THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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SC Court of Appeals

Roger M. Young, Circuit Court Judge

Case No. 13-CP-10-5579
Appellate Case No. 2014-001828

JOSHUA FAY, ...Appellant-Respondent,

vs.

TOTAL QUALITY LOGISTICS, LLC..Respondent-Appellant.

FINAL REPLY BRIEF OF APPELLANT-RESPONDENT

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ARGUMENT

I. THE AGREEMENT IS NOT VALID UNDER OHIO LAW, AND NO OHIO COURT HAS UPHELD THE AGREEMENT AT ISSUE.

In its Brief before this Court, TQL states that the issue of whether the agreement would be found valid by Ohio courts was not addressed by the trial court and should not be considered by this Court. The crux of this appeal is whether the agreement is valid under Ohio law or South Carolina law, and that is what that argument addresses. Because Ohio law provides that Ohio courts will not enforce choice of law provisions when there is no substantive relationship to Ohio and would instead look to the law of the state where the contract was performed. In this case, that state is South Carolina where the agreement is not valid, so the agreement is also not valid under Ohio law.

TQL argues that two Ohio lower courts have found that the TQL agreement is a valid noncompete agreement. From a review of the two orders proffered by TQL, that is not the case. Both of these Ohio courts issued orders on motions for restraining orders under a TQL agreement. Neither order set forth the terms of the TQL agreement being examined in the present case. In one of the opinions, the Court quoted one term that was different from the term contained in the Fay Agreement, so there is no basis for TQL's statement that these courts found the agreement that was signed by Fay to be valid. In addition, both of those cases concerned TQL agreements entered into, and to be performed, in Ohio and not in South Carolina.

Contrary to TQL's arguments, the only court to address whether the TQL agreement before it was reasonable found that it was not. The other court made no finding that the agreement before it was valid under Ohio law. In Jeffrey A. Dangelo v.

Total Quality Logistics, LLC, Case No. 1:09cv512 (S.D. Ohio 2009), the agreement at issue was a different agreement than the one being interpreted in the present case. (R. pp. 102-03) Although the entire agreement is not set forth in the opinion, the definition of "Business" in the Dangelo agreement is different from the definition in the Fay agreement. (R. pp. 108-09) In addition, the Fay Agreement actually has the initials, "SC," on the bottom of it indicating that it was prepared especially for South Carolina. TQL has not produced in this action any other agreements for other states, including Ohio, to show that they are the same as the Fay Agreement. In Dangelo, the court denied the Plaintiff employee's motion for temporary restraining order but also denied the Defendant TQL's motion to dismiss. The denial of the restraining order came after the court modified the overbroad noncompete provision to make it "reasonable." (R. p. 110) South Carolina courts do not allow such blue penciling or modification of an agreement in order to make it reasonable and, in fact, would find that the agreement violated public policy if it needed to be modified in order to be enforceable. *See* Standard Register Co. v. Kerrigan, 238 S.C. 54, 70, 119 S.E.2d 533, 541-42 (1961); and Stonhard v. Carolina Flooring Specialists, 366 S.C. 156, 159, 621 S.E. 2d 352, 353 (2005) ("Even if the agreement could be reformed in this manner under New Jersey law, the agreement would be unenforceable in South Carolina because the very act of adding a term not negotiated and agreed upon by the parties violates public policy.") Thus, the Dangelo court found that the agreement was not reasonable contrary to the assertion of TQL in its brief.

In the second Ohio lower court decision, Total Quality Logistics, LLC v. Siano, Case No. 2010-CV-2731 (Court of Common Pleas, Clermont County, Ohio January 4, 2011), the Court granted TQL's motion for a temporary restraining order after a hearing

at which the Defendants did not appear and put nothing in the record, so the Order was based solely on the evidence and argument presented by TQL. (R. pp. 113-15) As in Dangelo, there is no way to determine whether the agreement at issue is even the same agreement as the one before this Court. Contrary to TQL's assertions, that court made no findings as to the reasonableness or validity of the agreement. Indeed, the order was set to expire by its own terms 14 days after its entry. TQL produced no other orders in that case.

Neither of these lower court opinions has any precedential value with regard to the pending appeal. The Ohio trial courts' interpretation of a different agreement entered into and performed in the State of Ohio has no bearing on any issues in this case. As the Ohio Supreme Court held in Schulke Radio Prods., Ltd. V. Midwestern Broadcasting Co., 453 N.E.2d 683, 684 (1983), it would not enforce the parties' choice of law in Ohio if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." Ohio courts would use South Carolina law if this case were brought in Ohio, so South Carolina law clearly applies.

The Fay Agreement is not valid under South Carolina law because it violates public policy. Therefore, it is not valid under Ohio law, which requires that its courts interpret the contract in accordance with South Carolina law.

II. FAY DID NOT VIOLATE THE TERMS OF THE AGREEMENT WHEN HE PROVIDED LOGISTICS MANAGEMENT SERVICES UNDER AN EXCLUSIVE AGREEMENT WITH BRANDT.

TQL admits in the Supplemental Affidavit of Hillary Kotlarz and in its Brief that Fay's "noncompete permits him to hold several positions, including... logistics planner for any company other than a freight broker..." (R. p. 199 ¶ 4; Respondent's Brief, p. 100. Brandt is not a freight broker, and Fay provided logistics planning services under an exclusive agreement with Brandt. TQL's argument appears to be that Fay could have done the job individually and not violated the noncompete, but, because he did it through an LLC, he is violating the agreement. What legitimate business purpose can be served by that?

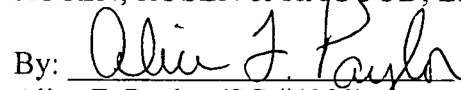
TQL further argues that "Fay presumably hoped to compete by diverting business from other TQL customers, not just Brandt." Respondent's Brief, p. 13. However, there is absolutely no evidence in the record to support this assertion. In fact, the evidence is to the contrary as Fay's agreement with Brandt was an exclusive agreement, so he would not have been able to contract with other companies as TQL argues. In addition, Fay only sought to have the agreement declared invalid after TQL brought an action in Ohio against Brandt, which ceased doing business with Fay because of that. Because Fay, doing business as JF Progressions, was performing a job that TQL admits did not violate the agreement, Fay is entitled to summary judgment.

CONCLUSION

Because the noncompete agreement at issue in this action is not valid under South Carolina or Ohio law and, even if it were, TQL admits that Fay did not violate it, the decision of the lower court should be reversed and summary judgment awarded to Fay with regard to his declaratory judgment action requesting that the agreement be declared invalid.

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC

By: 

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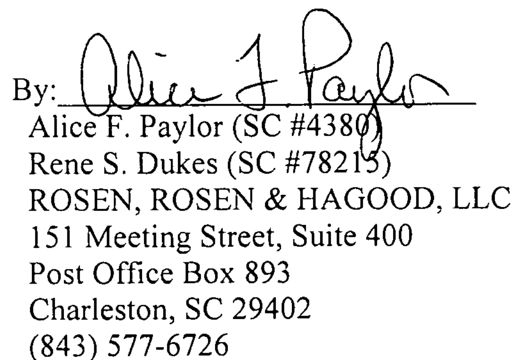
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Appellant's Final Reply Brief of Appellant-Respondent complies with Rule 211(b), SCACR.

March 17, 2015

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Appellant's Final Reply Brief of Appellant-Respondent by depositing a copy of it in the United States Mail, postage prepaid on March 17, 2015 addressed to attorney of record as follows:

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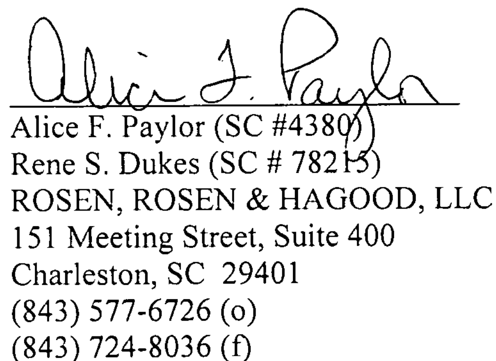

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