the employer,[44] unnecessary restrictions in the employment contract,[45] undue hardship,[46] and lack of irreparable harm to the plaintiff.[47]

CONCLUSION

Courts will enforce a negative employment contract when its restrictions are reasonably limited in time and space, necessary for the protection of the employer, not unreasonable to the employee, and when they do not contravene public policy. This question depends on the nature and extent of the business, the nature of the services rendered, and the intentions of the parties.

The difficulty arises in applying these general and rather vague statements to specific fact situations. The law is in need of simplification and clarification in the employment contract area. In order to avoid confusion the courts should state what must be proved in terms which are more clear so that the trial lawyer will know what he need prove to establish his case.

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[39] May v. Lee, 28 S.W.2d 202 (Tex. Civ. App. 1930).

[40] Capital Laundry Co. v. Vannozzi, 115 N.J. Eq. 26, 169 Atl. 554 (1933).

[41] May v. Lee, 28 S.W. 2d 202 (Tex. Civ. App. 1930).

[42] White Baking Co. v. Snell, 28 Ohio N.P. (N.S.) 172 (Montgomery Com. Pleas 1930).

[43] Clark Paper and Mfg. Co. v. Stenacher, 236 N.Y. 312, 140 N.E. 708 (1923).

[44] Langdon v. Progress Laundry & Cleaning Co., 105 S.W. 2d 346 (Tex. Civ. App. 1937).

[45] Wisconsin Ice and Coal Co. v. Lueth, 213 Wis. 42, 250 N.W. 819 (1933).

[46] Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944).

[47] Capital Laundry Co. v. Vannozzi, 115 N.J. Eq. 26, 169 Atl. 554 (1933).