

IN THE COURT OF APPEALS OF IOWA

No. 7-476 / 96-1929

000225

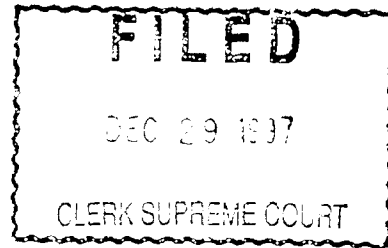
DAVE NELSON,

Plaintiff-Appellee,

vs.

AGRO GLOBE ENGINEERING, INC.,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Linda R. Reade, Judge.

Defendant appeals a district court ruling in plaintiff's declaratory judgment action to rewrite provisions of a restrictive covenant contained in plaintiff's employment contract with defendant. **AFFIRMED AS MODIFIED.**

David L. Charles and Margaret C. Callahan of Belin Lamson McCormick Zumbach Flynn, P.C., Des Moines, for appellant.

Kenneth L. Butters of Dreher, Simpson & Jensen, P.C., Des Moines, for appellee.

Heard by Sackett, P.J., and Vogel and Mahan, JJ. Streit, J., takes no part.

SACKETT, P.J.

Plaintiff-appellee David Nelson was employed as general manager by defendant-appellant Agro Globe Engineering, Inc. in 1990. In 1995, Nelson resigned and brought this action contending he did not, in 1994, execute a four-year employment agreement containing a restrictive covenant not to compete, and if he did it was executed by mistake. Nelson further contended if the agreement was valid, the geographical scope of the restrictive covenant should be modified. The district court found the restrictive covenant too restrictive and modified it. This appeal follows. We affirm as modified.

Agro Globe is a wholly-owned subsidiary of Sass Enterprises, Ltd. Sass, a manufacturer of structural steel, serves a global market. Sass, among other things, fabricates equipment used by producers of seed. Initially Sass sold to companies who relied on their own engineers. Sass established Agro Globe intending to increase sales by providing project management, including engineering services. The hope was this would open markets with smaller seed companies.

Nelson allegedly signed the questioned agreement in November 1994,¹ at a time additional money was infused in Agro Globe. The investors insisted on an assurance Nelson would remain with Agro Globe. The agreement provided if Agro Globe terminated Nelson without cause, it would be liable for his salary for the

¹ He had signed a less restrictive agreement in 1990.

remainder of the contract period, subject to Nelson's duty to mitigate his damages.

It further provided Nelson, through the end of his term of employment on December 31, 1998, would not:

[W]ithout the written consent of the Company, directly or indirectly, engage, assist or have any active interest in (whether as a principal, partner, stockholder, officer, director or otherwise) or enter the employment of or act as an agent for or advisor or consultant to any person, corporation or business entity which is or is about to become directly or indirectly engaged in, the development, manufacture, or sale of any product or service which competes with or is similar to any product or service of the Company, or any affiliate of Company.

The agreement provided this provision would not apply if Agro Globe terminated Nelson without cause.

The trial court modified the agreement and ordered:

[U]ntil October 31, 1997, Dave Nelson shall not solicit, divert or appropriate to any Competing Business, directly or indirectly, on his own behalf or in the service of or on behalf of any Competing Business, or attempt to solicit, divert or appropriate to any such Competing Business any person or entity who was a customer of [Agro Globe Engineering] during the time that Dave Nelson was employed by [Agro Globe Engineering]. For purposes of this Order, "Competing Business" means any business engaged in the design and fabrication of plants and equipment, or facilities for the separation, classification, treatment or other processing of corn or soybeans. For purposes of this Order, "Customer" means any person or entity listed as "Owner" on Plaintiff's Exhibit 4 attached hereto and by this reference incorporated herein.

The parties disagree on our scope of review. Nelson contends this action was tried as a law action and our review should be at law. Agro Globe advances when a

court rewrites a restrictive covenant, it exercises equitable powers and our review should be de novo.

When a court rewrites a covenant, it exercises its equitable powers. *See Ehlers v. Iowa Warehouse Co.*, 188 N.W.2d 368, 374 (Iowa 1971). There is no clear showing this was tried as a law action. We find our scope of review to be de novo.

First, we are in agreement with the trial court that Nelson signed the agreement in November 1994. We next address the contention the rewriting was too restrictive and the agreement should have been enforced as written.

To determine reasonableness, a first question is whether the restraint was greater than necessary considering the protected interest. *See Iowa Glass Depot v. Jindrich*, 338 N.W.2d 376, 381 (Iowa 1983). Agro Globe argues the trial court failed to consider the investors' interest in the value of Agro Globe as an operating business. Agro Globe contends the covenant not to compete was ancillary to the refinancing of Agro Globe. Agro Globe also argues that because of the limited number of similar businesses in the global market it is reasonable to restrict Nelson from working for any of the four businesses identified at trial.

This is an employment contract. There is a distinction between a non-competitive covenant in a contract selling a business and one in an employment contract. *Ehlers*, 188 N.W.2d at 369. A covenant in a contract for the sale of a business is enforced more freely. *See id.*

We find the basic purpose of the agreement was to secure Nelson's services during the fixed period. A covenant not to accept other work during the fixed term is generally found valid and not in opposition to public policy where the employee's services are unique and enforcing the agreement will not prevent the employee from making a living. *See H.W. Gossard Co. v. Crosby*, 132 Iowa 155, 176, 109 N.W. 483, 490 (1906).

We agree with the trial court's conclusions in all respects except we find, because of the limited similar competition in the global market, it is reasonable to restrict Nelson's employment with these companies. Such an additional restriction will not prevent Nelson from earning a living.

We modify the trial court's decision to include this additional language:

Until October 31, 1997, Dave Nelson shall not accept employment with or have an active interest in Bratney, Seed and Grain, Corn States, or MBS.

In all other respects, we affirm the trial court's decision. Costs on appeal are taxed one-half to plaintiff and one-half to defendant.

AFFIRMED AS MODIFIED.