2011 IL App (2d) 100353-U
No. 2-10-0353
Order filed February 3, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARY HAFFERKAMP, d/b/a/ Mary's Shear Artistry, Plaintiff-Appellant, v. LEAH LLORCA, Defendant-Appellee.	)	Appeal from the Circuit Court of Winnebago County. No. 09-CH-1038 Honorable J. Edward Prochaska, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Bowman and Schostok concurred in the judgment.

ORDER

Held: The trial court applied the wrong legal theory to the facts of this case. The proper remedy is to reverse and remand to allow the parties to provide any other relevant evidence and argument pertaining to the totality of the circumstances where the primary issue is the reasonableness of the noncompetition agreement at issue, following *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871.

¶ 1 Plaintiff, Mary Hafferkamp, d/b/a Mary's Shear Artistry, appeals the judgment of the circuit court of Winnebago County, denying her request for injunctive relief, liquidated damages, and attorney's fees and finding in favor of defendant, Leah Llorca, following a bench trial. Plaintiff

argues on appeal that the trial court erred in determining that the restrictive covenant contained in the employment agreement between plaintiff and defendant was unenforceable and abused its discretion in denying plaintiff's requested injunctive relief. We reverse and remand.

¶ 2 We need not extensively summarize the evidence because our ultimate conclusion is that the trial court improperly utilized a now-obsolete framework for its analysis of the restrictive covenant at issue in this case. Instead, we note that defendant signed a noncompetition agreement with plaintiff, left defendant's hair salon, and joined another competing hair salon that was located within the geographic exclusionary area prescribed by plaintiff's noncompetition agreement. Plaintiff sued to enforce the noncompetition agreement, and the trial court, after conducting an evidentiary hearing, held that the noncompetition agreement was unenforceable. In so ruling, the trial court perspicaciously rejected *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill. App. 3d 421 (2009), but followed *LSBZ, Inc. v. Brokis*, 237 Ill. App. 3d 415 (1992), a case involving a noncompetition agreement executed by a hair salon and its employee.

¶ 3 Before we focus on *LSBZ*, however, we first consider a potentially dispositive argument posed by defendant that would obviate the need to consider the restrictive covenant on its merits if we sustained defendant's argument. Defendant argues that the restrictive covenant in the employment agreement was never triggered because none of the conditions precedent occurred. Defendant interprets paragraph 13 of the employment agreement to allow a termination of the contract by either of two mechanisms: "either by the expiration [of] the initial term or any subsequent term hereof or by violation of employer's Standards of Conduct." Defendant also reasons that the either-or clause of the above-quoted provision imposes a condition precedent upon the parties before the restrictive covenant described in paragraph 13 may be triggered. In other

words, defendant contends that the restrictive covenant will not be triggered until after the contract terminates through the expiration of a term or it terminates due to an employee violation of the terms in plaintiff's Standards of Conduct manual. Defendant argues that neither of these occurrences obtained, so the restrictive covenant was never triggered. We disagree.

¶ 4 Initially, we note that the interpretation of a contract provision poses a question of law, and our review is *de novo*. *Hamer v. City Segway Tours of Chicago, LLC*, 402 Ill. App. 3d 42, 44 (2010). The main goal of interpreting a contract is to give effect to the intent of the parties. *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483-84 (2009). In order to effect the parties' intent, we interpret the contract as a whole and give the unambiguous terms of the contract their plain and ordinary meaning. *Covinsky*, 388 Ill. App. 3d at 484. In addition, it is well settled that a contract may incorporate all or part of another document by reference. *Arneson v. Board of Trustees*, 210 Ill. App. 3d 844, 849 (1991). The reference to the other document, however, must show the intention to incorporate that document and make it a part of the contract. *Arneson*, 210 Ill. App. 3d at 849-50. With these principles in mind, we consider defendant's contention as to the condition precedent.

¶ 5 In the first place, we believe that defendant's argument is flawed because it begins, at best, in the middle. Defendant presupposes that paragraph 13 defines a condition precedent, but she fails to explain or, more importantly, cite to pertinent authority to support her contention. As defendant is required to cite pertinent legal authority in support of her legal arguments, the failure to do so will result in forfeiture of that argument. Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Vancura v. Katris*, 238 Ill. 2d 352, 370 (2010).

¶ 6 The issue of forfeiture aside, defendant's reading is not borne out by the plain and unambiguous meaning of the provisions of the employment agreement. We note that "termination" is not defined within the employment agreement, and, therefore, we look to its common and generally accepted meaning. *Covinsky*, 388 Ill. App. 3d at 484. "Termination" is defined as the act of ending something; in the employment context, it is defined as an end to employment, either voluntarily or involuntarily. *Covinsky*, 388 Ill. App. 3d at 484. In addition, "termination" is discussed in plaintiff's policy and procedures manual: "the salon expects any employees who voluntarily terminate their employment to give notice in writing at least 2 weeks in advance." Paragraph 12 of the employment agreement incorporates the policy and procedures manual: "Employee agrees that she (he) will abide by [the terms of the policy and procedures manual] as a part of the terms and conditions of this agreement." Thus, "termination," through the incorporation of the policy and procedures manual, receives an additional layer of meaning, namely, that an employee may voluntarily terminate the employment agreement by giving two weeks notice, along with the express provisions of expiration of the term of the contract and of violation of the standards of conduct set forth in paragraph 13. In order to effectuate the incorporation of the employee's right to voluntarily terminate the employment agreement, the either-or phrase cannot be read as a limitation on the manners in which the agreement can be terminated or as conditions precedent, but must be read as examples, otherwise, an employee has no right to terminate the employment agreement and the "terminations" section of the policy and procedures manual, which is clearly incorporated into the employment agreement, is rendered nugatory. Likewise, under defendant's reading, the definition of "termination" is changed from its ordinary and accepted meaning to exclude the employee's voluntary decision to end his or her employment even though there is

otherwise no suggestion that "termination" should have a meaning different from its ordinary and commonly accepted meaning.

¶ 7 One of the rules of contract interpretation is that each word of the agreement must be given meaning and effect, if possible (*Hufford v. Balk*, 113 Ill. 2d 168, 172 (1986)), and defendant's interpretation fails to do so. However, by reading the expiration and violation terms as examples rather than limitations or conditions precedent, the employee's right to terminate the agreement is preserved and given effect. Accordingly, we reject defendant's interpretation of the employment agreement.

¶ 8 Under our interpretation of the employment agreement, then, the termination of the agreement is the triggering event for the non-competition provision, and the agreement may be terminated in various fashions, such as the expiration of the term, the employee's violation of the employer's standards of conduct, or the employee's decision to voluntarily terminate the agreement upon two weeks written notice. Here, defendant clearly terminated the employment agreement, and the non-competition provision of paragraph 13 was triggered. Accordingly, we reject defendant's contentions on this point.

¶ 9 We now return to our examination of the merits of the noncompetition agreement. As noted above, the trial court relied on and followed the analysis in *LSBZ*, essentially using it verbatim in its written ruling. The problem with *LSBZ*, however, is that it followed a recently-rejected analytical structure, namely the legitimate-business-interest test (LBI test). The LBI test as utilized by the appellate court for the past 30-plus years developed into the *sine qua non* to determine the enforceability of a covenant not to compete. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 38. The LBI test held that an employer had a protectable interest that could be

safeguarded by a restrictive covenant in only two circumstances: (1) where the employee acquired confidential information from the employer during his or her tenure, or (2) where the employer had near-permanent customer relationships. *Nationwide Advertising Service, Inc. v. Kolar*, 28 Ill. App. 3d 671, 673 (1975). During the LBI regime, there arose a further refinement, the seven-factor test, which sought provide factors by which a court could decide if the employer possessed near-permanent customer relationships. See, *e.g.*, *Hanchett Paper Co. v. Melchiorre*, 341 Ill. App. 3d 345, 352 (2003). Our supreme court rejected this analytical structure in *Reliable*.

¶ 10 In *Reliable*, our supreme court held that the enforceability of a restrictive covenant is determined under the "three-dimensional rule of reason" employed by Illinois courts from the 1800s. *Reliable*, 2011 IL 111871, at ¶¶ 16-18. Under this three-dimensional rule of reason:

¶ 11 "[a] restrictive covenant, assuming it is ancillary to a valid employment relationship, is reasonable only if the covenant: (1) is not greater that is required for the protection of a legitimate business interest of the employer-promisee; (2) does not impose undue hardship on the employee-promisor, and (3) is not injurious to the public." *Reliable*, 2011 IL 111871, at ¶ 17.

¶ 12 The supreme court also overruled *Sunbelt*, which dispensed with the idea that, in order to enforce a restrictive covenant, the employer had to demonstrate a protectable interest in favor of considering only the time and territory restrictions of the restrictive covenant. *Reliable*, 2011 IL 111871, at ¶ 29. Thus, the trial court was correct in rejecting plaintiff's invitation to consider the noncompetition agreement at issue here under the *Sunbelt* analysis. After overruling *Sunbelt*, the supreme court went on to hold:

¶ 13 "To the extent the appellate court's [formulations of the LBI test] are conclusive, they are plainly contrary to the above-described general principles pertaining to the promisee's legitimate business interest based on the totality of the circumstances of the particular case. The understandable temptation is to view exemplary facts presented in particular cases as the outermost boundary of the inquiry. ***

¶ 14 *** The common law, based on reason and experience, has recognized several factors and subfactors within the component of the promisee's legitimate business interest.

¶ 15 However, we hold that such factors are only nonconclusive aids in determining the promisee's legitimate business interest, which in turn is but one component in the three-prong rule of reason, grounded in the totality of the circumstances. *** We expressly observe that appellate court precedent for the past three decades remains intact, but only as nonconclusive examples of applying the promisee's legitimate business interest, as a component of the three-prong rule of reason, and not as establishing inflexible rules beyond the general and established three-prong rule of reason." *Reliable*, 2011 IL 111871, ¶¶ 40-42.

Further, the supreme court expressly held that the LBI test was invalid insofar as it was solely determinative of the employer's protectable interest, even as courts could still consider, but not be limited to, the near-permanence of customer relationships, the employee's acquisition of confidential information through his or her employment, and time and territory restrictions in determining the existence of a protectable interest. *Reliable,* 2011 IL 111871, ¶ 43.

¶ 16 Based on the supreme court's holding in *Reliable*, then, it is clear that the trial court, while appropriately carrying out its analysis under the then-existing analytical regime of the LBI test

nevertheless used the wrong legal standard in considering the facts of this case. Of course, this leads to the question of whether *Reliable* should apply to the facts of this case. We believe that it should.

¶ 17 Generally, when a court issues an opinion, it is presumed to apply both retroactively and prospectively. *Tosado v. Miller*, 188 Ill. 2d 186, 196 (1999). This presumption may be changed or overcome, however, such as when the court expressly limits its decision to prospective application only. *Tosado*, 188 Ill. 2d at 196-97. Another way to vary the presumption occurs when a later court declines to give the previous opinion retroactive effect, at least with respect to the parties before it. *American Airlines v. Industrial Comm'n*, 328 Ill. App. 3d 343, 346 (2002). However, as the issue in this case is precisely the issue decided in *Reliable*, and because the supreme court did not expressly limit the application of *Reliable* to prospective cases only, we will not presume to hold that our supreme court's opinion in *Reliable* should be subject to only prospective application, at least not without that court's express guidance.

¶ 18 Indeed, our conclusion not to limit *Reliable* to prospective application only is supported by considering the factors set forth in *Tosado*:

¶ 19 "(1) whether the decision to be applied nonretroactively established a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) whether, given the purpose and history of the new rule, its operation will be retarded or promoted by prospective application; and (3) whether substantial inequitable results would be produced if the former decision is applied retroactively." *Tosado*, 188 Ill. 2d at 197.

Applying these factors, we determine that retroactive application is appropriate. The supreme court's decision in *Reliable* did not establish a new principle; rather, it reconfirmed that Illinois courts have

always followed and will continue to follow the "three-dimensional rule of reason." It did, however, tweak the law regarding the employer's ability to establish a protectable interest or legitimate business interest by broadening the consideration to the totality of the circumstances. *Reliable*, 2011 IL 111871, at ¶ 43. The parties, however, presented only evidence bearing on the LBI test, and did not seek to consider the totality of the circumstances. Thus, both parties are impacted by the use of the LBI test as the *sine qua non* of establishing a protectable interest.

¶ 20 Applying the rule from *Reliable* only prospectively will seriously hamper its implementation and potentially result in cases decided by the fortuity of the filing date. For example, a case in which the employer has interests beyond confidentiality and near-permanency of customer relationships will be unable to establish a protectable interest if the case was filed before the date of the *Reliable* decision, while one filed after the decision could conceivably establish its protectable interest wholly without any evidence of confidentiality or near-permanency of customer relationships. And this result would obtain even though the law, namely the three-dimensional rule of reason, had not changed.

¶ 21 Finally, inequity is avoided by applying *Reliable* to this case because both sides will be able to receive the benefit of the bargain they agreed to in executing the employment agreement at issue here, especially if we note that the trial court decided this case applying the wrong legal standard to the facts of the case. As a result, we hold that *Reliable* should be applied both retroactively and prospectively.

¶ 22 Regarding the trial court's application of the wrong legal standard, we note the court did the best it could with what it had, namely the appellate court's "rigid and preclusive legitimate business interest test." *Reliable*, 2011 IL 111871, at ¶ 46. Nevertheless, it was an incorrect legal standard.

When the trial court resolves a case under an incorrect legal theory, the appropriate action is to reverse the judgment and remand the cause for a trial. *Reliable*, 2011 IL 111871, at ¶ 46, quoting *Sparling v. Peabody Coal Co.*, 59 Ill. 2d 491, 496 (1974). In this case, both parties fashioned their cases, presented their evidence, and made their arguments based on the improperly rigid and preclusive LBI test. The trial court carefully applied the LBI test to the facts and concluded that the noncompetition agreement was unenforceable. However, where, as here, the ultimate issue, namely, the reasonableness of the noncompetition agreement, turns upon the totality of the facts and circumstances surrounding the agreement, the parties must be given a full opportunity to develop the necessary evidentiary record. *Reliable*, 2011 IL 111871, at ¶ 46. Accordingly, because the trial court followed the wrong legal standard in determining the enforceability of the restrictive covenant at issue in this case, we reverse the judgment and remand the cause to allow the parties to develop an appropriate evidentiary record based on the totality of the circumstances. We also note that the trial court need not necessarily retry the case from scratch; rather, it may allow the parties to supplement the existing record with any additional evidence and argument that pertains to the totality of the circumstances. *Reliable*, 2011 IL 111871, at ¶ 46.

¶ 23 For the foregoing reasons, we reverse the judgment of the circuit court of Winnebago County and remand the matter for further proceedings consistent with this disposition.

¶ 24 Reversed and remanded.