

No. 70554-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

3MD, INC., d/b/a DENALI ADVANCED INTEGRATION

Appellant,

v.

SHAWN OLSON

Respondent.

APPEALED FROM KING COUNTY COURT CAUSE NO. 13-

2-05626-7 SEA

RESPONDENT SHAWN OLSON'S BRIEF

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I. INTRODUCTION

Mr. Olson's non-competition and non-solicitation obligations owed to Denali expired on January 1, 2013 as a result of being severely demoted a year prior. Mr. Olson was a dedicated Denali employee who only left Denali's employ after working in a severely demoted and under appreciated position for 13 months.

On April 14, 2010, while employed by Denali, Mr. Olson signed an Employment Agreement containing non-competition and non-solicitation obligations. This Employment Agreement was necessary to reflect Mr. Olson's March 1, 2010 promotion to Vice President of Network Business. Mr. Olson agreed to be bound by its terms in consideration for the compensation and managerial duties associated with the new position of Vice President of Network Business.

However, on January 1, 2012, Denali severely demoted Mr. Olson to the position of Vice President of Solution's Architects. This demotion drastically cut his pay by over \$110,000, and significantly reduced his managerial duties. The demotion terminated Mr. Olson as Vice President of Network Business and it eliminated the compensation and unique duties of that position.

As a result of being terminated as Vice President of Network Business, the one-year time period for non-solicitation and non-competition obligations began to run because Mr. Olson was no longer receiving the benefit he contracted for or the compensation associated with the position of Vice President of Network Business. Denali then hired Mr. Olson into the demoted role of Vice President of Solution's Architect and presented another Employment Agreement to Mr. Olson. This new Employment Agreement contained non-compete and non-solicitation obligations and specifically referenced Mr. Olson's demoted position as Vice President of Solution's Architect. Despite Denali's best efforts, Mr. Olson refused to sign the new non-compete. On January 1, 2013, the obligations owed to Denali expired.

Denali's attempt to construe the Employment Agreement in a light most favorable to itself is overwhelmingly flawed. The Trial Court correctly applied the law and undisputed facts. Furthermore, Denali's appeal becomes moot as of February 8, 2014, because the one year prohibition under Denali's argument expires on that date. As such, this Court should affirm the Trial Court's June 25, 2013 order and reverse the denial of Mr. Olson's attorney fees and costs.

II. RESPONDENT'S CROSS-ASSIGNMENT OF ERROR

The Trial Court erred when it denied Mr. Olson's motion for attorney fees and costs because the Trial Court granted Mr. Olson the relief in which he prayed for at summary judgment making him the substantially prevailing party.

III. RE-STATEMENT OF THE ISSUES

1. Did the Trial Court properly grant partial summary judgment in favor of Mr. Olson where it determined that the non-competition and non-solicitation provisions of Mr. Olson's Employment Agreement were limited for a period of one year after Denali terminated Mr. Olson from his position of Vice President of Network Business on January 1, 2012?

2. Did the Trial Court properly conclude that Denali's acts of severely decreasing Mr. Olson's compensation, job duties, and changing his job title constituted termination from Mr. Olson's position as Vice President of Network Business beginning the one-year restrictive covenants contained in Mr. Olson's Employment Agreement?

3. Did the Trial Court properly conclude that the Employment Agreement was limited by its own terms to Mr. Olson's employment with Denali as "VP Network Business" when

Mr. Olson received the compensation associated with that position as consideration for signing a non-compete agreement within that Employment Agreement?

4. Did the Trial Court err when it denied Mr. Olson's motion for attorney fees and costs after it awarded Mr. Olson the relief he sought in his complaint, a finding that the restrictive covenant obligations in Mr. Olson's Employment Agreement was not enforceable, when the Employment Agreement provides for an award of attorney fees and costs to the substantially prevailing party?

IV. RE-STATEMENT OF THE CASE

A. Factual Background

Mr. Olson began employment with Denali on November 19, 2007, as a network manager. (CP 30-31). On March 1, 2010, Mr. Olson was promoted to and began working as the Vice President of Network Business. As of March 1, 2010, Mr. Olson began receiving the benefits, bonuses and salary associated with his new position. Id. Over a month later, on April 14, 2010, Denali presented Mr. Olson with an employment agreement dated March 1, 2010 ("Employment Agreement"), which contained a non-compete and non-solicitation clause. Id. The agreement provided that if Mr.

Olson voluntarily left Denali's employ or was terminated, Mr. Olson could not solicit business from or compete with Denali for one year from the date of departure. Id. Mr. Olson signed the Employment Agreement on April 14, 2010. Id.

Over a year later, on January 1, 2012, Denali suddenly and inexplicably terminated Mr. Olson from his position as the Vice President of Network Business and demoted him to the position of Vice President of Solution's Architects. Id. This demotion cut Mr. Olson's commission payout in half. Id. In addition, Mr. Olson's role changed as he was required to sell many more services and products than he had to in his previous role and his managerial responsibilities were greatly diminished. Id. Beginning January 1, 2012, Mr. Olson was no longer receiving the benefits associated with the position of Vice President of Network Business. Id. At that time, Denali presented Mr. Olson with a new employment agreement reflecting his position as Vice President of Solution's Architects and the lower amount of compensation associated with that position. Id. This new agreement also contained a new non-compete and non-solicitation agreement. Id. Mr. Olson refused to sign the new non-compete and non-solicitation agreement. Id. Mr.

Olson stayed with Denali for just over a year after his demotion, voluntarily resigning on February 8, 2013. Id.

B. Procedural History

On February 15, 2013, Respondent Shawn Olson filed a Complaint seeking declaratory relief that the non-competition and non-solicitation obligations of his April 14, 2010 Employment Agreement were not in full force and effect. He asserted that either the covenants were not supported by adequate consideration or that even if they were, the non-compete and non-solicitation provisions expired on January 1, 2013 (one year after he was terminated and demoted). (CP 1-6). On March 6, 2013, Denali sought declaratory relief that all the non-compete and non-solicitation obligations continued until February 8, 2014. (CP 7-15). On May 20, 2013 Mr. Olson moved for summary judgment and on May 23, 2013 Denali cross-moved for summary judgment. (CP 21-83).

On June 21, 2013, the Trial Court heard oral argument. (CP 92). On June 25, 2013, the Trial Court ruled, granting Mr. Olson's motion for summary judgment as to the expiration of the one year non-solicitation and non-competition obligations on January 1, 2013, and granted Denali's cross-motion for summary judgment as to the adequacy of the consideration supporting the non-solicitation

and non-competition provisions of the Employment Agreement. (CP 92-95). The Trial Court found that the Employment Agreement was limited by its own terms to Mr. Olson's employment with Denali as the Vice President of Network Business. (CP 93).

On June 27, 2013, Denali appealed the Trial Court's partial grant of summary judgment to Mr. Olson. (CP 96-102). Denali asserted that the Trial Court erred in finding that the non-solicitation and non-competition obligations of the Employment Agreement expired exactly one year after Denali demoted Mr. Olson. Id.

V. STANDARD OF REVIEW

When an appellate court reviews the granting of a motion for summary judgment its review is de novo. Castro v. Stanwood School Dist. No. 401, 151 Wn.2d 221, 224 (2004). However, the appellate court conducts a two-part review for denials of attorney fees: (1) the court reviews de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) the court reviews a discretionary decision to deny attorney fees for an abuse of discretion. Gander v. Yeager, 167 Wn. App. 638, 647 (2012). The appellate court engages in the same inquiry as the trial court. In re Parentage of J.M.K., 155 Wn.2d 374, 386 (2005).

Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Young v. Key Pharmaceuticals, Inc., 112 Wn.2d 216, 225 (1989). Summary judgment should be granted only if reasonable persons could reach but one conclusion from the evidence presented. Korslund v. Dyncorp Tri-Cities Sevs. Inc., 156 Wn.2d 168, 177 (2005).

Here, there is no genuine issue of material fact and Mr. Olson is entitled to judgment as a matter of law. The non-solicitation and non-compete obligations contained in the Employment Agreement expired on January 1, 2013, exactly one year after Denali terminated Mr. Olson from the position of Vice President of Network Business and demoted him to the position of Vice President of Solution's Architects. Consequently, this Court should affirm the Trial Court's ruling regarding Mr. Olson's non-solicitation and non-competition obligation to Denali. However, this Court should reverse the Trial Court's denial of an award of attorney fees and costs to Mr. Olson because he was the substantially prevailing party.

VI. ARGUMENT

A. The Non-Compete And Non-Solicitation Obligations Under the March 1, 2010 Employment Agreement

Expired One Year From Mr. Olson's Termination And Demotion.

Mr. Olson agreed to the one-year non-solicitation and non-compete obligations contained in the March 1, 2010 Employment Agreement in consideration for the compensation and duties associated with the position of Vice President of Network Business. When Denali terminated Mr. Olson from his position as Vice President of Network Business and demoted him to Vice President of Solution's Architect, the one-year non-compete and non-solicitation obligations began. This demotion was marked by a reduction in job duties and a pay cut of over \$110,000. Thus, the Trial Court properly found that the restrictive period expired one year after the demotion occurred.

Washington courts enforce non-compete agreements that are validly formed and reasonable. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 833 (2004). Such an agreement must be supported by consideration. Id. Consideration is "*any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.*" Id. (quoting King v. Riveland, 125 Wn.2d 500, 505 (1994)). The court looks to:

(1) whether the restraint is necessary to protect the employer's business or goodwill, (2) whether it imposes on the employee any greater restraint than

is reasonably necessary to secure the employer's business or goodwill, and (3) whether enforcing the covenant would injury the public through loss of the employee's service and skill to the extent that the court should not enforce the covenant, i.e., whether it violates public policy.

Emerick v. Cardiac Study Center, Inc., P.S., 170 Wn. App. 248, 254 (2012) (citing Perry v. Moran, 109 Wn.2d 691, 698 (1987), judgment modified on recon., 111 Wn.2d 885 (1989)).

Public policy requires a court to carefully examine covenants not to compete. Id. at 257. Even when protection of a legitimate business interest is demonstrated, the court must carefully scrutinize covenants not to compete because of equally competing concerns of freedom of employment and free access of the public to professional services. Id.

Here, the consideration Mr. Olson accepted in exchange for agreeing to be bound by the non-solicitation and non-compete obligation in the Employment Agreement was the compensation and duties associated with the position of Vice President of Network Business. When Denali terminated Mr. Olson from that position, cut his pay by \$110,000, and reduced his managerial duties, the non-solicitation and non-compete obligations began to run. Consequently, the Trial Court correctly ruled that the non-

competition and non-solicitation obligations expired one year from the date Denali demoted Mr. Olson.

Despite Denali's assertions, the fact that Denali presented a new employment agreement to Mr. Olson for his demoted position of Vice President of Solution's Architect, only evidences the fact that Denali knew the restrictive covenants began to run upon his demotion. The March 1, 2010 Employment Agreement was limited by its terms and exchange of consideration to Mr. Olson's employment as the Vice President of Network Business.

Denali cannot argue that its acts subsequent to Mr. Olson's termination as Vice President of Network Business cannot be considered the Court, but Mr. Olson's subsequent acts should be considered. (Appellant's Brief, pp. 9-16). The undisputed facts demonstrate that the Employment Agreement promised certain pay and duties to Mr. Olson in exchange for a restrictive period for competition and solicitation. Assuming there is some legitimate reason Denali desires this protection, the restrictive covenants cannot be applied to restrict Mr. Olson over a year after the benefits of the Employment Agreement were eliminated. Despite Denali's arguments, the Trial Court properly applied the law to the

undisputed facts and reached a proper conclusion. Therefore, the Trial Court should be affirmed.

B. This Court Should Affirm The Trial Court's Order Because In Less Than Two Months Denali's Appeal Will Be Moot.

Denali's argument and its appeal will be moot as of February 8, 2014. Although technically appealable, a decision may be deemed non-reviewable on the grounds of mootness. Orwick v. City of Seattle, 103 Wn.2d 249, 253 (1984). A case is moot if a court can no longer provide effective relief. Id. In general, an appellate court will not review a moot case. Id. Moreover, the issue of mootness may be raised at any time. Citizens for Financially Responsible Government v. City of Spokane, 99 Wn.2d 339, 350 (1983) (citing CR 12(h)(3)).

According to Denali's argument and the admissions in its pleadings, the one-year non-solicitation and non-compete obligations in the March 2010 Employment Agreement expire on February 8, 2014. (Appellant's Brief, p. 9). It is unlikely that this case will be decided prior to that date. Therefore, Mr. Olson urges the Court to deny Denali's appeal as moot.

C. The Trial Court Properly Considered Denali's Subsequent Acts When Interpreting The Employment Agreement Under The Context Rule.

Denali asserts that the Trial Court improperly considered its subsequent offering of a new employment contract with new non-compete and non-solicitation covenants to Mr. Olson after it demoted him to Vice President of Solution's Architects. (Appellant's Brief, pp. 9-13). However, under the Berg context rule the Trial Court properly considered evidence of Denali's subsequent acts in determining that Mr. Olson's non-compete and non-solicitation obligations under the March 2010 Employment Agreement expired on January 1, 2013. See Berg v. Hudesman, 115 Wn. 2d 657, 668 (1990).

It is undisputed that Denali offered Mr. Olson a new employment contract with new restrictive covenants because Denali knew the March 2010 Employment Agreement was specific to Mr. Olson's employment as Vice President of Network Business. (See CP 30-31). As such, the restrictive covenants began when Mr. Olson was terminated and expired one-year later, January 1, 2013.

According to the rules of contract interpretation, the Trial Court correctly ruled that Mr. Olson's non-solicitation and non-compete obligations began to run on the date Denali terminated

Mr. Olson from his position as Vice President of Network Business and those obligations expired on January 1, 2013, exactly one year from the date of termination. (See CP 92-95).

Contrary to Denali's assertion that the Trial Court impermissibly considered parol evidence, the Trial Court simply took into consideration the context in which the March 2010 Employment Agreement was executed to ascertain the intent of the parties. (See CP 30-31). Subsequent conduct of contracting parties may be used to interpret a written contract under the context rule. Berg, 115 Wn. 2d at 668. The context rule provides:

*May we say here that we are mindful of the general rule that parol evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written contract, in the absence of fraud, accident, or mistake. But, as stated in Olsen v. Nichols, 86 Wn. 185 (1915), **parol evidence is admissible to show the situation of the parties and the circumstances under which a written instrument was executed, for the purpose of ascertaining the intention of the parties and properly construing the writing.** Such evidence, however, is admitted, not for the purpose of importing into a writing an intention not expressed therein, but with the view of elucidating the meaning of the words employed. Evidence of this character is admitted for the purpose of aiding in the interpretation of what is in the instrument, and not for the purpose of showing intention independent of the instrument. It is the duty of the court to declare the meaning of what is written, and not what was intended to be written. **If the evidence goes no further than to show the situation of the parties and the circumstances***

**under which the instrument was executed,
then it is admissible.**

Id. at 669 (quoting Pollock, 20 Wn. 337, 348-49 (1944))(emphasis added). Specifically, the subsequent acts and conduct of the parties to the contract is admissible under the context rule to determine the intent of the contracting parties. Id. at 667.

Denali also continuously asserts that there was no ambiguity in the March 2010 Employment Agreement. However, this argument is meritless. The absence of an ambiguity is not determinative of whether the Trial Court may consider the subsequent acts of a party. See id. at 669 Explicitly, the Berg Court held, “*we thus reject the theory that ambiguity in the meaning of contract language must exist before evidence of the surrounding circumstances is admissible.*” Id. at 669. Thus, application of the context rule is not outside of the plain meaning rule and may be utilized even when the issue of ambiguity does not exist or has not been raised. See Id. at 666-667, 669.

The Trial Court’s consideration of Denali’s presentment of a new employment contract to Mr. Olson after it terminated him from Vice President of Network Business was properly considered because it was not introduced to add to, modify, or contradict the terms of the Employment Agreement but was considered by the

Trial Court to help ascertain the intent of the parties under the context rule. Under the context rule, the Trial Court's consideration of Denali's subsequent offer of a new contract was permissible. Consequently, this Court should affirm the Trial Court's June 25, 2013 ruling.

D. The Plain Language Of The Employment Agreement Provides That The Non-Compete And Non-Solicitation Limitations Become Enforceable Upon Mr. Olson's Termination From The Agreed Upon Terms of Employment.

Throughout its brief, Denali selectively quotes provisions of the March 2010 Employment Agreement and makes a number of ill-fated attempts to improperly construe the language of the Employment Agreement to its benefit. (Appellant's Brief, pp. 8-16). Denali seemingly asserts that it alone can determine and infer the meaning of the express and unequivocal language in the Employment Agreement. (Appellant's Brief, p. 8). However, when the contract is read as a whole and Berg is considered, only one conclusion can be properly drawn. Namely, the restrictive covenants began to run when Mr. Olson was terminated as Vice President of Network Business and demoted to Vice President of Solution's Architect.

For example, Denali argues that the plain language of the March 2010 Employment Agreement mandates that the restrictive covenants stay in place for one year from when Mr. Olson leaves Denali. Denali also argues it was free to change Mr. Olson's duties, job title and compensation therefore; the restrictive covenants would not apply until Mr. Olson actually left Denali. Denali thus concludes that because Mr. Olson resigned on February 8, 2013, the restrictive covenants are in place until February 8, 2014.

While Denali was free to change Mr. Olson's duties, job title and compensation, that right has no bearing on when the restrictive covenants begin to run. What Denali overlooks is the fact that the plain language of the March 2010 Employment Agreement contemplates the restrictive period clock starting once Mr. Olson resigns or is terminated from his position as Vice President of Network Business, not from when he leaves Denali.

With regard to the restrictive covenants, the March 2010 Employment Agreement states:

9.2 *Employee. During his employment with Denali and for a period of one (1) year thereafter, Employee agrees not to [solicit other employees]...*

9.3 *No Diversion. During his employment with Denali and for a period of one (1) year*

thereafter, Employee agrees not to [divert business] ...

10. Non-Competition.

During the term of this Agreement and subject to the applicable time limits set forth below, Employee agrees not to... (the "Competitive Restriction")

- A. *If Employee Voluntarily Terminates his employment or is terminated for Cause, Employee's Competitive Restriction **shall be during the term of this Agreement and for one (1) calendar year after the date of the Employee's termination.***

- B. *If Employee is Involuntarily Terminated Without Cause¹ during the term of this Agreement, Employee's Competitive Restriction **shall be 6 (six) months from the date of Employee's termination.***

(CP 55-57)(emphasis added).

Each restriction at issue ties the beginning of the restrictive period to the date of "termination from employment" or "one year after employment" with Denali. Fortunately, the March 2010 Employment Agreement specifically defines what "employment" with Denali means. It states in paragraph 1:

¹The March 2010 Employment Agreement defines "voluntary termination", "cause" and "involuntary termination without cause" and affixes differing time periods for each situation. However, for the purposes of this litigation it does not matter as Mr. Olson has abided by the restrictions for over a year. The question centers on when the restrictive period starts.

Denali employs Employee and Employee hereby accepts employment with Denali as VP Network Business.

(CP 51)(emphasis added). Under the plain language of the March 2010 Employment Agreement the restrictive periods begin to run once Mr. Olson ceases to be VP of Network Business. Id. It is undisputed that Mr. Olson was terminated from his position as Vice President of Network Business on January 1, 2012 when he was terminated and demoted to Vice President of Solution's Architect. (CP 31). Therefore, the restrictive periods began on January 1, 2012 and expired on January 1, 2013. Consequently, the Trial Court's ruling regarding the expiration of the restrictive covenants on January 1, 2013 should be affirmed.

E. The Trial Court Erred By Failing To Award Mr. Olson, The Substantially Prevailing Party, Attorney Fees and Costs.

As the prevailing party, Mr. Olson is entitled to an award of attorney fees and costs. The Trial Court awarded Mr. Olson the relief that he prayed for in his complaint. (CP 6; 92-95). As a result, the Trial Court erred when it denied Mr. Olson's July 1, 2013 motion for an award of attorney fees and costs. (CP 104-108; 160-162).

Paragraph 19 of the Employment Agreement specifically states:

*In any suit, proceeding or action to enforce any term, condition or covenant of this Agreement or to procure an adjudication or determination of the rights of Denali or Employee, the **substantially prevailing party shall be entitled to recover from the other party reasonable sums as attorneys' fees and costs and expenses in connection with such suit, proceeding or action, including appeal**, which sums shall be included in any judgment or decree entered therein.*

(CP 59)(emphasis added).

Here, Mr. Olson is the substantially prevailing party because the Trial Court awarded him the relief requested in his complaint and denied Denali's requested relief. (CP 92-95). Mr. Olson alleged one cause of action for declaratory relief and prayed for a finding that the non-complete and non-solicitation covenants were void and unenforceable or in the alternative that the obligations had expired by the terms of the Employment Agreement. (CP 1-6; 21). Denali asserted in its counterclaim that in fact the restrictive covenants were in place and did not expire until February 8, 2014. (CP 10-14).

It is unmistakably clear that the Trial Court awarded Mr. Olson the relief requested, i.e. that the restrictive covenant were expired as of the date he filed his complaint. (CP 92-95).

Correspondingly, the Trial Court denied Denali's requested relief, i.e. that the restrictive covenants are in full force and effect until February 8, 2014. Therefore, Mr. Olson is the substantially prevailing party and under the terms of the March 2010 Employment Agreement is entitled to an award of attorney fees and costs.

When the Trial Court refused to award Mr. Olson attorney fees and costs it committed error. Mr. Olson was the substantially prevailing party and is entitled to his attorney fees and costs, both at the Trial Court and Appellate level. Therefore, the Trial Court should be reversed and this Court should award Mr. Olson attorney fees and costs incurred at the Trial Court level and on appeal.

VII. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Mr. Olson requests an award of attorney fees and costs pursuant to RAP 18.1, contract and RCW 4.84.330. When a contract provides for an award of attorney fees and costs incurred to enforce the provisions of that contract the prevailing party shall be entitled to reasonable attorney fees in addition to costs. RCW 4.84.330.

As set forth above, Paragraph 19 of the March 2010 Employment Agreement explicitly states that the substantially prevailing party shall be entitled to recover attorney fees and costs

from the other party in connection with a suit to enforce the agreement, including appeal. (CP 59). Mr. Olson respectfully requests an award of reasonable attorney fees and costs incurred below and on appeal.

VIII. CONCLUSION

Pursuant to the foregoing, Shawn Olson requests that this Court affirm the Trial Court's June 25, 2013 order granting Mr. Olson's Motion for Summary Judgment. (CP 92-95). In addition, Mr. Olson requests that this Court reverse the Trial Court's July 17, 2013 order denying an award of attorney fees and costs to Mr. Olson and award Mr. Olson attorney fees and costs incurred on appeal and at the Trial Court level.

DATED this 26th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of November, 2013, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

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