

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 12, 2008 Session

SOUTHERN FIRE ANALYSIS, INC. v. MICHAEL E. RAMBO ET AL.

**Appeal from the Chancery Court for Davidson County
No. 07-1744-II Carol L. McCoy, Chancellor**

No. M2008-00056-COA-R3-CV - Filed January 22, 2009

This is an appeal arising from the dismissal of breach of contract claims against three defendants, each of whom the plaintiff alleges is violating non-compete agreements by working for a competitor of the plaintiff. The trial court dismissed the breach of contract claims for failure to state a claim upon which relief could be granted pursuant to Tennessee Rule of Civil Procedure 12.02(6) because it found the non-compete agreements were invalid as to these defendants. We have determined that the plaintiff's pleadings are sufficient to state a claim for breach of contract on a non-compete agreement. We, therefore, reverse and remand for further proceedings.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Robert E. Boston and John E. B. Gerth, Nashville, Tennessee, for the appellant, Southern Fire Analysis, Inc.

Wallace W. Dietz and Justin D. Pitt, Nashville, Tennessee, for the appellees, Michael E. Rambo, David L. Edge, III, James Jennings, and Glenn E. Johnson, Jr.

OPINION

The plaintiff, Southern Fire Analysis, Inc. (Southern Fire), is in the business of investigating the cause of fires for insurance companies so the companies may decide if claims are properly payable. Gary Haun incorporated the business and has served as its president and chief executive officer since its incorporation.

Michael Rambo was employed by Southern Fire as a fire investigator in July 1989 and continued to work with and at the direction of Haun investigating fires and helping to expand the company's business in Middle Tennessee until a month before this action was commenced. In 1991, Rambo was promoted to Vice-President of the company. In 1996, Haun decided to relocate to East

Tennessee to further expand the territory of Southern Fire's investigative operations, and placed Rambo in charge of the Nashville office.

During this same time frame, James Jennings was hired to work as a fire investigator out of the Nashville office. As a condition of employment, Jennings was asked to enter into a non-compete agreement. On April 3, 1996, Jennings signed a document titled "Corporate Resolution," the first two paragraphs of which state:

WHEREAS, in the opinion of this Board, it is for the best interests of this Corporation to adopt a No-Compete Agreement, be it

RESOLVED, That a No-Compete Agreement shall remain in effect for a period of Six (6) Months from the date of Termination with the Corporation by James D. Jennings, and shall cover an area of up to and including a One Hundred & Fifty (150) Mile radius from Nashville, Tennessee.

The document was also signed by the secretary of Southern Fire Analysis, Inc.

A year later, Glenn Johnson was hired as a fire investigator to work out of the Nashville office. As a condition of employment, Johnson was also asked to enter into a non-compete agreement, and on October 16, 1997, Johnson signed a document identical to the one Jennings signed. As was the case when Jennings was hired, the secretary of the corporation signed the document along with Johnson.

Jennings and Johnson continued working as employees of Southern Fire until 2004, at which time they requested a change in their employment status to that of independent contractors. The company approved their requests and in April 2004, Jennings and Johnson each signed identical contracts with Southern Fire, entitled "Independent Contractor Agreement[s]." Paragraph 7 of the Independent Contractor Agreements contained a provision stating "[t]he Independent Contractor must have and maintain and must provide [Southern Fire] with documents of" . . . a "Valid Non-Compete Agreement effective for six (6) month time period."

David Edge began his association with Southern Fire in 2005 as a fire investigator for the company, however, unlike Jennings and Johnson, Edge was never an employee of Southern Fire. Instead, his association with Southern Fire was that of an independent contractor from the beginning. It is undisputed that Edge was an independent contractor and that he signed an independent contractor agreement at the commencement of his association with Southern Fire; however, it is disputed whether he ever signed a non-compete agreement. Southern Fire has been unable to

provide a signed non-compete agreement with Edge, nevertheless, it contends in its Complaint that Edge signed a non-compete agreement identical to that of Jennings and Johnson.¹

The matters at issue arose when the secretary arrived at the Nashville office on the morning of July 2, 2007, and found letters of resignation signed by the defendants, Rambo, Edge, Jennings, and Johnson, and one signed by the now-former receptionist. Shortly after learning of the resignations, Southern Fire also learned that immediately following their resignations, the four defendants and the former receptionist began working for a competitor of Southern Fire, Unified Investigations and Science, Inc. (“Unified”).

One month later, on August 3, 2007, Southern Fire filed this action against Rambo, Jennings, Johnson and Edge. In the Complaint, Southern Fire alleged that Edge, Jennings and Johnson were working for Unified in violation of their respective non-compete agreements. As for defendant Rambo, Southern Fire asserted claims for breach of fiduciary duty and a claim of inducement to breach contract. As for all four defendants, Southern Fire alleged claims of civil conspiracy. Attached to the Complaint were copies of the corporate resolutions and Independent Contractor Agreements for Jennings and Johnson. Southern Fire stated in the Complaint that it was unable to find either document signed by David Edge and alleged “upon information and belief” that “Rambo removed Edge’s Independent Contractor Agreement and Non-Compete Agreement from SFA’s files.”

In addition to damages, Southern Fire sought injunctive relief to prohibit the four defendants from working for a competitor, and specific performance of the defendants’ “obligations under their respective Non-Compete Agreements.” Southern Fire was granted an *ex parte* temporary restraining order against all four defendants prohibiting them from working for Southern Fire’s competitor, Unified.

On September 18, 2007, all four defendants filed a Motion to Dismiss, arguing that “absent a valid, enforceable non[-]compete agreement, Plaintiff’s claims are either not actionable or not properly pled,” and therefore should be dismissed. The defendants advanced multiple theories as to the invalidity of the non-compete agreements. They argued that Southern Fire had not pled a protectable business interest, the non-compete agreements were overbroad in their scope, and if valid, the non-compete provisions had expired six months after the independent contractor agreements were signed. Additionally, Edge moved to dismiss the breach of contract claim on the ground there was no evidence that he had entered into a non-compete agreement. Southern Fire opposed the motion on various grounds, and additionally contended that the defendants’ motion to dismiss should be treated as a motion for summary judgment under Tenn. R. Civ. P. 56, because the

¹Southern Fire alleges the non-compete agreement was signed by Edge a year after he had been working with Southern Fire. It alleges that Haun requested Edge sign a non-compete agreement after discovering that Edge had not signed one at the time he began working with Southern Fire.

defendants referred to facts outside of the pleadings.² Southern Fire contended that material facts were in dispute and, thus, the motion for summary judgment should be denied. Southern Fire additionally contended that its Complaint was sufficient to withstand a Tenn. R. Civ. P. 12.02(6) motion to dismiss.

A hearing was held on November 16, 2007. Following the hearing, the trial court granted the defendants' motion to dismiss on all of Southern Fire's claims except for one, the breach of fiduciary duty claim against Rambo. In pertinent part, the trial court found that "the documents relied upon by Plaintiff and attached to the Petition as non-compete agreements between it and Defendants Edge, Jennings, and Johnson are unenforceable and fail to support the claims alleged in the Complaint." Therefore, the trial court concluded that the Complaint failed to state claims upon which relief could be granted. The trial court also stated that it had not considered any factual matter outside of the pleadings, including the affidavits filed by the defendants, and, therefore, it was treating the motion as a Tenn. R. Civ. P. 12.02(6) Motion to Dismiss, and not as a motion for summary judgment. The trial court also ruled that its decision to dismiss the claims against Edge, Jennings, and Johnson was a final judgment pursuant to Tenn. R. Civ. P. 54.02.³ This appeal by Southern Fire followed.

The only issue on appeal pertains to the dismissal of Southern Fire's breach of contract claims against Edge, Jennings, and Johnson.⁴ Specifically, Southern Fire argues that the trial court erred in dismissing its claims against Edge, Jennings, and Johnson for breach of contract. It argues that the trial court looked beyond the sufficiency of its pleadings to the strength of its proof when the court concluded that the non-compete agreements were unenforceable.

STANDARD OF REVIEW

A Rule 12.02(6) motion to dismiss seeks only to determine whether the pleadings state a claim upon which relief can be granted. Such a motion challenges the legal sufficiency of the complaint, *not* the strength of the plaintiff's proof. *Edwards v. Allen*, 216 S.W.3d 278, 284 (Tenn. 2007) (citing *Bell ex rel. Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 554 (Tenn. 1999)) (emphasis added). The motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. *Id.* (citing *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997)). In

²The trial court had dissolved the temporary restraining order against the defendants and denied Southern Fire's request for a temporary injunction following a hearing on August 10, 2007. In their motion to dismiss, the defendants referred to information contained in affidavits submitted to the court in support of their opposition to Southern Fire's request for an injunction.

³The trial court did not dismiss Southern Fire's claim against Michael Rambo for breach of fiduciary duty. That claim survived the defendants' Motion to Dismiss and Rambo did not appeal that decision. Therefore, issues pertaining to Southern Fire's breach of fiduciary claim against Rambo are not on appeal and remain with the trial court.

⁴Southern Fire does not appeal the dismissal of its other claims against Rambo, Edge, Jennings and Johnson.

considering a motion to dismiss, the court is required to take the relevant and material factual allegations in the complaint as true and to construe liberally all allegations in favor of the plaintiff. *Id.* (citing *Stein*, 945 S.W.2d at 716). “A complaint must set forth ‘a short and plain statement of the claim showing that the pleader is entitled to relief’ but will not be sustained by allegations of pure legal conclusions.” *TIG Ins. Co. and Fairmont Specialty Group v. Titan Underwriting Managers, LLC*, No. M2007-01977-COA-R3-CV, 2008 WL 4853081, at *1 (Tenn. Ct. App. Nov. 7, 2008) (quoting Tenn. R. Civ. P. 8.01; citing *White v. Revco Disc. Drug Ctrs., Inc.*, 33 S.W.3d 713, 718 (Tenn.2000)). “It is well-settled that a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief.” *Id.* (quoting *Trau-Med of Am., Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 696 (Tenn. 2002)); *see also Doe v. Sundquist*, 2 S.W.3d 919, 922 (Tenn. 1999). Making such a determination is a question of law and, therefore, our review of the trial court’s determinations is *de novo*, with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Center, P.C.*, 70 S.W.3d 710, 712-713 (Tenn. 2002); *Bowden v. Ward*, 27 S.W.3d 913, 916 (Tenn. 2000); *Ganzevoort v. Russell*, 949 S.W.2d 293, 296 (Tenn. 1997).

ANALYSIS

On appeal, Southern Fire argues that the trial court erred in dismissing its claims against the defendants, Edge, Jennings, and Johnson (hereinafter collectively “the defendants”) for breach of contract. It argues that the trial court looked beyond the sufficiency of its pleadings to the strength of its proof when the court concluded that the non-compete agreements were unenforceable.

In response, the defendants advance several theories for why the breach of contract claims were properly dismissed by the trial court. These arguments center upon their contention that the non-compete agreements were invalid. They argue that the corporate resolutions were not actually non-compete agreements, that even if they were non-compete agreements they terminated six months after Jennings and Johnson became independent contractors, that the non-compete agreements are invalid on their face because their scope is “limitless and undefined,” and that Southern Fire did not plead a legitimate and protectable business interest. Edge additionally asserts that Southern Fire failed to meet its burden of demonstrating a valid contract because it did not produce a non-compete agreement or an independent contractor agreement signed by Edge. Lastly, the defendants assert that Southern Fire waived its right to a *de novo* review on appeal because the arguments it raised on appeal were not raised in opposition to the motion to dismiss in the trial court.

We shall first address the defendants’ argument regarding waiver. In its opposition to the motion to dismiss, Southern Fire argued that it had sufficiently pled its claims. While its arguments are more detailed as to why its pleadings should be considered sufficient on appeal, its arguments are not new “issues.” We, therefore, find that Southern Fire did not waive the issue and will determine whether the Complaint states a claim upon which relief may be granted.

The trial court dismissed Southern Fire’s claims against the defendants based upon its finding that there were no enforceable contracts, i.e., that the non-compete agreements were unenforceable.

We will review that decision under a *de novo* standard for review with no presumption of correctness of the trial court's determination. *See Frye*, 70 S.W.3d at 712-13.

A claim for breach of contract requires “(1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract.” *C & W Asset Acquisition, LLC v. Oggs*, 230 S.W.3d 671, 676-77 (Tenn. Ct. App. 2007) (citing *ARC LifeMed, Inc., v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005)). Non-compete agreements are enforceable if they are found to be reasonable under the circumstances. *Packers Supply Co. v. Weber*, No. M2007-00257-COA-R3-CV, 2008 WL 1726103, at *4 (Tenn. Ct. App. Apr. 14, 2008) (citing *Hasty v. Rent-A-Driver*, 671 S.W.2d 471, 472 (Tenn. 1984); *AllRight Auto Parks*, 409 S.W.2d 361, 365 (Tenn. 1966); *Matthews v. Barnes*, 293 S.W. 993 (Tenn. 1927); *Ramsey v. Mutual Supply*, 427 S.W.2d 849 (Tenn. Ct. App. 1968)). Covenants not to compete are enforceable if an employee or independent contractor would otherwise be able “to exercise an unfair advantage in future competition with his employer, and if they are no broader in duration or as to the territory they embrace ‘than is reasonably necessary to secure the protection of the business or good will of the employer.’” *Id.* (quoting *Matthews*, 293 S.W. at 994); *see also Baker v. Hooper*, No. 03A01-9707-CV-00280, 1998 WL 608285, at *3 (Tenn. Ct. App. Aug. 6, 1998) (holding non-compete agreements are applicable to independent contractors). Factors to be considered in determining the reasonableness of non-compete agreements include: “the consideration supporting the agreements; the threatened danger to the employer in the absence of such an agreement; the economic hardship imposed on the employee by such a covenant; and whether or not such a covenant should be inimical to public interest.” *Allright Auto Parks, Inc. v. Berry*, 409 S.W.2d 361, 363 (Tenn. 1966).

This appeal arises from the grant of a Tenn. R. Civ. P. 12.02(6) motion to dismiss. Therefore, we are required to presume all factual allegations in the Complaint as true, and draw all reasonable inferences in favor of Southern Fire in determining whether it sufficiently pled its claims for breach of contract against the defendants. *See Edwards*, 216 S.W.3d at 284.

In its Complaint, Southern Fire alleged that the defendants were under the restriction of non-compete agreements and independent contractor agreements, that they violated these agreements by working for Southern Fire's competitor, and that due to their breach Southern Fire suffered both economic and non-economic damages. Attached to its complaint were copies of the alleged non-compete agreements with Jennings and Johnson, styled as corporate resolutions, which bore the signatures of two of the defendants, Jennings and Johnson. While Southern Fire could not provide documentation of a written agreement with Edge, it alleged upon information and belief that Edge had signed a non-compete agreement and an independent contractor agreement identical to those of Jennings and Johnson, but they could not be produced because Rambo, Edge's co-defendant, had removed the signed documents from the company's files in violation of his fiduciary duties to the company. In the Complaint, Southern Fire additionally alleged that the non-compete agreements were signed by the defendants in exchange for specialized training provided by the company in order for the defendants to be able to gain certification as fire investigators. Further, Southern Fire alleged in its Complaint that the defendants began working for a competitor immediately following their

departure from Southern Fire within 150 miles of its Nashville office and in the same geographic area in which they worked as fire investigators for Southern Fire, which resulted in non-economic and economic damages to the company.

Because we are required to presume all factual allegations in the Complaint of Southern Fire as being true and draw all reasonable inferences in favor of Southern Fire, we must accept as true or infer from the allegations in the Complaint that all three defendants signed identical independent contractor agreements, which required the defendants to “maintain” valid non-compete agreements effective for “six month time period,” that all three defendants signed non-compete agreements that “remain in effect” for a period of six months from the date of termination with the company, which were entered into in exchange for the benefit of receiving training from Southern Fire to become certified as fire inspectors, that Southern Fire provided fire investigation services for its clients within 150 miles of its Nashville office, that the defendants were working for its competitors within the protected geographic area within six months of termination with Southern Fire, and that Southern Fire was damaged as a consequence of the defendants’ actions. *See Edwards*, 216 S.W.3d at 284.

Based upon our examination of the Complaint, liberally construing these pleadings, presuming all factual allegations as true, and drawing all reasonable inferences in favor of Southern Fire, we find that Southern Fire has pled its claims sufficiently to survive a Tenn. R. Civ. P. 12.02(6) motion to dismiss for failure to state a claim upon which relief could be granted.

IN CONCLUSION

The judgment of the trial court is reversed, and this matter is remanded for further proceedings in accordance with our decision, with costs of appeal assessed against the defendants.

FRANK G. CLEMENT, JR., JUDGE