Case In Point

Ontario Court of Appeal Decision Underscores Importance of Properly Drafted Restrictive Covenants

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A recent decision of the Court of Appeal for Ontario reinforces the importance of carefully drafting restrictive covenants and considering what evidence is necessary to succeed on a summary judgment motion.

The claim arose when individual employees left their employer to work for a competitor. The former employees were all subject to the same “non-competition” clause (which included a non-solicitation obligation) in their employment agreements and their former employer brought an action to enforce those clauses.

The motion judge had found that the non-competition clause in issue was not enforceable: the plaintiff failed to bring any evidence, other than a “very bald assertion,” that it had any proprietary information entitled to protection and the spatial features of the clause were too broad in the absence of a geographic limit. Moreover, the clause prohibited competition, not just “mere solicitation,” and there were no circumstances here which would warrant the enforceability of such a clause.

The motion judge also noted that, on a motion for summary judgment, the parties must put their “best foot forward,” which the employer failed to do. Instead, the employer made bald assertions and provided innuendo, but gave no specific evidence of actual solicitations by the individual defendants. The motion judge stated: “I would expect to see that evidence on the motion. There was none.” He referred to the Court of Appeal for the proposition that a party cannot simply sit back and wait for better facts to develop at trial but must “lead with trump or risk losing.”

The Court of Appeal agreed with the analysis of the motion judge and dismissed the employer’s appeal. It found that the case was “straightforward” given the employer’s bald allegations, its limited examples of specific incidents, and the employees’ uncontested denials and explanations in response to those allegations. Further, the fact the employer had failed to cross-examine or otherwise challenge the employees’ explanations did not mean there were live issues for trial; rather, it simply allowed the motion judge to decide the issues without the need for a trial.

This case again emphasizes the importance of taking proactive and reactive measures to enforce restrictive covenants. Prior to litigation, it is important to have properly drafted restrictive covenants in place to minimize any challenges to their enforceability and, if litigation ensues, it is crucial to lead all pertinent evidence and argument at the summary judgment stage.

Eagle Professional Resources Inc. v. MacMullin, 2013 ONCA 639 (CanLII)