CHAMBERSBURG PUBLISHING COMPANY VS. STATLER, ET AT., C.P. Franklin County Branch, Eq. Doc. Vol. 7, Page 428

Covenant Not to Compete - Substantial Change in Duties

1. When a covenant not to compete is signed after the initial taking of employment, it is enforceable only if there is a "substantial change in employment status."
2. A "substantial change" must entail an increase or variance of duties, not merely a pay increase or elevation of job classification.
3. A new commission structure is not a "substantial change in employment status."
4. A plaintiff should not be entitle to enforce one provision of an agreement when it had breached several other material provisions of the contract.

Thomas J. Finucane, Esq., Counsel for Plaintiffs
Frederic C. Antonn, Esq., Counsel for Defendants

OPINION AND DECREE NISI

WALKER, J., July 9, 1986:

On or about May, 28, 1984, the defendant, Cheryl Statler, began employment with the The Franklin Shopper as a salesperson. When Mrs. Staler initially began her employment with The Franklin Shopper, there was no written contract. Sometime later in 1984, Mrs. Statler was presented with an employment contract which contained an agreement not to compete after termination from employment for a period of one (1) year in an area of twenty-five (25) miles. Mrs. Statler testified that she was not given a copy of this agreement and the plaintiff did not produce an original at the hearing held on June 27, 1986 at the Franklin County Court House.

From the time Mrs. Statler signed the original employment agreement, including the non-competition provision in 1984 until March 11, 1986, Mrs. Statler continued employment at The Franklin Shopper in the capacity of a salesperson. On March 11,1986, Mrs. Statler and three other salespersons were given three contracts by the manager of The Franklin Shopper. These contracts included a new employment contract, an agreement not to compete,

and a sales compensation agreement. All three of these documents were signed by Mrs. Statler and the company on March 11, 1986. Mrs. Statler was informed that these new contracts were necessary and a part of "company policy", and that if she wanted to continue working for The Franklin Shopper, these agreements would have to be executed by her. Mrs. Statler's position with The Franklin Shopper after she signed the agreements on March 11, 1986 remained that of a salesperson. The only benefits accrued to her was that for any sales in a previous month of over $9,250 up to and including $11,750, she would receive a twenty percent commission and on sales over $11,750 per month, she would have recieved compensation in the amount of twenty—five percent of her sales on the additional amount.

The employment agreement signed by Mrs. Statler and The Franklin Shopper on March 11, 1986 provided that the employee would receive a one week vacation with pay after one full year of employment and two weeks of vacation with pay after two years of continuous employment. The employment contract also contained a provision stating that employees would receive five paid days sick leave per year, and an extended provisions for a second week at half pay.

However, the employer testified that he did not intend these provision to be binding on The Franklin Shopper, but instead, Mrs. Statler was only to be paid on a strictly commission basis. There is nothing in the employment contract, though, that would indicate in any manner that employees are to be paid strictly on a commission basis. Plaintiff now wishes the court to enforce Provision No. 9 of this same contract, dealing with non-competition.

Mrs. Statler testified that it was company policy to automatically pull several of her accounts and give them to new employees when they began working for the paper. She also testified that she was required to service several accounts for which the company received the use of a new car and for which she received no compensation whatsoever. The Franklin Shopper did not deny that these were the paper's policies. Likewise, Mrs. Statler testified that if an account was more than ninety days delinquent that the salesperson would receive no commission for the sales of that account. The employment contract makes no mention of a commission based pay, let alone not paying salepersons for delinquent accounts or for

servicing accounts for which the company received benefits.

Under Pennsylvania law, a reasonable non-competition agreement is enforceable if it is signed at the initial taking of employment and ancillary to the employment. When executed subsequent to beginning employment, such an agreement is enforceable only if there is a corresponding "substantial change in employment status". *Jacobson & Co. v. International Env't Corp.*, 427 Pa. 439, 235 A.2d 612 (1967). This "substantial Change" must entail an increasee or variance of duties and responsibilities, not merely a pay increase or elevation of job classification. *Pennsylvania Higher Education Assistance Agency v. Layton, 59* D.&C. 2d 270 (1972).

The plaintiff does not argue that the original non-competition agreement, allegedly executed in June, 1984, is in any way binding on the defendants. The plaintiff's sole contention is that the potential for increased earnings, based on the new commission structure, is adequate consideration to make the March, 1986 non-competition agreement enforceable. Even though there may be a temporary drop in actual salary, the potential for increased earnings may be a factor sustaining the validity of a non-competition agreement. *See Jacobson,* Supra.

Here, however, the defendant earned less after signing the agreement because the plaintiff took a number of the defendant's accounts away from her. The plaintiff's unrestricted ability to strip employees of successful accounts renders the potential for increased income illusory.

More importantly, the plaintiff admits that the defendant took on no additional duties or responsibilities as a result of the March, 1986 agreement since the second agreement did not rise to the level of "taking on employment", the non-competition agreement is void and unenforceable.

In addition, the plaintiff should not be entitled to enforce one provision of an agreement when, by its own admission, it had breached several other material provisions of the contract of employment. The plaintiff admitted at the hearing that the vacation and sick pay provisions of contract were not applicable to salespersons on a "commission only" pay. The court finds it ludicrous for the employer to draft the agreement, fail to abide by its

material provisions, then to argue that these provisions were inadvertently included in the contract. The plaintiff's own failure to abide by the terms of the agreement makes it very difficult for them to persuade the court to only enforce the clauses which are beneficial to them.

All three documents were signed on the same day, as such, they should be considered as an integrated contract. Since the employer failed to abide by the material terms of the employment contract that they had written, the court is not inclined to enforce the non-competition agreement against the defendant.

Wherefore, the court finds that the temporary preliminary injunction banning defendant from competing with the plaintiff should be lifted.

DECREE NISI

July 9, 1986, the court orders that the temporary preliminary injunction issued by order of court dated June 23, 1986 is lifted, and Mrs. Cheryl Statler will not be barred from competing with The Franklin Shopper.

RYDER V. RYDER, C.P. Franklin County Branch, Equity Doc. Vol. 7, Page 462

Equity - Tenancy by Entireties - Partition

1. To permit the plaintiff to provoke his spouse to commit an action sufficient for partition would allow him to destroy the entireties estate by his own act.

2. Where a party acts in good faith for the mutual benefit of both parties, the use of joint income is not an offer of partition.

J. McDowell Sharpe, Esq., Counsel for Plaintiff
Richard W. Cleckner, Esq., Counsel for Defendant

OPINION AND ORDER

WALKER, J. September 20, 1989:

FINDINGS OF FACT

A trial without jury was held on June 27, 1989, to determine if the defendant, Miriam K. Ryder, appropriated property owned as tenants-by-the-entireties to the detriment of her husband, the plaintiff, William L. Ryder, Sr. Plaintiff claims that the defendant made an offer to partition by refusing to share the income from jointly owned property, by taking jointly owned income and depositing it into her own individual account, and by using joint income for her own benefit rather than the mutual benefit of both parties. Plaintiff further claims that he accepted this offer for partition by filing this suit.

DISCUSSION

As stated in *Shapiro v. Shapiro,* 424 Pa. 120, 137, 224 A.2d 164, 169 (1966) *Citing Stemniski v. Stemniski,* 403 Pa. 38, 42, 169 A.2d 51 (1961):

> A violation of the rules by one's spouse appropriating the property to his own use works a revocation of the estate by the fiction of the appropriation's being an offer of an agreement to destroy the estate and an acceptance of that offer when the other spouse starts suit . . .

In the case at bar, however, the court finds that the defendant's actions did not constitute an offer of partition; therefore, there can be no acceptance.

The facts in this case indicate that the defendant acted for the mutual benefit of both parties. On April 10, 1987, without telling the defendant, the plaintiff voluntarily left the marital home. Weeks later, defendant discovered that the plaintiff had had a nervous breakdown and was institutionalized in Tennessee. Their joint checking account at the Chambersburg Trust Company required both signatures for use. Based on the plaintiff's disability, the defendant had no access to this joint account, so she opened a special account in her name at Farmers & Merchants.