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STATE OF WASHINGTON

No. 43486-5-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

WILL McKASSON,

Petitioner;

v.

BRIAN JOHNSON, DANIELLE JOHNSON, and ACADEMY
OF BRIAN JOHNSON, LLC,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

Respondents Brian Johnson, Danielle Johnson, and the Academy of Brian Johnson, L.L.C., are the defendants in the action below. Petitioner Will McKasson is the plaintiff in the action below and was a former employee of the Academy of Brian Johnson, L.L.C.

This appeal centers on the enforceability of a lawful non-compete agreement entered into by the parties. The Honorable Judge Lisa Sutton of Thurston County Superior Court entered an *Order Denying Plaintiff's Motion for Summary Judgment* finding that genuine issues of material fact existed with respect to the enforceability of the non-compete agreement and thus ruled that summary judgment was not appropriate.

II. ASSIGNMENTS OF ERROR

There are no assignments of error from the Thurston County Superior Court's ruling because it was proper for the court to look at extrinsic evidence in determining whether the writing encompassed the entire agreement between the parties; therefore the *Order Denying Plaintiff's Motion for Summary Judgment* should be affirmed.

III. STATEMENT OF THE CASE

Respondents Brian Johnson and Danielle Johnson (hereinafter collectively "Johnson") are the owners and operators of the Academy of

Brian Johnson, L.L.C. (hereinafter the “Academy”). CP 25. The Academy is a fitness facility with a membership of approximately 400. *Id.* The Academy offers group classes, individual instruction and lessons, and has equipment on site for self-directed exercise. *Id.* The facility is located in Lacey, Washington and has been in business for 12 years. *Id.*

Petitioner Will McKasson (hereinafter “McKasson”) came to work for the Academy in 2004 possessing no substantive experience in martial arts at the time. *Id.*; CP 26. Johnson spent countless hours training McKasson so he could develop the skills to be a qualified martial arts instructor and/or trainer. CP 26.

Throughout the course of their relationship, the Academy and McKasson entered into several agreements (both written and oral) regarding the terms of McKasson’s employment. *Id.* In 2009 the parties executed a written employment agreement in an effort to better formalize their relationship. *Id.* In exchange for the non-compete provisions therein the Academy provided McKasson with a role in management and additional income opportunities (teaching private and group lessons and selling equipment for commission). *Id.* McKasson and Johnson also agreed that a non-competition clause was paramount to the relationship. *Id.* Without the non-compete agreement, Johnson would not have

provided McKasson with the expanded business opportunities and/or his management role. *Id.*

Thereafter Johnson discovered that McKasson had engaged in sexual relationships with several customers of the Academy. CP 25. Johnson advised McKasson on a number of occasions that his conduct was unacceptable and unprofessional. *Id.*

McKasson was also fully aware of the fact that his conduct was extremely detrimental to the Academy. *Id.* During October 2011, the Academy terminated McKasson's employment. CP 26. The final straw came when Johnson discovered that McKasson was engaged in a sexual relationship with a customer who was under the age of 18. *Id.* McKasson admitted his malfeasance in correspondence with Johnson and also in his application for unemployment benefits. *Id.*; CP 28-29.

Subsequent to his termination, McKasson acknowledged the basic restrictions set forth in the non-compete clause and agreed to abide by them. CP 22. Nonetheless McKasson immediately set up a business that directly competes with the Academy. CP 18-19. In response to the Academy's efforts to enforce the non-compete provisions, McKasson filed suit. CP 3-5. McKasson then brought a *Motion for Summary Judgment*

seeking the court's determination that the non-compete agreement was unenforceable. CP 6-8.

The Honorable Judge Lisa Sutton of the Thurston County Superior Court ruled that there were genuine issues of material fact surrounding the terms of the non-compete agreement signed by the parties and thus summary judgment was not appropriate. CP 46-47. McKasson filed a *Motion to Reconsider* which was also denied by the Honorable Judge Lisa Sutton. CP 48-52.

McKasson and Johnson stipulated that the orders denying McKasson's summary judgment motion and motion to reconsider involved a controlling question of law of which there was a substantial ground for a difference of opinion and review would materially advance the ultimate termination of the litigation. Accordingly, this court granted review. CP 59-61.

IV. SUMMARY OF THE ARGUMENT

There are material facts in dispute relating to the independent consideration provided in exchange for the non-compete agreement and thus a credibility determination needs to be made by a fact finder before the dispute can be resolved and thus summary judgment is not appropriate.

V. ARGUMENT

A. STANDARD OF REVIEW.

This appeal is made by McKasson based on the order denying his motion for summary judgment that was entered by the trial court. “In reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court.” *Kruse v. Hemp*, 121 Wash.2d 715, 722, 853 P.2d 1373 (1993).

A motion for summary judgment “may be granted if the pleadings, affidavits, and depositions before the trial court establish that there is no genuine issue of material fact and that as a matter of law the moving party is entitled to judgment.” *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Integration of a contract is generally a **question of fact**. *Lopez v. Reynoso*, 129 Wn. App 165, 171, 118 P.3d 398 (2005) (emphasis added). In the case of contract interpretation, in a summary judgment proceeding, the moving party has the burden of demonstrating the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Summary judgment is not appropriate “if the record shows any reasonable hypothesis which entitles the nonmoving party to relief.” *White v. Kent Med. Ctr., Inc.*, 61 Wn. App. 163, 175, 810 P.2d 4 (1991).

B. THERE ARE GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER THE WRITING ENCOMPASSED THE ENTIRE AGREEMENT BETWEEN THE PARTIES AND THUS SUMMARY JUDGMENT IS PREMATURE.

In early 2009, Johnson and McKasson entered into discussions to expand McKasson's role at the Academy including the eventual transfer of ownership to McKasson. CP 26. The parties obtained a written employment agreement with a non-compete provision which was supported by the parties' oral agreement that McKasson would take on a management role and be provided additional business opportunities. *Id.*

There is no dispute that the consideration was provided. CP 22. However, the consideration was not expressly incorporated in the writing. CP 11-16. McKasson now seeks to exclude any evidence of the consideration, and also seeks to exclude any reference to the parties' actions and oral agreements confirming the exchange of consideration. CP 9.

In determining whether an agreement is integrated, the court may consider evidence of the negotiations and circumstances surrounding the formation of the contract. *M.A. Mortensen Co. Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 579, 998 P.2d 305 (2000). The court has a duty to ascertain from all relevant, extrinsic evidence, either oral or written, whether the entire agreement has been incorporated in the writing or not.

Barber v. Rochester, 52 Wn. 2d 691, 698, 328 P.2d 711 (1958). That is a question of fact. *Id.*

Any relevant evidence is admissible to show the writing was not final. Washington Practice Manual, *Contract Law and Practice*, Volume 25, Section 4.3 (2nd Ed.) (citing *Calamari & Perillo*, *Contracts*, Sec 3.3 at 131 (5th Ed. 2003)). Courts are also free to disregard “boilerplate” provisions to the extent those provisions are inconsistent with the parties’ actual agreement and/or actions. *South Kitsap Family Worship Center v. Weir*, 135 Wn. App. 900, 907, 146 P.3d 935 (2006).

The crucial element appears to be whether or not the parties treated the written document as their sole and solitary agreement. *See Id.* The parties’ clearly did not treat the written employment agreement as their only agreement. CP 26. The undisputed mutual intent of the parties, which was confirmed by their actions, was that McKasson would execute the employment agreement in exchange for better opportunities for increased income, responsibility and additional training. CP 26; CP 22. McKasson asks the Court to ignore what the parties agreed to, what they intended, and what they did, hoping the court will narrow the agreement to within the parameters of a limited writing which was clearly deficient with respect to the parties actual agreement.

Any contractual relationship between the parties was the result of multiple interactions, some of which were written into the employment agreement and some of which were not. Further, the parties engaged in a course of conduct over several years (including post-termination) which confirmed the parties' agreement that the non-compete provisions were enforceable and based upon valuable consideration. CP 22. In a post-termination private message to Johnson, McKasson indicated that he intended to abide by the terms of the non-compete agreement by venturing into new area of fitness including CrossFit, personal training, and nutrition instead of martial arts and fighting. *Id.*

Generally, people have the right to make their agreements entirely oral, entirely in writing, or partly oral and partly in writing. *Diel v. Beekman*, 1 Wash. App. 874, 879-80, 465 P.2d 212 (1970) (quoting *Barber*, 52 Wn.2d. at 698). As noted, the written employment agreement was but one component of the entire agreement while the rest of the agreement was made orally and confirmed by the parties' actions.

McKasson's argument that the contract was completely integrated is not supported by the evidence. CP 22; CP 26. McKasson and Johnson agreed that a non-competition clause was paramount to the relationship. CP 26. For a period of nearly two years, McKasson and Johnson

continued to act in a manner consistent with the additional consideration and the terms of their agreement. *Id.* Without the non-compete agreement, Johnson would not have provided McKasson with additional business opportunities, increased income, and an expanded role in management. *Id.*

At the very least, there are genuine issues of material facts regarding whether the written agreement was the entire contract between the parties and thus summarily entering any finding at this stage is premature because this is a question of fact for trial.

C. **SUMMARY JUDGMENT IS NOT APPROPRIATE AS THERE ARE GENUINE ISSUES OF MATERIAL FACT SURROUNDING THE TERMS OF CONSIDERATION PROVIDED TO SUPPORT THE NON-COMPETE AGREEMENT.**

There is no dispute that McKasson is seeking to have the non-compete provision declared invalid so that he can compete with the Academy. McKasson was fully aware of the importance of the non-compete provisions. CP 22. So much so that he acknowledged his contractual duties subsequent to being terminated. *Id.* McKasson also willingly accepted the advancements and additional business opportunities provided as part of the agreement. CP 26. McKasson cannot now contend the consideration he received was inadequate.

McKasson's main dispute is that there was insufficient consideration to support the non-compete clause. CP 9. Courts generally do not inquire into the adequacy of consideration. *Browning v. Johnson*, 70 Wn.2d 145, 147, 422 P.2d 314, 430 P.2d 591 (1967); *Rogich v. Dressel*, 45 Wn.2d 829, 843, 278 P.2d 367 (1954). In any event, given the testimony of Johnson, the oral and written agreements of the parties, and the course of conduct undertaken by Johnson and McKasson, there is clearly sufficient consideration to support the parties' agreement. CP 22; CP 25-27; CP 11-16. This consideration includes increased income, responsibility, and additional training. CP 26.

McKasson correctly cites *Labriola v. Pollard Group* for the proposition that continued employment is not independent consideration for a non-competition clause. CP 9; *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 830, 100 P.3d 791 (2004). However, continued employment was not the only consideration provided to McKasson.

A non-compete agreement entered into after employment will be enforced if it is supported by independent consideration. *Rosellini v. Banchemo*, 83 Wn.2d 268, 273, 517 P.2d 955 (1974); *Schneller v. Hayes*, 176 Wash. 115, 118, 28 P.2d 273 (1934). Independent consideration may include increased wages, a promotion, a bonus, a fixed term of

employment, or perhaps access to protected information. *Schneller*, 176 Wash. at 118–19. The Academy and McKasson expressly agreed that McKasson would be provided additional business opportunities, training, compensation and responsibility in exchange for the employment agreement. CP 26.

Wood v. May is determinative to the case at hand. *Wood v. May*, 73 Wn.2d 307, 311, 438 P.2d 587 (1968). Wood was a master horseshoer with 15 years' experience who employed May as an apprentice horseshoer. *Id.* at 308. A few months later the parties signed a written contract wherein Wood agreed to teach May the art of horseshoeing. *Id.* The Supreme Court for the State of Washington held that the contract, despite being vague and poorly drawn, was supported by adequate consideration because the apprentice received an extensive amount of training after he signed a non-compete agreement and that training was adequate consideration in exchange for signing the non-compete agreement. *Id.* at 310-11.

Similar to *Wood*, when McKasson came to work for the Academy he had no knowledge with respect to what was involved in working in a martial arts gym. CP 26. Johnson spent countless hours training McKasson so he could develop the skills to be a qualified martial arts

instructor and/or trainer. *Id.* In exchange for the non-compete agreement, Johnson allowed McKasson to use his learned training to expand his role and to teach virtually all of the private lessons at the gym. *Id.* Based on *Wood* this is clearly sufficient consideration to support the non-compete agreement.

McKasson and the Academy acknowledged the negotiation, execution, and existence of the non-compete agreement. CP 22. Courts enforce non-compete agreements that are validly formed and are reasonable. *Racine v. Bender*, 141 Wash. 606, 615, 252 P. 115 (1927). The Academy fulfilled its obligations, but was required to terminate McKasson's employment based upon McKasson's continued misconduct. CP 26. The Academy has the right to rely upon the extremely valuable non-compete provisions negotiated by the parties.

The question is not whether the non-compete provisions are enforceable as a matter of law, but rather whether there was consideration provided – which is a question of fact. The court cannot, at a summary proceeding, invalidate the terms of that which was negotiated, agreed, and relied upon by the parties. At the very least, there are material facts at issue regarding the independent consideration provided and therefore the court cannot make a declaratory finding at this stage.

C. **IN A SUMMARY JUDGMENT PROCEEDING EXTRINSIC EVIDENCE IS RELEVANT IN DETERMINING THE TERMS OF AN AGREEMENT.**

The Academy has put forth uncontroverted extrinsic evidence supporting the contract and the underlying consideration. CP 26. It is the court's duty to ascertain from all relevant *extrinsic evidence*, either oral or written, whether the writing encompasses the entire agreement. *Lopez*, 129 Wash. App at 171; *M.A. Mortensen Co. Inc.*, 140 at 579.

Johnson's uncontroverted testimony is that there was additional consideration discussed, and provided, contemporaneously with the execution of the document. *Id.* Further, Johnson promoted McKasson, gave McKasson additional business opportunities, and expanded McKasson's role in the gym. *Id.* As the Court cannot judge credibility at this stage, any of those assertions standing alone would provide evidence of consideration sufficient to defeat a motion for summary judgment.

D. **WHETHER THE PAROL EVIDENCE RULE APPLIES IS NOT DETERMINABLE AT THIS STAGE WHEN THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING THE INTEGRATION OF THE AGREEMENT.**

"[T]he parol evidence rule only applies to a writing intended by the parties as an 'integration' of their agreement; *i.e.*, a writing intended as a final expression of the terms of the agreement." *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990) citing *Emrich v. Connell*, 105

Wn.2d 551, 556, 716 P.2d 863 (1986). Where a contract is only partially integrated, *i.e.*, the writing is a final expression of those terms which it contains, but not a complete expression of all terms agreed upon, the terms not included in the writing may be proved by extrinsic evidence provided that the additional terms are not inconsistent with the written terms, in the absence of fraud, accident, or mistake. *Id.*

The non-compete agreement was the product of a series of discussions, and actions of the parties, wherein they mutually agreed to perform certain terms not expressed in the writing. CP 26. Johnson has proved the additional terms were part of the parties' agreement. *Id.*

McKasson cannot get past summary judgment on the issue of whether the contract is partially or fully integrated because this is a genuine issue of material fact which affects the outcome of the case and cannot be decided at this stage. Moreover, because the court cannot decide at this stage whether the contract is partially or fully integrated the court does not make it to the second inquiry regarding whether the parol evidence rule or context rule would exclude the evidence of additional consideration.

Nonetheless if it is partially integrated *Berg* would allow extrinsic evidence regarding additional consideration as it supplements the written

terms by supporting the non-compete agreement. Furthermore, even if the oral agreement of the parties contradict the written terms it is boilerplate language that is unenforceable and based on mutual mistake as the parties agreed to act in a different way. *See Lopez*, 129 Wash. App. at 172 (holding that the extrinsic evidence of prior negotiations did not contradict the valid terms of the written contract).

VI. CONCLUSION

The Academy and Johnson engaged in a series of negotiations, exchanging mutual promises, some of which were contained within a writing. However, there is no dispute that material agreements of the parties were not contained within the writing. McKasson is not entitled to exclude certain terms to which he agreed merely because they are not contained within the writing.

In any event, as noted by the trial court, there are certainly material facts at issue with respect to the terms of the parties' agreement. Thus, the *Order Denying Plaintiff's Motion for Summary Judgment* should be affirmed as there are material facts at issue regarding the consideration provided in exchange for execution of the non-compete agreement and therefore summary judgment is not appropriate.

DATED this 4th day of December, 2012.

Melissa Shumway
Melissa Shumway

SIGNED AND SWORN to before me this 4th day of December, 2012, by Melissa Shumway.



Megan D. Card
NOTARY PUBLIC in and for the State of
Washington, residing at Olympia.
My commission expires: 2-1-15