

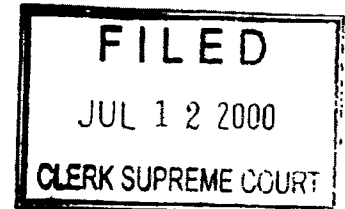
IN THE COURT OF APPEALS OF IOWA

No. 0-213 / 99-59
Filed July 12, 2000

ALL AMERICAN TURF BEAUTY, INC.
Plaintiff-Appellant,

vs.

RICHARD SHEFFLER,
Defendant-Appellee.



Appeal from the Iowa District Court for Warren County, David L. Christensen, Judge.

Plaintiff appeals, following the denial of his action in equity to recover damages for the breach of an alleged noncompetition contractual clause and to enjoin the defendant from competing with the plaintiff. **AFFIRMED.**

Jerrold B. Oliver and G. Stephen Walters of Jordan, Oliver & Walters, P.C., Winterset, for appellant.

Louis M. Fusco of Wilson, Fowler & Fusco, Indianola, for appellee.
Trial Counsel:

Considered by Sackett, C.J., and Huitink and Vaitheswaran, JJ.

HUTINK, J.

1. Background Facts and Proceedings.

All American-Turf Beauty, Inc. is a central Iowa lawn care business based in Van Meter. All American sued its former employee, Richard Sheffler, to enforce a covenant not to compete included in a written employment agreement.

At trial All American presented evidence indicating all employees with Sheffler's job description were required to sign the following agreement:

2. During the term of employment, and in the event of the termination of employment for any reason whatsoever, for a period of fifteen (15) months thereafter (or if that period be unenforceable by law, then for such a period as shall be enforceable), the Employee will not engage directly or indirectly in the same or similar or competitive line of business, as carried on by the Company, in competition with the Company for the business of any customer or prospective customer, for the Company's services or products, called upon, solicited, or contacted by the Employee personally on the Company's behalf during the period of two (2) years preceding the termination of the Employee's employment. Nor will Employee in said time period directly or indirectly attempt to hire any of the Company's employees or destroy, injure or damage the good will of the Company.

All American also offered evidence indicating Sheffler's employment agreement containing the covenant not to compete was missing. As a result, All American relied on secondary evidence to prove the relevant terms of the agreement. This evidence included testimony from a clerical employee who claimed she verified the existence of the written agreement by checking company records shortly after this dispute arose. The same employee testified that Sheffler's employment agreement was missing following a burglary in her office. None of All American's witnesses saw Sheffler sign an employment agreement.

Sheffler denied signing any covenant not to compete. He testified that if asked he would have refused to sign such an agreement even at the expense of his employment.

The district court, citing the absence of evidence indicating anyone saw Sheffler sign such an agreement, the failure of other employees to sign such an agreement, and All American's initial uncertainty concerning which form of the agreement Sheffler signed, resolved the resulting factual dispute against All American. The court concluded:

Plaintiff [All American] failed to meet its burden of proof and failed to establish the existence of an employment agreement signed by Sheffler by clear and convincing evidence and consequently failed to establish a breach of contract or any damage claim arising therefrom.

The court, based on its findings, entered judgment against All American denying injunctive or monetary relief.

On appeal All American contends the district court applied the wrong standard of proof. Specifically, All American argues it was not required to prove the existence, execution, loss, or terms of Sheffler's agreement by clear and convincing evidence and the record shows it met its burden to prove its claim by a preponderance of the evidence. All American accordingly demands that we reverse the judgment of the district court and grant injunctive and monetary relief to which it is legally entitled.

II. Standard of Review.

Review of this equitable proceeding is de novo. Iowa R. App. P. 4. We give weight to the trial court's findings of fact but are not bound by them. Iowa R. App. P. 14(f)(7).

III. Merits.

The dispositive issue at trial and on appeal is the existence of the agreement upon which All American's claim is based. As noted earlier, All American was unable to offer the relevant document because it was missing and presumably stolen or destroyed. Under these circumstances, secondary evidence of the missing document's existence, execution, loss, and contents is admissible. See *In re Marriage of Webb*, 426 N.W.2d 402, 404 (Iowa 1988) (citations omitted). However, the party relying on the missing document must establish the foregoing by clear and convincing evidence. *Id.* There is no merit in All American's contrary assertion.

Our review of the record leads us to the same conclusion as the district court. Sheffler flatly denies any covenant not to compete. There is no evidence of the date or circumstances under which the claimed agreements were signed. Moreover, All American's claim that the relevant document was stolen or destroyed is not supported by any evidence directly or indirectly linking Sheffler to its disappearance. Under these circumstances, the underlying factual dispute concerning the existence of any covenant not to compete was properly resolved against All American.

We affirm.

AFFIRMED.

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