COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DOUGLAS D. SAUNIER,	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff - Appellant	:	Hon. John W. Wise, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	
STARK TRUSS COMPANY, INC.,	:	Case No. 2015CA00202
	:	
Defendant - Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2014 CV 1428
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	May 23, 2016

APPEARANCES:

For Plaintiff-Appellant	For Defendant-Appellee
BRIAN R. MERTES WHITNEY L. WILLITS RYAN W. MAXWELL Black, McCuskey, Souers & Arbaugh 220 Market Avenue South, Suite 1000 Canton, Ohio 44702	SUSAN C. RODGERS NEIL BHAGAT Buckingham, Doolittle & Buroughs, LLC 4518 Fulton Drive NW, Suite 200 Canton, Ohio 44735

Baldwin, J.

{¶1} Plaintiff-appellant Douglas D. Saunier appeals from the October 7, 2015 Judgment Entry of the Stark County Court of Common Pleas finding that he was not entitled to severance payments from defendant-appellee Stark Truss Company, Inc.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellee Stark Truss Company, Inc., which was founded in 1963, is a family-owned manufacturer and supplier of wood and steel components for the construction industry. Appellee primarily manufactures, markets and sells roof and floor trusses and also manufactures, markets and/or sells pre-fabricated components used in construction projects such as wall panels, joists, pre-built stairs, beams and connector hardware.

{¶3} Appellant Douglas D. Saunier began his employment with appellee in 1976 and worked for appellee for more than thirty-five years in various capacities. In November of 2013, appellant, who was at the time appellee's asset manager, decided to resign. Appellant and Stephen Yoder, appellee's President, met on approximately November 11, 2013 to discuss appellant's separation from the company. After negotiations during which appellant was represented by counsel, the parties entered into a Confidential Separation Agreement and Release which provided for severance payments to appellant. Paragraph 10(a) of the agreement, which was executed by the parties on December 12, 2013, states as follows under Non-Competition:

> Because of Stark Truss' legitimate business interest and the good and valuable consideration offered to the Employee as described herein, beginning on the Separation Date, and for a period of one year thereafter,

the Employee agrees and covenants that Employee will not, in a geographical area within one hundred (100) mile radius of any and all Stark Truss locations ("Geographical Area") own, manage, operate, control, be employed by, perform services for, consult with, solicit business for, participate in, or be connected with, directly or indirectly, the ownership, management, operation, or control of ***any employer, person or other entity whose business is substantially similar to that of Stark Truss ("Competitor").*** As a specific and limited exception to the foregoing non-competition obligation, Employee will be permitted to be employed by a Competitor, but only in the capacity or job position related to maintenance or equipment management, and as long as he complies with his confidentiality obligations contained in paragraph 8 of this Agreement and the non-solicitation obligations set forth in subparagraphs (b) and (c) below. However, upon employment with the Competitor under this specific and limited exception to the non-competition obligation, all Severance payments shall cease and Stark Truss shall have no obligation under law, equity or contract to make any further Severance payments. During the one year period following the Separation Date, Employee agrees that prior to accepting employment with another employee, or as soon as practical after accepting such employment if notice of such acceptance cannot be given to Stark Truss prior to accepting such employment, he will advise the President of Stark Truss, in writing, of the name of the prospective employer, the position Employee expects to hold and a description of the

duties and responsibilities. ***Within ten (10) business days after such notification, Stark Truss will inform Employee, in writing, as to whether it, in its sole discretion, deems the prospective employer to be a Competitor.***

In the event that Employee breaches the non-competition provision set forth in the forgoing paragraph of this section 10.a., Stark Truss' sole and exclusive remedy shall be limited to termination of the remaining Severance set forth in Section 2 of this Agreement. (Emphasis added)

{¶4} Appellant's last day of employment with appellee was December 13, 2013 and, on December 16, 2013, appellant began employment with Carter Lumber Company as an equipment manager. After being advised by appellant of his employment with Carter Lumber, appellee, on January 3, 2014, notified appellant that it had determined that Carter Lumber was a competitor and that, under the terms of the parties' Agreement, severance payments to appellant would cease.

{¶5} Thereafter, on June 13, 2014, appellant filed a complaint for declaratory judgment against appellee, seeking a declaration from the trial court that his employment with Carter Lumber did not violate the terms of the Agreement and that appellee was obligated to resume severance payments to appellant under the Agreement. Appellant filed a First Amended Complaint on July 10, 2014 and appellee filed an answer on August 15, 2014. With leave of court, appellee later filed counterclaims for breach of contract and fraud against appellant.

{¶6} As memorialized in a Judgment Entry filed on October 7, 2015, the trial court, after considering the briefs filed by the parties with respect to appellant's First

Amended Complaint, held that appellant was not entitled to a declaration that his employment with Carter Lumber did not violate the terms of the Agreement or a declaration that appellee was obligated to resume severance payments to appellant under the Agreement. The trial court further scheduled a bench trial for December 22, 2015 on the remaining fraud and breach of contract claims. The trial court's Judgment Entry contained Civ.R. 54(B) language.

{¶7} Appellant now raises the following assignments of error on appeal:

{¶8} THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FINDING THE TERMS OF THE CONFIDENTIAL SEPARATION AGREEMENT AND RELEASE ARE CLEAR AND UNAMBIGUOUS.

{¶9} EVEN IF THE TERMS OF THE CONFIDENTIAL SEPARATION AGREEMENT AND RELEASE ARE CLEAR AND UNAMBIGUOUS, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN FINDING CARTER LUMBER COMPANY TO BE A COMPETITOR OF STARK TRUSS COMPANY, INC.

I

{¶10} Appellant, in his first assignment of error, argues that the trial court erred by finding that the terms of the Confidential Separation Agreement and Release are clear and unambiguous.

{¶11} In the case of contracts, deeds, or other written instruments, the construction of the writing is a matter of law, which is reviewed de novo. *Long Beach Assn., Inc. v. Jones,* 82 Ohio St.3d 574, 576, 1998-Ohio-186, 697 N.E.2d 208. Under a de novo review, an appellate court may interpret the language of the contract substituting its interpretation for that of the trial court. *Witte v. Protek Ltd.,* 5th Dist. Stark No.

2009CA00230, 2010-Ohio-1193, 2010 WL 1076070, ¶ 6, citing *Children's Medical Center v. Ward,* 87 Ohio App.3d 504, 622 N.E.2d 692 (2nd Dist. 1993).

{¶12} A contract is to be interpreted to give effect to the intention of the parties. *Morrison v. Petro Evaluation Serv., Inc.,* 5th Dist. Morrow No.2004 CA 0004, 2005–Ohio–5640, ¶ 29 citing *Employer's Liab. Assur. Corp. v. Roehm,* 99 Ohio St. 343, 124 N.E. 223 (1919), syllabus. It is a fundamental principle in contract construction that contracts should "be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language." *Id.* quoting *Skivolocki v. E. Ohio Gas Co.,* 38 Ohio St.2d 244, 313 N.E.2d 374 (1974), paragraph one of the syllabus. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Id.* quoting *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.,* 78 Ohio St.3d 353, 361, 1997–Ohio–202, 678 N.E.2d 519. If the terms of the contract are clear and unambiguous, courts must give the words their plain and ordinary meaning and may not create a new contract by finding the parties intended something not set out in the contract. *Alexander v. Buckeye Pipeline,* 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978).

{¶13} In the case sub judice, the parties' Agreement, in paragraph 10(a), defined "Competitor" as "any employer person or other entity whose business is substantially similar to that of Stark Truss." The Agreement further granted appellee the "sole discretion" to determine who constituted a "Competitor" as defined in the Agreement. As noted by the Ohio Supreme Court, in *In re Trust of Brooke,* 82 Ohio St.3d 553, 1998-Ohio-185, 697 N.E.2d 191,195 "[t]he words "sole discretion," taken in their common and ordinary meaning, are clear and unambiguous." We concur with appellee that appellant's

"proposed self-serving exclusion of the 'sole exclusion language' would make it [the definition of "Competitor"] a nullity and render it meaningless." The language contained in the Agreement was negotiated by appellee and appellant with the advice of counsel.

{¶14} Moreover, we note that "sole discretion" provisions are valid and have been upheld by courts, including the Ohio Supreme Court, See *In re Trust of Brooks*, supra. and *Polaris Owners Assn., Inc. v. Solomon Oil Co.,* 5th Dist. Delaware No. 14CAE110075, 2015-Ohio-4948

{¶15} Based on the foregoing, we find that the trial court did not err in finding that the terms of the Confidential Separation Agreement and Release clearly and unambiguously granted appellee the "sole discretion" to determine who was a "Competitor".

{¶16} Appellant's first assignment of error is, therefore, overruled.

II

{¶17} Appellant, in his second assignment of error, contends that even if the terms of the Confidential Separation Agreement and Release are clear and unambiguous, the trial court erred in finding Carter Lumber Company to be appellee's competitor.

{¶18} Appellant initially argues that appellee failed to "deem" Carter Lumber Company to be a competitor as required by the Agreement. The Agreement provides, in relevant part, that "[w]ithin ten (10) business days after such notification, Stark Truss will inform Employee, in writing, as to whether it, in its sole discretion, **deems** the prospective employer to be a Competitor." (Emphasis added). Appellant cites to *Triad Realty, LLC v SVG Mgemt., LLC*, 5th Dist. Stark No. 2013CA00174, 2014-Ohio-2157 for the proposition that "deem" is defined as "to come to view, judge, or classify after some

reflection." According to appellant, Stephen Yoder, appellee's President, testified that he "always" made decisions of this nature by discussing the matter with officers of the company but that, during his deposition, he admitted that he determined that Carter was a competitor without discussing the matter. In short, appellant maintains that Yoder "failed to reflect at all" and, therefore, did not "deem" Carter Lumber a competitor.

{¶19} However, the plain and ordinary meaning of the word "deems" as used in the Agreement is that appellee will determine who constitutes a Competitor. It did. Moreover, we agree with appellee that "[i]t is, literally impossible for Stark Truss to deem Carter a Competitor without some type of reflection." Finally, the word "deem" also is defined as "to sit in judgment upon." Webster's Third New International Dictionary. Appellee clearly sat in judgment upon the issue of whether or not Carter Lumber was a Competitor.

{¶20} Appellant, in his second assignment of error, also contends that under the language of the Agreement, appellee can only determine if prospective employers are competitors, not current ones. Appellant points out that at the time that appellee deemed Carter to be a "Competitor", Carter Lumber was not his prospective employer, but was his current employer. We note that appellee failed to raise this issue at the trial court level and thus it is waived on appeal. *The Strip Delaware, LLC v. Landry's Restaurants, Inc.*, 5th Dist. Stark No .2010CA00316, 2011–Ohio–4075.

{¶21} Furthermore, paragraph 10(a) of the parties' Agreement states, in relevant part, as follows: "During the one year period following the Separation Date, Employee agrees that prior to accepting employment with another employer, or as soon as practical after accepting such employment if notice of such acceptance cannot be given to Stark

Truss prior to accepting such employment, he will advise the President of Stark Truss, in writing, of the name of the prospective employer, the position Employee expects to hold and a description of the duties and responsibilities." (Emphasis added). A plan and ordinary interpretation of the above language is that if appellant cannot give notice prior to accepting employment, he will advise appellee "as soon as practical" after accepting employment of the "name of the prospective employer." As noted by appellee, under appellant's interpretation of the term "prospective employer", such language would be meaningless.

{¶22} Based on the foregoing, appellant's second assignment of error is overruled.

{¶23} Accordingly, the judgment of the Stark County Court of Common Pleas is affirmed. Costs are assessed to appellant.

By: Baldwin, J.

Farmer, P.J. and

Wise, J. concur.