IN THE COURT OF APPEALS OF IOWA

No. 8-407 / 97-1219

GATTON REALTY, INC., JIM LORBER and ROBERT GATTON,

Appellees,

vs.

JACK DEE BARNARD,

Appellant.

FILED
AUG 28 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Mahaska County, Richard J. Vogel, Judge.

Jack Barnard, a real estate broker, appeals from the district court's ruling enforcing a covenant not to compete. **AFFIRMED.**

Greg A. Life of Life Law Office, Oskaloosa, for appellant.

Garold F. Heslinga of Heslinga, Heslinga, Dixon & Smith, Oskaloosa, for appellees.

Considered by Cady, C.J., and Vogel, and Mahan, JJ.

CADY, C.J.

Jack Barnard appeals from the district court ruling enforcing a covenant not to compete. He claims the district court erred by finding an agreement for the sale of stock included a binding covenant not to compete. He also asserts the ten-year period of the covenant was unenforceable. We affirm the district court.

Jack Barnard owned two shares in Gatton Realty, Inc. He also worked as a real estate broker for Gatton Realty. He decided to sell one share to Jim Lorber and one share to Robert Gatton. Consequently, he drafted a contract agreeing to sell the shares pursuant to certain conditions. One of the conditions of the sale stated:

> Jack Dee Barnard shall continue to be employed to sell Real Estate for Gatton Realty, Inc. until July 1, 1996 and at that time Gatton Realty, Inc. and Jack Dee Barnard will enter into a no compete agreement for Barnard not to sell Real Estate in Mahaska County for a period of ten (10) years.

After Barnard ended his employment with Gatton Realty, he became associated with another real estate company in Mahaska County. He refused to sign a covenant not to compete provided by Gatton Realty after his employment with them ended because it did not offer him any compensation for signing and did not conform to the original agreement.[1]

---

[1] The covenant not to compete provided by Gatton Realty provides: "1. Jack Dee Barnard shall not, directly or indirectly, as an owner, partner, shareholder, employee, or in any other capacity, engage in the business of the sale of real estate in Mahaska County, Iowa, for a period of five years from and after July 1, 1996.... 3. That the consideration for this Agreement is expressed in the original Contract of January 16, 1995."

Gatton Realty, Lorber, and Gatton subsequently brought an action asserting Barnard breached the parties' contract. Following a trial, the district court determined the agreement between the parties was complete, the language definite, and, accordingly, the covenant not to compete was enforceable. The trial court found Barnard should be enjoined from competing against Gatton Realty in Mahaska County in the business of real estate sales for a ten-year period after July 1, 1996.

On appeal Barnard claims the district court erred by finding the agreement to sell stock contained a binding covenant not to compete, and by failing to find the length of the agreement excessive.

This action was tried at law. Our scope of review in actions at law is for correction of errors at law. Iowa R. App. P. 4. Accordingly, we are bound by the district court's fact findings if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

Barnard claims the trial court erred by finding the agreement to sell stock contained a binding covenant not to compete. Specifically, he asserts the contract concerned only the sale of stock and the contract contained no additional consideration for the covenant not to compete. He further maintains the covenant not to compete language merely established the parties would negotiate such an agreement at a later time.

We first consider the nature of the noncompetition agreement. We must consider the noncompetition agreement within the context of the entire agreement.

The noncompetition provision was clearly a term of the original contract. It contained a specific and definite description of the parties, term, and area covered. Because of the clarity of the terms, no room was left for the parties to later negotiate alternate terms. Further, Barnard drafted the contract, thus allowing us to construe any ambiguity against him. *Dickson v. Hubbell Realty Co.*, 567 N.W.2d 427, 430 (Iowa 1997). If Barnard had wanted to provide for renegotiation of the terms or that additional consideration would be required, he had the opportunity to do so. Additionally, while Barnard asserts the noncompetition agreement is merely an agreement to agree at a future time, he failed to carry his burden to explain exactly what terms the agreement lacked. Accordingly, we find the covenant not to compete was specific enough to give rise to a binding contract.

We next turn to the issue of consideration. Consideration constitutes either a benefit to the promisor or a detriment to the promisee. *Magnusson Agency v. Public Entity Nat'l Co.-Midwest*, 560 N.W.2d 20, 27 (Iowa 1997). Consideration may consist of a performance or a return promise, and it must be bargained for. *Id.* A promise to do that which one is already obligated to do will not suffice as consideration. *Insurance Agents, Inc. v. Abel*, 338 N.W.2d 531, 534 (Iowa App. 1983). Additionally, where there is a written contract, the burden of proof is on the party relying upon the defense of lack of consideration. *Id.*

Under the contract, Gatton and Lorber agreed to pay $10,000 for the stock and employ Barnard until July 1, 1996. Barnard agreed to give Lorber and Gatton his

stock and enter into the noncompetition agreement. Each did or promised to do something they were not otherwise obligated to do. This was the bargained for exchange and constituted the consideration to bind the agreement. Barnard cannot now claim the consideration given pursuant to the agreement applied to only select portions of the agreement. Barnard has failed to meet his burden of proof to show the lack of consideration.

Barnard next challenges the length of the agreement. He claims the ten-year term of the noncompetition agreement is not reasonably limited in time.[2] This issue however, was not specifically raised at trial. The district court had the option of exercising the "blue pencil rule" which allows a noncompetitive covenant to be partially enforced. *See Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 371-72 (Iowa 1971). Yet, while *Ehlers* allows for modification of such agreements, it does not require a court to do so sua sponte where the issue of partial enforcement was never raised in the pleadings or addressed in the district court's ruling. *Lamp v. American Prosthetics, Inc.*, 379 N.W.2d 909, 911 (Iowa 1986). Furthermore, a 179(b) motion was never filed to bring the issue to the court's attention. Under such

---

[2] Covenants not to compete are unreasonably restrictive unless they are tightly limited as to both time and area. *Lemmon v. Hendrickson*, 559 N.W.2d 278, 282 (Iowa 1997). We have found the duration of a restrictive covenant typically ranges from two to three years and restrictive employment covenants beyond five years have typically not been enforced. *Phone Connection, Inc. v. Harbst*, 494 N.W.2d 445, 449-50 (Iowa App. 1992) (citing *Rasmussen Heating & Cooling, Inc. v. Idso*, 463 N.W.2d 703, 705 (Iowa App.1990).

circumstances, we have held the issue was not properly preserved for appeal. *Id.* Accordingly, we conclude the failure to raise the issue of the length of the agreement in district court constitutes a waiver of the issue on appeal.

AFFIRMED.