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2009 Ga. App. LEXIS 162,*

GLOBAL LINK LOGISTICS, INC. et al. v. BRILES.

A08A1871.

COURT OF APPEALS OF GEORGIA, FIRST DIVISION

2009 Ga. App. LEXIS 162

February 18, 2009, Decided

NOTICE:

THIS OPINION IS UNCORRECTED AND SUBJECT TO REVISION BY THE COU

DISPOSITION: [*1]

Judgment affirmed.

JUDGES: ANDREWS, Presiding Judge. Barnes and Bernes, JJ., concur.

OPINION BY: ANDREWS

OPINION

Andrews, Presiding Judge.

After Jim Briles quit an executive position at Global Link Logistics, Inc., and starte competitor, he brought this action for injunctive and declaratory relief concerning covenants in his employment agreement with Global Link. Briles also sued f Global Link answered and moved to compel arbitration. The trial court held unenforceable and sent the rest of the matter to arbitration. On appeal, Global L the trial court abused its discretion when it held the covenants unenforceab arbitration as to them. We disagree and therefore affirm.

The standard of review from the grant or denial of a motion to compel arbitration trial court was correct as a matter of law. **Moore & Moore Plumbing v. Tri-South 256 Ga App. 58, 60-61 (1) (567 SE2d 697) (2002)** (grant of motion); **D. S. Ameri v. Simpson, 271 Ga. App. 825, 826 (611 SE2d 103) (2005)** (denial of motion) hether [a] restraint imposed by [an] employment contract is reasonable is a que [*2] determination by the court, which considers the nature and extent of the tra the situation of the parties, and all the other circumstances." **Habif, Arogeti & W Baggett, 231 Ga. App. 289, 292 (498 SE2d 346) (1998)**.

The record shows that on May 20, 2006, Briles entered into an employment a Global Link's predecessor in interest. At the time of the agreement, Briles dic ownership interest in Global Link's predecessor, although he apparently acqu interest in Global Link in one of the transactions surrounding Global Link's p predecessor. The employment agreement contained a non-disclosure covenar non-compete and non-solicitation covenant. The non-disclosure covenant pro without time limitation, from disclosing or using for his own purposes "the inform lists of customers or potential customers), observations, customer and vendor re data (including trade secrets) obtained by him while employed by the Compa compete covenant prohibited Briles from "engag[ing] (whether as an owner, oper employee, officer, director, consultant, advisor, [*3] representative or otherwi indirectly, in any Competitive Business," for 24 months after his departure, and any Global Link customer, present or future supplier, or employee during that time

The employment agreement's arbitration provision reads in relevant part:

(a) Each party hereto agrees that arbitration . . . shall be the sole and exclus resolving any claim or dispute . . . arising out of or relating to the rights and ob parties under this Agreement. . . .

The parties hereto agree that . . . the arbitrators shall apply the substantive la arbitral law) of the State of Delaware to resolve the dispute. . . .

At any time prior to the arbitrators having been selected and accepting the res their position, a party requiring a temporary restraining order or a preliminary injunction may pursue such injunctive relief in court. The subsequent appo arbitrators shall not deprive the court of the authority to conduct a hearing injunction. The arbitrators may subsequently cancel or modify the injunction or hearing, cause the injunction, as issued or [*4] modified, to be made permanent.

(b) Notwithstanding the foregoing, prior to any party hereto instituting a proceeding . . . , such party first shall submit the Claim to a mediation proceeding by the prevailing procedures of the American Arbitration Association. . . . If the have not agreed in writing to a resolution of the Claim pursuant to the mediation after the commencement thereof, [or] if any party refuses to participate in process, then the Claim may be submitted to arbitration. . . .(Emphasis added.) also contained a severability clause to the effect that if any of its provisio unenforceable, "such . . . unenforceability shall not affect any other provision of or any action in any other jurisdiction."

According to Briles's verified complaint, he left Global Link on September 25, 20 working for a competitor shortly afterward. On December 14, 2007, Global Link fi for injunctive relief against Briles and another ex-employee in Delaware Chan December 18, Briles filed this action. On December 19, Briles moved for a TI [*5] Link requested mediation. The trial court held an evidentiary hearing on Jar On January 28, Global Link voluntarily dismissed its Delaware action. On Febru court held the restrictive covenants unenforceable and severable, issued a TI them, n1 and stayed further proceedings pending arbitration of the parties' remair

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The TRO was unnecessary in light of the trial court's ruling that the co unenforceable as a matter of law.
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1. Global Link argues that the trial court erred when it held that the restrictive c unenforceable. We disagree.

Covenants against competition which are contained in employment contracts are

be in partial restraint of trade and will be upheld only if they are strictly limit territorial effect, and are otherwise reasonable considering the business interest sought to be protected and the effect on the employee.**Orkin Exterminating 251 Ga. 536, 537 (307 SE2d 914) (1983)**. Although facts may be necessary " questionable restriction, though not void on its face, is, in fact, reasonable containing sufficiently indefinite [*6] restrictions "[can]not be saved by addition "void on its face." **Koger Properties v. Adams-Cates Co., 247 Ga. 68, 69 (2) ((1981)**; see also **Uni-Worth Enterprises v. Wilson, 244 Ga. 636, 640-641 (2 (1979)** (affirming grant of interlocutory injunction when the enforceability of restric "was a legal question which could be determined by looking solely to the la restrictive covenant").

(a) It is undisputed that Briles did not own an interest in Global Link or its prec time he executed the employment agreement. This means that the covenants cannot have the benefit of the lesser scrutiny afforded to those "ancillary to [business," and thus cannot be "blue-penciled," or modified, to make them les objectionable. See **Baggett, 231 Ga. App. at 289-290 (1)**; **Russell Daniel Irr Coram, 237 Ga. App. 758, 759-760 (1) (516 SE2d 804) (1999)** (even when em part owner "as a *result* of the transaction," covenant should receive strict scruti had "the bargaining power of only a mere employee at the time he *negotiated* th (emphasis in [*7] original).

(b) The non-disclosure covenant bars Briles from using even his "observatic tenure in any future employment and extends for an indefinite period of time. C not cited any authority upholding such a provision, which is overbroad and uner **Nasco, Inc. v. Gimbert, 239 Ga. 675, 676-677 (3) (238 SE2d 368) (1977)** (c disclose "any information concerning any matters affecting or relating to the bu employer" for two years was unenforceable).

(c) "A non-competition covenant which prohibits an employee from working for any capacity, that is, a covenant which fails to specify with particularity the activ employee is prohibited from performing, is too broad and indefinite to be enforce omitted.) **National Teen-Ager Co. v. Scarborough, 254 Ga. 467, 469 (330 SE2c**

The non-compete covenant at issue here bars Briles from "engag[ing] (whethe operator, manager, employee, officer, director, consultant, advisor, representative *directly or indirectly*, in any Competitive Business," and also bars solicitation of customers as well [*8] as employees. As such, it is unenforceable. See **Coram at 761 (2) (a)** (covenant restricting former employee from engaging in any direc activity was "unenforceable because it purports to prevent [the employee]

employment with any competitor in any capacity"); **Ken's Stereo-Video Juncti 253 Ga. App. 811 (560 SE2d 708) (2002)** (no evidentiary hearing on non-com was required because the covenant, including an 18-month time limit, a 25 restriction, and a bar on becoming an officer, director or shareholder of anot company, was void on its face); compare **Palmer & Cay of Ga. v. Lockton Cos 480-481 (1) (629 SE2d 800) (2006)** (upholding non-solicitation covenant that "[c prohibit the solicitation of all of [the employer's] customers").

2. Global Link also argues that the trial court's order ignored Georgia's policy actions previously filed in other jurisdictions as well as the parties' own forum s and that it undermined state and federal policy favoring arbitration. These conte merit.

The arbitration section of the employment [*9] agreement contains a choice-o not a forum-selection provision. The parties agreed that substantive Delaware la to the arbitration proceedings, and that "[a]t any time prior to the arbitrator selected and accepting the responsibilities of their position, a party requirin restraining order or a preliminary or temporary injunction may pursue such inju *court*." The parties did not specify any forum in which such relief had to be soug Link dismissed its Delaware action before the trial court issued its ruling. n2 provision or legal rule, then, barred Briles from seeking injunctive relief in a Geo **OCGA § 1-3-9** (Georgia courts shall enforce comity to laws of other states enforcement is not contrary to the policy or prejudicial to the interests of this **supra, 239 Ga. at 676 (2)** (refusing to enforce choice-of-law provision i agreement containing restrictive covenants); **Enron Capital & Trade Resou Pokalsky, 227 Ga. App. 727, 730 (3) (490 SE2d 136) (1997)** (affirming trial co apply Texas law designated in parties' [*10] choice-of-law provision to restrictive

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Incredibly, even as it argued on appeal that the trial court should have deferred action, Global Link opposed Briles's motion to supplement the record to show th that action before the trial court's ruling.
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At the time Briles filed his suit, moreover, neither party had requested arbitra obtained the appointment of an arbitrator sufficient to activate the agreement's judicial proceedings. Because Briles's action was consistent with the agreeme consistent with federal and state policy favoring arbitration.

Judgment affirmed. Barnes and Bernes, JJ., concur.

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